Date and Time: Wednesday, October 25, 2023 2:18:00 PM CST

Job Number: 208876599

Documents (100)

1. MacCausland v. Uber Techs., Inc., 312 F. Supp. 3d 209

Client/Matter: -None-

Search Terms: "antitrust law"

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2. Encana Oil & Gas (USA) Inc. v. Zaremba Family Farms, Inc., 736 Fed. Appx. 557

Client/Matter: -None-

Search Terms: "antitrust law"

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3. Arista Networks, Inc. v. Cisco Sys., 2018 U.S. Dist. LEXIS 228820

Client/Matter: -None-

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Content Type	**Narrowed by**
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4. In re Processed Egg Prods. Antitrust Litig., 322 F. Supp. 3d 599

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	**Narrowed by**
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5. Hodsdon v. Mars, Inc., 891 F.3d 857

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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6. Robinson v. Hunger Free Am., Inc., 2018 U.S. Dist. LEXIS 93734

Client/Matter: -None-

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Search Type: Natural Language

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7. LABMD, Inc. v. FTC, 894 F.3d 1221

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Search Type: Natural Language

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8. United States v. AT&T Inc., 310 F. Supp. 3d 161

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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9. Morton v. Stephenson, 2018 U.S. Dist. LEXIS 238261

Client/Matter: -None-

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Search Type: Natural Language

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10. Seegert v. Rexall Sundown, Inc., 2018 U.S. Dist. LEXIS 99581

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

11. *Animal Sci. Prods. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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12. *Bijan Nikoopour v. Ocwen Loan Servicing, LLC, 2018 U.S. Dist. LEXIS 100828*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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13. *FTC v. Actavis, Inc. (In re Androgel Antitrust Litig. (No. II)), 2018 U.S. Dist. LEXIS 99716*

Client/Matter: -None-

Search Terms: "antitrust law"

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14. *Xitronix Corp. v. KLA-Tencor Corp., 892 F.3d 1194*

Client/Matter: -None-

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Search Type: Natural Language

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15. *Malden Transp., Inc. v. Uber Techs., Inc., 321 F. Supp. 3d 174*

Client/Matter: -None-

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Search Type: Natural Language

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16. [Aya Healthcare Servs. v. AMN Healthcare, Inc., 2018 U.S. Dist. LEXIS 102582]

Client/Matter: -None-

Search Terms: "antitrust law"

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17. [John Bean Techs. Corp. v. Morris & Assocs., 2018 U.S. Dist. LEXIS 102133]

Client/Matter: -None-

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18. [NYU Hosps. Ctr. v. League of Voluntary Hosps., 318 F. Supp. 3d 622]

Client/Matter: -None-

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19. [SG Interests I, Ltd. v. Kolbenschlag, 2018 Colo. Dist. LEXIS 2867]

Client/Matter: -None-

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20. [Ortiz v. Ferrellgas Partners, L.P. (In re Pre -Filled Propane Tank Antitrust Litig.), 893 F.3d 1047]

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21. [Salone v. Bank of Am., N.A., 2018 U.S. Dist. LEXIS 216978]

Client/Matter: -None-

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22. *Deslandes v. McDonald's USA, LLC, 2018 U.S. Dist. LEXIS 105260*

Client/Matter: -None-

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23. *Ohio v. Am. Express Co., 138 S. Ct. 2274*

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Search Terms: "antitrust law"

Search Type: Natural Language

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

24. *Pro Slab v. Argos United States Corp., 2018 U.S. Dist. LEXIS 237916*

Client/Matter: -None-

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25. *FTC v. AbbVie Inc., 329 F. Supp. 3d 98*

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	**Narrowed by**
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26. *McGarry & McGarry LLP v. Bankr. Mgmt. Sols., 2018 U.S. Dist. LEXIS 110264*

Client/Matter: -None-

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27. Hackert v. Sutter Med. Found., 2018 Cal. App. Unpub. LEXIS 4616

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

28. MB Realty Grp., Inc. v. Gaston Cty. Bd. of Educ., 2018 U.S. Dist. LEXIS 115458

Client/Matter: -None-

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Search Type: Natural Language

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29. In re Domestic Drywall Antitrust Litig., 2018 U.S. Dist. LEXIS 118758

Client/Matter: -None-

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Search Type: Natural Language

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

30. ABG Prime Grp., LLC v. Innovative Salon Prods., LLC, 2018 U.S. Dist. LEXIS 120595

Client/Matter: -None-

Search Terms: "antitrust law"

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

31. Anderson News, L.L.C. v. Am. Media, Inc., 899 F.3d 87

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

32. [Avocent Huntsville, LLC v. ZPE Sys., Inc., 2018 U.S. Dist. LEXIS 233681]

Client/Matter: -None-

Search Terms: "antitrust law"

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

33. [K&F Rest. Holdings, Ltd. v. Rouse, 2018 U.S. Dist. LEXIS 123154]

Client/Matter: -None-

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34. [Power Analytics Corp. v. Operation Tech., Inc., 2018 U.S. Dist. LEXIS 232779]

Client/Matter: -None-

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

35. [Charych v. Siriusware, Inc., 2018 U.S. Dist. LEXIS 128341]

Client/Matter: -None-

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36. [Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786]

Client/Matter: -None-

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37. [Saginaw Cty. v. Stat Emergency Med. Serv., 2018 U.S. Dist. LEXIS 127349]

Client/Matter: -None-

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38. [Osbourne v. Anschutz Entm't Grp., Inc., 2018 U.S. Dist. LEXIS 152338]

Client/Matter: -None-

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39. [Alarm Detection Sys. v. Orland Fire Prot. Dist., 326 F. Supp. 3d 602]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
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40. [In re Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
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41. [State v. Fournier Industrie et Sante & Labs. Fournier, S.A., 256 So. 3d 295]

Client/Matter: -None-

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Search Type: Natural Language

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42. [AngioDynamics, Inc. v. C.R. Bard, Inc., 2018 U.S. Dist. LEXIS 131206]

Client/Matter: -None-

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43. *Arandell Corp. v. Cantera Res., Inc. (In re Western States Wholesale Nat. Gas Antitrust Litig.), 743 Fed. Appx. 825*

Client/Matter: -None-

Search Terms: "antitrust law"

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44. *Arandell Corp. v. CenterPoint Energy Servs., 900 F.3d 623*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

45. *Gold Medal LLC v. USA Track & Field, 899 F.3d 712*

Client/Matter: -None-

Search Terms: "antitrust law"

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46. *Dehoog v. Anheuser-Busch InBev SA/NV, 899 F.3d 758*

Client/Matter: -None-

Search Terms: "antitrust law"

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

47. *Pfizer Inc. v. Johnson & Johnson, 333 F. Supp. 3d 494*

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

48. *Wortman v. Air New Zealand, 326 F.R.D. 549*

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49. *In re Liquid Aluminum Sulfate Antitrust Litig., 2018 U.S. Dist. LEXIS 138719*

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50. *Int'l Equip. Trading, Ltd. v. Illumina, Inc., 2018 U.S. Dist. LEXIS 136718*

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51. *Viamedia, Inc. v. Comcast Corp., 335 F. Supp. 3d 1036*

Client/Matter: -None-

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52. *Veritext Corp. v. Bonin, 901 F.3d 287*

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

53. *Bray v. Bank of Am. Corp., 2018 U.S. Dist. LEXIS 187674*

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54. *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., 336 F. Supp. 3d 1256*

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55. *In re Lipitor Antitrust Litig., 336 F. Supp. 3d 395*

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56. *United Food & Commer. Workers Unions & Employers Midwest Health Benefits Fund v. Novartis Pharms. Corp., 902 F.3d 1*

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57. *23andMe, Inc. v. Ancestry.com DNA, LLC, 356 F. Supp. 3d 889*

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58. In re SSA Bonds Antitrust Litig., 2018 U.S. Dist. LEXIS 147022

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59. Smith v. Ditech Fin. LLC, 2018 U.S. Dist. LEXIS 227070

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60. LifeWatch Servs. v. Highmark Inc., 902 F.3d 323

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61. Card v. Ralph Lauren Corp., 2018 U.S. Dist. LEXIS 147609

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62. Geico Corp. v. Autoliv, Inc., 345 F. Supp. 3d 799

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63. [United States v. Horma, 2018 U.S. Dist. LEXIS 150598]

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64. [Inline Packaging, LLC v. Graphic Packaging Int'l, LLC, 351 F. Supp. 3d 1187]

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65. [In re Comcast Corp., 2018 U.S. Dist. LEXIS 150712]

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66. [In re Packaged Seafood Prods. Antitrust Litig., 338 F. Supp. 3d 1079]

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67. [In re Zetia Ezetimibe Antitrust Litig., 2018 U.S. Dist. LEXIS 218116]

Client/Matter: -None-

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68. [Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc., 902 F.3d 735]

Client/Matter: -None-

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69. *Githieya v. Tel, 2018 U.S. Dist. LEXIS 245566*

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70. *VBS Distrib. v. Nutrivita Labs., Inc., 2018 U.S. Dist. LEXIS 239015*

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71. *Breiding v. Eversource Energy, 344 F. Supp. 3d 433*

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72. *FTC v. Tronox Ltd., 332 F. Supp. 3d 187*

Client/Matter: -None-

Search Terms: "antitrust law"

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73. *In re Effexor Antitrust Litig., 357 F. Supp. 3d 363*

Client/Matter: -None-

Search Terms: "antitrust law"

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74. *Beyer v. Symantec Corp., 333 F. Supp. 3d 966*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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75. *Laboratoires Majorelle SAS v. Apricus Biosciences, Inc., 2018 U.S. Dist. LEXIS 241158*

Client/Matter: -None-

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76. *DeSoto Cab Co. v. Uber Techs., Inc., 2018 U.S. Dist. LEXIS 226261*

Client/Matter: -None-

Search Terms: "antitrust law"

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

77. *Hansen v. Marin Gen. Hosp., 2018 U.S. Dist. LEXIS 163449*

Client/Matter: -None-

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

78. *Northshore Sheet Metal, Inc. v. Sheet Metal Workers Int'l Ass'n, Local 66, 2018 U.S. Dist. LEXIS 163327*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

79. *Huawei Techs., Co v. Samsung Elecs. Co, 340 F. Supp. 3d 934*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

80. *Zendejas v. Redman, 334 F. Supp. 3d 1249*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

81. *Humphrey v. GlaxoSmithKline PLC, 905 F.3d 694*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

82. *Chaiwong v. Hanlees Fremont, Inc., 2018 U.S. Dist. LEXIS 166884*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

83. *In re Qualcomm Antitrust Litig., 328 F.R.D. 280*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

84. Iowa Pub. Emples. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 340 F. Supp. 3d 285

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

85. 2301 M Cinema LLC v. Silver Cinemas Acquisiton Co., 342 F. Supp. 3d 126

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

86. V5 Techs., LLC v. Switch, Ltd., 2018 U.S. Dist. LEXIS 245769

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

87. FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

88. Mylan Pharms. v. Celgene Corp., 2018 U.S. Dist. LEXIS 242826

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

89. Indus. Bank of Korea v. Asi Corp., 2018 U.S. Dist. LEXIS 217861

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

90. *Nat'l Prescription Opiate Litig. v. Purdue Pharma L.P. (In re Nat'l Prescription Opiate Litig.), 2018 U.S. Dist. LEXIS 176260*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

91. *Steves & Sons, Inc. v. Jeld-Wen, Inc., 345 F. Supp. 3d 614*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

92. *Hoglund v. Charter Communs., Inc., 2018 U.S. Dist. LEXIS 173210*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

93. *Ashton Woods Holdings LLC v. USG Corp. (In re Domestic Drywall Antitrust Litig.), 2018 U.S. Dist. LEXIS 174981*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

94. *Dealer Mgmt. Sys. Antitrust Litig. v. CDK Global, 2018 U.S. Dist. LEXIS 214398*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

95. *Counts v. GM, LLC, 2018 U.S. Dist. LEXIS 181490*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

96. *In re Lantus Direct Purchaser Antitrust Litig., 2018 U.S. Dist. LEXIS 216240*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

97. *Contant v. Bank of Am. Corp., 2018 U.S. Dist. LEXIS 183586*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

98. *Ellison v. Am. Bd. of Orthopaedic Surgery, Inc., 2018 U.S. Dist. LEXIS 186459*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

99. *LegalForce RAPC Worldwide, P.C. v. Trademark Engine LLC, 2018 U.S. Dist. LEXIS 186769*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

100. *U.S. Futures Exch., LLC v. Bd. of Trade, 346 F. Supp. 3d 1230*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

MacCausland v. Uber Techs., Inc.

United States District Court for the District of Massachusetts

May 30, 2018, Decided; May 30, 2018, Filed

Civil Action No. 17-10253-NMG

Reporter

312 F. Supp. 3d 209 *; 2018 U.S. Dist. LEXIS 144743 **; 2018-1 Trade Cas. (CCH) P80,403

Raymond P MacCausland, Individually and on Behalf of All Persons Similarly Situated, Plaintiff, v. Uber Technologies, Inc. and Rasier, LLC, Defendants.

Prior History: *Maiden Transp., Inc. v. Uber Techs., Inc., 2017 U.S. Dist. LEXIS 182983 (D. Mass., Oct. 5, 2017)*

Core Terms

taxi, antitrust, allegations, pricing, motion to dismiss, monopolize, costs, unfair competition, amended complaint, ride-hailing, predatory, drivers

Counsel: For Raymond P MacCausland, Individually and on Behalf of all Persons Similarly Situated, Plaintiff: Darin M. Colucci, LEAD ATTORNEY, Colucci, Colucci & Marcus, P.C., Milton, MA; Brendan R. Pitts, Paul K. Flavin, Thomas T. Worboys **[**1]** , Colucci, Colucci, Marcus & Flavin, P.C., Milton, MA.

For Uber Technologies, Inc., Defendant: Michael Sheetz, LEAD ATTORNEY, Adam S. Gershenson, Michael E. Welsh, Timothy W. Cook, Cooley LLP, Boston, MA; Beatriz Mejia, PRO HAC VICE, Cooley LLP, San Francisco, CA.

For Travis Kalanick, Defendant: Joshua N. Ruby, T. Christopher Donnelly, LEAD ATTORNEYS, Donnelly, Conroy & Gelhaar, LLP, Boston, MA Melinda Haag, LEAD ATTORNEY, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA; Robin Linsenmayer, PRO HAC VICE, Orrick, Herrington & Sutcliffe LLP, Menlo Park, CA; Timothy W. Cook, Cooley LLP, Boston, MA; Walter Brown, PRO HAC VICE, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

For Garrett Camp, Rasier, LLC, Defendants: Timothy W. Cook, Cooley LLP, Boston, MA.

Judges: Nathaniel M. Gorton, United States District Judge.

Opinion by: Nathaniel M. Gorton

Opinion

[*211] MEMORANDUM & ORDER

GORTON, J.

This is a putative class action brought by Raymond MacCausland ("MacCausland" or "plaintiff") on behalf **[**2]** of taxi drivers in the Greater Boston area. Plaintiff alleges that Uber Technologies, Inc. and its wholly-owned subsidiary, Raiser, LLC ("Uber" or "defendant") competed unlawfully in the on-demand, ride-hail ground transportation market in and around Boston, Massachusetts. Plaintiff alleges that Uber competed unfairly and deceptively in violation of the common law and of the *Massachusetts Consumer Protection Act*, that Uber violated state and federal ***antitrust law*** and that Uber engaged in a civil conspiracy and aided and abetted unfair competition.

Before the Court is defendant's motion to dismiss plaintiff's antitrust claims.

I. Background

Uber entered the Boston market for private transportation services in 2011 and launched its UberX service in 2013. The company provides a digital tool for potential riders to request private vehicles-for-hire by using Uber's free "smart phone application" ("the Uber app"). Users who open the Uber app on their mobile phones are shown a map of their location or a nearby designated pick-up point and the available Uber-affiliated vehicles in that vicinity.

According to MacCausland, the City of Boston has issued approximately 1,825 taxi licenses, referred **[**3]** to as taxi medallions, subject to a strict and extensive city regulatory regime. In contrast, there are over 20,000 cars-for-hire that currently provide Uber's ride-hailing service in the Boston area.

In February, 2017, MacCausland, a Boston taxi driver, filed this complaint against Uber. At the same time, taxi medallion holders sued Uber under the same legal theories that plaintiff alleges here. That related action involves seven different groups of plaintiffs who represent over 800 plaintiff taxi companies in the Greater Boston area. Originally, seven separate complaints were filed in this district between December, 2016, and April, 2017. The Court consolidated the cases pursuant to *Fed. R. Civ. P. 42(a)(2)* in October, 2017.

In December, 2017, this session ruled on Uber's motion to dismiss the consolidated action. See *Malden Transportation, Inc. v. Uber Techs., Inc., 286 F. Supp. 3d 264 (D. Mass. 2017)*. The Court held that the so-called Malden plaintiffs stated a claim for unfair competition under the common law and *M.G.L. c. 93A* and that plaintiffs stated a claim for aiding and abetting unfair competition and civil conspiracy to commit unfair competition. The Court allowed defendants' motion to dismiss claims against two of Uber's founders for want of personal jurisdiction. It also allowed **[**4]** Uber's motion to dismiss with respect to plaintiffs' antitrust claims, tortious interference claims and failed theories of civil conspiracy. See generally id.

After the issuance of that memorandum and order, plaintiffs in the Malden cases as well as the plaintiff in this case (MacCausland) amended their complaints. MacCausland's second amended complaint mimics the amended complaints in Malden. He asserts counts of unfair and deceptive trade practices under the common law and Massachusetts Consumer Protection Act, as well as aiding and abetting and unfair competition. He has also added factual allegations **[*212]** to his complaint which bear upon his claims of violation of state and federal ***antitrust law***. In May, 2018, the parties in this case filed a stipulation of dismissal against the individual defendants.

Before the Court is Uber's motion to dismiss MacCausland's antitrust claims.

II. Legal Standard

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In considering the merits of a motion to dismiss, the Court may look only to the facts alleged in the pleadings, documents attached **[**5]** as exhibits or incorporated by reference in the complaint and matters of which judicial notice can be taken. *Nollet v. Justices of Trial Court of Mass., 83 F.Supp.2d 204, 208 (D. Mass. 2000)*, aff'd, *248 F.3d 1127 (1st Cir. 2000)*. Furthermore, the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Langadinos v. Am. Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000)*. If the facts in the complaint are sufficient to state a cause of action, a motion to dismiss the complaint must be denied. See *Nollet, 83 F.Supp.2d at 208*.

Although a court must accept as true all of the factual allegations contained in a complaint, that doctrine is not applicable to legal conclusions. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Threadbare recitals of the legal elements which are supported by mere conclusory statements do not suffice to state a cause of action. Id. Accordingly, a complaint does not state a claim for relief where the well-pled facts fail to warrant an inference of any more than the mere possibility of misconduct. *Id. at 679*.

III. Analysis

MacCausland asserts claims for attempt to monopolize in violation of the *Sherman Antitrust Act, 15 U.S.C. § 2*, and the *Massachusetts Antitrust Act, M.G.L. c. 93 § 5*.[1]

Plaintiff alleges that Uber has attempted to drive taxi companies out of business by using its predatorily-priced UberX service. Defendant responds that plaintiff has not met the high burden of alleging **[**6]** a predatory pricing claim and has not alleged an injury to competition.

Section 2 of the Sherman Act makes it illegal to

> monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.

15 U.S.C. § 2.

To state a monopolization claim under *§ 2*, a plaintiff must adequately allege that defendant (1) has monopoly power in the relevant market and (2) has engaged in illicit "exclusionary practices" with "the design or effect of protecting or enhancing its monopoly position." *Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 125 (1st Cir. 2011)* (quoting *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 195 (1st Cir. 1996)* (internal citation omitted)).

One kind of exclusionary practice is the practice of "predatory pricing". In such a scheme, a company reduces the price of its product to below cost, intending to drive competitors out of business so that it can then raise prices after it has achieved a monopoly position. See *Matsushita Elec. Industrial Co. v. Zenith Radio **[*213]** Corp., 475 U.S. 574, 584-585, n. 8, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. To succeed on a predatory pricing claim a plaintiff must demonstrate that

> the prices complained of are below an appropriate measure of its rival's costs . . . [and that the competitor had] a dangerous probability of recouping its investment in below-cost prices.

Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S. 1993).

Because an economically unsound approach by a **[**7]** competitor could actually benefit consumers, plaintiffs must explain with particularity "just what the arrangements were and why they plausibly constituted antitrust violations." See *Am. Steel Erectors v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 815 F.3d 43, 71 (1st Cir. 2016)* (quoting *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 65 (1st Cir. 2004))*.

MacCausland here fails to allege facts supporting a predatory pricing claim. His new allegations do not cure the deficiencies that doomed the Malden plaintiffs. See *Malden, 286 F. Supp. 3d at 279-280*.

Plaintiff does not allege that Uber's services were priced below Uber's costs. He has failed to "explain in detail" why Uber's conduct constituted an antitrust violation. See *Am. Steel, 815 F.3d at 71*. His second amended complaint alleges that Uber "deflated the UberX fares to below cost in order to drive out the taxi drivers" but such "threadbare

[1] Neither party contends that the legal standard varies for the state law claim.

recitals of a cause of action's elements, supported by mere conclusory statements, do not suffice" to survive a motion to dismiss. *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 555*).

Basic facts such as what an average or median "ride" in the Boston area costs Uber, or costs a taxi, are absent. MacCausland attempts to bolster the factual allegations found lacking in Malden by attaching a report from the Wall Street Journal showing that, worldwide, Uber's costs exceed its revenue. Uber's global performance does not, however, constitute a relevant allegation **[**8]** as to Uber's costs in the "ride-hailing market in the City of Boston." Furthermore, although plaintiff correctly notes that "Uber is a privately-held company that [does] not disclose relevant financial and market information," that fact does not absolve plaintiff from meeting the required pleading standard.

In a similar vein, MacCausland fails to allege facts demonstrating Uber's intent to monopolize. A plaintiff alleging an attempt to monopolize must establish "specific intent" to destroy competition. *Home Placement Serv., Inc. v. Providence Journal Co., 682 F.2d 274, 281 (1st Cir. 1982)* (citing *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 626, 73 S. Ct. 872, 97 L. Ed. 1277 (1953))*. MacCausland generally asserts that Uber

> engaged in a scheme to intentionally undercut the taxi industry [and that Uber was] intent on destroying any and all competition through drastic anti-competitive pricing.

He also refers to specific statements, such as an Uber advertisement proclaiming "These fares may only last a limited time, but the more you ride, the more likely they will last." Finally, plaintiff cites a handful of unremarkable statements by Uber's former CEO made in entrepreneurial business-speak such as "I try to push the limits. Pedal to the metal." No specific facts in the second amended complaint even suggest that Uber intended to obtain a monopoly in the Boston **[**9]** ride-hailing market. Without an unlawful intent, "increasing sales and increasing market share are normal business goals," not verboten practices. *U.S. Steel Corp. v. Fortner Enterprises, **[*214]** Inc., 429 U.S. 610, 612 n.1, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977)*.

Equally important, plaintiff fails to show an injury to Boston consumers. That omission is dispositive, because antitrust plaintiffs must show that "defendants' actions caused an injury to competition, as distinguished from impact on themselves." *R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478, 487 (1st Cir. 1994)*. According to plaintiff's complaint, Uber's entry caused the supply in the ride-hailing market to increase and the price to diminish. Such allegations fail to demonstrate an injury to competition. See *Sullivan v. Nat'l Football League, 34 F.3d 1091, 1096 (1st Cir. 1994)*, as amended on denial of reh'g (Oct. 26, 1994) ("Anticompetitive effects, more commonly referred to as injury to competition or harm to the competitive process, are usually measured by a reduction in output and an increase in prices in the relevant market.") (internal quotation marks omitted) (citation omitted). A decrease in the value of Boston taxi medallions is superfluous.

Finally, this Court finds the analysis in *Philadelphia Taxi Ass'n, Inc. v. Uber Techs., Inc., 886 F.3d 332 (3d Cir. 2018)*, applicable and persuasive. In that case, Philadelphia taxicab drivers and taxicab companies alleged that Uber's entry into the Philadelphia taxicab market violated the Sherman Act. **[**10]** *Id. at 336*. Just as plaintiff does here, the Philadelphia plaintiffs argued that Uber's actions were

> illegal, predatory and led to a sharp drop in the value of taxicab medallions as well as a loss of profits.

Id.

The Third Circuit Court of Appeals ("Third Circuit") affirmed the district court's dismissal of plaintiffs' complaint, holding that the plaintiffs had failed 1) to state a claim for attempted monopolization and 2) to allege a legally cognizable antitrust injury. Id. The facts in the Philadelphia Taxi case are strikingly similar to those in this case and there the Third Circuit:

> 1) reasoned that Uber "bolstered competition, . . . operate[d] at a lower cost [and attracted taxi drivers] due to its cost efficiency and competitive advantage," but that such conduct does not constitute anticompetitive conduct violative of ***antitrust law***, *id. at 340-41*;

2) found that plaintiffs failed to allege specific intent to monopolize which was insufficient given that Uber's strategy could "be reasonably viewed as predominantly motivated by legitimate business aims, *id. at 341* (internal quotation marks omitted) (quoting *Times Picayune Publ'g Co. v. United States, 345 U.S. 594, 627, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*); and

3) observed that plaintiffs had failed to allege antitrust standing because "harm to [plaintiffs'] business **[**11]** does not equal harm to competition." *Id. at 344*.

MacCausland's complaint and legal theories are substantially indistinguishable from those dismissed in Philadelphia Taxi and this Court sees no reason to diverge from the well-reasoned opinion in that case.

ORDER

For the foregoing reasons, defendants' partial motion to dismiss the antitrust claims in the second amended complaint (Docket No. 64) is **ALLOWED**.

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated May 30, 2018

Encana Oil & Gas (USA) Inc. v. Zaremba Family Farms, Inc.

United States Court of Appeals for the Sixth Circuit

May 31, 2018, Filed

Case Nos. 16-2065/17-1429

Reporter

736 Fed. Appx. 557 *; 2018 U.S. App. LEXIS 14314 **; 2018-1 Trade Cas. (CCH) P80,402; 2018 WL 2446698

ENCANA OIL & GAS (USA) INC., a Delaware corporation, Plaintiff-Appellant/Cross-Appellee, v. ZAREMBA FAMILY FARMS, INC., a Michigan corporation; ZAREMBA GROUP, LLC, a Michigan limited liability corporation; WALTER ZAREMBA, an individual, Defendants-Appellees/Cross-Appellants.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: Rehearing denied by *Encana Oil & Gas (USA) Inc. v. Zaremba Family Farms, Inc., 2018 U.S. App. LEXIS 16532 (6th Cir., June 18, 2018)*

Motion granted by *Zaremba Family Farms, Inc. v. Encana Oil & Gas (USA) Inc., 139 S. Ct. 396, 202 L. Ed. 2d 285, 2018 U.S. LEXIS 6156 (U.S., Oct. 15, 2018)*

US Supreme Court certiorari denied by *Zaremba Family Farms, Inc. v. Encana Oil & Gas (USA) Inc., 2019 U.S. LEXIS 754 (U.S., Jan. 22, 2019)*

Dismissed by, in part, Motion denied by, in part, Motion denied by, As moot *Encana Oil & Gas United States v. Zaremba Family Farms, 2019 U.S. App. LEXIS 5773 (6th Cir., Feb. 26, 2019)*

Prior History: [1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN.

Encana Oil & Gas (USA), Inc. v. Zaremba Family Farms, Inc., 2015 U.S. Dist. LEXIS 183806 (W.D. Mich., Oct. 16, 2015)
Encana Oil & Gas United States v. Zaremba Family Farms, Inc., 2016 U.S. Dist. LEXIS 182326 (W.D. Mich., June 21, 2016)

Core Terms

email, district court, letter of intent, antitrust, lease, summary judgment, negotiating, bidding, walk, matter of law, motion for judgment as a matter of law, motion for a new trial, reasonable juror, per curiam, counterclaims, courts, tanked, instructions, collusive, binding, parties, rights

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN1[] **Sherman Act, Claims**

The *Sherman Act* outlaws agreements that unreasonably restrain trade. *15 U.S.C.S. § 1*. Whether a restraint is reasonable typically depends on the aptly named rule of reason, which necessitates an elaborate inquiry into the restraint's effect on competition in the relevant market. But the rule of reason has limits. Some kinds of agreements are so likely to have a pernicious effect on competition that they are conclusively presumed to be unreasonable. Price fixing of a certain kind is per se unlawful.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

HN2[] **Clayton Act, Claims**

The *Clayton Act* creates a private cause of action for violations of the antitrust laws. *15 U.S.C.S. § 15*. The claimant must prove that his opponent entered into an agreement that is per se unlawful, and that the agreement in fact caused the claimant to suffer an antitrust injury. An antitrust injury is an injury that is "of the type the antitrust laws were intended to prevent and flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Sherman Act > Claims

HN3[] **Clayton Act, Claims**

To prevail on antitrust claims, plaintiffs have to show that defendants entered into the agreements and that they suffered a resulting antitrust injury. The question at summary judgment is whether the plaintiffs produced sufficient evidence for a reasonable juror to reach that conclusion. Because ***antitrust law*** limits the range of permissible inferences from ambiguous evidence, the plaintiffs must point to evidence that 'tends to exclude the possibility that the alleged conspirators acted independently if they are to succeed.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN4[] **Summary Judgment, Evidentiary Considerations**

Although courts on summary judgment view the evidence in the light most favorable to the non-movant, there is a limit to the inferences courts can draw in their favor.

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

HN5[] Entitlement as Matter of Law, Appropriateness

Summary judgment is appropriate where evidence is so one-sided that no fair-minded jury could return a verdict for the plaintiff.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN6[] Summary Judgment, Evidentiary Considerations

When opposing parties tell two different stories, one of which is blatantly contradicted by the record a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Sherman Act > Claims

HN7[] Clayton Act, Claims

Antitrust plaintiffs are required to show that the conspiracy caused them an injury for which the antitrust laws provide relief, not just that the defendant was up to no good.

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

HN8[] Burdens of Proof, Movant Persuasion & Proof

A moving party may discharge its burden on summary judgment by pointing out the absence of evidence to support the non-moving party's case.

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN9[] Appellate Review, Standards of Review

Appellate courts review the denial of a motion for judgment as a matter of law de novo.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN10[] Federal & State Interrelationships, Erie Doctrine

Where federal courts sit in diversity, they apply the standard for judgment as a matter of law used by the courts of the state whose substantive law governs the action.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Trials > Judgment as Matter of Law > Postverdict Judgment

HN11[] **Summary Judgment, Evidentiary Considerations**

In Michigan, judgment as a matter of law may be granted only where reasonable minds could not differ as to the conclusions to be drawn from the evidence. Just like at summary judgment, courts view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Waivers

HN12[] **Contract Conditions & Provisions, Waivers**

Michigan law requires consideration for a waiver to be effective. A waiver of a substantial [contract] right requires consideration.

Business & Corporate Compliance > ... > Contract Modifications > Contracts Law > Contract Modifications

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Waivers

HN13[] **Contracts, Contract Modifications**

Modification and waiver are different. Waiver occurs when one party unilaterally surrenders its right to object to a counter-party's failure to perform a contract obligation. In contrast, modification occurs when parties mutually agree to change the terms of an agreement.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN14[] **Federal & State Interrelationships, Erie Doctrine**

The Michigan Supreme Court says what the law is in Michigan. And a federal court sitting in diversity is bound by what it believes Michigan courts would do.

Contracts Law > Statute of Frauds > Requirements

HN15[] **Statute of Frauds, Requirements**

Under Michigan law, an agreement made to discharge a contractual obligation shall not be invalid because of the absence of consideration if that agreement is in writing and signed by the party against whom it is sought to enforce the change. *Mich. Comp. Laws § 566.1*.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN16[] **Actual Fraud, Elements**

To prevail on their fraud claims, plaintiffs have to show that (1) the defendant made a material representation, (2) that was false, (3) that the defendant knew the representation was false when it was made (or made it recklessly), (4) that the defendant made the representation with the intent that the plaintiffs rely on it, (5) that the plaintiffs did in fact rely on it, and (6) that the plaintiffs were injured as a result of that reliance.

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

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN17[] **Standards of Review, Abuse of Discretion**

Appellate courts review the denial of a motion for a new trial for abuse of discretion. The authority to grant a new trial is confided almost entirely to the exercise of discretion on the part of the trial court. Where the district court admitted allegedly improper evidence but later issued a curative instruction, appellate courts will reverse only if (1) there is an overwhelming probability that the jury did not or could not follow the instruction and (2) a strong likelihood that the effect of the evidence was devastating to the moving party. The burden of showing this likelihood of prejudice is on the party seeking the new trial.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN18[] **Relief From Judgments, Motions for New Trials**

When alleged prejudice is cured by instructions of the court, a motion for a new trial should be denied.

Counsel: For ENCANA OIL & GAS (USA) INC., a Delaware corporation (16-2065, 17-1429), Plaintiff - Appellant Cross-Appellee: Robert J. Wierenga, Jessica Anne Sprovtsoff, Schiff Hardin, Ann Arbor, MI.

For WALTER ZAREMBA, an individual, ZAREMBA FAMILY FARMS, INC., an individual, ZAREMBA GROUP, LLC, an individual, Defendants - Appellees Cross-Appellants (16-2065): Michael F. Wais, Michael Jeffrey Sheehan, Howard & Howard, Royal Oak, MI; Richard C. Kraus, Foster, Swift, Collins & Smith, Lansing, MI.

For ZAREMBA FAMILY FARMS, INC., a Michigan corporation, ZAREMBA GROUP, LLC, a Michigan limited liability company, WALTER ZAREMBA, an individual, Defendants - Appellees Cross-Appellants (17-1429): Michael F. Wais, Michael Jeffrey Sheehan, Howard & Howard, Royal Oak, MI; Richard C. Kraus, Foster, Swift, Collins & Smith, Lansing, MI.

Judges: BEFORE: MOORE, THAPAR, and BUSH, Circuit Judges.

Opinion by: THAPAR

Opinion

[*558] THAPAR, Circuit Judge. At least for a while, the fracking boom came to Michigan. Oil companies started drilling wells, and the going rate for mineral rights went through the roof. Eventually, however, the bubble burst. This case arises from the **[**2]** fallout.

I.

The Zaremba family held the mineral rights to a large amount of drillable land in Michigan.[1] So when the drilling boom began, **[*559]** oil-company suitors began lining up at their door. The Zarembas entered negotiations with two such companies: Encana Oil & Gas ("Encana") and Chesapeake Energy ("Chesapeake"). Eventually, the Zarembas neared a deal with Chesapeake. But that deal fell apart over a dispute about how Chesapeake and the Zarembas would allocate costs.

After the Chesapeake deal unraveled, the Zarembas signed a letter of intent with Encana. The Zarembas and Encana agreed to negotiate a binding lease agreement, and Encana paid the Zarembas $2 million in earnest money. But the letter of intent also said that if the parties did *not* go through with the agreement—for whatever reason—the Zarembas would return $1.8 million of that money to Encana.

The Zarembas and Encana never reached a binding deal. About two weeks after the parties signed the letter of intent, Encana decided to walk away. And that meant the Zarembas had to return the $1.8 million. Yet after Encana walked, an Encana employee mistakenly told the Zarembas they could *keep* the whole $2 million. So when Encana later asked **[**3]** for the $1.8 million back, the Zarembas refused. Encana promptly sued the Zarembas for breach of contract. The Zarembas counterclaimed, arguing that Encana was liable for fraud and fraudulent inducement (among other things not relevant here).

Then, a surprise. About eight months after Encana sued, explosive allegations emerged in the press: Encana and Chesapeake had purportedly colluded to suppress lease prices in Michigan. Reuters published emails in which the two companies' top executives discussed how they might find a way to avoid "bidding each other up" in Michigan. R. 39, Pg. ID 211. These revelations prompted the Zarembas to lodge a counterclaim against Encana for violations of the Sherman Antitrust Act and the Michigan Antitrust Reform Act.

After several years of litigation, the district court granted Encana summary judgment on the Zarembas' antitrust claims. But Encana's breach-of-contract claim and the Zarembas' fraud claims went to trial. The jury ultimately determined that Encana had waived its right to recoup the $1.8 million, but that the Zarembas had failed to prove their fraud counterclaims.

Both parties now appeal. The Zarembas claim the district court erred in dismissing **[**4]** their *Sherman Act* claim on summary judgment. They also claim that they were entitled to judgment as a matter of law on their fraud counterclaims, and that the district court should have granted their motion for a new trial because Encana's expert witness misled the jury. For its part, Encana claims it was entitled to judgment as a matter of law on its breach-of-contract claim, and that the district court wrongly instructed the jury on that claim.

II.

We turn first to the Zarembas' antitrust claims. ***HN1***[] The *Sherman Act* outlaws agreements that "unreasonably" restrain trade. *United States v. Joint-Traffic Ass'n, 171 U.S. 505, 559, 19 S. Ct. 25, 43 L. Ed. 259 (1898)* (interpreting *15 U.S.C. § 1*). Whether a restraint is reasonable typically depends on the aptly named "rule of reason," which necessitates an "elaborate inquiry" into the restraint's effect on competition in the relevant market. *Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. But the rule of reason has limits. Some kinds of agreements are so likely to have a "pernicious effect on competition" that they are "conclusively presumed to be unreasonable." **[*560]** *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. For instance, sellers of "sanitary pottery" (*i.e.*, toilets) cannot get together and decide that they will sell their wares only for a given amount. *United States v. Trenton Potteries Co., 273 U.S. 392, 394, 397-98, 47 S. Ct. 377, 71 L. Ed. 700 (1927)*. Price fixing of that kind is "per se" unlawful. *N. Pac., 356 U.S. at 5*.

HN2[] The *Clayton Act* creates a private **[**5]** cause of action for violations of the antitrust laws. *See 15 U.S.C. § 15*. The claimant must prove that his opponent entered into an agreement that is per se unlawful, and that the agreement in fact caused the claimant to suffer an "antitrust injury." *See Atl. Richfield Co. v. USA Petroleum Co.,*

[1] For convenience, this opinion refers to "the Zarembas" collectively. That moniker refers to all three of the defendant-appellees/cross-appellants: Zaremba Family Farms, the Zaremba Group, and Walter Zaremba.

495 U.S. 328, 344-45, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990). An antitrust injury is an injury that is "of the type the antitrust laws were intended to prevent and . . . flows from that which makes defendants' acts unlawful." Id. at 334 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)).

Here, the Zarembas allege Encana engaged in two kinds of per se unlawful conduct. First, they argue that Encana and Chesapeake engaged in an unlawful "bid rigging" scheme whereby the two companies agreed not to outbid each other for the Zarembas' leases. *See* United States v. Portsmouth Paving Corp., 694 F.2d 312, 325 (4th Cir. 1982) (defining "bid rigging" as "[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party"); *see also* United States v. Green, 592 F.3d 1057, 1068 (9th Cir. 2010) (holding that "bid rigging" is per se illegal and citing cases from the Fifth and Tenth Circuits in agreement). Second, the Zarembas argue that Encana and Chesapeake engaged in illegal "market allocation" by dividing up the Michigan mineral-rights market, rather than competing with each other for it. *See* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990) (per curiam) (holding that "agree[ments] to allocate **[**6]** markets" are per se unlawful). ***HN3***[] To prevail, the Zarembas have to show that Encana entered into one or both of these agreements and that they suffered a resulting "antitrust injury." Atl. Richfield, 495 U.S. at 344-45. The question at summary judgment, of course, is whether the Zarembas produced sufficient evidence for a reasonable juror to reach that conclusion. *See* Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Because "***antitrust law*** limits the range of permissible inferences from ambiguous evidence," they must point to evidence that "'tends to exclude the possibility' that the alleged conspirators acted independently" if they are to succeed. Id. (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)). Here, the Zarembas advance three distinct theories.

Theory One: The Poison Pill.[2] The Zarembas first argue that just as they were preparing to finalize their deal with Chesapeake, Encana and Chesapeake agreed to rig the bidding. So, they claim, Chesapeake tanked the Zaremba deal by inserting a "poison pill," forcing the Zarembas to sign with Encana instead.

In support of this theory, the Zarembas point to the following evidence. Emails between top Encana and Chesapeake executives **[*561]** show that at the same time they were negotiating with the Zarembas, the two companies were indeed interested in colluding. **[**7]** At one point, Chesapeake's CEO suggested that the companies "throw in 50/50 together" instead of "bash[ing] each other's brains out on lease buying." R. 379-13, Pg. ID 7118. Encana's CEO responded that he was "open to any ideas to reduce costs." *Id.*, Pg. ID 7115. Later, an Encana executive wrote to Encana's CEO that the company "appear[ed] to have agreed" to a "division of work" with Chesapeake. R. 379-18, Pg. ID 7130. And the companies subsequently haggled over a draft "Area of Mutual Interest" agreement. R. 379-21, Pg. ID 7140-45. That agreement contemplated a scheme whereby the companies would "agree not to compete against one another" in designated geographic areas. *Id.*, Pg. ID 7141.

Troubling stuff. But what does that evidence have to do with the Zarembas? Well, email records confirm that at the same time the companies were contemplating collusion, each was also negotiating for the Zarembas' mineral-rights leases. The Zarembas claim these negotiations eventually resulted in an agreement in principle between the Zarembas and Chesapeake. In support, they point to an email in which Chesapeake's CEO instructed an employee to "sign [the Zarembas] up I guess." R. 379-10, Pg. ID 7104. **[**8]** But then, on the day Chesapeake and the Zarembas had planned to close their deal, two high-level executives at Chesapeake and Encana had what the Zarembas believe was a crucial phone call. During that call, those executives discussed their potential non-compete agreement. And the Zarembas say that, as a result, Chesapeake agreed to tank the Chesapeake-Zaremba deal by reneging on an earlier assurance that Chesapeake would bear all the "post-production costs" from the Zaremba wells. In the end, the Zarembas claim that Chesapeake's production-costs "poison pill" forced them to walk away from the Chesapeake deal and instead sign the letter of intent with Encana, which set out "far inferior" lease terms. Second Br. 24.

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[2] Not to be confused with the poison pill of Delaware lore. *See, e.g.,* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995).

From all this, the Zarembas argue that a reasonable juror could conclude that Encana and Chesapeake struck a deal in which they agreed that Chesapeake would walk away from negotiations with the Zarembas, forcing them into Encana's arms. But, the Zarembas' evidence does not "tend[] to exclude the possibility" that Encana and Chesapeake had not yet reached an anti-competitive agreement and were continuing to try to outbid each other. Matsushita, 475 U.S. at 588 (internal quotations and citation omitted). **[**9]** First, for all their troubling emails, the evidence shows that Encana and Chesapeake did *not* agree to tank the Zaremba deal. True, one Encana executive said the companies "appeared" to have reached an agreement before Chesapeake's deal with the Zarembas fell apart. R. 379-18, Pg. ID 7130. But appearances can be deceiving. The evidence shows that after that executive sent his email, Encana and Chesapeake continued to compete vigorously for the Zaremba leases. Encana's initial offer for those leases was $2,000 per acre, but the amount contemplated in the ultimate letter of intent was $2,900 per acre—a *twenty-three million dollar increase* in the deal's total value. And that increase was brought on by competition from Chesapeake, as evidenced by a series of emails showing that the companies were "bidding each other up" even as they separately tried to work out their mutual-interest agreement. R. 362-8, Pg. ID 5338-39. Indeed, just days before the Zaremba-Chesapeake deal fell apart, Chesapeake's CEO said of the Zaremba deal: "[Encana] won't share, let's win." R. 362-51, Pg. ID 5657. And this all happened *after* Encana circulated **[*562]** its draft mutual-interest agreement to Chesapeake and the Encana **[**10]** executive said the companies appeared to have agreed on an arrangement. There is only one way to read this evidence: Encana and Chesapeake certainly talked about a mutual-interest agreement as they were negotiating with the Zarembas, but they were simultaneously engaged in a bidding war and never reached a collusive truce. This is "conduct [] consistent with permissible competition," Matsushita, 475 U.S. at 588, and therefore cannot sustain an inference of an anti-competitive agreement.

That just leaves the infamous Encana-Chesapeake phone call. As the Zarembas point out, the emails indicating that the companies were "bidding each other up" were sent a few days *before* the Zaremba-Chesapeake deal fell apart. But on the day Chesapeake purportedly tanked the deal with its poison pill, Encana and Chesapeake executives talked about their companies' potential agreement in a phone call. Accordingly, the Zarembas suggest that the executives may have finally struck their agreement that very morning. But the inference the Zarembas seek to draw is firmly rebutted by the record evidence. The Encana executive's contemporaneous notes about that call do not say anything about the Zarembas—and in fact reflect that the companies **[**11]** still had *not* reached an agreement.[3] *See* R. 379-9, Pg. ID 7102 (noting that Encana and Chesapeake's arrangement was "subject only to definitive agreement," that the draft agreement "needs work to get to where [Chesapeake] thinks we're headed," and that Chesapeake was "on the side of quality versus timing"). In addition, in a post-call email to colleagues, that same Encana executive said he "continue[d] to feel" that Chesapeake was "not really motivated to enter an [agreement]." R. 362-10, Pg. ID 5351. All this evidence says, in no uncertain terms, exactly the opposite of what the Zarembas would have a jury conclude. ***HN4***[] Although we view the evidence in the light most favorable to the Zarembas, there is a limit to the inferences we can draw in their favor. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (***HN5***[] summary judgment is appropriate where evidence is "so one-sided" that no "fair-minded jury could return a verdict for the plaintiff"). ***HN6***[] "When opposing parties tell two different stories, one of which is blatantly contradicted by the record . . . a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). So it is here.

Finally, the Zarembas make no attempt to show how their poison-pill **[**12]** theory makes sense in light of the parties' later behavior. Two days after the Zarembas signed with Encana, Chesapeake notified the Zarembas that Chesapeake's offer *had not yet expired*. That same day, a Chesapeake manager wrote to Chesapeake's CEO about Encana's "unwillingness to end the competition," and expressed doubt that continuing to pursue a mutual-interest agreement with Encana was even worth it. R. 362-48, Pg. ID 5650. Chesapeake's CEO responded that the

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[3] The Zarembas argue that a juror could draw an adverse inference from the fact that, when asked about the call under oath, the executives involved invoked their Fifth Amendment right against self-incrimination. But the Encana executive involved in the call later revoked his Fifth Amendment invocation and testified that the executives did not speak about the Zarembas and that they did not reach a deal with Chesapeake on that call.

manager should "freeze [Encana] for another 10 days or so," because it was "probably still better for us for them to believe we'll do a deal **[*563]** with them." *Id.*, Pg. ID 5649. These messages show that not only had Encana and Chesapeake failed to reach an agreement before Chesapeake purportedly tanked the Zaremba deal, but that their negotiations had been going so poorly Chesapeake was considering bowing out. Again, in light of this evidence, there is simply no way a reasonable juror could believe the Zarembas' poison-pill theory. So, if they are to succeed, it must be on a different one.

Theory Two: The Freeze Out. The Zarembas' next theory is that Chesapeake and Encana agreed to simultaneously walk away from any binding deal with **[**13]** the Zarembas after Encana and the Zarembas entered into the letter of intent. Since the evidence discussed above shows that the companies had not reached any collusive agreement *before* the Zarembas signed with Encana, the Zarembas' freeze-out theory can succeed only if they can show that the companies did so *afterward*. Here again, the evidence belies the Zarembas' position. Chesapeake emails show that it learned about Encana's decision to walk away from the Zaremba deal not from Encana—its alleged partner-in-crime—but from an anonymous participant in an online natural-gas discussion forum. And when an employee forwarded that post to Chesapeake's CEO, he reacted with surprise and said that Encana's decision made him "nervous." R. 383-4, Pg. ID 7558. He then emailed an Encana executive, asking whether Encana's sudden exit meant that it had "no more interest in joining forces down the road." R. 362-35, Pg. ID 5573. After ignoring him for a few days, the Encana executive responded, curtly, that Encana had "decided to discontinue further leasing," and would "reassess [its] position after the summer." *Id.* Yet again, this evidence does not "tend[] to exclude the possibility" that Encana and **[**14]** Chesapeake were acting independently. *Matsushita, 475 U.S. at 588* (internal quotations and citation omitted). Encana kept Chesapeake in the dark about its decision to walk away from the Zaremba deal, and it was not interested in playing nice even when Chesapeake's CEO tried to mend the fence. These emails contradict the Zarembas' freeze-out theory, and the Zarembas have failed to point to any evidence to the contrary. So this theory must fail too. *See* *Scott, 550 U.S. at 380*.

Theory Three: Ongoing Price Depression. The Zarembas' final theory is that after the companies tanked the Zaremba deal, they succeeded in decreasing the going rate for mineral-rights leases across northern Michigan. The Zarembas thus argue that they not only lost the opportunity to do a deal with Encana or Chesapeake, but also the opportunity to do so at a fair price on the open market with some other player. In support, they point to evidence suggesting that the companies reached an agreement several months after they stopped negotiating with the Zarembas. For instance, in one Encana executive's notes from a later phone call with Chesapeake, he wrote that the "principles" of Encana and Chesapeake's potential agreement were "non compete," "share data," and "save **[**15]** billions." R. 379-14, Pg. ID 7121. And in a later email, another Encana executive identified an area of land up for auction as "a [Chesapeake] area [where] we will not be bidding." R. 379-28, Pg. ID 7170.

This evidence "tends to exclude the possibility" that Encana and Chesapeake acted independently. *Matsushita, 475 U.S. at 588* (internal quotations and citation omitted). But the Zarembas cannot win under this theory: It fails to connect the companies' alleged collusion to any harm that the Zarembas suffered. A reasonable juror could credit the Zarembas' evidence that the companies eventually **[*564]** formed a collusive agreement, but the Zarembas nevertheless fail to point to evidence suggesting that they even considered leasing their rights after their last communication with Chesapeake in July 2010. They claim they did so in their briefing, but appellate briefing is not summary-judgment evidence. As the Supreme Court has held, ***HN7***[] antitrust plaintiffs are required to show "that the conspiracy caused *them* an injury for which the antitrust laws provide relief," not just that the defendant was up to no good. *Atl. Richfield, 495 U.S. at 344* (quoting *Matsushita, 475 U.S. at 584 n.7*). So, since the Zarembas have not pointed to any competent summary judgment evidence from which a reasonable **[**16]** juror could infer that they suffered an injury in the months after the companies walked away from their deal, their price-depression theory fails. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (holding that ***HN8***[] moving party may discharge its burden on summary judgment by pointing out the absence of evidence to support the non-moving party's case).

III.

After Encana sued the Zarembas for breach of contract, the Zarembas counterclaimed that Encana was liable for fraud and fraudulent inducement. Both Encana's breach-of-contract claim and the Zarembas' fraud claims went to trial. At the close of proofs, both sides made motions for judgment as a matter of law, which the district court denied.

HN9[] We review the denial of a motion for judgment as a matter of law de novo. *Mich. First Credit Union v. CUMIS Ins. Soc., Inc., 641 F.3d 240, 245 (6th Cir. 2011)*. **HN10**[] Where federal courts sit in diversity, as the district court did here, they apply the standard for judgment as a matter of law used by the courts of the state whose substantive law governs the action. *Id.* **HN11**[] In Michigan, judgment as a matter of law may be granted only where "reasonable minds could not differ as to the conclusions to be drawn from the evidence." *Id.* (quoting *Ridgway v. Ford Dealer Comput. Servs., Inc., 114 F.3d 94, 97 (6th Cir. 1997)*). Just like at summary judgment, we view the evidence in the light most favorable to the non-moving party **[**17]** and draw all reasonable inferences in its favor. *Id.*

A.

Encana argues that the district court erred by denying its motion for judgment as a matter of law on its breach-of-contract claim. Specifically, Encana takes issue with the court's treatment of the Zarembas' waiver defense. At trial, the Zarembas admitted that they had failed to comply with the letter of intent's terms by refusing to return the $1.8 million. Instead, they mounted a waiver defense, relying on Encana's agent's assurance that they could keep the entire $2 million after Encana decided to walk away from the deal. Encana argues that Michigan law required the Zarembas to provide consideration for Encana's waiver. The district court held that Michigan law did not require the Zarembas to provide consideration and instructed the jury accordingly. The jury ultimately found that Encana had waived its right to recoup the earnest money.

The district court erred: **HN12**[] Michigan law requires consideration for a waiver to be effective. The Michigan Model Civil Jury Instructions explicitly state that "[a] waiver of a substantial [contract] right requires consideration." *See* M Civ. JI 142.41. And the instructions cite *Babcock v. Public Bank* ***[**18]*** , in which the Michigan Supreme Court said just that: "waiver of a substantial right . . . is a matter of contract which requires a consideration." *366 Mich. 124, **[*565]** 114 N.W.2d 159, 164 (Mich. 1962)*. The Zarembas do not contest that the right to collect $1.8 million qualifies as a "substantial right." And since the Zarembas made no attempt to prove consideration at trial, Michigan law dictates that Encana's waiver was not effective. *Id.; cf. Lee v. Macomb Cty., 288 Mich. 233, 284 N.W. 892, 893 (Mich. 1939)* ("Waiver being contractual in its nature can be no more effective as a bar than an express agreement or contract . . . .").

The Zarembas have not pointed to any intervening Michigan authority that questions *Babcock*'s validity. In fact, as Encana points out, Michigan courts continue to cite *Babcock* with some regularity. *See Brown v. Northwoods Animal Shelter, No. 299361, 2011 Mich. App. LEXIS 1912, 2011 WL 5072600, at *2 (Mich. Ct. App. Oct. 25, 2011)* (per curiam) (citing *Babcock* for the proposition that "[a] release must be supported by sufficient consideration to be considered valid"); *Jack v. Hastings Mut. Ins. Co., No. 278109, 2008 Mich. App. LEXIS 2311, 2008 WL 4958787, at *3 (Mich. Ct. App. Nov. 20, 2008)* (per curiam) (same); *Davis v. Meade Grp., No. 262190, 2006 Mich. App. LEXIS 148, 2006 WL 142527, at *1 (Mich. Ct. App. Jan. 19, 2006)* (per curiam) (same); *Karapetian v. Pontiac Osteopathic Hosp., No. 187077, 1996 Mich. App. LEXIS 1889, 1996 WL 33358118, at *1 (Mich. Ct. App. Sept. 20, 1996)* (per curiam) (same). Instead, the Zarembas point to *McCarty v. Mercury Metalcraft Co., 372 Mich. 567, 127 N.W.2d 340, 344 (Mich. 1964)*, in which the Michigan Supreme Court held that proof of consideration is not required to enforce a contract *modification*. But **HN13**[] modification and waiver are different. Waiver occurs when one party unilaterally surrenders its right to object to a **[**19]** counterparty's failure to perform a contract obligation. In contrast, modification occurs when parties mutually agree to change the terms of an agreement. This is a waiver case. So *McCarty* is inapposite.

The Zarembas next argue that "the vast majority of courts"—*i.e.*, courts in states other than Michigan—require no consideration for waiver. And indeed, *Williston on Contracts* says as much. 13 *Williston on Contracts* § 39:25 (4th ed.). But **HN14**[] the Michigan Supreme Court says what the law is in Michigan. And as a federal court sitting in diversity, "we are bound by what we believe Michigan courts would do." *J.C. Wyckoff & Assoc. v. Standard Fire Ins. Co., 936 F.2d 1474, 1485 (6th Cir. 1991)* (quoting *Diggs v. Pepsi-Cola Metro. Bottling Co., 861 F.2d 914, 927 (6th*

Cir. 1988)). The Zarembas cannot circumvent Michigan law by pointing out that Michigan has adopted a minority position.

With their consideration arguments exhausted, the Zarembas try one more avenue. **HN15**[] Under Michigan law, an agreement made to discharge a contractual obligation "shall not be invalid because of the absence of consideration" if that agreement is "in writing and signed by the party against whom it is sought to enforce the change." Mich. Comp. Laws § 566.1. So even though *Babcock* requires consideration for waiver of substantial contract rights, Michigan law *also* suggests that a waiver lacking in consideration **[**20]** may be enforceable if it is set out in a signed writing. *Id.* The Zarembas thus argue that, regardless whether they failed to prove consideration, the jury could have found that Encana's waiver was enforceable because it was in fact set out in such a writing.[4]

[*566] The Zarembas point to two such writings. First, an email chain in which Encana employees discussed the potential consequences of backing out of the Zaremba deal. Those emails noted that "[w]alking on Zaremba" could cause Encana to "lose $2MM in earnest money." R. 375-3, Pg. ID 6530. Second, a copy of a 1099-MISC tax form that Encana sent to the Zarembas after it submitted that form to the IRS, in which Encana noted that it had paid the Zarembas $2 million. But neither an *internal* Encana email nor a tax form constitutes an "*agreement* . . . in writing" between Encana and the Zarembas. Mich. Comp. Laws § 566.1 (emphasis added). Moreover, the tax form was not signed. *Id.* (an agreement discharging a contract obligation "shall not be valid or binding unless it shall be in writing *and signed* by the party against whom it is sought to enforce") (emphasis added). So neither of these documents can serve as a consideration substitute under MCL § 566.1.

In sum, the **[**21]** district court was incorrect that (1) waiver of a substantial contractual right does not require consideration under Michigan law and (2) the Zarembas' proffered writings were sufficient to satisfy § 566.1. Thus, since the Zarembas did not argue that Encana's purported waiver was in fact supported by consideration, no reasonable juror could lawfully find that they had succeeded on their waiver defense. The district court should have granted Encana's motion for judgment as a matter of law.[5]

B.

The Zarembas appeal the district court's denial of their motion for judgment as a matter of law on their fraud counterclaims.[6] The Zarembas claim that Encana made false representations that led them to sign the letter of intent and forgo the opportunity to strike a deal with Chesapeake. They argue that the evidence on this claim was so one-sided that they were entitled to judgment as a matter of law.

HN16[] To prevail on their fraud claims, the Zarembas had to show that (1) Encana made a material representation, (2) that was false, (3) that Encana knew the representation was false when it was made (or made it recklessly), (4) that Encana made the representation with the intent that the Zarembas rely on it, (5) that **[**22]** the Zarembas did in fact rely on it, and (6) that the Zarembas were injured as a result of that reliance. U.S. Fidelity & Guaranty Co. v. Black, 412 Mich. 99, 313 N.W.2d 77, 82 (Mich. 1981) (quoting Hi-Way Motor Co. v. Int'l Harvester Co., 398 Mich. 330, 247 N.W.2d 813, 816 (Mich. 1976)). The Zarembas base their fraud theory on a single email from an Encana representative informing the Zarembas that she had "confirmed with [Encana's] VP" that Encana included the "non-binding language" in the letter of intent because it had to "observe Encana's Corporate protocol

[4] The Zarembas take a curious position in interpreting § 566.1. At one point, they rely on § 566.1 to argue that consideration is *never* required for a waiver. But this argument is contrary to the provision's plain text, which indicates that an agreement discharging an obligation is not invalid absent consideration *if* there is a signed writing. Elsewhere, the Zarembas reverse course, suggesting that § 566.1 does not apply to waivers *at all*. We will assume to the Zarembas' benefit, however, that § 566.1 does apply and that absent consideration, the Zarembas could enforce Encana's waiver by pointing to a signed writing.

[5] Given that Encana was entitled to judgment as a matter of law at the close of proofs, we need not reach its claim that the district court improperly instructed the jury on the Zarembas' waiver defense.

[6] Before the case was submitted to the jury, Walter Zaremba and the Zaremba Group voluntarily dismissed their counterclaims in recognition of the fact that damages accruing from those claims accrued to Zaremba Family Farms. For continuity, this section will continue to refer to "the Zarembas."

for Board approval of the deal." R. 598-1, Pg. ID 12789. The representative then assured the Zarembas **[*567]** that she "ha[d] authority and budget to enter into the deal in good faith." *Id.* The Zarembas argue that the jury was required to view these statements as knowing or reckless misrepresentations because Encana's management had not yet issued a final approval authorizing a binding lease of the Zarembas' rights.

The Zarembas' argument hinges on the idea that the only way to understand Encana representative's reference to the "deal" was as a reference to the final acquisition. There was ample evidence, however, that the "deal" referred to was the signing of the non-binding letter of intent and the transfer of the $2 million in earnest money, which Encana's representatives did in fact have the "authority **[**23]** and budget" to carry out. At trial, the head of Encana's land-negotiations team testified that management had authorized her to offer the Zarembas up to $2 million without seeking further approval. She also testified that the Encana vice president who signed the letter of intent had the authority to agree to the letter on Encana's behalf. Moreover, the Encana representative who sent the disputed email testified that she intended "deal" to mean "letter of intent." And *the Zarembas' own representative* testified unequivocally that he "knew that the deal [Encana's representative] was referring to was [the letter of intent]." R. 606-3, Pg. ID 13031. Indeed, the letter of intent itself made clear that (1) the final purchase agreement would be a document separate from the letter of intent that would not be finalized for at least a few more weeks, and (2) a final purchase might *never* be completed. This was more than enough evidence for the jury to conclude that the Encana representative did not make a misrepresentation of fact, much less an intentional or reckless one. And so the district court correctly held that the Zarembas were not entitled to judgment as a matter of law.

IV.

The final dispute **[**24]** on appeal is over the Zarembas' motion for a new trial. At trial, Encana called an attorney with knowledge about oil-and-gas industry contracting practices as an expert witness. During his testimony, the district court repeatedly sustained the Zarembas' objections to the expert's attempts to testify as to improper legal conclusions. Afterward, the district court issued a curative instruction that the jury should "disregard any opinion" given by the expert about "what the law does or does not require." R. 625, Pg. ID 16323. The court then reminded the jurors that he, the trial judge, was "the sole judge of the law," and would be "giving [the jury] instructions about the law to be applied" during deliberations. *Id.* The Zarembas later made a motion for a new trial, arguing that the expert's testimony had tainted the jury. The district court denied that motion.

HN17[] We review the denial of a motion for a new trial for abuse of discretion. *Clarksville-Montgomery Cty. Sch. Sys. v. U.S. Gypsum Co., 925 F.2d 993, 1002-03 (6th Cir. 1991)* ("The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court." (quoting in parenthetical *Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980)* (per curiam))). Where the district court admitted allegedly improper evidence but later issued **[**25]** a curative instruction, we will reverse only if (1) there is an "overwhelming probability" that the jury did not or could not follow the instruction and (2) a strong likelihood that the effect of the evidence was "devastating" to the moving party. *See* *Holmes v. City of Massillon, 78 F.3d 1041, 1047 (6th Cir. 1996)* (quoting in parenthetical *Greer v. Miller, 483 U.S. 756, 766 n.8,* ***[*568]*** *107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987))*. The burden of showing this likelihood of prejudice is on the party seeking the new trial. *See* *Clarksville, 925 F.2d at 1002*.

The Zarembas cannot clear this very high bar for several reasons. First, they have not established an "overwhelming probability" that the jury could not follow the district court's curative instruction. They seem to rely instead on the generalized notion that one cannot "unring the bell" once improper trial testimony has been heard by the jury. But that argument cannot itself win the day. If it could, there would be no need for the "overwhelming probability" standard—we would simply reverse every time jurors were exposed to improper testimony. That is not the law. *See* *Clarksville, 925 F.2d at 1002* (explaining that ***HN18***[] when "prejudice is cured by instructions of the court, the motion for a new trial should be denied").

Second, the Zarembas fail to show a strong likelihood that the expert's testimony was "devastating" to their case. The testimony the **[**26]** Zarembas challenge related to the appropriate measure of *damages* for the alleged fraud, *not* to the Zarembas' attempt to prove fraud *liability*. Since the verdict form showed that the jury rejected the

Zarembas' claim on liability, it is difficult to see how the challenged testimony could have had a "devastating" impact here. Therefore, the district court did not abuse its discretion in denying the Zarembas' motion for a new trial.

V.

For these reasons, we **AFFIRM** the district court's decisions to (1) grant Encana's motion for summary judgment on the Zarembas' antitrust claims, (2) deny the Zarembas' motion for judgment as a matter of law on their fraud claims, and (3) deny the Zarembas' motion for a new trial. We **REVERSE** the district court's denial of Encana's motion for judgment as a matter of law on its breach of contract claim, **VACATE** the corresponding judgment, and **REMAND** with instructions to enter judgment for Encana.

Arista Networks, Inc. v. Cisco Sys.

United States District Court for the Northern District of California, San Jose Division

June 1, 2018, Decided; June 15, 2018, Filed

Case No. 16-cv-00923-BLF

Reporter

2018 U.S. Dist. LEXIS 228820 *; 2018 WL 8949299

ARISTA NETWORKS, INC., Plaintiff, v. CISCO SYSTEMS INC., Defendant.

Prior History: *Arista Networks, Inc. v. Cisco Sys., 2016 U.S. Dist. LEXIS 109493 (N.D. Cal., Aug. 17, 2016)*

Core Terms

opines, damages, argues, de facto, effects, industry standard, motion to exclude, deposition, Motions, asserts, intellectual property rights, intellectual property, anti trust law, forecasting, documents, expert testimony, anticompetitive, lawsuit, offering, patent, procompetitive, testifying, expertise, purported, reliable, copying, reasons, contrary to law, expert opinion, last sentence

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Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

ORDER ON *DAUBERT* MOTIONS

[Re: ECF 209, 211, 212, 217]

Before the Court are the parties' motions to exclude certain opinions of each party's experts under *Federal Rule of Evidence 702* and *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. For the reasons stated on the record and set forth below, **[*3]** Plaintiff Arista Networks, Inc.'s ("Arista") motions are GRANTED IN PART and DENIED IN PART and Defendant Cisco Systems Inc.'s ("Cisco") motions are GRANTED IN PART and DENIED IN PART.

I. LEGAL STANDARD

Federal Rule of Evidence 702 provides that a qualified expert may testify if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." *Fed. R. Evid. 702*. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that *Rule 702* requires the district court to act as a gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. In *Kumho Tire Co., Ltd. v. Carmichael*, the Supreme Court clarified that the "basic gatekeeping obligation" articulated in *Daubert* applies not only to scientific testimony but to all expert testimony. *526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. The Supreme Court also made clear that the reliability inquiry is a flexible one, and "whether *Daubert*'s specific factors are, or **[*4]** are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id. at 153*; *see also* *Micro Chem., Inc. v. Lextron, Inc., 317 F.3d 1387, 1391 (Fed. Cir. 2003)*.

"*Daubert* and *Rule 702* are safeguards against unreliable or irrelevant opinions, not guarantees of correctness." *i4i Ltd. P'ship v. Microsoft Corp., 598 F.3d 831, 854 (Fed. Cir. 2010) aff'd*, *564 U.S. 91, 131 S. Ct. 2238, 180 L. Ed. 2d 131 (2011)*. So long as an expert's methodology is sound and his opinions satisfy the requirements of *Rule 702*, underlying factual disputes and how much weight to accord the expert's opinion are questions for the jury. *Micro Chem., 317 F.3d at 1392*; *Primiano v. Cook, 598 F.3d 558, 565 (9th Cir. 2010)*.

II. DISCUSSION

The parties have each moved to exclude opinions rendered by the other party's technical and economics experts. Cisco seeks to exclude the opinions of Dr. John R. Black, Jr. and Dr. Fiona Scott Morton. Arista, for its part, seeks to exclude the opinions of Dr. Kevin Almeroth and Dr. Dennis Carlton. The Court first addresses the parties' motions regarding their respective technical experts, Dr. Black and Dr. Almeroth.

A. Dr. John R. Black, Jr.

Cisco moves to exclude Dr. Black from offering opinions that were previously excluded in the parties' CLI case.[1] Black Mot. 1, ECF 217. Specifically, Cisco asks the Court to preclude Dr. Black's opinions regarding whether

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[1] Cisco previously filed an action against Arista, alleging that Arista infringes Cisco's patents and copyrights in its command line interface ("CLI"). *Cisco Systems, Inc. v. Arista Networks, Inc.*, Case No. 14-cv-05344-BLF (the "CLI case"). A jury found that

Cisco's CLI is a *de facto* or informal industry **[*5]** standard as well as opinions on "corporate intent or beliefs of others." *Id.* Such opinions were precluded in the CLI case. *See* CLI *Daubert* Motions Order 2-5, Case No. 14-cv-05344-BLF, Dkt. 661. Cisco argues that Dr. Black's opinions in this case are identical to those which he offered in the CLI case and thus the Court should adopt its prior ruling in the CLI case. Black Mot. 1-2.

Arista responds that it will not offer Dr. Black's opinions as to "whether Cisco's CLI is a 'standard,' *de facto* or otherwise," "to the extent that Cisco does not open the door by presenting the opinion of its technical expert, Dr. Kevin Almeroth, that Cisco's CLI is *not* an industry standard." Black Opp'n 1, ECF 239-8 (emphasis in original). Arista also states that Dr. Black will not offer opinions regarding "corporate intent or beliefs of others." *Id.* Instead, Arista asserts that Dr. Black will "present his analysis of the evidence he reviewed 'to determine whether Cisco CLI has become common in the industry'" as the Court allowed in the CLI case. *Id.* at 1-2.

The parties agree that the Court's rulings set forth in the CLI *Daubert* Motions Order should apply in this action. **[*6]** *See* Black Mot. 1; Hearing Tr. 5:24-6:1, ECF 280. The Court does not find any reason why the Court's prior rulings in the CLI case are inapplicable here. As such, Dr. Black shall be excluded from offering opinions that were precluded in the CLI *Daubert* Motions Order. Dr. Black will not be allowed to opine whether Cisco's CLI is a *de facto* or informal industry standard. Moreover, Dr. Black will be excluded from opining on corporate intent or beliefs of others. In particular, as Cisco requests, Dr. Black may not testify that "Cisco was aware that its CLI was in widespread use by other vendors throughout the industry, acquiesced in that use, and even encouraged that use" (Black Reply 3, ECF 249-4) because that testimony directly relates to Cisco's state of mind. However, he will be permitted to opine on the common or frequent use of CLI by others in the industry based on his analysis of evidence as permitted in the CLI *Daubert* Motions Order. Based on the foregoing, the Court GRANTS Cisco's motion to exclude Dr. Black's opinions relating to whether Cisco's CLI is a *de facto* or informal industry standard as well as opinions on corporate intent or beliefs of others.

The Court addresses Arista's **[*7]** concern on whether Cisco will "open the door" by having Dr. Almeroth testify that Cisco's CLI is not an industry standard. As stated during the hearing, Dr. Almeroth will be permitted to testify whether Cisco's CLI has been promulgated as a standard by a standard setting organization. Hearing Tr. 6:12-15, 7:16-23. Dr. Almeroth, however, will not be allowed to offer opinions that Cisco's CLI is not a *de facto* or informal industry standard, and Arista may raise objections if he proceeds to do so.

B. Dr. Kevin C. Almeroth

Arista moves to exclude Dr. Almeroth's opinions that Cisco was "public and consistent" concerning its CLI intellectual property rights. Almeroth Mot. 3-5, ECF 212. Arista further seeks to preclude Dr. Almeroth's opinions that were previously excluded in the CLI case. *Id.* at 5-6. Arista's challenges are separately addressed below.

i. Dr. Almeroth's Opinions on Cisco's "Public and Consistent" Position Regarding Its Copyright

Arista contends that Dr. Almeroth, a computer scientist, submitted a Rebuttal Report that includes his opinion that "Cisco's position regarding its copyrighted CLI was public and consistent." Almeroth Mot. 2, ECF 212 (citing Ex. 12 to Nelson Decl. ("Rebuttal Report") **[*8]** ¶¶ 129-31, ECF 210-19). Under the heading "VI. Cisco's Position Regarding Its Copyrighted CLI was Public and Consistent," the Rebuttal Report states the following:

> **129**. In 2003, Cisco sued Huawei alleging theft of intellectual property alleging that Huawei copied Cisco's CLI and source code. The result of this lawsuit was a settlement requiring Huawei to change its command line interface, which was known to the industry.

Arista infringed Cisco's copyright but that the infringement was excused by the scènes à faire affirmative defense. The jury did not find patent infringement. *Id.* at Dkt. 749.

> **130**. Based on my review of the written discovery in this case, Cisco was public about its position regarding Huawei and others copying its CLI....
>
> **131**. Moreover, other switch vendors intentionally did not look at or copy Cisco's CLI in order to avoid Intellectual Property rights issues. For example, Philip Shafer was developing JUNOS CLI in the 1997 to 1998 timeframe. During his development, he intentionally did not want to look at Cisco's CLI in order to avoid infringing Cisco's rights....

Rebuttal Report ¶¶ 129-31. Arista argues that those statements are not expert testimony and that Dr. Almeroth improperly vouches for Cisco's view of disputed facts. Almeroth Mot. 3-4.

Cisco responds that paragraphs 129 to 130 of Dr. Almeroth's Rebuttal Report recite background facts **[*9]** which support Dr. Almeroth's opinions that "Cisco's CLI is not an industry standard." Almeroth Opp'n 3-4, ECF 237-3. According to Cisco, Arista seeks to strike various facts that Dr. Almeroth considers in forming his opinions. *Id.* at 4. Cisco also asserts that Arista's reference to "public and consistent" in the Rebuttal Report's section heading mischaracterizes the actual content of paragraphs 129 to 131 which addresses "background factual information." *Id.*

The Court has reviewed section "VI. Cisco's Position Regarding Its Copyrighted CLI was Public and Consistent" in Dr. Almeroth's Rebuttal Report. As a general matter, Dr. Almeroth will not be allowed to testify whether Cisco had a "public and consistent" position regarding its CLI because he does not have the expertise to opine what it means for a company to take a "public and consistent" position. Moreover, this is a factual issue about which the jury needs no expert testimony. Cisco admits that Dr. Almeroth is not an expert on whether a company's position is "public and consistent." Hearing Tr. 17:21-23; *see also* Almeroth Opp'n 3. This ruling, however, does not preclude Dr. Almeroth from offering his opinions about the market players and **[*10]** how they would have responded and reacted to Cisco's activities.

The Court turns to the three paragraphs in section VI of Dr. Almeroth's Rebuttal Report. In paragraph 129, Dr. Almeroth summarizes his view of what the 2003 lawsuit between Cisco and Huawei was about and how the lawsuit concluded. Rebuttal Report ¶ 129. This is neither the proper subject of expert testimony nor does Dr. Almeroth have expertise in characterizing lawsuits and their results. Thus, to the extent that Dr. Almeroth proffers expert opinions on the nature of the Huawei lawsuit, those opinions are inadmissible. If Cisco intends to offer the statements in paragraph 129 as a factual background, Cisco does not require an expert to introduce such statements. Allowing Dr. Almeroth to do so would amount to no more than an unfair vouching of evidence. *See United States v. Freeman, 498 F.3d 893, 903 (9th Cir. 2007)*. In paragraph 130, Dr. Almeroth opines that "Cisco was public about its position regarding Huawei and others copying its CLI" based on his review of written discovery in this case. Rebuttal Report ¶ 130. Again, Dr. Almeroth is simply vouching for fact evidence rather than providing expert opinions. An expert may not act as a mere conduit to provide an "additional summation" **[*11]** of evidence. *See id. at 903-04*. For these reasons, the Court excludes paragraphs 129 and 130 of Dr. Almeroth's report.

In paragraph 131, Dr. Almeroth opines that "other switch venders *intentionally* did not look at or copy Cisco's CLI" and that, for example, "[Philip Shafer] *intentionally* did not want to look at Cisco's CLI" when he was developing JUNOS CLI. Rebuttal Report ¶ 131 (emphasis added). Here, Dr. Almeroth opines on the subjective intent of others. Experts may not speculate about the state of mind or vouch for opinions of others as Cisco has persuasively argued regarding Dr. Black's opinions. For these reasons, Dr. Almeroth's opinion in paragraph 131 will be excluded. To be clear, Dr. Almeroth will be allowed to testify about his review of JUNOS and whether or not it copies Cisco's CLI.

The Court is unpersuaded by Cisco's arguments that paragraphs 129 to 131 should not be excluded because they are relevant to Dr. Almeroth's opinion that "Cisco's CLI is not an industry standard" (Almeroth Opp'n 3-4; Hearing Tr. 13:2-8). As stated during the hearing, the Court will not allow testimony regarding whether or not Cisco's CLI is a *de facto* or informal standard. Hearing Tr. 13:9-10. As such, to **[*12]** the extent that Dr. Almeroth relies on those paragraphs to opine that Cisco's CLI is not a *de facto* standard, those paragraphs are irrelevant and thus will not assist the jury. *See Daubert, 509 U.S. at 591* (holding that expert testimony must assist the trier of fact).

For the above reasons, Arista's motion to exclude Dr. Almeroth's opinions on whether Cisco was "public and consistent" regarding its intellectual property in CLI, including paragraphs 129 to 131 in the Rebuttal Report, is

GRANTED. To be clear, the Court will not exclude the subject matter contained in those paragraphs. In addition, as stated during the hearing, this ruling does not preclude Dr. Almeroth from offering opinions on how he views the evidence regarding Cisco's marketing campaign related to its CLI and development of products. Hearing Tr. 18:13-16.

ii. Dr. Almeroth's Opinions that Were Previously Excluded in the CLI Case

Arista seeks to exclude Dr. Almeroth's opinions that were not allowed in the CLI case. Almeroth Mot. 5. According to Arista, Dr. Almeroth's Rebuttal Report incorporates by reference the entirety of his reports in the CLI case. *Id.* Arista argues that the Court should not permit Dr. Almeroth to present previously excluded **[*13]** opinions. *Id.* Specifically, Arista challenges Dr. Almeroth's opinions that Arista copied Cisco's source code and the "look and feel" of Cisco's CLI. *Id.* at 5-6. Arista also asserts that Dr. Almeroth's opinions that speculate about Arista's state of mind and that do nothing more than vouch for Cisco's version of disputed facts should be excluded. *Id.* at 6.

Cisco agrees that the Court's prior rulings regarding Dr. Almeroth's opinions in the CLI case should apply to this action. Almeroth Opp'n 7-8. Accordingly, the Court GRANTS Arista's motion to exclude Dr. Almeroth's opinions that were previously precluded in the CLI case as set forth in the CLI *Daubert* Motions Order.

C. Dr. Dennis Carlton

Arista advances several challenges to the opinions offered by Cisco's economics expert, Dr. Carlton. Carlton Mot., ECF 211. The Court addresses each challenge below.

i. Dr. Carlton's Opinions Regarding What Conduct the *Antitrust Law* Should and Should Not Punish

Arista argues that Dr. Carlton's opinions regarding what "conduct the ***antitrust law*** should and should not punish" must be excluded. Carlton Mot. 2-4. Specifically, Arista asserts that Dr. Carlton's Report repeatedly expresses his opinions that, if Cisco were found **[*14]** liable under Arista's theory, such a finding would be inconsistent with a procompetitive antitrust policy and "wreak economic havoc." *Id.* at 2-3, 3 n.2 (citing Ex. 1 to Nelson Decl. ("Carlton Report") ¶¶ 10, 13, 56, 60-62, 64, 77, 83, 85, ECF 210-9). Those opinions should be excluded, Arista argues, because experts are prohibited from "interpreting the law for the court or from advising the court about how the law should apply to the facts of a particular case." *Id.* at 3 (citing *Mannick v. Kaiser Found. Health Plan, Inc., No. C 03-5905 PJH, 2006 U.S. Dist. LEXIS 38430, 2006 WL 1626909, at *17 (N.D. Cal. June 9, 2006)*; *Nimely v. City of New York, 414 F.3d 381, 397 (2d Cir. 2005))*.

Cisco responds that Arista mischaracterizes Dr. Carlton's opinions. Carlton Opp'n 2, ECF 233-4. In Cisco's view, Dr. Carlton has not offered prescriptive opinions about antitrust laws. *Id.* Rather, Cisco asserts, Dr. Carlton's Report explains his opinions regarding the "economic incentives that underlie intellectual property," "procompetitive benefits of information," and "procompetitive aspects of formal standard setting." *Id.* at 3-4.

After reviewing the paragraphs of Dr. Carlton's Report identified by Arista, the Court concludes that some portions of those paragraphs should be excluded. First, as a general matter, Dr. Carlton's reference **[*15]** to "wreak economic havoc" will be precluded as that phrase is inflammatory and will not aid the jury.

Second, Dr. Carlton's Report contains improper opinions that usurp the role of the court and jury. An expert's testimony may not "interpret[] the law for the court or . . . advis[e] the court about how the law should apply to the facts of a particular case." *Mannick, 2006 U.S. Dist. LEXIS 38430, 2006 WL 1626909, at *17*. Nor should the expert testify about what conduct the antitrust laws should or should not allow. *In re Delta/Airtran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343, 1362 (N.D. Ga. 2017)*. Such opinions impermissibly "tell the jury what result to reach, and thus attempt[] to substitute the expert's judgment for the jury's." *Id.* (quoting *Nimely, 414 F.3d at 397*). For example, Dr. Carlton states in his report that a company should generally be able to "alter its policies as it sees fit" and that Dr. Scott Morton's "interpretation of intellectual property laws would create economic havoc among firms that invest to create intellectual property rights." Carlton Report ¶ 13; *see also id.* ¶¶ 60-62 (offering similar opinions). As another example, Dr. Carlton essentially opines that certain conduct should not be punished by the antitrust laws. *See*, *e.g., id.* ¶¶ 83 ("[Dr. Scott Morton's] claim has far-reaching economic implications . . . . Such a system **[*16]** would harm competition by undermining the intellectual property rights system and the economic incentives that it is designed to create."). The Court finds that paragraphs 13, 60, 61, 62 (last sentence), 77 (last sentence), and 83 of Dr. Carlton's Report run afoul of the above principles that prohibit an expert from offering opinions that usurp the role of the court and jury and inform the jury what result should be reached. *Mannick, 2006 U.S. Dist. LEXIS 38430, 2006 WL 1626909, at *17* (holding that experts should not interpret the law for the court); *In re Delta, 245 F. Supp. 3d at 1362-63* (holding that experts may not instruct the jury what result to reach). Accordingly, paragraphs 13, 60, 61, 62 (last sentence), 77 (last sentence), and 83 of Dr. Carlton's Report are excluded.

On the other hand, the Court finds that other paragraphs identified by Arista are admissible. First of all, paragraph 10 will not be excluded. In that paragraph, Dr. Carlton describes the parties' CLI litigation and ITC actions and opines that "[t]he interference with firms pursuing valid intellectual property claims and valid regulatory concerns would lead to a reduction in economic efficiency, even though infringers like Arista may benefit from such interference." Carlton Report ¶ 10. Here, Dr. Carlton describes **[*17]** the economic effects of enforcing intellectual property rights. This opinion does not rise to the level of instructing the jury on what conduct the antitrust laws should or should not punish.

Dr. Carlton will also be allowed to provide the opinions in paragraphs 56 and 85 of his report. In paragraph 56, Dr. Carlton testifies that it is "economically rational and efficient for a firm to seek to enforce its property rights." *Id.* ¶ 56. In paragraph 85, Dr. Carlton opines that companies will have less incentive to develop intellectual property if the validity of those rights would depend on the motivation for filing past intellectual property lawsuits. *Id.* ¶ 85. In those paragraphs, Dr. Carlton is not opining whether antitrust laws should prohibit specific conduct unlike his other opinions that are excluded above. Rather, he is explaining the rationality of companies to enforce intellectual property rights and the incentive considerations for protecting those rights. Those opinions are not improper.

In addition, the Court will not exclude paragraph 64 where Dr. Carlton explains the procompetitive benefits of allowing companies to disclose truthful information to customers. This opinion is **[*18]** not a prescriptive statement of the law that warrants exclusion.

Based on the above discussion, the Court GRANTS IN PART and DENIES IN PART Arista's request to exclude Dr. Carlton's opinions regarding what conduct the antitrust laws should or should not punish.

ii. Dr. Carlton's Opinions that Are Contrary to *Kodak*

Arista further moves to exclude Dr. Carlton's opinions that are in disagreement with the Supreme Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. Carlton Mot. 4-7. Specifically, Arista takes issue with Dr. Carlton's opinion that "[i]n general, a firm should be able to alter its policies as it sees fit" and that "[a]bsent a legal commitment in the form of a contract, no economic basis exists for Dr. Scott Morton's opinion that another firm should rely on what it thinks its rival might do." Carlton Report ¶ 13. Arista argues that those opinions are contrary to *Kodak* and thus must be excluded as being contrary to law. Carlton Mot. 4 (citing *Cave v. Saxon Mortg. Servs., Inc., No. 11-4586, 2015 U.S. Dist. LEXIS 142198, 2015 WL 6153754, at *9 (E.D. Pa. Oct. 20, 2015)* (holding that expert opinions that are contrary to law are *per se* unreliable)). For similar reasons, Arista asserts that paragraphs 9, 12, 56, 59-61, 77 and 82-83 of Dr. Carlton's Report should be excluded. *See* Carlton Mot. 4-6.

Cisco disputes Arista's characterization **[*19]** of Dr. Carlton's opinions as being inconsistent with *Kodak.* Carlton Opp'n 2. Cisco argues that Dr. Carlton opines on the economic bases of intellectual property rights and the procompetitive aspects of a formal standard setting (as opposed to "informal" standards). *Id.* at 4-5. In Cisco's view, those opinions are consistent with *Kodak. Id.*

The Court has reviewed the paragraphs identified by Arista and excludes paragraphs 13, 60, and 61 of Dr. Carlton's Report. First, Dr. Carlton opines in paragraph 13 that "[i]n general, a firm should be able to alter its policies as it sees fit. To do otherwise would condemn a firm to forever being stuck with its initial business plan. Such a requirement would wreak economic havoc especially in rapidly changing industries . . . ." Carlton Report ¶ 13. The Court disagrees with Cisco's argument that such an opinion does not contradict *Kodak* because that case had a "very specific set of facts" that showed a policy change "that turned out to be an antitrust problem." Hearing Tr. 27:21-28:5. Dr. Carlton's broad opinion that a company should be able to freely change its policy is inconsistent with *Kodak* because Dr. Carlton's opinion does not recognize that a policy **[*20]** change can indeed violate antitrust laws as in *Kodak.* Such an opinion is not permitted. *Apple, Inc. v. Samsung Elecs. Co., No. 11-CV-01846-LHK, 2012 U.S. Dist. LEXIS 90877, 2012 WL 2571332, at *7 (N.D. Cal. June 30, 2012)* (excluding an expert's opinion that is contrary to law).

Second, in paragraphs 60 and 61, Dr. Carlton opines that as a general matter a company should be able to alter its policies as it sees fit. Carlton Report ¶ 61. He explains that imposing an implicit requirement for a company to not alter its policy would fundamentally alter the intellectual property system. *See id.* ¶ 60. Like paragraph 13, here Dr. Carlton's broad opinion that a company should be able to freely change its policy is inconsistent with *Kodak.* As mentioned, *Kodak* recognizes that a policy change can violate antitrust laws. *See* *Kodak, 504 U.S. at 458, 477-86*.[2] Thus, paragraphs 60 and 61 of Dr. Carlton's Report are excluded. *Apple, 2012 U.S. Dist. LEXIS 90877, 2012 WL 2571332, at *7* (excluding an expert's opinion that is contrary to law).

On the other hand, the Court will not exclude paragraphs 9, 12, 56, 59 and 82 as those paragraphs are not contrary to *Kodak.*[3] Regarding paragraph 9, Arista takes issue that in this paragraph Dr. Carlton opines that "[p]enalizing [enforcement of IP rights] would harm competition" without considering whether such enforcement was part **[*21]** of an "open early, closed late policy change." Carlton Mot. 6. However, this opinion is not necessarily inconsistent with *Kodak* which did not involve the particular type of "open early, closed late" scheme that is the subject of this case. For this reason, the Court finds that the opinions in paragraph 9 are not precluded by *Kodak.*

As set forth in paragraph 12, Dr. Carlton asserts that "Dr. Scott Morton's analogy regarding hold up in formal standard setting organizations is invalid for several reasons." Carlton Report ¶ 12. Here, Dr. Carlton explains why this case is different from a "hold up" based on a formal standard set by a standard setting organization. *Id.* The Court does not find that his opinions as stated in paragraph 12 are inadmissible. For instance, Dr. Carlton points out that "there is no claim that Cisco had a contractual obligation to make its CLI available for free." *Id.* This statement on its own is factually correct and does not contradict *Kodak.* However, Dr. Carlton will not be allowed to opine that an anticompetitive "open early, closed late scheme" *requires* a contractual obligation between the involved parties because *Kodak* does not preclude the possibility **[*22]** that such a scheme is unlawful in the absence of a contractual relationship. Dr. Carlton also opines that "even if a firm initially does not charge for a product, it would be an economic error to require that the firm should never charge for it." *Id.* This opinion is not contrary to law because *Kodak* does not require a firm to never change its policy. But the phrase "economic error" may mislead the jury and thus Dr. Carlton will not be allowed to use that phrase.

In paragraph 56, Dr. Carlton testifies that "it is economically rational and efficient for a firm to seek to enforce its property rights." Carlton Report ¶ 56. In paragraph 59, Dr. Carlton discusses that disputes over intellectual property rights are common and that he disagrees with "Dr. Scott Morton's claim that it is anti-competitive to sue in order to enforce even a valid intellectual property right." *Id.* ¶ 59. Here, Dr. Carlton is explaining the rationality of companies to enforce intellectual property rights and opines that intellectual property lawsuits are not anticompetitive. Those opinions are not inconsistent with *Kodak* and thus will be allowed.

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[2] The Court does not mean to suggest that *Kodak* bans all policy shifts, but rather that Dr. Carlton's opinions are impermissibly overbroad by suggesting that there are absolutely no limits.

[3] The Court also does not find that paragraphs 77 and 83 are necessarily inconsistent with *Kodak.* The Court need not discuss those paragraphs in detail because those portions are already excluded as discussed in the previous subsection.

Dr. Carlton further opines in paragraph 82 that companies that use another's **[*23]** intellectual property can "protect themselves through contract or by relying on standards set by [a standard setting organization]" and that "Cisco made no . . . contractual commitments to Arista or other competitors for free use of its CLI." Carlton Report ¶ 82. Those statements are not contrary to law and thus the opinions in paragraph 82 will be allowed. That said, as discussed above, Dr. Carlton will not be allowed to opine that an anticompetitive "open early, closed late scheme" *requires* a contractual obligation between the involved parties because *Kodak* does not preclude the possibility that such a scheme is unlawful in the absence of a contractual relationship.

Based on the foregoing discussion, the Court GRANTS IN PART and DENIES IN PART Arista's request to exclude Dr. Carlton's opinions that are contrary to *Kodak.* To be clear, Dr. Carlton will be allowed to opine about intellectual property rights, the rights Cisco has, and why those rights are valuable to Cisco in developing its competitive position in the market.

iii. Dr. Carlton's Opinions Regarding the Competitive Effects of Cisco's Conduct

Arista challenges Dr. Carlton's testimony that "Cisco's conduct . . . did not harm **[*24]** competition but instead promoted it." Carlton Mot. 7. According to Arista, Dr. Carlton defines "Cisco's conduct" as "1) bringing a lawsuit about Arista's use of Cisco's CLI, and 2) making public and private communications with customers that Arista had a culture of copying." *Id.* (citing Carlton Report ¶¶ 52-101) (internal quotation marks omitted). In this regard, Arista argues that Dr. Carlton determines only whether Cisco's 2014 CLI lawsuit and "Cisco's communication about it" were procompetitive but fails to assess evidence concerning Cisco's "open early, closed late" policy shift. *See id.* at 8. Specifically, Arista asserts that Dr. Carlton did not review eight documents that relate to Cisco's "open early, closed late" strategy. *Id.* at 8-9. On this basis, Arista argues that Dr. Carlton fails to consider "core evidence" and thus his opinion that "Cisco's copyright suit against Arista is procompetitive" and all associated assertions should be excluded. *Id.* at 9-10.

In Cisco's view, Arista incorrectly argues that the fact that Dr. Carlton did not recall reviewing a handful of documents at the time of his deposition suggests that he did not consider relevant facts. Carlton Opp'n 9. Cisco points out that Arista lists **[*25]** eight allegedly "unreviewed" documents while Cisco has produced over 2 million documents in this case. *Id.* Cisco asserts that Dr. Carlton cannot reasonably remember each document that he reviewed and the lack of recollection on reviewing a few documents does not justify excluding his testimony. *Id.* Moreover, Cisco argues that Dr. Carlton did consider documents that have similar information contained in the allegedly unreviewed documents to reach his conclusions. *Id.*

The Court is satisfied that Dr. Carlton's opinions regarding the competitive effects of Cisco's conduct are admissible. Seven of the eight documents that Arista identifies contain Cisco's statements that describe its CLI as a "standard" or note other competitors' use of Cisco CLI. *See, e.g.*, Exs. 5, 6 to Nelson Decl., ECF 210-12, -13. Dr. Carlton testifies that he has "seen documents in which [Cisco] describes its CLI as [an] industry standard." Ex. A to Leary Decl. ("Carlton Dep.") 195:18-19, ECF 233-5; *id.* at 161:4-8. Thus, even if Dr. Carlton did not actually review the documents pointed out by Arista, he did consider similar information contain therein. Moreover, Dr. Carlton explains that he accounted for such information **[*26]** by speaking with Dr. Almeroth about the meaning of Cisco's description of its CLI as a standard. *Id.* at 161:4-13. Thus, contrary to Arista's contention, Dr. Carlton's opinions about the competitive effects of Cisco's conduct are "sufficiently tied to the facts of this case." *Daubert, 509 U.S. at 591* (quoting *United States v. Downing, 753 F.2d 1224, 1242 (3rd Cir. 1985))*. To the extent that Dr. Carlton did not consider certain documents, the Court finds that the alleged deficiencies in Dr. Carlton's opinions are better addressed through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Clear-View Techs., Inc. v. Rasnick, No. 13-CV-02744-BLF, 2015 U.S. Dist. LEXIS 71990, 2015 WL 3505003, at *2 (N.D. Cal. June 2, 2015)*. The Court thus DENIES Arista's motion to exclude Dr. Carlton's opinions regarding the competitive effects of Cisco's conduct.

D. Dr. Fiona Scott Morton

Cisco raises three challenges to Dr. Scott Morton's opinions relating to (1) the existence of an informal industry standard for CLI, (2) damages assessment based on her forecasting model, and (3) apportionment of damages that were discussed during her deposition. The Court addresses each challenge in turn.

i. Dr. Scott Morton's Opinions Regarding a *De Facto* or Informal Standard

Cisco seeks to preclude Dr. Scott Morton from **[*27]** testifying on the existence of a *de facto* or informal standard for CLI. Scott Morton Mot. 2, ECF 209. Cisco argues that Dr. Scott Morton lacks the expertise to identify a *de facto* or informal industry standard and that she did not use a reliable methodology to determine that Cisco's CLI is such a standard. *Id.* at 3. Arista responds that it will not seek to offer any opinion of Dr. Scott Morton that states that "Cisco's CLI is a 'standard,' *de facto* or otherwise." Scott Morton Opp'n 3, ECF 239-6. According to Arista, Dr. Scott Morton's analysis does not depend on whether Cisco's CLI is a standard. *Id.*

The Court agrees with Cisco that Dr. Scott Morton lacks the expertise to determine whether Cisco's CLI is a standard. Nor does she have the expertise to testify whether Cisco's CLI has the attributes of a standard. While Dr. Scott Morton is a highly qualified economist, she has no special training in identifying informal industry standards. Thus, the Court will preclude Dr. Scott Morton from opining on whether the CLI at issue in this case is a *de facto* or informal standard. She will also not be allowed to opine on whether the CLI has attributes of a standard. In addition, Dr. Scott Morton will **[*28]** not be permitted to use the term "hold up" which would mislead the jury. Hearing Tr. 37:1-8, 14-16; *see also id.* at 45:19-24 (Arista stating that Dr. Scott Morton does not need to use the term "hold up" in offering her opinions).

Cisco further asserts that Dr. Scott Morton's opinions regarding anticompetitive "open early, closed late" conduct should be excluded because she has no basis for those opinions once she is precluded from testifying that "Cisco's CLI is a 'standard.'" Scott Morton Reply 1, ECF 248. To the extent that Cisco argues that Dr. Scott Morton should be precluded from offering opinions regarding Cisco's purported "open early, closed late" scheme at all, the Court rejects that argument. Although Dr. Scott Morton frequently uses the term "standard" in her report, she also describes Cisco's conduct based on evidence without referring to that term. Dr. Scott Morton has the expertise to understand the market reality from the facts of this case and thus will be allowed to offer her opinions based on Cisco's marketing of CLI and the market reality. Hearing Tr. 36:2-4.

Accordingly, the Court GRANTS Cisco's motion to exclude Dr. Scott Morton's opinions regarding the existence **[*29]** of a *de facto* or informal standard for CLI as set forth above. This ruling, however, does not preclude Dr. Scott Morton from testifying on the anticompetitive effects of an "open early, closed late" scheme.

ii. Dr. Scott Morton's Opinions Regarding Damages Based on Her Forecasting Model

Cisco moves to exclude Dr. Scott Morton's testimony regarding damages based on her forecasting model. Scott Morton Mot. 6. Cisco contends that Dr. Scott Morton's forecasting approach cannot distinguish between the effects of Cisco's purported CLI policy reversal and other factors—such as the patent and ITC litigations, aggressive pricing and new switches from Cisco, and growing competition—and thus cannot isolate "damages due to Cisco's [unlawful] actions." *Id.* In other words, Cisco claims that Dr. Scott Morton's analysis fails to segregate the losses caused by the purported anticompetitive conduct from other lawful conduct. *See id.* (citing *City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1372 (9th Cir. 1992)*; *Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1352 (9th Cir. 1985))*; *see also id.* at 7-8.

Arista counters that courts have applied a relaxed standard for proving the amount of damages once the fact of damage has been shown. Scott Morton Opp'n 5 (citing *Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 836 (9th Cir. 1982))*. In this regard, Arista argues that "a plaintiff need not exhaust all possible alternative **[*30]** sources of injury." *Id.* at 5 (quoting *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1051 (9th Cir. 1981))*; *see also id.* at 6-7. Arista further contends that Dr. Scott Morton properly considers multiple factors that affected its revenue, including "developing market factors, competition from white box installations and others, and the ITC import bans." *Id.* at 6.

In her report, Dr. Scott Morton uses a "forecasting approach" to predict Arista's revenues based on a statistical model which "assumes that, but for Cisco's conduct, Arista's revenues would have evolved in a similar fashion during the conduct period" as the revenues have evolved before the "conduct period."[4] Ex. A to Seddon Decl. ("Scott Morton Report") ¶¶ 194-95, ECF 208-5. Dr. Scott Morton then determines the difference between her forecast and Arista's actual revenues to be Arista's "lost revenues." *Id.* ¶ 235. To estimate damages, Dr. Scott Morton multiplies the lost revenues with Arista's gross margins as a "measure of profits on incremental sales." *Id.*

The above analysis conducted by Dr. Scott Morton does not utterly fail to segregate Arista's losses based on Cisco's purported anticompetitive conduct and other lawful factors. In applying her forecasting approach, Dr. Scott Morton uses data from a "benchmark period" **[*31]** (from the fourth quarter of 2008 to the fourth quarter of 2014) to predict Arista's revenues during the "conduct period" that would have occurred "but for Cisco's conduct from the first quarter [of] 2015 onwards." Scott Morton Report ¶¶ 209-10. As Arista argues, Dr. Scott Morton's analysis takes into account Cisco's aggressive pricing and sales of new switches because those factors existed during the benchmark period. *Id.* ¶¶ 60-62; *see also* Ex. B to Seddon Decl. ("Scott Morton Dep.") 363:23-9, ECF 208-7 (explaining that "much of the release [of new products] actually occurs in the [benchmark period]" and thus that factor is accounted in the model). Likewise, contrary to Cisco's contention, Dr. Scott Morton's model takes into account the increased competition from white box installations and Juniper which had increases in market share during the benchmark period. *See* Scott Morton Dep. 364:10-18 (explaining that white boxes were introduced before the conduct period and thus are accounted for in the model); Fig. 4 of Scott Morton Report (showing Juniper's trend in market share during the benchmark period).[5] For these reasons, the Court is unpersuaded by Cisco's argument that Dr. Scott **[*32]** Morton's treatment of Cisco's aggressive pricing and new switches as well as competition from other vendors renders her opinions unreliable. Whether Dr. Scott Morton's benchmark analysis properly considers the effects of those factors goes to the weight rather than the admissibility of her opinions. *Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1188 (9th Cir. 2002)* ("[I]n most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility. Vigorous cross-examination of a study's inadequacies allows the jury to appropriately weigh the alleged defects and reduces the possibility of prejudice." (internal citation omitted)).

Cisco also argues that Dr. Scott Morton does not separate the effects of Cisco's lawful patent litigation and corresponding ITC investigations. Scott Morton Report 7. Arista admits that Dr. Scott Morton's model does not "quantifiably" separate the impact of Cisco's purported anticompetitive conduct from Cisco's ITC actions. Scott Morton Opp'n 7.

Nevertheless, Arista asserts that Dr. Scott Morton "qualitatively" assesses the impact of the ITC litigations. *See* Hearing Tr. 51:23-52:13, 54:24-55:2; Scott Morton Opp'n 7. Indeed, Dr. **[*33]** Scott Morton has reviewed evidence to consider the effect of the parties' dispute before the ITC. For example, Dr. Scott Morton analyzes the trend in Arista's new customer acquisitions before and during the "conduct period" and concludes that the slowdown of acquisitions is attributable to Cisco's change in CLI policy rather than the ITC import bans. *See id.* ¶¶ 185-86. Moreover, Dr. Scott Morton also considers that Arista was able to maintain production in face of the ITC's import ban by "[TEXT REDACTED BY THE COURT]" *Id.* ¶ 234. In her deposition, she explains that her analysis gives

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[4] Dr. Scott Morton treats the period from the first quarter in 2015 to the last quarter in 2016 as the "conduct period" when Cisco was actively litigating the CLI case. Scott Morton Report ¶ 208. Cisco filed the CLI case on December 5, 2014 and the jury reached a jury verdict on December 14, 2016.

[5] Cisco also contends that Dr. Scott Morton fails to consider the increased market share of Huawei. Scott Morton Mot. 8. However, Huawei does not have a significant presence in the U.S. (*see* Fig. 4 of Scott Morton Report) and Huawei's increase in worldwide market share is largely irrelevant because Dr. Scott Morton estimates only loss of revenues in the U.S. as a conservative measure. *Id.* ¶ 212 (explaining that the damages calculation exclusively considers only Arista's U.S. revenues as a conservative estimate).

substantial weight to Cisco's CLI-related conduct and that her assessment is supported by Cisco's _30(b)(6)_ witness' description of the CLI as being "foundational." Scott Morton Dep. 268:2-12; 355:1-356:22; 362:21-363:3. Because Dr. Scott Morton considers evidence and conducts an analysis to support her discount of the effects of Cisco's ITC actions, the Court concludes that her opinions are based on an adequate foundation and a reliable methodology. Therefore, Dr. Scott Morton's damages opinions based on her forecasting model will not be excluded.[6]

The cases relied on by Cisco—*City of Vernon* and *Farley* ***[*34]*** —do not dictate a conclusion that Dr. Scott Morton's damages opinions are inadmissible. Those cases do not directly address the admissibility of an expert's testimony but rather speak to the issue of an antitrust plaintiff's burden of proving damages. *See* _City of Vernon, 955 F.2d at 1373_; *Farley, 786 F.2d at 1351-52*.

That said, *City of Vernon* and *Farley* raise a concern on Arista's burden to prove damages. Those cases hold that the antitrust plaintiff must proffer sufficient evidence so that a jury could reasonably estimate without speculation the amount of damages attributable to the unlawful conduct. *See* _City of Vernon, 955 F.2d at 1371-73_; *Farley, 786 F.2d at 1350-52*. In this regard, Dr. Scott Morton's opinions raise an issue due to her model's inability to quantitatively separate out the effects of Cisco's purported anticompetitive conduct and the ITC actions. But as the Ninth Circuit recognized in *City of Vernon*, a plaintiff's evidence on damages may be "filled in by testimony at trial." _955 F.2d at 1373_ (citing _Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc., 773 F.2d 1506, 1513 (9th Cir. 1985))_. Here, Arista represents that it will proffer other evidence to support apportionment of damages. Hearing Tr. 63:16-17. For the instant motion, the Court is reviewing only the admissibility of Dr. Scott Morton's opinions based on her forecasting model and thus need not determine whether Arista would be able **[*35]** to ultimately satisfy its burden to prove damages without requiring speculation.

Accordingly, the Court DENIES Cisco's motion to exclude Dr. Scott Morton's opinions regarding damages based on her forecasting model. During the hearing, Cisco argued that it would be prejudiced if Arista were allowed to present a huge damages number without a basis for apportionment. Hearing Tr. 43:2-3. At this juncture, the Court is unable to determine the merits of Cisco's "prejudice" argument without knowing the entirety of Arista's apportionment evidence. Cisco will have the opportunity to raise objections during trial.

iii. Dr. Scott Morton's Opinions on Apportionment that are Purportedly Undisclosed in Her Expert Report

Cisco seeks to exclude Dr. Scott Morton's opinions on apportionment of damages that she provided during her deposition. Scott Morton Mot. 9. Specifically, Cisco challenges Dr. Scott Morton's deposition testimony that "the effects of the [CLI] copyright litigation are 'a much more impactful and important part of the effect on demand than the patent litigation.'" *Id.* (citing Scott Morton Dep. 358:12-359:25). Cisco contends that this opinion should be excluded because the opinion is not **[*36]** disclosed in Dr. Scott Morton's Report and it is based on an ad hoc evaluation that she is unqualified to perform. *Id.* at 9-10.

Arista counters that Dr. Scott Morton properly responded to the questions of Cisco's counsel at deposition regarding the confounding effects on damages such as the ITC proceedings. Scott Morton Opp'n 9. Arista further argues that Dr. Scott Morton is qualified to elaborate on the details of her damages model. *Id.* at 10.

The Court agrees with Arista. Dr. Scott Morton's deposition testimony regarding the larger effect of the CLI litigation compared to the patent litigation is not a new opinion undisclosed in her report. For example, Dr. Scott Morton considers the impact of Cisco's conduct on Arista's acquisition of new customers. Scott Morton Report ¶¶ 183-86. She analyzes the decline in new customer acquisitions during the conduct period and concludes that the slowdown

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[6] Cisco also contends that Arista failed to take discovery of its customers on whether Arista's lost sales were due to the CLI litigation or the ITC actions. *See* Hearing Tr. 41:2-8. Arista responds that it cannot survey unidentified customers and that it is not required to survey all customers in the industry. *Id.* at 55:15-21. The Court finds that Arista's lack of discovery of its customers does not affect the reliability and admissibility of Dr. Scott Morton's opinions although conducting such discovery may have bolstered her analysis.

is attributable to Cisco's change in CLI policy and the CLI litigation rather than the ITC import bans. *See id.* ¶¶ 185-86. Thus, the Court finds that Dr. Scott Morton's response that was made during her deposition does not go beyond what she opines in her expert report. Dr. Scott Morton is not limited to the reading **[*37]** of her report. *Lewert v. Boiron, Inc., 212 F. Supp. 3d 917, 932 (C.D. Cal. 2016)*. Indeed, an expert may "supplement, elaborate upon, and explain his [or her] report in . . . oral testimony." *Id.* Dr. Scott Morton did not make an improper opinion when she elaborated her damages analysis at her deposition.

In addition, the Court is unpersuaded by Cisco's argument that Dr. Scott Morton conducted an improper ad hoc evaluation that warrants an exclusion of her damages opinion. Cisco takes issue with Dr. Scott Morton's deposition statement that patents "'pose[] a much less serious long-run threat to a customer' because 'you can design around them.'" Scott Morton Mot. 9 (citing Scott Morton Dep. 359:8-12). Here, the Court does not find that Dr. Scott Morton is testifying about designing around patents as a technical matter, which is a field that she does not have expertise. Rather, Dr. Scott Morton is opining on the economic effects of patent lawsuits while giving consideration to the possibility of circumventing patents. Whether her opinion is correct goes to "the weight of the evidence rather than its admissibility" and is subject to cross-examination. *Hemmings, 285 F.3d at 1188*.

Accordingly, Cisco's motion to exclude Dr. Scott Morton's opinions on apportionment of damages that **[*38]** she provided during her deposition is DENIED.

III. ORDER

For the foregoing reasons, Cisco and Arista's *Daubert* motions are both GRANTED IN PART and DENIED IN PART.

1. Cisco's motions to exclude expert testimony are GRANTED with respect to:

    a. Dr. Black's opinions regarding whether Cisco's CLI is a *de facto* or informal industry standard as well as opinions on corporate intent or beliefs of others as set forth in the CLI *Daubert* Motions Order.

    b. Dr. Scott Morton's opinions regarding the existence of a *de facto* or informal standard.

2. Cisco's motions to exclude expert testimony are DENIED with respect to:
    a. Dr. Scott Morton's opinions regarding damages based on her forecasting model.
    b. Dr. Scott Morton's opinions on apportionment of damages that she provided during her deposition.
3. Arista's motions to exclude expert testimony are GRANTED with respect to:
    a. Dr. Almeroth's opinions regarding whether Cisco was public and consistent concerning its intellectual property in the CLI, including paragraphs 129-131 of Dr. Almeroth's Rebuttal Report.

    b. Dr. Almeroth's opinions regarding purported source code copying, the "look and feel" of Cisco's CLI, and Arista's state of mind or vouching for the **[*39]** opinions of others as set forth in the CLI *Daubert* Motions Order.
    c. Dr. Carlton's opinions regarding what conduct the antitrust laws should and should not punish that are presented in paragraphs 13, 60, 61, 62 (last sentence), 77 (last sentence), and 83 of Dr. Carlton's Report.

    d. Dr. Carlton's opinions that are inconsistent with *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* and presented in paragraphs 13, 60, and 61 of Dr. Carlton's Report.
4. Arista's motion to exclude Dr. Carlton's opinions is DENIED as to the remainder.

IT IS SO ORDERED.

Dated: June 1, 2018

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

In re Processed Egg Prods. Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

June 1, 2018, Decided; June 1, 2018, Filed

No. 08-md-2002

Reporter

322 F. Supp. 3d 599 *; 2018 U.S. Dist. LEXIS 92798 **; 2018-1 Trade Cas. (CCH) P80,400; 2018 WL 2465169

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION; THIS DOCUMENT APPLIES TO: ALL DIRECT PURCHASER ACTIONS

Subsequent History: Motion denied by *In re Processed Egg Prods. Antitrust Litig., 2018 U.S. Dist. LEXIS 210905 (E.D. Pa., Dec. 13, 2018)*

Prior History: *In re Processed Egg Prods. Antitrust Litig., 2018 U.S. Dist. LEXIS 59633 (E.D. Pa., Apr. 6, 2018)*

Core Terms

eggs, export, domestic, volume, widgets, non-members, prices, handled, cooperative, buyer, milk, indicia of reliability, fair market value, antitrust, defendants', demands, markets

Counsel: [1]** For SANDRA A. JESKIE, Special Master: SANDRA A. JESKIE, LEAD ATTORNEY, DUANE, MORRIS LLP, PHILADELPHIA, PA.

Judges: GENE E.K. PRATTER, UNITED STATES DISTRICT JUDGE.

Opinion by: GENE E.K. PRATTER

Opinion

[*600] MEMORANDUM

PRATTER, J.

INTRODUCTION[1]

This is a straightforward case of statutory interpretation where the plain language dictates the result. After ten years of incubating, and on the eve of closing arguments of a month-long trial, the parties suggest that the outcome of the case hinges on the meaning of one word in a little-used 1922 statute partially protecting farmers from antitrust laws.

[1] Because the Court has issued many opinions already in this case, and because of the exigencies of trial, this memorandum necessarily does not set out all of the background facts of this litigation. The parties know them well. Generally, however, the Court makes reference to the Court's September 2016 opinion on a different question on the *Capper-Volstead Act*, as well as the Court's summary judgment ruling. *See* *In re Processed Egg Prods. Antitrust Litig., 206 F. Supp. 3d 1033 (E.D. Pa. 2016)*.

The Court is called upon to answer the deceptively simple question: how should one calculate the "value" of something?

In a certain sense, value is ephemeral. There are many types of value. Black's Law Dictionary lists 54 different types of value, 53 of which contain an adjective preceding it. But there is only one definition of "value" that can be used here: the amount a good can demand in exchange. The Court finds that "value" must mean the price for which it is purchased by the cooperative, and therefore concludes that, on the basis of the evidence, volume cannot serve as an adequate substitute for value. For this reason, the **[**2]** Court finds that there is insufficient evidence to grant a directed verdict at this time in favor of the defense. However, because the defendants have not rested their case, the Court also declines to grant the motion for a directed verdict to the plaintiffs. The defendants may still attempt to present evidence of the value of goods to the jury that would otherwise satisfy the statutory requirements as outlined below.

BACKGROUND

In 1922, as the effects of the *Sherman* and *Clayton Acts* were coming into greater focus, Congress passed the Capper-Volstead Act to "remove the threat of antitrust restrictions on certain kinds of collective activity." *National Broiler Marketing Ass'n v. United States, 436 U.S. 816, 824, 98 S. Ct. 2122, 56 L. Ed. 2d 728 (1978)*. The grant was not absolute. Among the limitations imposed was a requirement that "the association shall not deal in the products of nonmembers to an amount greater in value **[*601]** than such as are handled by it for members." *7 U.S.C. § 291*. In other words, the immunity only applies to agricultural cooperatives that have the majority of their products handled by members. This is the so-called "50% rule." The 50% is determined by the value of the products handled by the cooperative.

There is scant case law on the rule. Few courts have even addressed this provision, and **[**3]** none have done so with such a novel fact pattern as presented here. In most agricultural commodity businesses, volume and price paid are directly proportional—economic laws dictate that market forces command relatively similar prices for similar goods in a market. But here, the United States Egg Marketers (USEM) was expressly designed (or, if not designed, then operated) to bridge two different markets by allowing USEM to export eggs from the U.S. market to the foreign market. USEM coordinated bulk shipments to sell eggs overseas for less than the prices eggs demanded domestically, while sharing the losses *pro rata* amongst members. The plaintiffs allege that this "dumping" scheme was done to raise prices domestically so that, even though so that, even though there was (or could be) a short-term loss for all members on a specific export, the resulting buoyed egg prices would nevertheless increase domestic profits to justify the export losses.

USEM members were obligated to supply eggs for the export in accordance with their *pro rata* size, and were paid the foreign price of export.[2] Usually, not all USEM members would have enough domestic eggs to cover USEM's export commitments. When this **[**4]** happened, members could ask USEM to go into the open market to purchase eggs and would then be invoiced for the loss in the market purchase. This provision meant that *non-members* were paid a higher price by USEM than *members* were paid to export their eggs. As an example, in a given export, USEM members who had eggs could sell their eggs overseas for $0.50, but to fulfill the export requirement, USEM would go into the market and buy eggs from non-members at the going domestic rate of $1.50. USEM would then turn around and export these "$1.50 eggs" at $0.50 and bill the $1.00 loss to the members.

Thus, even when USEM would ensure that the *volume* of each egg shipment from members made up more than 50% of the total, the *price paid* for the eggs could be drastically different. This means that the precise question presented to the Court is binary. If the Court concludes that "value" means "volume," the defendants have presented sufficient evidence for their affirmative defense to go to the jury. But if the Court concludes that "value"

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[2] Thus, for example, if a USEM member owned 10% of the total hen-laying eggs in USEM, that producer would be required to supply 10% of the eggs for the proposed export.

means "price paid for the goods" then there is insufficient evidence on the record (as currently constituted at the moment of the issuance of this memorandum) **[**5]** to support the defense.

DISCUSSION

The Court concludes that the word "value" in the statute must mean the price the buyer pays for it domestically. Such a reading is compelled by the statute.

I. Definition of Value

As in any question of statutory interpretation, the Court must start with the text of the statute. The Capper-Volstead Act requires that "the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members." *7 U.S.C. § 291*. **[*602]** At the time Capper-Volstead was drafted, value, when "applied without qualification to property of any description," which is how the statute used the word, "necessarily means the price which it will command in the market." Bouvier's Law Dictionary and Concise Encyclopedia, *Value* (8th Ed. 1914); *accord* Baldwin's Century Edition of Bouvier's Law Dictionary, *Value* (1926). This common sense meaning has changed little today.[3]

The defendants argue that volume is the same as value, but that cannot be true. "Volume" is synonymous with quantity, and while quantity is often directly proportional to value, that is not necessarily true. Congress could have written the statute to encompass an "amount greater in volume," **[**6]** or an "amount greater than the fair market value." It did not. Instead, it used plain language to define value in the common sense way: the price of the good. This plain reading of the statute is buttressed by the goal of the Capper-Volstead Act. It was enacted to partially protect agricultural cooperatives from the threat of antitrust laws so the association could operate "for the mutual benefit of the members thereof." *7 U.S.C. § 291*. It would certainly be curious for the statute to allow the cooperative to discriminate *against* its members by giving dispositive preference to non-members.

However, even this plain reading, defining value as "the price which it will command in the market," begs two questions. First, how does the Court determine the price a good will command in the market? And, second, which market should the Court look to? The Court finds that the most reliable way to determine the price a good will command is by looking at the price for which it was purchased, and the market the Court must look to is the domestic market.

II. Determining the Price a Good Demands

The defendants argue that, in determining the price a good demands, the Court should look to the market price (and thus, volume). **[**7]** [4] The plaintiffs argue that the most reliable indicator for the price a good demands is the price a buyer pays for the good itself.

This debate over the interpretation of the word "value" has been addressed before by the Supreme Court. In interpreting whether a property sold in a foreclosure sale was for "reasonably equivalent value," the Court held that "the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself." *BFP v. Resolution Trust Corp., 511 U.S. 531, 549, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994)* (Scalia, J.). In dismissing the metric of assessment advocated by the defense here—the fair market price of the good—the Court noted that the

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[3] The operative definition in Black's Law Dictionary notes that value means the "monetary worth or price of something; the amount of goods, services, or money that something commands in an exchange." Black's Law Dictionary, *Value*.

[4] If the Court uses market price as the correct way to determine the price a good commands, it necessarily follows that volume is an adequate proxy. This is because volume multiplied by price equals value, and the market price becomes a constant. Therefore, volume would be directly proportional to value.

"term 'fair market value,' though it is a well-established concept, does not appear in" the text of the statute. Id. at 537. The same is true in the Capper-Volstead Act—the statute does not mention "fair market value."

The defendants argue that, as a practical matter, "fair market value" is a reliable indication of the value of something. But "fair market value cannot—or at least **[*603]** cannot *always*—be the benchmark." Id. at 537. For example, in *BFP*, the Supreme Court found that fair market value cannot be used as a proxy for the value of a house in foreclosure because the phrase "presumes market conditions **[**8]** that, by definition, simply do not obtain in the context of a forced sale." Id. at 538. In other words, "the fact that a piece of property is legally subject to forced sale, like any other fact bearing upon the property's use or alienability, necessarily affects its worth." Id. at 548.

Given the nature of the facts here, and the fact that the USEM export scheme explicitly crossed markets in selling the eggs, the Court cannot presume "market conditions that, by definition, simply do not obtain." BFP, 511 U.S. 531 at 548, 114 S. Ct. 1757, 128 L. Ed. 2d 556.

The same is true of the USEM export program. In attempting to interpret the word value, the Court must consider the context to determine value. Although often times volume is a good—sometimes the best—proxy for value, there are often more reliable determinants for value. The fact that the member eggs were contractually obligated for export, "like any other fact bearing upon the property's use or alienability, necessarily affects its worth." *Id.*

The parties debate at great length over two cases with dueling interpretations of how to calculate value in the context of Capper-Volstead. *Compare* Bd. Of Trade of City of Chicago v. Wallace, 67 F.2d 402 (7th Cir. 1933) (determining value from price) with Ewald Bros., Inc. v. Mid-America Dairymen, Inc., 877 F.2d 1384 (8th Cir. 1989) (determining value through volume). Neither case is particularly on point. Although *Wallace* ***[**9]*** dealt with wheat prices, the case took place at the height of Congressional price regulation of such commodities. *See, e.g.,* Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942). Thus, price in that instance not only was synonymous with volume, but the value of the commodity was controlled entirely by the federal government.

The defendants' proffered case fares no better. *Ewald* dealt with milk producers who joined together to purchase options contracts to buy milk. Ewald, 877 F.2d at 1389. Importantly, the option prices were not tied to the actual purchase of milk—they were speculative hedging mechanisms to protect against milk shortfalls. The options were purchased in advance, and when the time came to exercise the option, members could either exercise the option, at which point the milk would be purchased at the pre-determined option price, or it could allow the option to expire, and simply pay the price of the option. *Id.*

Therefore, the *Ewald* Court had no reliable indicator for price. The Court only had the prices for the option contracts, which are a poor proxy for the value of the milk. Indeed, an option contract is simply a bet about where the market is going—it has no bearing on what the actual price of the good is. Given the fact that the options were **[**10]** bought in advance to speculate on milk prices, the Eighth Circuit Court of Appeals was forced to use volume as a proxy for value.

This was reasonable for the *Ewald* Court to do. Absent information about price to determine value, volume can sometimes be a reliable indicator, especially when a court lacks more reliable information to gauge the value of the product. For example, if a court has no price with which to determine the value of widgets, perhaps finding that a group of 10 widgets is more valuable than a group of 5 widgets is a perfectly acceptable conclusion. However, if a court knows that the 10 widgets were bought for a total of $10, but the 5 widgets were bought for a total of $100, a court **[*604]** cannot simply substitute volume for value and claim that the cheaper widgets were more valuable. After all, there is a far more reliable indication for value: that the marketplace assessed the group of 5 widgets as more valuable than the group of 10. Perhaps the group of 10 widgets had defects. Perhaps the group of 5 widgets was comprised of superior quality widgets, or they were "brand name" widgets. But one thing is for certain: the market valued the 5 widgets higher because the consumers **[**11]** paid more.

Indeed, the defendants' argued at trial that the member eggs were of lower value than the market prices. The defendants argued that they were forced to export the eggs precisely because they could not find a domestic buyer and the eggs were in danger of rotting if they were not sold expeditiously. No such evidence is present regarding non-member eggs. These non-member eggs were purchased at a much higher price in the marketplace, in part because they had a willing buyer: USEM. Accepting the defendants' own arguments as true, it shows that the member eggs actually had less value than the non-member eggs.

Therefore, the Court determines that the most reliable indicator of the price a good demands is the price that the goods are actually purchased for.

III. Market to Assess Value

The Court's inquiry cannot stop there. Here, non-member eggs were purchased twice: once by USEM, and once by the export buyer. The defendants urge the Court to look to the export buyer's purchase price, but the plaintiffs urge the Court to look to USEM's purchase price. The Court must look to the relevant market, which in this case is the domestic market. Indeed, the Capper-Volstead Act requires the Court **[**12]** to look at the value of the goods *handled* by the cooperative. The goods are handled by the cooperative once they are purchased, and they are purchased domestically. The eggs are handled while they are in the domestic market, and cease to be handled by the cooperative once they are exported. The text of the statute mandates this conclusion.

Such a reading is underscored by the very aims of ***antitrust law***. ***Antitrust law*** focuses on domestic markets and the prices paid in those markets. It attempts to limit *domestic* price fixing, not international violations. Even in this case, the plaintiffs allege, and must prove, harm in the relevant domestic market. It makes little sense, when assessing an antitrust statute, to look to foreign prices to determine value. Therefore, the Court must look to the price of the goods paid by USEM in the domestic purchase of the eggs from non-members, not the price paid by foreign buyers.

Conclusion

For the foregoing reasons, the Court finds that the value of the goods handled by non-members must be calculated by the price that USEM paid to purchase the eggs domestically. The motion for a directed verdict on the affirmative defense of Capper-Volstead immunity for **[**13]** USEM is denied for both parties. An appropriate order follows.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

ORDER

AND NOW, on this 1st day of June, 2018, upon consideration of the Direct Purchaser Plaintiffs' Motion for Judgment as a Matter of Law regarding Defendants' Capper-Volstead Affirmative Defense (Doc. No. 1733), the Defendants' Motion for Judgment as a Matter of Law (Doc. No. 1737), multiple submissions to the Court relating thereto, and oral argument held on the question, it is **ORDERED** that the Motions (Doc. Nos. 1733 & 1737) are **DENIED** as outlined in this Court's June 1, 2018 memorandum opinion.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

UNITED STATES DISTRICT JUDGE

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Hodsdon v. Mars, Inc.

United States Court of Appeals for the Ninth Circuit

December 7, 2017, Argued and Submitted, Pasadena, California; June 4, 2018, Filed

No. 16-15444

Reporter

891 F.3d 857 *; 2018 U.S. App. LEXIS 15013 **; 2018 WL 2473486

ROBERT HODSDON, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. MARS, INC., a Delaware corporation; MARS CHOCOLATE NORTH AMERICA LLC, a Delaware company, Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Northern District of California. D.C. No. 3:15-cv-04450 RS. Richard Seeborg, District Judge, Presiding.

Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016, 2016 U.S. Dist. LEXIS 19268 (N.D. Cal., Feb. 17, 2016)

Disposition: AFFIRMED.

Core Terms

duty to disclose, chain, prong, unfair, consumer, labels, disclose, omission, labor practice, chocolate, products, slave labor, cases, manufacturers, child labor, failure to disclose, fraudulent, tethered, safety hazard, immoral, blight, courts, warranty period, functionality, decisions, violating, slave, worst

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection

HN1[] **Antitrust & Trade Law, Consumer Protection**

Omissions may be the basis of claims under California consumer protections laws, but to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN2[] **Nondisclosure, Elements**

A failure to disclose a fact can constitute actionable fraud or deceit in four circumstances: (1) when the defendant is the plaintiff's fiduciary; (2) when the defendant has exclusive knowledge of material facts not known or reasonably accessible to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations that are misleading because some other material fact has not been disclosed.

Antitrust & Trade Law > Consumer Protection

Commercial Law (UCC) > Sales (Article 2) > Contract Provisions > Warranties

HN3[] **Antitrust & Trade Law, Consumer Protection**

A manufacturer has a duty to disclose only physical defects—not the means by which a product is produced—that relate to a product's central function and arise during the warranty period.

Torts > Business Torts > Unfair Business Practices > Elements

HN4[] **Unfair Business Practices, Elements**

Case law sanctions a sanction an Unfair Competition Law omission claim when: the plaintiff alleges that the omission was material; second, the plaintiff must plead that the defect was central to the product's function; and third, the plaintiff must allege one of four actors. The defect must relate to the central functionality of the product.

Torts > Business Torts > Unfair Business Practices > Elements

HN5[] **Unfair Business Practices, Elements**

For Unfair Competition Law omission claim purposes, the central functionality of the product is not based on subjective preferences about a product.

Torts > Business Torts > Unfair Business Practices > Elements

HN6[] **Unfair Business Practices, Elements**

The safety hazard pleading requirement is not necessary in all Unfair Competition Law omission cases, but the requirement may remain applicable in some circumstances. Where the challenged omission does not concern a central functional defect, the plaintiff may still have to plead a safety hazard to establish that the defendant had a duty to disclose.

Antitrust & Trade Law > Consumer Protection

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN7[] **Antitrust & Trade Law, Consumer Protection**

Although a claim may be stated under the Consumers Legal Remedies Act in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose.

Torts > Business Torts > Unfair Business Practices > Elements

HN8[] Unfair Business Practices, Elements

The Unfair Competition Law prohibits any unlawful, unfair or fraudulent business act or practice. *Cal. Bus. & Prof. Code § 17200*. Because *§ 17200* is written in the disjunctive, it establishes three varieties of unfair competition-acts or practices which are unlawful, or unfair, or fraudulent.

Torts > Business Torts > Unfair Business Practices > Elements

HN9[] Unfair Business Practices, Elements

A failure to disclose a fact one has no affirmative duty to disclose is not likely to deceive anyone within the meaning of the Unfair Competition Law (UCL). Absent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL.

Torts > Business Torts > Unfair Business Practices > Elements

HN10[] Unfair Business Practices, Elements

Unlike the other two Unfair Competition Law (UCL) prongs, the lack of a duty to disclose does not necessarily dispose of claims under the unfair prong. The UCL does not define the term unfair. In fact, the proper definition of unfair conduct against consumers is currently in flux among California courts.

Torts > Business Torts > Unfair Business Practices > Elements

HN11[] Unfair Business Practices, Elements

Unfair means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. Any finding of unfairness to competitors under *Cal. Bus. & Prof. Code § 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. Some courts in California have extended this definition to consumer actions, while others have applied the test from S. Bay Chevrolet v. Gen. Motors Acceptance Corp.

Torts > Business Torts > Unfair Business Practices > Elements

HN12[] Unfair Business Practices, Elements

To determine whether something is sufficiently tethered to a legislative policy for the purposes of the unfair prong of the Unfair Competition Law, California courts require a close nexus between the challenged act and the legislative policy. For an act to be unfair, it must threaten a violation of law or violate the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN13[] **False Advertising, State Regulation**

California's False Advertising Law makes it unlawful for any person to 'induce the public to enter into any obligation' based on a statement that is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. Whether an advertisement is misleading is determined by asking whether a reasonable consumer would likely be deceived. A failure to disclose a fact one has no affirmative duty to disclose is not likely to deceive anyone.

Summary:

SUMMARY*

California Law

The panel affirmed the district court's dismissal of plaintiff's consumer protection claims in a putative class action alleging that Mars, Inc., a chocolate manufacturer, had a duty to disclose on its labels the labor practices that may have tainted its supply chain.

Concerning plaintiff's duty to disclose claims, the panel held that California consumer protection laws did not obligate Mars, Inc. to label its goods as possibly being produced by child or slave labor. The panel further held that in the absence of any affirmative misrepresentations by the manufacturer, the manufacturer did not have a duty to disclose the labor practices in question, even though they were reprehensible, because they were not physical defects that affected the central function of the chocolate products. The panel concluded that, absent a duty to disclose, plaintiff's *Consumers Legal Remedies Act*, *Unfair Competition Law*, and *False Advertising Law* claims were foreclosed.

The panel held that plaintiff's claims failed under the **[**2]** unfair prong of the Unfair Competition Law under either the *Cel-Tech* test, *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 540 (Cal. 1999)*, or the *South Bay* test, outlined in *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301, 316 (Ct. App. 1999)*.

Counsel: Steve W. Berman (argued), Hagens Berman Sobol Shapiro LLP, Seattle, Washington; Elaine T. Byszewski, Hagens Berman Sobol Shapiro LLP, Pasadena, California; for Plaintiff-Appellant.

Stephen D. Raber (argued), Richmond T. Moore, and Joelle Perry Justus, Williams & Connolly LLP, Washington, D.C., for Defendants-Appellees.

Tina Charoenpong, Deputy Attorney General; Michele Van Gelderen, Supervising Deputy Attorney General; Nicklas A. Akers, Senior Assistant Attorney General; Office of the Attorney General, Los Angeles, California; for Amicus Curiae State of California.

Judges: Before: A. Wallace Tashima, William A. Fletcher, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Tashima.

Opinion by: A. Wallace Tashima

Opinion

[*859] TASHIMA, Circuit Judge:

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

In this action, the putative class plaintiff alleges that California consumer protection laws require certain food manufacturers to disclose, on their products' labels, that the products' supply chain may involve child or slave labor. Regrettably, despite some efforts to eradicate the practices, child labor and slave labor are modern-day scourges, **[*860]** and manufacturers **[**3]** that source materials from around the world may benefit from that illicit labor. This issue has gained public attention in recent years such that many consumers now consider in their purchasing decisions the labor practices behind household products. In fact, some manufacturers have decided to market their products as free of unsavory labor practices, and some legislatures have attempted to further educate the public about modern-day slavery.

Nonetheless, the California consumer protection laws do not obligate the defendants-appellees to label their goods as possibly being produced by child or slave labor. In the absence of any affirmative misrepresentations by the manufacturer, we hold that the manufacturers do not have a duty to disclose the labor practices in question, even though they are reprehensible, because they are not physical defects that affect the central function of the chocolate products.

One of the key issues in this case is the continued viability of *Wilson v. Hewlett-Packard Co., 668 F.3d 1136 (9th Cir. 2012)*. Defendants-appellees rely on *Wilson* to argue that plaintiff-appellant has not alleged that defendants-appellees had a duty to disclose because *Wilson* stands for the premise that plaintiffs in pure omission cases must plead **[**4]** that the undisclosed information created a safety hazard. Plaintiff-appellant acknowledges the holding in *Wilson*, but urges us to deviate from that precedent, arguing that intervening California Courts of Appeal cases render our interpretation of California law incorrect. It is true that recent state-court cases have cast doubt on the breadth of this Circuit's precedent about the duty to disclose, but the facts before us today do not compel us to reexamine that precedent in this case. This is so because, even applying the tests from the intervening California cases, Plaintiff cannot state a claim. We therefore affirm the district court's order of dismissal.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff-appellant Robert Hodsdon ("Plaintiff") is a California citizen who purchased defendants-appellees' (together, "Mars") chocolate products at retail stores and viewed the labeling. Hodsdon alleges he would not have bought the chocolate or would not have paid as much for it if the manufacturer had disclosed, on the label itself, the existence of child and slave labor in its supply chain.

The Ivory Coast (or Côte d'Ivoire) is the world's largest producer of cocoa beans, the raw ingredient **[**5]** for chocolate. Like most chocolate manufacturers, Mars sources at least some cocoa beans from the Ivory Coast. Some cocoa beans from the Ivory Coast are produced using what the International Labor Organization ("ILO") calls "the worst forms of child labour." The Bureau of International Labor Affairs of the U.S. Department of Labor describes the situation in the Ivory Coast as follows:

> [C]hildren . . . are working under conditions of forced labor on Ivoirian cocoa farms . . . . Some children are sold by their parents to traffickers, some are kidnapped, and others migrate willingly but fall victim to traffickers who sell them to recruiters or farmers, where they end up in conditions of bonded labor . . . . Some children are forced to perform dangerous tasks . . . .

Mars recognizes that its supply chains may be infected by the worst forms of child labor, but does not disclose this on its product labeling. However, in compliance with the California Transparency in Supply Chains Act of 2010 ("Supply Chains Act"), Mars does disclose on its website its **[*861]** efforts to combat slavery and labor abuses in its supply chain.[1]

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[1] The *Supply Chains Act, Cal. Civ. Code § 1714.43*, was enacted in 2010. The California Attorney General later described the requirements of the Act:

> This Act requires large retailers and manufacturers doing business in California **[**6]** to disclose on their websites their "efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale." . . .

Plaintiff brought this action under California's Consumers Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL"), and False Advertising Law ("FAL"), alleging that Mars has a duty to disclose on its labels the labor practices that may taint its supply chain. Plaintiff's CLRA claim is that Mars misrepresented the source, characteristics, and standard of the chocolate products by omitting information about labor practices on its label. *See Cal. Civ. Code § 1770(a)(2)*, *(5)*, *(7)*. As to the UCL, Plaintiff claims that Mars' conduct came within the UCL's prohibition on "any unlawful, unfair or fraudulent business act or practice" by: (1) violating the "unlawful" prong based on its violation of the CLRA; (2) violating the "fraudulent" prong because it omitted information **[**7]** about the forced labor at the point of sale; and (3) violating the "unfair" prong because the omission contravened legislative policy against child and slave labor, or because Mars' "participation in a supply chain involving [slave labor] is immoral, unethical, oppressive, unscrupulous and injurious to consumers." *See* *Cal. Bus. & Prof. Code § 17200*. Finally, Plaintiff's FAL claim also is based on Mars' alleged failure to disclose its labor practices on its label. *See id.* *§ 17500*.

The district court dismissed the complaint for failure to state a claim. *Fed. R. Civ. P. 12(b)(6)*. Plaintiff has timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction under *28 U.S.C. § 1332(a)*. We have jurisdiction under *28 U.S.C. § 1291*, and review de novo the district court's dismissal for failure to state a claim. *See* *Hinojos v. Kohl's Corp., 718 F.3d 1098, 1103 (9th Cir. 2013)*.

III. ANALYSIS

A. Duty to Disclose

Plaintiff does not allege any affirmative misstatement and relies solely on an omission theory of consumer fraud. ***HN1***[] Omissions may be the basis of claims under California consumer protections laws, but "to be actionable the omission must be contrary to a representation actually made by the defendant, or *an omission of a fact the defendant was obliged to disclose*." *Daugherty v. Am. Honda Motor Co., 144 Cal. App. 4th 824, 51 Cal. Rptr. 3d 118, 126 (Ct. App. 2006)* (emphasis added).

Mars argues that to establish a duty **[**8]** to disclose, under the Ninth Circuit's interpretation of California law, Plaintiff must always allege that the undisclosed information "caused an unreasonable safety hazard." *Wilson, 668 F.3d at 1143*. Plaintiff urges us to rule that *Wilson* is no longer good law after more recent California Courts of Appeal opinions, and to apply the tests for duty to disclose from those cases. While the recent California cases do cast doubt on whether *Wilson*'s safety-hazard **[*862]** requirement applies in all circumstances, we have no occasion in this case to consider whether the later state-court cases have effectively overruled *Wilson*. This is true because even applying Plaintiff's proposed tests, derived from his reading of the more recent California decisions, he cannot state a claim. Specifically, Plaintiff has not sufficiently alleged that the defect in question—the existence of child labor in the supply chain—affects the central functionality of the chocolate products. Therefore, without either relying on or overruling *Wilson,* we hold that Plaintiff has not established that Mars had a duty to disclose the labor practices on its labels.

Companies subject to the Act must post disclosures on their Internet websites related to five specific areas: verification, audits, certification, internal accountability, and training.

KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE, i (2015).

The primary California cases on which Plaintiff relies are Collins v. eMachines, Inc., 202 Cal. App. 4th 249, 134 Cal. Rptr. 3d 588 (Ct. App. 2011), and Rutledge v. Hewlett-Packard Co., 238 Cal. App. 4th 1164, 190 Cal. Rptr. 3d 411 (Ct. App. 2015). Plaintiff **[**9]** has not sufficiently alleged that Mars has a duty to disclose under these cases.

In *Collins*, the plaintiffs were a putative class of consumers that purchased eMachine computers. 134 Cal. Rptr. 3d at 591. The plaintiffs complained that a floppy disk controller defect, which manifested itself during the warranty period, caused critical data corruption of the hard drive. *Id. at 591-92*. Citing the four-prong test from LiMandri v. Judkins, 52 Cal. App. 4th 326, 60 Cal. Rptr. 2d 539 (Ct. App. 1997), the plaintiffs asserted that eMachines had a duty to disclose the defect. Collins, 134 Cal. Rptr. 3d at 593. The court explained:

> ***HN2***[] A failure to disclose a fact can constitute actionable fraud or deceit in four circumstances: (1) when the defendant is the plaintiff's fiduciary; (2) when the defendant has exclusive knowledge of material facts not known or reasonably accessible to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations that are misleading because some other material fact has not been disclosed.

Id. (citing LiMandri, 60 Cal. Rptr. 2d at 543). The plaintiffs in *Collins* argued that eMachines had a duty to disclose based on either prong (2) or (3). *Id. at 593*.

The court held that the plaintiffs had stated a CLRA claim under prong (2). *Id. at 594*. The fact of the defect was material because a "reasonable **[**10]** consumer would deem it important in determining how to act in the transaction at issue," *id. at 593* (internal quotation and alterations omitted), and "according to the complaint, eMachines knew of this defect while plaintiffs did not, and, given the nature of the defect, it was difficult to discover."[2] *Id. at 594* (alteration omitted). Further, *Collins* emphasized that the failure to disclose the defect at issue supported a CLRA claim because the defect "was central to the function of a computer as a computer." *Id. at 595*. In so holding, *Collins* distinguished *Daugherty*—on which *Wilson* is based—by noting that the defect in the case before it, unlike the defect in *Daugherty*, resulted in damage to the computers *during* the warranty period. *See id. at 595*. *Collins*, therefore, stands for the premise that ***HN3***[] a manufacturer has a duty to disclose only physical defects—not the means by which a product is produced—that relate to a product's central function and arise during the warranty period.

The second case that Plaintiff relies upon is *Rutledge*, another case involving computers. The plaintiffs there alleged that Hewlett Packard ("HP") actively concealed and did not disclose that its laptops contained defective inverters that would **[*863]** cause **[**11]** the screens to dim and darken during the warranty period. Rutledge, 190 Cal. Rptr. 3d at 418. The plaintiffs further alleged that HP made misrepresentations in its press releases, that the plaintiffs relied on these statements, and that the laptop screen is central to the function of the laptop. *See id. at 420-422*. On summary judgment, the court held that there was a triable issue about whether HP had a duty to disclose the inverter defect. *Id. at 422*.

The court's reasoning in Rutledge, however, is far from clear. First, the court did not apply the *LiMandri* factors, as *Collins* did, to determine whether defendants had an obligation to disclose. Further, the section of the opinion on the duty to disclose ultimately concludes that there is "a triable issue of fact as to the nature of HP's [affirmative] representations, and whether that *triggered* a duty to disclose the defect." *Id. at 422* (emphasis added). The opinion is thus somewhat inconclusive on whether there was a duty to disclose independent of HP's affirmative representations about its product. Finally, *Rutledge* seems to cite favorably the holding in *Collins* that manufacturers have a duty to disclose a defect when it affects the central functionality of a product. *See id. at 421*.

Rutledge, therefore, could **[**12]** be read as a case that stands for any of the following propositions: (1) there is a duty to disclose in light of affirmative representations; (2) there is a duty to disclose defects that go to the central

[2] The court also determined that plaintiffs' complaint alleged that eMachines actively concealed the defect. Collins, 134 Cal. Rptr. 3d at 594.

function of the product; or (3) there is a duty to disclose defects that go to the central function of the product and which arise during the warranty period. Plaintiff cannot state a claim under any of these interpretations.

While *Collins* and *Rutledge* are somewhat vague about the test for determining whether a defendant has a duty to disclose, ***HN4***[] they sanction a UCL omission claim when: the plaintiff alleges that the omission was material; second, the plaintiff must plead that the defect was central to the product's function; and third, the plaintiff must allege one of the four *LiMandri* factors. *See* *Collins, 134 Cal. Rptr. 3d at 593-95*. Plaintiff argues that Mars had a duty to disclose because information about labor practices is material to consumers and—relying on the second prong of *LiMandri*—because Mars had "superior knowledge" about labor issues in its supply chain. Plaintiff, however, omits a crucial element that *Collins* and *Rutledge* emphasize—that the defect must relate to the central functionality of the product. **[**13]** [3]

[*864] First, we assume without deciding that the existence of slave or child labor in a product's supply chain is material to consumers.

Second, however, Plaintiff fails to allege that the existence of slave or child labor in the supply chain affects the product's central function. In *Collins* and *Rutledge*, the plaintiffs were required to plead that the allegedly concealed *physical* defect was *central* to the product's function.[4] Here, the alleged lack of disclosure about the existence of slave labor in the supply chain is not a physical defect at all, much less one related to the chocolate's function as chocolate. Plaintiff contends that he has "no practical use" for the products tainted by slave or child labor, but ***HN5***[] the central functionality of the product is not based on subjective preferences about a product. A computer chip that corrupts the hard drive, or a laptop screen that goes dark, renders those products incapable of use by any consumer; some consumers of chocolate are not concerned about the labor practices used to manufacture the product. Thus, Plaintiff fails to establish that Mars has a duty to disclose the issues in its supply chain. **[**14]** [5]

Nonetheless, even though we apply the more recent California Courts of Appeal decisions, doing so does not deprive *Wilson* of all vitality. The recent California cases show that *Wilson*'s ***HN6***[] safety hazard pleading requirement is not necessary in *all* omission cases, but that the requirement may remain applicable in some

[3] Plaintiff also cites *Rubenstein v. Gap, Inc., 14 Cal. App. 5th 870, 222 Cal. Rptr. 3d 397 (Ct. App. 2017)*. The plaintiffs in *Rubenstein* alleged that Gap violated the consumer protection laws "based on Gap's alleged misrepresentation in using the Gap and Banana Republic brand names for [factory store] items that had never been sold in traditional Gap and Banana Republic stores and/or were of lesser quality, and also on Gap's failure to disclose these facts to consumers. *Id. at 401*. The court rejected the plaintiffs' claims, reasoning that the plaintiffs did not "allege facts showing that the sales history of factory store items is material to reasonable consumers." It further held that "any quality issues with factory store merchandise were not in Gap's exclusive knowledge." *Id. at 405*.

Additionally, after oral argument in this case, the California Court of Appeal, Fifth District, decided *Gutierrez v. CarMax Auto Superstores Cal., 19 Cal. App. 5th 1234, 228 Cal. Rptr. 3d 699 (Ct. App. 2018)*. In *Gutierrez*, the defendant car dealer did not disclose that the car that the plaintiff purchased was subject to a safety recall relating to the car's braking and lighting systems. The court held that the omitted information was material because it related to safety concerns—which would be important to the reasonable consumer. *Id. at 705*. Further, the court concluded that the car dealer had a duty to disclose the recall because "CarMax made *partial representations* about the vehicle's braking and lighting systems and those representations were likely to mislead for want of communication of the facts about the recall." *Id. at 722-23*. As *Gutierrez* is a partial misrepresentation case, it does not affect the outcome of this purely omissions-based case.

[4] Neither *Rubenstein* nor *Gutierrez* mentions the "central functionality" test, but their facts are consistent with requiring that the alleged defect be physical and important to the product's function. In *Gutierrez*, the alleged omission related to a physical defect that created a safety hazard. *228 Cal. Rptr. 3d at 723*. In *Rubenstein*, the court concluded that there were no "facts showing that the sales history of factory store items is material to reasonable consumers." *222 Cal. Rptr. 3d at 405*.

[5] The parties also dispute whether Plaintiff sufficiently pleaded that Mars had knowledge that Plaintiff did not about the existence of child or slave labor in the supply chain. Plaintiff argues that Mars need only have "superior" knowledge over the consumer to satisfy the *LiMandri* prong, whereas Mars contends that the test is "exclusive" knowledge. While we need not reach the issue here, Mars appears to have the better reading of California law.

circumstances. In other words, *Collins* and *Rutledge* are not necessarily irreconcilable with *Wilson* because, where the challenged omission does not concern a central functional defect, the plaintiff may still have to plead a safety hazard to establish that the defendant had a duty to disclose.[6] For example, even though we offer no binding opinion on the issue, *Wilson* may still apply where the defect in question does not go to the central functionality of the product, but still creates a safety hazard. For this reason, we are not convinced that the California Supreme Court would rule that a plaintiff need never plead a safety hazard. *See* *Muniz v. UPS, 738 F.3d 214, 219 (9th Cir. 2013)* ("Decisions of the six [California] district appellate courts are persuasive but do not bind each other or us. We should nevertheless follow a published intermediate state court decision regarding **[**15]** California law unless we are convinced that the California Supreme Court would reject it.") (citations omitted). *But see* *In re Watts, 298 F.3d 1077, 1084-86 (9th Cir. 2002)* (O'Scannlain, J., concurring) (questioning this Circuit's **[*865]** practice of revisiting panel decisions based on subsequent state intermediate appellate opinions, especially where state appellate courts have independent districts that do not follow one another's precedent).

Therefore, we hold that in this pure omissions case concerning no physical product defect relating to the central function of the chocolate and no safety defect, Plaintiff has not sufficiently pleaded that Mars had a duty to disclose on its labels the labor issues in its supply chain.[7] Absent a duty to disclose, Plaintiff's CLRA, UCL and FAL claims are foreclosed.

B. CLRA

Plaintiff alleges three separate violations of the CLRA, namely that Mars' failure to disclose on its labels information about slave or child labor: (1) "[m]isrepresent[ed] the source" of the products; (2) "[r]epresent[ed] that [the] goods . . . have . . . characteristics . . . which they do not have"; and (3) "[r]epresent[ed] that goods . . . are of a particular standard." *Cal. Civ. Code § 1770(a)(2)*, *(5)*, *(7)*.

Again, ***HN7***[] "although a claim may be stated under the **[**16]** CLRA in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." *Daugherty, 51 Cal. Rptr. 3d at 126*. As discussed above, Mars was not obliged to disclose issues about its supply chain. Therefore, Mars did not violate the CLRA.

C. UCL

HN8[] The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. "*Because Business & Professions Code § 17200* is written in the disjunctive, it establishes three varieties of unfair competition-acts or practices which are unlawful, or unfair, or fraudulent." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 540 (Cal. 1999)*. Plaintiff claims that Mars is liable under all three of the varieties.

1. Unlawful Prong

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[6] For example, even though we offer no binding opinion on the issue, *Wilson* may still apply where the defect in question does not go to the central functionality of the product but still creates a safety hazard.

[7] Plaintiff has an outstanding motion to certify the following question to the California Supreme Court: "Must a pure omission-based consumer deception claim under the UCL, FAL, and CLRA involve a safety concern to be actionable?" Because Plaintiff cannot establish that Mars had a duty to disclose, even if he is not required to plead a safety hazard, the answer to Plaintiff's question is not outcome-determinative. *See* *Cal. R. of Court 8.548(a)(1)* ("The [California] Supreme Court may decide a question of California law if . . . [t]he decision could determine the outcome of a matter pending in the requesting court."). We therefore deny the motion to certify the question.

Plaintiff links his unlawful prong claim to Mars' alleged violation of the CLRA. As discussed above, Mars did not violate the CLRA; thus, it did not violate the unlawful prong of the UCL.

2. Fraudulent Prong

HN9[] "[A] failure to disclose a fact one has no affirmative duty to disclose is [not] 'likely to deceive' anyone within the meaning of the UCL." *Daugherty, 51 Cal. Rptr. 3d at 128*; *see also* *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 62 Cal. Rptr. 3d 177, 188 (Ct. App. 2007)* ("Absent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL."). Plaintiff does not state **[**17]** a claim under this prong.

3. Unfair Prong

HN10[] Unlike the other two UCL prongs, the lack of a duty to disclose does not necessarily dispose of claims under the unfair **[*866]** prong. "The UCL does not define the term 'unfair.' In fact, the proper definition of 'unfair' conduct against consumers 'is currently in flux' among California courts." *Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1169 (9th Cir. 2012)* (quoting *Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 735 (9th Cir. 2007))*. "Before *Cel-Tech*, courts held that 'unfair' conduct occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Id.* (citing *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301, 316 (Ct. App. 1999))* ("*South Bay* test"). The California Supreme Court, in *Cel-Tech*, established a different, more concrete, definition of unfair:

> ***HN11***[] "[U]nfair" means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." It further required that "any finding of unfairness to competitors under *section 17200* be *tethered* to some legislatively declared policy or proof of some actual or threatened impact on competition."

Davis, 691 F.3d at 1169-70 (quoting *Cel-Tech, 973 P.2d at 543-44*) (emphasis added). The **[**18]** *Cel-Tech* test did not apply to actions by consumers, but "some courts in California have extended the *Cel-Tech* definition to consumer actions, while others have applied the [*South Bay* test]." *Id. at 1170*; *see also* *Cel-Tech, 973 P.2d at 544 n.12*. The parties here argue under both the *Cel-Tech* and *South Bay* tests.

First, under the *Cel-Tech* test, Plaintiff contends that his claims are "tethered" to the United Nations' Universal Declaration of Human Rights and the ILO's Convention 182 ("Worst Forms of Child Labour Convention")—the former forbidding slavery and the latter forbidding the worst forms of child labor. Plaintiff's theory is that these international declarations demonstrate the "legislatively declared policy" against child and slave labor. ***HN12***[] To determine whether something is sufficiently "tethered" to a legislative policy for the purposes of the unfair prong, California courts require a close nexus between the challenged act and the legislative policy. *See* *Cel-Tech, 973 P.2d at 544* (holding that for an act to be "unfair," it must "threaten[]" a violation of law or "violate[] the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law").

For example, in *Gregory v. Albertson's, Inc., 104 Cal. App. 4th 845, 128 Cal. Rptr. 2d 389 (Ct. App. 2002)*, the plaintiffs alleged that the defendants **[**19]** violated the unfair prong of the UCL when the defendant grocery store chain closed one location, but held the lease and kept the property empty to prevent a competitor from moving in. *Id. at 395*. Plaintiffs tried to tether defendants' actions to a policy against urban blight. *See id.* ("[B]y keeping off the market the chief retail store in the shopping center, the [defendants] have put in motion a process of deterioration affecting the entire shopping center that will inevitably produce the kind of blight that *Health and Safety Code section 33035* condemns . . . ."). The court rejected plaintiffs' argument that defendants' decision to hold onto *one* lease was sufficiently tethered to the policy against *community* blight in *§ 33035*. *Id. at 395-96*. Instead, the court reasoned that *§ 33035* was part of a broader *Community Redevelopment Law*, which established procedures for public participation in the redevelopment of blighted areas, but did not "call[] for a private remedy affecting a single parcel of property **[*867]** under the unfair competition law." *Id. at 395*.[8] In other words, the challenged action was too far removed from the legislative policy, as stated in the Community Redevelopment Law, to be the tether for a claim under the unfair prong. *Id.; see* ***[**20]*** *also* *Scripps Clinic v. Superior Court, 108 Cal. App. 4th 917, 134 Cal. Rptr. 2d 101, 117 (Ct. App. 2003)* (holding that plaintiffs did not state a claim under the unfair prong where defendant medical center's practice of not continuing to treat patients who sued the center did not affect plaintiffs' constitutional right to redress in court).

As the plaintiffs in *Gregory* pointed to a general policy against urban blight, so too, Plaintiff here highlights a general policy against child or slave labor. However, like in *Gregory*, there is not a close enough nexus between the policy at issue—here a policy against certain labor practices— and the challenged action—here not placing disclosures on consumer labels. Just as leaving one building empty may *eventually* lead to blight, so too not labeling chocolate bars may indirectly exacerbate slave labor in the supply chain; however, the labeling of products is too far removed from the U.N. and ILO policies to serve as the basis for a UCL claim. As such, the U.N. Convention and the Worst Forms of Child Labour Convention do not provide a tether here. Further, requiring Mars to place labels on its products could arguably impinge on the Supply Chains Act, which addresses disclosure of labor abuses, but does not require labels on the products **[**21]** themselves. Plaintiff cannot state an unfairness prong claim under the *Cel-Tech* test.

Plaintiff's claims also fail under the *South Bay* test. Mars' failure to disclose information it had no duty to disclose in the first place is not substantially injurious, immoral, or unethical. *See* *Bardin v. DaimlerChrysler Corp., 136 Cal. App. 4th 1255, 39 Cal. Rptr. 3d 634, 643-44 (Ct. App. 2006)* (holding that the use of less expensive tubular steel exhaust manifolds did not violate public policy because the defendant made no representation about the composition of the manifolds and the plaintiffs did not allege a safety concern or a violation of the warranty). Plaintiff's allegation that Mars' participation in a supply chain involving slave labor is "immoral" does not suffice here, because Plaintiff is challenging the failure to disclose. While the labor practices themselves are clearly immoral, it is doubtful that failing to disclose on the label that a product may be tainted by such labor practices is itself immoral, especially when there is no specific duty to disclose this information and the information is otherwise disclosed under the Supply Chains Act. Further, the failure to disclose is not substantially injurious because, as mentioned above, information about slave and child labor is public **[**22]** knowledge, accessible on Mars' website—pursuant to the Supply Chains Act. Therefore, under either test for the unfair prong of the UCL, Plaintiff's claims fail.

D. FAL

HN13[] "California's False Advertising Law makes it unlawful for any person to 'induce the public to enter into any obligation' based on a statement that is 'untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.'" *Davis, 691 F.3d at 1161* (quoting *Cal. Bus. & Prof. Code § 17500*). Whether an advertisement is misleading is determined by asking whether a reasonable **[*868]** consumer would likely be deceived. *See* *id. at 1162*. Plaintiff's FAL claims fail because "a failure to disclose a fact one has no affirmative duty to disclose is [not] 'likely to deceive' anyone." *Daugherty, 51 Cal. Rptr. 3d at 128*.[9]

IV. CONCLUSION

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[8] *Gregory* also rejected plaintiffs' tethering claim because "it would impinge on a separate state policy favoring freedom of contract by the parties to commercial real property leases." *128 Cal. Rptr. 2d at 395* (quotation marks omitted).

[9] Because we hold that Plaintiff has not pleaded a claim under the CLRA, UCL, or FAL, we need not, and do not, reach any of Mars' other arguments in support of affirmance.

For the foregoing reasons, we affirm the judgment of the district court dismissing Plaintiff Hodsdon's CLRA, UCL, and FAL claims with prejudice.

AFFIRMED.

Robinson v. Hunger Free Am., Inc.

United States District Court for the Eastern District of California

June 4, 2018, Decided; June 4, 2018, Filed

1:18-cv-00042-LJO-BAM

Reporter

2018 U.S. Dist. LEXIS 93734 *; 2018 WL 2563809

DEMEATRUS ROBINSON, SR., Plaintiff, v. HUNGER FREE AMERICA, INC. A New York not-for-profit corporation, et al., Defendants.

Prior History: *Robinson v. Hunger Free Am., Inc., 2018 U.S. Dist. LEXIS 41256 (E.D. Cal., Mar. 13, 2018)*

Core Terms

allegations, trademark, Registration, trademark infringement, unfair, Lanham Act, fraudulent, customers, prong, likelihood of confusion, motion to dismiss, infringement, proceedings, cognizable, similarity, marketing, t-shirts, factors, reasons, marks

Counsel: **[*1]** Demeatrus Robinson, Sr., Doing business as Hunger for America, Inc, Plaintiff, Pro se, Clovis, CA.

For Christopher Karagheuoff, Joel Berg, Defendants: Shane Garrett Smith, LEAD ATTORNEY, McCormick Barstow LLP, Fresno, CA; D. Greg Durbin, McCormick Barstow, LLP, Fresno, CA.

For Hunger Free America, Inc., a New York not-for-profit corporation, erroneously sued as "C/O New York Coalition Against Hunger", Defendant: D. Greg Durbin, LEAD ATTORNEY, Martin Law Firm, Hanford, CA; Shane Garrett Smith, LEAD ATTORNEY, McCormick Barstow LLP, Fresno, CA.

Judges: Lawrence J. O'Neill, UNITED STATES CHIEF DISTRICT JUDGE.

Opinion by: Lawrence J. O'Neill

Opinion

MEMORANDUM DECISION AND ORDER RE DEFENDANT'S MOTION TO DISMISS

(Doc. 19)

ORDER DENYING PLAINTIFF'S MOTION FOR A 60-DAY STAY OF PROCEEDINGS

(Doc. 24)

I. INTRODUCTION

Pending before the Court is Defendant's motion to dismiss Plaintiff's First Amended Complaint ("FAC") and Plaintiff's motion for a 60-day stay of proceedings so that he may attempt to retain counsel. For the reasons set forth below, the Court DENIES Plaintiff's motion for a stay of the proceedings and GRANTS Defendant's motion to dismiss.[1] For the reasons set forth below, Plaintiff's complaint is dismissed with prejudice. **[*2]**

II. FACTUAL BACKGROUND

From what can be gleaned from Plaintiff's complaint, Hunger Free America, Inc. was founded in 2010 by Plaintiff.[2] Hunger Free America, Inc. owns a registered trademark No. 5,297,297 ("'297"), and designs, develops, manufactures, and distributes T-shirts. The '297 trademark is used for apparel, goods, and services. (FAC, ¶ 13.) Plaintiff alleges that he received the trademark for t-shirts and graphics, but that it also gave him "a partial right to use the standard character." (FAC, ¶ 14.) Plaintiff alleges he has been using the standard character "Hunger Free America" since June 24, 2011. (FAC, ¶ 14.)

Defendant[3] contacted Plaintiff at some point in 2016 to notify Plaintiff that Defendant's board had just voted to use the name "Hunger Free America." (FAC, ¶ 14.) "Defendant wanted to know if Plaintiff would give them his facebook URL or if not Defendant would simply go around him to get it." (FAC, ¶ 14.) On September 26, 2017, Plaintiff mailed a certified letter of cease and desist to Defendant and its board of directors. (FAC, ¶ 14.)

Plaintiff also asserts the following:

> After checking USPTO registration[,] Plaintiff found Defendant had resuscitated their Service Mark which had been dead **[*3]** since May 10, 2016. Hunger Free America, Inc. [i]s currently registered in the State of California and the Internal Revenue Service and is in good standing. Plaintiff has conducted a national search of registries for ownership of Hunger Free America, as well as, internet search before using the standard character Hunger Free America[] which revealed no ownership prior to 2010, which allows Plaintiff common law rights and now exclusive rights through USPTO.
> (FAC, ¶ 15.)

Plaintiff alleges that Defendant's use of the standard character "Hunger Free America" in commerce is "likely to cause customer confusion or to cause mistake or to deceive [as] to the origin of the products and services offered and sold by Defendant and as to their affiliation, connection, or association with and/or endorsement or approval of Plaintiff." (FAC, ¶ 21.) Plaintiff's (former) attorney informed him "that his trademark registration blocked [Defendant]." (FAC, ¶ 14.)

The FAC purports to allege a trademark infringement claim under the Lanham Act, *15 U.S.C. § 1114*, a common law infringement claim, and a claim under California's Unfair Competition Law, *Cal. Bus. & Prof. Code §12700*. Defendant filed a motion to dismiss the FAC pursuant to *Federal Rule of Civil Procedure 12(b)(6)*.

III. LEGAL STANDARD [*4]

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[1] Plaintiff filed a complaint against New York Coalition Against Hunger, Christopher G. Karagheuoff, and Joel Berg. Hunger Free America, Inc., was erroneously sued as "New York Coalition Against Hunger," and Christopher Karagheuoff, and Joel Berg were never served. Hunger Free America, Inc., removed the case to this court where it proceeds as the only defendant served.

[2] Plaintiff asserts the corporation was "federally" incorporated in February 2010. A California Secretary of State record shows Plaintiff's original entity, Hour of Truth Ministry, Inc., amended its corporate name to "Hunger Free America, Inc." in 2016. (*See* Doc. 19-2.) This document was attached to Plaintiff's original complaint. (Doc. 1, p. 55.)

[3] Defendant is a non-profit corporation, originally founded as New York City Coalition Against Hunger. It adopted its name, Hunger Free America, Inc. in early 2016.

A motion to dismiss pursuant to *Rule 12(b)(6)* is a challenge to the sufficiency of the allegations set forth in the complaint. Dismissal under *Rule 12(b)(6)* is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. In considering a motion to dismiss for failure to state a claim, the court generally accepts as true the allegations in the complaint, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y. Ranch LTD v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008)*.

To survive a 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly, 550 U.S. at 556*). "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' **[*5]** of his 'entitlement to relief' requires more than labels and conclusions." *Twombly, 550 U.S. at 555* (internal citations omitted). Thus, "bare assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the elements'. . . are not entitled to be assumed true." *Iqbal, 556 U.S. at 681*. "[T]o be entitled to the presumption of truth, allegations in a complaint . . . must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*. In practice, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly, 550 U.S. at 562*. To the extent that the pleadings can be cured by the allegation of additional facts, a plaintiff should be afforded leave to amend. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 247 (9th Cir. 1990)* (citations omitted).

IV. ANALYSIS

A. Plaintiff's Motion to Stay Proceedings is DENIED

Plaintiff filed a motion to stay this case for 60 days so that he may attempt to retain counsel. Plaintiff has had ample opportunity to seek representation. Plaintiff's complaint, which was originally filed in Fresno County Superior Court in December 2017, alleges he first became aware of Defendant's use of "Hunger Free **[*6]** America" in 2016. Thus, Plaintiff has known of the facts of Defendant's allegedly infringing conduct for nearly two years and, during this time, has had more than sufficient opportunity to seek the advice of and/or retain counsel. It is Plaintiff who initiated this suit, and did so more than six months ago. Plaintiff's motion for a stay of proceedings to search for counsel is DENIED.

B. Plaintiff May Not Add Hunger Free America, Inc. as a Plaintiff

Plaintiff's original complaint was filed in his individual capacity, "doing business as" Hunger Free America, Inc. (Doc. 1, p. 18.) Plaintiff has impermissibly added Hunger Free America, Inc. as a plaintiff with neither the permission of the Court nor a stipulation of the parties pursuant to *Federal Rule of Civil Procedure 15*. Plaintiff may not add a new party as a matter of right. Additionally, corporate or other artificial entities, such as Hunger Free America, Inc., require licensed attorney representation to appear in federal court. *Rowland v. Cal. Men's Colony, 506 U.S. 194, 201-02, 113 S. Ct. 716, 121 L. Ed. 2d 656 (1993)* (noting that *28 U.S.C. § 1654* does not allow corporations, partnerships, or associations to appear in federal court other than through a licensed attorney). To the extent Plaintiff seeks relief on behalf of Hunger Free America, Inc., he is prohibited from **[*7]** doing so as a non-attorney. *Id.* For these reasons, Plaintiff may not amend the complaint to add Hunger Free America, Inc. as a Plaintiff.

C. Plaintiff Fails to State A Cognizable Trademark Claim[4]

Neither Plaintiff's trademark infringement claim under the Lanham Act nor his common law trademark infringement claim is viable for the same reasons set forth in the Court's order dismissing the original complaint. After explaining the pleading requirements for both a federal trademark infringement action under the Lanham Act as well as under state law, the Court explained that any amended complaint must address the following deficiencies:

> Plaintiff must allege facts showing how there is a likelihood of confusion with Defendant's use of [its] "Hunger Free America" mark pursuant to the *Sleekcraft* factors. If Plaintiff's claim is predicated on an unregistered mark broader than that in the '297 Registration, Plaintiff must also plead a valid, protectable trademark by showing that he was the first to use the mark in the ordinary course of trade, and that his use of the mark was distinctive. [citations omitted].

(Doc. 13, 9:14-19.) Plaintiff has failed to cure the defects in his original complaint.

[*8] To state a claim for trademark infringement under either the Lanham Act or for common law trademark infringement, a plaintiff must allege that (1) he has a valid, protectable trademark right; (2) that was used by defendant; (3) in a way that is likely to cause consumer confusion and thus infringe upon the trademark right. *Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1354 (9th Cir. 1985)*. "The core element of trademark infringement is the likelihood of confusion, i.e., whether the similarity of the marks is likely to confuse customers about the source of the products." *Abercrombie & Fitch Co. v. Moose Creek, Inc., 486 F.3d 629, 633 (9th Cir. 2007)*. As the elements for both claims overlap, they are analyzed together. *Hokto Kinoko Co. v. Concord Farms, Inc., 810 F. Supp. 2d 1013, 1031 (C.D. Cal. 2011)*.

To show a valid, protectable trademark interest, registration of a mark is prima facie evidence of the exclusive right to use that mark on the goods and services specified in the registration. *15 U.S.C. §§ 1057(b)*; *1115(a)*; *Brookfield Communs., Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1046 (9th Cir. 1999)*. While Plaintiff has sufficiently alleged registration of the '297 mark, which is limited to t-shirts, Plaintiff has not pled any facts showing that he actually used the mark covered by the '297 Registration or the standard character "Hunger Free America" prior to any use by *Defendant.*[5] *Sengoku Works, Ltd. v. RMC Int'l, Ltd., 96 F.3d 1217, 1219 (9th Cir. 1996)* (to acquire ownership of a trademark, "[i]t is not enough to have invented the mark first or even to have registered it first; the party claiming ownership must have been the first to actually use the mark in the sale of goods or services."). Although Plaintiff summarily alleges he has used the standard character "Hunger Free America" in commerce since 2011, he does not specify what products **[*9]** or services he has sold since 2011 bearing, or sold in conjunction with, that standard character. As noted by Defendant, Plaintiff's corporation name "Hunger Free America, Inc." was not adopted until 2016. Prior to that time, Plaintiff's corporate entity was named "Hour of Truth Ministry, Inc.," and it is not clear what goods or services were sold by that entity or what particular mark was used in conjunction with those sales. (*See* Doc. 19-2 (California Secretary of State filing).) For purposes of the Lanham Act trademark claim, Plaintiff has alleged a registered mark, but it is unclear when he sold products in conjunction with the use of that mark.

Most importantly, for purposes of both Plaintiff's infringement claims, Plaintiff has not adequately alleged a likelihood of confusion through Defendant's use of either the mark delineated in the '297 Registration or the use of the standard character "Hunger Free America." The likelihood of confusion is the pivotal element of trademark infringement, and the "issue can be . . . cast as the determination of whether 'the similarity of the marks is likely to confuse customers about the source of the products'" or services. *GoTo.com, Inc. v. Walt Disney Co. 202 F.3d 1199, 1205 (9th Cir. 2000)* (internal citation **[*10]** omitted). The Ninth Circuit recognizes an eight-factor test, set out

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[4] Plaintiff submitted an untimely opposition brief, which is unsigned.

[5] As discussed in the Court's last order, the '297 Registration mark covers a specific design consisting of the words "Huger Free America" in green lettering with black and white outlining, below a background of farm rows and vegetables. The graphic mark is limited to t-shirts. See United States Patent and Trademark Office, Trademark Electronic Search System ("TESS"); http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4808:4wwulv.2.3

in *AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979)*, *abrogated on other grounds by* *Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003)*, to determine whether a defendant's use of a mark or name creates a likelihood of confusion. The factors are (1) the strength or distinctiveness of the mark; (2) the proximity or relatedness of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) types of goods and degrees of care likely to be exercised by the purchaser; (7) defendant's intent in selecting its mark; and (8) the likelihood of expansion into other markets. *Sleekcraft, 599 F.2d at 348*. These factors are non-exhaustive and should be applied with flexibility. *Network Automation, Inc. v. Adv. Sys. Concepts, Inc., 638 F.3d 1137, 1149 (9th Cir. 2011)*; *Dreamwerks Production, Inc. v. SKG Studio, 142 F.3d 1127, (9th Cir. 1998)* (*Sleekcraft* factors should not be rigidly weighed; they are not a score-card, a bean counter, or a checklist).

The FAC alleges broadly that Plaintiff has developed and operates one of the most "successful feeding programs for low income families and homeless people in the Central Valley," and that "Hunger Free America[]" has developed a variety of programs for the people and implements 'hope' where there has been no hope." (FAC, ¶¶ 2, 3.) Plaintiff also alleges he designs, develops, manufactures, markets and distributes t-shirts. **[*11]** (FAC, ¶ 13.) As for the '297 Registration mark, Plaintiff does not allege that Defendant utilized this mark in any manner, or that anything Plaintiff sells with this mark is similar to a mark utilized by Defendant or marketed to the same class of customers as Plaintiff. *Brookfield, 174 F.3d at 1054* (similarity of the marks is a critical question in the likelihood-of-confusion analysis). As it pertains to any use by Defendant of the standard character "Hunger Free America," the same is true. Plaintiff operates his business in California, while Defendant provides anti-hunger and anti-poverty services nationally. Plaintiff's general allegation that he manages one of the most successful feeding programs for low income people is bereft of any facts showing what services or goods Plaintiff sells or offers beside t-shirts, or how these are similar to the services and goods offered by Defendant. *Id.* (similarity of marks, relatedness of services, and use of a common marketing channel are "controlling troika in the *Sleekcraft* analysis"). There is also no indication Defendant's use of "Hunger Free America" caused Plaintiff's customers any confusion. Plaintiff has not alleged facts showing that any of the *Sleekcraft* factors **[*12]** indicate a reasonably prudent customer is likely to be confused by Defendant's use of "Hunger Free America" or the '297 Registration mark in its online content, logo, or materials.

B. Plaintiff's Third Cause of Action under California's Unfair Competition Law ("UCL")

The FAC impermissibly includes a new UCL claim without leave of court or stipulation of the parties under *Federal Rule of Civil Procedure 15*. Notwithstanding this issue, the UCL claim is not viable. California's UCL "prohibits any unfair competition, which means 'any unlawful, unfair or fraudulent business act or practice.'" *In re Pomona Valley Med. Grp., 476 F.3d 665, 674 (9th Cir. 2007)* (quoting *Cal. Bus. & Prof. Code § 17200, et seq.*). Each prong — fraudulent, unfair, and unlawful — is independently actionable. *Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007)*.

Under the UCL, an "unlawful" practice includes all business practices "forbidden by law." *Saunders v. Super. Ct., 27 Cal. App. 4th 832, 838, 33 Cal. Rptr. 2d 438 (1994)*. The UCL provides a cause of action for violations of any other law as an unlawful practice. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. As such, a UCL claim under the unlawful prong is dependent on an underlying offense. The "unfair" prong of the UCL requires conduct that threatens "an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms **[*13]** competition." *Id. at 187*. The UCL's "fraudulent" prong requires a plaintiff "show deception to some members of the public, or harm to the public interest," *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc. 178 F. Supp. 2d 1099, 1121 (C.D. Cal. 2001)*, or to allege "members of the public are likely to be deceived," *Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1167, 93 Cal. Rptr. 2d 439 (2000)*.

The FAC lacks any facts showing an unlawful, unfair, or fraudulent business practice to support a UCL claim. Not only does Plaintiff fail to articulate under what prong he states his claim, there are no facts alleged supporting a violation of the UCL under any of the three prongs. There is no underlying cognizable claim of unlawful conduct as it pertains to Plaintiff's trademark infringement claims, which is required. *Cel-Tech Commc'ns, Inc., 20 Cal. 4th at 180*.

Although Plaintiff alleges his mark is "famous"[6] under the Lanham Act, and that Defendant took unspecified "unlawful actions" after Plaintiff's mark became famous to deliberately and willfully trade on Plaintiff's reputation and dilute Plaintiff's mark, these allegations are entirely conclusory and allege no facts showing what Defendant actually did or how Defendant used a mark or traded on Plaintiff's reputation or diluted any mark of Plaintiffs.

There are also no allegations of unfair or fraudulent business practices. Plaintiff alleges only that Defendant's **[*14]** conduct was "unlawful, unfair, and fraudulent" and it caused harm to Plaintiff. (FAC, ¶¶ 35-36.) These conclusory allegations are entirely insufficient under the basic pleading standards of *Federal Rule of Civil Procedure 8* to provide Defendant any notice of what conduct allegedly wronged Plaintiff. Additionally, UCL claims grounded in fraud require *heightened* specificity in pleading under *Federal Rule of Civil Procedure 9(b)*. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*; *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)* ("Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged."). The FAC allegations of a violation of the UCL are entirely lacking.

As with the original complaint, there are no viable claims alleged in the FAC. Plaintiff has been given notice of the deficiencies of his complaint, has had opportunity to cure the defects, but remains unable to marshal any facts necessary to state a cognizable claim. For all the reasons stated above, the FAC is dismissed with prejudice.

V. CONCLUSION

For the reasons set forth above, IT IS HEREBY ORDERED that:

1. Plaintiff's complaint is dismissed with prejudice; and
2. The Clerk of Court is DIRECT to close this case.

IT IS SO ORDERED.

Dated: **June 4, 2018**

/s/ Lawrence J. O'Neill

UNITED STATES CHIEF DISTRICT JUDGE

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[6] In 1995, Congress amended *Section 43 of the Trademark Act of 1946, 15 U.S.C.§1125*, to provide a remedy for the "dilution of famous marks." The FAC does not allege a viable dilution claim, which is predicated on the lessening of the capacity of a famous mark to identify and distinguish goods and services, regardless of the likelihood of confusion. A party alleging dilution is required to show, among other things, that the mark is famous — i.e., so prominent and renowned as to be a household name. *See Jada Toys, Inc. v. Mattel, Inc., 518 F.3d 628, 635 (9th Cir. 2008)*. There are no facts showing that any mark or standard character at issue in the FAC is famous.

LABMD, Inc. v. FTC

United States Court of Appeals for the Eleventh Circuit

June 6, 2018, Decided

No. 16-16270

Reporter

894 F.3d 1221 *; 2018 U.S. App. LEXIS 36902 **; 2018-1 Trade Cas. (CCH) P80,406; 27 Fla. L. Weekly Fed. C 962

LABMD, INC., Petitioner, versus FEDERAL TRADE COMMISSION, Respondent.

Prior History: **[**1]** Petition for Review of a Decision of the Federal Trade Commission. Agency No. 9357.

In the Matter of LabMD, Inc., 2016 FTC LEXIS 128 (F.T.C., July 28, 2016)

Core Terms

FTC, consumers, unfair, unfair act, injunction, cease and desist order, practices, data-security, notice, personal information, district court, installed, safeguards, engaging, compliance, computer network, unenforceable, contempt, appeals, network, mail, substantial injury, terminate, alleges, billing, show cause hearing, security program, federal court, employees, overnight

LexisNexis® Headnotes

HN1[] Section 5(a), *15 U.S.C.S. § 45(a)*, of the Federal Trade Commission Act declares unlawful unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. *15 U.S.C.S. § 45(a)(1)*. It empowers and directs the Federal Trade Commission to prevent persons, partnerships, or corporations from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce. *15 U.S.C.S. § 45(a)(2)*.

HN2[] *Section 5(n)*, *15 U.S.C.S. § 45(n)*, of the Federal Trade Commission Act states, as a prerequisite for an act or practice to be unfair, the act or practice [1] causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or to competition.

HN3[] Courts review the FTC's legal conclusions de novo but give some deference to its informed judgment that a particular commercial practice is to be condemned as "unfair." Courts review the FTC's findings of facts under the "substantial evidence" standard, which requires more than a mere scintilla of evidence but less than a preponderance.

HN4[] Section 5(a), *15 U.S.C.S. § 45(a)*, of the Federal Trade Commission Act authorizes the FTC to protect consumers by preventing persons, partnerships, or corporations from using unfair acts or practices in or affecting commerce. The Act does not define the term "unfair." The provision's history, however, elucidates the term's meaning. The FTC Act, passed in 1914, created the FTC and gave it power to prohibit unfair methods of competition. Rather than list the particular practices to which unfairness was intended to apply, Congress intentionally left development of the term "unfair" to the Commission through case-by-case litigation —though, at the time of the FTC Act's inception, the FTC's primary mission was understood to be the enforcement of ***antitrust law***. In 1938, the Act was amended to provide that the FTC had authority to prohibit unfair acts or practices. This amendment sought to clarify that the FTC's authority applied not only to competitors but, importantly, also to consumers. Hence, the FTC possesses "unfairness authority" to prohibit and prosecute unfair acts or practices harmful to consumers.

HN5[] As to the unfairness factor of consumer injury, the FTC laid out a separate three-part test defining a qualifying injury. These consumer-injury factors were codified in Section 5(n), *15 U.S.C.S. § 45(n)*, of the Federal Trade Commission Act. The FTC stated that to warrant a finding of unfairness, an injury [1] must be substantial; [2] it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and [3] it must be an injury that consumers themselves could not reasonably have avoided.

HN6[] As to the unfairness factor of public policy, the FTC has specified that the policies relied upon should be clear and well-established—that is, declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from the general sense of the national values. Put another way, an act or practice's "unfairness" must be grounded in statute, judicial decisions—i.e., the common law—or the Constitution. An act or practice that causes substantial injury but lacks such grounding is not unfair within the meaning of Section 5(a), *15 U.S.C.S. § 45(a)*, of the Federal Trade Commission Act. The FTC stated that it was nixing the other unfairness factor—whether a practice is immoral, unethical, or unscrupulous—because it was "largely duplicative" of the first two. Thus, an "unfair" act or practice is one which meets the consumer-injury factors and is grounded in well-established legal policy.

HN7[] The Federal Trade Commission must find the standards of unfairness it enforces in "clear and well-established" policies that are expressed in the Constitution, statutes, or the common law.

HN8[] The FTC carries out its Section 5(a), *15 U.S.C.S. § 45(a)*, of the Federal Trade Commission Act, mission to prevent unfair acts or practices in two ways: formal rulemaking and case-by-case litigation. The FTC is authorized under *15 U.S.C.S. § 57a* to prescribe rules which define with specificity unfair acts or practices within the meaning of *Section 5(a)*. Once a rule takes effect, it becomes in essence an addendum to Section 5(a)'s phrase unfair acts or practices; the rule puts the public on notice that a particular act or practice is unfair. The FTC enforces its rules in the federal district courts. Under *15 U.S.C.S. § 45(m)(1)(A)*, the FTC may bring an action to recover a civil penalty against any person, partnership or corporation that knowingly violates a rule.

HN9[] In the litigation context, once an act or practice is adjudged to be unfair, the act or practice becomes in effect—like an FTC-promulgated rule—an addendum to *Section 5(a)*, *15 U.S.C.S. § 45(a)*, of the Federal Trade Commission Act.

HN10[] The Federal Trade Commission Act provides two forums for litigation. The FTC may choose to prosecute its claim that an act or practice is unfair before an administrate law judge (ALJ) , with appellate review before the full FTC and then in a federal court of appeals. 15 U.S.C.S. § 45(b), (c); 16 C.F.R. § 3.1 et seq. Or, under Section 13(b) of the Act, 15 U.S.C.S. § 53(b), it may prosecute its claim before a federal district judge, with appellate review also in a federal court of appeals. Assume a factual scenario in which the FTC believes a certain act or practice is unfair. It should not matter which of the two forums the FTC chooses to prosecute its claim. The result should be the same. The ALJ and the district judge use materially identical procedural rules in processing the case to judgment and both apply the same substantive law to the facts. Further, putting any venue differences aside, the same court of appeals reviews their decisions.

HN11[] Under Section 5(l), 15 U.S.C.S. § 45(l), the FTC may bring a civil-penalty action in district court should the respondent violate a final cease and desist order.

HN12[] If the FTC has obtained an injunction in district court requiring the defendant to discontinue an unfair act or practice, it may invoke the district court's civil-contempt power should the defendant disobey. Rather than filing a complaint, as in a Section 5(l), 15 U.S.C.S. § 45(l), action, the FTC simply moves the district court for an order requiring the defendant to show cause why it should not be held in contempt for engaging in conduct the injunction specifically enjoined. If the court is satisfied that the conduct is forbidden, it issues a show cause order. Then, if at the show cause hearing the FTC establishes by clear and convincing proof that the defendant engaged in the forbidden conduct and that the defendant had the ability to comply" with the injunctive provision at issue, the court may adjudicate the defendant in civil contempt and impose appropriate sanctions.

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Judges: Before TJOFLAT and WILSON, Circuit Judges, and ROBRENO,* District Judge.

Opinion by: TJOFLAT

Opinion

[*1223] TJOFLAT, Circuit Judge:

This is an enforcement action brought by the Federal Trade Commission ("FTC" **[*1224]** or "Commission") against LabMD, Inc., alleging that LabMD's data-security program was inadequate and thus constituted an "unfair act or practice" under *Section 5(a) of the Federal Trade Commission Act* (the "FTC Act" or "Act"), *15 U.S.C. § 45(a)*.[1] Following a trial before an administrative law judge ("ALJ"), the Commission issued a cease and desist order directing LabMD to create and implement a variety of protective measures. LabMD petitions this Court to vacate the order, arguing that the order is unenforceable because it does not direct LabMD to cease committing an unfair act or practice within the meaning of *Section 5(a)*. We **[**3]** agree and accordingly vacate the order.[2]

I.

A.

LabMD is a now-defunct medical laboratory that previously conducted diagnostic testing for cancer.[3] It used medical specimen samples, along with relevant patient information, to provide physicians with diagnoses. Given the nature of its work, LabMD was subject to data-security regulations issued under the Health Insurance Portability and Accountability Act of 1996, known colloquially as *HIPAA*. LabMD employed a data-security program in an effort to comply with those regulations.[4]

Sometime in 2005, contrary to LabMD policy, a peer-to-peer file-sharing application called LimeWire was installed on a computer used by LabMD's billing manager.[5] LimeWire is an application commonly used for sharing and downloading music and videos over the Internet. It connects to the "Gnutella" network, which during the relevant period had two to five million people logged in at any given time. Those using LimeWire and connected to the Gnutella network can browse directories and download files that other users on the network designate for sharing. The billing manager designated the contents of the "My Documents" folder on her computer for sharing, exposing the contents to the other users. Between July 2007 and May 2008, this **[**4]** folder contained a 1,718-page file (the "1718 File") with the personal information of 9,300 consumers, including names, dates of birth, social security numbers, laboratory test codes, and, for some, health insurance company names, addresses, and policy numbers.

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* Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

1 ***HN1***[] *Section 5(a)* declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." *15 U.S.C. § 45(a)(1)*. It empowers and directs the Commission "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." *Id. § 45(a)(2)*.

2 *See 15 U.S.C. § 45(c)*.

3 LabMD is no longer in operation but still exists as a company and continues to secure its computers and the patient data stored within them.

4 LabMD's program included "a compliance program, training, firewalls, network monitoring, password controls, access controls, antivirus, and security-related inspections."

5 The record is not clear on the point but we assume that the billing manager installed the peer-to-peer application on her workstation computer.

In February 2008, Tiversa Holding Corporation, an entity specializing in data security, used LimeWire to download the 1718 File. Tiversa began contacting LabMD months later, offering to sell its remediation services to LabMD.[6] LabMD **[*1225]** refused Tiversa's services and removed LimeWire from the billing manager's computer. Tiversa's solicitations stopped in July 2008, after LabMD instructed Tiversa to direct any further communications to LabMD's lawyer. In 2009, Tiversa arranged for the delivery of the 1718 File to the FTC.[7]

B.

In August 2013, the Commission, following an extensive investigation, issued an administrative complaint against LabMD and assigned an ALJ to the case. The complaint alleged that LabMD had committed an "unfair act or practice" prohibited by *Section 5(a)* by "engag[ing] in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computer networks." Rather than allege specific acts or practices that LabMD engaged in, however, the FTC's complaint set forth a number of data-security measures that LabMD failed to perform.[8] LabMD answered the complaint, denying **[*1226]** it had engaged in the

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[6] As described by the ALJ who initially presided over this case,

> [Tiversa's] efforts included representing to LabMD that the 1718 File had been found on a peer-to-peer network and sending LabMD a Tiversa Incident Response Services Agreement describing Tiversa's proposed fee schedule, payment terms, and services that would be provided. These contacts continued from mid-May through mid-July 2008. In these communications, Tiversa represented that Tiversa had "continued to see individuals **[**5]** [on peer-to-peer networks] searching for and downloading copies" of the 1718 File. . . .
>
> Tiversa's representations in its communications with LabMD that the 1718 File was being searched for on peer-to-peer networks, and that the 1718 File had spread across peer-to-peer networks, were not true. These assertions were the "usual sales pitch" to encourage the purchase of remediation services from Tiversa. . . .

Tiversa did, however, share a copy of the 1718 File with a Dartmouth College professor, who in February 2009 published an article about data security in the healthcare industry. Tiversa was a "research partner" for the article, meaning it searched for and provided the professor with relevant files to analyze. The professor did not share the 1718 File or its contents with anyone.

[7] Tiversa's CEO and the FTC offered testimony at a 2007 congressional hearing regarding peer-to-peer file-sharing technology. About two months after the hearing, the FTC and Tiversa began communicating. The FTC wanted Tiversa to provide it with information regarding companies' data-security practices. Tiversa, though, did not want a formal request for information—such as a Civil Investigative Demand ("CID")—to be issued directly to it because it had been in talks about its possible acquisition by a third party. Tiversa thus created an entity called "The Privacy Institute" so that a CID could be issued without directly implicating Tiversa. The FTC issued a CID to The Privacy Institute in 2009 and The Privacy Institute provided the FTC with the 1718 File.

[8] The FTC's complaint alleged that LabMD

> (a) did not develop, implement, or maintain a comprehensive information security program to protect consumers' personal information. Thus, for example, employees were allowed to send emails with such information to their personal email accounts without using readily available measures to protect the information from unauthorized disclosure;
>
> (b) did not use readily available measures to identify commonly known or reasonably foreseeable security risks and vulnerabilities on its networks. By not using measures such as penetration tests, for example, respondent could not adequately assess the extent of the risks and vulnerabilities of its networks;
>
> (c) did not use adequate measures to prevent employees from accessing personal information not needed to perform their jobs;
>
> (d) did not adequately train employees to safeguard personal information;
>
> (e) did not require employees, or other users with remote access to the networks, to use common authentication-related security measures, such as periodically changing passwords, prohibiting the use of the same password across applications and programs, or using two-factor authentication;
>
> (f) did not **[**7]** maintain and update operating systems of computers and other devices on its networks. For example, on some computers respondent used operating systems that were unsupported by the vendor, making it unlikely that the systems would be updated to address newly discovered vulnerabilities; and

conduct alleged and asserting several affirmative defenses, among them that the Commission lacked authority under Section 5 of the Act to regulate its handling **[**6]** of the personal information in its computer networks.

After answering the FTC's complaint, LabMD filed a motion to dismiss it for failure to state a case cognizable under Section 5. The motion essentially replicated the assertions in LabMD's answer. Under the FTC's Rules of Practice, the Commission, rather than the ALJ, ruled on the motion to dismiss. The Commission denied the motion, concluding that it had authority under Section 5(a) to prosecute the charge of unfairness asserted **[**8]** in its complaint. *LabMD, Inc., 2014-1 Trade Cases P 78784 (F.T.C.) (Jan. 16, 2014)*.

Following discovery, LabMD filed a motion for summary judgment, presenting arguments similar to those made in support of its motion to dismiss. As before, the motion was submitted to the Commission to decide. It denied the motion on the ground that there were genuine factual disputes relating to LabMD's liability "for engaging in unfair acts or practices in violation of Section 5(a)," necessitating an evidentiary hearing. *LabMD, Inc.*, 2014-1 Trade Cases P 78785 (F.T.C.), at *1 (May 19, 2014) (quotations omitted). An evidentiary hearing was held before the ALJ in July 2015.[9]

After considering the parties' submissions, the ALJ dismissed the FTC's complaint, concluding that the FTC failed to prove that LabMD had committed unfair acts or practices in neglecting to provide adequate security for the personal information lodged in its computer networks. Namely, the FTC failed to prove that LabMD's "alleged failure to employ reasonable data security . . . caused or is likely to cause substantial injury to consumers," as required by Section 5(n) of the Act, 15 U.S.C. § 45(n).[10] Because there was no substantial injury or likelihood thereof, there could be no unfair act or practice.

The FTC appealed the ALJ's decision, which under **[**9]** 16 C.F.R. § 3.52 brought the decision before the full Commission for review. In July 2016, reviewing the ALJ's findings of fact and conclusions of law *de novo, see id.* § 3.54, the FTC reversed the ALJ's decision.

The FTC first found that LabMD "failed to implement reasonable security measures to protect the sensitive consumer information on its computer network." Therefore, LabMD's "data security practices were unfair under Section 5." In particular, **[*1227]** LabMD failed to adequately secure its computer network, employ suitable risk-assessment tools, provide data-security training to its employees, and adequately restrict and monitor the computer practices of those using its network. Because of these deficiencies, the Commission continued, LimeWire was able to be installed on the LabMD billing manager's computer, and Tiversa was ultimately able to download the 1718 File. The Commission then held that, contrary to the ALJ's decision, the evidence showed that Section 5(n)'s "substantial injury" prong was met in two ways: the unauthorized disclosure of the 1718 File itself caused intangible privacy harm, and the mere exposure of the 1718 File on LimeWire was likely to cause substantial injury. The FTC went on to conclude that Section 5(n)'s other **[**10]** requirements were also met.[11]

Next, the Commission addressed and rejected LabMD's arguments that Section 5(a)'s "unfairness" standard—which, according to the Commission, is a reasonableness standard—is void for vagueness and that the

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(g) did not employ readily available measures to prevent or detect unauthorized access to personal information on its computer networks. For example, respondent did not use appropriate measures to prevent employees from installing on computers applications or materials that were not needed to perform their jobs or adequately maintain or review records of activity on its networks. As a result, respondent did not detect the installation or use of an unauthorized file sharing application on its networks.

[9] Prior to the hearing, LabMD amended its answer and once again unsuccessfully moved to dismiss the FTC's complaint. Nothing in the answer or the motion is pertinent here.

[10] ***HN2***[] Section 5(n) states, as a prerequisite for an act or practice to be unfair, "[T]he act or practice [1] causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or to competition."

[11] *See supra* note 10.

Commission failed to provide fair notice of what data-security practices were adequate under *Section 5(a)*. The FTC then entered an order vacating the ALJ's decision and enjoining LabMD to install a data-security program that comported with the FTC's standard of reasonableness. *See generally Appendix*. The order is to terminate on either July 28, 2036, or twenty years "from the most recent date that the [FTC] files a complaint . . . in federal court alleging any violation of the order, whichever comes later." *Id.* at 6.

C.

LabMD petitioned this Court to review the FTC's decision. LabMD then moved to stay enforcement of the FTC's cease and desist order pending review, arguing that compliance with the order was unfeasible given LabMD's defunct status and *de minimis* assets. After an FTC response urging against the stay, we granted LabMD's motion. *LabMD, Inc. v. FTC, 678 F. App'x 816 (11th Cir. 2016)*.

II.

Now, LabMD argues that the Commission's cease and desist order is unenforceable because the order does not direct it to cease committing **[**11]** an unfair "act or practice" within the meaning of *Section 5(a)*.[12] ***HN3***[] We review the FTC's legal conclusions *de novo* but give "some deference to [its] informed judgment that a particular commercial practice is to be condemned as 'unfair.'" *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 2016, 90 L. Ed. 2d 445 (1986)*. We review the FTC's findings of facts under the "substantial evidence" standard, *McWane, Inc. v. FTC, 783 F.3d 814, 824 (11th Cir. 2015)*, which requires "more than a mere scintilla" of evidence "but less than a preponderance," *Dyer v. Barnhart, 395 F.3d 1206, 1210 (11th Cir. 2005)*.

A.

HN4[] *Section 5(a) of the FTC Act* authorizes the FTC to protect consumers by "prevent[ing] persons, partnerships, or corporations . . . from using unfair . . . acts or practices in or affecting commerce." The Act does not define the term "unfair." The provision's history, however, elucidates the term's meaning.

[*1228] The FTC Act, passed in 1914, created the FTC and gave it power to prohibit "unfair methods of competition."[13] Rather than list "the particular practices to which [unfairness] was intended to apply," Congress "intentionally left development of the term 'unfair' to the Commission" through case-by-case litigation[14] —though, at the time of the FTC Act's inception, the FTC's primary mission was understood to be the enforcement of ***antitrust law***.[15] In 1938, the Act was amended to provide that the FTC had authority to prohibit "unfair **[**12]** . . . acts or practices."[16] This amendment sought to clarify that the FTC's authority applied not only to competitors but, importantly, also to consumers.[17] Hence, the FTC possesses "unfairness authority" to prohibit and prosecute unfair acts or practices harmful to consumers.

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[12] LabMD's brief asserts several grounds for setting aside the FTC's order. The only issue we address is the enforceability of the FTC's order.

[13] *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1, 2-6 (2003).

[14] *FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-40, 92 S. Ct. 898, 903, 31 L. Ed. 2d 170 (1972)*; *Atl. Ref. Co. v. FTC, 381 U.S. 357, 367, 85 S. Ct. 1498, 1505, 14 L. Ed. 2d 443 (1965)*; *see* S. Rep. No. 63-597, at 13 (1914); H.R. Rep. No. 63-1142, at 19 (1914).

[15] *See generally* Winerman, *supra* note 13.

[16] *Id.* at 96.

[17] *FTC v. Colgate-Palmolive Co., 380 U.S. 374, 384, 85 S. Ct. 1035, 1042, 13 L. Ed. 2d 904 (1965)*; H.R. Rep. No. 75-1613, at 3 (1937).

In 1964, the FTC set forth three factors to consider in deciding whether to wield its unfairness authority. The FTC was to consider whether an act or practice (1) caused consumers, competitors, or other businesses substantial injury; (2) offended public policy as established by statute, the common law, or otherwise; and (3) was immoral, unethical, or unscrupulous.[18] The Supreme Court cited these factors with apparent approval in dicta in the 1972 case *FTC v. Sperry & Hutchinson, 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 905 n.5, 31 L. Ed. 2d 170 (1972)*.

"Emboldened" by *Sperry & Hutchinson*'s dicta, "the Commission set forth to test the limits of the unfairness doctrine."[19] This effort peaked in a 1978 attempt to "use unfairness to ban all advertising directed to children on the grounds that it was 'immoral, unscrupulous, and unethical' and based on generalized public policies to protect children."[20] Congress **[**13]** and much of the public disapproved.[21] Congressional backlash included refusing to fund the FTC, thus shutting it down for several days, and passing legislation that prevented the FTC from using its unfairness authority to promulgate rules that restrict children's advertising.[22]

Following this episode, the Commission wrote a unanimous letter to two senators in 1980[23] placing gloss on the three 1964 **[*1229]** unfairness factors that were recognized in *Sperry & Hutchinson*. ***HN5***[] As to the first factor, consumer injury, the FTC laid out a separate three-part test defining a qualifying injury. These consumer-injury factors would later be codified in *Section 5(n)*. The FTC stated that to warrant a finding of unfairness, an injury "[1] must be substantial; [2] it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and [3] it must be an injury that consumers themselves could not reasonably have avoided."

HN6[] As to the second 1964 unfairness factor, public policy, the FTC specified that the policies relied upon **[**14]** "should be clear and well-established"—that is, "declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from the general sense of the national values." Put another way, an act or practice's "unfairness" must be grounded in statute, judicial decisions—*i.e.*, the common law—or the Constitution. An act or practice that causes substantial injury but lacks such grounding is not unfair within *Section 5(a)*'s meaning.[24] Finally, the FTC stated that it was nixing the third 1964 unfairness factor—whether a practice is immoral, unethical, or unscrupulous—because it was "largely duplicative" of the first two. Thus, an "unfair" act or practice is one which meets the consumer-injury factors listed above and is grounded in well-established legal policy.

B.

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[18] ***Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose, 29 Fed. Reg. 8324, 8355 (July 2, 1964)***.

[19] J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FTC (May 30, 2003), https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection.

[20] *Id.*

[21] *See, e.g., The FTC as National Nanny*, Wash. Post (Mar. 1, 1978), https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/?utm_term=.015de8e7203d.

[22] Beales, *supra* note 19 (citing *FTC Improvements Act of 1980, Pub. L. No. 96-252, § 14, 94 Stat. 388*); *see* *15 U.S.C. § 57a(h)*.

[23] *FTC Policy Statement on Unfairness*, FTC (Dec. 17, 1980), available at https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

[24] *Section 5(n)* now states, with regard to public policy, "In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination." We do not take this ambiguous statement to mean that the Commission may bring suit purely on the basis of substantial consumer injury. The act or practice alleged to have caused the injury must still be unfair under a well-established legal standard, whether grounded in statute, the common law, or the Constitution.

Here, the FTC's complaint alleges that LimeWire was installed on the computer used by LabMD's billing manager. This installation was contrary to company policy.[25] The complaint then alleges that LimeWire's installation caused the 1718 File, which consisted of consumers' personal information, to be exposed. The 1718 File's exposure caused consumers injury by infringing **[**15]** upon their right of privacy. Thus, the complaint alleges that LimeWire was installed in defiance of LabMD policy and caused the alleged consumer injury. Had the complaint stopped there, a narrowly drawn and easily enforceable order might have followed, commanding LabMD to eliminate the possibility that employees could install unauthorized programs on their computers.

But the complaint continues past this single allegation of wrongdoing, adding that LimeWire's installation was not the only conduct that caused the 1718 File to be exposed. It also alleges broadly that LabMD "engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computer networks." The complaint then provides a litany of security measures that LabMD failed to employ, each setting out in general terms a deficiency in LabMD's data- **[*1230]** security protocol.[26] Because LabMD failed to employ these measures, the Commission's theory goes, LimeWire was able to be installed on the billing manager's computer. LabMD's policy forbidding employees from installing programs like LimeWire was insufficient.

The FTC's complaint, therefore, uses LimeWire's **[**16]** installation, and the 1718 File's exposure, as an entry point to broadly allege that LabMD's data-security operations are deficient as a whole. Aside from the installation of LimeWire on a company computer, the complaint alleges no specific unfair acts or practices engaged in by LabMD. Rather, it was LabMD's multiple, unspecified failures to act in creating and operating its data-security program that amounted to an unfair act or practice.[27] Given the breadth of these failures, the Commission attached to its complaint a proposed order which would regulate all aspects of LabMD's data-security program—sweeping prophylactic measures to collectively reduce the possibility of employees installing unauthorized programs on their computers and thus exposing consumer information. The proposed cease and desist order, which is identical in all relevant respects to the order the FTC ultimately issued, identifies no specific unfair acts or practices from which LabMD must abstain and instead requires LabMD to implement and maintain a data-security program "reasonably designed" to the Commission's satisfaction. *See generally Appendix*.

The decision on which the FTC based its final cease and desist order exhibits more of the same. The FTC found that LabMD "failed to implement reasonable security measures to protect the sensitive consumer information on its computer network" and that the failure caused substantial consumer injury. In effect, the decision held that LabMD's

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[25] The FTC's complaint does not state that LimeWire was installed contrary to company policy. But the complaint implies as much in that it does not allege that LabMD's policy allowed the installation. Further, undisputed evidence in the record indicates that LimeWire was installed contrary to LabMD policy.

[26] *See supra* note 8.

[27] After outlining LabMD's shortcomings in data security, namely those items listed in note 8, *supra*, the FTC's complaint states in paragraph 22 that LabMD's

> failure to employ reasonable and appropriate measures to prevent **[**17]** unauthorized access to personal information, including dates of birth, SSNs, medical test codes, and health information, caused, or is likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. *This practice was, and is, an unfair act or practice*.

(Emphasis added). Oddly, paragraph 23 of the complaint states that the "*acts and practices* of [LabMD] as alleged in this complaint constitute unfair *acts or practices* in or affecting commerce in violation of *Section 5(a)*." (Emphasis added). Thus, paragraph 22 seems to conceive of all of LabMD's data-security deficiencies as culminating in a single unfair act or practice, and paragraph 23, though unspecific and perhaps boilerplate, suggests that there were multiple unfair acts or practices. Paragraph 22 better encapsulates the FTC's theory, as the complaint in preceding paragraphs lays out a number of deficiencies that, "taken together," constitute unreasonable data security. Further, the Commission's cease and desist order states, "[T]he Commission has concluded that LabMD's *data security practices were unreasonable* and *constitute an unfair act or practice* that violates *Section 5*." (Emphasis added). *See Appendix* at 1.

failure to act in various ways to protect consumer data rendered its entire data-security operation an unfair act or practice. The broad cease and desist order now at issue, according to the Commission, was therefore justified.

* * *

The first question LabMD's petition for review presents is whether LabMD's failure to implement and maintain a reasonably designed data-security program **[**18]** constituted an unfair act or practice within the ambit of *Section 5(a)*. The FTC declared that it did because such failure caused **[*1231]** substantial injury to consumers' right of privacy, and it issued a cease and desist order to avoid further injury.

HN7[] The Commission must find the standards of unfairness it enforces in "clear and well-established" policies that are expressed in the Constitution, statutes, or the common law.[28] The Commission's decision in this case does not explicitly cite the source of the standard of unfairness it used in holding that LabMD's failure to implement and maintain a reasonably designed data-security program constituted an unfair act or practice. It is apparent to us, though, that the source is the common law of negligence. According to the *Restatement (Second) of Torts § 281* (Am. Law Inst. 1965), Statement of the Elements of a Cause of Action for Negligence, [an] actor is liable for an invasion of an interest of another, if:

> (a) the interest invaded is protected against unintentional invasion, and
> (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which [the other] is included, and
> (c) the actor's conduct is a legal cause of the invasion, and
>
> (d) the other has not so **[**19]** conducted himself as to disable himself from bringing an action for such invasion.

The gist of the Commission's complaint and its decision is this: The consumers' right of privacy is protected against unintentional invasion. LabMD unintentionally invaded their right, and its deficient data-security program was a legal cause. *Section 5(a)* empowers the Commission to "prevent persons, partnerships, or corporations . . . from using unfair . . . acts or practices." The law of negligence, the Commission's action implies, is a source that provides standards for determining whether an act or practice is unfair, so a person, partnership, or corporation that negligently infringes a consumer interest protected against unintentional invasion may be held accountable under *Section 5(a)*. We will assume *arguendo* that the Commission is correct and that LabMD's negligent failure to design and maintain a reasonable data-security program invaded consumers' right of privacy and thus constituted an unfair act or practice.

The second question LabMD's petition for review presents is whether the Commission's cease and desist order, founded upon LabMD's general negligent failure to act, is enforceable. We answer this question in the **[**20]** negative. We illustrate why by first laying out the FTC Act's enforcement and remedial schemes and then by demonstrating the problems that enforcing the order would pose.

III.

HN8[] The FTC carries out its *Section 5(a)* mission to prevent unfair acts or practices in two ways: formal rulemaking and case-by-case litigation.

The Commission is authorized under *15 U.S.C. § 57a* to prescribe rules "which define with specificity" unfair acts or practices within the meaning of *Section 5(a)*. Once a rule takes effect, it becomes in essence an addendum to *Section 5(a)*'s phrase "unfair . . . acts or practices"; the rule puts the public on notice that a particular act or practice is unfair. The FTC enforces its rules in the federal district courts. Under *15 U.S.C. § 45(m)(1)(A)*,[29] **[*1232]** the

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[28] ***FTC Policy Statement on Unfairness, supra note 23***.

[29] This provision states,

Commission may bring an action to recover a civil penalty against any person, partnership or corporation that knowingly violates a rule.[30] This case does not involve the enforcement of an FTC-promulgated rule.

What is involved here is the FTC's establishment of an unfair act or practice through litigation. Because Congress thought impossible the task of legislating a comprehensive list of unfair acts or practices, it authorized the Commission to establish unfair acts or practices through case-by-case litigation. ***HN9***[] In the litigation context, once an act or practice is adjudged to be unfair, the act or practice becomes in effect—like an FTC-promulgated rule—an addendum to *Section 5(a)*.

HN10[] The FTC Act provides two forums for such litigation. The Commission may choose to prosecute its claim that an act or practice is unfair before an ALJ, with appellate review before the full Commission and then in a federal court of appeals. *See* *15 U.S.C. § 45(b)*, *(c)*; *16 C.F.R. § 3.1 et seq.* Or, under *Section 13(b)* of the Act, *15 U.S.C. § 53(b)*, it may prosecute its claim before a federal district judge, with appellate review also in a federal court of appeals.

Assume a factual scenario in which the Commission believes a certain act or practice **[**22]** is unfair. It should not matter which of the two forums the Commission chooses to prosecute its claim. The result should be the same. As we explain below, the ALJ and the district judge use materially identical procedural rules in processing the case to judgment[31] and both apply the same substantive law to the facts. Further, putting any venue differences aside, the same court of appeals reviews their decisions.

A.

We consider the Commission's first option, litigation before an ALJ. The Commission issues an administrative complaint against a party it has reason to believe is engaging in an unfair act or practice and seeks a cease and desist order. *16 C.F.R. § 3.13*. The Commission prosecutes the complaint before an ALJ whom it designates, in accordance with its Rules of Practice. *Id.* *§ 3.1 et seq.* Under these Rules, the complaint must provide, among other things, "[a] clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." *Id.* *§ 3.11*. If the respondent **[*1233]** files a motion to dismiss the complaint, the motion is referred to the Commission for a ruling.[32] If **[**23]** the motion is denied, the respondent files an answer. From that point on, the proceedings before the ALJ resemble the proceedings in an action for injunctive relief in federal district court. If the ALJ finds that the respondent has been engaging in the unfair act or practice alleged and will likely continue doing so, the ALJ enters a cease and desist order enjoining the respondent from engaging in the unfair conduct.[33] If not, the ALJ dismisses the Commission's

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> The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices . . . with actual knowledge or knowledge fairly **[**21]** implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

15 U.S.C. § 45(m)(1)(A). As explained in note 39, *infra*, the Commission has increased the penalty amount to $41,484 per violation.

[30] The Commission may also bring a suit in federal district court or a state court of competent jurisdiction to obtain relief in the form of consumer redress. *15 U.S.C. § 57b*.

[31] *See* FTC, *Operating Manual* Chapter 10.7, available at https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch10administrativelitigation.pdf (stating that "many [of the Commission's] adjudicative rules are derived from the Federal Rules of Civil Procedure"); *see also* Stephanie W. Kanwit, *Federal Trade Commission* § 8:1 (2017) (noting that the Commission "has held over the years that the [Federal Rules of Civil Procedure] can provide an analytical framework for the disposition of related issues" (quotations omitted)).

[32] The Commission may, in its discretion, refer the motion back to the ALJ for a ruling. *16 C.F.R. § 3.22*.

complaint.[34] Either way, the ALJ's decision is appealable to the FTC, *id.* *§ 3.52*, and the FTC's decision is in turn reviewable in a federal court of appeals, *15 U.S.C. § 45(c)*.

Suppose the Commission chooses the second option, litigation before a federal district judge under *Section 13(b)*. If the Commission has reason to believe a party is engaging in an unfair act or practice, it seeks an injunction by filing in district court a complaint that sets forth "well-pleaded facts . . . permit[ting] the court to infer more than the mere possibility of misconduct." *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* (citing *Fed. R. Civ. P. 8(a)(2)*). Although the case is tried pursuant to the Federal Rules of Civil Procedure, not the FTC Rules of Practice, it is handled essentially as it would be before the ALJ. If the district judge finds that **[**24]** the defendant has been engaging in the unfair act or practice alleged and will likely continue doing so, the judge enjoins the defendant from engaging in such conduct. Whatever the court's decision, it is reviewable in the court of appeals.

Assume the result is the same in both litigation forums. The ALJ enters a cease and desist order; the district court issues an injunction. Appellate review would reach the same result regardless of the trial forum (assuming that venue is laid in the same court of appeals).[35] Assume further that both coercive orders are affirmed by the court of appeals. The cease and desist order and the injunction address the same behavior and contain the same command: discontinue engaging in a specific unfair act or practice.

With the cease and desist order or the injunction in hand, the Commission may **[*1234]** proceed in two ways against a party who violates its terms.[36] The Commission may seek the imposition of either a civil penalty or civil-contempt sanction.[37] We explain below the procedures the Commission invokes in pursuing these respective remedies.

B.

1.

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[33] The ALJ's decision must set out findings of fact and conclusions of law, *16 C.F.R. § 3.51(c)*, just like a district judge must do pursuant to *Federal Rule of Civil Procedure 52(a)* following a bench trial.

[34] As a whole, this administrative procedure, set out in the FTC's Rules of Practice, effectively supersedes *15 U.S.C. § 45(b)*, the FTC Act provision governing Commission proceedings.

[35] There are a couple of subtle differences in how cease and desist orders and injunctions are reviewed. First, an appellate court reviews a district court's findings of fact for clear error and those of the FTC under the "substantial evidence" standard. *McWane, Inc., 783 F.3d at 824*; *Dyer, 395 F.3d at 1210*. In practice, however, these two standards make little or no difference in terms of outcome. *See* *Dickinson v. Zurko, 527 U.S. 150, 162-63, 119 S. Ct. 1816, 1823, 144 L. Ed. 2d 143 (1999)* ("The court/agency [substantial-evidence] standard, as we have said, is somewhat less strict than the court/court [clearly erroneous] standard. But the difference is a subtle one—so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome."). Further, although both the FTC's and a district court's conclusions of law are reviewed *de novo*, appellate courts give "some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair.'" *Ind. Fed'n of Dentists, 476 U.S. at 454, 106 S. Ct. at 2016*.

[36] We note that with respect to violations of final cease and desist orders, the Commission may also bring a *15 U.S.C. § 57b* action as described in note 30, *supra*.

[37] The two remedies are similar in nature. Indeed, not long after *Section 5*'s civil-penalty scheme was implemented, the Commissioner of the FTC described civil penalties as "an additional remedy to that formerly employed of invoking the inherent power of the courts to punish for contempt anyone who violated a court order directing compliance with an order of the Commission." *See* Hon. R. E. Freer, Commissioner, Federal Trade Commission, Address before the Annual Convention of the Proprietary Association (May 17, 1938).

HN11[] Under Section 5(l), 15 U.S.C. § 45(l), the Commission may bring a civil-penalty action in district court should the respondent violate **[**25]** a final cease and desist order.[38] The Commission's complaint would allege that the defendant is subject to an existing cease and desist order and has violated its terms. For each separate violation of the order—or, in the case of a continuing violation, for each day in violation—the district court may impose a penalty of up to $41,484.[39] *Id.* Section 5(l) also empowers the district court to grant an injunction if the Commission proves that the violation is likely to continue and an injunction is necessary to enforce the order.

HN12[] If the Commission has obtained an injunction in district court requiring the defendant to discontinue an unfair act or practice, it may invoke the district court's civil-contempt power should the defendant disobey. Rather than filing a complaint, as in a Section 5(l) action, the Commission simply moves the district court for an order requiring the defendant to show cause why it should not be held in contempt for engaging in conduct the injunction specifically enjoined. If the court is satisfied that the conduct is forbidden, it issues a show cause order. Then, if at the show cause hearing the Commission establishes by clear and convincing proof that the defendant engaged in the **[**26]** forbidden conduct and that the defendant "had the ability to comply" with the injunctive provision at issue, McGregor v. Chierico, 206 F.3d 1378, 1383 (11th Cir. 2000), the court may adjudicate **[*1235]** the defendant in civil contempt and impose appropriate sanctions.

2.

The concept of specificity is crucial to both modes of enforcement. We start with civil penalties for violations of cease and desist orders. Nothing in the FTC Act addresses what content must go into a cease and desist order. The FTC Rule of Practice governing Commission complaints, however, states that a complaint must contain "[a] clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." 16 C.F.R § 3.11. It follows that the remedy the complaint seeks must comport with this requirement of reasonable definiteness. Moreover, given the severity of the civil penalties a district court may impose for the violation of a cease and desist order, the order's prohibitions must be stated with clarity and precision. The United States Supreme Court emphasized this point in *FTC v. Colgate-Palmolive Co.*, stating,

> [T]his Court has . . . warned that an order's prohibitions should be clear and precise **[**27]** in order that they may be understood by those against whom they are directed, and that [t]he severity of possible penalties prescribed . . . for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.

380 U.S. 374, 392, 85 S. Ct. 1035, 1046, 13 L. Ed. 2d 904 (1965) (quotations and citations omitted). The imposition of penalties upon a party for violating an imprecise cease and desist order—up to $41,484 per violation or day in violation—may constitute a denial of due process.[40]

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[38] A cease and desist order is made final pursuant to the conditions set forth in 15 U.S.C. § 45(g). Section 5(l) directs the Commission to call upon the United States Attorney General to commence a civil-penalty action against the respondent. The Commission can bring the action itself, however, in accordance with the criteria in 15 U.S.C. § 56(a).

Section 5(m)(1)(B) of the Act, 15 U.S.C. § 45(m)(1)(B), authorizes the Commission to file suit against a nonrespondent who "with actual knowledge" engages in the "act or practice" declared a violation of Section 5(a) and enjoined via a cease and desist order entered in a previous administrative adjudication. The previous adjudication, however, is afforded no collateral estoppel effect against the defendant. That is, the defendant can challenge the factual predicate for the cease and desist order and the ultimate determination that the facts found in the previous adjudication constituted an unfair act or practice. *See id.* § 45(m)(2).

[39] Sections 5(l) and 5(m)(1)(B) set the maximum penalty at $10,000, but the Commission may adjust this figure for inflation under 16 C.F.R. § 1.98. Hence the current $41,484 figure, which "appl[ies] only to penalties assessed after January 22, 2018" but "includ[es] those penalties whose associated violation predated January 22, 2018." *Id.*

Specificity is equally important in the fashioning and enforcement of an injunction consequent to an action brought in district court under *Section 13(b)*. *Federal Rule of Civil Procedure 65(d)(1)* requires that an injunctive order state the reasons for its coercive provisions, state the provisions "specifically," and describe the acts restrained or required "in reasonable detail." The Supreme Court has stated that *Rule 65(d)(1)*'s "specificity provisions . . . are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree **[**28]** too vague to be understood." *Schmidt v. Lessard, 414 U.S. 473, 476, 94 S. Ct. 713, 715, 38 L. Ed. 2d 661 (1974)*. Indeed, "[t]he most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." *Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n, 389 U.S. 64, 76, 88 S. Ct. 201, 208, 19 L. Ed. 2d 236 (1967)*. Being held in contempt and sanctioned pursuant to an insufficiently specific injunction is therefore **[*1236]** a denial of due process. *See id.* (reversing a civil-contempt judgment founded upon an order too vague to be understood).

In sum, the prohibitions contained in cease and desist orders and injunctions must be specific. Otherwise, they may be unenforceable. Both coercive orders are also governed by the same standard of specificity, as the stakes involved for a violation are the same—severe penalties or sanctions.

C.

In the case at hand, the cease and desist order contains no prohibitions. It does not instruct LabMD to stop committing a specific act or practice. Rather, it commands LabMD to overhaul and replace its data-security program to meet an indeterminable standard of reasonableness. This command is unenforceable. Its unenforceability is made clear if we imagine what would take place if the Commission sought the order's enforcement. As we have explained, the standards a district court would apply are essentially **[**29]** the same whether it is entertaining the Commission's action for the imposition of a penalty or the Commission's motion for an order requiring the enjoined defendant to show cause why it should not be adjudicated in contempt. For ease of discussion, we posit a scenario in which the Commission obtained the coercive order it entered in this case from a district court, and now seeks to enforce the order.

The Commission moves the district court for an order requiring LabMD to show cause why it should not be held in contempt for violating the following injunctive provision:

> [T]he respondent shall . . . establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers . . . . Such program . . . shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers . . . .[41]

See Appendix at 2. The Commission's motion alleges that LabMD's program failed to **[**30]** implement "*x*" and is therefore not "reasonably designed." The court concludes that the Commission's alleged failure is within the provision's language and orders LabMD to show cause why it should not be held in contempt.

At the show cause hearing, LabMD calls an expert who testifies that the data-security program LabMD implemented complies with the injunctive provision at issue. The expert testifies that "*x*" is not a necessary component of a reasonably designed data-security program. The Commission, in response, calls an expert who disagrees. At this

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[40] *See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574, & n.22, 116 S. Ct. 1589, 1598, & n.22, 134 L. Ed. 2d 809 (1996)* ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment . . . . [T]he basic protection against judgments without notice afforded by the *Due Process Clause* is implicated by civil penalties." (citation, quotations, and emphasis omitted)); *see also Sessions v. Dimaya, 584 U.S. __, 138 S. Ct. 1204, 1228-29, 200 L. Ed. 2d 549 (2018)* (Gorsuch, J., concurring) (suggesting that the severity of a civil penalty corresponds with the degree of fair notice of unlawful conduct that must be accorded to the defendant).

[41] Following this provision in the Commission's cease and desist order are five equally vague items which must be included in LabMD's data-security program. *See Appendix* at 2-3. These items suffer the same enforceability problems discussed below.

point, the district court undertakes to determine which of the two equally qualified experts correctly read the injunctive provision. Nothing in the provision, however, indicates which expert is correct. The provision contains no mention of "*x*" and is devoid of any meaningful standard informing the court of what constitutes a "reasonably designed" data-security program.[42] The court therefore has no choice **[*1237]** but to conclude that the Commission has not proven—and indeed cannot prove—LabMD's alleged violation by clear and convincing evidence. *See* McGregor, 206 F.3d at 1383.[43]

If the court held otherwise and ordered LabMD to implement "*x*," the court **[**31]** would have effectively modified the injunction at a show cause hearing. This would open the door to future modifications, all improperly made at show cause hearings.[44] Pretend that LabMD implemented "*x*" pursuant to the court's order, but the FTC, which is continually monitoring LabMD's compliance with the court's injunction, finds that "*x*" failed to bring the system up to the FTC's conception of reasonableness. So, the FTC again moves the district court for an order to show cause. This time, its motion alleges that LabMD failed to implement "*y*," another item the Commission thinks necessary to any reasonable data-security program. Does the court side with the Commission, modify the injunction, and order the implementation of "*y*"? Suppose "*y*" fails. Does another show cause hearing result in a third modification requiring the implementation of "*z*"?

The practical effect of repeatedly modifying the injunction at show cause hearings is that the district court is put in the position of managing LabMD's business in accordance with the Commission's wishes. It would be as if the Commission was LabMD's chief executive officer and the court was its operating officer. It is self-evident that this **[**32]** micromanaging is beyond the scope of court oversight contemplated by injunction law.

This all serves to show that an injunction identical to the FTC cease and desist order at issue would be unenforceable under a district court's contempt power. Because the standards governing the coercive enforcement of injunctions and cease and desist orders are the same, it follows that the Commission's cease and desist order is itself unenforceable.

IV.

In sum, assuming *arguendo* that LabMD's negligent failure to implement and maintain a reasonable data-security program constituted an unfair act or practice under Section 5(a), the Commission's cease and desist order is nonetheless unenforceable. It does not enjoin a specific act or practice. Instead, it mandates a complete overhaul of LabMD's data-security program and says precious little about how this is to be accomplished. Moreover, it effectually charges the district court with managing the overhaul. This is a scheme Congress could not have envisioned. We therefore grant LabMD's petition for review and vacate the Commission's order.

SO ORDERED.

[*1238] EXHIBIT

UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSION

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[42] Further, the order's other provisions, mentioned in note 41, *supra*, also fail to state with specificity the actions LabMD must take to bring its program into compliance with the order.

[43] *See also* FTC v. Trudeau, 579 F.3d 754, 763 (7th Cir. 2009) ("To succeed on a contempt petition, the FTC must demonstrate by clear and convincing evidence that the respondent has violated the express and unequivocal command of a court order." (quotations omitted)).

[44] The purpose of a show cause hearing is to determine whether the alleged contemner has violated the injunctive provision as it stands. If the party holding the injunction wishes to modify the provision, the party must move the district court to effect the modification. Implicit in Federal Rule of Civil Procedure 65 is the notion that before the modification can be made, the adverse party must be provided notice of the proposed modification and an opportunity to be heard.

COMMISSIONERS: Edith Ramirez, Chairwoman

Maureen [33] K. Ohlhausen**

Terrell McSweeny

In the Matter of LabMD, Inc., a corporation.

DOCKET NO. 9357

PUBLIC

FINAL ORDER

The Commission has heard this matter upon the appeal of Complaint Counsel from the Initial Decision of the Administrative Law Judge, and upon briefs and oral argument in support thereof and in opposition thereto. For the reasons stated in the accompanying opinion of the Commission, the Commission has concluded that LabMD's data security practices were unreasonable and constitute an unfair act or practice that violates *Section 5 of the Federal Trade Commission Act*. The Commission has therefore determined to vacate the Initial Decision and issue the following order:

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "Commerce" shall mean as defined in *Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44*.

2. Unless otherwise specified, "respondent" shall mean LabMD, Inc., and its successors and assigns.

3. "Affected Individual" shall mean any consumer whose personal information LabMD has reason to believe was, or could have been, accessible to unauthorized persons before July 28, 2016, including, but not limited to, consumers listed in the Insurance File and other documents available to a peer-to-peer file sharing network, but excluding consumers **[**34]** whom LabMD has notified, before July 28, 2016, of a data security breach.

[*1239] 4. "Insurance File" shall mean the file containing personal information about approximately 9,300 consumers, including names, dates of birth, Social Security numbers, health insurance company names and policy numbers, and medical test codes, that was available to a peer-to-peer file sharing network through a peer-to-peer file sharing application installed on a computer on respondent's computer network.

5. "Personal information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (1) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a "cookie" or processor serial number.

I.

IT IS ORDERED that the **[**35]** respondent shall, no later than the date this order becomes final and effective, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers by respondent or by any corporation, subsidiary, division, website, or other device or affiliate owned or controlled by respondent. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:

A. the designation of an employee or employees to coordinate and be accountable for the information security program;

B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the **[**36]** sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures;

C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;

[*1240] D. the development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards; and

E. the evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by Subpart C, any material changes to respondent's operations or business arrangements, or any other **[**37]** circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.

II.

IT IS FURTHER ORDERED that, in connection with its compliance with Part I of this order, respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. Professionals qualified to prepare such assessments shall be: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after July 28, 2016, for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after July 28, 2016, **[**38]** for the biennial Assessments. Each Assessment shall:

A. set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;

B. explain how such safeguards are appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers;

C. explain how the safeguards that have been implemented meet or exceed the protections required by Part I of this order; and

D. certify that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected, and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial **[**39]** Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request. Unless otherwise directed by a representative of the Commission, the initial Assessment, and any subsequent Assessments requested, shall be sent by overnight courier (not **[*1241]** the U.S. Postal Service) to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the Matter of LabMD, Inc.*, FTC Docket No. 9357. Provided, however, that in lieu of overnight courier, Assessments may be sent by first-class mail, but only if an electronic version of any such Assessment is contemporaneously sent to the Commission at Debrief@ftc.gov.

III.

IT IS FURTHER ORDERED that respondent shall provide notice to Affected Individuals and their health insurance companies within 60 days of the date this order becomes final and effective unless an appropriate notice has already been provided, as follows:

A. Respondent shall send the notice to each Affected Individual by first class mail, only after obtaining acknowledgment from the Commission **[**40]** or its staff that the form and substance of the notice satisfies the provisions of the order. The notice must be easy to understand and must include:

1. a brief description of why the notice is being sent, including the approximate time period of the unauthorized disclosure, the types of personal information that were or may have been disclosed without authorization (*e.g.*, insurance information, Social Security numbers, etc.), and the steps respondent has taken to investigate the unauthorized disclosure and protect against future unauthorized disclosures;
2. advice on how Affected Individuals can protect themselves from identity theft or related harms. Respondent may refer Affected Individuals to the Commission's identity theft website (www.ftc.gov/idtheft), advise them to contact their health care providers or insurance companies if bills don't arrive on time or contain irregularities, or to obtain a free copy of their credit report from www.annualcreditreport.com and monitor it and their accounts for suspicious activity, or take such other steps as respondent deems appropriate; and

3. methods by which Affected Individuals can contact respondent for more information, including a toll-free **[**41]** number for 90 days after notice to Affected Individuals, an email address, a website, and mailing address.

B. Respondent shall send a copy of the notice to each Affected Individual's health insurance company by first class mail.

C. If respondent does not have an Affected Individual's mailing address in its possession, it shall make reasonable efforts to find such mailing address, such as by reviewing online directories, and once found, shall provide the notice described in Subpart A, above.

[*1242] IV.

IT IS FURTHER ORDERED that respondent shall maintain and, upon request, make available to the Federal Trade Commission for inspection and copying:

A. for a period of five (5) years, a print or electronic copy of each document relating to compliance, including, but not limited to, notice letters required by Part III of this order and documents, prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order; and

B. for a period of three (3) years after the date of preparation of each Assessment required under Part II of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of respondent, including, **[**42]** but not limited to, all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials relating to respondent's compliance with Parts I and II of this order, for the compliance period covered by such Assessment.

V.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to: (1) all current and future principals, officers, directors, and managers; (2) all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order; and (3) any business entity resulting from any change in structure set forth in Part VI. Respondent shall deliver this order to such current personnel within thirty (30) days after the date this order becomes final and effective, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities. For any business entity resulting from any change in structure set forth in Part VI, delivery shall be at least ten (10) days prior to the change in structure.

VI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in respondent that **[**43]** may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in either corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the Matter of LabMD, Inc.*, FTC Docket No. 9357. Provided, however, that in lieu of overnight courier, notices may be sent by first-class mail, but only **[**44]** if an electronic version of any such notice is contemporaneously sent to the Commission at Debrief@ftc.gov.

[*1243] **VII**.

IT IS FURTHER ORDERED that respondent, within sixty (60) days after the date this order becomes final and effective, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the Matter of LabMD, Inc.*, FTC Docket No. 9357. Provided, however, that in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of any such notice is contemporaneously sent to the Commission at Debrief@ftc.gov.

VIII.

This order will terminate **[**45]** on July 28, 2036, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. any Part in this order that terminates in less than twenty (20) years;

B. this order's application to any respondent that is not named as a defendant in such complaint; and
C. this order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that each respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Donald S. Clark

Secretary

SEAL:

ISSUED: July **[**46]** 28, 2016

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![LexisNexis]

United States v. AT&T Inc.

United States District Court for the District of Columbia

June 12, 2018, Decided; June 12, 2018, Filed

Civil Case No. 17-2511 (RJL)

Reporter

310 F. Supp. 3d 161 *; 2018 U.S. Dist. LEXIS 100023 **; 2018-1 Trade Cas. (CCH) P80,407; 2018 Comm. Reg. (P & F) 86; 2018 WL 2930849

UNITED STATES OF AMERICA, Plaintiff, v. AT&T INC., et al., Defendants.

Subsequent History: Affirmed by *United States v. AT&T, Inc., 2019 U.S. App. LEXIS 5561 (D.C. Cir., Feb. 26, 2019)*

Prior History: *United States v. At&T Inc., 2017 U.S. Dist. LEXIS 207694 (D.D.C., Dec. 8, 2017)*

Core Terms

merger, distributors, video, subscriber, consumers, programming, blackout, customers, affiliate, programmers, negotiations, networks, bargaining, predicted, advertising, long-term, proposed merger, leverage, increased-leverage, competitor, Cable, post-merger, defendants', vertically, coordination, DISH, prices, third-party, real-world, effects

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Claims

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN1[] **Clayton Act, Claims**

Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, prohibits acquisitions, including mergers, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition. The Government has the ultimate burden of proving a *Section 7* violation by a preponderance of the evidence. Accordingly, the Government's failure of proof in any respect will mean the transaction should not be enjoined. Although certainty of harm is not necessary to prove a Section 7 violation, neither is the mere possibility of harm sufficient. Rather, to grant injunctive relief under the *Clayton Act*, the Court must conclude that the Government has introduced evidence sufficient to show that the challenged transaction is likely to lessen competition substantially. As part of satisfying that burden, Section 7 demands that a plaintiff demonstrate that the substantial lessening of competition will be sufficiently probable and imminent to warrant relief.

Antitrust & Trade Law > Clayton Act > Claims

HN2[] Clayton Act, Claims

In assessing the Government's *Section 7 of the Clayton Act*, *15 U.S.C.S. § 18* case, the court must engage in a comprehensive inquiry into the future competitive conditions in a given market, keeping in mind that the *Clayton Act* protects competition, rather than any particular competitor. Only examination of the particular market — its structure, history and probable future — can provide the appropriate setting for judging the probable anticompetitive effect of the merger. Hence, antitrust theory and speculation cannot trump facts; the Government must make its case on the basis of the record evidence relating to the market and its probable future.

Antitrust & Trade Law > Clayton Act > Claims

Evidence > Burdens of Proof > Burden Shifting

HN3[] Clayton Act, Claims

To further assist courts in the prospective inquiry under *Section 7 of the Clayton Act*, *15 U.S.C.S. § 18*, the D.C. Circuit has set forth a burden shifting framework for use in determining whether a proposed transaction violates the *Clayton Act*. Under that framework, the Government must first establish its prima facie case by: (1) identifying the relevant product and geographic market and 2) showing that the proposed merger is likely to substantially lessen competition in that market. If the Government satisfies its prima facie burden, the burden then shifts to defendants to provide sufficient evidence that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition. One way defendants may do so is to offer evidence that post-merger efficiencies will outweigh the merger's anticompetitive effects. If the defendants put forward sufficient evidence to rebut plaintiff's prima facie case, the burden of producing additional evidence of anticompetitive effect shifts to the Government, and merges with the ultimate burden of persuasion, which remains with the Government at all times.

Antitrust & Trade Law > Clayton Act > Claims

Evidence > Types of Evidence > Testimony > Expert Witnesses

HN4[] Clayton Act, Claims

It is beyond dispute that, to be probative in a particular case, expert testimony must incorporate assumptions that are "reasonable" in light of the record evidence. Hewing to that rule is especially important in *Section 7 of the Clayton Act*, *15 U.S.C.S. § 18*, cases where "only" an examination of the particular market — its structure, history and probable future — can provide the appropriate setting for judging the probable anticompetitive effect of the merger dictates that the disputes must be resolved on the basis of record evidence relating to the market and its probable future. Antitrust theory and speculation cannot trump facts. That is true no matter whether the testimony relates to a theory that is considered "mainstream" or has been deemed applicable to different factual or economic scenarios in other proceedings.

Antitrust & Trade Law > Clayton Act > Scope

HN5[] **Antitrust & Trade Law, Clayton Act**

A proposed merger may violate *Section 7 of the Clayton Act*, *15 U.S.C.S. § 18*, by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms consumers. Such coordinated conduct need not constitute an illegal agreement under *Section 1 of the Sherman Act*, but instead can comprise instances of tacit coordination. In order to assess whether a merger will lead to an unacceptable risk of competition-stifling coordination, courts evaluate various market conditions, on the whole. In short, that analysis involves consideration of whether would-be coordinators could wield anticompetitive power by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

Counsel: **[**1]** For UNITED STATES OF AMERICA, Plaintiff: Craig William Conrath, Eric Damian Welsh, Jared A. Hughes, Justin T. Heipp, Lawrence Andrew Reicher, Peter Joseph Schwingler, Scott Alan Scheele, LEAD ATTORNEYS, U.S. DEPARTMENT OF JUSTICE, Antitrust Division, Washington, DC.

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For TIME WARNER INC., Defendant: Christine Anne Varney, LEAD ATTORNEY, CRAVATH, SWAINE & MOORE LLP, New York, NY; Katrina M. Robson, LEAD ATTORNEY, O'MELVENY & MYERS LLP, Washington, DC; Andrew J. Frackman, PRO HAC VICE, O'MELVENY & MYERS LLP, New York, NY; Daniel M. Petrocelli, M. Randall Oppenheimer, PRO HAC VICE, O'MELVENY & MYERS LLP, Los Angeles, CA; Julie **[**2]** A. North, Kevin J. Orsini, Margaret Segall D'Amico, Peter T. Barbur, PRO HAC VICE, CRAVATH, SWAINE & MOORE LLP, New York, NY; Kenneth R. O'Rourke, PRO HAC VICE, O'MELVENY & MYERS LLP, Washington, DC.

Judges: RICHARD J. LEON, United States District Judge.

Opinion by: RICHARD J. LEON

Opinion

[*163] **MEMORANDUM OPINION**

If there ever were an antitrust case where the parties had a dramatically different assessment of the current state of the relevant market and a fundamentally different vision of its future development, this is the one. Small wonder it had to go to trial !

[*164] On November 20, 2017, the U.S. Department of Justice's Antitrust Division brought this suit, on behalf of the United States of America ("the Government" or "the plaintiff"), to block the merger of AT&T Inc. ("AT&T") and Time Warner Inc. ("Time Warner") as a violation of *Section 7* of the Clayton Act, *15 U.S.C. § 18*. The Government claims, in essence, that permitting AT&T to acquire Time Warner is likely to substantially lessen competition in the video programming and distribution market nationwide by enabling AT&T to use Time Warner's "must have" television content to either raise its rivals' video programming costs or, by way of a "blackout," drive those same rivals' customers to **[**3]** its subsidiary, DirecTV. Thus, according to the Government, consumers nationwide will be harmed by increased prices for access to Turner networks, notwithstanding the Government's concession that this vertical merger would result in hundreds of millions of dollars in annual cost savings to AT&T's customers and notwithstanding the fact that (unlike in "horizontal" mergers) no competitor will be eliminated by the merger's proposed vertical integration.

Not surprisingly, the defendants, AT&T, Time Warner, and DirecTV, strongly disagree. Their vision couldn't be more different. The video programming and distribution market, they point out, has been, and is, in the middle of a revolution where high-speed internet access has facilitated a "veritable explosion" of new, innovative video content and advertising offerings over the past five years. Trial Tr. ("Tr.") 1397:1-4 (Montemagno (Charter)). Vertically integrated entities like Netflix, Hulu, and Amazon have achieved remarkable success in creating and providing affordable, on-demand video content directly to viewers over the internet. Meanwhile, web giants Facebook and Google have developed new ways to use data to create effective — and **[**4]** lucrative — digital advertisements tailored to the individual consumer.

As a result of these "tectonic changes" brought on by the proliferation of high-speed internet access, video programmers such as Time Warner and video distributors such as AT&T find themselves facing two stark realities: declining video subscriptions and flatlining television advertising revenues. *Id.* at 3079:18 (Bewkes (Time Warner)). Indeed, cost-conscious consumers increasingly choose to "cut" or "shave" the cord, abandoning their traditional cable- or satellite- TV packages for cheaper content alternatives available over the internet. At the same time, Facebook's and Google's dominant digital advertising platforms have surpassed television advertising in revenue. Watching vertically integrated, data-informed entities thrive as television subscriptions and advertising revenues declined, AT&T and Time Warner concluded that each had a problem that the other could solve: Time Warner could provide AT&T with the ability to experiment with and develop innovative video content and advertising offerings for AT&T's many video and wireless customers, and AT&T could afford Time Warner access to customer relationships and **[**5]** valuable data about its programming. Together, AT&T and Time Warner concluded that both companies could stop "chasing taillights" and catch up with the competition. 2/16/18 Hr'g Tr. 34:16 [Dkt # 67]. Those were the circumstances that drove AT&T, a distributor of content, and Time Warner, a content creator and programmer, to announce their historic $108 billion merger in October 2016 (the "proposed merger" or "challenged merger"). Those are the circumstances that cause them to claim today that their merger will increase not only innovation, but competition in this marketplace for years to come.

[*165] *Section 7* of the Clayton Act assigns this Court the "uncertain task" of weighing the parties' competing visions of the future of the relevant market and the challenged merger's place within it. *United States v. Baker Hughes Inc., 908 F.2d 981, 991, 285 U.S. App. D.C. 222 (D.C. Cir. 1990)*. Nothing less than a comprehensive inquiry into future competitive conditions in that market is expected. And the Government has the burden of proof to demonstrate that the merger is likely to lessen competition substantially in that uncertain future.

Since announcing the transaction in late October 2016, defendants have delayed closing on the merger agreement for about 18 months as a result of the Government's **[**6]** investigation and suit. The deal is now set to expire if not consummated on or before June 21, 2018 — a turn of events that would require AT&T to pay Time Warner a "break-up fee" of $500 million. The parties have engaged in a highly accelerated discovery schedule to prepare themselves to try this case in March and April of this year. The trial itself lasted nearly six weeks. Both sides put on a case-in-chief and the Government put on a rebuttal case as well. At the conclusion of the trial, I advised the parties I would issue a ruling, if not an opinion, no later than June 12, 2018 so that the losing side would have the agreed-upon time remaining to pursue its appellate rights *before* the merger or the $500 million break-up fee went into effect.

The following is the Court's Opinion. Initially, I provide context for this suit by reviewing the background of the video programming and distribution industry, the proposed merger, and the procedural history of this case. Thereafter, I discuss the legal standards governing a suit under *Section 7* of the Clayton Act, emphasizing in particular the considerations at play in evaluating vertical mergers. With that in place, I next analyze each of the Government's **[**7]** three theories of harm to competition, balancing, as appropriate, the conceded proconsumer benefits of the merger with the consumer harms alleged and the evidence offered to support them. Ultimately, I conclude that the Government has failed to meet its burden to establish that the proposed "transaction is likely to lessen competition substantially." *Baker Hughes, 908 F.2d at 985*.

As such, based on that conclusion, and for all the reasons set forth in greater detail in this Opinion, the Court **DENIES** the Government's request to enjoin the proposed merger.

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BACKGROUND

I. The Video Programming and Distribution Industry[1]

The structure of the video programming and distribution industry generally resembles **[*167]** the "three-stage chain of production comprised of manufacturers, wholesalers, and retailers that typifies the distribution of many, if not **[**10]** most, physical goods in the U.S. economy." Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 Yale J. Reg. 171, 220 (2002). Here, that three-stage chain of production and

[1] For consistency throughout this Opinion, I will use the phrase "video programming and distribution industry" to include creation, packaging, and distribution of professionally produced video content. Of particular relevance here, the Court's definition of "video programming and distribution industry" encompasses programmers such as Turner; traditional multichannel video programming distributors ("MVPDs") such as cable and satellite companies; virtual multichannel video programming distributors ("virtual MVPDs" or "vMVPDs") such as DirecTV Now and DISH's Sling; and subscription video on demand services ("SVODs") such as Netflix, Hulu, and Amazon Prime. By contrast, I use the phrase "pay-TV" to refer only to the packaging and delivery of linear — or "live" — television content. That phrase encompasses only MVPDs and virtual MVPDs.

distribution involves "content creation, content aggregation, and content distribution." Proposed Findings of Fact of the United States ("Gov't PFOF") ¶ 8 [Dkt. # 1281.[2]

Television content begins at the manufacturing level. Although video programming is often created by studios (such as Time Warner's Warner Bros.), some networks or distributors "produce content for themselves" or, in the case of live sporting events, license the rights to broadcast the events from the various sports leagues. *See* Tr. 80:12-16 (Fenwick (Cox)). At the second level, programmers (such as Time Warner's Turner or Home Box Office ("HBO")) aggregate content into a network or network group and then license those networks to video distributors, like AT&T's DirecTV. *See, e.g., id.* at 80:4-9; Plaintiff's Exhibit ("PX") 456-4 to 10. At the third level, distributors bundle and distribute networks to their subscribers. Tr. 80:4-9 (Fenwick (Cox)).

Some subscription-based video programming services are "vertically integrated," meaning, in this context, **[**11]** that those services create or aggregate their content offerings and then distribute those offerings directly to consumers. *Id.* at 3081:18-25 (Bewkes (Time Warner)); *see* Defs.' Proposed Findings of Fact ("Defs.' PFOF") ¶ 12 [Dkt. # 120]. Examples of those services include Netflix, Hulu, and Amazon Prime. Tr. 3155:22-23 (Bewkes (Time Warner)). Traditional video programmers, such as Turner, generally lack such "soup to nuts" integration of content creation and distribution; they are instead reliant upon video distributors to deliver their content offerings to consumers. *Id.* at 3388:6-7 (Stephenson (AT&T)); *see id.* at 485:1-486:6, 612:17-20 (Martin (Turner)). Because the Government's claims center on the proposed combination of Time Warner's video programming with AT&T's video distribution, my background review focuses on those facets of the video programming and distribution industry.

A. Video Programing and Distribution

1. Programmers

Traditional programmers, such as Turner, acquire and aggregate video content. *Id.* at 80:4-16 (Fenwick (Cox)). Generally, programmers do not offer their content directly to consumers. *See, e.g., id.* at 485:1-486:6, 612:1-20 (Martin (Turner)). Instead, they **[**12]** package video content into networks — in Turner's case, networks such as TNT, TBS, and CNN — and then license the rights to display those networks to **[*168]** video distributors. PX459-18; Tr. 80:6-9 (Fenwick (Cox)). As such, Turner and its programming competitors may be thought of as content "wholesaler[s]" in that they are typically reliant upon third-party video distributors to get their offerings to consumers in the downstream market. Tr. 612:3-4, 17-20 (Martin (Turner)).

Most programmers make money in two primary ways, and Turner is no exception. *First*, programmers receive payments from distributors, known as "affiliate fees," in exchange for granting distributors the rights to display the programmers' content. *See, e.g., id.* at 604:21-23, 610:20-23. Affiliate fees are memorialized in affiliate agreements, which specify the "net effective rate" a programmer charges for a network on a per-subscriber, per-month basis. *Id.* at 987:5-17 (Breland (Turner)). Rates typically increase year-over-year, pursuant to what are called "escalator" clauses. *Id.* at 91:6-10 (Fenwick (Cox)); *id.* at 2728:19-23 (Katz). Affiliate fees have been "going up" over the past decade industrywide, due at least in part **[**13]** to rising costs of making "higher quality" content. Tr. 2562:9-2563:25 (Carlton); *cf id.* at 1495:12-16 (Sutton (HBO)) ("So the cost it takes to make shows, shows like the shows we make, has escalated significantly."). Affiliate fees vary, however, based on the size of the distributor; specifically, in order to incentivize and reward wide distribution, programmers typically provide distributors with "volume discounts" on affiliate fees, meaning that the more subscribers a distributor has, the more a programmer's net effective rates will decline. *See, e.g., id.* at 987:25-988:13 (Breland (Turner)) (explaining variance in rates between "small," "medium," and "large" MVPDs and virtual MVPDs); *id.* at 2911:21-23 (Holanda (RCN)) (describing "volume discounts" of larger distributors); PX127-2 (showing rate differentials).

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[2] Many materials before the Court contain confidential business information or other proprietary data; such submissions were typically filed under seal with an accompanying redacted version accessible to the public. The Court has made great effort to refrain from quoting or otherwise including confidential business information in this Opinion, opting instead to refer generally to the exhibits or information filed under seal.

Second, and as any television viewer can attest, programmers sell advertising slots on their networks to advertisers. *See* Tr. 3179:23-3181:6 (Bewkes (Time Warner)). For decades, television advertising has followed the same playbook. *See id.* at 3086:9-10. During each hour of television, there are roughly eighteen minutes of advertisements. *See id.* at 609:23-610:4 (Martin (Turner)). **[**14]** Distributors sell advertisements for only two of those minutes; the programmer sells ads for the remaining sixteen minutes. *See id.* Advertising fees vary by the channel and the time of day an ad airs. *Id.* at 625:4-11. As with affiliate fees, the broader a program's audience, the more advertising revenue for Turner: as Chairman and CEO John Martin explained with regard to Turner's advertising strategy, "our goal is to have our networks in front of as many eyeballs as possible." *Id.* at 605:7-8.

The classic model of television advertising is limited in two ways. First, in deciding the placement of commercials to be seen by a wide audience, programmers generally must rely on general demographic data, such as age range, about the typical audience for a given program. *See id.* at 625:4-6. Second, and as a result, programmers have no choice but to saturate all viewers of a program with the same, undifferentiated ads — despite knowing that the selected ad will be of little interest to some number of those viewers. *See id.* at 3087:1-8 (Bewkes (Time Warner)).

In the past, Turner's total revenues have been split roughly equally between affiliate fee revenues and advertising revenues. *See id.* at **[**15]** 3088:10-12; PX456-8. For present purposes, however, the key point is this: both the affiliate fee and advertising revenue streams depend upon broad distribution of programmers' networks to consumers. *See, e.g.*, Tr. 604:17-18 (Martin (Turner)) ("I believe that distribution is **[*169]** the most important variable for success for any programmer."); *id.* at 3078:17-20 (Bewkes (Time Warner)) ("Q: What are the key drivers of the Turner business? A: Well, the Turner business, first, we need to get it on every distribution platform so that we can have subscriber fees and advertising revenues."). For that reason, Turner executives aim to "achieve wide distribution" of their networks. Post-Trial Brief of the United States ("Gov't Post-Tr. Br.") 6 [Dkt. # 126]; *see also, e.g.*, Tr. 3120:3-7 (Bewkes (Time Warner)); ("So we try everything to stay on all of our channels, Turner, HBO, everything, to keep them on there. And that's very important to us. If they're not on there, we're not only losing the subscriber fees; we're losing the advertising revenues."); *cf. id.* at 90:1-2 (Fenwick (Cox)) ("We are dealing with network groups where their goal [is] a hundred percent distribution.").

2. Distributors

Today, there **[**16]** are three categories of key players in the distribution of professionally produced video content: (1) "traditional" multichannel video programming distributors ("MVPDs"); (2) "virtual" MVPDs; and (3) subscription video on demand services ("SVODs"). *See* Tr. 485:1-487:13 (Martin (Turner)); Gov't PFOF ¶¶ 9, 14, 19.

First, there are traditional MVPDs. Those distributors include direct broadcast satellite providers, such as DISH or AT&T's DirecTV; cable television providers, such as Comcast,[3] Charter Communications ("Charter"), or Cox

[3] In 2009, Comcast announced its intent to acquire ownership of NBCUniversal ("NBCU"), a media and entertainment company that owns the NBC and Telemundo networks as well as Universal Pictures and Universal Studios. *See* Compl. ¶¶ 16-17, *United States v. Comcast Corp., 808 F. Supp. 2d 145 (D.D.C. 2011)* (No. 11-cv-106) [Dkt. # 1]. Although the Government, through the Antitrust Division, filed an action claiming that the transaction would violate *Section 7* of the Clayton Act — an action, as fortune would have it, also assigned to this Court — the Government also urged me to approve the transaction pursuant to a final judgment containing various "remedies" that it represented would "diminish[] Comcast's ability to use [NBCU's] programming to harm competition." Competitive Impact Statement 3, 7, *Comcast Corp., 808 F. Supp. 2d 145* [Dkt. # 4]. Those remedies related to procedures set forth in a related FCC order governing the transaction, including, as especially relevant here, requirements that Comcast-NBCU: 1) submit to "baseball style arbitration," at the distributor's option, in the event the parties were unable to reach a carriage agreement, 7/27/11 Hr'g Tr. 7:4-7 [Dkt. # 38], and 2) "continue to provide" video programming to the distributor "pursuant to the terms of any existing agreement until the arbitration is completed," Competitive Impact Statement Ex. A, at 24, *Comcast Corp., 808 F. Supp. 2d 145* [Dkt. # 4-1]. At a hearing to discuss the proposed final judgment, counsel for the Government asserted that, "especially in cases of vertical mergers, conduct remedies" such as the ones proposed "can be a very useful tool to address the competitive problems while preserving competition and allowing efficiencies" that "may result from the transaction." 7/27/11 Hr'g Tr. 15:16-21. Ultimately, I approved the Government's proposed final judgment with a few modifications to allow me to better monitor the implementation of the remedies imposed as part of the judgment. *See generally Comcast Corp., 808 F. Supp. 2d 145*. The transaction proceeded and today Comcast-NBCU operates as a "vertically integrated" programmer and distributor. *See* Tr. 882:14-16 (Rigdon (Comcast)).

Communications ("Cox"); "overbuilders," such as RCN; or "telcos," such as AT&T's U-verse or Verizon Fios. *See* Gov't PFOF ¶¶ 9, 43-45; Defs.' PFOF ¶ 34. All of those services offer live — or "linear" — television content as well as libraries of licensed content available for viewing on demand, typically in exchange for a monthly subscription fee. *See* Tr. 81:1-82:8 (Fenwick (Cox)); *id.* at 471:12-16, 638:16-22 (Martin (Turner)); *id.* at 1185:22-1186:1 (Warren (Turner)). Satellite distributors such as DirecTV and DISH operate nationally, whereas cable **[*170]** companies, telcos, and overbuilders distribute video content regionally; in any given local area, however, the incumbent **[**17]** cable operator is typically the dominant MVPD. *See id.* at 408:1-3 (Schlichting (DISH)). Consumers' choices of traditional MVPDs are therefore dictated by geography. *See id.* at 2187:3-23 (Shapiro); Gov't PFOF ¶¶ 43-46. Consumers often subscribe to traditional MVPDs as part of a "bundle" of various services, which may include, for example, a single price offering for cable, wireless internet, and home or mobile phone services. *See* Tr. 2784:21-25 (Rossi). Of the approximately 90 million American households that still receive television content from providers in the pay-TV industry, a substantial majority do so through traditional MVPDs. *See* Gov't PFOF ¶¶ 9, 13. That number is steadily declining, however, as consumers shift towards lower-cost virtual MVPDs or SVODs. *See* Tr. 3450:7-14 (Stephenson (AT&T)); *id.* at 3157:5-13 (Bewkes (Time Warner)).

Second, there are virtual MVPDs, which began to arrive in the marketplace in early 2015. *See id.* at 235:18-22 (Schlichting (DISH)). Like traditional MVPDs, virtual MVPDs distribute linear channels and on-demand content to subscribers for a subscription fee; unlike traditional MVPDs, virtual MVPDs offer their services over the **[**18]** internet, rather than through proprietary infrastructure such as satellite networks or cable lines. Gov't PFOF ¶¶ 14, 15. Because they offer their services over the internet, virtual MVPDs offer service nationwide, either via the web or mobile apps. *See* PX8-18. Examples of virtual MVPDs include DirecTV Now, DISH's Sling, Sony's Playstation Vue, Hulu Live, Google's YouTube TV, FuboTV, and Philo. *See id.* at 18-19; Defs.' PFOF ¶ 8. As their names suggest, some virtual MVPDs are associated with companies that operate traditional MVPDs. Each virtual MVPD competes with traditional MVPDs for subscribers and, increasingly, virtual MVPDs are gaining market share on traditional MVPDs due in part to their ease of use and lower-cost offerings. *See, e.g.*, Tr. 448:24-449:2 (Schlichting (DISH)); *id.* at 607:17-20 (Martin (Turner)); *id.* at 1829:3-12 (Merrill (AT&T)). Therefore, despite their relatively recent vintage, virtual MVPDs already have millions of subscribers. *See id.* at 2019:20-2020:18 (Bond (NBCU)).

Third, there are SVODs, a category that includes Netflix, Hulu, and Amazon Prime. SVODs generally do not offer live, linear programming such as live sporting events or live news. *See id.* at 487:1-16 (Martin **[**19]** (Turner)). Instead, they have large libraries of original and acquired content, accessible by a viewer on demand at any time. *See id.* at 486:12-17. The leading SVODs are vertically integrated and invest *billions* of dollars in creating original programming. *See id.* at 3081:13-25 (Bewkes (Time Warner)); *id.* at 3388:8-9 (Stephenson (AT&T)). By way of example, Netflix *alone* spends more on content than all of Time Warner. *See id.* at 2456:13-14 (Carlton); *see also id.* at 1053:2-7 (Breland (Turner)) (Netflix will spend "almost $8 billion" on content "[t]his year"). As with virtual MVPDs, SVODs offer low-cost subscription plans as compared to traditional MVPDs and continue to gain market share in the video programming and distribution industry. Indeed, while traditional MVPDs are losing subscribers at a steady clip, Netflix added 2 million subscribers in the last quarter alone. *See id.* at 3450:11-12 (Stephenson (AT&T)).

3. Affiliate Negotiations and "Blackouts"

As previously discussed, the schemes under which programmers extend licensing rights to MVPDs and virtual MVPDs are governed by detailed contracts known as affiliate agreements. *See* PX456-8; Tr. 80:4-9 (Fenwick (Cox)); *id.* at 485:1-486:6 **[**20]** (Martin (Turner)). Those agreements describe **[*171]** the precise rights granted by the programmer, and contain numerous terms and conditions. *See, e.g.*, PX409. Although the "rate" or payment amount is an important feature of any affiliate agreement, Tr. 90:5-10 (Fenwick (Cox)), "these deals are complicated" and "start with a hundred plus open issues," *id.* at 459:24-25. (Schlichting (DISH)); *see also id.* at 1690:23-25 (York (AT&T)) ("There's literally hundreds of items that go on kind of a priority list on what's the right deal."). Those issues can include digital rights, "windows" (*i.e.*, limitations on when certain content can be aired), "TV Everywhere" rights (*i.e.*, the rights for subscribers to access content away from home on an authorized device), volume discounts, and penetration rate requirements, among others. *See, e.g., id.* at 90:5-14, 101:19-23 (Fenwick (Cox)); Gov't PFOF ¶¶ 11, 105; PX409-14. At least in the case of Turner, affiliate agreements also include most-favored-nation ("MFN") clauses, which generally require the programmer to extend to the distributor certain types of terms given to another distributor. *See* Tr. 1024:6-14 (Breland (Turner)) (describing MFNs). Affiliate agreements **[**21]** run "between five and eight years on average." *Id.* at 87:9-11 (Fenwick (Cox)).

Because wide distribution maximizes programmers' two income streams — affiliate fees and advertising revenue — programmers like Turner bargain for terms aimed at promoting that distribution. To start, Turner seeks to license "every network" it owns. *Id.* at 606:6-8 (Martin (Turner)).[4] In addition, Turner negotiates for guarantees of particular "penetration rates" — the percentage of a given distributor's subscribers who receive a given channel. *Id.* at 1023:10-16 (Breland (Turner)).

Given the duration of the contract and the rights at issue, a single affiliate agreement can dictate the transfer of upwards of a billion dollars between programmer and distributor. *See, e.g.*, PX144-21, 48. It is thus no surprise that witnesses described affiliate agreement negotiations as "very tough" and "intense and aggressive." Tr. 1022:25-1023:2 (Breland (Turner)); *id.* at 3251:24-25 (Stankey (AT&T)); *see also* Gov't PFOF ¶ 104. Although the negotiations themselves typically last several months, closing a deal often "come[s] down to the last day and sometimes the last handful of minutes." Tr. 1093:14-16 **[**22]** (Breland (Turner)); *see also id.* at 87:14-19 (Fenwick (Cox)). Negotiations involving programmers with multiple networks, such as Turner, are particularly "time consuming." *Id.* at 87:17 (Fenwick (Cox)).

Affiliate negotiations are also idiosyncratic, varying from programmer to programmer and distributor to distributor. The Government's chief economic expert, Professor Carl Shapiro, recognized as much at trial. Noting that "bargaining is a dark art in many ways," Professor Shapiro acknowledged that negotiations may turn on myriad "unpredictable factors," including the "personalities" at the table and other "hairy stuff." *Id.* at 2213:12, 2294:18-2295:6 (Shapiro). This dynamic flows from the "multitude" of considerations that inform each negotiation. *Id.* at 1690:15 (York (AT&T)). With so many factors and priorities, and with such high stakes, it should be no surprise that terms and conditions vary across affiliate agreements. **[*172]** *See, e.g., id.* at 1681:16-17 ("[W]e do hundreds of deals, and we have hundreds of flavors of most favored nations."). In short, as Professor Shapiro explained, "the real world is messy and it's imperfect." *Id.* at 2210:22-23 (Shapiro).

Sometimes, negotiations between **[**23]** programmers and distributors reach an impasse. If a negotiation is ultimately unsuccessful, the distributor will lose the rights to display the programmer's content to its customers — a situation known in the industry as a programming "blackout," or "going dark." *See id.* at 129:4-9 (Fenwick (Cox)). Blackouts have negative consequences for programmers and distributors alike. On the programming side, a blackout causes a programmer to suffer immediate (and unrecoverable) losses of both advertising and affiliate fee revenue. *See, e.g., id.* at 1094:21-1096:18 (Breland (Turner)). On the distributor side, a blackout may lead a distributor to lose subscribers or may prevent the distributor from attracting new subscribers. *See* Gov't PFOF ¶ 119; *see also, e.g., id.* at 864:12-23 (Rigdon (Comcast)); *id.* at 1348:3-7 (Montemagno (Charter)) (discussing PX373). Because blackouts are almost always negative events for both programmers and distributors, "at the end of the day . . . [t]here's no benefit for anyone to walk away" without an affiliate agreement. Tr. 89:23-90:4 (Fenwick (Cox)). Therefore, bargains between programmers and distributors are almost always struck in order to avoid long-term blackouts. **[**24]** *See id.* at 138:13-15; *id.* at 1027:4-7 (Breland (Turner)); *id.* at 1359:14-15 (Montemagno (Charter)); *id.* at 3124:4-7 (Bewkes (Time Warner)).

That is not to say, however, that blackouts are irrelevant to the negotiating dynamic. Rather, in what can best be thought of as an elaborate and stylized Kabuki dance, the evidence shows that "almost every negotiation" involves both programmers and distributors threatening blackouts, especially when one side is seen as demanding terms that are out of line with the market. *Id.* at 1026:17-20 (Breland (Turner)); *cf. id.* at 376:22-377:11 (Schlichting (DISH)). To better understand how to assign the "right value" to a particular deal, programmers and distributors

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[4] That said, in the case of DISH's virtual MVPD, Sling, Turner did license only its "core" networks — CNN, TBS, TNT, and Cartoon Network. *See* Tr. 236:23-24 (Schlichting (DISH)). As Time Warner CEO Jeff Bewkes testified, because 85 to 90% of Turner's revenue comes from four networks, Turner is well situated to offer skinnier bundles. *See id.* at 3126:22-3127:3 (Bewkes (Time Warner)); *see also id.* at 584:18-24 (Martin (Turner)) (same). By contrast, NBCU's revenues are spread more evenly across its more than one-dozen networks. *See id.* at 3127:6 (Bewkes (Time Warner)).

might perform "drop" or "go dark" analyses to estimate the potential impact of a blackout on the programmer's advertising or affiliate fee revenues or on the distributor's customer base. *Id.* at 1343:11-16 (Montemagno (Charter)); *see also id.* at 1348:3-10 (discussing PX373); *id.* at 862:19-863:3 (Rigdon (Comcast)); *id.* at 1029:10-1030:11 (Breland (Turner)) (discussing PX144).

Nevertheless, given the negative consequences for both sides from a blackout, "the reality" is that "virtually every" bargaining **[**25]** impasse between a programmer and distributor "is resolved after requiring either no blackout or a short-term blackout." *Id.* at 2396:1-5 (Shapiro). Indeed, in recent memory, Turner networks have been blacked out only twice, both for roughly one-month periods. *See id.* at 2357:15-23; Defs.' PFOF ¶¶ 139-143. Permanent blackouts, the evidence shows, are a vanishingly rare occurrence; the record indicates that Turner has *never* engaged in a long-term blackout with a distributor. *See* Tr. 2394:8-11 (Shapiro) (acknowledging that "in the real world there has never been a permanent blackout of the Turner networks").

B. Industry Trends

In recent years, traditional programmers, including Turner, and MVPDs, including DirecTV, have been faced with a number of interrelated industry trends that are particularly relevant to the challenged merger. I will review three of those trends in turn.

[*173] 1. Rise and Innovation of Over-the-Top, Vertically Integrated Video Content Services

Traditional programmers and distributors are experiencing increased competition from innovative, over-the-top content services, including virtual MVPDs and SVODs. *See infra* p. 24 n.5. Those web-based companies are harnessing the power of the internet **[**26]** and data to provide lower-cost, better-tailored programming content directly to consumers. The dramatic growth of the leading SVODs in particular, including Netflix, Hulu, and Amazon Prime, can be traced in part to the value conferred by vertical integration — that is, to having content creation and aggregation as well as content distribution under the same roof. *See, e.g.*, Tr. 3080:8-3085:21 (Bewkes (Time Warner)).

As relevant to the video programming and distribution market, vertical integration provides two notable advantages to content services. First, vertical integration reduces the "bargaining friction" inherent in the arm's-length affiliate negotiations that govern the exchange of rights between traditional programmers and distributors. *See, e.g., id.* at 3104:18-3107:13; *id.* at 1684:25-1685:13 (York (AT&T)). As numerous witnesses discussed, bargaining friction refers to the difficulty inherent in assigning value to and negotiating over new, innovative content rights, like "TV Everywhere," download rights, and "4K" high resolution. *See id.* at 1685:22-1686:7, 1688:6-13 (York (AT&T)); *id.* at 3104:18-25 (Bewkes (Time Warner)); *id.* at 3222:4-3223:2 (Stankey (AT&T)). AT&T executive **[**27]** Daniel York testified, for example, that DirecTV has attempted, with limited success (and considerable delay), to obtain such rights from programmers through arm's length-negotiations. *See id.* at 1685:24-1686:22 (York (AT&T)). RCN CEO Jim Holanda joined York in discussing the way in which bargaining friction hindered RCN's negotiations over TV Everywhere rights. *See id.* at 2968:25-2971:14 (Holanda (RCN)). Further, DirecTV Now's affiliate agreements require it to restrict the number of viewers who can stream or access programs simultaneously on its platform. *See id.* at 1687:10-14 (York (AT&T)). And when DirecTV floated the concept of "DirecTV mobile" — a pay-TV subscription exclusively for mobile devices — that was "dead on arrival." *Id.* at 1687:15-25. By contrast, with control over the creation and use of large amounts of original content, SVODs have driven much of the recent innovation in the video programming and distribution industry. *See id.* at 1685:7-13; *id.* at 639:1-8 (Martin (Turner)). These companies have, for example, developed download rights, allowing users to view their content anywhere without wireless access. *See id.* at 1688:16-18 (York (AT&T)).

Second, and relatedly, **[**28]** SVODs' ability to distribute their content directly to consumers over the internet gives them superior access to customer data. SVODs are able to use that customer data to inform their strategy and improve the customer's experience in a number of ways. *See id.* at 3081:21-25 (Bewkes (Time Warner)); *see also id.* at 3388:6-3389:8 (Stephenson (AT&T)). SVODs can use data about viewing habits to determine what programs are popular, and create more of that type of content. *See id.* at 2452:21-2453:3 (Carlton); *id.* at 3245:16-20 (Stankey (AT&T)). In addition, data informs marketing decisions, and allows SVODs to recommend content to users based on their revealed preferences, *i.e.*, the shows they have watched in the past. *See id.* at 3080:19-3081:12 (Bewkes (Time Warner)). Even more, data can inform scheduling choices, and enhance efforts at recapturing consumers who disconnect. *See id.* at 3245:16-20 (Stankey (AT&T)); *id.* at 3081:4-12 (Bewkes (Time Warner)). Finally, **[*174]** and as discussed in more detail below, to the extent SVODs incorporate advertising into their platforms, data allows those ads to be more targeted and thus more lucrative.

2. <u>Declining MVPD Subscriptions Resulting from an Increasingly</u> **[**29]** <u>Competitive Industry Landscape</u>

At trial, witness after witness acknowledged that MVPD subscriptions are on the decline. *See, e.g., id.* at 633:5-15 (Martin (Turner)); *id.* at 891:18-22 (Rigdon (Comcast)); 2229:21-22 (Shapiro); 3369:13-16 (Stankey (AT&T)); *id.* at 3450:15-3451:1 (Stephenson (AT&T)); *see also* PX63-36. Those declines "started faster" than many in the industry anticipated. Tr. 3369:13-16 (Stankey (AT&T)) (discussing the "inflection change" where the "decline of the traditional pay-TV bundle started faster than [AT&T] assumed"). To illustrate, in 2016 AT&T's traditional MVPDs lost 133,000 customers; last year, DirecTV *alone* lost 1.2 million subscribers. *See id.* at 3004:6-8 (Christopher (AT&T)); *id.* at 3450:7-9 (Stephenson (AT&T)).

The decline in traditional MVPD subscriptions is just one symptom of the increasingly competitive nature of the video programming and distribution industry. Indeed, several witnesses testified that competition in the industry is more intense today than ever before. *See, e.g., id.* at 1398:24-25 (Montemagno (Charter)) (video distribution business is "more competitive now than I've ever experienced in my career"); *id.* at 2134:1-3 (Sejen (Cable ONE)) ("Q: **[**30]** In your 31 years in the industry, have you ever seen it more competitive at the distribution level? A: No."); *id.* at 2950:2-6 (Holanda (RCN)) ("Q: And so in the course of this 30 years that you have been in the business, the video distribution market today is more competitive than at any point that you can recall, true? A: True."); *id.* at 3213:9 (Stankey (AT&T)) (competition in industry is "at an all-time high"); *id.* at 2476:1-9 (Carlton) ("new entrants" in market such as "Netflix" are "making the market more competitive").

More specifically, the decline of traditional MVPD subscriptions reflects the growing popularity of virtual MVPDs and SVODs. *See, e.g.*, PX153-3. On that score, two rising trends are worth noting: cord-cutting and cord-shaving. A household "cuts the cord" when it discontinues MVPD services altogether, whether traditional or virtual MVPDs. *See id.* at 605:23-606:4 (Martin (Turner)); *id.* at 2505:10-20 (Carlton). As Professor Carlton relayed, SNL Kagan estimates that roughly twenty percent of American households have cut the cord, discontinuing traditional MVPD services. *Id.* at 2505:12-20. This number, high as it is, continues to grow. *See id.* at 2466:4-10; *see also id.* ***[**31]*** at 891:18-22 (Rigdon (Comcast)); *cf. id.* at 2948:20-2949:3 (Holanda (RCN)). That said, those households have not exited the entertainment field altogether. *See id.* at 3450:2-6, 12-14 (Stephenson (AT&T)). Instead, many have gravitated to vertically integrated SVODs. *See* PX153-3; *see also* Tr. 3449:12-24, 3450:7-12 (Stephenson (AT&T)). Consumers, particularly young people, find SVODs attractive, with their improved user interfaces, premium content, and lower price points. *See, e.g.*, Tr. 639:1-8 (Martin (Turner)); *id.* at 3449:12-18 (Stankey (AT&T)). On a similar note, a household "shaves the cord" when it departs a traditional MVPD for one of the many virtual MVPDs, which, again, typically carry smaller bundles of networks at lower price points. Gov't PFOF ¶¶ 16; Defs.' PFOF ¶ 21. Many other consumers have shaved the cord, reducing, but not eliminating, their consumption of MVPD services. *See, e.g.*, Tr. 606:2-4 (Martin (Turner)). Consumers intent on shaving the cord have an increasing array of virtual MVPD services from which to choose — services that operate nationwide over the **[*175]** internet. *See id.* at 2949:15-18 (Holanda (RCN)). Consumers may choose to subscribe to a less expensive, "skinny **[**32]** bundle," *i.e.*, one with fewer networks, and then supplement that bundle with subscriptions to SVODs like Netflix and Hulu. *Cf id.* at 2984:13-20 (SEALED); *id.* at 3506:24-3507:2 (Stephenson (AT&T)).

Of course, when a household departs a traditional MVPD, whether for an SVOD or a virtual MVPD, that subscriber loss affects the traditional MVPD in the form of lost margins on subscription fees. *See, e.g.*, PX456-56; Tr. 3450:7-14 (Stephenson (AT&T)); *id.* at 2219:13-21 (Shapiro). Such losses may also affect programmers in the form of declining affiliate fee revenues as well as stagnating or declining viewership. *See, e.g., id.* at 3088:22-3089:1 (Bewkes (Time Warner)) (SVODs and other new competitors are "bleeding away our viewers"); PX153-3. Turner, for example, projects that its domestic subscription revenue growth will decrease to low single digits in each year from 2018 to 2022. *See* Tr. 647:3-11 (Martin (Turner)) (discussing Defendants' Exhibit ("DX") 781-21). Increased competition from SVODs also means that more original, high-quality programming is being produced — a trend that increases the costs of securing the talent and rights necessary to make such programming. *See id.* at 1494:15-21, **[**33]** 1495:12-16 (Sutton (HBO)) ("There was a time when very few people were making the kind of shows we make. Now, it seems that almost every week, there's an announcement of somebody else making it. . . . [A]s I've mentioned, Netflix; Hulu makes shows and so does Prime Video. . . . So the cost it takes to make shows, shows like the shows we make, has escalated significantly" because "more people are bidding for the talent involved."); PX153-6; *cf.* Tr. 633:16-18 (Martin (Turner)) ("[T]he number of professionally produced television shows in the United States has doubled in the last five years alone.").[5]

It is therefore no surprise that programmers and distributors alike have noted the competitive threat posed by SVODs. After all, as Nobel laureate Bob Dylan correctly observed: "You don't need a weatherman to know which way the wind blows." *Subterranean Homesick Blues*. At trial, numerous witnesses from defendants testified that SVODs present a broad-range of competitive challenges. *See, e.g.*, Tr. 3088:22-3089:25 (Bewkes (Time Warner)) (over-the-top companies are "bleeding away our viewers, because they're offering competitive video that has these advantages, because they know **[**34]** what to put in front of you individually, and we don't"); *id.* at 3213:3-9, 3214:8-10 (Stankey (AT&T)) ("The time-and-attention competition now from the likes of Facebook, from the likes of Google, from the likes of Netflix . . . . I started asking myself, what should the business do to respond to the changing environment that we've heard about in this courtroom, the dawn of these new services coming from the likes [of] Netflix and Google?"). Third-party witnesses from AT&T's competitor distributors also testified to the role of SVODs in the increasingly competitive industry landscape. *See id.* at **[*176]** 860:24-861:9 (Rigdon (Comcast)) ("[A]n SVOD service like in Netflix provides a wide array of entertainment choices. So people have limited time in the day. So where they're going to spend their time for entertainment in that respect Netflix competes with traditional TV providers."); *id.* at 1395:12-21 (Montemagno (Charter)) (Charter's competitors include "the Googles and the Amazons and the Netflix"); *see also* DX921-35 (DISH "face[s] significant competition" from other companies, including, among others, "Netflix, Hulu, Apple, Amazon, Alphabet . . . .").[6]

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[5] Although the Government asserts that "consumers of Multichannel Video Distribution are largely insensitive to price changes" as reflected by their continued payment of increased subscription costs, Gov't PFOF ¶ 35, at trial there was near-uniform testimony that "consumers are up to here with subscription prices" and that "it's getting harder and harder" for distributors to pass their increased costs along, Tr. 3089:6-11 (Bewkes (Time Warner)); *id.* at 3446:1-4 (Stephenson (AT&T)). That consumers are at a "gag point" when it comes to traditional MVPD subscription costs is further illustrated by the continued *decline* in subscriptions nationally. *Id.* at 140:13-15 (Fenwick (Cox)); *id.* at 3450:7-9 (Stephenson (AT&T)).

[6] In the face of all that, the Government continues to insist that SVODs are merely "complement[s]" or "adjunct[s]" to traditional MVPDs, rather than competitors of traditional MVPDs; a few of the Government's third-party competitor witnesses testified to the same. Gov't PFOF ¶ 36. I agree with defendants that the Government's arguments (and the corresponding witness testimony) on that score defy reality, as demonstrated by the evidence adduced at trial. The evidence clearly showed that the leading SVODs — as vertically-integrated entities that produce and distribute their own award-winning content - fiercely compete *both* with programmers such as Turner and HBO *and* with traditional MVPDs and virtual MVPDs. Indeed, industry data reflects that large percentages of MVPD customers have chosen to "cut the cord" and receive content exclusively from SVODs. *See supra* pp. 22-24.

To be sure, the Government contends that, notwithstanding the increasing prevalence of SVODs, "[e]ven programmers believe MVPDs are likely to remain highly profitable in the future." Gov't PFOF ¶ 13. That proposition rests on a document from May 2016. *Id.* (citing PX78). As the Court learned at trial, however, the industry has undergone significant changes since mid-2016, diminishing the persuasiveness of that statement and others like it. To take just one example, video programming margins are declining, a fact that presents an obvious threat to future MVPD profitability. Tr. 3853:18-19 (Shapiro) ("I think it is not disputed that the video margins are going down."). And while the Court accepts that traditional MVPDs continue to have a substantial subscriber base, and indeed may currently constitute a distinct submarket, *see infra* pp. 61-66, it is inescapable that SVODs have played a large role in causing the demand for and continued purchase of traditional MVPD subscriptions to "declin[e] at a rapid pace." Tr. 3450:7-3451:1 (Stephenson (AT&T)). To ignore those industry trends — trends that are transforming how consumers view video content and blurring the lines between programming, distribution, and web-based competitors - would be to ignore the Supreme Court's direction to examine this case with an eye toward the "structure, history, and probable future" of

3. Shift Toward Targeted, **[**35]** Digital Advertising

Finally, and again as a result of the rising influence of innovative, web-based competitors, the advertising landscape has shifted away from reliance on television advertising offered by programmers to highly-targeted digital advertising. *See* Tr. 3088:3-6 (Bewkes (Time Warner)) (noting that advertisers are shifting their "ad budgets, which are finite, to the digital platforms at Google and Facebook" and "away from television advertising in general"); PX456-56 ("The advantages of digital advertising . . . have resulted in advertisers shifting more of their advertising budgets from traditional television advertising to digital advertising."). The share of U.S. spending on digital advertising exceeded spending on television advertising in 2016. *See* DX746A-2; Tr. 3092:15-19 (Bewkes (Time Warner)). Digital advertising revenue is expected to further eclipse television advertising revenue in the coming years. *See* Tr. 3092:22-3093:1 (Bewkes (Time Warner)).

Why the rush from television ads to digital ones? Simply put, digital ads are more efficient. Through their access to and use of consumer data, Google and Facebook **[*177]** are better able to discern the purchasing preferences and **[**36]** interests of individuals viewing particular online content. *See id.* at 623:2-13 (Martin (Turner)); *id.* at 3087:16-3088:2 (Bewkes (Time Warner)); *id.* at 3243:5-10 (Stankey (AT&T)). They can use that information to infer what types of ads would most interest those users. *See id.* at 3087:16-3088:2 (Bewkes (Time Warner)). And they can tailor digital advertisements to those users based on those preferences. *See id.* at 623:8-13 (Martin (Turner)). Best of all from an advertiser's perspective, Google, Facebook, and other entities engaged in digital advertising have confirmatory data that demonstrates whether particular ads were effective. *See id.* at 623:14-22.

Although traditional programmers like Turner maintain "massive inventories of advertising," they lack the type of fine-grained data necessary to generate targeted ads. *Id.* at 3392:10-13 (Stephenson (AT&T)). Under the "spray and pray" approach, programmers instead sell ads based on "broad demographic data" about the viewers of a particular program. *Id.* at 3760:20-24 (Athey). As a result, consumers regularly see ads for things that do not interest them, and advertisers pay to show ads that they know will be ineffective in motivating many **[**37]** in the audience. *See id.* at 3087:1-8 (Bewkes (Time Warner)). As Turner CEO John Martin put it, "there's been a long saying in the advertising industry where the advertiser would always say, I know I'm wasting half of my money, I just don't know which half." *Id.* at 685:20-23 (Martin (Turner)).

The shift toward digital advertising has been extremely profitable for the tech giants — Google and Facebook, in particular. Indeed, those two entities account for roughly 60% of U.S. digital advertising. *See id.* at 3746:16-22 (Athey). And they are growing at a rapid pace: Google's advertising revenue has "almost tripl[ed]" between 2012 and 2017, while Facebook's advertising revenue went from $4 to $40 billion in the same period. *Id.* at 3097:2-11 (Bewkes (Time Warner)) (discussing DXD122).

By contrast, the rise of digital advertising has been costly to Turner and other programmers that rely on television advertising as a major source of revenue. *See id.* at 3088:3-21; *cf.* PX456-25. In 2017, for example, Turner's advertising revenue *declined* by 2% relative to the previous year. *See* Defs.' PFOF ¶ 31 (citing PX456-65); Tr. 3097:14-20 (Bewkes (Time Warner)). In light of the dual-revenue-stream business **[**38]** model of programmers, witnesses testified that declines in television advertising revenue will produce a predictable result: it will place more pressure on affiliate fees, meaning that programmers will increase the fees charged for their content. *See, e.g.*, Tr. 3088:16-21 (Bewkes (Time Warner)). For that reason, Jeff Bewkes, CEO of Time Warner, explained that the explosion of digital advertising is "actually bad for" video distribution consumers, "because it means that the financial support for all this programming on all these different channels gets pushed over toward subscription prices. And that's a problem, because we think consumers are up to here with subscription prices." *Id.* at 3089:6-11.

II. The Parties and Proposed Merger

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this fast-changing industry. *United States v. Gen. Dynamics Corp., 415 U.S. 486, 498, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974)* (internal quotation marks omitted). I, of course, cannot do that !

A. AT&T

AT&T is a "leading provider of communications and digital entertainment services in the United States and the world." PX455-7. As a distribution company, AT&T is in what its Chairman and CEO Randall Stephenson calls "the connectivity business." Tr. 3378:23-24 (Stephenson (AT&T)). Although originally known for its "voice telephone" service, AT&T also provides wireless service, broadband service, **[*178]** and pay-TV service to consumers. *See id.* at 3377:23-25, **[**39]** 3379:12-15. AT&T, however, does not create any significant television or movie content. *See id.* at 3245:24-25 (Stankey (AT&T)).

AT&T has two traditional MVPD products: DirecTV and U-verse. Defs.' PFOF ¶ 34. DirecTV, acquired by AT&T in 2015, is a "satellite-based MVPD service that operates by transmitting programming from satellites to rooftop dishes installed at the customers' homes." *Id.*; *see* Tr. 3206:21-22, 3207:21-23 (Stankey (AT&T)); PX455-11 to 12. U-verse, by contrast, is a "telco" MVPD service that operates "[o]ver the same line that [] deliver[s] your telephone service." *Id.* at 3384:1-2 (Stephenson (AT&T)); Defs.' PFOF ¶ 34. Between DirecTV and U-verse, AT&T has approximately 25 million video distribution subscribers today, making it the largest provider of traditional MVPD services. *See* PX455-11; Tr. 3384:13-14 (Stephenson (AT&T)).

Despite that substantial traditional MVPD subscriber base, AT&T witnesses testified that they believe the company's future lies in the use of online and mobile wireless connections to access premium video. As John Stankey, the AT&T executive who will be tasked with running Time Warner should the merger proceed, explained, AT&T acquired DirecTV in **[**40]** 2015 not in an effort to double down on the satellite business — a concededly mature and indeed declining asset — but to "pick up a lot of new customers that we could work on migrating" to new, innovative products necessary to compete in the future. Tr. 3207:18-3208:2, 3209:4-7 (Stankey (AT&T)). In late 2016, AT&T launched one such product, DirecTV Now. *See, e.g., id.* at 1824:23-24 (Merrill). DirecTV Now is a virtual MVPD and, as such, carries fewer channels than DirecTV or other traditional MVPDs; is offered at a lower price-point; and is delivered over the internet. *See id.* at 1825:1-3; *id.* at 3385:5-3386:10 (Stephenson (AT&T)). Today, and in large part due to significant promotional efforts and high-level support for the product's launch, DirecTV Now has grown to more than one million subscribers. *See id.* at 3386:2-3 (Stephenson (AT&T)); *id.* at 1825:12-1826:8, 1827:18-1828:2 (Merrill (AT&T)).

AT&T Chairman and CEO Randall Stephenson testified that DirecTV Now plays to AT&T's strong suit, namely its 100-million plus wireless subscriber base. *See id.* at 3379:19-20, 3385:9-14 (Stephenson (AT&T)). With customers increasingly turning to cell phone and mobile devices to access video content, **[**41]** fully "[h]alf of the volume on [AT&T's] network is video." *Id.* at 3382:5-6. Stankey noted that AT&T welcomes this trend, as it results in users purchasing larger data plans and acquiring more devices. *See id.* at 3254:15-22 (Stankey (AT&T)). AT&T's next major initiative, fifth generation or "5G" wireless, is calculated to increase video consumption even more. *See id.* at 3383:3-14 (Stephenson (AT&T)). As Stephenson explained to the Court, "[w]hat we're all working towards is creating [$]35 and $15 bundles. And that's where the world is moving . . . *Id.* at 3506:23-25. To that end, Stephenson continued, AT&T has plans to launch a new product called AT&T Watch, through which customers will be able to receive "real skinny bundle[s]" of programming for $15 per month or, in the case of "AT&T wireless unlimited customer[s,] . . . for free." *Id.* at 3434:12-3435:4.

B. Time Warner

Time Warner, by contrast, is in the entertainment business. It has three distinct units: Warner Bros., Turner, and HBO. *See* PX459-18 (Turner), -22 (HBO), -24 (Warner Bros.). Turner operates, among other things, ten linear cable networks **[*179]** that televise scheduled video programming around the clock. *See id.* at 18; Defs.' PFOF ¶ 7.[7] **[**42]** HBO is a premium, subscription-based video service that offers movie and television shows, including a

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[7] Those networks are TNT, TBS, CNN, CNN Español, CNN International, Cartoon Network/Adult Swim, TruTV, TCM, Boomerang, and HLN. *See* Defs.' PFOF ¶ 7.

significant amount of original content. *See* PX459-22. Unlike Turner, which collects both programming fees and advertising revenue, HBO relies solely on subscription payments to operate. *See id.* at 23; PX456-67; *compare* Tr. 604:21-23 (Martin (Turner)), *with id.* at 1450:12-17, 1493:15-17 (Sutton (HBO)). Warner Bros. operates a studio that creates movies, television programs, and other kinds of video content that are licensed both to Time Warner's other businesses and to third parties. *See* PX459-24.

The Government's claims in this case implicate Turner and HBO. Those business units are therefore discussed in more detail below.

1. Turner Networks

The Turner networks are central to the Government's primary theory of harm, and thus warrant the greatest attention here. Turner's business model is simple: distribute its content as broadly as possible in order to maximize the dual income streams of affiliate fees and advertising revenue. *See* Tr. 3078:17-20 (Bewkes (Time Warner)). Historically, Turner has relied on unaffiliated third parties to distribute its content to consumers. *See id.* at 485:1-18, 612:3-4 (Martin (Turner)). Those include traditional MVPDs, such as cable companies and satellite companies. *See id.* at 485:1-18. In recent years, Turner has distributed its content to consumers through virtual MVPDs as well. *See id.* at 485:19-486:6; Gov't Post-Tr. Br. 6.

Industry participants view Turner content as popular and valuable, primarily for Turner's broadcast rights to live sports and for CNN's live news. **[**43]** *See, e.g.*, Tr. 2112:24-2113:12 (Sejen (Cable ONE)) (agreeing that "sports programming" is "[t]he only thing that was unique" to TBS and TNT); *id.* at 245:7-23 (describing TBS and TNT's "important sports" and CNN's "news"). CNN is the second-rated news network, and a top-seven ranked network by viewership. PX8-35; Tr. 717:5-8 (Hinson (Cox)). In the sports domain, Turner has long-term contract rights to show portions of NCAA March Madness, the NBA Playoffs, and certain games of the Major League Baseball Playoffs. *See* PX8-35; Tr. 533:3-12 (Martin (Turner)); *see generally* Gov't PFOF ¶¶ 82-86, 88 (reviewing Turner's sports rights). TBS and TNT are "by far and away" the two most popular Turner networks due to their sports content. Tr. 471:17-20 (Martin (Turner)). Not surprisingly perhaps, TBS and TNT rank in the top ten most profitable cable networks. *Id.* at 471:21-24; *see also* Gov't PFOF ¶¶ 25, 27.

Reflecting that popularity, Turner enjoyed rate increases from every major MVPD in the last five years. *See* Tr. 998:20-22 (Breland (Turner)); *see also* Gov't PFOF ¶ 97. Turner executives testified that those rate hikes were due in part to a multi-year plan to "catch up" to competitors' price increases **[**44]** after years of below-market increases. Tr. 644:1-18 (Martin (Turner)). As such, Turner projects that its rate increases will slow to the low single digits from 2018 to 2022. *See id.* at 647:3-11 (discussing DX781). That slowing rate-increase trend is consistent with Turner's declining viewership numbers. *See id.* at 2458:5-8, 22-24 (Carlton); *see also* PX153-3 to -4; PX456-22. Turner networks account for only 8% of pay-TV viewership, down from 10% in 2011. *See* Tr. 2458:22-24 (Carlton) (discussing DXD109). **[*180]** When internet-based distribution is added to the mix, Turner's share shrinks to 6% of viewership for 2017. *See id.* at 2458:13-15.

The growth in digital advertising has also posed a particular challenge for Turner. Today, "advanced advertising" makes up less than 5% of Turner's ad revenue — and it shows. *Id.* at 680:4-7 (Martin (Turner)). Turner's ad revenues have flatlined. *See* PX456-65. This is because, as a "stuck in the middle wholesaler," Turner for the most part lacks customer relationships, which supply critical data concerning consumer preferences — data that can be used to tailor advertisements to the end user. *See* Tr. 641:13-25 (Martin (Turner)); *id.* at 3087:16-3088:2 (Bewkes **[**45]** (Time Warner)). Without such data, Turner cannot tailor ads to particular consumers, making its ads less valuable than those carried on Google or Facebook. *See id.* at 623:5-16 (Martin (Turner)); *cf. id.* at 3771:12-23 (Athey).

At trial, the Court learned that Turner has attempted workarounds to improve its data and sharpen its advertisements. Turner has tried, for example, to purchase data from third parties, but that data was not sufficiently granular. *See, e.g., id.* at 3100:2-4 (Bewkes (Time Warner)). Time Warner also considered buying technology companies, but concluded that the companies' data was insufficient, and came without any guarantee of long-term access. *See id.* 3102:9-3103:6. Finally, Turner has attempted to obtain rights to customer information through affiliate negotiations. *See id.* at 3100:16-22; *cf. id.* at 92:19-24 (Fenwick (Cox)). The record reflects, however, that such efforts generally have been unsuccessful due to the bargaining friction of hotly contested affiliate negotiations and the fact that distributors consider their customer data proprietary. *Id.* at 955:10-18 (SEALED); *cf. id.* at 1022:2-20 (Breland (Turner)); Defs.' PFOF ¶ 16.[8]

In an effort to break **[**46]** out of its "trapped wholesaler" role, Turner has made recent efforts to launch its own direct-to-consumer content offerings. The most notable of those offerings are Film Struck, Boomerang, and Bleacher Report Live. *See* Tr. 588:8-16, 666:10-12 (Martin (Turner)). FilmStruck, which allows viewers to access classic movies as well as independent films, has approximately 100,000 subscribers; Boomerang, which offers a library of children's content and cartoons, has around 150,000 subscribers. Defs.' PFOF ¶ 15. Those figures are of course microscopic in comparison to Netflix's 125 million subscribers and Amazon's 100 million Prime subscribers with access to video content. *See* Tr. at 3099:6-12 (Bewkes (Time Warner)); *id.* at 3389:22-25 (Stephenson (AT&T)).[9]

2. HBO

HBO has a different business model than Turner. As a premium network, HBO offers high-quality programming that is supported by subscriber fees rather than advertising. Tr. 1450:12-17 (Sutton (HBO)); *see also* PX456-67. Indeed, HBO has no advertising inventory at all. *Id.* In addition, and unlike the Turner networks, which appear in base cable or satellite **[*181]** packages, HBO is typically an "add-on." *Id.* at 3073:14-15 (Bewkes (Time Warner)); **[**47]** *see id.* at 1451:16-18 (Sutton (HBO)).[10] HBO offers popular movies and television shows, including a significant amount of original content. *See* PX459-22.

Without advertising, HBO's business model is even more reliant on broad distribution: "the more, the better," according to Time Warner CEO Jeff Bewkes. Tr. 3070:3-8 (Bewkes (Time Warner)). HBO content reaches consumers in four ways: (i) through MVPDs; (ii) through virtual MVPDs; (iii) through SVODs; and (iv) through HBO's proprietary over-the-top product, HBO Now. *Id.* at 1494:1-8, 1451:13-23 (Sutton (HBO)). In each case, the end-customer accesses HBO by way of a distributor — even for HBO Now, which is sold by digital distributors like Apple and Amazon. *See id.* at 1491:6-11. As with Turner, the fact that HBO relies on third parties to distribute its programming means that Time Warner lacks critical data about the preferences and viewing habits of HBO's subscribers. *See id.* at 3084:14-24, 3098:13-16 (Bewkes (Time Warner)).

HBO faces an array of competitors in the field of premium content creation and programming. There are premium television networks, like Showtime, Starz, and Epix, and online offerings, such as Netflix, **[**48]** Amazon Prime, and Hulu. *See id.* at 1492:20-23 (Sutton (HBO)). What's more, Disney has launched, and Apple appears poised to launch, a premium, direct-to-consumer service. *See id.* at 1492:22-24; *id.* at 1396:21-25 (Montemagno (Charter)). All of those rivals feature high-quality, premium content, and thus compete directly with HBO. *See, e.g., id.* at 1494:16-23 (Sutton (HBO)). Indeed, Netflix's programming budget alone is more than twice the size of HBO's. *Id.* at 3099:13-15 (Bewkes (Time Warner)).

In this highly competitive environment, and lacking direct relationships with its viewers, HBO "[a]bsolutely" depends on MVPD promotions to maximize its distribution. *Id.* at 1496:16-17 (Sutton (HBO)); *cf. id.* at 1528:25-1529:4 (Patel

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[8] Turner has been able to negotiate for the rights to *limited* data from Hulu's and YouTube's virtual MVPDs. *See* Gov't PFOF ¶ 336. As relevant here, however, that data relates only to the viewing patterns of those who view Time Warner content. That is a limited picture, as such data does not allow Turner to discern what its viewers are watching on competing channels, which could help develop a fuller picture of viewer preferences. Tr. 3101:13-22 (Bewkes (Time Warner)).

[9] Turner's Lilliputian direct-to-consumer subscriber numbers, on their face, discredit the Government's assertion that "Turner is also not the 'trapped wholesaler' it claims to be." Gov't PFOF ¶ 30.

[10] The Government states that "pay-TV packages include linear TV programming, on-demand content, and typically premium channels *like HBO*." Gov't PFOF ¶ 12 (emphasis added). However, no matter how many premium channels "like HBO" may be available on such packages, HBO itself has historically had only a 30% national penetration rate. *See* Tr. 1529:16-17 (Patel (AT&T)); *id.* at 3073:22-23 (Bewke s (Time Warner)).

(AT&T)). As HBO President Simon Sutton explained, "our whole business is relying on our affiliates to promote us. If we can't do that, then our entire business model is destroyed." *Id.* at 1508:14-16 (Sutton (HBO)). For that reason, HBO seeks to structure its affiliate agreements so as to "incent" distributors to maximize HBO's distribution. *Id.* at 1456:8-10. Specifically, as distributors add HBO subscribers, "they generally pay less on the increment." *Id.* at 1455:18-19. **[**49]**

C. The Proposed Merger

On October 22, 2016, AT&T announced its plan to acquire Time Warner. Answer 18 [Dkt. # 20]. Inclusive of debt, the transaction is valued at approximately $108 billion. *Id.*

At trial, the evidence showed that defendants view the proposed merger as an essential response to the industry dynamics described above — that is, the increasing importance of web- and mobile-based content offerings; the explosion in targeted, digital advertising; and the limitations attendant with AT&T's and Time Warner's respective business models. *See generally* Defs.' PFOF ¶¶ 49-62 (discussing various proconsumer rationales for the proposed merger). The proposed merger would do so, defendants' executives asserted, **[*182]** through vertical integration of the companies' complementary assets: Time Warner's popular content and significant advertising inventory, and AT&T's consumer relationships, customer data, and large wireless business.

As a traditional programmer, Time Warner generally lacks access to valuable information about its viewers — it is, as mentioned, akin to a "stuck in the middle wholesaler." Tr. 641:13-25 (Martin (Turner)). That is because it is the video distributors — not Turner — that **[**50]** own the customer relationships and, therefore, the customer data. *See supra* pp. 20, 25-28. Although Time Warner has "massive inventories of advertising," it does not "know who the customer is. . . . They don't know who they are, they don't know what they're watching." *Id.* at 3392:10-13 (Stephenson (AT&T)). Without information about who its customers are and what their content preferences may be, Time Warner is disadvantaged vis-à-vis SVODs, such as Netflix Hulu, and Amazon Prime, and web companies, such as Facebook and Google, when it comes to its ability to cater programming or advertisements to viewers. *See supra* pp. 20, 25-28. As AT&T CEO Randall Stephenson explained, without consumer relationships and access to data, Time Warner's "large load of advertising inventory [is] being under utilized." Tr. at 3394:1-2 (Stephenson (AT&T)); *see also id.* at 3771:12-23 (Athey) (confirming that AT&T's digital, data-driven advertising prices are 60% higher than Nielsen-based ads because the former have "finer demographics that are offered for targeting").

As a video distributor, AT&T generally lacks control over the video content it offers. *See id.* at 3219:1-3 (Stankey (AT&T)) ("What we don't have is, we didn't have programming. **[**51]** We didn't have the flexibility to change the product, and that's what the guys on the other side had."). AT&T also has access to only limited advertising inventory. *Cf. id.* at 3393:1-11 (Stephenson (AT&T)); *id.* at 609:23-610:4 (Martin (Turner)). When AT&T seeks to negotiate with programmers for rights to provide or experiment with innovative content offerings, it typically encounters significant bargaining friction that renders those efforts unsuccessful. *See supra* pp. 19-20.

By acquiring Time Warner, AT&T executives testified, the company will immediately gain access to high-quality content and an extensive advertising inventory. *See* Tr. 3408:3-10 (Stephenson (AT&T)). Using its wireless network, AT&T intends to distribute Time Warner content through mobile devices. With such strong industry tailwinds in favor of mobile video consumption, this strategy will increase viewership, making Time Warner content "worth far more." *Id.* at 3393:24-25; *cf.* 891:23-25 (Rigdon (Comcast)) (confirming "increasing trend in the consumption of video over mobile devices"). At the same time, AT&T will bring to bear its consumer relationships and data to begin to tailor Time Warner's advertising and increase its value. **[**52]** *See id.* at 3394:3-18 (Stephenson (AT&T)).

As the Government concedes, that access will inure right away to the benefit of AT&T's current video distribution subscribers. In particular, the Government's own expert predicts that, due to a standard benefit of vertical integration, AT&T's DirecTV and U-verse customers will pay a total of about $350 million less per year for their video distribution services. *See infra* pp. 66-68. AT&T executives testified about the other efficiencies that would redound to the benefit of AT&T subscribers should the merger be approved. Of most relevance here, with the Time

Warner assets, and without the interference of bargaining friction, AT&T **[*183]** will be able to deliver content to its customers in more innovative ways. The merged entity could, for instance, gather and edit individual news clips from CNN throughout the day — all tailored to a given user's interests — and deliver that news to the wireless customer for viewing on his or her fifteen-minute break. *See* Tr. 3220:21-3221:9 (Stankey (AT&T)). According to AT&T executive John Stankey, that opportunity represents "a new customer at a new moment doing something that wasn't being done otherwise." *Id.* at 3221:13-14. Stankey **[**53]** testified that the absence of bargaining friction will also enable AT&T and Time Warner to pursue broader introduction of new technologies, such as "4K" high-resolution programming. *See id.* at 3222:4-22.

AT&T will also, with their customers' permission, use consumer data to develop targeted ads, thereby increasing the value of Time Warner's ad inventory. *See id.* at 3391:12-22, 3393:4-9 (Stephenson (AT&T)). AT&T witnesses testified that, in their view, the Time Warner ad inventory is of sufficient scale to warrant the development of a "programmatic advertising platform" through which AT&T can deploy its data to create a marketplace of data-informed advertising inventory for use by Time Warner and third-party programmers alike. *Id.* at 3243:14-3244:8 (Stankey (AT&T)). At the same time, new, tailored forms of mobile content delivery — like the CNN clips teased above — will create additional advertising opportunities. *See id.* at 3221:10-11. Those opportunities, Time Warner and AT&T witnesses testified, will lead to higher ad revenues that will alleviate pressure on the programming side and lower the price of video distribution to consumers. All of those steps, defendants asserted, will allow **[**54]** AT&T to imitate the highly successful, data-driven entities in the video programming and distribution and advertising markets.

In addition, ownership of Time Warner content will allow AT&T to more efficiently pursue what it sees as the future of the video programming and distribution industry: increased delivery of content via mobile devices, such as cell phones. *See id.* at 3381:24-3382:2, 3393:13-25 (Stephenson (AT&T)). AT&T's vast wireless business — a business that, if taken separately, "would be number 37 in the Fortune 500" — has over 100 million subscribers. *Id.* at 3379:20-24; *see id.* at 3208:21-23 (Stankey (AT&T)). AT&T executives testified about their vision for using those wireless connections to "transform the way we deliver video to customers, [to] make the video far more portable." *Id.* at 3208:20-22 (Stankey (AT&T)); *see id.* at 3393:13-25 (Stephenson (AT&T)). To sum it up, in the words of AT&T Chairman and CEO Randall Stephenson, defendants view the proposed merger as a "vision deal" reflecting a belief "that distribution of [Time Warner's] content to wireless will drive the value of the content up," and that "the ability to pair our data with [Time Warner's] advertising **[**55]** inventory will drive value." *Id.* at 3402:24-3403:6.

III. Procedural History

A. The Investigation

Following the announcement of the deal in October 2016, the Department of Justice's Antitrust Division conducted an investigation of the proposed merger's competitive effects. Defs.' PFOF ¶ 2. The investigation lasted more than one year. *Id.* During that investigatory phase, the Government took approximately 20 depositions and received roughly 25 *million* pages of documents. Despite the investigation's vast scale and obvious importance, defendants had scarce visibility into the process. They could not access the Government's materials during the course of the investigation. *See* 12/21/18 Hr'g Tr. 12:1-12 [Dkt. # 56]. Nor could **[*184]** they attend, let alone ask questions during, the depositions that took place during the investigation. *See id.*

B. Pretrial Proceedings

1. The Complaint

On November 20, 2017, the Government, acting through the Department of Justice, filed this lawsuit against AT&T, DirecTV, and Time Warner to enjoin the proposed merger under *Section 7* of the Clayton Act, *15 U.S.C. § 18*. *See* Compl. ¶ 48. Thirty-seven members of the Department of Justice, including Assistant Attorney General for Antitrust

Makan Delrahim, **[**56]** signed the Complaint. *Id.* at 23. In its prayer for relief, the Government asked that defendants AT&T and Time Warner "be permanently enjoined from carrying out the proposed merger and related transactions" or "carrying out any other agreement, understanding, or plan by which AT&T would acquire control over Time Warner or any of its assets; or merging." *Id. ¶ 48*.

2. Turner's Arbitration Commitment

About one week after the Government filed its Complaint, Turner sent a letter and an accompanying list of terms and conditions to approximately 1,000 video distributors. *See, e.g.*, PX490; PX491; Tr. 1181:11-16 (Warren (Turner)). In the letter, Turner represented that it was "irrevocably offering to you this agreement to engage in AAA arbitration, subject to the conditions below." PX490. "This agreement," the letter continued, "also provides you with the right to continued carriage of the Turner Networks . . . pending the arbitration in the event of a failure to agree upon renewal terms." *Id.* The agreement specifies that once arbitration is invoked by a distributor, Turner must continue to provide carriage on the same terms and conditions in effect at the expiration of its existing contract with the distributor, **[**57]** subject to the right to receive a "true-up" — make-up payments, in essence — based on the arbitrator's award. PX491-3 to -4, §§ B.1-.3. In other words, the commitment guarantees that no blackout of Turner content can occur once arbitration is invoked. *See, e.g.*, Tr. 2653:21-23 (Katz). The proposed arbitration agreement incorporates by reference the choice-of-law provisions in the underlying affiliate agreements. PX491-2, ¶ 7.

3. Pre-Discovery Timeline

Defendants filed their answer on November 28, 2017. *See generally* Answer. AT&T and Time Warner also announced that they had agreed to extend the merger agreement through April 22, 2018. *See* PX456-2. Defendants swiftly moved for a trial date and, along with the Government, for a protective order. *See* Defs.' Mot. to Set Trial Date [Dkt. # 22]; Defs.' Mot. to Enter Protective Order [Dkt. # 23]; Pl.'s Mot. to Enter Protective Order [Dkt. # 24]. On December 8, 2017, I issued a protective order governing the designation and use of confidential information. *See* Protective Order [Dkt. # 37]. On December 21, 2017, I issued a Case Management Order ("CMO") [Dkt. # 54] and Scheduling Order [Dkt. # 55], which, among other things, set the trial for March **[**58]** 19, 2018 and stated that there would be no dispositive motions. That same day, to allow for the possibility of the March 19, 2018 trial and the ruling to follow, AT&T and Time Warner extended yet again the drop-dead date of the merger from April 22, 2018 to June 21, 2018. *See* PX456-2. If the deal is not consummated by then, the merger agreement specifies that AT&T will be required to pay Time Warner a break-up fee of $500 million. *See* PX451-87. In the event of a favorable judgment, defendants agreed "not to consummate or otherwise complete the challenged acquisition until 12:01a.m. on the sixth calendar day following entry of such judgment." CMO ¶ 3.

4. Discovery

Given the stakes and the June 21, 2018 drop-dead merger deadline, the parties **[*185]** proceeded through discovery on an expedited basis. Fact discovery began in late December, and concluded in mid-February. The Government began producing third-party documents collected during the investigation to defendants before the New Year. The parties exchanged preliminary fact witness lists in early January, and final fact witness lists one month later. They spent the intervening time on a forced march of depositions. The exchange of initial expert **[**59]** reports took place in early February, with rebuttal reports due at the end of that month. Supplemental discovery closed on February 28, 2018, and expert discovery did so on March 9, 2018. The Scheduling Order set additional deadlines for pre-trial motions, *Daubert* motions, and pre-trial submission of final exhibit lists, just before the March 19 start date for trial.

I provided detailed prescriptions concerning discovery in this compressed time period. The CMO limited each side's final trial witness list to 30 fact witnesses. CMO ¶ 12. The Government and defendants each had a maximum of 15 interrogatories and seven requests for admission. *Id.* ¶ 14(d), (e). The CMO restricted each side to 150 hours of party-depositions, plus 100 hours of non-party depositions. *Id. ¶ 16*. The CMO did not preclude the taking of a deposition of someone already deposed during the investigation phase. *Id.* There were no limits on the number of requests for production. *Id.* ¶ 14(a).

The parties achieved herculean feats during that time. Beyond the 25 million pages of documents produced during the Government's investigation, an additional 7.5 million pages of documents were produced during discovery. 2/2/18 Hr'g **[**60]** Tr. 13:10-13 [Dkt. # 66]. Dozens of third parties received *Rule 45* subpoenas. *See* 1/5/18 Hr'g Tr. 7:18-21 [Dkt. # 61]. The Government noticed more than 40 depositions of defendants' witnesses. *Id.* at 9:13-15.

5. Discovery Disputes

Rather than appointing a special master to handle discovery related issues, I relied upon the seasoned counsel on both sides of this case to work together to resolve discovery disputes as they arose. Although counsel generally were successful in doing so, two notable pre-trial issues were brought to this Court for resolution. The first, which arose in mid-January, concerned the disclosure of third-party data collected in prior Government investigations and still in the Government's possession. The second flash point, which took place closer to trial, involved discovery requests in support of defendants' selective prosecution claim.

In a January 18, 2018 letter and during a status hearing held the next day, defendants raised an issue related to the production of historical video programming pricing data in Government files — data that the Government had apparently obtained via prior merger investigations. *See* 1/19/18 Hr'g Tr. 6:14-9:23 [Dkt. # 63]. To that point, the **[**61]** Government had resisted defendants' production requests, arguing that the *Antitrust Civil Process Act*, *15 U.S.C. § 1313*, required it to obtain consent from each of the third parties that originally had produced the information in question. *See id.* at 13:14-15. No third party had given consent, the Government continued; nor did those parties continue to possess some or all of the requested information due to the passage of time since those earlier investigations. *See id.* at 7:12-16, 8:17-20, 15:19-25.

Stuck in a seeming game of document "hot potato," defendants asked this Court to direct the Government to provide copies of the pricing data to the third parties that originally produced it. *Id.* at 16:11, 18:23-25. Such an order would in turn enable defendants to subpoena the information directly from the third parties. Following oral argument on the issue, I ordered the **[*186]** Government to seek consent from the relevant third parties and to produce the requested information to those third parties by a date certain, 1/22/18 Order [Dkt. # 62]. The Government complied with this Order and defendants apparently were able to obtain the pricing data at issue. 2/2/18 Hr'g Tr. 6:2-5.

The case sailed along until mid-February, **[**62]** when the parties raised an issue related to defendants' contemplated motion for discovery on their "selective enforcement" claim and their attendant inclusion of Assistant Attorney General Makan Delrahim on their trial witness list. The Court held a hearing and heard oral argument on that dispute. *See generally* 2/16/18 Hr'g Tr. [Dkt. # 67]. In that hearing, defendants made an oral motion to compel production of privilege logs relating to their selective enforcement defense. *See id.* at 22:17-23. The Government, for its part, made an oral motion to strike defendants outstanding discovery and interrogatory requests for logs listing (i) all written communications about the proposed merger between the White House and the Attorney General's Office, (ii) all written communications about the White House's views of the proposed merger between the Attorney General's Office and the Antitrust Division, and (iii) all oral communications about the proposed merger between the White House and the Antitrust Division. *See id.* at 46:8-20, 54:13-55:14. During the hearing, defendants agreed to strike Mr. Delrahim from their witness list subject to the right to call him at trial for good cause. *Id.* at 36:17-37:4. **[**63]** A few days later, after considering the parties' arguments at the hearing, I issued a Memorandum Opinion denying defendants' oral motion to compel and granting the Government's oral motion to strike. 2/20/18 Mem. Op. & Order 6 [Dkt. # 68]. As set out more thoroughly in that opinion, I concluded that defendants had failed to meet the rigorous standard for obtaining discovery on their selective enforcement defense. *See id.* at 4.

6. Evidentiary Disputes

As with most trials featuring large volumes of documentary evidence, evidentiary issues were heavily litigated in this case. Indeed, I set aside the first two days of the trial to address evidentiary issues. Not surprisingly, each side vacillated between arguing for exclusion of documents as prejudicial or irrelevant, on the one hand, or for admission of documents because such concerns are inapplicable in bench trials, on the other. While keenly aware of the principles governing evidentiary rulings in bench trials, in this case. I did not have the luxury of blanketly admitting a mass of documentary evidence and sorting through it after trial.[11] The compressed timeline and novel, complicated nature of the case instead necessitated that I make individualized **[**64]** rulings on relevance and admissibility. *Cf.* Manual for Complex Litigation § 12.5.

For this reason, I generally instructed the parties to seek admission of documents through sponsoring witnesses, in order to facilitate determinations of relevancy or to establish the foundation necessary for nonhearsay or hearsay exceptions.[12] Witnesses would be able to contextualize and explain the technical and lengthy documents at **[*187]** issue, which might otherwise be misunderstood or selectively cited in post-trial briefs. As such, I instructed the parties to introduce documents through sponsoring witnesses, recognizing that doing so would extend, somewhat, the length of the trial. In the end, the parties agreed to abide by that approach. *See, e.g.*, 3/19/18 Hr'g Tr. 6:17-22 (afternoon session) (Government agrees to "add[] some additional witness and [to] talk[] with the defendants about that with regard to sponsorship issues").[13]

C. The Trial

The trial began on March 19, 2018 and ended with closing arguments on April 30, 2018.[14] Over that period, there were 23 days of proceedings.

The Government called 20 fact witnesses and two expert witnesses in its case-in-chief. Of the fact witnesses, 11 were employees of defendants, and 9 were **[**65]** employees of third parties. The Government's chief economic expert was Professor Carl Shapiro. Professor Shapiro is a Ph.D. industrial economist who currently holds a professorship at the University of California, Berkeley. Professor Shapiro has served in various positions in the federal government, including most recently as Deputy Assistant Attorney General for Economics at the Antitrust Division in 2009 through 2011 and as a member of the President's Council of Economic Advisers in 2011 and 2012. He has testified in a number of antitrust matters, including several antitrust trials in our Circuit. The Government also called Professor John Hauser from the Massachusetts Institute of Technology to testify about a survey he designed and performed and on which the Government relies.

For their part, defendants called three expert and three fact witnesses. Chief among their experts was University of Chicago Professor Dennis Carlton, who provided rebuttal testimony to Professor Shapiro. Professor Carlton has served as an economics professor within the University of Chicago since 1976, teaching in the economics department, business school, and the law school. Like Professor Shapiro, Professor **[**66]** Carlton is a seasoned expert witness who himself has served as Deputy Assistant Attorney General for Economics at the Antitrust Division

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[11] Nor did defendants broadly stipulate to the admission of the Government's proffered documentary evidence, as defendants seem to have done in recent antitrust cases in our Circuit. The parties also did not introduce their experts' reports into evidence; instead, they rested on the experts' trial testimony.

[12] There was not a uniform rule mandating sponsorship of documents by witnesses. I took judicial notice, for example, of certain statements made by DirecTV and AT&T before the FCC without sponsoring witnesses. *See* Tr. 3966:5-3967:22. In the same way, I was mindful that some documents, such as a slide presentation known at trial as "version 41," would not constitute hearsay, as they were introduced to establish the intent of the parties, rather than for the truth of the matter asserted.

[13] Negotiations between the parties further winnowed the evidentiary disputes. *See, e.g.*, 3/19/18 Hr'g Tr., PDF at p. 7 (morning session). The parties also heeded warnings from the Court during initial evidentiary hearings as to the likely inadmissibility of certain documents. For instance, after a warning as to the likely admissibility of newspaper clippings, defendants did not seek admission of those documents at trial. *See* 3/20/18 Hr'g Tr. 5:16-20 (afternoon session) (advising defendants that the Court "usually [does not] allow news articles [to be] introduced into evidence. I'll wait to see what you've got ... but I'm giving you fair notice here").

[14] On March 9, 2018, the parties each filed a brief, laying out their theories of the case. [Dkt. ## 75, 76, 77]. On March 13, 2018, the parties filed a Statement of Evidentiary Objections under seal. [Dkt. # 86]. The same day, the parties filed a Joint Statement on the Burden of Proof at Trial, which set forth each side's views of the legal standards and burden of proof applicable to this case. [Dkt. # 87].

from 2006 to 2008. Defendants also called Professor Michael Katz from the Haas School of Business at the University of California, Berkeley, and Professor Peter Rossi from the UCLA's Anderson School of Management. Defendants called Professor Katz to testify about the effect of arbitration and the FCC's program access rules, and called Professor Rossi to testify about survey methods and to rebut testimony concerning surveys and studies on which the Government relied. As their fact witnesses, **[*188]** defendants called Jeff Bewkes, Chairman and CEO of Time Warner, and Randall Stephenson, Chairman and CEO of AT&T, to testify regarding their decision to merge. Defendants also called John Stankey, a senior executive at AT&T responsible for planning and integration of the proposed merger. Stankey, who will be running Time Warner should the merger be allowed to occur, testified about the rationale for the merger as well as the synergies and efficiencies that would result from the merger.

The Government's rebuttal case consisted of testimony from three experts. First, **[**67]** the Government called Ronald Quintero, an accounting and financial consultant, to testify as an expert witness on defendants' claims that the challenged merger will result in a number of procompetitive synergies. Next, the Government called Professor Susan Athey, an economics of technology professor at the Stanford Graduate School of Business, to testify regarding defendants' proffered "content intelligence" synergies. Finally, the Government closed out its rebuttal presentation by recalling Professor Shapiro to defend and further explain his case-in-chief testimony in the face of defendants' various criticisms.

To say the trial was well staffed would be an understatement. Thirty-two lawyers entered appearances for the Government, and 14 did so for defendants. Evidentiary disputes were handled on a case-by-case basis as issues arose. In order to accommodate the confidentiality interests of third parties, counsel agreed to craft their questions so as not to elicit sensitive business information, and, on three occasions, I had to close the courtroom to the public following factual proffers by the Government as to the need for doing so.[15] In total, **[*189]** I admitted into evidence over 3,000 pages **[**68]** of documents, broken up into over 120 exhibits. The trial transcript itself exceeds 4,300 pages in length.

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[15] The Court explained to the parties that it appreciated both the public's interest in open judicial proceedings, and the importance to the Government's case of third-party testimony and the need to maintain confidentiality. Consistent with these competing interests, and applicable case law, the Court advised the parties that, when seeking to close the courtroom, they would first need to make a proffer explaining the necessity of doing so. *Cf.* 28 C.F.R. § 50.9 (2017) (reciting "the vital public interest in open judicial proceedings" and stating the policy that DOJ counsel "shall not move for or consent to closure of a proceeding" unless "[n]o reasonable alternative exists for protecting the interests at stake" and "[f]ailure to close the proceedings will produce . . . [a] substantial likelihood of denial of the right . . . to a fair trial").

In order to accommodate those confidentiality interests, counsel agreed to craft their questions so as not to elicit sensitive business information. *See* Tr. 692:14-16 ("[G]overnment's counsel has got this choreographed approach here to get this information from you under oath without revealing it to the public."); *see also, e.g., id.* at 99:12-14 (SEALED). Counsel routinely asked witnesses to point to or confirm for the Court the contents of documents under seal. *See, e.g., id.* at 119:1-21, 124:18-125:13 (Fenwick (Cox)); 535:1 1-22, 662:7-20 (Martin (Turner)); *id.* at 1095:19-1096:7 (Breland (Turner)); *id.* at 3011:9-21 (Christopher (AT&T)); *id.* at 3529:18-3530:10 (Quintero). Indeed, the Government succeeded in eliciting considerable testimony from a third-party witness — this time from AT&T's competitor, Cox - by way of a single exhibit. *See, e.g., id.* at 689:18-20 (Hinson (Cox)) ("Your Honor, I'd like to mark Plaintiff's Exhibit, it's got some confidential information that Mr. Hinson can point to."); *see generally id.* at 692:25-708:14; *see also* PX523. In those instances, the Court, but not the public, had access to the referenced documents. In the same way, counsel asked witnesses to describe the contents at an appropriate level of generality. *See id.* at 259:11-13 (Schlichting (DISH)); *id.* at 1278:13-1279:21 (Bewley (Altman Vilandrie)).

Through skillful lines of inquiry and the use of exhibits and demonstratives, this approach resolved most confidentiality-based concerns. For several witnesses, the Government initially raised the possibility of going into closed session, before later declining to seek to do so. *See, e.g.*, Tr. 439:14-16 (SEALED). Other times, the Government elected to establish the factual proffer necessary to close the courtroom. To take one example of the way in which — when it chose to do so — the Government developed the need for closing the courtroom, Government counsel confirmed with NBCU's Madison Bond in open court that he felt constrained by confidentiality obligations with respect to at least six different items. *See, e.g., id.* at 1992:2-1992:8; *id.* at 1993:24-1994:6 (Bond (NBCU)).

On May 3, 2018, a mere one week after the close of evidence, the parties filed their proposed Findings of Fact and Conclusions of Law, totaling nearly 400 pages in length, as well as briefs that synthesized their arguments. On the last day of trial, I advised the parties that it would issue a ruling by June 12, 2018 in order to avoid running afoul of the defendants' merger deadline of June 21, 2018 and to provide the losing party sufficient time to preserve its appellate rights.

IV. Legal Standard

A. The *Clayton Act*

The Government seeks to enjoin the proposed merger on the basis that it violates *Section 7* of the Clayton Act, *15 U.S.C. § 18*. *See id. § 25* (authorizing United States to seek equitable relief to restrain a pending acquisition that violates *Clayton Act*). As relevant here, ***HN1***[] *Section 7* "prohibits acquisitions, including mergers, 'where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially **[**69]** to lessen competition.'" *FTC v. H.J. Heinz Co., 246 F.3d 708, 713, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)* (quoting *15 U.S.C. § 18*). The Government "has the ultimate burden of proving a *Section 7* violation by a preponderance of the evidence." *United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 49 (D.D.C. 2011)* (internal quotation marks omitted); *see also* Proposed Conclusions of Law of the United States ("Gov't PCOL") ¶ 24 [Dkt. # 127]. Accordingly, the Government's "failure of proof in any respect will mean the transaction should not be enjoined." *FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 116 (D.D.C. 2004)*.

By using "the words 'may be substantially to lessen competition'" in *Section 7*, Congress indicated "that its concern was with probabilities, not certainties." *FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1042, 383 U.S. App. D.C. 341 (D.C. Cir. 2008)* (emphasis omitted) (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. Although certainty of harm is not necessary to prove a *Section 7* violation, neither is the "mere possibility" of harm sufficient. *Heinz, 246 F.3d at 713* (quoting S. Rep. No. 1775, at 6 (1950)); *see also Baker Hughes, 908 F.2d at 984* ("*Section 7* involves *probabilities*, not certainties or possibilities."). Rather, to grant injunctive relief under the *Clayton Act*, the Court *must* conclude that the Government has introduced evidence sufficient to show that the challenged "transaction is likely to lessen competition substantially." *Baker Hughes, 908 F.2d at 985*.[16] As part of satisfying that burden, *Section 7* **[*190]** "demand[s] that a plaintiff demonstrate that the

[16] It is undisputed that the Government has the burden of proving a *Section 7* violation. The Government's view on what measure of proof that burden requires, however, has been somewhat of a moving target. In some instances, the Government mirrors defendants' position that *Section 7* requires a showing that the challenged transaction is "likely" to harm competition; in others, the Government states that it must show a "reasonable probability" or "appreciable danger" of harm to prevail. *Compare* Compl. ¶ 44 ("The effect of the proposed merger would be likely to lessen competition substantially" in the relevant markets.), *and* Gov't PFOF 20 ("The proposed merger would likely substantially lessen competition" in the relevant markets.) (capitalization altered), *with* Gov't Post-Tr. Br. 13 (disputing that the "United States must show that harm is 'likely'"), *and* Gov't PCOL ¶ 5 & n.1 (reciting a purportedly more lenient "reasonable probability" standard). In the final analysis, each alternative formulation appears aimed at clarifying the central point that *Section 7* does not require "certain" harm, but instead permits courts to use predictive judgment to "arrest anticompetitive tendencies in their 'incipiency.'" *United States v. Penn-Olin Chem. Co., 378 U.S. 158, 171, 84 S. Ct. 1710, 12 L. Ed. 2d 775 (1964)* (quoting *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)* (internal quotation marks omitted)). Thus, it is not surprising that courts have used these terms interchangeably. *See, e.g., Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986)* (noting that *Section 7* requires "an appreciable danger" of anticompetitive consequences and concluding in same paragraph that Commission had adequately demonstrated that the "challenged acquisitions are likely to foster collusive practices, harmful to consumers"); *Anthem, 236 F. Supp. 3d at 215* (citing with approval other court's use of "reasonably likely" formulation, later concluding that "[p]laintiffs have carried their burden to establish that the merger is likely to harm competition").

For present purposes, I need not further toil over discerning or articulating the daylight, if any, between "appreciable danger," "probable," "reasonably probable," and "likely" as used in the *Section 7* context. That is because even assuming that the substantial lessening of competition will be 'sufficiently probable and imminent' to warrant **[**70]** relief." *Arch Coal, 329 F. Supp. 2d at 115* (quoting *United States v. Marine Bancorporation, 418 U.S. 602, 623 n.22, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974))*.

HN2[] In assessing the Government's *Section 7* case, the court must engage in a "'comprehensive inquiry' into the 'future competitive conditions in a given market,'" keeping in mind that "the *Clayton Act* protects 'competition,' rather than any particular competitor." *United States v. Aetna, 240 F. Supp. 3d 1, 18 (D.D.C. 2017)* (quoting *Baker Hughes, 908 F.2d at 988, 991 n.12*). "[O]nly . . . examination of the particular market — its structure, history and probable future — can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *United States v. General Dynamics Corp., 415 U.S. 486, 498, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974)* (quoting *Brown Shoe, 370 U.S. at 322 n.38*). "Hence, antitrust theory and speculation cannot trump facts"; the Government must make its case "on the basis of the record evidence relating to the market and its probable future." *Arch Coal, 329 F. Supp. 2d at 116-117*.

B. *Baker Hughes* Burden Shifting Framework

As the above discussion displays, *Section 7* vests courts with the "uncertain task" of "making a prediction about the future." *Baker Hughes, 908 F.2d at 991*; *United States v. Anthem, Inc., 236 F. Supp. 3d 171, 191 (D.D.C. 2017)*. To say the least: that is no easy assignment ! In such a setting, and in the absence of a crystal ball, "allocation of the burdens of proof assumes particular importance." *Baker Hughes, 908 F.2d at 991*. ***HN3***[] To further assist courts in this prospective inquiry, our Circuit has set forth a burden shifting framework for use in determining **[*191]** whether a proposed **[**71]** transaction violates the *Clayton Act*. *See, e.g., id. at 982-83*.

Under that framework, the Government must first establish its prima facie case by 1) identifying the relevant product and geographic market and 2) showing that the proposed merger is likely to "substantially lessen competition" in that market. *Id. at 982, 991*; *see also Arch Coal, 329 F. Supp. 2d at 117*; Gov't PCOL ¶ 24. If the Government satisfies its prima facie burden, the burden then shifts to defendants to "provide sufficient evidence that the prima facie case 'inaccurately predicts the relevant transaction's probable effect on future competition.'" *United States v. Anthem, Inc., 855 F.3d 345, 349 (D.C. Cir. 2017)* (quoting *Baker Hughes, 908 F.2d at 991*). One way defendants may do so is to offer evidence that "post-merger efficiencies will outweigh the merger's anticompetitive effects." *Heinz, 246 F.3d at 721*. If the defendants put forward sufficient evidence to rebut plaintiff's prima facie case, "the burden of producing additional evidence of anticompetitive effect shifts to the [government], and merges with the ultimate burden of persuasion, which remains with the [government] at all times." *Anthem, 855 F.3d at 350* (quoting *Baker Hughes, 908 F.2d at 983*).[17]

"reasonable probability" or "appreciable danger" formulations govern here and require more than a "mere possibility," but less than a "more likely than not" showing of harm, *but see Baker Hughes, 908 F.2d at 991* (describing "the ultimate issue" in a *Section 7* case as "whether [the proposed] transaction is *likely* to lessen competition substantially" (emphasis added)); *Anthem, 236 F. Supp. 3d at 215* ("merger is likely to harm competition"); *United States v. Aetna, Inc., 240 F. Supp. 3d 1, 9 (D.D.C. 2017)* ("the proposed merger is likely to substantially lessen competition"); *FTC v. Staples, Inc., 190 F. Supp. 3d 100, 110 (D.D.C. 2016)* ("proposed merger is likely to reduce competition"), my conclusions regarding the Government's failure of proof would remain unchanged for all of the reasons discussed below.

[17] Defendants assert that the burden-shifting framework is inapplicable to vertical merger cases, where no market-concentration-based presumption of harm attaches. As such, defendants argue that the Government has the burden to account for all of defendants' proffered efficiencies as part of making its prima facie case. I am skeptical of this position, both as a matter of law and logic. *Cf. Heinz, 246 F.3d at 720* (discussing "efficiencies defense" as a component of the defendants' case); 4A Areeda & Hovenkamp, ***Antitrust Law*** ¶ 970c. But given that the "ultimate burden" of proving a *Section 7* violation rests with the plaintiff, *H & R Block, Inc., 833 F. Supp. 2d at 49*, any debate over burden shifting "may be somewhat academic," as defense counsel conceded, 3/20/18 Hr'g Tr. 67:6-7 (morning session); *cf. Baker Hughes, 908 F.2d at 991* (deeming "the distinction between" the "burden of production" and "the ultimate burden of persuasion" as "always an elusive distinction in practice"). That is especially so here, where, as will become evident, the Court's ruling does *not* turn on the efficiencies offered by defendants in their affirmative case, but rather on its conclusion that the *Government's* evidence, as "undermined and "discredit[ed]" by defendants'

[*192] C. Antitrust Analysis of Vertical Mergers

In the typical horizontal merger case under *Section 7*, the Government's **[**72]** path to carrying its prima facie burden is clear: by putting forward statistics to show that the proposed "merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market," the Government triggers a "'presumption' that the merger will substantially lessen competition." *Heinz, 246 F.3d at 715* (internal quotation marks and alterations omitted) (quoting *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963))*; *see also, e.g., Anthem, 236 F. Supp. 3d at 209*; *Aetna, 240 F. Supp. 3d at 43*; *H & R Block, Inc., 833 F. Supp. 2d at 72*.

In this case, however, the "familiar" horizontal merger playbook is of little use. *Baker Hughes, 908 F.2d at 982*. That is, of course, because the proposed transaction between AT&T and Time Warner is a vertical merger — *i.e.*, one that involves "firms that do not operate in the same market" and thus "produce[s] no immediate change in the level of concentration in any relevant market." Dept. of Justice & Fed. Trade Comm'n, Non-Horizontal Merger Guidelines § 4.0 (June 14, 1984) ("Non-Horizontal Merger Guidelines"),[18] The parties therefore agree that in this case "there is no short-cut way to establish anticompetitive effects, as there is with horizontal mergers." Joint Statement on the Burden of Proof at Trial ("Joint Statement") 3 [Dkt. # 87]; *see* 4A Areeda & Hovenkamp, **[**73]** ***Antitrust Law*** ¶ 1000a ("[T]he basic economic reason for limiting horizontal mergers is well-founded and rather generally accepted: horizontal mergers increase market concentration, and high market concentration can substantially lessen competition among rivals, particularly with respect to price. Unfortunately, there is no comparable theoretical basis for dealing with vertical mergers.").

With no presumption of harm in play, the Government concedes that, to satisfy its burden here, it must make a "fact-specific" showing that the effect of the proposed merger "is likely to be anticompetitive." Joint Statement 3-4.

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attacks, is insufficient to "show[] a probability of substantially lessened competition," and thus that the Government has "failed to carry its ultimate burden of persuasion." *Baker Hughes, 908 F.2d at 983, 990-91*.

I will nevertheless pause to mention briefly why I am confident that defendants will achieve considerable efficiencies beyond those conceded by the Government. At trial, defendants presented the Court with documentary and testimonial evidence concerning efficiencies likely to flow from the proposed merger. The efficiencies, defendants explain, come both on the "cost" side, and on the "revenue" side. By defendants' calculations, cost synergies will total $1.5 billion and revenue synergies $1 billion on an annual basis. *See* Tr. 3234:17-3235:14 (Stankey (AT&T)). On the cost side, AT&T's John Stankey testified that the marriage of AT&T and Time Warner will lead to the elimination of redundant positions in each company, achievement of certain economies of scale, and insourcing of services that the acquired entity currently acquires from vendors. *See id.* at 3235:22-3240:1. And on the revenue side, AT&T and Time Warner expect to see the gains in innovation — particularly by way of a new programmatic advertising platform — that motivated the merger in the first place. *See id.* at 3229:20-25, 3240:2-3246:9.

Putting aside the revenue synergies, which, by their nature, are more uncertain, I have a high degree of confidence that defendants will generate most, if not all, of the predicted $1.5 billion in annual cost savings by 2021. *See id.* at 3234:13-20. AT&T derives its prediction through the same rigorous analytical process applied in each of its mergers. *See id.* at 3226:1-3229:3; *see also* DX658. Most recently, in the acquisition of DirecTV, AT&T exceeded cost synergy predictions, which now total $2 billion annually. Tr. 3229:4-8, 3369:21-3370:4 (Stankey (AT&T)). Indeed, it is uncontested that AT&T has a strong record of meeting similar cost synergy estimates in past mergers. *See id.* at 3229:2-3, 3229:9; *see also id.* at 3226:3-5. That "analogous past experience" serves to "substantiat[e]" defendants' "efficiency claims," leaving this Court with little doubt that AT&T will stay on its projected track. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (Aug. 19, 2010). Thus, while not necessary to my final judgment in this case, defendants have presented persuasive, probative evidence that the merger will produce even more efficiencies than those accounted for in this Opinion. As such, no further "troll[ing] the Internet" by Mr. Quintero would likely convince the Court otherwise ! Tr. 3605:25 (Quintero).

[18] Although the Guidelines are not binding on this Court, our Circuit has noted that they are "a helpful tool, in view of the many years of thoughtful analysis they represent, for analyzing proposed mergers." *Anthem, 855 F. 3d at 349* (citing *Baker Hughes, 908 F.2d at 985-86*). As the Non-Horizontal Merger Guidelines make reference to concepts contained within the Horizontal Merger Guidelines, I will cite to both as appropriate.

Such a showing is "necessarily both highly complex" and "institution specific." David T. Scheffman & Richard S. Higgins, *Vertical Mergers: Theory and Policy*, 12 Geo. Mason L. Rev. 967, 967 (2004); *see also* Gov't PCOL ¶ 25 (collecting sources for proposition that "vertical mergers are judged on a case-by-case basis" based on consideration of "case-specific evidence of a danger of future competitive harm"). Of particular relevance here, the Government states that a vertical merger may "act as a clog on competition" by giving the merged firm "control of a competitively significant supplier." **[*193]** Gov't PCOL ¶ 46 (quoting **[**74]** Brown Shoe, 370 U.S. at 324). Such a situation would occur, the Government continues, if the merged firm were to withhold a source of supply from its rivals or otherwise foreclose access to the source "on competitive terms," such as by causing its rivals to "pay[] more to procure necessary inputs," which in turn could "harm[] competition and consumers." Id. ¶¶ 46, 57-58 (emphasis omitted) (quoting Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp., 224 F. Supp. 2d 657, 673 (S.D.N.Y. 2002); Sprint Nextel Corp. v. AT&T, Inc., 821 F. Supp. 2d 308, 330 (D.D.C. 2011)).

Further complicating the Government's challenge is the recognition among academics, courts, and antitrust enforcement authorities alike that "many vertical mergers create vertical integration efficiencies between purchasers and sellers." Michael H. Riordan & Steven C. Salop. *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513, 519 (1995).[19] The proposed merger reflects that principle: the Government's chief economic expert, Professor Shapiro, predicts that the merger, if consummated, would lead to 5352 million in annual cost savings on the part of AT&T's customers. *See* Tr. 2252:19-21 (Shapiro); *infra* pp. 66-68; *see also* Gov't PFOF ¶¶ 222-223 (EDM effect is "generally accepted as a potential procompetitive benefit resulting from vertical mergers").

As the Government also notes, the **[**75]** "principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively." Gov't PCOL ¶ 4 (quoting Anthem, 855 F.3d at 366 (emphasis and internal quotation marks omitted)); *see id.* ("Section 7 proscribes mergers with the potential to harm the competitive process, and thereby result in harm to consumers, including higher prices . . . ."). As such, any proper assessment of a proposed merger, Professor Shapiro testified, must consider both the positive and negative "impact[s] on consumers" by "balancing" the proconsumer, "positive elements" of the merger against the asserted anticompetitive harms. *See* Tr. 2182:12-20, 2253:4-5 (Shapiro); *see also id.* at 2461:22-2462:5 (Carlton) ("Well, Professor Shapiro is looking at the [e]ffects on consumer prices. That seems the right thing to do. . . .[W]e want to see what's going to be the result on the end price that consumers pay."); *cf.* Gov't PFOF ¶ 223 (discussing fact that Professor Shapiro accounted for EDM effects). In view of that "somewhat different" analysis applicable to vertical mergers, Tr. 2182:16-18 (Shapiro), it is perhaps little surprise that the Department of Justice's Non-Horizontal Merger Guidelines recognize that **[**76]** vertical mergers "are less likely than horizontal mergers to create competitive problems," Non-Horizontal Merger Guidelines § 4.

Given all of the competing considerations at play, "the analysis of vertical mergers" has been described as "much more complex than the analysis of horizontal mergers." Scheffman & Higgins, *Vertical Mergers*, 12 Geo. Mason L. Rev. at 967. Things are made more difficult still by the lack of modern judicial precedent involving vertical merger challenges — a dearth of authority that is unsurprising, considering that the Antitrust Division apparently has **[*194]** not tried a vertical merger case to decision in *four* decades ! *See* Defs.' Proposed Conclusions of Law ("Defs.' PCOL") ¶ 32 [Dkt. # 120]; 2/16/18 Hr'g Tr. 13:24-14:1.

To sum up, the Court accepts that vertical mergers "are not invariably innocuous," but instead can generate competitive harm "[i]n certain circumstances." Non-Horizontal Merger Guidelines §§ 4, 4.2; Gov't PCOL ¶ 22.[20] The

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[19] *See also* Robert H. Bork, *The Antitrust Paradox* 227 (2d ed. 1993) ("Vertical mergers may cut sales and distribution costs, facilitate the flow of information between levels of the industry ...[,] create economies of scale in management, and so on."); Ernest Gellhorn et al., ***Antitrust Law*** *and Economics* 411 (5th ed. 2004) (discussing the "[v]arious efficiency rationales" that "can motivate vertical mergers"); *cf.* National Fuel Gas Supply Corp. v. FERC, 468 F.3d 831, 840, 373 U.S. App. D.C. 351 (D.C. Cir. 2006) ("[V]ertical integration creates efficiencies for consumers.").

[20] The Court therefore declines defendants' invitation to adopt either a per se rule or a presumption that would apply to most vertical mergers. *See* Pre-Tr. Br. of Defs. 29 [Dkt. # 77]. To be sure, the standard for which defendants advocate aligns with the views of a number of authorities, including judges from this Circuit. *See, e.g.*, Robert Bork, *The Antitrust Paradox* 245 ("[I]n the

case at hand therefore turns on whether, notwithstanding the proposed merger's conceded procompetitive effects, the Government has met its burden of proof of establishing, through "case-specific evidence," that the merger of AT&T and Time Warner, at this time and in this **[**77]** remarkably dynamic industry, is likely to substantially lessen competition in the manner it predicts. Gov't PCOL ¶ 25. Unfortunately for the Government, for the following reasons, it did not meet its burden.

ANALYSIS

The challenged vertical merger here would unite Time Warner, a creator and supplier of popular video content, with AT&T, a large downstream purchaser and distributor of video content. The Government concedes that the challenged merger, like most vertical mergers, will result in significant benefits to customers of the merged company. Specifically, the Government's lead expert, Professor Carl Shapiro, estimates that the merger will cause AT&T to lower the price of DirecTV, resulting in $352 million in annual savings for DirecTV's customers. *See* Tr. 2252:19-20 (Shapiro).

Notwithstanding those conceded consumer benefits, the Government contends that the challenged merger is "likely to lessen competition substantially," *Baker Hughes, 908 F.2d at 985*, and thus should be enjoined under *Section 7*, *see* Compl. ¶ 10. The challenged merger would likely result in a substantial lessening of competition, according **[**78]** to the Government, in three "mutually reinforcing" ways. Gov't Post-Tr. Br. 7.

First and foremost, the Government argues that the challenged merger would enable Turner to charge AT&T's rival distributors — and ultimately consumers — higher prices for its content on account of its post-merger relationship with AT&T. *See, e.g.* Compl. ¶¶ 36-38; Gov't PFOF ¶¶ 226, 231-32; Gov't Post-Tr. Br. 1-2. *Second*, the Government contends that the challenged merger will substantially lessen competition by creating an increased risk that the merged firm will act, either unilaterally or in coordination with Comcast-NBCU, to thwart the rise of the lower-cost, consumer-friendly virtual MVPDs that are threatening the traditional pay-TV model. *See* Compl. ¶¶ 40-41; Gov't PFOF ¶ 278. *Finally*, the Government alleges that the merged entity could harm competition by preventing AT&T's rival distributors from using HBO as a promotional tool to attract and retain customers. *See* Compl. ¶ 39; Gov't PFOF ¶ 234.

[*195] In the remainder of this section, I will analyze each of those theories of harm to competition. Initially, I will set forth the relevant market definition, which incorporates the Government's proposed product **[**79]** and geographic markets. Next, I will discuss the conceded consumer benefits associated with the proposed merger. Mindful of those conceded benefits, and the need to balance them against the Government's allegations of consumer harm, I will then evaluate whether the Government has carried its burden to show a likelihood that the challenged merger will result in a substantial lessening of competition. For the reasons discussed in detail below, I have concluded that the answer to that question is no !

I. Market Definition

Typically, "[m]erger analysis starts with defining the relevant market" in which to assess the alleged anticompetitive harms. *FTC v. Sysco Corp., 113 F. Supp. 3d 1, 24 (D.D.C. 2015)* (citing *United States v. Marine Bancorporation, 418 U.S. 602, 618, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974))*. The relevant market comprises two parts: a product market and a geographic market. *Anthem, 236 F. Supp. 3d at 193*. Here, the Government defines the primary relevant product market as the "Multichannel Video Distribution" market, and the relevant geographic markets as the approximately 1,200 local markets in which residents have access to video offerings from the same set of

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absence of a most unlikely proved predatory power and purpose, antitrust should never object to the verticality of any merger."); *Comcast Cable Comms., LLC v. FCC, 717 F.3d 982, 990, 405 U.S. App. D.C. 188 (D.C. Cir. 2013)* (Kavanaugh, J., concurring) ("[A]bsent market power, vertical integration and vertical contracts are *procompetitive*.") (citing Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 Antitrust L.J. 67, 76 (1991)). Tempting though it may be to agree with my appellate brethren, I need not, and will not, go that far to resolve this case.

multichannel video programming distributors. Gov't PFOF ¶¶ 31, 38-41. Both of those proposed markets find support, the Government contends, in Professor Shapiro's expert analysis, *see* Tr. 2184:22-2188:4 **[**80]** (discussing hypothetical monopolist test, among other things), as well as the *Brown Shoe* "practical indicia," *see* *370 U.S. at 325* (listing "industry or public recognition of the submarket," "the product's peculiar characteristics and uses," and "distinct customers" and "distinct prices" of the product as relevant to product market determination); Gov't PFOF ¶¶ 32-36.

Horizontal merger cases often "to a great extent . . . hinge[] on" market definition because such definition affects the ultimate market concentration statistics associated with a proposed transaction. *FTC v. Staples, Inc., 970 F. Supp. 1066, 1073 (D.D.C. 1997)*. For that reason, market definition is often heavily contested in horizontal merger cases, turning on fine-grained economic analyses of "SSNIPs" and cross-elasticity of demand. *See, e.g., Anthem, 236 F. Supp. 3d at 193-198*; *FTC v. Staples, Inc., 190 F. Supp. 3d 100, 116-127 (D.D.C. 2016)*; *Sysco Corp., 113 F. Supp. 3d at 24-48*. Happily, I need not delve deeply into those concepts here. The proposed vertical merger, as discussed, does not "involve an increase in market concentration," and defendants, for all of their objections to the Government's case, have not meaningfully challenged the Government's proposed product or geographic markets. Joint Statement 3; *see* Tr. 2186:25-2187:2, 2188:2-4 (Shapiro). I will thus accept the Government's proposed product and geographic **[**81]** markets for purposes of this case, and briefly discuss the basics of those markets — as well as the role of the product market as it relates to my analysis of the Government's claims of harm — below.

Product Market. The Government's *primary* product market is the market for multichannel video distribution. Multichannel video distribution, as defined by the Government, involves the distribution of live, or "linear," video programming networks, as well as on-demand content, to subscribing consumers. Gov't PFOF ¶ 31; Trial Br. of the United States ("Gov't Pre-Tr. Br.") 22 [Dkt. # 76]. As relevant here, the sellers in that product market are: 1) MVPDs, including cable television providers, such as Comcast, Cox, and Charter; **[*196]** direct broadcast satellite providers, such as DirecTV and DISH, which operate nationally; telecommunications providers, or "telcos," such as Verizon Fios and AT&T's U-verse; and overbuilders, such as RCN; and 2) virtual MVPDs, including Sony's Playstation Vue, Hulu Live, Google's YouTube TV, DirecTV Now, and DISH's Sling. As discussed, virtual MVPDs provide the same live-TV services as do traditional MVPDs, but do so over the internet rather than by way of a dedicated **[**82]** transmission path that they control. *See* Gov't PFOF ¶ 15. Although the majority of U.S. households (approximately 90 million) currently receive linear video programming through traditional MVPDs, *id.*, and a majority are likely to continue to do so, there is no debating that the number of MVPD subscribers is "declining unequivocally" as consumers increasingly turn to virtual MVPDs and SVODs for their video content needs. Tr. 3451:22-23 (Stephenson (AT&T)); *see id.* at 3449:12-3451:1 ("DirecTV lost 1.2 million subscribers in 2017. The whole system, pay TV, cable, satellite, lost 3 million."); *see also id.* at 2948:11-24 (Holanda (RCN)); PX455-136 to -137.

As the above discussion indicates, the Government's proposed product market focuses on the downstream distribution of live-TV content to consumers—a focus that excludes both the upstream programming market and the market for SVODs such as Netflix, Hulu, and Amazon Prime. *See, e.g., id.* at 2184:22-2185:5 (Shapiro); *cf.* Gov't PCOL ¶ 38 (disputing need to "define an 'upstream' programming marker).[21] That product market definition appears to reflect the Government's (and Professor Shapiro's) projections regarding where the challenged merger's **[**83]** ultimate "net harm" to consumers — *i.e.*, the predicted increased costs to "multichannel video subscribers" — will result. *Cf.* Gov't PFOF ¶ 231. Importantly, however, accepting the Government's proposed product market does not mean that Turner's position in the upstream programming market is irrelevant to evaluating the Government's theories of harm in this case. Nor does it require this Court to ignore the rising role of SVODs in the broader multichannel video programming and distribution market. That is because the Government's proffered increased-leverage theory, not to mention its other theories of harm, incorporates those factors in at least three different ways.

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[21] The Government also asserts that a broader market of "All Video Distribution" — which includes SVODs in addition to MVPDs and virtual MVPDs — constitutes a relevant product market. *See* Gov't PFOF ¶ 37 (citing Tr. 2184:18-2185:17) (Shapiro). For simplicity's sake, this discussion mirrors the Government's focus on the multichannel video distribution market. *Cf.* Gov't Pre-Trial Br. 22.

First, as will become clear in the ensuing discussion, examining the importance of Turner's content to distributors in the upstream programming market is a necessary (but not sufficient) step in evaluating the Government's increased-leverage theory. *Cf.* Gov't PFOF ¶¶ 69-102 (proposing findings of fact to support assertion that the "merger would enable AT&T to harm competition because MVPDs and virtual MPVDs need Turner content to compete effectively"). *Second*, the bargaining model from which the Government's measures **[**84]** of consumer harm are derived itself accounts for the increasing role of SVODs and "cord cutting" in the market, as those trends affect the amount of benefits that AT&T could expect to receive under the Government's increased-leverage theory. *See, e.g.*, Tr. 2242:2-18 (Shapiro) (discussing role of "cord cutting" in calculating the bargaining model's "diversion rate" input); *id.* at 2504:11-2506:24 (Carlton) (explaining why cord cutting "matters a lot" to bargaining model). *Third* and finally, the Government **[*197]** has argued that certain documents reflect an intent on the part of defendants to use the proposed merger to act consistently with the Government's increased-leverage theory of harm, among other theories. *See* Gov't PCOL ¶ 51 (stating, in relation to "[d]efendants' internal documents," that "[e]vidence of anticompetitive intent can also form the basis of a court's prediction of harm"). To appropriately evaluate the strength of such evidence, however, I must be able to put it in the context of other documents and statements related to the various rationales for the proposed merger including, of most relevance here, defendants' asserted desire to compete with SVODs and other technology **[**85]** companies amid "the ongoing revolution in video programming and distribution." Defs.' PFOF ¶ 6; *see also* Tr. 3079:18-3080:2 (Bewkes (Time Warner)). Therefore, although the Government is of course correct that the refrain "'we are getting killed by new competition in different markets'" is no "defense to an illegal merger," Gov't Post-Tr. Br. 21, I simply cannot evaluate the Government's theories and predictions of harm, as presented by the Government at trial, without factoring in the dramatic changes that are transforming how consumers view video content.

Geographic Markets. The Government has identified over 1,100 local multichannel video distribution markets as the relevant geographic markets. *See* Gov't PFOF ¶ 41. These local markets, which the Government calls "Local Footprint Overlap Zones," represent each local geographic area in which "residents have access to video offerings from the same set of MVPD competitors." *Id.*; *see* Tr. 2187:3-25 (Shapiro). The localized geographic markets reflect the reality that, due to limitations of the physical transmission paths maintained by many of the providers in the multichannel video distribution market, the mix of MVPDs and virtual MVPDs **[**86]** available to a consumer varies based upon where that consumer lives. *See* Gov't PFOF ¶ 40. As such, the Government contends that the asserted "effects of the proposed merger" will vary depending "on the market shares of the various MVPDs and virtual MVPDs in [a] region," and that analyzing the local markets is therefore appropriate. *Id.* The Government has not relied upon harm in any particular local market as the basis for enjoining the merger, however. Instead, the Government's expert "aggregated" all of the alleged harms in the local markets in order to derive a total measure of nationwide economic harm. Gov't PFOF 13 ("Relevant downstream geographic markets are local, but they can be aggregated for analytical convenience."); *see* Tr. 2255:1-2256:15 (Shapiro) (providing aggregate estimates of consumer harm nationwide).

II. Conceded Consumer Benefits of Proposed Merger

Vertical mergers often generate efficiencies and other procompetitive effects. *See supra* pp. 53-57 & nn. 17, 19. The proposed merger is no exception. Indeed, the Government concedes that this case implicates one "standard benefit" associated with vertical mergers: the elimination of double marginalization ("EDM"). Tr. 2438:6 (Carlton); **[**87]** Gov't PFOF ¶ 222.

As relevant here (and at the risk of oversimplifying things), double marginalization refers to the situation in which two different firms in the same industry, but at different levels in the supply chain, each apply their own markups (reflecting their own margins) in pricing their products. *See* Tr. 2251:15-25 (Shapiro). Those "stacked" margins are both incorporated into the final price that consumers have to pay for the end product. *Id.* at 2251:24. By vertically integrating two such firms into one, the merged company is able to "shrink that total margin so there's one instead of two," leading to lower prices for consumers. **[*198]** *Id.* at 2252:1-3. EDM is, therefore, procompetitive.

In the context of a Time Warner and AT&T combination, EDM will play out as follows. Prior to the merger, AT&T must pay Time Warner a certain price to display Turner content to its DirecTV customers. *Id.* at 2251:19-25. The price that AT&T pays includes Time Warner's profit margin, that is, an amount over and above the marginal cost of the programming. *Id.* After the vertical integration of AT&T and Time Warner, however, AT&T will no longer need to pay Turner's profit margin to display Turner content. **[**88]** *See id.* at 2252:1-3; *id.* at 2438:9-15 (Carlton). In effect, that means that AT&T's marginal cost of licensing Turner content will be lower, which in turn renders distribution of Turner to its DirecTV customers more profitable. *Id.* at 2438:13-15 (Carlton). With its profits increased, AT&T would have the "incentive to get more customers and in particular AT&T's price, the DirecTV price will go down to consumers." *Id.* at 2438:16-18.

According to the Government's expert, Professor Shapiro, EDM would result in AT&T lowering the price for DirecTV by a "significant" amount: $1.20 per-subscriber, per-month. *Id.* at 2252:6-7 (Shapiro). All told, those savings to AT&T's customers add up to $352 million annually. *See id.* at 2252:19-21. Those savings, moreover, would begin flowing to AT&T's customers "pretty quickly" after consummation of the merger. *Id.* at 2446:4-5 (Carlton).

All sides agree that any proper antitrust analysis of the proposed merger must account for those "positive elements of the merger in terms of DirecTV, having lower costs." *Id.* at 2182:12-13 (Shapiro); *cf.* Gov't PFOF ¶¶ 222-23. In other words, to understand whether the proposed merger will harm consumers, Professor Shapiro explained, **[**89]** it is necessary to "balance" whether the Government's asserted harms outweigh the merger's conceded consumer benefits. Tr. 2180:24, 2181:1-6 (Shapiro); *see id.* at 2182:11-21 ("So I'm going to need to trade those off. This is somewhat different than horizontal merger analysis. We're talking about vertical merger analysis here."). With that important principle in mind, I will now examine whether the Government has met its burden under *Section 7*.

III. The Government Has Failed to Meet Its Burden to Show That the Proposed Merger Is Likely to Substantially Lessen Competition by Increasing Turner's Bargaining Leverage in Affiliate Negotiations

The Government's primary theory of harm to competition focuses on the challenged merger's integration of Turner's important video content — content that includes, among other things, the networks CNN, TNT, and TBS — with AT&T's video distributors, U-verse and DirecTV.[22] Specifically, the Government contends that, should the challenged merger proceed, Turner's relationship with AT&T will enable Turner to extract greater prices from AT&T's rival distributors for its "must-have" content than it could without the merger. *See, e.g.*, Compl. ¶¶ 31-38. The Government argues **[**90]** that distributors would then pass on those price increases to their subscribers, resulting in an increase of hundreds of millions of dollars in annual consumer payments. *Id. ¶ 39*; Gov't PFOF ¶¶ 231-232.

According to the Government, it carried its burden to support its increased-leverage theory of harm to competition by offering what it refers to as "real-world objective **[*199]** evidence" — namely, statements contained within defendants' prior regulatory filings and internal business documents as well as testimony from third-party competitor witnesses. Gov't PCOL ¶ 21. To further corroborate its increased-leverage theory and predict the consumer harm that would be generated, the Government also relied on testimony and economic modeling proffered by Professor Carl Shapiro. Professor Shapiro opined that a post-merger Turner would be able to extract greater affiliate fees from distributors due to increased bargaining leverage Turner would gain on account of its relationship with AT&T. Citing the results of his economic models, Professor Shapiro predicts that such increased leverage would lead to total, annual consumer harms that outweigh the conceded $352 million in annual cost savings that the **[**91]** proposed merger would generate for AT&T's customers. *See, e.g.*, Tr. 2253:4-15 (Shapiro).

Not surprisingly, the defendants vigorously disagree with the Government's increased-leverage theory of harm. To start, defendants argue that the Government has failed to put forward any "meaningful real-world evidence" to support the premise that a post-merger Turner would benefit from increased bargaining leverage with distributors on account of its relationship with AT&T. Defs.' PFOF ¶ 81. If anything, defendants argue, analysis of real-world pricing data demonstrates that prior instances of vertical integration in this industry have not produced the increased-leverage effects that the Government predicts. *Id. ¶¶ 95-102*. Defendants also challenge Professor

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[22] For purposes of this section, the Court at times refers to AT&T's collective distribution offerings as "DirecTV."

Shapiro's testimony, arguing that it lacks sufficient basis in the facts of this industry and reflects results based on a model riddled with improper inputs and faulty assumptions. *Id.* ¶¶ 86-94, 105, 111-13, 188, 204.

In evaluating these competing contentions, the Court unfortunately does not have the luxury of looking to judicial precedents applying the increased-leverage theory in the context of a *Section 7* challenge to a vertical merger. Indeed, the **[**92]** Government has not pointed to *any* prior trials in federal district court in which the Antitrust Division has successfully used this increased-leverage theory to block a proposed vertical merger as violative of *Section 7*. *Cf.* Tr. 2390:2-4 (Shapiro) (noting, with respect to proffered economic bargaining model, that "[w]hat's less common is to use it to evaluate a merger or a vertical merger especially"); Defs.' PCOL ¶ 32. Thus, in this matter of first impression, I must determine whether the evidence adduced at trial is sufficient to support the Government's assertion that Turner will likely gain increased bargaining leverage in affiliate negotiations on account of the proposed merger and, if so, whether any increased distributor or consumer costs stemming from the increased bargaining leverage will result in a substantial lessening of competition under *Section 7*.

Having heard and considered the evidence adduced at trial, I conclude that the Government has failed to clear the first hurdle of showing that the proposed merger is likely to increase Turner's bargaining leverage in affiliate negotiations; I thus need not consider the separate legal question of whether any effects associated with the Government's **[**93]** increased-leverage theory would result in a substantial lessening of competition for purposes of the *Clayton Act's* prohibitions.[23] Before explaining that **[*200]** conclusion, I need to briefly review the basics of affiliate negotiations and the Government's increased-leverage theory of harm. With that background established. I will examine the evidence put forward by the Government to support its argument that the challenged merger would likely increase Turner's bargaining leverage with distributors and thereby enable it to secure greater affiliate fees than it could without the merger. Ultimately, as I will explain, the Government's proof at trial falls *far* short of establishing the validity of its increased-leverage theory.

A. Background of Increased-Leverage Theory of Harm

As previously discussed, the terms under which distributors may license and display programmers' content are set through a "very tough" series of affiliate negotiations. Tr. 1023:2 (Breland (Turner)); *see supra* pp. 14-18. As with any type of bargaining, each party to an affiliate negotiation attempts to take advantage of its points of leverage, and "reaching a deal in the end can come down to a battle of the competing **[**94]** bargaining leverages." Tr. 1025:20-22 (Breland (Turner)); Gov't PFOF ¶ 154. In the event an affiliate negotiation is unsuccessful, the distributor will lose the rights to display the programmer's content to its customers. Such a situation is known in the industry as a programming "blackout," or "going dark." Tr. 129:4-9 (Fenwick (Cox)).

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[23] On that score, defendants argue that "even taken at face value, the Government's projected price effects do not state a claim under the *Clayton Act*." Defs.' PCOL 159 (capitalization altered); *see also id.* ¶¶ 31-33. In particular, defendants point out that the miniscule per-consumer price increases of approximately 27-cents per month relied on by the Government would not prevent AT&T's rival distributors from competing in the marketplace or otherwise "impair[] their ability to discipline" AT&T's prices; indeed, they claim that competition would be promoted by the challenged merger's conceded vertical integration effect of lowering AT&T's prices to its projected consumers. *Id. ¶¶ 31-32*; *cf.* *Comcast Cable Comms., LLC v. FCC, 717 F.3d 982, 990, 405 U.S. App. D.C. 188 (D.C. Cir. 2013)* (Kavanaugh, J., concurring) ("Vertical integration and vertical contracts become potentially problematic only when a firm has market power in the relevant market.").

For the reasons given by defendants, the Court harbors serious doubts that the Government's proffered affiliate fee increases to AT&T's rivals or the resulting 27-cent per-month subscriber cost increases would, if proven, constitute a "substantial lessening of competition" for purposes of *Section 7*. *15 U.S.C. § 18*. As just noted, however, I need not rest this opinion on that legal conclusion. That is because, for all of the reasons provided in the section that follows, the Government has failed to carry its burden to put forward adequate evidence to show that there are likely to be *any* price increases (much less price increases that outweigh the conceded EDM benefits to consumers) either to AT&T's rival distributors or their subscribers under its increased-leverage theory.

Blackouts have significant, if not "catastrophic," negative consequences for programmers — in the form of lost advertising and affiliate fee revenues. *Id.* at 1128:7-12 (Breland (Turner)); Defs.' PFOF ¶¶ 76-77. Distributors, for their part, may lose subscribers. *See generally, e.g.*, Tr. 2197:4-2198:2 (Shapiro). In "almost every negotiation," therefore, programmers and distributors threaten blackouts in an attempt to gain concessions. *Id.* at 1026:17-1027:3 (Breland (Turner)); *cf. id.* at 367:1-22, 376:22-377:11 (Schlichting (DISH)). Given that blackouts are negative events for both programmers and distributors, however, deals between programmers and distributors are invariably struck in order to avoid long-term blackouts. *See id.* at 138:13-15 (Fenwick (Cox)); *id.* at 1027:4-7 (Breland (Turner)); *id.* at 1359:14-15 (Montemagno (Charter)); *id.* at 3124:4-7 (Bewkes **[**95]** (Time Warner)). Indeed, when it comes to Turner, the record shows that there has *never* been a long-term blackout of the Turner networks. *See id.* at 2357:12-14 (Shapiro) ("Q: But to be sure there's never been a long-term blackout of Turner, right? A: No **[*201]** . . . ."); Defs.' PFOF ¶ 94. That fact is by no means lost on either side.

That background brings us to the Government's increased-leverage theory. Notably, under that theory, the Government does *not* allege that a post-merger Turner would be incentivized to start *actually* engaging in long-term blackouts with distributors. That is so, as Professor Shapiro concedes, because withholding Turner content would not be "profitable" to the merged entity given the attendant losses in significant advertising and affiliate fee revenues. *See* Tr. 2293:9-17 (Shapiro). In other words, and in contrast to a prevalent theory of vertical merger antitrust harm, Turner will not "foreclose" downstream distributors from accessing Turner content. *See id.* at 2218:15-16 ("This is not a foreclosure-withholding story."); *cf.* *Brown Shoe, 370 U.S. at 323-24* (stating that "[t]he primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors **[**96]** of either party from a segment of the market otherwise open to them, the arrangement may act as a clog on competition" (internal quotation marks omitted)).

Instead, the Government's increased-leverage theory of harm posits that Turner's bargaining position in affiliate negotiations would improve after the merger due to its relationship with AT&T. That is so, the Government argues, because Turner and its distributor counterparties would recognize that, should Turner fail to strike a deal and engage in a long-term blackout with a distributor, Turner would no longer face the mere downside of losing affiliate fees and advertising revenues. *See, e.g.*, Gov't Post-Tr. Br. 1-2. Rather, some of those losses would be offset, according to the Government, by new benefits to AT&T's video distribution companies via the following chain of events: 1) some of the rival distributor's customers would depart or fail to join the distributor due to the missing Turner content; 2) some portion of those lost customers would choose to sign up with AT&T's video distributors (which would have Turner); and 3) AT&T would profit from those gained subscribers. *See generally* Tr. 2197:15-2198:12 (Shapiro). As a result, **[**97]** the Government predicts that Turner's downside position in the event of a blackout would improve as a result of the proposed merger. That improved downside position, according to the Government, would in turn enable Turner to demand higher prices for its content in post-merger affiliate fee negotiations with distributors — price increases that would ultimately be passed on to consumers. *See* Compl. ¶ 38.

At trial, the Government relied on two primary categories of evidence to support its increased-leverage theory of harm. First, it offered so-called -real-world objective evidence" — namely, statements contained within defendants' prior regulatory filings and internal business documents as well as testimony from third-party competitor witnesses. Gov't PCOL 21. Second, the Government called an expert, Professor Carl Shapiro, to testify about its increased-leverage theory, which is based on an economic theory of bargaining known as the Nash bargaining theory, and to estimate the consumer harm associated with the increased-leverage theory. Gov't PFOF ¶ 201. For the following reasons, neither category of evidence was effective in proving the Government's increased-leverage theory. Accordingly, **[**98]** as to this theory, the Government has failed to meet its burden of proof to show that the merger is likely to result in a substantial lessening of competition.

[*202] B. The Government's So-Called "Real-World Objective Evidence" Is Insufficient to Support Its Increased-Leverage Theory of Harm

To support its increased-leverage theory of harm, the Government first points to various pieces of the so-called "real-world objective evidence" it offered at trial. Gov't PCOL 21. That evidence primarily consisted of defendants' ordinary course-of-business documents and excerpts of regulatory filings submitted by defendants in prior administrative proceedings, as well as the testimony of third-party witnesses from AT&T's rival distribution companies. Of particular importance here, the Government's so-called real-world evidence was directed at explaining and establishing two main concepts. First, the Government sought to establish the importance of Turner content to distributors and the resulting leverage Turner enjoys in affiliate fee negotiations. Second, the Government relied on this so-called "real-world objective evidence" to substantiate its prediction that Turner's leverage with distributors would **[**99]** *increase* as a result of Turner's post-merger relationship with AT&T. Neither, however, provided persuasive support for the Government's increased-leverage theory of harm. How so?

1. <u>Evidence Regarding the Popularity of Turner Content Is of Limited Probative Value in Evaluating the Contention That Turner Will Gain Increased Leverage Due to the Proposed Merger</u>

At trial, much time was spent debating the "must-have" status of Turner's programming content. According to the Government, distributors literally "'must haves'" Turner's content in order "to compete effectively" in the video distribution industry. Gov't Post-Tr. Br. 4; *see also id.* at 6 ("Distributors don't just want this specific input to compete effectively, they truly need it."); Gov't PFOF 23 (similar). Defendants countered that the term "must have" is simply a marketing phrase used to mean "popular" and, similarly, that Turner content is not actually necessary to allow distributors to operate their businesses successfully. *See* Defs.' PFOF ¶ 179.

Based on the evidence, I agree with defendants that Turner's content is not *literally* "must have" in the sense that distributors cannot effectively compete without it. The evidence showed that **[**100]** distributors have successfully operated, and continue to operate, without the Turner networks or similar programming. *Cf.* Tr. 351:5-25 (Schlichting (DISH)) (discussing fact that DISH's virtual MVPD, Sling, offers packages without broadcast stations and CBS); PX144-121 (listing "[p]ast [n]etwork [d]rops" by distributors). Indeed, Stefan Bewley, a consultant who generated a slide deck with recommendations for Charter's use in evaluating its relationships with programmers, indicated that "Charter would be better off and would save a lot of money [by] canceling Turner." Tr. 1336:10-12 (Bewley (Altman Vilandrie)). Sling President Warren Schlichting acknowledged DISH founder and chairman Charlie Ergen made similar statements to the investment community. *See, e.g., id.* at 365:17-366:1 (Schlichting (DISH)) (conceding that Ergen stated in investor call that a Turner blackout would be "slightly cash positive for us from a cash-flow perspective").

I therefore give little credit to blanket statements by third-party competitor witnesses indicating that the entire "viability of [their] video model" could depend on whether they offer Turner programming. *Id.* at 128:21 (Fenwick (Cox)); *see also id.* **[**101]** at 697:2-19 (Hinson (Cox)) (claiming that, without Turner, Cox would lack "the ability to compete" and that their customers would "go somewhere else"). Such statements were largely unaccompanied by any sort of factual analyses or, worse, contradicted **[*203]** by real-world examples from the witnesses themselves. *See, e.g., id.* at 128:22-129:20 (Fenwick (Cox)) (neither she nor others at Cox had done analysis of potential subscriber losses in Turner blackout); *id.* at 2947:1-13 (Holanda (RCN)) ("Q: And so today, you're not offering this Court any empirical data or any real-world evidence of subscriber losses if RCN didn't have Turner, right? A: No, not our company."). *Compare id.* at 242:14-15, 352:5-7 (Schlichting (DISH)) ("[I]f you don't have March Madness" games, half of which are carried by Turner, "you're not in the pay-TV business."), *and id.* at 245:14-15 ("Q: How about CNN, why is CNN must have? A: Well, imagine coming around to midterm elections without CNN, right."), *and id.* at 242:16-243:1 ("ABC, NBC, CBS, Fox and Time Warner are the five groups that you, you just, it's very hard to have a pay-TV service without them."), *with id.* at 352:1-19 (conceding that DISH's Sling does not carry CBS, which offers the other half of the March Madness games), *and id.* at 360:18-24, 388:10-389:5 (acknowledging that DISH went dark with CNN at time of 2014 midterm elections and suffered only negligible subscriber loss), *and id.* at 351:11-21 (admitting that Sling Orange package lacks all of the "broadcast stations [and] CBS").[24]

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[24] The "must have" status of Turner content also varies based on whether the content is available for viewing through other means, such as over the internet. Former Cable ONE negotiator Randy Sejen testified, for example, that subscriber losses from a blackout of Turner's live baseball content were mitigated by the fact that "consumers were able to wire around" the blackout by "accessing mlb.com if they needed to see a particular playoff game." Tr. 2117:21-2118:20 (Sejen (CABLE ONE)). Along those same lines, Sejen testified that the online availability of March Madness basketball games could potentially "address the sort of must-have nature" of that content. *See id.* at 2121:11-16, 2123:1-5. 1 received similar evidence indicating that the availability of

Nor does those witnesses' (or, for that matter, defendants') use of the term "must have" to describe Turner content change things. Indeed, the evidence indicated that the term "must have" is a marketing phrase used by virtually every programmer to suggest that its content is popular with viewers. *See, e.g., id.* at 549:19-20 (Martin (Turner)) ("'Must have' is another way of saying, we have popular programming."); *id.* at 899:13-16 (Rigdon (Comcast)) (agreeing that "must have is just a term of art that means something is popular"); *id.* at 1092:18-24 (Breland (Turner)) ("[M]ust have means it's popular . . . . I don't in a literal sense mean that I must have this content or I can't be successful."); *id.* at 2130:23-2131:6 (Sejen (Cable ONE)) (agreeing that he would "expect to hear" all programmers pitch their **[**102]** content as "must-have" and that he would "kind of take that with a grain of salt").

That said, I do nonetheless accept the Government's contention that Turner has popular content - especially live sporting events and live news - and, as a result, enjoys bargaining leverage with distributors. *See* Gov't PFOF ¶¶ 70-102 (summarizing evidence regarding Turner's importance to distributors); *id. ¶¶ 103 -177* (summarizing evidence supporting proposition that "Turner's valuable content gives it leverage in negotiations" with distributors). Importantly, however, accepting that straightforward proposition - *i.e.*, that popular programmers such as Turner are able to demand more for their content than less popular programmers - does not prove that the challenged *merger* would harm competition pursuant to the Government's increased-leverage theory of harm. **[*204]** To prove its increased-leverage theory, in other words, it is not sufficient for the Government to put forward evidence that Turner has important content and thus bargaining leverage - that fact is true today, pre-merger. Rather, the Government's increased-leverage theory posits that Turner's pre-merger bargaining leverage would materially increase **[**103]** as a result of its post-merger relationship with AT&T and that, as a result, distributors would cede greater affiliate fees than they would absent the merger.

To support that contention at trial, the Government primarily relied on defendants' own statements and documents as well as testimony of third-party competitor witnesses, most (but not all) of whom expressed concern regarding the challenged merger's potential effects on their businesses. Neither category of evidence, however, is persuasive in proving that Turner's post-merger negotiating position would materially increase based on its ownership by AT&T.

2. Defendants' Own Statements and Documents Provide Little Support for the Contention That Turner Will Gain Increased Leverage Due to the Proposed Merger

According to the Government, defendants' own prior statements and ordinary course business documents "recognize that vertical integration poses a threat to competition" and, thus, provide convincing support for the Government's bargaining leverage claim. *See* Gov't PFOF ¶¶ 47-58. The Government points to statements made by defendants in the context of prior regulatory proceedings, and statements contained in internal documents such **[**104]** as slide decks and emails created by various individuals within the defendant companies. Neither category, however, was of any particular probative value. How so?

As a general matter, the Government is undoubtedly correct that "ordinary course-of-business documents, including those generated by the defendants," can be probative of whether a proposed merger is likely to result in competitive harm. Gov't PCOL ¶ 49. But as with any other piece of documentary evidence, assessing the probative value of defendants' own documents and statements requires an examination of the context, circumstances, and foundation of the proffered evidence. As such, with few exceptions, the Court denied the Government's requests to admit into evidence and cite in post-trial briefing a number of company documents for which there was no accompanying background or foundation testimony. *See supra* pp. 46-47 & nn. 11-13. With the benefit of foundational testimony, I have considered all of the documentary and testimonial evidence from defendants' files and witnesses upon which the Government relied at trial. Having done so, I nonetheless conclude that the proffered statements and

HBO's content through online, direct-to-consumer platforms has lowered the value of HBO programming — and thus its leverage — in the eyes of distributors. *See, e.g.*, DX709.

documents admitted are of such marginal probative **[**105]** value that they cannot bear the weight the Government seeks to place on them.[25]

[*205] *First*, the Government argues that defendants' statements "made in external filings with governmental authorities" are evidence of defendants' "understanding of the anticompetitive effects that result from this transaction." Gov't PCOL ¶ 52. The statements in particular upon which the Government relies were made, either in comments or supporting expert reports filed by AT&T or DirecTV, in the course of the following FCC proceedings: 1) the 2010 review of the Comcast-NBCU merger, *see* PX1 (DirecTV); PX441 (DirecTV); 2) the 2012 proceeding to determine, *inter alia*, whether to allow one of the FCC's program access rules to sunset, *see* PX2 (AT&T); PX442 (AT&T); PX443 (DirecTV); 3) the 2014 annual video competition proceeding, *see* PX444 (AT&T); and 4) the 2014 review of the AT&T-DirecTV merger, *see* PX467 (AT&T and DirecTV).[26] Not surprisingly, the Government contends that these prior statements show that defendants have previously recognized the validity of applying its increased-leverage theory to affiliate fee negotiations. *See, e.g.*, Gov't Post-Tr. Br. 2. But with that said: so what? Although I agree **[**106]** that a few of the proffered statements might be somewhat probative of the Government's increased-leverage theory, that limited probative value cannot, and does not, overcome the numerous insufficiencies with the Government's case discussed below.

In particular, in examining defendants' prior regulatory filing statements, I am mindful of the considerations discussed in the context of the third-party competitor testimony. *See infra* pp. 91-99. When AT&T and DirecTV made many of the proffered regulatory filings, they acted as competitors to (or customers of) distributors whose competitive positions would be affected by FCC review. For that reason **[*206]** alone, I am hesitant to assign any significant evidentiary value to those prior regulatory filings.

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[25] Before proceeding further, the Court notes a bit of confusion in the Government's position about the role of defendants' alleged "anticompetitive intent" in assessing the likely harms associated with the challenged merger. Gov't PCOL ¶ 51. In opening arguments, counsel for the Government stated, in reference to the predictive exercised called for by Section 7, that "courts don't focus on intent. What they focus on is effects, effects in the market." Tr. 10:15-16. But the Government's post-trial brief cites cases for the proposition that "[e]vidence of anticompetitive intent can also form the basis of a court's prediction of harm," while at the same time noting that "absence of evidence demonstrating anticompetitive intent . . . suggests nothing." Gov't PCOL ¶ 51 & n.12.

The Court need not toil to reconcile those positions or parse the state of our Circuit's current case law on the issue. *Compare* ***Whole Foods Mkt., 548 F.3d at 1047*** (Tatel, J., concurring in the judgment) ("[T]he Supreme Court has clearly said that 'evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger." (emphasis and internal quotation marks omitted) (quoting *Brown Shoe, 370 U.S. at 329 n.48*)), *with* ***id. at 1057*** (Kavanaugh, J., dissenting) ("[I]ntent is not an element of a § 7 claim. . . . " (citing *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989))* ("Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition.")). That is because, as discussed below, here there is nothing akin to the direct, anticompetitive intent evidence of the other cases cited by the Government in its post-trial brief.

[26] Just prior to the close of evidence, when the Government moved the Court to take judicial notice of certain enumerated regulatory filings, I noted that the materials filled a notebook that is about "4 inches thick of paper." Tr. 3942:4-5. Given the complex analyses and arguments contained within the voluminous filings, I noted that the Government was "at an absolute minimum . . . going to have to isolate and identify as to each document which statement or statements" it thought were relevant to the case for purposes of clearing *Federal Rule of Evidence ("FRE") 403*. *Id.* at 3943:23-3944:3. In response, counsel for the Government stated that the "memorandum that I handed up isolates and lists the specific statements, and I'm happy to limit to those that are identified on page 3 and 4." *Id.* at 3945:11-13. In its post-trial papers, the Government nonetheless appears to argue that the *entire* expert reports appended to the prior regulatory filings are admissible under *FRE 801(d)(2)* as adoptions of defendants. *See* Gov't PCOL ¶ 54 & n.13. That is largely beside the point, however. That is because the Court declines to admit those portions of the proffered expert reports and filings not "identified on page 3 and 4" of the Government's motion under *FRE 403*. *Id.* at 3945:11-13. In my judgment, evaluating the complicated, fact-specific arguments and analyses contained with those filings and reports would essentially require a trial within a trial (recall that not even the expert reports in *this case* were offered into evidence by the parties), the result of which would produce evidence that is only marginally probative for all of the reasons discussed below.

Finally, with respect to this particular categories of statements, I particularly decline to place much stock in the statements related to the sunsetting of the FCC's ban on exclusive contracting between certain programmers and distributors. *See, e.g.*, PX2, PX442. Many of those statements relate to the issue of withholding content — something the Government's own expert concedes would *not* occur as a result of the proposed merger. *Compare* ***[**107]*** PX2-4 ("[V]ertically integrated programmers continue to have the incentive and ability to use (and indeed have used whenever and wherever they can) that control as a weapon to hinder competition to their down-stream cable affiliates *by withholding popular programming from competing MVPDs*.") (emphasis added), *with* Tr. 2218:13-17 (Shapiro) ("I'm not saying that after the merger, Turner will deny its content to the other distributors. *This is not a foreclosure-withholding story*.") (emphasis added). Generic statements about "mushroom[ing]" bargaining power of all programmers are similarly unhelpful to evaluating the Government's particular claims in this case. PX444-3 to -4.

That brings us to select statements made by DirecTV or AT&T that relate to vertically integrated programmers' ability to raise content prices and the use of the Nash bargaining model to estimate increased affiliate fees. *See, e.g.*, PX1-17, -83 ("[V]ertical integration of programming and distribution can, if left unchecked, give the integrated entity the incentive and ability to gain an unfair advantage over its rivals."); PX441-5 (noting "voluminous economic and other evidence that the proposed transaction would enable **[**108]** Comcast to raise the prices paid by its MVPD rivals for NBCU programming"); PX443-79 ("[V]ertically integrated MVPDs have an incentive to charge higher license fees for programming that is particularly effective in gaining MVPD subscribers than do non-vertically integrated MVPDs."). According to the Government, those statements show that defendants recognize the validity of applying *this* bargaining model to estimate the impact of AT&T and Time Warner's vertical integration on affiliate fee negotiations. Please !

Generic statements that vertical integration "*can*" allow the integrated entity to gain an "unfair advantage over its rivals," PX1-17 (emphasis added), do not come close to answering the question before the Court in relation to the Government's increased-leverage theory: whether the Government has carried its *Section 7* burden to show, through proof at trial, that Time Warner will gain increased bargaining leverage in affiliate negotiations on account of the proposed merger and, if so, whether that increased bargaining leverage would result in increased distributor or consumer costs that would constitute a substantial lessening of competition under *Section 7*. *Cf. In re Applications of Comcast Corp., 26 FCC Rcd. 4238* ¶ 24 (2011) (noting differences **[**109]** in FCC's "public interest" review and DOJ's burden for "block[ing] a transaction" under *Section 7*). Similarly, the arguments that the Comcast-NBCU merger would harm distributors or consumers (as well the projections of harm) were, of course, informed by the state of the market at the time of the proceeding and the particular inputs to the models presented to the FCC. *See, e.g., id.* app. B (Technical Appendix) (setting out various formulae and inputs used to model potential economic harm). Given all that, defendants' specific predictions regarding the ability of a merged Comcast-NBCU to leverage price increases by threatening to withhold the particular programming at issue is not particularly probative of whether a merged AT&T-Time Warner could do the same with its programming in **[*207]** today's more competitive marketplace. *Compare id.* ¶ 41 ("We do not determine at this time whether online video competes with MVPD services."), *with* Gov't PFOF ¶¶ 14-18 (detailing role of virtual MVPDs in "distribut[ing] linear channels and on demand content to subscribers over the internet"). Moreover, as discussed in more detail below, defendants' expert Professor Carlton concluded in an econometric analysis of content **[**110]** pricing following the Comcast-NBCU merger that, contrary to the predictions offered by competitors in the regulatory filings, the merger did *not* cause content prices to increase. *See infra* pp. 100-105.

That said, the Court agrees with the Government that the fact that defendants previously submitted expert reports or commentary sponsoring the use of the Nash bargaining model in the context of affiliate fee negotiations counts as a mark (albeit a faint one) against defendants' attempts to disavow the applicability of the Nash bargaining theory in this case. Unfortunately for the Government, however, my conclusion that the Government has failed to provide sufficient evidentiary support to show the Nash bargaining theory accurately reflects post-merger affiliate negotiations or the proffered bargaining model in this case does not turn on defendants' protestations that the theory is "preposterous," "ridiculous," or "absurd." Gov't PFOF ¶ 47 (quoting Tr. 50:18 (Defs.' Opening); *id.* at 3119:19-24 (Bewkes (Time Warner)); *id.* at 3430:1-11 (Stephenson (AT&T)). It rests instead on my evaluation of the shortcomings in the proffered third-party competitor testimony, *see infra* pp. 91-99; the testimony about the complex nature **[**111]** of these negotiations and the low likelihood of a long-term Turner blackout, *see infra* pp. 14-18, 115-117 & nn.34-36; and the fact that real-world pricing data and the experiences of individuals who have negotiated on behalf of vertically integrated entities all fail to support the Government's increased-leverage theory, *see infra* pp. 99-108. Therefore, even assigning *some* probative weight to the statements made by defendants in prior regulatory proceedings, those statements do not come close to providing a sufficient evidentiary basis to prove the viability of the Government's increased-leverage theory in this case.[27]

[*208] *Second*, to prove its increased-leverage theory, the Government relies upon random statements from defendants' "ordinary course" business documents, including employees' emails and internal slide decks. Indeed, the Government even featured many such statements (or, more accurately, snippets of such statements) in its Complaint and pre-trial filings. However, as became clear at trial, when live witnesses take the stand a trial by slide deck leaves much to be desired !

Exemplary of this problem is a series of Government exhibits containing **[**112]** emails and drafts of slide decks generated prior to a merger integration meeting in 2017. *See* PX31; PX184; PX189; PX363. The Government has emphasized statements excerpted from those slide decks, contending before, during, and after trial that they highlight AT&T's "core belief" that the merger would help it preserve the role of "[t]raditional Pay-TV" as a "cash cow business to AT&T for many years to come" by ensuring "stability through the slow, structural decline of the industry." PX363-12 to -13; *see, e.g.*, Compl. ¶ 3 ("As AT&T/DirecTV's strategic merger documents state, after the merger, disruption need not occur immediately — the merged firm 'can operate [its] pay-TV business as a 'cash cow' while slowly pivoting to new models."); Gov't Pre-Tr. Br. 2-3 (same).

At trial, however, we learned that those statements were drafted by a lower-level AT&T employee who had nothing to do with the substance of the decision to acquire Time Warner, *see* Tr. 1777:16-1778:3 (Manty (AT&T)), and in any event, were contained in a preliminary draft and were subsequently removed or changed, *see id.* at 1732:25-1733:25. To be sure, Government counsel endeavored to characterize that subsequent change as **[**113]** a

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[27] The Government takes its regulatory filings argument one step further in its post-trial briefing, asserting, for the first time, that defendants' prior regulatory statements should result in them being *judicially estopped* from denying basic predicates of the increased-leverage theory of harm. Gov't PCOL ¶¶ 74-75. To say the least, that argument is a stretch. As the Supreme Court has explained, the "equitable doctrine" of judicial estoppel may be "invoked by a court at its discretion" to guard against a party's "improper use of judicial machinery" to gain an "unfair advantage." *New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)* (internal quotation marks omitted). To appropriately apply judicial estoppel against a party, the "party's later position must be 'clearly inconsistent' with its earlier position"; courts also consider whether the party has "succeeded in persuading a court to accept that party's earlier position" or would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (internal quotation marks omitted).

Applying those factors, I easily conclude that estoppel is not appropriate here. To start, the cited prior regulatory comments are not "clearly inconsistent" with defendants' current positions: predicting that a different vertical transaction, made at an earlier time period and in a less-competitive market, will shift bargaining outcomes is *not* inconsistent with arguing that the Government has failed to carry its burden of proof to show at trial that a different transaction, proposed in the context of an even more competitive market, is likely to similarly shift outcomes (much less substantially lessen competition). *Maine, 532 U.S. at 750*; *Jankovic v. Int'l Crisis Grp., 822 F.3d 576, 586, 422 U.S. App. D.C. 259 (D.C. Cir. 2016)* (declining to apply estoppel when party's position was not inconsistent). Although that consideration alone is fatal to the Government's estoppel argument, the Court further notes that the equities also weigh against applying estoppel here. The Government investigated the proposed merger for approximately one year before filing its suit. Disputes regarding the applicability of an increased-leverage theory as applied to the transaction have been front and center in the litigation, and were fully aired at trial. Given all that, I am hard pressed to understand how the Government would suffer an "unfair detriment" if defendants are not estopped; if anything, it would seem manifestly unfair to defendants to accept the Government's post-trial estoppel argument that much of the trial evidence can be ignored and indeed substituted with decades-old regulatory filings. Thus, even assuming that estoppel can be applied based on statements contained within *third-party* regulatory comments to prior administrative proceedings, *but see Abtew v. U.S. Dep't of Homeland Sec., 808 F.3d 895, 899-900, 420 U.S. App. D.C. 356 (D.C. Cir. 2015)* ("[T]he rule of judicial estoppel 'generally prevents *a party* from prevailing in *one phase of a case* on an argument and then relying on a contradictory argument to prevail in *another phase*.'" (emphasis added) (quoting *Maine, 532 U.S. at 749*)), the Court declines the Government's last-minute invitation to estop defendants here.

nefarious "sanitization" by lawyers; but testimony indicated that the "whole deck changed" as a result of the parlor room process and its attendant legal review. *See id.* at 1738:7-13, 1744:8-13. *Compare* PX363 (Apr. 8, 2017), *and* PX31 (Apr. 9, 2017), *with* PX189 (Apr. 18, 2017). In the final analysis, no upper-level AT&T witness testified to ever having viewed or otherwise relied on the draft statements. To say the least, their probative value was minimal.

As it turned out, much of the Government's proffered "ordinary course" evidence went the way of those draft slide deck statements. *Compare* Tr. 1713:20-23, 1714:3-6 (Gibson (AT&T)) (confirming that internal AT&T documents stated that "NBCU could become a more formidable negotiating power" and that "[c]ontent costs could increase" as a result of the expiration of the Comcast-NBCU consent decree) (internal quotation marks omitted), **[*209]** *with id.* at 1712:14, 25, 1714:1-2, 9-10 (testifying that the document in question represents a "draft understanding of some pretty complicated merger conditions" designed to "brainstorm the what-ifs" of what Comcast-NBCU "may be able to do" that the team "hadn't finished"), *and id.* at 1715:20-21, 1717:17-18 (email **[**114]** chain, PX11, contains "first very rough understanding of" Comcast-NBCU merger conditions by "individual who reported to me regarding merger conditions for the first time"). *See also id.* at 1770:25-1771:12, 1772:16-25 (Manty (AT&T)) (showing that PX184, although sent to two AT&T senior vice presidents in July 2016, was generated in 2014 by team of lower-level AT&T employees and consulting firm members). I need not recount all of the examples here. Suffice it to say that I find that the Government frequently "overemphasized the importance and relevance" of the excerpts from defendants' documents, given that many of them, the testimony revealed, contained "informal speculation" about "rationales for the merger" or were generated by individuals "who had no decision-making role or authority in relation to the merger." *H & R Block, 833 F. Supp. 2d at 77 n.30*; *cf.* Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 2.2.1 (Aug. 19, 2010) (-Horizontal Merger Guidelines") ("The Agencies give careful consideration to the views of individuals whose responsibilities, expertise, and experience relating to the issues in question provide particular indicia of reliability.").

In a few instances, however, the Government sought to **[**115]** draw evidentiary support from some of AT&T CEO Randall Stephenson's own statements and notes. The Government pointed, for example, to an email that Stephenson sent upon being informed by Time Warner CEO Jeff Bewkes that "Time Warner had 'taken a 10% stake in Hulu' and that Hulu was going to launch a virtual MVPD." Gov't PFOF ¶ 51 (alteration omitted) (quoting PX47). In response to Bewkes' statement that he did not think the announcement would impact AT&T's relationship with Time Warner, Stephenson stated that it was "hard to imagine how it won't impact all of our relationships," continuing that AT&T is "trying to figure out how we navigate a very new world where you folks are going around us while trying to preserve the old revenue streams and business models from us." PX47. At trial, Stephenson testified that his email indicated his concern that DirecTV Now, the new virtual MVPD AT&T was "standing . . . up" at around that same time, would get the "same access" as one of its virtual competitors, Hulu. Tr. 3475:21-22, 3477:6-7. In this Court's view, expressing concern about how a rival virtual MVPD's relationship with Time Warner could affect AT&T's nascent DirecTV Now platform does **[**116]** little to prove how AT&T would likely behave in the event of a vertical integration.

The Government also relies on notes that Stephenson drafted to himself in preparation for an AT&T Board of Directors Meeting to discuss the merger. *See* Gov't PFOF ¶ 52. In those notes, Stephenson listed the following as a discussion point: "How can you advantage your own distribution (TV, BB, Wireless) without harming TW position as a wide distributor of content to other SVOD, cable networks, and broadcast networks." DX609-8. The Government argues that this bullet point reflects "exactly the theory of the government's case: use content to advantage distribution." Tr. 3980:4-5 (Gov't Closing); *see also* Gov't PFOF ¶¶ 52-53. Not so. At trial, Stephenson testified credibly that the point of that note was to frame a discussion with his Board "that if there is a thought process that says we're going to use this content to enhance the distribution business, that means you're going to have to limit the distribution" and that "is **[*210]** counter is how you create value in one of these businesses." Tr. 3407:16-21. That testimony mirrors the contents of a letter sent by Stephenson to all AT&T officers shortly after the **[**117]** announcement of the proposed merger. In that letter, known among those in defendant companies as the "'Magna Carta'" of the merger, Stephenson writes "[t]o Time Warner employees: We will continue to distribute Time Warner content broadly across the industry. In fact, we want to extend its distribution deeper into mobile so all wireless companies become distribution points for Time Warner content." DX625-1; *see also* Tr. 3408:16-22 (Stephenson (AT&T)).

To be sure, the Government impugns Stephenson's explanation, calling it "curious" and credulity "strain[ing]" in light of the testimony given about the other notes on the same page. *See* Gov't PFOF ¶ 53; Tr. 3980:21, 3981:9 (Gov't Closing). But even should I fail to credit Stephenson's explanation about that particular pre-Board-meeting bullet point, the contents of that bullet point fail to meaningfully advance the Government's case. To start, as we learned at trial, there are a number of ways in which AT&T could "advantage [its] own distribution" through use of Time Warner content without acting in accordance with the Government's increased-leverage theory of anticompetitive harm. *See, e.g.*, Tr. 3220:21-3221:20 (re-stacking and re-editing **[**118]** personalized sets of CNN news clips for access on mobile devices); *id.* at 3222:4-22 (shooting, producing, and broadcasting live sporting events in 4K resolution); *id.* at 3223:13-3224:4 (integration of social media and multi-screen functionality with content).

In short, despite the Government's efforts to paint a contrary picture, this is not a case containing direct, probative evidence of anticompetitive intent on the part of high-level executives within the merging company. *Cf, e.g., Whole Foods Mkt., 548 F.3d at 1044-45* (Tatel, J., concurring in the judgment) (discussing "Project Goldmine," as well as other merger-related documents, in which Whole Foods CEO stated, among other things, that company to be acquired is the "only existing . . . springboard for another player to get into this space" and that "[e]liminating" the company "means eliminating this threat forever, or almost forever"). Stephenson's statements and the Government's other proffered documentary evidence instead suggest, at the very most, that AT&T (or its third-party consultants) recognized that one *possibility* of uniting content and distribution would be to withhold or otherwise limit content from other distributors in an attempt to benefit AT&T's distribution **[**119]** platforms. But evidence indicating defendants' recognition that it could be possible to act in accordance with the Government's theories of harm is a far cry from evidence that the merged company is likely to do so (much less succeed in generating anticompetitive harms as a result). *Cf.* *Baker Hughes, 908 F.2d at 984* ("*Section 7* involves *probabilities*, not certainties or possibilities."). That is especially true when the Government's documentary evidence is weighed against the considerable contrary evidence — including other evidence related to the motivation for the challenged merger — that came out at trial. *See, e.g.*, Defs.' PFOF ¶¶ 49-62 (collecting evidence regarding the proposed merger's ability to "enable the combined company to respond to the challenges posed by the current transformation of the video marketplace and, in so doing, bring better products and better value to consumers"); *see also supra* pp. 36-40. Thus, taking such documentary evidence for all it's worth, that evidence is only marginally probative of the viability of the Government's increased-leverage theory of harm.

[*211] 3. Third-Party Competitor Witness Testimony Provides Little Support for the Contention That Turner Will Gain Increased Leverage Due to the Proposed Merger **[**120]**

In further support of its bargaining leverage claim, the Government called a number of third-party witnesses from AT&T's competitor video distribution companies to the stand. Although such companies are "customers" that purchase Turner content, Tr. 18:15 (Gov't Opening), all of them are also competitors of AT&T's video distribution services. *See, e.g.*, Tr. 82:7-8 (Fenwick (Cox)); *id.* at 263:19-24 (Schlichting (DISH)). Not surprisingly, most of the third-party competitor witnesses testified that they oppose the challenged merger for a number of reasons. According to the Government, that "direct industry evidence" supports its bargaining claim by describing "how the merger would increase Time Warner's leverage over distributors." Gov't Post-Tr. Br. 8. I disagree. For the reasons discussed below, the third-party competitor witness testimony fails to provide meaningful, reliable support for the Government's increased-leverage theory.

As has been observed in the context of other merger cases, I start by noting the difficulty of determining just how much weight to give the proffered third-party competitors' concerns about the challenged merger. On the one hand, such testimony can provide the **[**121]** Court with insight into the nature of the industry and a proposed transaction's potential effects in the market. *See* Gov't PCOL ¶¶ 48-49. On the other hand — and particularly in the context of a vertical merger case where, as here, upstream customers are downstream competitors — there is a threat that such testimony reflects self-interest rather than genuine concerns about harm to competition. *Cf.* *Arch Coal, 329 F. Supp. 2d at 145* (citing 2A Areeda & Hovenkamp, ***Antitrust Law*** ¶ 538b, at 239 ("subjective' testimony by customers" is "often unreliable")); Horizontal Merger Guidelines § 2.2.2 (noting possibility that customers may voice opposition to merger "for reasons unrelated to the antitrust issues raised by that merger"); Tr. 2462:14-23

(Carlton) (noting that a "rival doesn't want to see a transaction that makes it[s] competitor more efficient," even though such a result may be "good for consumer[s]"). As in any Section 7 case, however, the central issue here is whether the Government has proffered sufficient support for the anticompetitive effects it asserts; it is not about protecting AT&T's rivals from any and all competitive pressures they would experience should the merger go through. *Cf.* Aetna, 240 F. Supp. 3d at 18 ("[T]he Clayton Act protects 'competition,' **[**122]** rather than any particular competitor.") (citing Baker Hughes, 908 F.2d at 988, 991 n.12). Caution is therefore necessary in evaluating the probative value of the proffered third-party competitor testimony. *Cf.* Ken Heyer, *Predicting the Competitive Effects of Mergers by Listening to Customers*, 74 Antitrust L.J. 87, 127 (2007) ("In evaluating the likely competitive consequences of proposed mergers, competition authorities and courts properly weigh the totality of the evidence, refusing to take the views expressed by customers at face value and insisting that customer testimony be combined with economic evidence providing objective support for those views . . . .").

For starters, I would note that *not* all third-party witnesses provided testimony supportive of the Government's predictions that Turner's post-merger bargaining leverage would increase as a result of its relationship with AT&T. For example, when Comcast lead negotiator Gregory Rigdon was asked whether he believed the merger would increase Turner's bargaining leverage, he answered in the negative, noting that he didn't "have any **[*212]** reason to believe that it will impact my negotiations with Turner or HBO." Tr. 884:5-6 (Rigdon (Comcast)). Thus, the evidence indicates that AT&T's largest video distribution **[**123]** competitor - and thus a significant source of harm in Professor Shapiro's model, *see, e.g., id.* at 2665:3-7 (Katz) - does not anticipate changing its negotiating strategy with respect to a post-merger Turner. Along those same lines, Randy Sejen, a recently-retired negotiator from Cable ONE, testified that when negotiating with a programmer, "it doesn't matter to us who owns the network." *Id.* at 2102:6-7 (Sejen (Cable ONE)). In short, the Government's third-party competitor witnesses were not consistently concerned regarding Turner's ability to demand increased affiliate fees post-merger.

It is the case, however, that other third-party competitor witnesses expressed "concern about the increased" bargaining leverage or other competitive gains on the part of Turner "that will result from the proposed transaction." Arch Coal, 329 F. Supp. 2d at 145. Their testimony, however, suffered from shortcomings that, when viewed in light of my fundamental concerns with crediting the "subjective views of customers in the market," *id.*, undermine the probative value of their evidence in supporting the Government's predictions of Turner's increased-bargaining leverage.

Much of the third-party competitor testimony I heard consisted of **[**124]** speculative concerns regarding how the witnesses thought Turner might act in negotiations after the merger. Some witnesses simply accepted key assumptions of the Government's increased-leverage theory without any supporting analysis or data. For example, testimony from the Government's lead-off witness, Cox negotiator Suzanne Fenwick, helps to illustrate both of those problems. When asked on direct examination about her views of the proposed merger, Fenwick stated that she is "very concerned" that, post-merger, Cox would be presented by Turner with "a horribly ugly deal and that when faced with that deal, we have to think about that if we do go dark, they have a benefit in picking up Cox customers" via DirecTV. Tr. 107:18-21 (Fenwick (Cox)). Fenwick continued that, as a result of that "benefit that is created in this merger that isn't there today," the negotiating "leverage changes" and that AT&T "has a different incentive now than they had before" — namely, the incentive to "pick up customers" lost by Cox in a Turner blackout. *Id.* at 107:12-14, 108:7-9, 148:1-2.

Fenwick's speculation about how Turner might act relies on certain key assumptions for which she had no factual basis. Indeed, **[**125]** the amount of customers that distributors would lose as a result of a Turner blackout (not to mention the resulting "benefit" to AT&T), is one of the central disputes in this case. Without offering any supporting analysis, Fenwick simply assumes those figures to be in line with the Government's predictions, a point highlighted by the following exchange during cross-examination:

> Q: So let's talk about that. How many customers are going to leave [Cox] even with the reduction in your price to your cable subscribers, how many?
> A: We don't know.
> Q: Have you tried to compute it?
> A: I have not.

> Q: You have no idea?
> A: We believe that it's a large number.
> Q: I know you believe that, but do you have any evidence, any information, any hard facts?
> A: I don't have a churn analysis for you, no.
> . . .
>
> **[*213]** Q: Do you think you had an obligation in giving testimony to oppose a merger of this importance that you would do some homework and run some numbers?
> A: No, we felt like our job was to point out how the leverage changes.
>
> Q: So you think you could just come in here and give your opinion that the leverage is going to change and you're going to lose all of these customers even though you have no idea how many customers **[**126]** you're going to lose and you've never done a single bit of quantitative analysis; is that true?
> A: Sure.

Id. at 141:1-142:5; *see also id.* at 147:22-148:10.

Testimony from other third-party witnesses suffered from similar problems. DISH Sling president Warren Schlichting testified that the merger would "kind of throw[] the card table up in the air" by placing Turner in a "win win" situation where they "can raise prices and make more money and make us less competitive, or they can raise, they can present onerous terms that we can't accept." *Id.* at 261:24-25, 262:8-22 (Schlichting (DISH)). That was so, according to Schlichting, because DISH would lose "a lot of subs" in the event of a Turner blackout and most of those lost subscribers "would accrue to [DirecTV's] benefit." *Id.* at 262:19-21. RCN CEO Jim Holanda testified that he feared his company would lose access to certain Time Warner programming rights, even though he had no "empirical data or any real-world evidence of subscriber losses if RCN didn't have Turner." *Id.* at 2947:10-13 (Holanda (RCN)). Just as with Fenwick's testimony, Schlichting's and Holanda's contentions about Turner's post-merger position — including the amount of subscribers **[**127]** they would lose and AT&T would gain — assume away many of the disputed issues in this case. *Cf id.* at 404:22-405:3 (Schlichting (DISH)) ("Q: You don't have any calculations about how many subs DISH would lose or Sling would lose if there were a blackout let's say today. . . . A: No.").

Some third-party competitor testimony even contradicted the testimony of the Government's lead expert, Professor Carl Shapiro. *Cf.* *Staples, 970 F. Supp. at 1085* (declining to "give . . . much weight" to party's testimony that was "contradicted by other evidence" submitted by the party). For example, Schlichting's testimony regarding Turner's increased post-merger leverage *assumes* that Turner would profit from, or at the very least would be willing to accept, a long-term blackout of DISH. *See, e.g.*, Tr. 263:10-12 (Schlichting (DISH)) (stating that Turner may be incentivized to blackout DISH because "it's always, it's more lucrative to take subs than it is to, you know, collect programming, programming fees"); *id.* at 264:6-8 ("Q: So you would expect to be more likely to go dark [with Turner] if the merger goes through? A: I would."). Tom Montemagno, a lead negotiator for Charter, testified similarly. He noted that his concern with **[**128]** the challenged merger is "mainly around what's going to happen with excessive price, pricing increases," and specifically, whether Charter will "lose access to critically important content that AT&T make take exclusive away from our customers and make it harder for [Charter] to compete." *Id.* at 1350:12-15, 1352:1-3 (Montemagno (Charter)). The assumptions reflected by that testimony — namely, that a post-merger Turner could and would go dark with DISH or Charter — run directly contrary to Professor Shapiro's testimony that a post-merger Turner would *not* be incentivized to blackout or otherwise withhold its content from distributors. *See id.* at 2293:3-4, 14-15 (Shapiro) (Turner will "continue to license Turner content" to distributors after the merger); *id.* at 2218:13-21 ("I'm not saying **[*214]** that after the merger, Turner will deny its content to the other distributors."). Indeed, when asked whether he was "aware" of Professor Shapiro's opinion that "it would not be profitable for the merged company to withhold the Turner Networks from DISH and other distributors," Schlichting admitted that he was not. *Id.* at 417:13-17, 418:15-16 (Schlichting (DISH)).

Other concerns raised by the third-party **[**129]** competitors were not particularly germane to the Government's *Section 7* allegations in this case. Charter's Montemagno, for example, noted his concerns that the merger would harm Charter's competitive position due to the bundling of the Turner networks and the ability of DirecTV to use advertising to appeal to Charter's customers. *See id.* at 1405:13-18 (Montemagno (Charter)). On cross-examination. however. Montemagno conceded that "none of those issues are a result of this merger," but instead "all exist in the marketplace today." *Id.* at 1407:12-18; *see also id.* at 1407:19-23 ("Q: And AT&T, DirecTV, if it wanted to buy ads on Turner or anybody else in order to try to lure your customers away, they could do that today, they could do that yesterday, couldn't they? A: They can buy them yes."). Holanda grounded RCN's concerns about the challenged merger in a prior experience with Comcast-NBCU and negotiations over RCN's "broadcast basic" package. *Id.* at 2920:6-23, 2921:2-6 (Holanda (RCN)). But that experience is not especially probative of the Government's increased-leverage theory, given that the Turner networks do not include major broadcast programming and, in any event, that penetration rates **[**130]** exist in the pre-merger market. *See id.* at 2955:9-12.

Finally — and perhaps unsurprisingly given that a post-merger Turner, like a pre-merger Turner, would stand to suffer large losses in affiliate fee and advertising revenues in the event of a blackout — the record is barren of any contentions by the third-party competitors that they would actually give in to any price increases demanded by Turner as a result of its purported increase in post-merger leverage. Schlichting never testified, for instance, that DISH would in fact pay more to Turner for its content as a result of the merger, noting instead that "I don't think we've quite figured out what we would do" during post-merger negotiations with Turner. *Id.* at 264:11-12 (Schlichting (DISH)). The lack of real-world evidence that Turner would likely be successful in obtaining increased fees from virtually every distributor (as Professor Shapiro's model projects) due to its relationship with AT&T is yet another strike against the Government's increased-leverage theory of competitive harm. *Cf.* Anthem, 855 F.3d at 360 (describing as "farfetched" the assumption that contractual negotiations will lead to the same outcome "in every instance," especially in light **[**131]** of the fact that contracts at issue were "customized relationship-driven contracts" (internal quotation marks and alteration omitted)).

In the final analysis, the bulk of the third-party competitor testimony proffered by the Government was speculative, based on unproven assumptions, or unsupported — or even contradicted — by the Government's own evidence. Especially in view of the fact that the third-party competitor witnesses have an incentive to oppose a merger that would allow AT&T to increase innovation while lowering costs, such testimony falls far short of persuasively "show[ing] that this merger threatens" to harm competition by allowing Turner to wield increased bargaining leverage. Gov't Post-Tr. Br. 8.

[*215] 4. Real-World Evidence Indicating That Prior Vertical Integration of Programmers and Distributors Has Not Affected Affiliate Fee Negotiations Undermines the Government's Increased-Leverage Theory of Harm

For the reasons discussed above, the Court is not convinced that the "real-world objective evidence" offered by the Government provides sufficient support for its increased-bargaining leverage claim. That conclusion is further bolstered by evidence relating to three prior instances **[**132]** of vertical integration in the video programming and distribution industry: 1) News Corp., a programmer, acquiring part of DirecTV in 2003 and then spinning it off in 2008; 2) the 2009 split of Time Warner, a programmer, from Time Warner Cable, a MVPD; and 3) the 2011 combination of Comcast, a distributor, and NBCU, a programmer. *See* Defs.' PFOF ¶ 96; Tr. 2440:4-8 (Carlton). According to defendants, the econometric analysis of their chief economic expert, Professor Dennis Carlton, and witness testimony both provide significant, real-world evidence indicating that, contrary to the Government's increased-leverage theory, those prior instances of vertical integration did not affect affiliate fee negotiations or content prices. For the following reasons, the Court agrees with defendants.

a. Professor Carlton's Econometric Analyses of Prior Vertical Transactions Found No Statistically Significant Effects on Content Pricing

When it comes to evaluating the antitrust implications of proposed mergers, both Professor Shapiro and Professor Carlton recognize that empirical analysis of prior, similar transactions can be "convincing evidence." Tr. 2526:13 (Carlton); *see id.* at 3885:25-3886:20 (Shapiro) **[**133]** (agreeing with the "general thrust" of statement that "compar[ing] the observed changes from completed mergers against premerger predictions" is the "most direct way" to gauge the "reliability of different methods of evaluating proposed mergers"); *cf.* Horizontal Merger

Guidelines § 2.1.2 ("The Agencies look for historical events, or 'natural experiments,' that are informative regarding the competitive effects of the merger. For example, the Agencies may examine the impact of recent mergers, entry, expansion, or exit in the relevant market."). In this case, however, neither the Government nor Professor Shapiro presented original analysis of any prior vertical transactions in this industry. *See* Tr. 2337:11-13 (Shapiro) ("I did not end up doing my own separate analysis" of transactions analyzed by Professor Carlton.); *id.* at 2473:22-25 (Carlton) ("Professor Shapiro did no econometric analysis of any of the data as far as I can tell."); *see also* Defs.' PFOF ¶¶ 96, 99.[28]

Defendants, by contrast, did seek to analyze the available pricing data resulting from prior instances of vertical integration. Although they initially had trouble obtaining some of the relevant pricing data from the Government or **[**134]** third-parties, *see supra* pp. 44-45, they were eventually able to obtain the data after seeking relief from this Court, *see id.*; 1/22/18 Order. Defendants' lead economic expert, Professor Dennis Carlton, then analyzed that third-party pricing data, among other proprietary and public-source data in his possession, to test whether it is "true that **[*216]** content prices are higher on a network when it's sold by someone who's vertically integrated." Tr. 2470:10-12 (Carlton). Specifically, Professor Carlton performed a "regression analysis or an econometric analysis, which is a statistical attempt to answer the question precisely." *Id.* at 2473:1-2. In running his regressions, Professor Carlton used different "statistical techniques to analyze the problem in a variety of ways." *Id.* at 2473:7-8.

All of that analysis, Professor Carlton testified, generated "completely consistent" results across all three examples he considered: "There's absolutely no statistical basis to support the government's claim that vertical integration in this industry leads to higher content prices." *Id.* at 2473:13, 2440:13-15; *see id.* at 2470:13-17, 2476:22-24. The "bulk of the results," Professor Carlton explained, "show no statistically **[**135]** significant result at all," although "many do show a *decrease*" in content prices. *Id.* at 2477:7-12 (emphasis added). Moreover, Professor Carlton noted that his results are particularly "compelling" in light of the fact that the industry, as reaffirmed by numerous witnesses at trial, is "more competitive" today than at the time of the prior transactions he analyzed. *Id.* at 2476:6-9; *see also id.* at 1398:24-25 (Montemagno (Charter)) (video distribution business is "more competitive now than I've ever experienced in my career"); *id.* at 2134:1-3 (Sejen (Cable ONE)) ("Q: In your 31 years in the industry, have you ever seen it more competitive at the distribution level? A: No."); *id.* at 2950:2-6 (Holanda (RCN)) ("Q: And so in the course of this 30 years that you have been in the business, the video distribution market today is more competitive than at any point that you can recall, true? A: True."); *id.* at 3213:9 (Stankey (AT&T)) (competition in industry is "at an all-time high"). In short, based on his analysis, Professor Carlton stated that there has been "nothing like" the price increases predicted by Professor Shapiro following prior instances of vertical integration of programmers and **[**136]** distributors. *Id.* at 2470:19-20 (Carlton).

Although the Government and Professor Shapiro sought to undermine the basis for Professor Carlton's conclusions at trial, those efforts were unavailing. Professor Shapiro, for his part, critiqued Professor Carlton for relying on faulty data and attempting to draw conclusions from prior transactions that are not comparable to the challenged merger. Focusing on Professor Carlton's reliance on SNL Kagan data, Professor Shapiro stated that such data is "pretty poor" because it relies on "public sources" and reports content costs "to all of the distributors on average." *Id.* at 3831:11-18 (Shapiro). Of course, Professor Carlton testified that he relied not only on SNL Kagan data, but also on data from third parties such as DirecTV, DISH, and Charter — all of which, when analyzed, showed no statistical pricing effects associated with the relevant prior instances of vertical integration. *Id.* at 2470:4-12 (Carlton). Taking Professor Shapiro's critiques of the SNL Kagan data on their own terms, however, those critiques miss the mark. For one thing, even Professor Shapiro acknowledged that SNL Kagan data is "commonly used" by individuals in the industry. **[**137]** *Id.* at 3889:3 (Shapiro); *see also, e.g., id.* at 1073:20-1074:4 (Breland (Turner)).[29] Moreover, it was SNL Kagan data that formed the basis of the only study of prior harm cited by the Government and Professor

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[28] Indeed, when asked in discovery whether it had a position on whether these transactions affected content prices, the Government cited to one FCC study related to the News Corp.-DirecTV transaction and stated that, beyond that study, "the United States does not, at this time, have a position as to whether any prior vertical integration between a programmer and a distributor resulted in higher video programming fees" or "higher prices for consumers" than "would have prevailed absent the integration." DX893-28 to -29.

[29] One more witness testified to this fact in sealed testimony. Tr. 930:17-18 (SEALED).

Shapiro. *Id.* at 3889:4-9 (Shapiro) (agreeing that FCC study that he "relied on" in his expert report was "based on Kagan data"); Gov't Post-Tr. Br. 16 (citing same FCC study); DX893-28 (Gov't answer to interrogatory, citing same FCC study): *see also* Tr. 2467:21-2468:9 (Carlton). For those reasons, Professor Shapiro's **[*217]** criticisms of defendants' prior transaction data does not, in this Court's view, detract from Professor Carlton's expert opinion that defendants' evidence related to the prior transactions is "especially probative" when considering the Government's claims of harm. *Id.* at 2475:21-22 (Carlton); *see id.* at 2441:13-20 ("Ignoring that evidence is a big mistake.").

Professor Shapiro and the Government also denounced Professor Carlton's analysis on the basis that the prior vertical transactions are not sufficiently similar to the challenged merger. They pointed out, for example, that two of the prior transactions involved regional cable distributors (Comcast and Time Warner **[**138]** Cable), whereas the challenged merger involves DirecTV, which operates nationally. Regional operation means, Professor Shapiro testified, that one would "not expect[] to see evidence of post-merger price increases beyond the overall industry increases" because "most of the MVPDs . . . don't compete with Comcast," for example. *Id.* at 2338:8-13 (Shapiro); *cf. id.* at 2558:18-2559:15 (Carlton). Professor Carlton explained, however, that the regional versus national distinction is "irrelevant" when it comes to his analysis of DirecTV and DISH prices; that is so, Professor Carlton stated, because those two satellite companies compete "everywhere" the regional cable companies operate and it is the "national share" that matters to Professor Shapiro's bargaining model. *Id.* at 2474:11-17, 2560:5-11 (Carlton). To the extent the Government is now arguing that one would not expect to see *any* increased-leverage harm due to Comcast's status as a regional distributor, I simply note that the Government argued to the contrary prior to this case. *See, generally, e.g.*, Compl., *Comcast Corp., 808 F. Supp. 2d 145* (No. 11-cv-106).

Finally, the Government and Professor Shapiro note that the prior vertical transactions all were "remediated" **[**139]** by regulatory or court-ordered conditions — conditions that will not apply to the challenged merger. Tr. 3830:20 (Shapiro). Professor Carlton agrees that, in theory, his study's conclusions would be affected if the conditions associated with the prior transactions were not "sufficiently similar" to those at issue here. *Id.* at 2558:12-15 (Carlton). I will thus briefly address Turner's 2017 arbitration offer and its relation to the conditions on the Comcast-NBCU transaction.

The arbitration proceedings envisioned by Turner's offer are similar in many of "the fundamental ways" to those blessed by the FCC, DOJ, and this Court in the Comcast-NBCU merger. Defs.' PFOF ¶ 214 (citing Tr. 2680:1-9 (Katz)); *see also id.* ¶ 225. Most notably, both arbitration arrangements are "baseball-style": each party puts forward a final offer before knowing about its counterparty's offer, and the arbitrator chooses between those two. Tr. 2680:1-9 (Katz). In addition, both sets of arbitration arrangements contain "standstill provisions," which prevent the blackout of content while the arbitration is pending. *Id.* They also both set out "fair market value" as the standard, and have similar discovery procedures. **[**140]** *Id.* at 2680:1-13. As Professor Katz testified, "the objective is the same. The overall structure the same. So they are similar overall." *Id.*; *see also id.* at 2958:12-16 (Holanda (RCN)). Given all of these similarities, I conclude that Professor Carlton's econometric analysis of the pricing effects of the Comcast-NBCU combination can be afforded probative weight in predicting the potential pricing effects of the challenged merger.[30]

[*218] To sum it up, neither the Government nor Professor Shapiro has given this Court an adequate basis to decline to credit Professor Carlton's econometric analysis. And that analysis, according to Professor Carlton, definitively shows that prior instances of vertical integration in the video programming and distribution industry have had no statistically significant effect on content prices.

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[30] The parties spent a good deal of the trial debating the finer points of Turner's November 2017 arbitration offer, made shortly after the filing of the Complaint in this case. The Government asserts that the arbitration commitment must be ignored or, at the very least, must be proven binding and effective by defendants, while defendants describe its absence from Professor Shapiro's model as a critical weakness in the model's design and the Government's prima facie case. *Compare* Gov't Post-Tr. Br. 21-22, *with* Post-Trial Br. of Defs. ("Defs.' Post-Tr. Br.") 14. For purposes of this discussion, as explained below, I have confidence that Turner's arbitration offer will have real-world effect and, thus, that it is appropriate to consider Professor Carlton's econometric analysis of the Corncast-NBCU transaction. *See infra* n.51.

b. Executives from Vertically Integrated Programmers and Distributors Testified That Vertical Integration Does Not Affect Affiliate Fee Negotiations

Professor Carlton's analysis of prior vertical integration is further reinforced, defendants contend, by the consistent testimony of Comcast-NBCU and Time Warner executives that the integration of programming **[**141]** and distribution does not affect affiliate negotiations. I agree.

Defendants first point to the testimony from Madison Bond, who has served as a lead negotiator for NBCU during the past seven years when the company has been vertically integrated with Comcast. When questioned by defense counsel about his prior negotiations on behalf of NBCU, Bond testified that he "never once took into account the interest of Comcast cable in trying to negotiate a carriage agreement." Tr. 2014:22-24 (Bond (NBCU)). Consideration of potential Comcast gains during an NBCU blackout "doesn't factor at all" into his negotiations, Bond continued, nor has anyone from Comcast "ever asked" him "to think about that." *Id.* at 2015:1, 2015:10-12. Bond's statements were similar to testimony given by Comcast's chief negotiator, Greg Rigdon, who testified that he has never suggested, or seen a Comcast document suggesting, that NBC "should go dark on one of [Comcast's] competitors because then [Comcast] might pick up some subscribers" or that NBCU should "hold out for a little bit more in affiliate fees because that will harm" Comcast's competitors. *Id.* at 882:22-24, 883:1-11 (Rigdon (Comcast)).[31]

Time Warner executives testified similarly about their time at the company when it was vertically integrated with Time Warner Cable. Recalling that period, Time Warner CEO Jeff Bewkes testified that he was not aware of any Time Warner negotiator "articulating this theory of added incentive or added ability to leverage a price increase" because Time Warner was "vertically integrated with Time Warner Cable." *Id.* at 3121:22-3122:8 (Bewkes **[*219]** (Time Warner)). Turner CEO John Martin, who served as CFO of Time Warner Cable at the time it was vertically integrated with Time Warner, testified along the same lines, as did Turner lead negotiators Coleman Breland and Richard Warren. *See id.* at 601:10-602:15 (Martin (Turner)) ("Q: Did you ever hear anyone say that Turner would have more leverage because Time Warner Cable and Turner were in the same family? A: No, I did not"); *id.* at 1129:6-12 (Breland (Turner)) ("I've been in Turner when we were a vertically integrated company and had a sister company called Time Warner Cable. And I can tell you at no time during my tenure there did anyone ask me to consider in my negotiations and how I dealt with other distributors the outcome and impact **[**143]** at Time Warner Cable . . . ."); *id.* at 1190:14-15 (Warren (Turner)) (noting, when asked about Government's increased-leverage theory, that "[w]e didn't do that when we were part of Time Warner Cable"). Martin also testified that Time Warner's content prices did not decrease following the spin-off of Time Warner Cable. *See id.* at 603:24-604:1 (Martin (Turner)).

The Government seems to believe that any "post-merger" testimony given by Time Warner executives should be "discount[ed]" as potentially biased because it was given by interested employees of a defendant company. Gov't PCOL ¶ 56. Poppycock! The testimony at issue does not involve promises or speculations about the employees' future, post-merger behavior. Rather, it is testimony about what these executives previously experienced when working within a vertically integrated company. That testimony regarding executives' prior experiences in the industry is uniform among all testifying witnesses and unrebutted by the Government; moreover, it finds

[31] In response, the Government asks this Court to ignore the import of that testimony from the Comcast and NBCU witnesses on the basis that the conditions governing the Comcast-NBCU transaction would have prevented any coordination between the programming and distribution components and thus rendered such conversations between the two pointless. *See* Gov't Post-Tr. Br. 19 n.14. Please! The Comcast and NBCU witnesses' testimony aligns with testimony from witnesses not subject to the FCC order's conditions and is also entirely consistent, as subsequently discussed, *see infra* pp. 114-117, with the goal of companywide profit maximization. *See* Tr. 601:10-602:15 (Martin (Turner)); *id.* at 1129:6-12 (Breland (Turner)); *id.* at 1190:14-15 (Warren (Turner)); *cf. id.* ***[**142]*** at 2102:6-11 (Sejen (Cable ONE)) ("I mean, it doesn't matter to us who owns the network . . . . It really doesn't matter."). For that reason, among others, *see infra* nn. 34, 36, I decline the Government's invitation to disregard the Comcast and NBCU witnesses' testimony referenced in this section.

independent support in the analysis performed by Professor Carlton. For those reasons, I decline the Government's request to discount it.

To be sure, neither Professor Carlton's econometric **[**144]** analysis nor the testimony discussed above provides "perfect evidence" of what will happen as a result of the challenged merger. Tr. 2475:15-17 (Carlton). But when weighed against the relatively weak documentary and third-party testimonial evidence proffered by the Government in support of its increased-leverage theory, the real-world evidence indicating that vertical integration has not affected content prices or affiliate negotiations further undermines the persuasiveness of the Government's proof.

C. The Government's Expert Testimony Is Also Insufficient to Support Its Increased-Leverage Theory of Harm

In addition to offering the so-called "real-world objective evidence" set out above, the Government called noted antitrust economist, Professor Carl Shapiro, to testify in support of its increased-leverage theory. Professor Shapiro first discussed the academic underpinnings of the theory, explaining that it was grounded in an economic concept known as the Nash bargaining theory. Thereafter, Professor Shapiro opined that Turner's post-merger leverage would increase pursuant to those economic principles. In order to predict the increased distributor costs and consumer harms that would **[**145]** result from Turner's increased post-merger leverage, Professor Shapiro constructed economic models. Acknowledging that proper antitrust analysis of a proposed vertical merger requires balancing the merger's proconsumer benefits with its harms, *see supra* pp. 52-54, Professor Shapiro testified that the challenged merger would result in annual consumer cost increases that would far outweigh the $350 million in annual EDM savings he conceded the merger would generate. He thus concluded, based on his economic modeling, that the merger was likely to **[*220]** cause a substantial lessening of competition by increasing consumer costs as a result of Turner's increased bargaining leverage.

At trial, defendants mounted a series of attacks on Professor Shapiro's analysis. They challenged Professor Shapiro's threshold contention that the economic theory of Nash bargaining can accurately predict the dynamics and final fee structure of complex affiliate fee negotiations. They also asserted that the theory, as applied here, rests on improper assumptions — including the notion that Turner could gain increased leverage from threatening a long-term blackout — that negate its usefulness in evaluating the real-world effects of **[**146]** the proposed merger. Finally, defendants, both through their own experts and their examinations of industry witnesses, argue that Professor Shapiro's inputs are faulty, and note further that use of the proper inputs would cause the model to predict that the merger will have a net benefit to consumers rather than a net harm. As will become clear in the section that follows, I largely agree with defendants' various critiques of Professor Shapiro's testimony.

For starters, I couldn't help but notice that the more and more questions were raised during the trial about the reliability of Professor Shapiro's theory and model, the more the Government appeared to be minimizing the importance of his analysis. *Cf.* Defs.' Post-Tr. Br. 10 (noting Government's attempt to "retreat from the model" in its closing argument). Indeed, during its closing argument, the Government touched on Professor Shapiro's model relatively briefly, arguing that it simply "confirmed what the industry witnesses had already explained." Tr. 4000:5-6 (Gov't Closing). And the Government's post-trial filings, for their part, all but ask the Court to overlook any failings of the model, arguing that "*Section 7* does not require any quantification **[**147]** of harm from a price increase" and that "it would be perverse to penalize a plaintiff that does provide a quantification of the potential price increase." Gov't PCOL ¶ 20; *see also* Gov't Post-Tr. Br. 15 ("[D]efendants' critique of Professor Shapiro's model misses the bigger picture: the model is but one part of Professor Shapiro's opinion, and his opinion is one part of the United States' evidence.").[32] Go figure!

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[32] To the extent the Government's increased-leverage theory now leans more heavily for support on the industry witness testimony and defendants' documents, as "framed" by Professor Shapiro's analysis more generally, Gov't Post-Tr. Br. 8, that shift in emphasis fails to salvage its claim given the independent problems with that so-called "real-world objective evidence" set out in the section above. *See supra* pp. 75-109; *cf.* Defs.' Post-Tr. Br. 10 ("But adding zero to zero is hardly a sound way to prove a price increase."). In the Court's view, however, it is worth noting that the Government's retreat from Professor Shapiro's

[*221] With that, I will now turn to my own evaluation of Professor Shapiro's expert testimony. First, I will explain why the evidence is insufficient to support Professor Shapiro's conclusion that this Nash bargaining theory will accurately predict an increase of Turner's post-merger bargaining leverage in affiliate fee negotiations with distributors. Second, I will examine Professor Shapiro's economic bargaining model, concluding that the evidence is also insufficient to support the input values upon which he relied to generate his predictions of harm.

1. The Evidence Is Insufficient to Support Professor Shapiro's Conclusion That the Merger Will Increase Turner's Bargaining Leverage and, in Turn, Affiliate Fees

Relying on a particular economic bargaining **[**148]** theory, Professor Shapiro opines that, due to its post-merger relationship with AT&T, Turner's leverage in affiliate negotiations will increase due to a reduction in financial exposure in the event of a long-term blackout. Professor Shapiro in turn opines that, as such, a post-merger Turner would be able to secure greater affiliate fees from distributors.

HN4[] It is beyond dispute that, to be probative in a particular case, expert testimony must incorporate assumptions that are "reasonable" in light of the record evidence. Joint Statement 8; *cf. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."). Hewing to that rule is especially important in *Section 7* cases, where the Supreme Court's observation that "only" an "examination of the particular market — its structure, history and probable future — can provide the appropriate setting for judging the probable anticompetitive effect of the merger" dictates that the disputes "must be resolved on the basis of record evidence relating to the market and its probable future." *General Dynamics, 415 U.S. at 498* (internal **[**149]** quotation marks omitted); *Arch Coal, 329 F. Supp. 2d at 116-117*. "Hence," to borrow a line from one of my able colleagues, "antitrust theory and speculation cannot trump facts." *Arch Coal, 329 F. Supp. 2d at 116*; *accord* Gov't PCOL ¶ 22 n.6 (quoting Steven C. Salop, *Invigorating Vertical Merger Enforcement*, *127 Yale L.J. 1962, 2018 (2018)* ("[T]he direction of the net competitive effect is a question of fact, not theory. . . ."). That is true no matter whether the testimony relates to a theory that is considered "mainstream" or has been deemed applicable to different factual or economic scenarios in other proceedings. Gov't PFOF ¶ 202; *cf.* Gov't Post-Tr. Br. 9.[33] Unfortunately for Professor Shapiro, **[*222]** the facts adduced at trial regarding the real-world operation of affiliate negotiations demonstrated that his testimony "rests on assumptions" that are "implausible and inconsistent with

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model cannot be squared with Professor Shapiro's testimony (seemingly approved by the Government) that to perform a valid "vertical merger analysis" under the applicable "consumer welfare" standard, it is necessary to "balance" or "tradeoff" the merger's proconsumer benefits with any predicted consumer harms. *See* Tr. 2180:8-2181:8, 2182:7-21, 2253:4-5 (Shapiro). At trial, that "somewhat different" "balancing" analysis of the challenged vertical merger was enabled not by the testimony of the third-party competitors or defendants' documents and statements, but by the cost-benefit predictions Professor Shapiro generated through use of his models. *See id.* at 2182:17-18, 2252:19-2253:15. For that reason, asking the Government to provide sufficient support for the proffered bargaining model is not, as the Government seems to argue, penalizing them for failure to quantify the "specific *magnitude* of the potential harm," Gov't PCOL ¶ 16, but instead is simply part and parcel of what Professor Shapiro testified is necessary to determining *whether* the proposed vertical merger will harm consumers overall.

[33] On that score, it is notable that, although the Government states that its proffered bargaining model is "a standard model that is in economics textbooks and widely used by economists," Gov't PFOF ¶ 202, Professor Shapiro acknowledged that, with respect to the model. "[w]hat's less common is to use it to evaluate a merger or a vertical merger especially," Tr. 2390:2-3 (Shapiro).

To support Professor Shapiro's testimony regarding economic bargaining theory and his model, the Government contends that defendants' experts "endorsed" application of the model generally, but quibbled with the model's inputs. Gov't Post-Tr. Br. 2. That characterization is questionable, especially given Professor Carlton's extensive testimony about his conclusion that "the evidence provides no statistical support for the government's claim that prices will rise in this transaction" — statistical evidence that he considers more probative in analyzing the Government's increased-leverage theory than Professor's Shapiro's "quite . . . complicated economic model." Tr. 2439:19-25, 2441:25 (Carlton); *see id.* at 2439:22-2441:25. Nonetheless, it is of course the Government's burden — not defendants' — to sufficiently link its proffered expert testimony to the underlying facts in the industry. It is therefore no surprise that Professor Carlton spent most of his limited time on the stand discussing the econometric studies he performed, rather than cataloguing whether the facts adduced at trial support Professor Shapiro's testimony.

record evidence." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 n.19, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

To start, various industry witnesses testified that the identity of a programmer's owner does not affect the negotiating dynamic. Indeed, this opinion by Professor Shapiro runs contrary to all of the real-world testimony during the trial from those who have actually negotiated on behalf of vertically integrated companies. While I need not repeat their testimony here, I would simply **[**150]** note that the witnesses consistently testified that they had *never* considered the identity of the programmer's owner in the course of affiliate fee negotiations. *See, e.g.*, Tr. 2014:22-2015:14 (Bond (NBCU)); *id.* at 882:22-24, 883:1-11 (Rigdon (Comcast)); *id.* at 3121:22-3122:8 (Bewkes (Time Warner)); *id.* at 601:10-602:15 (Martin (Turner)); *id.* at 1129:6-12 (Breland (Turner)); *id.* at 1190:14-15 (Warren (Turner)). One was left to wonder why Professor Shapiro turned a blind eye to such extensive real-world experience? When I asked Professor Shapiro about the effect of that testimony on his analysis, the following exchange ensued:

> [A]: No, I am aware of that testimony. And so I think there's a very serious tension between that testimony and the working assumption for antitrust economists that Professor Carlton and I share; that the company after the merger will be run to maximize their joint profits.
>
> ...
>
> [A]: So what I'm saying is that it will be in AT&T's interests to play this — to use this leverage in the negotiations. It will be in their interest —
> The Court: So that's an assumption that you're making?
> [A]: Yes, it is. Okay.
>
> The Court: But you don't have an independent basis of evidence for **[**151]** that?
> [A]: That is fair.
> The Court: That's an economist assumption?
> [A]: That is true. That is true.
> ...
> [A]: Look, I think if you accept that, which, from my point of view, would not be in the combined interests of the new company. They would be leaving money on the table.
> The Court: Okay.
> [A]: If you accept that, then this bargaining leverage would not come into play.

Id. at 2199:22-2200:2, 2200:22-2201:7, 2202:6-12 (Shapiro).

The Court accepts Professor Shapiro's (and the Government's) argument that, generally, "a firm with multiple divisions will act to maximize profits across them." Gov't Post-Tr. Br. 19; *see also* Tr. 2525:22-25 (Carlton). That profit-maximization premise is *not* inconsistent, however, with the witness testimony that the identity of a programmer's owner has not affected affiliate negotiations in real-world instances of vertical integration. Rather, as those witnesses indicated, vertically integrated corporations have previously determined that the best way to increase company wide profits is for the programming and distribution components to separately **[*223]** maximize their respective revenues. *See, e.g.*, Tr. 2015:16-19 (Bond (NBCU)) ("Q: And, in fact, what you were doing is trying **[**152]** to maximize the revenue of NBC as a programmer in those negotiations, correct? A: Yes, sir."); *see also id.* at 1129:17-18 (Breland (Turner)). In the case of programmers, that means pursuing deals "to be on all the platforms," rather than undertaking a "series of risks" to threaten a long-term blackout. *Id.* at 1129:17-22 (Breland (Turner)); *id.* at 3120:22 (Bewkes (Time Warner)). So understood, the consistent and, in this Court's judgment, credible, trial testimony is not in fact in "serious tension" with "economic logic" — just with Professor Shapiro's opinion that the identity of a programmer's owner influences negotiations! *Id.* at 2199:22-2200:2 (Shapiro); Gov't Post-Tr. Br. 19.

Next, Professor Shapiro's opinion that Turner's post-merger relationship with AT&T will enable Turner to more credibly threaten a distributor with a long-term blackout in order to extract greater affiliate fees was severely undermined by defendants' evidence that such a blackout would be infeasible. *See id.* at 2195:4-7 (Shapiro) ("Q: Explain to His Honor why blackouts are relevant here for this discussion today. A: Well, even though they don't happen very much, that's the key to leverage, okay?"); *see also* ***[**153]*** *id.* at 2442:13-17 (Carlton). Indeed, the evidence showed that there has never been, and is likely never going to be, an actual long-term blackout of Turner content. *See id.* at 2218:13-23, 2357:12-14 (Shapiro). Numerous witnesses explained,[34] and Professor Shapiro acknowledged, that a long-term blackout of Turner content, even post-merger, would cause Turner to lose more in affiliate fee and advertising revenues than the merged entity would gain. *Cf id.* at 2293:2-17. Given that, there is an insufficient evidentiary basis to support Professor Shapiro's contention that a post-merger Turner would, or even could, drive up prices by *threatening* distributors with long-term blackouts.[35]

[*224] It is worth emphasizing again that Professor Shapiro does *not* contend that Turner's economics are going to somehow flip after the merger — he acknowledged, for example, that Turner would lose over $100 million per month during a post-merger blackout with a large distributor. *Id.* at 2314:4-15; *see also id.* at 2293:3-15 (agreeing with defense counsel that Turner will "continue to license Turner content" to distributors because it would **[**154]** be "profitable" to do so). As a result, Professor Shapiro testified that Turner would not be incentivized to *actually* engage in a long-term blackout with a distributor:

> I should say — I think we skipped over it. I'm not saying that after the merger, Turner will deny its content to the other distributors. This is not a foreclosure-withholding story. . . . I considered whether there would be withholding. And that has been a concern in some private — prior vertical mergers. And I did not think that would happen.

Id. at 2218:13-21; *see id.* at 2443:12-15 (Carlton).

In view of that evidence on the prospects of a long-term blackout, the lynchpin of Professor Shapiro's testimony (and, accordingly the Government's increased-leverage theory) is the *assumption* that a post-merger Turner would gain increased leverage by wielding a blackout threat that will only be somewhat less incredible. That does not make sense as a matter of logic and, more importantly, that has not been supported by sufficient real-world evidence.[36]

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[34] Witness after witness confirmed that blackouts — and the attendant loss of distribution — have "massive implications" for Turner. Tr. 1189:13-16 (Warren (Turner)); *see also, e.g., id.* at 659:22 (Martin (Turner)) ("[I]t's very bad for business to go dark."); *id.* at 1128:7-1129:4 (Breland (Turner)) ("I lose money the minute I go dark. It can be catastrophic to my business . . . ."); *id.* at 3119:22-3120:22 (Bewkes (Time Warner)) ("So if our channels, any of them, are not in some distribution offering, that's catastrophic for us. We lose a lot of money. . . . Due to the size of most of our distributors, hundreds of millions of dollars."). During Turner's one-month blackout with DISH in 2014, for example, Turner lost "[n]orth of 30 million dollars" in subscriber fees and advertising revenue. *Id.* at 1115:2 (Breland (Turner)). In order to end the blackout, Turner agreed to a temporary affiliate agreement extension that released DISH from any obligation to pay $120 million in audit monies that Turner believed it was owed. *Id.* at 1118:15-19. Turner agreed to cede those funds, Turner executive Coleman Breland testified, because Turner was "bleeding" and "losing a tremendous amount of money" during the blackout. *Id.* at 1118:23-24. Given all that, it is perhaps unsurprising that, for all of the testimony about the "very intense and aggressive" nature of affiliate negotiations, *id.* at 3251:24-25 (Stankey (AT&T)), Professor Shapiro testified that Turner has *never* experienced a long-term blackout with a distributor, *see id.* at 2357:12-14 (Shapiro).

[35] To understand why, note that Professor Shapiro's opinion incorporates the "key" recognition that each side's bargaining leverage "is based on what would happen if there were no deal." Tr. 2193:16-18 (Shapiro). Simply stated, if a party's alternative to striking a deal improves, that party is more willing and able to push harder for a better deal because it faces less downside risk if the deal implodes. Professor Shapiro gave an example of negotiations between a seller and buyer of a used car; he noted that if the seller's next-best offer improves, he will be able to extract a higher price from the original buyer. *See id.* at 2213:2-10. The bargaining concept the example demonstrates, Professor Shapiro explained, is that "you have more leverage now because you have a better offer. And you will be more . . . willing to apply that leverage. And some of them are willing to walk away, if necessary. . . . [B]etter outside offers make one party stronger in those negotiations." *Id.* at 2213:13-20. Unlike the car seller, who might be "willing to walk away" and accept his alternative offer to sell the car for a gain, however, *id.* at 2213:15-16, the evidence at trial indicated that Turner would *not be willing* to accept the "catastrophic" affiliate fee and advertising losses associated with a long-term blackout, *id.* at 1128:10 (Breland (Turner)); *see supra* pp. 14-18.

[36] The Court finds Time Warner CEO Jeff Bewkes' response to a question regarding the increased-leverage theory to be particularly persuasive: "And the way I — I think it's best the way to understand it, is if we have a risk that a thousand-pound weight might fall on us — we hope it doesn't, but if that's always there, then if you said to me, well, don't worry; it might be a 950-

[*225] 2. The Evidence Is Insufficient to Support the Inputs and Assumptions Incorporated into Professor Shapiro's Bargaining Model **[**155]**

In order to measure the increased distributor and consumer costs associated with his prediction that Turner's post-merger bargaining leverage would increase, Professor Shapiro constructed a rather complex economic bargaining model.[37] That model seeks to quantify the benefits that AT&T would gain as a result of a long-term, post-merger blackout of the Turner content on AT&T's rival distributors. According to Professor Shapiro, those benefits correspond to the increased affiliate fees that AT&T's rival distributors will pay as a result of Turner's increased post-merger bargaining leverage.

As Professor Shapiro explained at trial, his model relies on three primary inputs: 1) a figure for long-term subscriber loss, which is the total loss of subscribers a distributor would experience in the event of a long-term blackout of Turner content; 2) the diversion rate, which estimates the percentage of a distributor's lost subscribers that would sign up for AT&T's distribution services; and 3) AT&T margin data, from which Professor Shapiro calculates a measure of profits that AT&T would derive from subscribers it gains or maintains as a result of the hypothesized long-term Turner blackout. *See* **[**156]** Tr. 2217:15-24 (Shapiro). After selecting and entering values for those inputs and running his bargaining model, Professor Shapiro predicts that the challenged merger would lead to annual, net consumer harm ranging from $286.5 million to $561 million for the year 2016, with that range increasing in subsequent years. *See id.* at 2255:14-15, 3920:6-10; *id.* at 2256:16-20 (predicting $436 million in net consumer harm for the year 2017 and $571 million in net consumer harm for the year 2021). The low and high end of the

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pound weight instead of a thousand pounds, are you going to think about it differently, feel differently? Are you going to take more risk that any of that might happen to you? Absolutely not." Tr. 3120:23-3121:7 (Bewkes (Time Warner)). Although not controlling, the Court notes that some of Turner's lead negotiators credibly testified to similar effect. *See, e.g., id.* at 1128:7-12 (Breland (Turner)) ("The concept that Turner would push" as though "going dark is good for us, I believe I've given examples today of why it's just the opposite. I lose money the minute I go dark. . . ."); *id.* at 1190:14-17 (Warren (Turner)) (answering, when asked whether could gain leverage by "threatening to blackout distributors," that "I don't think that's a realistic perspective.").

On the stand, Professor Shapiro attempted to support his increased-leverage proposition by noting that programmers and distributors "think about what'll happen if there's a blackout" when formulating their negotiating strategy. *See id.* at 2193:23-2194:13 (Shapiro). The Government does the same in its post-trial filings. *See, e.g.*, Gov't PFOF ¶¶ 124-153 (collecting evidence to support proposition that "MVPDs have estimated their likely subscriber losses to inform their negotiating strategy"). The evidence showed that distributors engage in that exercise "with varying degrees of sophistication." *Id. ¶ 124*. With respect to companies that perform "go dark" analyses of the potential consequences of a blackout, the bulk of the evidence showed that negotiators relied on those analyses to get a general sense of "the value" of a programmer's content by measuring how many customers they would lose in the event of a blackout - customer losses that, notably, are not going to change as a result of the merger. *See* Tr. 935:12-16, 936:23 (SEALED); *see id.* at 1349:15-19 (Montemagno (Charter)) (reviewed the "high points" of the Altman Vilandrie go-dark analysis "[v]ery briefly"); *id.* at 1094:21-1095:1 (Breland (Turner)) (although "you never want to go dark if you are a programmer," preparing for a go dark scenario is "just prudent math"). Contrary to Professor Shapiro and the Government's arguments, such high-level evidence does not provide support for the more specific prediction that a marginal improvement in Turner's (still unprofitable) position in a blackout would meaningfully alter Turner's bargaining leverage.

In a similar way, the Government seeks to rely on the testimony of Turner executive Coleman Breland for the proposition that "Turner bargains over price down to hundredths of a penny," Gov't PFOF ¶ 108, and that Turner "almost went dark with Time Warner Cable over a single penny increase on one channel in 2012," *id. ¶ 158*. That account of Breland's testimony is "misleading at best." Defs.' PFOF 38 n.5. For the reasons set out in Defendants' proposed findings of fact, *see id.*, Breland's testimony does not bolster Professor Shapiro's model.

[37] Technically, Professor Shapiro used two models. He first used an economic bargaining model to generate predicted affiliate fee increases to distributors; then, he plugged those distributor cost increases into a separate merger simulation model to generate his estimates for consumer cost increases. *See* Tr. 2314:17-25 (Shapiro). As defendants' arguments focus on the design of Professor Shapiro's bargaining model rather than the merger simulation model, I will refer only to the bargaining model.

ranges result from using different values — 9% and 14%, respectively — for the subscriber loss rate. *See id.* at 2239:3-7.

Of course, both 2016 and 2017 have passed with no merger. Thus, as Professor Shapiro concedes, his bargaining model does not "literally predict[] the price increases that will occur in negotiations in the real world." *Id.* at 2294:18-2295:1. Rather, Professor Shapiro testified that his model is designed to "evaluate the fundamental incentives and changes in the market created by the merger." *Id.* at 2209:11-12. For that reason, he stated that his model does not account for the existence of Turner's current affiliate agreements **[*226]** with distributors, which will "expire in time." *Id.* at 2209:13-14.

Defendants attack Professor Shapiro's bargaining model from all directions. Noting that models are "only as good as the inputs," *id.* at 2315:11, defendants argue that each of Professor Shapiro's three "very important" inputs lacks a sufficient basis in the **[**157]** trial evidence, *id.* at 2315:12. Defendants also argue that Professor Shapiro's model improperly assumes away Turner's current affiliate agreements — agreements that will serve to significantly constrain Turner's post-merger bargaining leverage for years to come.[38] I agree with defendants, for the most part, that the inputs and assumptions of Professor Shapiro's model are not sufficiently grounded in the evidence — a fact that "undermine[s]" my "confidence in the reliability and factual credibility" of his projections. *Anthem, 855 F.3d at 363*. How so?

a. The Evidence Is Insufficient to Support Professor Shapiro's Long-Term Subscriber Loss Rate

In order for AT&T to benefit from a long-term Turner blackout with a rival distributor under the increased-leverage theory, a sufficient number of customers must actually depart or decline to join the rival distributor due to its failure to offer Turner content. Professor Shapiro refers to that measure of lost customers as the "long-term subscriber loss rate." At trial, Professor Shapiro testified that his model incorporates a low-end long-term subscriber loss rate of 9%, a number representing the combined percentage of current and potential **[**158]** subscribers who would either leave or decide not to sign up with a distributor in the event of a hypothetical long-term blackout of Turner content. *See* Tr. 2239:3-5 (Shapiro). Whether viewed as a measure of Turner's "market power" in the programming market or not, *id.* at 2239:18, that measure of customer loss — deemed the "long-term subscriber loss" rate by Professor Shapiro — is critical to Professor Shapiro's bargaining model and the predicted consumer harm it generates.

Of course, there has never been a long-term blackout of Turner content; Professor Shapiro thus had no "real-world" evidence on which to base his projected subscriber loss rate. *Id.* at 2394:8-11. Instead, as a basis for his chosen 9% value, Professor Shapiro relied on three principal pieces of evidence: (1) a third-party consultant slide deck commissioned by Charter in late 2016; (2) his own analyses of long-term **[*227]** blackouts of a different programmer, Viacom, with cable distributors Suddenlink and Cable ONE; and (3) the results of an internet survey conducted by another of the Government's testifying experts, Professor John Hauser. *See id.* at 2225:17-2226:7. The evidence indicates, however, that each of Professor Shapiro's **[**159]** sources is significantly flawed. Thus,

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[38] Correcting for those faults, defendants argue, would cause Professor Shapiro's model to predict a net *benefit* to consumers on account of the merger. Specifically, Professor Carlton testified that when one updates or accounts for those four factors — the long-term subscriber loss rate, the diversion rate, the margin data, and the presence of contracts — Professor Shapiro's model generates an average 52-cent per-month, per-consumer benefit rather than an average 27-cent per-month, per-consumer harm. *See* Tr. 2516:2-6 (Carlton); *see also id.* at 2255:9-25 (Shapiro) (testifying about the "[p]redicted Turner monthly fee increases for consumers" reflected by PDX11, slide 11).

The large effects on the predicted net harm created by minor changes to Professor Shaprio's inputs raises a separate question regarding the model's sensitivity. As Professor Carlton noted, Professor Shapiro performed no "statistical tests" to demonstrate that the "tiny percentage" increases in harm predicted by his model are "any different from zero" statistically speaking. *Id.* at 2450:16-2451:12 (Carlton). Without such statistical testing, Professor Carlton testified, the predicted harms could fall within the range of zero "just because of normal fluctuations in how we estimate models in the perimeters [sic] of the model." *Id.* The fact that Professor Shapiro's model "cannot be proven to any statistical significance" provides this Court with additional cause to reject the model's conclusions as "persuasive" evidence. *FTC v. Swedish Match, 131 F. Supp. 2d 151, 161 (D.D.C. 2000)*.

even taken together, they fail to establish the reliability of Professor Shapiro's long-term subscriber loss rate and the conclusions generated by his model.

1) Charter's Third-Party Consultant Slide Deck

According to Professor Shapiro, a slide deck, commissioned by AT&T's competitor Charter in late 2016 and authored by consultants at a San Francisco-based firm called Altman, Vilandrie & Company ("Altman Vilandrie"), was the "single best document and analysis" he found in coming up with a measure for the long-term subscriber loss rate. *Id.* at 2235:11-14. That was so, according to Professor Shapiro, because the slide deck, in contrast to the other available pieces of evidence, addressed "exactly" the question of interest to his analysis: the subscriber-loss effects of a long-term Turner blackout with a major distributor, as measured in *both* lost current customers and lost potential customers. *Id.* at 2235:19-20, 2236:20-2237:3. But although the slide deck may have analyzed the questions in which Professor Shapiro was interested (perhaps not so fortuitously, *see infra* pp. 127-128), the evidence shows that it did so via methodologies that were significantly flawed.

[160]** Before explaining further, it is necessary to review the basics of the slide deck's analysis. Altman Vilandrie director Stefan Bewley, who was responsible for supervising the project, explained that the slide deck was designed to examine "the value of content programming." *Id.* at 1271:23 (Bewley (Altman Vilandrie)). The slide deck, entitled "Content Valuation Project," contains charts predicting Charter's subscriber losses in the event of permanent blackouts with various programming networks. *See id.* at 1249:18-21; *see also* PX79. To generate those loss predictions, Altman Vilandrie used three different methods: (1) an internet survey, (2) set top box data, and (3) the so-called "hybrid" method, which made slight adjustments to the set top box analysis. *See* Tr. 2792:10-11, 2801:1-5, 2808:6-20 (Rossi); *id.* at 1271:24-1272:6 (Bewley (Altman Vilandrie)). Although Professor Shapiro praised that analysis for its apparent rigor, *see id.* at 2235:18-19 (Shapiro), he later conceded, despite professing that he usually does not accept data without "look[ing] into it more and figur[ing] out how reliable it is," *id.* at 3848:10-13, that he did not take steps to evaluate the reliability of the Altman Vilandrie data before he relied on it, *id.* at 3863:21-23 ("Q. So we can establish that all you did was read the report, right? A. I relied on the report. I didn't dig behind it."). Rather, Professor Shapiro simply incorporated the final figure included in the slide deck's table of results. *See* PX79-6.

Defendants' survey and statistics expert, Professor Peter Rossi, did however examine the methods that Altman Vilandrie used to predict the reported subscriber loss rates. And in testimony that largely went unrebutted,[39] Rossi explained his conclusion that "[a]ll three are invalid." Tr. 2792:5 (Rossi). Those conclusions, which I accept, are outlined below.

First, Altman Vilandrie relied on an internet survey. That survey, as Professor Rossi explained, combines three different **[*228]** types of internet surveys — a "conjoint," a "channel chooser," and a "Max Diff." *Id.* at 2792:13-17. In the conjoint survey, respondents view eight to ten screens and are presented with different options and pricing for bundles of video programming, broadband, and telephone services; the survey seeks to infer the respondent's willingness to trade off different service features. The channel chooser survey, **[**161]** for its part, tries to ascertain how much priority respondents give to a particular cable network. And the Max Diff survey allows the respondent to rank the different networks. Based on its internet survey's combination of those approaches, Altman Vilandrie calculated one set of subscriber loss figures for current and prospective video customers. *See* PX 79-18.

Professor Rossi testified that the internet survey method was plagued by considerable flaws, both in the way the questions were designed and in the way the answers to those questions were used to project subscriber loss. He noted, for example, that the conjoint survey's presentation of 12 networks included only one network — CNN — owned by Turner. Tr. 2794:7-9 (Rossi). Although Professor Rossi testified to the common-sense proposition that it is "impossible" to infer the value of all of the remaining Turner networks just from CNN, apparently that is what Altman Vilandrie did with the results of the conjoint survey. *See id.* at 2793:11-14, 2800:6-11. With respect to the Max Diff survey's process for ranking channels, Professor Rossi testified that such a ranking can give a sense of

[39] The Government did not recall any Altman Vilandrie witnesses on rebuttal to answer to Professor Rossi's critiques.

relative importance, but cannot measure how much **[**162]** more or less important one network is than another; of particular relevance here, moreover, the ranking methodology does not define what "important" means to a respondent, and thus says "[a]bsolutely nothing" about "whether a subscriber to Charter would leave if there was a Turner blackout." *Id.* at 2795:9-16. Finally, although Altman Vilandrie purported to combine the conjoint and Max Diff methodologies to bolster its analysis, Professor Rossi testified that such methodologies "fundamentally cannot be combined" as a matter of statistical practice. *See id.* at 2796:18-2797:4; *see id.* at 2800:16-17 ("It's literally an impossibility, and there is absolutely no way to combine these two.").[40] For those reasons, Professor Rossi's "bottom line conclusion" about the survey methodology was that it is "completely invalid." *Id.* at 2800:22-24.

Second, Altman Vilandrie utilized a set top box methodology. Set top box data, as should now be familiar, shows the amount of time a particular cable set top box is tuned to specific channels. *See id.* at 1274:16-18 (Bewley (Altman Vilandrie)); *id.* at 2801:5-12 (Rossi). As Bewley acknowledged, set top box data does not necessarily reflect actual viewership or **[**163]** correlate to a particular network's value. *See id.* at 1275:17-22 (Bewley (Altman Vilandrie)). Professor Rossi testified similarly, noting that such data, without more, "cannot possibly answer the question about the effect of removing any channel or group of channels." *Id.* at 2802:7-8 (Rossi). In addition, because set top box data is generated by Charter's current customers, it provides no information about "prospective customers for Charter." *Id.* at 2801:19-24. Notwithstanding those limitations, the Altman Vilandrie slide deck purported to derive current and prospective subscriber loss figures from the set top box data by assigning differing "churn propensity" values — that is, values **[*229]** reflecting the likelihood that a viewer will leave a distributor — to different levels of viewing concentration. *Id.* at 2802:9-2804:14; *see* PX79-18, -68.

Professor Rossi testified, however, that the churn propensity values, and their correlation with set top box data, are "not based on data of any kind" and instead reflect "purely assumed numbers." Tr. 2804:12-13 (Rossi). Although the lack of empirical support is reason enough to disregard the slide deck's analysis of the set top box data, that flaw is **[**164]** compounded by the particular values assigned in the churn propensity schedule. In particular, based on the schedule, Altman Vilandrie predicts that the loss of a network with a specified viewing concentration or greater will *always* cause a distributor's customers to leave. *Id.* at 2807:13-20; PX79-68; DX0681-73. I agree with Professor Rossi that the upper-threshold assumption, and indeed the entire set-top box methodology, lacks a sufficient basis in evidence and is unreliable. *See* Tr. 2807:13-22.

Third, and most importantly for purposes of Professor Shapiro's analysis, Altman Vilandrie implemented what it refers to as a "hybrid" methodology. Ultimately, the April 27, 2017 slide deck upon which Professor Shapiro relied indicates that the hybrid methodology produces a video subscriber loss rate of 9% for current customers and 10% for prospective customers. Tr. 2388:1-11, 3868:1-20 (Shapiro). Professor Shapiro testified that the 9% long-term subscriber loss rate that he incorporated into his model "reflect[s]" those results. *Id.* at 2237:4-8, 2388:1-11; *see* PX79-6, -18.

A key problem with the design of the hybrid methodology, as Professor Rossi testified, is that it blends two methods only **[**165]** in the sense that it alters the set top box method's lower churn propensity threshold "based to some extent on some of the survey data." Tr. 2808:14-18 (Rossi). In other words, the hybrid methodology can be thought of as "just a revision or alteration, minor alteration to the set-top box method." *Id.* at 2808:19-20. The hybrid methodology is thus plagued by the same problems as is the set top box methodology, including the fact that it "can't say anything about prospective customers." *Id.* at 2808:19-22. As a result, the hybrid methodology — and its associated 9% and 10% subscriber loss predictions for current and prospective customers — falters on the same grounds as the set top box methodology.

Moreover, evidence regarding the evolution of Altman Vilandrie's slide deck casts further doubt on the reliably of the figures associated with the hybrid methodology. Specifically, the evidence shows that a "final read out" version of the slide deck sent to Charter on April 21, 2017 reported that the hybrid method produced a 5% and 6% subscriber

[40] Although Professor Rossi explained that Altman Vilandrie relied in part on the Sawtooth Software, which incorporates some of his own innovations in survey methodology, the combination procedure took place "outside of Sawtooth Software." Tr. 2855:20-2856:6 (Rossi).

loss rate for current and prospective customers, respectively. *See id.* at 1302:4-20 (Bewley (Altman Vilandrie)); 3068:1-12 (Shapiro). Almost immediately **[**166]** after a meeting with Charter representatives a few days later, however, Altman Vilandrie, with the "permission" of Charter, altered the results of the hybrid methodology for "just" Turner and no other programmer. *Id.* at 1310:14-1311:15 (Bewley (Altman Vilandrie)). Those alterations led to the 9% and 10% current and prospective subscriber loss rates upon which Professor Shapiro's analysis relied. *See id.* at 3868:1-12 (Shapiro); *compare* DX681-23, *with* PX79-18.

That Turner-centric turn of events is enough alone to give me pause before accepting Professor Shapiro's reliance on the slide deck, notwithstanding the Government's presentation of a more benign view of the slide deck's evolution. *See, e.g.*, Tr. 1327:16-1332:4 (Bewley (Altman Vilandrie)) (testifying, among other things, that it was Altman Vilandrie that "proposed **[*230]** making an exception for Turner" based on the results of the hybrid methodology as compared to the results of other methodologies). In my view, moreover, the most troubling aspect of the testimony regarding the contested changes to the slide deck was that Professor Shapiro was entirely unaware of those changes when he "first relied on the document" to perform his analysis. **[**167]** *Id.* at 2365:8-10 (Shapiro); *see also id.* at 2366:4-7. At trial, Professor Shapiro admitted that he was not aware of the alterations made to the Altman Vilandrie slide deck until his pre-trial deposition by defendants. *Id.* at 2365:1-3. He nonetheless defended his reliance on the slide deck for the long-term subscriber loss figures, in no small part based on his insistence that although the current subscriber loss figure had been altered, the prospective subscriber loss figure "was not changed here." *Id.* at 2388:1-6; *see id.* at 2366:9-11 ("If I used the five percent instead, I would get a long-term subscriber loss rate of 8.5 percent instead of nine in my calculations."). Given that, Professor Shapiro continued, the altered current subscriber loss figure was "a lot less significant" because "it's just one of the two components that affects the long-term subscriber rate." *Id.* at 2388:11-15. Based on that assumption, Professor Shapiro testified that, even if one accepted the original 5% existing-customer subscriber loss figure, "[i]t's not as though my number would go from . . . nine to five percent if you made that change. It would go from nine to 8.5" percent. *Id.* at 2388:8-10.

But Professor **[**168]** Shapiro "made a mistake" in so testifying, a fact he was later forced to concede on rebuttal. *Id.* at 3868:17-20. When confronted on rebuttal with the two versions of the slide deck, Professor Shapiro acknowledged that the prospective subscriber loss figure *had* indeed been changed from an original value of 6% to the 10% value upon which he relied. *Id.* at 3868:1-20. He also testified, moreover, that using the original 5% existing customer subscriber loss figure and 6% prospective subscriber loss figure would yield a departure rate of about 5 or 6%, which in turn would "largely eliminate[] the net MVPD cost increase" he projects. *Id.* at 3870:22-3871:3.

For all of these reasons, I conclude that Professor Shapiro's reliance on the projected long-term subscriber loss rates contained in the Altman Vilandrie slide deck was misplaced. Given Professor Shapiro's testimony that the slide deck was the "single most important document" to him in calculating the long-term subscriber loss rate incorporated into the bargaining model, *id.* at 2360:25-2361:3, that conclusion *alone* is all but fatal to Professor Shapiro's analysis. To the extent, however, that Professor Shapiro relied upon two other categories **[**169]** of evidence, such evidence also fails to support his chosen long-term subscriber loss rate.

2) Long-Term Viacom Blackouts with Suddenlink and Cable ONE

In generating his long-term subscriber loss rate, Professor Shapiro also relied on his own analysis of the effects of long-term blackouts of Viacom programming — which includes networks such as MTV and Nickelodeon — with two MVPDs, Suddenlink and Cable ONE. In particular, Professor Shapiro opined that the Viacom blackout caused Suddenlink to lose 9.4% of its video subscribers and Cable ONE to lose 16% of its video subscribers. Gov't PFOF ¶ 208. The Court need not spill much ink addressing those figures because even a cursory review of the evidence shows that they are unreliable.

With respect to Professor Shapiro's 9.4% figure for Suddenlink, it is notable that *Suddenlink itself* represented to the public that it suffered only a 2 to 2.5% subscriber loss as a result of the blackout with Viacom. *See* Tr. 2480:21-22 (Carlton). **[*231]** Given the unusual nature of a long-term blackout, Charter, Comcast, and Wall Street power Citi also studied the event, the latter two concluding that Suddenlink's subscriber loss percentage was in the "low single digits." **[**170]** *Id.* at 2483:1-2; Defs.' PFOF ¶ 150. Altman Vilandrie's study for Charter produced similar results. *See* PX79-6. I heard from defendants' expert Professor Carlton that Professor Shapiro's estimates were inflated when compared to those other reported figures due to his failure to account for the fact that the rate of subscriber loss in the video distribution industry started to increase in 2016. *See* Tr. 2483:16-2484:2 (Carlton); *see also id.* at 2490:8-10.[41] When Professor Carlton corrected Professor Shapiro's analysis to control for that trend, he generated a 4.8% subscriber loss rate for the Suddenlink-Viacom blackout, a number much more in line with industry estimates. *See id.* at 2484:3-8.[42]

Professor Shapiro's 16% subscriber loss estimate for the Cable ONE long-term blackout of Viacom is even more unreliable. On that score, it is sufficient to note that Randy Sejen, Cable ONE's chief negotiator, testified that "[t]he losses attributable to Viacom are very, very small . . . and were not significant" *Id.* at 2123:21-2124:12 (Sejen (Cable ONE)). Specifically, Sejen noted that the Viacom blackout was "felt and absorbed" within four to six months and caused a subscriber loss of just **[**171]** 2%. *See id.* at 2130:1-4, 2123:21-24. Given Sejen's testimony that Cable ONE lost only 2% of subscribers, the Court has no reliable basis to accept Professor Shapiro's calculation of a subscriber loss figure eight times that amount — and therefore rejects it in toto.

To be sure, I heard evidence that, in relative terms, Turner programming is more valuable than Viacom programming. But that fact *alone* cannot make up for Professor Shapiro's baseline failure to establish any reliable measure of subscriber losses associated with the long-term Viacom blackouts. Having concluded that Professor Shapiro's Viacom analysis lacks an adequate basis, I will now turn to the last main piece of evidence he cited in support of his long-term subscriber loss figure.

3) Professor Hauser's Internet Survey

The last piece of evidence upon which Professor Shapiro based his long-term subscriber loss rate is an internet survey. The internet survey was conducted by another of the Government's testifying experts, Professor John Hauser, who heads the marketing department at the Massachusetts Institute of Technology. Tr. 756:9-14 (Hauser). The survey generated a long-term Turner blackout subscriber loss percentage of **[**172]** 12% and a 30-day Turner **[*232]** blackout subscriber loss percentage of a whopping 8.2%. *Id.* at 761:7, 803:24-804:3.

Although once at the forefront of the Government's presentation, *see, e.g.*, Gov't Pre-Trial Br. 29, Professor Hauser's survey now finds itself in the background, with even Professor Shapiro minimizing his reliance on it, *see* Tr. 2360:22-24 (Shapiro) ("[Hauser's] twelve percent is corroborative. If I didn't rely on that, if we decided that was unreliable, it wouldn't change my opinions."). Professor Shapiro however had good reason to unhitch his analysis from Professor Hauser's internet survey wagon: cross-examination and real-world evidence alike revealed that the survey was inherently unreliable and produced inflated results!

Before explaining that conclusion, a brief review of Professor Hauser's survey might be helpful. The survey had roughly 1,600 participants. *Id.* at 765:11 (Hauser). Those participants were drawn from an internet panel and then

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[41] Professor Shapiro omitted from his analysis of industry trends December 2016 data that showed an even steeper decline in industry subscribership. When first questioned about the decision not to include this data in his analysis, Professor Shapiro did not recall that any data was omitted, and could not provide an explanation for that omission. *See* Tr. 3879:1-14 (Shapiro). When called back to the stand days later, Professor Shapiro recalled that he had noticed something "peculiar" about the omitted numbers. *Id.* at 3915:9. Professor Shapiro's testimony concerning the 2016 data was not the only time that he demonstrated a lack of familiarity with the materials he presented to the Court. *See infra* pp. 127-129, 139-140. To be clear, although both call into question his analysis, Professor Shapiro's lack of familiarity with the contents of his report and with his own data analysis presents a credibility problem separate from the problems with key inputs generated by outside sources like Altman Vilandrie.

[42] Pursuant to the parties' representations and agreements during an April 26, 2018 bench conference related to the Suddenlink analysis, the Court will strike the following lines of trial testimony from Professor Shapiro: Tr. 3926:12-13; Tr. 3917:5-7; Tr. 3878:9-10; Tr. 3877:20-21; Tr. 3806:10-12.

broken into four groups of approximately 400 participants each: three "test" groups and one "control" group. *See id.* at 775:10-14, 761:21-762:5 (Hauser). The test groups were presented with an online survey, in which they were presented **[**173]** with questions about their potential responses to Turner blackouts of varying lengths, including a permanent blackout, a one-month blackout, and a one-week blackout. *See id.* at 775:22-776:6. The control group was not presented with any information about a blackout. *See id.* at 776:14-18; *id.* at 2768:8-11 (Rossi).

Defendants' survey expert, Professor Rossi, testified that Professor Hauser's survey is "unreliable" for any number of reasons. *Id.* at 2768:15 (Rossi). For purposes of the analysis here, I need only discuss two.[43] First, Professor Rossi testified that the survey was drawn in a biased and misleading way, with the effect of overstating the importance of Turner content. Second, Professor Rossi testified that the survey's centerpiece, the intent-to- switch scale, was confusing and skewed. *See id.* at 2768:12-2769:8. After considering the expert testimony as well as other evidence calling into question the results of Professor Hauser's survey, I agree with Professor Rossi's conclusions.

First, Professor Rossi faulted Professor Hauser's survey as building in bias at the "priming" stage. *Id.* at 2786:17. Professor Hauser testified that many television viewers think about video programming **[**174]** in terms of specific shows or genres, not channels. *See id.* at 817:17-818:5. Professor Hauser therefore began his survey by "priming" survey respondents to connect genres of programming to specific channels through the use of network logos. *See id.* at 817:25-818:17; *see also id.* at 824:15-825:6 (sports); *id.* at 821:4-12 (special events). According to Professor Rossi, however, Professor Hauser's use of logos was problematic. In particular, Rossi noted that the internet survey "tend[ed] to visually overemphasize Turner content" relative to other content by, for example, enumerating the Turner channels in large font or inaccurately over representing the Turner networks relative to other programming. *Id.* at 2783:12, 15-17 (Rossi); *see also id.* at 2787:9-2788:25 (discussing DX915B).[44] At one point, the survey presented **[*233]** respondents in the test group with large Turner logos for six straight slides, despite not showing those slides to the control group. *See id.* at 838:23-839:3 (Hauser); *id.* at 2789:25-2790:8, 24-25 (Rossi). As Professor Rossi explained, that priming tended to bias respondents in favor of indicating an intent to switch in the event of a Turner blackout. *Id.* at 2790:16-17 (Rossi). **[**175]**

Second, Professor Rossi testified that Professor Hauser's survey asked respondents to report their answers using a scale that was confusing and, again, likely to cause respondents to overestimate their likelihood of switching distributors in the event of a Turner blackout. Professor Hauser's survey did not squarely ask respondents whether they would switch providers in the event of a Turner blackout. Instead, the internet survey presented respondents with, as it is known in the industry, a "Juster scale" by which they answered the question, "How likely are you to switch your TV provider, on a scale from 1 to 99?" DX915-152: *see* Tr. 788:12-18, 814:1-4 (Hauser). The scale included percentages - 10%, 20%, 30%, etc. - and accompanying descriptors such as "very slight possibility," "slight possibility," "some possibility," and "fair possibility." *See* Tr. 813:15-814:19 (Hauser); DX915-152. The results of the Juster scale were translated directly into a subscriber loss rate. Thus, if each respondent rated his or her likelihood of switching at a "very slight possibility," corresponding to 10% on the Juster scale, Professor Hauser's survey would spin out **[**176]** a subscriber loss rate of 10%. *See* Tr. 815:20-816:18 (Hauser).

Professor Hauser's Juster scale had two critical flaws: first, its text descriptions were "out of w[h]ack with the numbers," Tr. 2778:17-21 (Rossi), and, second, Juster scales are particularly unreliable in quantifying consumer choices of this kind, *see id.* at 2779:1-2782:19. Professor Rossi put it in plain terms:

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[43] Professor Rossi also criticized Professor Hauser for failing: 1) to establish that his group of survey participants constituted a representative sample of the population of interest, and 2) to provide a margin of error that is, a measure of reliability—for his survey's results. *See* Tr. 2771:22-2273:21, 2775:2-6 (Rossi). Although the Court agrees that those problems are notable, it sees no need to pile on by addressing them further in light of the two significant design flaws discussed below.

[44] This is not the first time Professor Hauser's "graphic effects and presentation methods" have been called into question on this basis. *See* *Apple, Inc. v. Samsung Elecs. Co., No. 11-CV-01846-LHK, 2014 U.S. Dist. LEXIS 29721, 2014 WL 976898, at *10-*16 (N.D. Cal. Mar. 6, 2014)*.

> Now if I told you that I thought there was a very slight possibility that I would get into a car accident driving from Washington to Baltimore on the Baltimore Washington Parkway this evening, I don't think you would say that was one out of every ten times I attempted that. You might say one out of every thousand or more. So the text description is out of whack with the numbers. And that's true throughout the scale.

Id. at 2778:12-19. Professor Rossi also testified that the survey's text was bound to present skewed results because it "minimiz[ed] or neglect[ed] many aspects of switching costs" — that is, the various costs associated with switching distributors. *Id.* at 2783:13-14 (Rossi): *see also id.* at 2783:19-2786:16 (detailing different kinds of switching costs, including search costs, transactional costs, bundle-derived **[**177]** costs, and psychological costs, and concluding that Professor Hauser's survey failed to adequately account for those costs). That problem casts further doubt on the reliability of the survey. *Cf.* *H & R Block, 833 F. Supp. 2d at 66-68* (declining to rely on "customer survey[]'" results in part because survey "failed to assign" adequate "pricing" data to some of participants' response options).

More fundamentally, Professor Rossi explained, Juster scales are notoriously inaccurate when used "as an exact quantification" of the likelihood that a customer will engage in some future behavior. Tr. 2779:16-21, 2782:2-13 (Rossi). Academic literature cited by both Professors Rossi and Hauser establishes that the average correlation for predictions of this kind falls **[*234]** between .3 and .6. *See id.* at 2779:16-2780:5. Professor Hauser's scale, nonetheless, purports to assign a correlation value of 1.0, that is, a *perfect* linear association where intent predicts behavior virtually every time. *See id.* 2872:15-2781:2, 2872:1-4. And even that unsupported correlation "basically disappears" when respondents are asked to predict their behavior with respect to new products or situations — such as a permanent Turner blackout. *See id.* at 2780:15-24. **[**178]**

Given the significant questions raised about the design of Professor Hauser's survey, it should come as no surprise that the survey's results were puzzling to expert and fact witnesses alike. Gregory Rigdon, Comcast's chief negotiator, responded to Professor Hauser's one-month blackout loss estimate of 8% by noting, "[T]hat seems like a big number in one month." *Id.* at 897:2-3 (Rigdon (Comcast)). He gave the same answer when asked about the survey's long-term 12% loss estimate. *See id.* at 898:3-5 ("Q: But in terms of nay group you've ever seen dropped, have you ever seen anything approaching a 12 percent — A. That seems like a big number."). Turner CEO John Martin put things a bit more strongly, calling the survey's 8% one-month blackout subscriber loss prediction "absurd." *See id.* at 660:9-11 (Martin (Turner)). Defendants' expert Professor Carlton, for his part, said that the 8% departure rate for one month "strikes me as way too high" and is "nothing like" the Cable ONE estimate of 1.1% to 1.2% for the actual temporary Turner drop. *Id.* at 2491:4-15 (Carlton). Finally, even Professor Shapiro himself noted that Professor Hauser's one-month subscriber loss estimate of 8% "seems high." **[**179]** *Id.* at 2360:18.

Of course, if Professor Hauser's survey generated inflated one-month subscriber loss estimates as compared to real-world evidence, that fact "cast[s] doubt on what Professor Hauser is doing" with the survey design generally. *Id.* at 2491:4-15 (Carlton). It is therefore small wonder why both the Government and Professor Shapiro have deemphasized the role of the Hauser internet survey. All in all, I can't help but conclude that the internet survey's methods are unreliable and that its results fly in the face of real-world evidence regarding the effect of programming blackouts.

For all of the reasons discussed above, the evidence is not sufficient to support the 9% long-term subscriber loss figure that Professor Shapiro utilized in his model.[45] Because the Government has the burden of proof as well as

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[45] The miniscule nature of subscriber losses resulting from the two actual instances of Turner blackouts perhaps should have alerted Professor Shapiro that something was awry with his sources. The evidence showed that there have been two short-term blackouts of Turner content with distributors: 1) a thirty-day blackout with Cable ONE in October 2013, which resulted in "fairly insignificant" subscriber losses in the range of about .6%, Tr. 2116:10-13, 2127:21-2128:2 (Sejen (Cable ONE)); and 2) a thirty-day blackout with DISH in November 2014, in which some Turner networks — including CNN, but not TBS or TNT — were blacked out, resulting in a loss of less than 1% of DISH subscribers, *see id.* at 388:10-389:5 (Schlichting (DISH)). Those subscriber loss figures simply cannot be squared with some of the figures represented in the sources upon which Professor Shapiro relied.

the responsibility to demonstrate that its proffered expert testimony has an adequate grounding in evidence, the lack of evidentiary support for Professor Shapiro's input is fatal to the model's probative value in predicting the asserted harm associated with the Government's increased-leverage theory.[46]

[*235] *b. The Evidence Is Insufficient to Support Professor Shapiro's Diversion* ***[**180]*** *Rate*

To evaluate the number of customers that AT&T stands to gain from a long-term Turner blackout with a rival distributor, it is necessary to estimate how many of that rivals' customers "will end up as DirecTV subscribers, either by moving to DirecTV or by staying at DirecTV and not going to" the rival. Tr. 2240:9-11 (Shapiro). In Professor Shapiro's model, that figure is known as the "diversion rate." *Id.* at 2240:13. The diversion rates Professor Shapiro uses differ based on geography. Specifically, Professor Shapiro calculated a diversion rate for each of the local geographic markets based on an assumption that subscribers "move to the other [distributors], in each local market, to the other distributors proportional[ly] to their marketshare." *Id.* at 2240:23-2241:1-3, 2241:15-20.

The parties' main dispute related to diversion rate pertains to "cord cutting," also referred to in this context as the "outside good." *Id.* at 3871:8-9; *see id.* at 2604:13-17 (Carlton). As is likely familiar by now, an individual "cuts the cord" by discontinuing his MVPD subscription and opting instead to receive television programming through an internet-based SVOD like Netflix or Hulu. *See supra* pp. 22-23. Professor **[**181]** Shapiro acknowledges that, as a result of cord cutting, "[d]iversion to AT&T will be reduced to some extent because some current subscribers of a rival MVPD that would leave that MVPD due to a loss of Turner content will cancel their pay-TV service altogether" rather than "switch to AT&T or another MVPD that carries Turner." Gov't PFOF ¶ 215; *see* Tr. 2241:22-2242:18 (Shapiro). To account for that effect, Professor Shapiro assigns a value to cord cutting of approximately 10%. *See* Tr. 3871:8-15 (Shapiro).

According to defendants, Professor Shapiro's 10% figure understates the rate of cord-cutting and, accordingly, results in an inflated diversion rate. *See* Defs.' PFOF 182-187; *see also* Tr. 2515:16-20 (Carlton). Defendants insist that the proper cord-cutting rate is closer to 20%. *See* Defs.' PFOF ¶ 185; *see also* Tr. 2505:10-20 (Carlton). Plugging that 20% cord-cutting rate into Professor Shapiro's model, defendants' lead expert Professor Carlton testified, would result in a predicted net consumer *benefit. See* Tr. 2515:16-20 (Carlton) (if one uses 20% cord-cutting rate in Professor Shapiro's model, then "Professor Shapiro's 27-cent price increase on average becomes [a] 6-cent benefit, decrease"). **[**182]** After evaluating the evidence and the parties' arguments on cord cutting, I conclude that there is insufficient evidence to support the 10% cord-cutting figure utilized by Professor Shapiro.

The basis for Professor Shapiro's 10% figure was the (by now discredited) Altman Vilandrie slide deck, created for Charter. *See id.* at 2372:8-10 (Shapiro) ("A: Well, you relied on Altman Vilandrie for what you called the outside good, correct? A: For that part, yes, that's correct."). What I learned about the slide deck's cord-cutting figure, however, was **[*236]** that it was derived from the results of Altman Vilandrie's "conjoint survey." *Id.* at 2821:7-15 (Rossi). Specifically, as explained by defendants' survey expert Peter Rossi, Altman Vilandrie first looked to the measure of people who answered that they would not "take any" MVPD service in the event of a blackout with Charter. *Id.* at 2821:9-14 (Rossi); *id.* at 2242:11-15 (Shapiro). Altman Vilandrie then took those estimates, Rossi testified, and "multiplied all of those coefficients by .6 without justification" — meaning, in layman's terms, that they "cam[e] up with a figure and then reduc[ed] it by 40 percent." *Id.* at 2821:14-18 (Rossi); *id.* at 3871:16-19 **[**183]**

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[46] Because the evidence does not support use of Professor Shapiro's 9% "low end" long-term subscriber loss rate, it stands to reason that the larger 14% long-term subscriber loss rate he used to generate the high end of his predicted harm range is also unsupported. Tr. 3851:21-3852:8 (Shapiro). The same goes for the higher 12% and 16% long-term subscriber loss rates he used, rather curiously and contrary to the Altman Vilandrie slide deck upon which he claimed to rely, to generate the predicted harms for a 2017 and 2021 market configuration. *See* Tr. 2493:9-2495:18 (Carlton). Professor Shapiro's appeal to the fact that he predicted a range of harm is therefore unavailing: He is not "suffering the consequences of being conservative" in his estimates, Tr. 3852:1-2 (Shapiro), the consequences arise because even his conservative estimate lacks sufficient evidentiary support and reliability. The same can be said for the Government's post-trial submissions regarding the "conservative[]" nature of Professor Shapiro's analysis. Gov't Post-Tr. Br. 14.

(Shapiro). That reduction, in turn, produced Altman Vilandrie's cord cutting estimate of 16.8%, which Professor Shapiro used to derive his ultimate cord cutting estimate of 10%. *Id.* at 2372:19-2373:4, 3871:11-19 (Shapiro); *id.* at 2821:16-21 (Rossi); *see* PX79-38.

Although Professor Shapiro testified that he was "aware" of Altman Vilandrie's 40% reduction methodology, he could not recall whether he was aware of it at the time he relied upon Altman Vilandrie's cord-cutting figure, or just as a result of Professor Rossi's trial testimony. Tr. 3871:16-23 (Shapiro). Moreover, Professor Shapiro was unable to explain Altman Vilandrie's choice to reduce the cord-cutting figure, stating only that his "understanding is Mr. Bewley explained he did that based on evidence that reflected market conditions in Altman Vilandrie, as part of their analysis." *Id.* at 3872:4-8. The Court, however, has been unable to locate that alleged testimony in the trial record, or in the Government's post-trial filings for that matter. *Cf.* Gov't PFOF ¶¶ 214-216 (discussing Altman Vilandrie's cord-cutting figure with no reference to Bewley testimony).

If that were not enough alone to give pause before accepting Professor **[**184]** Shapiro's 10% cord-cutting estimate, defendants cast additional doubt on that figure by citing to SNL Kagan data as well as to real-world evidence regarding the prevalence of cord cutting in the industry. With respect to SNL Kagan data, Professor Carlton testified that the data shows that "[a]round 20 percent" of "total TV households" are "cord cutters." Tr. 2505:12-18 (Carlton).[47] SNL Kagan's 20% figure, defendants state, aligns with other industry evidence about the extent of cord cutting. *See* Defs.' PFOF ¶¶ 183, 185. AT&T surveys of departing customers, for example, indicate that "25 to 30 percent" of those customers report that they are "going to cord cutting." Tr. 2506:19-24 (Carlton). RCN CEO Jim Holanda testified that similar surveys by his company report that "at least half of the customers who leave RCN's video services are leaving for OTT providers" — a number that Holanda predicts is "likely to grow in the future as Millennials become more and more prominent in the marketplace." *Id.* at 2948:20-2949:3 (Holanda (RCN)). That evidence about the *increasing* presence of cord cutting in the market, in the Court's view, undercuts yet another **[*237]** aspect of Professor Shapiro's measures of **[**185]** cord cutting — namely, that they apparently "declin[e] over time" because of a particular "feature of his model." *Id.* at 2448:7-9 (Carlton).

In the final analysis, it is the Government's burden to adequately support its proffered model's harm — and, necessarily, the model's inputs — through the testimony of its expert or related evidence. The utter lack of explanation regarding Altman Vilandrie's methodology for generating the cord-cutting projection upon which Professor Shapiro relied, coupled with defendants' real-world evidence regarding the prevalence of cord cutting in the industry, leaves me with little confidence in the accuracy of Professor Shapiro's 10% cord-cutting figure. As with the long-term subscriber loss estimates, I therefore conclude that the Government has also failed to provide adequate support for Professor Shapiro's diversion rate estimate and thus the model's predicted net consumer harm.

c. The Evidence Is Insufficient to Support Professor Shapiro's Profit Margin Figure

Finally, Professor Shapiro's last input to his model is AT&T's monthly profit margins for its video customers. *See id.* at 2245:7-9, 2315:12-17 (Shapiro). To calculate those monthly video margins, **[**186]** Professor Shapiro relied on internal AT&T figures measuring new customers' "lifetime value" to AT&T, or "LTVs." *Id.* at 2344:12-16; *id.* at 2577:13-14 (Carlton). In particular, Professor Shapiro averaged AT&T's reported LTVs for a three-month period ending in June 2016. *See id.* at 2344:12-20, 3843:13-18 (Shapiro). That average generated a profit margin of

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[47] To be sure, the Government, through the rebuttal testimony of Professor Shapiro, attempted to rebuff Professor Carlton's 20% cord-cutting rate. Professor Shapiro pointed out that, in the context of examining the consequences of a Turner blackout, it is "pretty likely" that a departing customer would "want to go somewhere else where you can get the Turner content." Tr. 3808:11-12 (Shapiro). Thus, Professor Shapiro continued, stating that "20 percent of American households don't have pay-TV service" overall is "beside the point." *Id.* at 3808:5-6, 15. Were it defendants' obligation to provide sufficient support for the departure rate in Professor Shapiro's model, rather than Professor Shapiro's, that rebuff would perhaps be persuasive. But even accepting Professor Shapiro's point about defendants' proposed rate, that point does not prove that the departure rate *he* proffered had adequate evidentiary support.

$1,324, which Professor Shapiro used in his model to estimate the monetary benefits that AT&T would gain in the event of a long-term Turner blackout. *Id.* at 3843:21-3844:4.

Defendants argue that Professor Shapiro's 2016 LTV data is "outdated and thus not a reliable input into Professor Shapiro's model." Defs.' PFOF ¶ 188. Defendants assert that Professor Shapiro instead should have used the "latest" available LTV figure from June of 2017, or $821. Tr. 2508:3 (Carlton); *id.* at 3844:9 (Shapiro). That $821 figure — disclosed by an AT&T witness and Professor Carlton after Professor Shapiro's initial expert report and the close of fact discovery, but before Professor Shapiro's rebuttal report and the start of trial — is approximately 40% lower than the 2016 margin figure used by Professor Shapiro to generate his original estimates of net **[**187]** consumer harm. *See id.* at 2448:17-2449:1 (Carlton). Defendants argue that using the $821 figure from 2017, rather than the $1,324 figure from 2016, significantly reduces the net consumer harm predicted by Professor Shapiro's model. *See id.* at 2507:20-22 ("[I]f margins go down, Professor Shapiro will predict lower increases in Turner content, even in his own model."); *id.* at 2508:17-21 (using "the more up-to-date" profit margin figures "eliminates a large fraction of all [of Professor Shapiro's predicted] harms").

At trial, each side spent much time attempting to justify, or impugn, Professor Shapiro's reliance on the 2016 versus 2017 LTV data. The Government, for its part, raised questions about the genesis and legitimacy of the late-breaking 2017 margin data; on that score, it requested, and was granted, the opportunity to depose the AT&T executive responsible for compiling and producing the data. Defendants, on the other hand, questioned Professor Shapiro extensively about his continued reliance on the 2016 LTV data in the face of deposition testimony[48] and Professor Carlton's report, both of which disclosed updated 2017 LTV figures.

[*238] While I have no reason to doubt Professor **[**188]** Shapiro's good faith in continuing to rely upon the 2016 LTV data during his direct testimony, for present purposes, the important point is this: the trial evidence indicates that Professor Shapiro's 2016 LTV figures, and thus his measure of AT&T's margins, are outdated and too high. That is true whether they are compared against the "most current finalized" June 2017 LTV figure ($821) cited by Professor Carlton, *id.* at 3844:18, 3849:14-23 (Shapiro), or instead against an average of all three of the 2017 LTVs that had been finalized at the time of trial, *id.* at 2585:13-22 (Carlton).

At trial, AT&T witness David Christopher testified about AT&T's method for generating the 2017 LTV data; he also confirmed the values of the finalized LTVs for January, April, and June 2017. *See id.* at 3001:9-17, 3011:11-17 (Christopher (AT&T)). Although the Government rightly points out that such LTV numbers can (and, in the case of the 2017 LTVs, do) fluctuate from month to month, *see id.* at 3015:10-24, the overall "downward trend is the same," *id.* at 3016:4; *see also id.* at 3003:15-3004:15 (discussing downward pressures on LTVs). The declining state of AT&T's 2017 LTVs, moreover, aligns with the testimony **[**189]** of numerous witnesses regarding the continued decrease of video margins in the distribution industry. *See, e.g., id.* at 3852:22-25 (Shapiro) ("Q: And you are aware, sir, of the testimony of pretty much every other competitor witness in this case who has testified that their video margin are going down, right? A: Yes.").

Given that evidence, it is perhaps unsurprising that even Professor Shapiro conceded during his rebuttal testimony that he "think[s] there's some validity to using the 2017 margin instead of the 2016 margins." *Id.* at 3810:10-11; *see also id.* at 3843:17-18 ("[I]t would be reasonable to use the 2017 margins if one did it in the context of the rest of my analysis."); *id.* at 3849:5-8 ("Then when I'm given more data later and now we've had the trial, I understand that more; that's why I said this time around, I could see using the 2017 data."). Professor Shapiro also confirmed that using an average of all finalized 2017 LTVs would generate a 2016 net increase in MVPD costs of $98 million per year — a number "significantly lower" than his original estimate of $235 million in MVPD costs. *See id.* at 3849:24-3851:3. Those lower MVPD costs, in turn, would decrease the predicted **[**190]** harm to consumers from the $.27

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[48] Specifically, David Christopher testified to the June 2017 LTV figure during his deposition on February 14, 2018. *See* Tr. 3002:16-25. Although Professor Shapiro's report cites Christopher's deposition, on the stand Professor Shapiro admitted that he did not read that deposition transcript and did not in fact know David Christopher's role in the case. *See id.* at 2345:17-2346:3 (Shapiro) ("Q: If I told you that you cited to [Christopher's] deposition in your report, does that ring a bell? A: No. Q: Well, did you read his deposition? A: I did not.").

per-subscriber-per-month figure Professor Shapiro testified about to a figure of approximately $.13 per-subscriber-per-month. *See id.* at 3851:6-14.

In view of the above evidence, I agree with defendants that the 2016 margin data utilized by Professor Shapiro is outdated and inflated.[49] Whether one substitutes **[*239]** that figure for the June 2017 LTV data or an average of all of the finalized 2017 LTV data in Professor Shapiro's model, the result is a significant decrease in the predicted amount of net consumer harm. Although that decrease, standing alone, does not eliminate all of the harms generated by Professor Shapiro's model (just the bulk of them), it provides yet another reason to reject the predictions offered by Professor Shapiro at trial.

d. The Model's Failure to Account for the Real-World Effects of Turner's Long-Term Contracts Further Undermines Its Probative Value

Turner is currently party to long-term affiliate agreements with nearly all of its distributors. *See* Tr. 2316:3-18 (Shapiro); *id.* at 2444:10-23 (Carlton); *see also, e.g.*, PX211; PX410; PX422.[50] Those agreements, Professor Shapiro concedes, will "prevent **[**191]** [Turner] from raising the fees for some number of years" and thus "temporarily constrain[]" his predicted effects of the merger in the real-orld. Tr. 2209:8-9, 16 (Shapiro). In running his model and rendering his predictions, however, Professor Shapiro curiously chose to ignore Turner's current affiliate agreements. At trial, Professor Shapiro explained — and anticipated cross-examination on — that choice by noting that his model is designed to "evaluate the fundamental incentives and changes in the market created by the merger." *Id.* at 2208:21-25, 2209:4-19. In other words, Professor Shapiro's predictive **[*240]** exercise requires

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[49] With his model's original reliance on the 2016 LTVs under attack, Professor Shapiro's rebuttal testimony doubled down on an argument relating to the value of AT&T's existing customers. The argument proceeds as follows. In addition to calculating LTVs for newly acquired video customers, AT&T assigns margin values to its existing video subscribers. Those values, known as active customer values ("ACVs"), are generally higher than LTVs because they do not account for "subscriber acquisition costs." Tr. 3854:22-3855:4 (Shapiro). Professor Shapiro's long-term subscriber loss rate includes a measure of the existing customers that AT&T will retain as a result of a long-term Turner blackout on its distribution rivals. The value of those maintained customers, Professor Shapiro opines, is likely "50 percent higher" than the margin value for new-customers. *Id.* at 2244:13-21. Professor Shapiro did not, however attempt to generate or otherwise assign a "measure of the margin on the retained subscribers." *Id.* at 2244:9-10. Instead, his model only incorporates the margin value associated with new subscribers. *Id.* at 2244:22. As a result, Professor Shapiro states that his "margin figure is definitely understated and substantially understated because I don't have the proper data on the value of the retained customers." *Id.* at 2244:14-17.

Therein lies the problem. Although opining about the importance of the value of retained customers to AT&T, Professor Shapiro undertook no analysis to incorporate that overall effect into his model. That should come as little surprise, given that this "larger point" appeared only in footnote 414 of the ninth appendix to Professor Shapiro's 300-page expert report; nonetheless, it renders his reliance on the existing-versus-new customer distinction unconvincing. *Id.* at 3809:18, 3855:5-3856:5. That footnote, Professor Shapiro testified, indicates that "the value of existing subscribers [is] between 150 and 225 percent as large as new subscribers." *Id.* at 3813:13-17. Beyond footnote 414's general observation, Professor Shapiro did not attempt to quantify the total dollar value of existing customers' margins versus new customer margins, much less incorporate a figure for existing customer margins into his model. *Id.* at 2244:22-2245:1 ("But, again, the data I have available, I'm using those gross add margins."). On rebuttal, Professor Shapiro nonetheless cited that "higher number" as "what gives me a higher end of my range" of projected harm. *Id.* at 3819:25-3820:7. That does not appear to be the case: elsewhere, Professor Shapiro testified that the "higher end" of the range derives from his use of a higher long-term subscriber loss rate of 14% (as compared to the 9% rate he chose to present to the Court during his direct testimony), rather than any alterations to other inputs, such as the margin data. *Id.* at 2259:4-8 ("I realize there are ranges here. These are based on, we're starting from the low end, 9 percent subscriber loss rate, and projecting that. So if we started with the 14 percent, we'd have higher numbers."); *see also id.* at 2239:3-7. Professor Shapiro's belated attempts to link his point regarding the increased margins for existing customers to the high-end projections he reported, or to present those increased margins as if they were quantified and incorporated into his model, are thus unavailing and further undermine the credibility of his presentation.

[50] The primary exception is Charter, which has been displaying Turner content pursuant to temporary, short-term extensions of the companies' affiliate agreement, which initially expired in 2016. *See* Tr. 1353:21-1354:3 (Montemagno (Charter)).

assessing "the longer term impact of a new market structure"; factoring in Turner's current affiliate agreements, he noted, would be counterproductive because those agreements are "temporar[y]" and will "expire in time." *Id.* at 2209:11-19, 2320:24-2321:10.

The evidence in this case, however, shows that the real-world effect of Turner's present affiliate agreements will be rather "significant" until at least 2021. *Id.* at 2316:14-18. Indeed, Professor Shapiro conceded that by simply factoring in the presence of one such affiliate agreement with a large distributor **[**192]** (which the Court will not name for confidentiality purposes), the total MVPD price increase predicted by his model decreases by "about one-third" — a decrease that "take[s] away the vast majority the net effect" on MVPD monthly costs. *See id.* at 2317:25-2318:6, 2319:10-16; *see also id.* at 2617:12-2618:13 (Carlton) (factoring in that "one contract" reduces MVPD harm projection to "roughly a 5-cent projected price increase instead of a 27-cent price increase"). Not surprisingly, Professor Carlton testified that simply by accounting for all current affiliate agreements and making no other changes to Professor Shapiro's model, the model would generate a predicted net *benefit* to consumers rather than a net harm for the years 2016 and 2017. *See id.* at 2513:1-9 (2017) (discussing DXD116); *id.* at 2515:25-2516:1 (2016) (discussing DXD116).

In other words, given Turner's existing contracts, the level of post-merger harms predicted by Professor Shapiro's existing model would not begin to phase in until at least 2021. But even Professor Shapiro concedes that 2021 is "getting out there a ways" and that "it gets harder" to predict actual harm that far down the line. *Id.* at 2258:1-2, 2316:15-2317:4-5 **[**193]** (Shapiro). That recognition reflects the testimony of industry witnesses, many of whom testified that the landscape of the video distribution industry is continually changing and will continue to change as new entrants join the market. *See, e.g., id.* at 2456:7-11 (Carlton) ("So we have Netflix, we have Google coming in, you have Amazon Prime. These are all big firms, Apple and Facebook we know are coming in. . . ."); *id.* at 2948:20-2949:3 (Holanda (RCN)) (agreeing that migration to "OTT providers" is "likely to grow in the future as Millennials become more and more prominent in the marketplace"); *cf id.* at 3853:18-19 (Shapiro) ("I think it is not disputed that the video margins are going down.").

I am thus left with projections of harm for the years 2016, 2017, and 2021 that all concede have not and will not occur in the real world due to Turner's actual affiliate agreements. *See, e.g., id.* at 2317:6-15 (Shapiro) ("Q: So let's be clear about this when . . . you said $586,000,000 of annual price increase[s] to all of the MVPDs and a couple of virtual [MVPDs] in there, right? A: That's the number there. Q: So just to be clear, that isn't going to happen. This isn't going to happen let's **[**194]** say in the year after the merger, right? That can't happen. A: That is true."). As such, I have no choice but to agree with Professor Carlton that Professor Shapiro's model is "overestimating how quickly" the predicted harms "are going to start occurring." *Id.* at 2444:15-23 (Carlton). To the extent, moreover, that the model projects "actual effects [that] will only occur gradually" after the largest of those agreements expires in 2021, even Professor Shapiro admits that it "gets harder" to project what the industry — and thus actual, real-world harm — will look like that far down the road. *Id.* at 2209:17-19, 2316:19-2317:5 (Shapiro); *cf. id.* at 235:18-19 (Schlichting (DISH)) (Sling launched as the first virtual MVPD in February 2015). For those reasons, even putting aside the various problems with the model previously discussed, I conclude **[*241]** that the model's predictions of harm are not "'sufficiently probable and imminent' to be probative in view of the facts of this case, especially "in the context" of the ever-increasing competitiveness of this "particular industry." *Arch Coal, 329 F. Supp. 2d at 115* (quoting *Marine Bancorporation, 418 U.S. at 623 n.22*); *Aetna, 240 F. Supp. 3d at 79* (quoting *Brown Shoe, 370 U.S. at 321-22*).

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After hearing Professor Shapiro's bargaining model described in open Court, I wondered **[**195]** on the record whether its complexity made it seem like a Rube Goldberg contraption. Professor Carlton agreed at the trial that that was a fair description. *See* Tr. 2447:2-7 (Carlton). But in fairness to Mr. Goldberg, at least his contraptions would normally move a pea from one side of a room to another. By contrast, the evidence at trial showed that Professor Shapiro's model lacks both "reliability and factual credibility," and thus fails to generate probative predictions of future harm associated with the Government's increased-leverage theory. *Anthem, 855 F.3d at 363*. Accordingly, neither Professor Shapiro's model, nor his testimony based on it, provides me with an adequate basis to conclude that the challenged merger will lead to *any* raised costs on the part of distributors *or* consumers — much less consumer harms that outweigh the conceded $350 million in annual cost savings to AT&T's customers.[51]

[*242] IV. The Government Has Failed to Meet Its Burden to Show That the Proposed Merger Is Likely to Substantially Lessen Competition on the Theory That AT&T Will Act to Harm Virtual MVPDS Through Its Ownership of Time [196] Warner Content**

The Government's second theory of competitive harm relates to virtual MVPDs. Virtual MVPDs, like traditional MVPDs, offer consumers linear (or "live") television programming in exchange for a subscription fee. *See supra* pp. 11-13. Unlike traditional MVPDs, however, virtual MVPDs transmit their video content over the internet. *Id.* Compared to traditional MVPDs, virtual MVPDs generally offer lower-cost programming packages to consumers; those packages, known in the industry as "skinny bundles," contain fewer networks than do the larger bundles offered by MVPDs. *Id.* Although virtual MVPDs are of recent vintage, they are quickly gaining market share in the video programming and distribution industry. *See* Tr. 448:24-449:2 (Schlichting (DISH)). Examples of virtual MVPDs

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[51] Although they amount to "extra icing on a cake already frosted," there are even more reasons to be skeptical of the Government's increased-leverage theory of competitive harm. ***Yates v. United States, 135 S. Ct. 1074, 1093, 191 L. Ed. 2d 64 (2015)*** (Kagan, J., dissenting).

First, the Court has reason to believe that, post-merger, AT&T will honor Turner's commitment to arbitrate, counterparties will agree to the terms of that commitment, and the prospect of arbitration will influence affiliate negotiations. In short, the commitment, made by Turner shortly after the filing of this suit, will have real-world effects. For starters, the proposed arbitration agreement is similar "in many of the fundamental ways" to the arrangement blessed by the DOJ, FCC, and this Court in the Comcast-NBCU merger. Tr. 2680:1-9 (Katz); *see also* 7/27/2011 Hr'g Tr. 7:4-7, 13:6-10, *Comcast Corp., 808 F. Supp. 2d 145*. Record evidence confirmed the real-world impact of an arbitration provision of this kind, giving the Court confidence both that arbitration offer will have import to negotiations and would be accepted by Turner's counterparties. *See supra* pp. 100-105 (reviewing econometric analysis of affiliate-agreement prices after the Comcast-NBCU merger); *see also* Tr. 1388:18-22 (Montemagno (Charter)) (testifying to effects of arbitration in NBCU negotiations); *id.* at 2017:12-15 (Bond (NBCU)) (similar); *id.* at 121:14-122:9 (Fenwick (Cox)) (confirming that Cox had proposed arbitration "[j]ust like in Comcast case" as condition to this merger); *id.* at 464:17-20 (Schlichting (DISH)) (similar). Given its trial presentation, I am hard-pressed to conclude that AT&T would (much less could) retreat from the commitment in light of the apparent reputational costs of doing so — costs that would imperil future negotiations in a marketplace with repeat players. *See, e.g., id.* at 3261:23-3262:3 (Stankey (AT&T)); *cf. id.* at 2622:4-2624:1 (Carlton).

Contrary to the Government's insinuations about the reasons for the arbitration offer, moreover, the Court does not view the offer as akin to an admission by defendants that the proposed merger would lead to the anticompetitive harms that the Government posits. *Cf id.* at 39:1-5 (Gov't Opening). Instead, the Court credits John Stankey's and Randall Stephenson's testimony that the commitment was intended to "put our money where our mouth is" in showing that the proposed merger, far from being aimed at "do[ing] any of the things that the government allege[s]," is instead a "vision deal" being pursued to achieve "lower prices, improved quality, enhanced service, [and] new products." *Id.* at 3261:16-3262:3 (Stankey (AT&T)); *id* at 3402:3 (Stephenson (AT&T)); *see also id.* at 3467:18-3468:9 (Stankey (AT&T)); *id.* at 3395:23-25 (Stephenson (AT&T)); *supra* pp. 36-40.

Second, the Court observes that the Government's increased-leverage theory fails to account for another feature of the market, namely the FCC's program access rules. As defendants' expert, Professor Katz, testified, those rules are calculated to prevent precisely the kind of harm predicted by the Government: a vertically integrated entity discriminatorily increasing programming prices on its distributor-rivals. *See* Tr. 2693:14-2694:5 (Katz) ("They wanted to make sure that somehow control of the programmer wasn't used to harm competition."); *47 U.S.C. § 548(b)*, *(j)*; *47 C.F.R. § 76.1001(b)(1)(i)-(ii)*; *see* *47 U.S.C. § 548(c)(2)*. Those regulations are a proper subject of antitrust analysis, *see* *Verizon Comms Inc. v Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411-12, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, and appear to be squarely on-point, at least according to the unrebutted testimony of Professor Katz. *See* Tr. 2693:19-2694:1 (Katz) ("[T]here are two broad categories. One category . . . prohibits discrimination against different distributors. And the other broad category prohibits the distributor from having undue influence on the decisions of the programmer. So, again, the idea of you don't want the distributor telling the programmer to go do things to harm other distributors."). Nevertheless, the Government all but wishes them away — and does so with little explanation or, more importantly, record evidence.

include AT&T's DirecTV Now, DISH's Sling TV, Sony's Playstation Vue, Hulu Live, Google's YouTube TV, FuboTV, and Philo. Gov't PFOF ¶ 14; Defs.' PFOF ¶ 18.

According to the Government, the challenged merger would give AT&T the "ability to harm competition by slowing the growth of emerging, innovative online distributors" — that is, virtual MVPDs. Gov't PFOF 104. AT&T could do so, the Government asserts, either acting on its **[**197]** own (under the "unilateral theory") or in coordination with Comcast-NBCU (under the "coordination theory"). *See* Gov't PCOL ¶ 63.[52] Defendants counter that the evidence does not support the Government's virtual MVPD theories. Far from showing that AT&T is trying to marginalize virtual MVPDs, defendants claim that the trial demonstrated that AT&T is embracing those providers — even launching and supporting a successful virtual MVPD, DirecTV **[*243]** Now. With respect to the supposed incentive to coordinate with Comcast, defendants argue that the Government's theory ignores critical differences between the positions of AT&T and those of Comcast vis-à-vis virtual MVPDs as well as key limitations on the companies' abilities to coordinate successfully. For the following reasons, I agree with the defendants that the Government has failed to show a likelihood that the merger would substantially lessen competition by empowering the merged company to act, either unilaterally or in coordination with Comcast-NBCU, to harm virtual MVPDs.

Unilateral Theory. The Government first claims that AT&T has an incentive to harm innovative virtual MVPDs and could act unilaterally on that incentive by foreclosing **[**198]** or restricting virtual MVPDs' access to "must-have" Turner content. *See* Gov't Post-Tr. Br. 11. That is a curious claim, to say the least, in light of Professor Shapiro's testimony that, in his view, "standing alone, acting unilaterally, the — AT&T *will* still want to license the Turner content to virtual MVPDs." Tr. 2260:19-21 (Shapiro) (emphasis added); *see id.* at 2291:8-11 ("Q: Now with respect to coordination, you've made no claim that AT&T post merger would have a unilateral incentive to withhold Turner content from virtual MVPDs, correct? A: Correct."); *id.* at 2293:9-13 ("Q: And you're not contending and you've rendered no opinion that they will withhold Turner content from MVPD[s], correct? A: That's correct. Q: Or as we said unilaterally from virtual MVPDs, correct? A: Also correct."). That is so, according to Professor Shapiro, because as with traditional MVPDs, it would be "profitable" for the merged entity to continue to license Time Warner content to virtual MVPDs. *Id.* at 2293:14-17.

If citing Professor Shapiro's testimony weren't enough to dispel the Government's unilateral virtual MVPD theory, defendants put forward additional evidence that AT&T would have incentive to ***[**199]*** *license* Time Warner content to virtual MVPDs after the merger. For starters, given Turner's imperative of broad distribution, *see supra* pp. 10-11, Turner executives testified that it is important for Turner's content to be included on virtual MVPDs as they continue to grow in relevance. With consumers choosing to cut or shave the cord, Turner has "embrac[ed] virtual MVPDs," Turner CEO John Martin testified, "because, again, we need to be distributed to as full distribution as possible." *Id.* at 607:13-16 (Martin (Turner)); *see also id.* at 3157:22-3158:7 (Bewkes (Time Warner)) (explaining that virtual MVPDs are a favorable trend because they are "another place where we could put our networks in front of consumers"); *id.* at 1064:25-1065:3 (Breland (Turner)) ("Q. . . . [W]hat was your strategy with respect to negotiating with the new entrant virtual MVPDs? A. I want to be on every platform that comes."); *cf. id.* at 3126:8-16 (Bewkes (Time Warner)) (stating that the Government's coordination theory "makes no sense" because "[w]e want to be on all the virtual MVPDs").

The entire premise of the proposed merger - allowing AT&T to go mobile with video content - provides yet another reason to reject the Government's **[**200]** unilateral merger theory. *See id.* at 3393:24-25 (describing plans to deploy Time Warner video content over AT&T's wireless network in order to make that content "worth far more"); *see also* PX456-3 (discussing merger strategy and AT&T "strategy of ensuring that its content is available to

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[52] It will come as no surprise that a basic premise of the virtual claims — as for the Government's increased-leverage theory — is the literal "must have" nature of Turner programming. For all the reasons stated earlier in this opinion, the Court is skeptical that, in the Government's words, virtual MVPDs are "dependent on programmers" like Turner. Gov't PFOF ¶ 17. For instance, Sling, the most successful virtual MVPD, offers a package without broadcast stations and does not offer CBS at all. *See* Tr. 351:12-25 (Schlichting (DISH)). As Sling President Warren Schlichting explained, the whole point of virtual MVPDs like Sling, in fact, is to carry *fewer* channels. *See id.* at 236:2-6 ("Q. Do you carry all the same channels as other pay-TV services? A. Certainly not all of them. One of the places that we tried to innovate is to carry fewer channels, many fewer channels.").

consumers on a wide range of distribution platforms"). AT&T's largest business is its wireless business, where it has more than 100 million subscribers. *Id.* at 3208:19-24 (Stankey (AT&T)); *id.* at 3379:19-20 (Stephenson (AT&T)). On its **[*244]** own, if separated from the rest of the corporation, AT&T's wireless business would be "number 37 on the Fortune 500" - approximately the size of Proctor & Gamble. *Id.* at 3379:20-3380:1 (Stephenson (AT&T)).

Within its wireless business, AT&T Chairman and CEO Randall Stephenson explained, "getting video delivered onto the mobile device" is one of AT&T's "big focus areas." *Id.* at 3381:24-25; *see id.* at 3208:20-22 (testifying about AT&T's goal of "transform[ing] the way we deliver video to customers, [to] make the video far more portable"). Increased video consumption is lucrative for AT&T because viewers consume more data on the wireless network. This leads AT&T customers **[**201]** to "buy up" on data plans, get more devices, or connect more devices to the network — all "good for [AT&T's] business." *Id.* at 3254:19-22 (Stankey (AT&T)). Indeed, "over half of all of the traffic on [AT&T's] network today is video, delivering video." *Id.* at 3382:4-5 (Stephenson (AT&T)).

Industry trend-lines point toward increased video consumption in the future — and AT&T aims to ride these tailwinds. *See id.* at 3505:21-3507:2. Right now, AT&T is working to develop fifth-generation wireless, which will drive video consumption even more. *Id.* at 3382:7-3383:5. And AT&T views mobile consumption of video, including through virtual MVPDs, as a critical part of its post-merger future. *See id.* at 3506:23-25 ("What we're all working towards is creating [$]35 and $15 bundles. And that's where the world is moving."). Notably, the benefits associated with AT&T customers accessing virtual MVPD content continue to accrue even when they use DirecTV Now's competitors like Sling and YouTube TV. *See id.* at 3432:16-20 ("With AT&T, we're in a unique position. We like over-the-top. Over-the-top generally means, in this day and age, wireless. People are using their wireless devices to watch video, whether **[**202]** it's our video or not, we're somewhat ambivalent."). All of this gives the combined entity even more reason to distribute Time Warner content as broadly as possible in order to encourage the proliferation of virtual MVPDs. As Randall Stephenson put it, the proposed merger is a "vision deal" reflecting a belief "that distribution of [Time Warner] content to wireless will drive the value of the content up" and that "the ability to pair our data with [Time Warner's] advertising inventory" for digital ads delivered over the internet "will drive value." *Id.* at 3402:24-3403:6.

Against that evidence, the Government cites a handful of AT&T documents and statements related to virtual MVPDs — documents the Government says show AT&T has the incentive to slow the rise of virtual MVPDs. *See, e.g.*, PX42; PX228; PX40; PX47; PX48. For multiple reasons, however, I do not consider the fact that AT&T executives may have previously expressed displeasure with Turner's relationships with its competitor virtual MVPDs to be probative of AT&T's post-merger economic incentive to license Turner content to virtual MVPDs. First, these statements shed no light on the post-merger incentive AT&T would have to maximize **[**203]** distribution of Turner content. As the reader now knows, wide distribution is the *sine qua non* of the programming industry, driving both subscription and advertising revenue. Indeed, because of these "[gains] from trade" associated with licensing Turner content as broadly as possible, Professor Shapiro himself refused to countenance the Government's unilateral virtual MVPD theory. Tr. 2293:12-17. Second, these statements do not explain why AT&T would discard the profits associated with increased video consumption by its 100 million-plus wireless subscribers accessing virtual MVPD offerings. In short, the Government's **[*245]** evidence on its unilateral withholding theory is fatally anemic.[53]

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[53] To the extent the Government seeks to recycle these statements for purposes of its coordination theory, this evidence is unpersuasive on that count, too. The combined entity would stand to gain much from wide distribution of Time Warner content to virtual MVPDs, and stand to lose much by refusing to do so. The Government's remaining fact evidence similarly fails to establish any incentive to act, unilaterally or coordination, to stifle virtual MVPDs. To the extent the Government seeks to recycle the slide deck, PX184, PX543, or Schlichting's testimony for its virtual claims, that evidence remains of limited probative value for the reasons stated above. *See supra* pp. 86-88 (PX184, PX543); *see supra* pp. 75-78 (Schlichting testimony). Nor does additional speculation of third parties, *see* Gov't PFOF ¶¶ 291-292, or testimony as to the "importan[ce]" of Turner content to virtual MVPDs, *see id.* ¶¶ 293-294 — even if presented for the first time in this section — move the needle. Altogether, the best the Government could marshal was a statement from AT&T's John Stankey that "we kind of expected [Sling] might be concerned about" AT&T attacking their skinny bundle. *See* Tr. 3256:3-15. Such evidence, on its own or in combination, simply

Second, from the other direction, the Government advances an alternative unilateral claim: that AT&T would have the ability to break the "skinny bundle" models of virtual MVPDs by forcing those distributors to take *too many* Turner networks. Citing the testimony of Sling's President, Warren Schlichting, the Government argues that a post-merger requirement that Sling "take eight Turner networks instead of four would 'break [Sling's] model'" and, indeed, would have a snowball effect with **[**204]** other programmers. Gov't PFOF ¶ 288 (quoting Tr. 265:17-266:8, 268:9-23 (Schlichting (DISH)).

That argument, however, ignores that Turner has less of an imperative to risk a deal with Sling (or other virtual MVPDs) by insisting on carriage of all of its networks. That is so, the evidence indicates, because Turner has a highly "concentrated portfolio of networks," Tr. 558:1 (Martin (Turner)), with 85 to 90% of Turner's revenues deriving from only four networks, *see* Defs.' PCOL ¶ 51 n.39; *accord* Gov't PFOF ¶ 75. That fact, as Time Warner CEO Jeff Bewkes noted — means Turner is "better placed" to succeed in the skinny bundle model. Tr. 3126:22. The Government's skinny bundle point also overlooks the fact that Turner — like other programmers — already fights tooth and nail to get all of its networks into all of the packages of every distributor. *See id.* at 433:18-21 (Schlichting (DISH)); *id.* at 606:5-11 (Martin (Turner)). Simply put, the Government has not produced sufficient evidence to show that the challenged merger is likely to make a meaningful difference to that dynamic.[54] For all of the above reasons, I conclude that the Government has **[*246]** failed to meet its burden on its claims arising **[**205]** from AT&T's asserted potential to unilaterally harm virtual MVPDs through its post-merger control of Turner content.

Coordination Theory. The Government posits that the challenged merger would also create a likelihood that AT&T would coordinate with Comcast-NBCU to harm virtual MVPDs. In contrast to the unilateral withholding claim just discussed, the Government did at least attempt to provide some expert support for this coordination claim. *See id.* at 2261:14-20 (Shapiro). Unfortunately for the Government, however, neither that expert testimony nor its other evidence is even close to sufficient to support its coordination claim. How so?

HN5[] A proposed merger may violate *Section 7* by "enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms [consumers]." Gov't PCOL ¶ 67 (quoting *FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1086 (N.D. Ill. 2012))*. Such coordinated conduct need not constitute an illegal agreement under *Section 1 of the Sherman Act*, but instead can comprise instances of tacit coordination. *Cf. Heinz, 246 F.3d at 715* (coordinated effects can occur "either by overt collusion or implicit understanding"). In order to assess whether a merger will lead to an unacceptable risk of competition-stifling coordination, courts evaluate various **[**206]** "market conditions, on the whole." *H & R Block, 833 F. Supp. 2d at 77* (citation omitted). In short, that analysis involves consideration of whether would-be coordinators could wield anticompetitive power "by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Grp., 509 U.S. at 227*. Not so here !

As it does for its other claims, the Government relies on a key assumption when pressing its theory of coordinated effects. Here, the Government assumes that, "[a]s the only two vertically integrated traditional MVPDs, Comcast and AT&T would share an incentive to slow the entry and growth of virtual MVPDs." Gov't PFOF ¶ 299. To act on that incentive, the Government further asserts, the companies could "'mutually forbear'" from licensing their programming content "'without any communication between them.'" *Id.* (quoting Tr. 2265:5-2265:6 (Shapiro)). Not

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cannot countermand the prime directive of programming — broad distribution — not to mention AT&T's independent incentive to grow video consumption on its wireless network, *see supra* pp. 153-155.

[54] In support of the notion that virtual MVPDs need Turner networks (again, in the most literal sense), the Government points to a statement by John Martin, Turner's Chairman and CEO, that Sling would be "shit without Turner." Gov't PFOF ¶ 156 (quoting PX4). This statement does not accomplish the work that the Government thinks it does. For starters, as discussed above, the very "skinny bundle" concept embraces fewer networks — even fewer popular ones — with the knowledge that some consumers will welcome the trade of fewer networks for a lower subscription fee. And second, it should come as no surprise that — even in colorful language — executives would be avid boosters for their companies' products. In the final analysis, the Government's repeated use of this John Martin quote, *see* Tr. 12:3-7 (Gov't Opening), 17-18 (Gov't Closing), calls to the mind one Court's admonition "rummage[ing] through business records" for "tidbits that will sound impressive (or aggressive)" undermines efforts to ensure "accuracy of decisions." *A.A. Poultry Farms, Inc., 881 F.2d at 1402*.

only is that theory overly speculative, it ignores key differences between AT&T and Comcast that undermine the Government's argument.

First, the Government has failed to put forward sufficient evidence to show more than a theoretical "possibility" of coordination. *Cf.* Baker Hughes, 908 F.2d at 984 ("Section 7 involves *probabilities*, not certainties or possibilities."). Indeed, **[**207]** the Court need look no further than the testimony of Professor Shapiro in that regard. When questioned at trial about the Government's coordinated effects theory, Professor Shapiro conceded that he had no "way of accessing [sic] the probability" of coordination and thus had not attempted to "quantif[y] any risk whatsoever" that the predicted coordination "could occur." *See* Tr. 2291:25-2292:13 (Shapiro).[55] Accordingly, **[*247]** Professor Shapiro confirmed that he was "not in a position to say" that coordination is "more likely to happen than not," and indeed was not even prepared to say that there's a "one percent chance that coordination will happen" as a result of the challenged merger. *Id.* at 2292:6-13. Given that testimony, and the lack of "a detailed theory" with respect to coordination, I can sympathize with Professor Carlton's reaction: "I'm not quite sure what I'm supposed to rebut on [t]his." *Id.* at 2454:1-10 (Carlton).

Second, the Government's argument regarding the incentive of AT&T and Comcast to coordinate to harm virtual MVPDs ignores that both stand to lose large amounts of affiliate fee and advertising revenues by withholding their content from virtual **[**208]** MVPDs. *See supra* pp. 10-11; Tr. 3126:8-16 (Bewkes (Time Warner)) (stating that the Government's coordination theory "makes no sense" because "[w]e want to be on all the virtual MVPDs"); *id.* at 2020:5-18 (Bond (NBCU)) ("Q: Why have you decided to license your networks to each of those virtual MVPDs? A: Well, simply we're interested in getting the most amount of distribution that we can get, and they represent an important new pathway of distribution. As I said, they now have well over three million subscribers in total. . . . [I]f we were not on those platforms we would have, you know, three million less subs, fewer subs."). Unsurprisingly, NBCU has licensed its content to each virtual MVPD. *See id.* at 2019:15-2020:2 (Bond (NBCU)). The Government has not explained why either company would be willing to forgo those affiliate fees and advertising revenues from virtual MVPDs. Nor has the Government proffered any expert analysis, for example, of how those economics could, or would, change assuming a coordinated blackout of both Turner and NBCU.

Third, and critically, the Government's argument also ignores key differences between the two companies — differences that AT&T executives believe give AT&T a competitive **[**209]** advantage over Comcast moving forward in this new era of rising virtual MVPD prevalence. AT&T's John Stankey, who will be responsible for running Time Warner should the challenged merger proceed, emphatically (and credibly) stated at trial that he could not "even imagine" aligning with Comcast given the companies' history of dealings, adding, "I'm not going to cooperate with somebody I don't like." *Id.* at 3255:2-3256:2 (Stankey (AT&T)). AT&T CEO Randall Stephenson testified similarly, responding to a question about the Government's coordination theory as follows: You probably have to

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[55] The Government insists that it need not introduce quantitative evidence in support of the coordinated effects theory. *See* Gov't PCOL ¶ 71. The suggestion, of course, is that the Court should steer clear of imposing a requirement that the Government make a numbers-based showing on coordinated effects. Let me be clear. The Government here has failed to carry its burden on the coordination theory not because there is some *per se* requirement of quantitative analysis. Rather, the Government has failed to carry its burden because it has not put forward persuasive evidence — in any form — that AT&T and Comcast have the incentive or, given market constraints, the ability to coordinate in the manner predicted.

There is one more point. The cases cited by the Government *do* involve quantitative showings. In each one, the Court made or adopted a threshold quantitative assessment as to market concentration. *See* H & R Block, 833 F. Supp. 2d at 71-72 (applying Herfindahl-Hirschmann Index to determine market concentration); OSF Healthcare, 852 F. Supp. 2d at 1078-80 (same); *see also* Hosp. Corp., 807 F.2d at 1384 (accepting "FTC's figures" as to "highly concentrated market"). That determination, in turn, triggered the "'ordinary presumption of collusion' that attaches to a merger in a highly concentrated market." H & R Block, 833 F. Supp. 2d at 77 (quoting Heinz, 246 F.3d at 725). And with that presumption in place, the burden shifted to defendants to rebut the case by "produc[ing] evidence of 'structural market barriers to collusion' specific to [the relevant] industry that would defeat" the presumption. *Id.* (quoting Heinz, 246 F.3d at 725). Thus, the Government's insinuation that past coordinated-effects challenges were tried without resort to quantitative analysis is simply misleading. In short, the Government cannot evade its burden of proof on the "ultimate issue [of] whether the challenged acquisition is likely to facilitate collusion," Hosp. Corp., 807 F.2d at 1384; Gov't PCOL ¶ 71, by simply stating that it "does not need to quantify the potential harm," Gov't PCOL ¶ 71.

live in this industry every day like I do **[*248]** to appreciate what a stretch that is. We compete with Comcast in the marketplace. The individual that runs communication company, he wakes up every day trying to think, how do I win in the marketplace against Comcast?" *Id.* at 3431:25-3432:5 (Stephenson (AT&T)).

The most obvious "advantage" AT&T has over Comcast when it comes to virtual MVPDs is that, unlike Comcast, and as discussed at length above, AT&T has a vast wireless business with over 100 million customers. *Id.* at 3432:2-7; *id.* at 3208:19-24 (Stankey (AT&T)); *see also id.* at 3432:17-22 (Stephenson (AT&T)) **[**210]** ("Over-the-top generally means, in this day and age, wireless. People are using their wireless devices to watch video, whether it's our video or not, we're somewhat ambivalent. We'd rather it be our video; but either way, it serves our interests for people to watch video over our wireless network."); *see also supra* pp. 153-155. The reasons to encourage, not quash, virtual MVPDs unilaterally become even more compelling in the context of a coordination claim with Comcast — a competitor that is much more beholden to legacy cable infrastructure and the traditional MVPD business model. *See id.* at 3432:2-12 (Stephenson (AT&T)); *cf. id.* at 3255:18-22 (Stankey (AT&T)) ("We don't want to cooperate with Comcast to play their game. We want to figure out how we use our mobile devices and our mobile network to change the game . . . ."); *id.* at 3208:19-24 ("[O]ne of the clear objectives [for AT&T in acquiring DirecTV] was to start to transform the way we deliver video to customers [to] make the video far more portable, start to emphasize the fact that we could use our 100 million wireless subscribers to be able to do things differently, which is dramatically different than Comcast.").

The Government does not dispute **[**211]** that AT&T's wireless business confers strong incentives to maximize distribution to virtual MVPDs. Nor can it be questioned that AT&T's strong positioning in the world of mobile content distribution gives it a powerful disincentive to work with Comcast to stifle those mobile providers of video. AT&T has plainly positioned itself to ride industry tailwinds in support of mobile consumption of video. As John Stankey explained, AT&T acquired DirecTV in 2015 not in order to double down on the satellite business, a concededly mature and declining asset, but to "pick up a lot of new customers that we could work on migrating" to new products. *Id.* at 3207:18-20 (Stankey (AT&T)); *see also id.* at 3207:21-3208:2. Indeed, as soon as the merger closed, AT&T began renegotiating DirecTV's contracts to allow for a mobile, direct-to-consumer option, DirecTV Now. AT&T knew that it was "in a foot race to basically start to change the product to be able to catch the next wave, whatever that next wave was going to be. And we didn't expect that we were going to continue to see traditional pay-TV subscribers" increasing. *Id.* at 3209:12-16. Nowhere does the Government explain why AT&T would deploy valuable **[**212]** Time Warner content to prop up a rival's business model, while harming its own. Go figure !

This fundamental problem of incentives and profitability buries the Government's claim. It is beyond dispute that neither the proffered concentration in the MVPD market (which, by the way, will be the same post-merger), *see* Gov't PFOF ¶ 306, nor the importance of Turner and NBCU content, *see id.* ¶ 307, nor some transparency in "key information," *see id.* ¶¶ 308-310, nor any other of the Government's evidence on the coordination theory (alone or in combination), can establish a "risk of coordination" unless the parties have an incentive or interest to collude in the first place.

[*249] Even assuming, contrary to the evidence, that AT&T would want to coordinate with Comcast under the Government's theory, the staggered, lengthy industry contracts would make that coordination strategy extremely risky. *See id.* at 643:20-644:2 (Martin (Turner)) (testifying that "because of the length of these contracts, because they're typically years in length," a strategy set "in 2013" would "begin to show up in '15, '16 and '17"); *id.* at 87:9-11 (Fenwick (Cox)) (testifying that affiliate agreements run "between five and **[**213]** eight years on average"). Under the Government's coordination theory, one party — AT&T or Comcast — would have to "jump first," giving up valuable programming rights on the hope that the other, in some years' time, would elect to do the same. Indeed, this barrier to coordination is so great as to put to rest the notion not only that AT&T and Comcast would have the *incentive* to coordinate, but that the post-merger marketplace would afford them the *ability* to do so. Whether by way of tacit coordination or an illegal agreement, putting such blind faith in one's chief competitor strikes this Court as exceedingly implausible ! Indeed, the decision to "not to renew [a] license or not to license to a new virtual MVPD and wait and see if the other did it," as Professor Shapiro proposes, would *enhance* the other party's position in its next round of negotiations with the virtual MVPD at issue. Tr. 2264:14-2265:13 (Shapiro). As Charter's Tom

Montemagno explained, if a distributor goes dark with one network group, that distributor is in "a vulnerable spot, and I feel like I sort of have to do the deal" when another network group threatens a blackout. *Id.* at 1404:13-15. The result would be forgone **[**214]** revenue for a period of years, with AT&T's chief competitor gaining outsized profits in the next round of negotiations. The Government puts forward no persuasive reason why AT&T and Comcast would engage in such conduct.

The fundamental difference in incentives between AT&T and Comcast vis-à-vis virtual MVPM, the barrier to coordination in the form of long-term contracts, coupled with the fact that the Government has provided no evidence to show how the benefits of a coordinated blackout would outweigh the companies' resulting losses of affiliate fee and advertising revenues, leave me completely unable to accept the Government's coordinated effects theory.[56]

V. The Government Has Failed to Meet Its Burden to Show That the Proposed Merger Is Likely to Substantially Lessen Competition on the Theory That AT&T Will Restrict Distributors' Use of HBO as a Promotional Tool

The Government's final theory centers on HBO. On this score, the Government alleges that the combined entity will have **[*250]** the "incentive and ability" to prevent rival distributors from using HBO as a promotional tool to attract and retain customers. *See* Gov't Post-Tr. Br. 9-10; Compl. ¶ 39.[57] Under this theory, the combined **[**215]** entity

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[56] In support of its coordination theory, the Government points to past communication between Dan York of AT&T and counterparts at other distributors in the Los Angeles market concerning the Sportsnet LA network. *See* Gov't PFOF ¶¶ 311-312; Tr. 2081:9-2081:16 (York (AT&T)); PX462. These instances are only weakly probative of future coordination, involving, as they do, a different market, distinctive factual setting, and different distributors. In all respects, this evidence cannot overcome AT&T's strong disincentives to coordinate with Comcast detailed in this section. *Cf. H & R Block, 833 F. Supp. 2d at 77-78* (detailing "highly persuasive historical act of cooperation" between the same two parties at the center of post-merger coordination allegations). The same goes for inquiries by York concerning Verizon Fios packages or evidence regarding John Harran's conversations with his counterpart and "good friend" at NBCU. *See* Defs.' PFOF ¶ 291; Gov't PFOF ¶ 313.

[57] In its proposed conclusions of law, the Government describes its theory that the merged entity might "restrict the use of HBO as a competitive tool." Gov't PCOL ¶ 61; *see also* Tr. 3993:7-10 (Gov't Closing) ("It means that if this merger goes forward, then the combined firm could limit the use of HBO as a competitive tool, if that competition threatens to impact AT&T."). Under this theory, HBO is a "competitive tool" insofar as it is used by distributors for discounts, promotions, marketing, and ad campaigns. *See* Gov't PCOL ¶ 61 (predicting that AT&T will have an incentive "to restrict the use of HBO as a competitive tool, and *thereby impair the competitive process and deny consumers the benefits of discounted HBO and other promotions*" (emphasis added)); *see also* Gov't PFOF ¶ 234 ("Overall, HBO is a highly valuable brand, which currently engages in significant promotional activities with MVPDs, both AT&T and its rivals."). This is consistent with the way in which Professor Shapiro viewed the theory. *See* Tr. 2290:25-2291:3 (Shapiro) ("Q. The only theory of harm that you considered relating to HBO is this issue that perhaps some promotional, some promotion of HBO might be curtailed, right? A. That's fair."). It is also consistent with the way in which the Government's Complaint and Pre-Trial Brief characterized the theory. *See* Compl. ¶ 39 ("MVPDs ... today use HBO as a tool to entice new customers and to dissuade unhappy customers from leaving and switching to a rival MVPD.... After the merger, however, the merged firm would have the incentive and ability, through contractual restrictions, to impede rival MVPDs from using HBO to compete against AT&T/DirecTV."); Gov't Pre-Trial Br. 39 ("HBO could limit approvals for the use of HBO in marketing and promotions by DirecTV's rivals in a number of ways, including forms of subtle or targeted obstruction.").

The Government's proposed findings of fact, like its closing argument, appear to advance a considerably broader theory on the ways in which HBO could limit the terms of its distribution post-merger. Such a theory would go well beyond restricting promotion-related terms. *See* Gov't PFOF ¶ 267 (listing ways in which HBO could restrict distributors' offerings of HBO to customers); Tr. 3975:11-19 (Gov't Closing) (same). Most troubling is the Government's suggestion, based solely on the testimony of Martin Hinson of Cox, that the combined entity could "withhold[] HBO entirely." Gov't PFOF ¶ 267 (citing Tr. 703:25-704:18 (Hinson (Cox)). Professor Shapiro himself disavowed this very theory of withholding HBO content: "Q. You don't claim that post-merger HBO will be withheld from any MVPD, correct? A. Correct." Tr. 2290:15-18 (Shapiro). Professor Shapiro similarly disavowed any claim that HBO's price would increase on account of the merger. *See id.* at 2290:21-23.

For the reasons discussed in this Part, the Government has failed to prove that the merged entity has an incentive to restrict rival distributors' use of HBO for promotions. To the extent that the Government suggests that AT&T will withhold HBO content would "foreclos[e] competitors of the purchasing firm in the merger from access to a potential source of supply, *or from access on competitive terms*." Gov't PCOL ¶ 61 (quoting *Yankees Entm't & Sports Network, 224 F. Supp. 2d at 673*). The basic idea, the Government tells us, is that rival distributors' use of HBO in promotions will tend to draw potential customers to those MVPDs and away from AT&T, thereby giving AT&T reason to withhold or restrict its consent to use HBO in marketing, discounts, and bundles. *See* Gov't PFOF ¶ 234. At the risk of stating the obvious, this is a gossamer thin claim.

The Government has failed to meet its burden of proof on this theory for two independent reasons. *First*, the Government has failed to show that the merged **[*251]** entity would have *any* incentive to foreclose rivals' access to HBO-based promotions. This is because the Government's promotion-withholding theory conflicts with HBO's business model, which remains "heavily dependent" on promotion by distributors. Tr. 3074:5-6 (Bewkes (Time Warner)). HBO does not run ads, leaving subscription fees as its overwhelming **[**216]** source of revenue. *See id.* at 3070:3-5; PX456-67. This makes HBO a volume-based business, in which more subscribers means more revenue. *See* Tr. 3070:3-8, 3072:7-9 (Bewkes (Time Warner)). And because HBO continues to rely on distributors to reach the end-user, witnesses testified that HBO needs MVPD promotions in order to achieve this volume. *See, e.g., id.* at 3128:16-3129:8; *id.* at 1496:10-17 (Sutton (HBO)); *see also id.* at 1508:14-16 ("[O]ur whole business is relying on our affiliates to promote us. If we can't do that, then our entire business model is destroyed."); *cf id.* at 1528:25-1529:4 (Patel (AT&T)). The Government simply fails to explain why AT&T would jeopardize — much less jettison — the promotional model on which HBO "absolutely" depends.[58] *Id.* at 1496:16-17 (Sutton (HBO)).

Second, the Government fails to establish that HBO promotions are so valuable that withholding or restricting them will drive customers to AT&T.[59] Put differently, the Government has failed to show that the marketplace substitutes for HBO are "inferior, inadequate, or more costly." Gov't PCOL ¶ 62 (internal quotation marks omitted). Third-party distributor witnesses testified that, for example, **[**217]** their companies had reduced the use of HBO in promotions, *see* Tr. 950:22-951:7 (SEALED); *id.* at 2135:17-22, 2135:24-2136:1 (Sejen (Cable ONE)). An executive from RCN said that his employer used HBO for promotions only because of the "economic incentives" offered by HBO to do so. *See id.* at 2971:16-23 (Holanda (RCN)); *cf. id.* at 2136:15-19 (Sejen (Cable ONE)). A Comcast executive confirmed that Netflix is a "substitute" for HBO that Comcast has incorporated into its set top box and includes in marketing. *See id.* 886:8-22 (Rigdon (Comcast)). This is all consistent with other evidence adduced at trial, which showed that distributors' choice of which premium content provider to use for promotions may vary based on a number of factors. *See id.* at 1526:17-25 (Patel (AT&T)).[60] Indeed, the evidence at trial further **[*252]**

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altogether, will delay access to HBO content, will increase penetration rate requirements, or will engage in any other potentially anticompetitive conduct that falls outside the proffered promotion-withholding scheme, the Court holds that, in light of the sparse supporting evidence and Professor Shapiro's disavowal of those theories, the Government has failed to meet its burden of proof that such conduct would likely result from the proposed merger.

[58] As an add-on, HBO is low-hanging fruit for customers looking to shave monthly cable bills. *Cf.* Tr. 2137:3-6 (Sejen (Cable ONE)). This results in high "churn," making HBO that much more reliant on promotions to maintain subscriptions. *See id.* at 2316:10-12; *id.* at 2972:20-24 (Holanda (RCN)). In these promotions, HBO depends on distributors because "the distributor . . . owns the relationship with the customer." *Id.* at 1528:22-1529:4 (Patel (AT&T)).

[59] The Court is aware that, in the most technical sense, HBO has the "ability" to withhold certain promotions by way of its contract-based approval process, under which HBO must bless distributors' use of HBO trademarks and talent for us in promotions. This fact alone, however, does not establish that AT&T would be able to "impair the competitive process." Gov't PCOL ¶ 61. For its theory, the Government must also show that HBO has an incentive to act anticompetitively and that only "inferior, inadequate, or more costly" substitutes for HBO promotions exist in the marketplace, *id. ¶ 62* (citation omitted). The Government has failed to make these showings.

[60] After a trial replete with evidence on evolving, hyper-competitive marketplace conditions, the notion that Netflix is an adequate substitute for HBO should come as no surprise. "There was a time." HBO President Simon Sutton explained, "when very few people were making the kinds of shows we make [at HBO]. Now, it seems like almost every week, there's an announcement of somebody else making it." Tr. 1494:13-21. Netflix now has a programming budget that more than doubles HBO's, *id.* at 3099:13-15 (Bewkes (Time Warner)), and Netflix and HBO openly compete "in many different ways," including for "the talent to make the same shows," *id.* at 1493:18-1494:3 (Sutton (HBO)). And when measured by number of subscribers, both Netflix and Amazon

showed that MVPDs are hardly limited to premium content providers like HBO, Showtime, and Netflix in their choice of promotional tools; to the contrary, distributors have been known to bundle services with gift cards, price discounts, higher broadband speeds, additional telephone lines, video on demand films, devices such as iPads, and free installations or equipment. *Id.* at 717:15-25 **[**218]** (Hinson (Cox)); *id.* at 2972:1-6 (Holanda (RCN)); *id.* at 1497:5-10 (Sutton (HBO)).

Although this promotion-withholding theory made only a very brief appearance at trial, the Government asserts that this theory of harm constitutes an independent basis for blocking the merger. Gov't PCOL ¶¶ 61-62; Gov't Pre-Trial Br. 40.[61] But in support of this theory, the Government has brought to bear little evidence indeed. As with its primary, increased-leverage claim of harm, the Antitrust Division decided to spill most of its ink developing undisputed facts — HBO is popular, *see* Gov't PFOF ¶¶ 28, 235-242, valuable, *see id.* ¶¶ 28, 235, 243-252, and an effective promotional tool for MVPDs, *see id.* ¶¶ 253-258. The Government also relays the undisputed fact that HBO, as a matter of contract, retains significant control over the way in which its "trademarks or . . . talent" are used in those promotions. Tr. 1458:10-13 (Sutton (HBO)); *see* Gov't PFOF ¶¶ 269-270 (discussing approval process for use of HBO in promotions). It did not, however, come to Court with economic evidence of any kind, *see* Tr. 2291:4-7 (Shapiro), and proffered only bare conjecture about how there may be "like a thumb on the **[**219]** scale" in favor of the Government's promotion-withholding stratagem, *id.* at 2267:8-21; *see also id.* at 2267:3-7. As such, the Government's evidence is too thin a reed for this Court to find that AT&T has, in that well-worn turn-of-phrase, either the "incentive" or the "ability" to withhold HBO promotional rights in order to "lessen competition substantially." Gov't PCOL ¶ 61. For these reasons, it is small wonder that Professor Shapiro himself refused to endorse the theory, testifying that, in his view as an economist, such a ploy "[o]n its own . . . would not have such a big impact, that it would substantially lessen competition." Tr. 2275:24-2276:13 (Shapiro).

For these two, independent reasons, the Government has failed to provide sufficient evidence to support its final theory in this case. Accordingly, I reject outright the assertion that the combined entity would likely restrict HBO as a promotional tool in order to harm AT&T's distribution **[*253]** rivals and thereby lessen competition in the marketplace.

CONCLUSION

The parties have waged an epic battle, under extremely restricted deadlines, to litigate and try this historic vertical merger case. Each side's evidence and theories **[**220]** have been subjected to cross-examination and the rigors of the Rules of Evidence and Civil Procedure. It has been a herculean task for all the parties and the Court.[62] Each side has had its proverbial day in Court. The Court has now spoken and the defendants have won. But, the process is not quite over yet !

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are "eclipsing HBO." DX709-3. Indeed, one of the Government's experts, in an improper communication sent to Government attorneys during the course of his testimony in violation of the Court's witnesses rule, forwarded a YouTube video describing Netflix as one of the "top-ten ... monopolists you've never heard of." *See* Tr. 3602:17-3603:7, 3604:7-25 (Quintero). Put simply, HBO is in the fight of its life !

[61] The Government appears to suggest that incentive to engage in anticompetitive conduct — without any demonstration as to the probability of acting on that incentive — is sufficient reason to block a proposed merger. *See* Gov't PCOL ¶ 61 ("In this action, the effect of the merger may be to lessen competition substantially by incentivizing the merged firm to restrict the use of HBO as a competitive tool, and thereby impair the competitive process and deny consumers the benefits of discounted HBO and other promotions."). This proposition seems impossible to square with the legal standards governing *Section 7* actions, which require a probability of anticompetitive effects. *See supra* pp. 50-52 & n.16. Because the Government has failed to establish that the merged entity will have any incentive to withhold HBO promotional rights, the Court need not answer the question whether the existence of such an incentive, without more, would be sufficient to show that the proposed merger would substantially lessen competition for purposes of *Section 7*.

[62] *See, e.g.*, WDH & RSC at W.R. 6326.

There is a grave and understandable fear on the part of the defendants that the Government will now seek to do *indirectly* what it couldn't accomplish directly by seeking a stay of this Court's order pending an appeal to our Circuit Court.

The consequences of receiving such a stay would cause irreparable harm to the defendants in general and AT&T in specific. First, it would effectively prevent the consummation of the merger by the June 21, 2018 break-up date for the deal. Second, it would cause AT&T to have to pay the $500 million break-up fee it will owe to Time Warner if the deal is not consummated by that date. Those two consequences, of course, would occur regardless of whether this Court's decision were later upheld following appellate review. In this Court's judgment, a stay pending appeal would be a manifestly unjust outcome in this case.

The Government has had this **[**221]** merger on hold now since October of 2016 when it launched its investigation. In that 18-plus month period, the companies have twice extended the break-up date to accommodate the Government's litigation of this case. During that same period, the video programming and distribution industry has continued to evolve at a breakneck pace. The cost to the defendants and the Government to investigate, litigate, and try this case has undoubtedly been staggering — easily in the tens of millions of dollars.

If the Government were to ask me to stay this Court's ruling, I would, under the law, have to weigh whether the Government has a strong likelihood of success on the merits and would suffer irreparable harm should the stay be denied, among other things. Well, suffice it to say — as my 170-plus page opinion makes clear — I do not believe that the Government has a likelihood of success on the merits of an appeal. And in my judgment, given that our Circuit Court has never hesitated to unwind an unblocked merger if the law and facts warrant doing so, there would be no irreparable harm to the Government — only to the defendants — if my ruling were stayed. As such, I could not, and would not, grant **[**222]** such a stay in the first instance.

That of course is not to suggest in any way that the Government should not consider seeking appellate review of the merits of this Court's decision. That is, by any standard, fair game. But the temptation by some to view this decision as being something more than a resolution of this specific case should be resisted by one and all !

The Government here has taken its best shot to block the merger based on the law and facts, and within the time allowed. The defendants did their best to oppose it. The Court has spoken. To use a stay to accomplish *indirectly* what could not be done directly — especially when it would cause certain irreparable harm to the defendants — simply would be unjust. I hope and trust that the Government will have the good judgment, wisdom, and courage to **[*254]** avoid such a manifest injustice. To do otherwise, I fear, would undermine the faith in our system of justice of not only the defendants, but their millions of shareholders and the business community at large.

* * *

Thus, for all of the foregoing reasons, the Government's request to enjoin the proposed merger is **DENIED**.

/s/ Richard J. Leon

RICHARD J. LEON

United States District Judge

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

[*none] **ORDER [**223]**

Upon consideration of the applicable law, the evidence presented at trial, the parties' arguments, and the entire record before the Court, and for all of the reasons given in the accompanying Memorandum Opinion, the Court concludes that the Government has failed to carry its burden to show that the merger of defendants AT&T and Time

Warner, as reflected in the October 22, 2016 merger agreement, is likely to "substantially . . . lessen competition" in violation of *Section 7* of the Clayton Act, *15 U.S.C. § 18*.

It is therefore **ORDERED** that the Government's request to enjoin the proposed merger between defendants AT&T and Time Warner is **DENIED**; it is further

ORDERED that the pending post-trial motions for leave to file amici curiae briefs, *see* Dkt. ## 129, 135, 144; motion to intervene, *see* Dkt. # 142; and motions for admission pro hac vice, *see* Dkt. ## 133; 134, are **DENIED**.

SO ORDERED.

/s/ Richard J. Leon

RICHARD J. LEON

United States District Judge

Morton v. Stephenson

United States District Court for the Central District of California

June 13, 2018, Decided; June 13, 2018, Filed

Case No. 8:17-cv-02198-JLS-DFM

Reporter

2018 U.S. Dist. LEXIS 238261 *

Randall Aaron Morton v. Randall Stephenson et al.

Core Terms

antitrust, mergers, allegations, mail, Clayton Act, appears, summons

Counsel: **[*1]** Randall Aaron Morton, Plaintiff, Pro se, Laguna Niguel, CA USA.

For Randall Stephenson, At&T, Jeff Bewkes, Time Warner, Defendants: Michael John Finnegan, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, Los Angeles, CA USA; Ashley Brooke Eickhof, Jeffrey S Oliver, Joseph A Ostoyich, Baker Botts LLP, Washington, DC USA.

For The Walt Disney Company, Defendant: Justin P Raphael, Munger Tolles and Olson LLP, San Francisco, CA USA; Stuart N Senator, Bradley S Phillips, Munger Tolles and Olson LLP, Los Angeles, CA USA.

Judges: HONORABLE JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE.

Opinion by: JOSEPHINE L. STATON

Opinion

CIVIL MINUTES — GENERAL

PROCEEDINGS: (IN CHAMBERS) ORDER (1) GRANTING DEFENDANTS' MOTIONS TO DISMISS (Docs. 18, 22); AND (2) DENYING AS MOOT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (Doc. 46)

Before the Court are two Motions to Dismiss, one filed by Defendant The Walt Disney Company (Disney Mot., Doc. 18) and one filed by Defendants AT&T Inc., Jeff Bewkes, Randall Stephenson, and Time Warner Inc. (AT&T Mot., Doc. 22). Plaintiff Randall Morton filed an untimely opposition. (Opp., Doc. 33.) Defendants replied. (Disney Reply, Doc. 38; AT&T Reply, Doc. 40.) The Court finds these matters appropriate for **[*2]** decision without oral argument. *Fed. R. Civ. P. 78(b)*; C.D. Cal. R. 7-15. Accordingly, the hearings set for June 15, 2018, at 2:30 p.m., are VACATED. For the following reasons, the Court GRANTS Defendants' Motions.

A. BACKGROUND

Morton brings suit against Defendants Randall Stephenson, AT&T, Jeff Bewkes, Time Warner Corporation, Robert Iger, Walt Disney, Rupert Murdoch, and 21st Century Fox pursuant to the Sherman Antitrust Act, the Clayton Act, the California Cartwright Act, and *18 U.S.C. section 1343* (criminal wire fraud). (FAC at 1, Doc. 15.) He seeks to enjoin the mergers of AT&T with Time Warner and of Disney with Fox. (*Id.* at 10.)

Morton's First Amended Complaint is anything but the "short and plain statement" required by *Rule 8 of the Federal Rules of Civil Procedure*. He alleges that Defendants "knowingly and willfully are working in concert with a cabal of highlyplaced, highly-remunerated attorney/lobbyist ENABLERS . . . to crush up-and-coming competitors by consolidating the entire communications, telecom and entertainment industries under singular roofs in violation of longstanding, pre-U.C.C. laws of the United States brought forward and amended within the U.C.C. that continue to recognize the danger to competition inherent in the corporatocracy powers." (*Id.* at 3.) Morton "contends and **[*3]** alleges that the chairmen of all four defendant organizations are highranking members of the Council on Foreign Relations (CFR) or at least frequent guest speakers, and are therefore cleared in advance to ignore or bypass federal and state law when it suits the monopolist agenda." (*Id.* at 4.) The merger attempts by AT&T and Disney violates the Clayton Act because they "would give the combined behemoths firm control over massive video, wireless and internet distribution networks as well as the content-producing studios Warner Bros. and Fox that, by merging or being acquired, would no longer compete with the already monolithic owners, let alone any other competitor." (*Id.* at 6.) He writes that "both merger-acquisitions appearing on the world stage in this day and age portend creation of massive monopolies in terms of the mergers and the potential for crushing all competition thereafter, even in perpetuity . . . the simultaneity of these mergers and the enablers involved would indicate that these defendants and their enablers are working in concert with each other and with all the principals who enabled the takeover of Universal NBC." (*Id.* at 9-10)

Morton asserts that he has standing "as a consumer of communication **[*4]** and entertainment systems controlled, owned, and shaped by Defendant AT&T bureaucrats who currently take full advantage of the Plaintiff and his family with exorbitant cost structures and derivative, limited product appeal." (*Id.* ¶ 9.) He "will seek to prove in Discovery that AT&T's Chinese business partners and affiliates currently are staging a Great Withdrawal of investment in America, yet may well emerge at some future date as the owners of Warner Brothers Studio." (*Id.* ¶ 12.) Morton "has identified an opportunity to build a consortium that has the financial wherewithal to acquire either of the defendant studios Warner and Fox without the antitrust issues. (*Id.* at 1.)

Morton filed an application for a Temporary Restraining Order on January 2, 2018. (Ex Parte App., Doc. 10.) The Court denied the request due to Morton's failure to demonstrate a likelihood of success on the merits or irreparable injury in his Complaint or Application. (Order Denying TRO at 2, Doc. 14.) Defendants The Walt Disney Company, AT&T, Jeff Bewkes, Randall Stephenson, and Time Warner Inc. filed Motions to Dismiss the FAC that were set for hearing on April 13, 2018. Plaintiff filed an opposition on April 3, 2018, ten **[*5]** days before the hearing and eleven days late pursuant to Local Rule 7-9, which requires that opposition paperwork be filed no later than twenty-one days before the hearing. (*See* Order Continuing Hearings, Doc. 37.) The Court continued the hearings to allow Defendants to reply.

B. LEGAL STANDARD

1. 12(b)(5)

"Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987)*. Under *Federal Rule of Civil Procedure 12(b)(5)*, a party may move to dismiss for insufficient service of process. *Fed. R. Civ. P. 12(b)(5)*. "Once service is challenged, plaintiffs bear the burden of establishing that service was valid." *Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004)*.

2. 12(b)(6)

When evaluating a *Rule 12(b)(6)* motion, the Court must accept as true all allegations of material facts that are in the complaint and must construe all inferences in the light most favorable to the non-moving party. *Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994)*. If a complaint fails to state a claim as a matter of law, that is, if "it appears certain that [the plaintiff] can prove no set of facts in support of his claim which would entitle him to relief," the complaint is dismissed. *Id.*

C. DISCUSSION

Defendants argue that the FAC fails to state a claim under *Rule 12(b)(6)* and does not comply with *Rule 8*'s requirement that a complaint include a short **[*6]** and plain statement of a claim. (Disney Mot. at 4-8, AT&T Mot at 7-12.) Further, Defendants Stephenson, Bewkes, AT&T, and Time Warner argue that service upon them was defective. (AT&T Mot. at 4-6.)

As a preliminary matter, the Court notes that it would be justified in granting relief due to the untimeliness of Morton's opposition alone. Local Rule 7-12 provides, "The failure to file any required document . . . may be deemed consent to the granting or denial of the motion . . . ." C.D. Cal. R. 7-12. The Court will, however, exercise its discretion to consider the papers on their merits.

A. Improper Service

According to Defendants Stephenson, Bewkes, AT&T, and Time Warner, Plaintiff's purported service on them was defective in both content and method. (AT&T Mot. at 4-12.) Proper service is a threshold for the Court to exercise personal jurisdiction over a defendant. *See, e.g. Omni Capital, 484 U.S. at 104*. According to *Federal Rule of Civil Procedure 4*, a summons must "state the time within which the defendant must appear and defend," "notify the defendant that a failure to appear and defend will result in a default judgment against the defendant," "be signed by the clerk," and "bear the court's seal." *Fed. R. Civ. P. 4(a)(1)(C)-(G)*. Service upon an individual within the United States must be in accordance **[*7]** with "state law for serving a summons" either in "the state where the district court is located or where service is made." *Fed. R. Civ. P. 4(e)(1)*. The same applies for serving a corporation. *Fed. R. Civ. P. 4(h)(1)(A)*. "[N]either actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction without 'substantial compliance with *Rule 4*.'" *Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986)*, *amended*, *807 F.2d 1514 (9th Cir. 1987)* (quoting *Jackson v. Hayakawa, 682 F.2d. 1344, 1347 (9th Cir. 1982))*.

Having reviewed the proof of service, the Court agrees that it is defective. First, the certificate lists that the federal complaint, civil cover sheet, and Morton's declaration were served, but the service list does not include the summons. (Doc. 16 at 2, 3.) Second, the Court concludes that the method of service does not comply with *Rule 4*. Morton attempted service by mail on Defendant Stephenson at a Texas address and on Defendant Bewkes at a Connecticut address. (*Id.* at 3.). California requires that service by mail on an out-of-state defendant must be first-class with postage prepaid and requiring a return receipt. *Cal. Civ. Proc. Code § 415.40*. Texas requires mail service to be effected by "registered or certified mail, return receipt requested." *Tex. R. Civ. P. 106(a)(2)*. Connecticut does not allow for mail service upon defendants. *See Conn. Gen. Stat. Ann. § 52-57*. The certificate of service does not state that any return receipt was **[*8]** requested, nor that the service was attempted through registered or certified mail. Accordingly, the content of the attempted service did not comply with *Rule 4*.

Moreover, AT&T and Time Warner assert that Daniel Petrocelli of O'Melveny & Myers, upon whom service was attempted, is not a "designated . . . agent for service or process," "president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process" for either corporation. *Cal. Civ. Proc. Code § 416.10(a)-(b)*. Rather, they assert that Petrocelli is outside counsel for both corporations in a separate matter. (AT&T Mot. at 11.) Morton, who bears the burden to establish proper service, does not contest this assertion. *Brockmeyer, 383 F.3d at 801*. Because Petrocelli is not a proper recipient of service on behalf of Defendants AT&T and Time Warner, the Court concludes that service as to these Defendants was defective.

The Court therefore concludes that service on Defendants Bewkes, Stephenson, AT&T, and Time Warner was defective. These deficiencies suffice to require dismissal of the **[*9]** FAC as to them.

B. Failure to State a Claim

Even had service been effective on Defendants, however, the Court concludes that the FAC fails to state a claim. The FAC asserts that the case arises out of the Sherman Antitrust Act, the Clayton Act, the California Cartwright Act, and "possible criminal violations under *18 U.S.C. section 1343*," for wire fraud. (FAC at 1.) The Court will take each claim in turn.[1]

1. Sherman Antitrust Act and Clayton Act

Defendants argue that Morton lacks standing to pursue an antitrust claim under the Sherman Antitrust Act or Clayton Act. (Disney Mot. at 6; AT&T Mot. at 13.) They further argue that even if Morton had demonstrated standing, he fails to allege facts to support his claims. (Disney Mot. at 6-7; AT&T Mot. at 13-15.) The Court agrees.

"To establish a section 1 violation under the Sherman Act, a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., 'antitrust injury')." *McGlinchy v. Shell Chemical Co., 845 F.2d 802, 811 (9th Cir. 1988)*. In the Ninth **[*10]** Circuit, "an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality." *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)*. The Clayton Act authorizes a private plaintiff to obtain injunctive relief "against such violations only on a showing of 'threatened loss or damage'" which "must be of a sort personal to the plaintiff." *United States v. Borden Co., 347 U.S. 514, 518, 74 S. Ct. 703, 98 L. Ed. 903 (1954)*.

A review of the FAC indicates that Morton does not allege an antitrust injury. He alleges that the merger would "give said new owners unlimited power across the United States' communication, telecom, and entertainment market space." (FAC at 6.) He alleges that the mergers might have "cultural implications important to American consumers such as the Plaintiff." (*Id.* ¶ 6.) Defendant AT&T "currently take[s] full advantage of the Plaintiff and his family with exorbitant cost structures and derivative, limited product appeal." (*Id.* ¶ 9.) There is no allegation that prices will increase if the companies merge, nor any facts to show a diminution in quality. Morton also fails to show how any threatened loss or damage is personal to him. Without an allegation of antitrust injury, Morton lacks standing.

[*11] Moreover, although Morton speculates about the impact and potential changes in studio content and ownership, he does not allege facts to show that the mergers are "intended to harm or unreasonably restrain competition." The Court "cannot infer a conspiracy based on speculation." *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1131 (9th Cir. 2015)*. Morton's opposition is likewise filled with speculation, including speculation about a new cybercurrency, but fails to state any facts to support his claim. (Opp. at 3-4.) Accordingly, Morton has not alleged sufficient facts to support his federal antitrust claims.

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[1] The Court notes that Morton references a number of other code sections in his opposition, including the Celler-Kefauver Act and the Hart-Scott-Rodino Act. (Opp. at 1.) These causes of action are not mentioned in the FAC. The Court will consider only those causes of action brought in the FAC, as an Opposition is not the appropriate vehicle for asserting new claims or facts. See, e.g., *Lepp v. Gonzales, No. C-05-0566 VRW, 2005 U.S. Dist. LEXIS 41525, 2005 WL 1867723, at *2 (N.D. Cal. Aug. 2, 2005)*.

2. California Cartwright Act

The Ninth Circuit has held that "the analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.*, was modeled after the Sherman Act." *Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*. Accordingly, the Court's conclusion that the FAC's factual allegations do not state a federal antitrust violation applies equally to the state antitrust claim.

Defendants also argue that the Cartwright Act does not reach mergers or acquisitions. (Disney Mot. at 7, AT&T Mot. at 16.) As a matter of law, California courts have explained that the Cartwright Act cannot be used to challenge mergers and acquisitions. *State of California ex rel. Van de Kamp v. Texaco, Inc., 46 Cal. 3d 1147, 1167, 252 Cal. Rptr. 221, 762 P.2d 385 (1988)*, *superseded by statute on other grounds as recognized by* *United Farm Workers of Am., AFL-CIO v. Dutra Farms, 83 Cal. App. 4th 1146, 1163, 100 Cal. Rptr. 2d 251, 263 (2000)*; *see also* *Asahi Kasei Pharma Corp. v. CoTherix, Inc., 204 Cal. App. 4th 1, 9, 138 Cal. Rptr. 3d 620 (2012)*. Accordingly, this claim is dismissed with prejudice.

3. *18 U.S.C. § 1343*

Morton's final claim is for violation of the federal wire fraud statute, **[*12]** *18 U.S.C. section 1343*. As a matter of law, this claim fails because there is no private right of action for violation of this criminal statute. *See, e.g.,* *Pineda v. Mortg. Elec. Registration Sys., Inc., No. EDCV 13-2089-JLS, 2014 U.S. Dist. LEXIS 11828, 2014 WL 346997, at *2 (C.D. Cal. Jan. 29, 2014)* (no private right of action for mail fraud under *18 U.S.C. section 1341*); *Kraft v. Old Castle Precast Inc., No. LA CV 15-00701-VBF, 2015 U.S. Dist. LEXIS 103440, 2015 WL 4693220, at *2 (C.D. Cal. Aug. 5, 2015)*. Accordingly, the Court dismisses this claim with prejudice.

C. Improper Joinder

Federal Rule of Civil Procedure 20(a)(2) provides that defendants may be joined in one action if: "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of occurrences; and (B) any question of law or fact common to all defendants will arise in the action." Defendants do not assert improper joinder, but the Court may sua sponte "on just terms, add or drop a party" or "sever any claim against a party." *Fed. R. Civ. P. 21*.

It appears to the Court that Morton's allegations against AT&T (related to its merger with Time Warner) are improperly joined with his allegations against Disney (related to its potential merger with 21st Century Fox). Morton does not allege that joint or several liability applies, nor does he allege that the mergers are part of the **[*13]** same transaction, occurrence, or series of transactions. He further presents no factual allegations to show that Disney and AT&T have a conspiracy or are acting jointly. *See, e.g., Bravado Int'l Grp. Merch. Servs. v. Cha*, No. CV 09-*9066 PSG (CWX), 2010 U.S. Dist. LEXIS 80361, 2010 WL 2650432, at *4 (C.D. Cal. June 30, 2010)*. Accordingly, the Court concludes that, even were the other identified deficiencies of the FAC remedied, these defendants were improperly joined.

D. Remaining Defendants

Although Robert Iger, Rupert Murdoch, and 21st Century Fox, who are named as Defendants, did not join in either Motion, they have not entered an appearance in this case, and it appears that Morton did not serve any of these Defendants with a summons. (*See* Proof of Service, Doc. 16.) Therefore, the Court cannot exercise personal jurisdiction over Iger, Murdoch, and 21st Century Fox. *See* *Fed. R. Civ. P. 4(a)*; *Omni Capital, 484 U.S. at 104*. Even if Morton's service were effective, however, the other Defendants have sought to dismiss Morton's entire case based on the sufficiency of the First Amended Complaint. (*See* Disney Mem. at 1; AT&T Mem. at 1.) Therefore, Morton's failure to state a claim as a matter of law is equally effective to dismiss Plaintiff's claims against Iger, Murdoch, and 21st Century Fox.

D. CONCLUSION

For the foregoing reasons, **[*14]** the FAC is DISMISSED as to all Defendants. Morton may amend his FAC within **twenty-one (21) days** of this Order, as to his federal antitrust claims only. Any Second Amended Complaint must comply with the requirements of *Rule 8 of the Federal Rules of Civil Procedure*. Morton may not add Defendants without leave of court. *See Fed. R. Civ. P. 21*. Failure to timely file a Second Amended Complaint in conformity with this Order may result in the dismissal of this action. *See Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002)*, *cert. denied*, *538 U.S. 909 (2003)* (court may dismiss action for failure to follow court order); *Simon v. Value Behaviorial Health, Inc., 208 F.3d 1073, 1084 (9th Cir. 2000)*, *amended*, *234 F.3d 428 (9th Cir. 2000)*, *cert. denied*, *531 U.S. 1104 (2001)*, *overruled on other grounds, Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007)*, *cert. denied*, *552 U.S. 985 (2007)* (affirming dismissal without leave to amend where plaintiff failed to correct deficiencies in complaint, where court had afforded plaintiff opportunities to do so, and where court had given plaintiff notice of the substantive problems with his claims); *Plumeau v. School District #40, Cnty. of Yamhill, 130 F.3d 432, 439 (9th Cir. 1997)* (denial of leave to amend appropriate where further amendment would be futile). Any Second Amended Complaint must be served on Defendants in conformity with *Rule 4*. Any Second Amended Complaint must reflect the Court's finding as to the improper joinder of parties.

Further, Morton's Motion for Summary Judgment is DENIED AS MOOT, and the hearing set for July **[*15]** 6, 2018, at 2:30 p.m., is VACATED. (Doc. 26.)

End of Document

Seegert v. Rexall Sundown, Inc.

United States District Court for the Southern District of California

June 13, 2018, Decided; June 13, 2018, Filed

Case No.: 3:17-cv-1243-JAH-JLB

Reporter
2018 U.S. Dist. LEXIS 99581 *; 2018 WL 2966855

SANDRA SEEGERT, individually and on behalf of all other similarly situated, Plaintiffs, v. REXALL SUNDOWN, INC., Defendant.

Prior History: *Seegert v. Rexall Sundown, Inc., 2017 U.S. Dist. LEXIS 198165 (S.D. Cal., Dec. 1, 2017)*

Core Terms

products, motion to dismiss, advertising, studies, alleges, misleading, ingredients, packaging, judicial notice, representations, argues, health benefits, osteoarthritis, contends, class certification, benefits, consumer, unfair

Counsel: **[*1]** For Sandra Seegert, individually and on behalf of all others similarly situated, Plaintiff: Thomas Joseph O'Reardon , II, Timothy G. Blood, LEAD ATTORNEYS, Blood Hurst & O'Reardon, LLP, San Diego, CA; Todd D. Carpenter, LEAD ATTORNEY, Carlson Lynch Sweet Kilpela & Carpenter, LLP, San Diego, CA.

For Rexall Sundown, Inc., Defendant: Adriane K Peralta, Amy Pesapane Lally, LEAD ATTORNEYS, Sidley Austin LLP, Los Angeles, CA.

Judges: JOHN A. HOUSTON, United States District Judge.

Opinion by: JOHN A. HOUSTON

Opinion

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Presently before the Court is Defendant Rexall Sundown, Inc.'s ("Defendant" or "Rexall") Motion to Dismiss Plaintiff Sandra Seegert's ("Plaintiff") First Amended Complaint ("FAC") pursuant to *Federal Rules of Civil Procedure 8*, *9(b)*, *12(b)(1)*, and *12(b)(6)*. [Doc. No. 34]. In addition, Defendant requests the Court take judicial notice of several exhibits attached in support of its Motion to Dismiss. [Doc. No. 34-2]. The motion has been fully briefed. After careful consideration of the pleadings, and for the reasons set forth below, Defendant's Motion to Dismiss is **DENIED**.

BACKGROUND

Plaintiff brings this class action complaint on behalf of herself, and all others similarly situated, alleging that Defendant violated **[*2]** two California statutes: (1) California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200*; and (2) California's Consumers Legal Remedies Act ("CLRA"), *Cal. Civ. Code § 1750*. See Doc. No. 31.

I. Factual History

Defendant distributes and sells a line of "joint health" supplements marketed by the product name "Osteo Bi-Flex." Doc. No. 31, ¶ 2. Defendant offers four different types of Osteo Bi-Flex products: (1) Osteo Bi-Flex One Per Day, (2) Osteo Bi-Flex Triple Strength, (3) Osteo Bi-Flex Triple Strength MSM formula, and (4) Osteo Bi-Flex Triple Strength with Vitamin D. Id. at ¶ 15. Plaintiff alleges that on February 20, 2017 she purchased Defendant's Osteo Bi-Flex Triple Strength product while shopping at a Walgreens store in San Diego, California. Id. at ¶ 11. Plaintiff further alleges that she purchased Defendant's product believing it would provide the joint health benefits that it advertised, including relief from joint pain and increased joint mobility. Id. at ¶ 12. Defendant advertises and markets its four Osteo Bi-Flex products as having the ability to provide meaningful joint health benefits.[1] Id. at ¶ 3. Plaintiff asserts that these claims constitute false and misleading advertising because the Osteo Bi-Flex products **[*3]** are "incapable of supporting or benefitting the health of human joints." Id. at ¶ 5. In support, Plaintiff cites to numerous clinical trials and studies which demonstrate that the main ingredients in Osteo Bi-Flex are ineffective and unable to produce "joint health benefits." Id. at ¶ 34.

II. Procedural History

Plaintiff filed her initial complaint on June 19, 2017. [Doc. No. 1]. On August 14, 2017, Defendant filed a motion to dismiss and motion to strike Plaintiff's complaint. [Doc. Nos. 17, 18]. On December 1, 2017, this Court granted Defendant's motion to dismiss and motion to strike, dismissing Plaintiff's claims without prejudice. [Doc. No. 30]. On December 29, 2017, Plaintiff filed a FAC, to which Defendant filed this pending Motion to Dismiss. [Doc. Nos. 31, 34]. The Court has received an opposition from Plaintiff and a reply from Defendant. [Doc. Nos. 35, 37].

LEGAL STANDARD

I. *Federal Rule of Civil Procedure 12(b)(1)*

Under *Rule 12(b)(1) of the Federal Rules of Civil Procedure*, a defendant may seek to dismiss a complaint for lack of jurisdiction over the subject matter. The federal court is one of limited jurisdiction. See *Gould v. Mutual Life Ins. Co., 790 F.2d 769, 774 (9th Cir. 1986)*. As such, it cannot reach the merits of any dispute until it confirms its own subject matter jurisdiction. See *Steel Co. v. Citizens for a Better Environ., 523 U.S. 83, 95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*. When considering a *Rule 12(b)(1)* **[*4]** motion to dismiss, the district court is free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary. See *Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983)*.

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[1] Plaintiff asserts that on the label of each of the Osteo Bi-Flex products Defendant "prominently and in all caps" displays the words "Joint Health," "Glucosamine," and "Joint Shield" as well as the phrase: "Shows Improved Joint Comfort within 7 days!" Doc. No. 31, ¶ 3. In addition, Plaintiff alleges that Defendant reinforces their overall joint health benefit message by representing that Osteo Bi-Flex can help with: (1) "range of motion," (2) "strengthen joints", (3) "support flexibility," (4) "support mobility," (5) "supports joint comfort," (6) "defend your joints," and (7) "helps strengthen joints while helping to maintain joint cartilage essential for comfortable joint movement." Id. at ¶ 25. Finally, Plaintiff alleges that Defendant labels the Osteo Bi-Flex products as the "#1 Pharmacist Recommended Brand," which "adds credibility" and "provides consumers with a 'reason to believe'" the representations made by Defendant. Id. at ¶ 26.

a. Standing

A necessary element of Article III's "case" or "controversy" requirement is that a litigant must have "'standing' to challenge the action sought to be adjudicated in the lawsuit." *Valley Forge College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)*; *LSO, Ltd. v. Stroh, 205 F.3d 1146, 1152 (9th Cir. 2000)*. Standing under Article III pertains to the Court's subject matter jurisdiction and therefore is "properly raised in a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(1)*." *White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)*. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011)* (quoting *Warth v. Seldin, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975))*.

The "irreducible constitutional minimum" of Article III standing has three elements. *LSO, 205 F.3d at 1152* (internal quotations omitted). First, plaintiff must have suffered "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (internal citations and quotations omitted). Second, plaintiff must show a causal connection between the injury and **[*5]** the conduct complained of; *i.e.*, "the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Id. (quoting *Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976))* (alterations in original). Third, it must be "likely," and not merely "speculative," that the plaintiff's injury will be redressed by a favorable decision. *Id. at 561*. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan, 504 U.S. at 561* (internal citations omitted).

II. *Federal Rule of Civil Procedure 12(b)(6)*

Under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, a party may move to dismiss for failure to state a claim for relief. Dismissal is warranted under *Rule 12(b)(6)* where the complaint lacks a cognizable legal theory or fails to allege sufficient facts to support a cognizable legal theory. *Li v. Kerry, 710 F.3d 995, 999 (9th Cir. 2013)*. Under *Rule 8(a)(2) of the Federal Rules of Civil Procedure*, the plaintiff is required to set forth a "short and plain statement of the claim showing that the pleader is entitled to relief," and "give the defendant fair notice of what the...claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal citations omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 570*). A claim **[*6]** is facially plausible when the factual allegations permit "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. In other words, "the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009)* (citing *Iqbal, 556 U.S. at 678*). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal, 556 U.S. at 679*.

In reviewing a motion to dismiss under *Rule 12(b)(6)*, the reviewing court must assume the truth of all factual allegations and construe them in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *Ileto v. Glock Inc., 349 F.3d 1191, 1200 (9th Cir. 2003)*. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 557*).

III. *Federal Rule of Civil Procedure 9(b)*

Rule 9(b) of the Federal Rules of Civil Procedure, requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Under Ninth Circuit case law, *Rule 9(b)* imposes two distinct requirements on complaints alleging fraud. **[*7]** First, the basic notice requirements of *Rule 9(b)* require complaints pleading fraud to "state precisely the time, place, and nature of the misleading statements, misrepresentations, and specific acts of fraud." *Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994)*; see also *Vess v. Ciba-Geigy Corp., U.S.A., 317 F.3d 1097, 1106 (9th Cir. 2003)* (citation omitted) (stating that a plaintiff must set forth the "who, what, when, where and how" of the alleged misconduct). Second, *Rule 9(b)* requires that the complaint "set forth an explanation as to why the statement or omission complained of was false or misleading." *Yourish v. California Amplifier, 191 F.3d 983, 993 (9th Cir. 1999)* (citation and quotation omitted).

IV. Judicial Notice

Defendant filed a request for judicial notice in support of its Motion to Dismiss. [Doc. No. 34-2]. This Court may take judicial notice of an adjudicative fact "not subject to reasonable dispute because it can be . . . accurately and readily determined from sources whose accuracy cannot be reasonably questioned." See *Fed. R. Evid. 201*; *Grason Elec. Co. v. Sacramento Mun. Util. Dist., 571 F. Supp. 1504, 1521 (E.D. Cal. 1983)*. The documents Defendant submits for judicial notice include packaging and labeling for the four Osteo Bi-Flex products [Exhibits 1-4] and an order from the Hon. Michael M. Anello affirming a tentative ruling. [Exhibit 5]. See Doc. No. 34-2. Because the request of judicial notice is capable of accurate and ready determination from sources whose **[*8]** accuracy cannot be reasonably questioned and the parties do not dispute the authenticity of the documents, Defendant's request for judicial notice is **GRANTED**.

DISCUSSION

Defendant makes several arguments in support of its Motion to Dismiss. First, Defendant argues that because Plaintiff only purchased Osteo Bi-Flex Triple Strength, she lacks standing to assert claims for the remaining Osteo Bi-Flex products. See Doc. No. 34-1, pg. 17-19. Next, Defendant argues that Plaintiff's complaint should be dismissed in its entirety because she has not plausibly alleged that the representations made by Defendant concerning its Osteo Bi-Flex products are false. Id. at 20-26. Finally, Defendant contends that Plaintiff failed to remedy any of the *Rule 9(b)* deficiencies discussed by this Court in dismissing her original complaint. Id. at pg. 26-27. The arguments will be addressed in turn below.

I. Standing for unpurchased Osteo Bi-Flex products

Defendant argues that Plaintiff lacks standing to pursue claims as to the products she did not purchase. See Doc. No. 34-1, pg. 17-19. Defendant contends that Plaintiff read and relied solely on the packaging, and claims thereon, of the Osteo Bi-Flex Triple Strength product in making **[*9]** her purchase decision, and because Plaintiff did not purchase—or even rely upon—the three remaining Osteo Bi-Flex products, she lacks standing to pursue claims as to those products. In opposition, Plaintiff argues that the Ninth Circuit has adopted a "class certification" approach where any dissimilarities between the class representative and passive class members is addressed at the class certification stage rather than a motion to dismiss. See Doc. No. 35, pg. 12 (citing *Melendres v. Arpaio, 784 F.3d 1254 (9th Cir. 2015)*). Plaintiff argues that this "class certification" approach has been applied to UCL and CLRA claims by numerous district courts throughout the Ninth Circuit. Id. In dismissing Plaintiff's initial complaint, this Court held that Plaintiff lacked standing to assert claims for the non-purchased products because she "failed to show how she was injured by products she did not come across or purchase." Doc. No. 30. However, upon reconsideration of Ninth Circuit case law, and in light of Plaintiff's new allegations regarding the similarities between the Osteo Bi-Flex products, the Court finds it appropriate to change course.

In Melendres,[2] the Ninth Circuit Court of Appeals held that "once the named plaintiff demonstrates **[*10]** her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the *Rule 23(a)* prerequisites for class certification have been met." *Melendres, 784 F.3d at 1262* (quoting 1 William B. Rubenstein, Newberg on Class Actions § 2:6 (5th ed.)). In Kirola v. City & Cty. of San Francisco, the Ninth Circuit applied Melendres to an American with Disabilities ("ADA") claim holding that the plaintiff had standing to challenge the disability access of facilities she never physically visited. *860 F.3d 1164, 1176 (9th Cir. 2017)*. Defendant argues that these holdings are irrelevant because they do not involve consumer class actions, and cites to numerous UCL and CLRA cases wherein standing was denied to plaintiffs concerning products they did not actually purchase or advertisements they did not rely upon.[3]

The Court need not determine *Melendres*' applicability here because, as clearly demonstrated by Defendant's cited authority, the majority of Ninth Circuit courts already allow plaintiffs to assert claims for unnamed class **[*11]** members "based on products he or she did not purchase ***so long as the products and alleged misrepresentations are substantially similar***." *Miller v. Ghirardelli Chocolate Co., 912 F. Supp. 2d 861, 870-72 (N.D. Cal. 2012)* (emphasis added); see also *Wilson v. Frito-Lay N. Am., Inc., 961 F. Supp. 2d 1134, 1141 (N.D. Cal. 2013)* ("Plaintiffs have failed to allege substantial similarity among the Purchased Products and the Non—Purchased Products."); *Route v. Mead Johnson Nutrition Co., 2013 U.S. Dist. LEXIS 35069, 2013 WL 658251, at *3 n.4* (acknowledging the plaintiff might have standing with respect to unpurchased products "[i]f all four products (1) contained the same controverted ingredient in the same amount, (2) were subject to the same advertisement campaign and same representations, and (3) the only differences between the products were not germane to Plaintiff's claims. . . ."). Accordingly, Plaintiff will have standing to pursue claims for the unpurchased Osteo Bi-Flex products so long as they are alleged to be substantially similar.

Here, Plaintiff has added detail in her FAC about the similarities of the Osteo Bi-Flex products and their packaging. Plaintiff alleges that all Osteo Bi-Flex products contain the same main ingredient—glucosamine hydrochloride—in the same amount per serving. Doc. No. 31, ¶¶ 16-17. Plaintiff further alleges that the front packaging of all Osteo Bi-Flex products is materially identical "and communicates **[*12]** the very same advertising message." Id. at ¶¶ 22, 24. In analyzing the front packaging of all four Osteo Bi-Flex products, the Court notes only minimal differences, including different "sub-names" located under "Osteo Bi-Flex Joint Health" and the color of the packaging. See Doc. No. 34 - 2, Exs. 1-4. Additionally, Plaintiff contends that the same "overall joint health benefits message" is used throughout Defendant's Osteo Bi-Flex products, including affirmations that the products assist with "range of motion," "support flexibility," and "support joint comfort." Doc. No. 31, ¶ 25, Ex. A. The Court finds that Plaintiff has sufficiently alleged substantial similarities between the Osteo Bi-Flex products, and thus has standing to pursue claims for the products she did not purchase. While a different result may be obtained in a motion for class certification, Defendant's motion to dismiss on such a basis must be **DENIED**.

II. UCL and CLRA Claims

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[2] Melendres involved a civil rights class action dealing with racial profiling, and specifically discussed whether plaintiffs had standing to assert claims against defendants for a particular type of police stop, even though they were pulled over under a different stop regime than other class members.

[3] *Route v. Mead Johnson Nutrition Co., No. CV 12-7350-GW JEMX, 2013 U.S. Dist. LEXIS 35069, 2013 WL 658251, at *1 (C.D. Cal. Feb. 21, 2013)*; *Wilson v. Frito-Lay N. Am., Inc., 961 F. Supp. 2d 1134, 1141-42 (N.D. Cal. 2013)*; *Miller v. Ghirardelli Chocolate Co., 912 F. Supp. 2d 861, 870-72 (N.D. Cal. 2012)*; *Granfield v. Nvidia Corp., No. 11-cv-05403, 2012 U.S. Dist. LEXIS 98678, 2012 WL 2847575, at *6 (N.D. Cal. July 11, 2012)*; *Hairston v. S. Beach Beverage Co., Inc., No. 12-cv-1429, 2012 U.S. Dist. LEXIS 74279, 2012 WL 1893818, at *5 n.5 (C.D. Cal. May 18, 2012)*; *Mlejnecky v. Olympus Imaging Am. Inc., No. 10-cv-2630, 2011 U.S. Dist. LEXIS 42333, 2011 WL 1497096, at *4-5 (E.D. Cal. Apr. 19, 2011)*; *Carrea v. Dreyer's Grand Ice Cream, Inc., No. 10-cv-1044, 2011 U.S. Dist. LEXIS 6371, 2011 WL 159380, at *3 (N.D. Cal. Jan. 10, 2011)*; *Johns v. Bayer Corp., No. 09-cv-1935, 2010 U.S. Dist. LEXIS 10926, 2010 WL 476688, at *5 (S.D. Cal. Feb. 9, 2010)*

"The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.'" *Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 320, 120 Cal.Rptr.3d 741, 246 P.3d 877 (2011)* (quoting *Cal. Bus. & Prof. Code § 17200*). This section establishes **[*13]** three separate and distinct theories of liability. *Rubio v. Capital One Bank, 613 F.3d 1195, 1203 (9th Cir. 2010)* ("A business act or practice may violate the UCL if it is either 'unlawful,' 'unfair,' or 'fraudulent.'"). To state a claim under the "fraudulent" prong, a plaintiff must allege "members of the public are likely to be deceived" by the defendant's business practices. *Schnall v. Hertz Corp., 78 Cal.App.4th 1144, 1167, 93 Cal.Rptr.2d 439 (2000)*. The "unlawful" prong "borrows" violations of other laws and makes them independently actionable under the UCL. *Cel—Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999)*. An "unfair" business practice is one that "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws, or otherwise significantly threatens or harms competition." *Id. at 187, 83 Cal.Rptr.2d 548, 973 P.2d 527*.

In addition, Plaintiff asserts a claim for a violation of the CLRA. She alleges Defendant violated the CLRA by engaging in the following practices proscribed by *California Civil Code § 1770(a)*:

> (5) Representing that goods . . . have . . . approval, characteristics . . . uses [and] benefits . . . which [they do] not have . . . [;]
> (7) Representing that goods are of a particular standard, quality or grade . . . if they are of another[;]
> (9) Advertising goods . . . with intent not to sell them as advertised[; and]
>
> (16) Representing that [goods] have been supplied in accordance with **[*14]** a previous representation when [they have] not.

Doc. No. 31, ¶ 128.

The gravamen of Plaintiff's FAC concerns the alleged false and deceptive advertising of Defendant's Osteo Bi-Flex Products. See generally Doc. No. 31. To sufficiently plead a claim for false or misleading advertising claims under the UCL and CLRA, Plaintiff must plausibly allege that Defendant's advertising and marketing are false or misleading in the eyes of a "reasonable consumer." *Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir.2008)* (citing *Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir.1995)*. Under the reasonable consumer standard, Plaintiff must "show that 'members of the public are likely to be deceived.'" *Freeman, 68 F.3d at 289* (quoting *Bank of West v. Superior Court, 2 Cal.4th 1254, 1267, 10 Cal. Rptr. 2d 538, 833 P.2d 545 (1992))*. "[N]aked assertion[s]" that Defendant's representations are misleading are "nothing more than a legal conclusion", which the Court can ignore. *Otto v. Abbott Labs., Inc., No. CV 12-1411-SVW (DTB), 2013 U.S. Dist. LEXIS 53287, 2013 WL 12132064, at *2 (C.D. Cal. Mar. 15, 2013)*. As such, in order to survive a motion to dismiss, Plaintiff must demonstrate that it is plausible that Defendant's representations were either false or likely to mislead a reasonable consumer.

In granting Defendant's previous motion to dismiss, the Court noted several deficiencies which necessitated dismissal. See Doc. No. 30, pg. 7. The Court found that Plaintiff did not adequately describe the Osteo Bi-Flex labels, **[*15]** nor did she allege how her cited studies were relevant to show the active ingredients in Defendant's products cannot deliver the promised results. Id. Ultimately, the Court determined that Plaintiff failed to plausibly allege that Defendant's advertisement of Osteo Bi-Flex are false or misleading. Id. In her FAC, Plaintiff cites to additional scientific studies, articles, and clinical trials which tested the effects of Osteo Bi-Flex's two main ingredients—glucosamine and chondroitin. See Doc. No. 31 ¶¶ 31-100. Plaintiff alleges that there is substantial scientific evidence to suggest that glucosamine and chondroitin—alone or in combination—do not support or promote joint health as Defendant claims. Id. Defendant contends that Plaintiff's FAC is similarly deficient to her initial complaint. See Doc. No. 34-1, pg. 20. Specifically, Defendant argues that Plaintiff's studies remain irrelevant because the studies only tested whether glucosamine and chondroitin successfully treated osteoarthritis, and they do not directly address the representations made on Osteo Bi-Flex packaging. See Doc. No. 34-1, pg. 20-26. Furthermore, Defendant contends that Plaintiff is unable to plausibly allege **[*16]** that Osteo Bi-Flex does not provide its advertised benefits without a study utilizing all of the active ingredients in its unique formula. Id. at pg. 23-26.

First, the Court disagrees with Defendant's assertion that osteoarthritis related studies are irrelevant for purposes of establishing plausibility in this case. In fact, Defendant cites to several osteoarthritis related studies on the Osteo Bi-

Flex packaging in an effort to support and corroborate the efficacy of Osteo Bi-Flex. See Doc. No. 31, ¶ 32. If Defendant can utilize studies involving osteoarthritis subjects to promote and substantiate its product, then certainly Plaintiff can use those same types of studies to plausibly allege the contrary. Moreover, according to the FAC, the findings in the published osteoarthritis studies cited by Plaintiff do not exclusively apply to osteoarthritis sufferers, but instead are equally applicable to those individuals who have yet to be diagnosed. See Doc. No. 31, ¶¶ 31, 32. Secondly, the Court is not persuaded by the Eckler, Padilla, McCrary, or Murray decisions cited by Defendant. See Doc. No. 34-1, pg. 24-25.[4] These courts held that studies and clinical trials are unable to establish facial **[*17]** plausibility that a product is ineffective when the study does not include ***all*** of the active ingredients from the contested product. Id. (emphasis added). This Court is of the mind, however, that compelling such a showing would heighten the plausibility standard beyond what *Twombly* and *Iqbal* require. *Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). If a product's primary ingredients provide no benefits related to joint health, as Plaintiff's studies allegedly show, certainly then a reasonable inference can be drawn that such a product does not provide the joint health benefits it represents. See *Vasic v. Patent Health, LLC., No. 13CV849 AJB MDD, 2014 U.S. Dist. LEXIS 33181, 2014 WL 940323, at *4 (S.D. Cal. Mar. 10, 2014)*. Because the studies cited by Plaintiff examine products with similar active ingredients as Osteo Bi-Flex, the Court finds Plaintiff's claims facially plausible. Whether the remaining ingredients in Osteo Bi-Flex distinguish it from the proffered studies is a factual inquiry, not ripe for review in a motion to dismiss. Thus, the Court finds Plaintiff has plausibly alleged that Defendant's representations of Osteo Bi-Flex **[*18]** are false or misleading, and Defendant's Motion to Dismiss on 12(b)(6) grounds is **DENIED**.

III. *Rule 9(b)*

In its final argument for dismissal, Defendant contends that Plaintiff fails to plead her claims with the sufficient particularity as required by *Rule 9(b)*. See Doc. No. 34-1, pgs. 26-27. Defendant further argues that the *Rule 9(b)* deficiencies noted in this Court's previous order were not rectified in the FAC. Id. at pg. 26. The Court disagrees. As noted above, "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp., U.S.A., 317 F.3d 1097, 1106 (9th Cir. 2003)* (quoting *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir.1997))*. Here, Plaintiff alleges that she relied upon the representations made on the Osteo Bi-Flex product label, specifically those regarding "joint health" when she purchased the Osteo Bi-Flex Triple Strength product from a San Diego Walgreens. Doc. No. 31, ¶ 12. Plaintiff further alleges that Osteo Bi-Flex "cannot provide the promised benefits" and had she "known the truth . . . she would not have purchased Defendant's Osteo Bi-Flex Triple Strength product." Id. Plaintiff's claims are clear: The representations made on Osteo Bi-Flex's packaging and advertising **[*19]** is false and misleading because Osteo Bi-Flex is unable to provide any joint health benefits. This level of specificity is sufficient to provide Defendant with adequate notice of the particular conduct so that it may properly "defend against the charge and not just deny that they have done anything wrong." Bly—*Magee v. California, 236 F.3d 1014, 1019 (9th Cir.2001)* (internal citations and quotations omitted). Accordingly, Defendant's Motion to Dismiss for failure to plead with sufficient particularity as required by *Rule 9(b)* is **DENIED**.

CONCLUSION AND ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that Defendant's Request for Judicial Notice [Doc. No. 34-2] is **GRANTED** and Defendant's Motion to Dismiss Plaintiff's FAC [Doc. No. 34] is **DENIED**.

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[4] *Eckler v. Wal-Mart Stores, Inc., No. 12-CV-727-LAB-MDD, 2012 U.S. Dist. LEXIS 157132, 2012 WL 5382218 (S.D. Cal. Nov. 1, 2012)*; *Padilla v. Costco Wholesale Corp., No. 11 C 7686, 2013 U.S. Dist. LEXIS 7990, 2013 WL 195769 (N.D. Ill. Jan. 16, 2013)*; *McCrary v. Elations Co., LLC, No. EDCV 13-0242 JGB OPX, 2013 U.S. Dist. LEXIS 173591, 2013 WL 6402217 (C.D. Cal. Apr. 24, 2013)*; *Murray v. Elations Co., No. 13-CV-02357-BAS WVG, 2014 U.S. Dist. LEXIS 107721, 2014 WL 3849911 (S.D. Cal. Aug. 4, 2014)*.

IT IS SO ORDERED.

DATED: June 13, 2018

/s/ John A. Houston

JOHN A. HOUSTON

United States District Judge

Animal Sci. Prods. v. Hebei Welcome Pharm. Co.

Supreme Court of the United States

April 24, 2018, Argued; June 14, 2018, Decided

No. 16-1220.

Reporter

138 S. Ct. 1865 *; 201 L. Ed. 2d 225 **; 2018 U.S. LEXIS 3684 ***; 86 U.S.L.W. 4411; 2018-1 Trade Cas. (CCH) P80,408; 100 Fed. R. Serv. 3d (Callaghan) 1269; 27 Fla. L. Weekly Fed. S 345; 2018 WL 2973745

ANIMAL SCIENCE PRODUCTS, INC., et al., Petitioners v. HEBEI WELCOME PHARMACEUTICAL CO. LTD., et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [*1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Animal Sci. Prods. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.), 837 F.3d 175, 2016 U.S. App. LEXIS 17135 (2d Cir. N.Y., Sept. 20, 2016)

Disposition: Vacated and remanded.

Core Terms

sellers, court of appeals, foreign law, purchasers, federal court, exports, vitamin, foreign government, price fixing, own law, declaration, relevant material, characterization, circumstances, quantity, decree, defer, views

LexisNexis® Headnotes

Evidence > Judicial Notice > Legislative Facts > Laws of Foreign States

HN1[] **Legislative Facts, Laws of Foreign States**

A federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements. Instead, *Fed. R. Civ. P. 44.1* instructs that, in determining foreign law, the court may consider any relevant material or source whether or not submitted by a party. As the court's determination must be treated as a ruling on a question of law, *Fed. R. Civ. P. 44.1*, the court may engage in its own research and consider any relevant material thus found.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Judicial Notice > Legislative Facts > Laws of Foreign States

HN2[] **Standards of Review, De Novo Review**

Fed. R. Civ. P. 44.1, adopted in 1966, fundamentally changed the mode of determining foreign law in federal courts. The rule specifies that a court's determination of foreign law must be treated as a ruling on a question of law, rather than as a finding of fact. Correspondingly, in ascertaining foreign law, courts are not limited to materials submitted by the parties; instead, they may consider any relevant material or source, whether or not admissible under the Federal Rules of Evidence. Appellate review, as is true of domestic law determinations, is de novo. *Rule 44.1* frees courts to reexamine and amplify material presented by counsel in partisan fashion or in insufficient detail. The obvious purpose of the changes *Rule 44.1* ordered was to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so.

Evidence > Judicial Notice > Legislative Facts > Laws of Foreign States

International Law > Dispute Resolution > Comity Doctrine

HN3[] **Legislative Facts, Laws of Foreign States**

Federal courts deciding questions of foreign law under *Fed. R. Civ. P. 44.1* are sometimes provided with the views of the relevant foreign government. *Rule 44.1* does not address the weight a federal court determining foreign law should give to the views presented by a foreign government. Nor does any other rule or statute. In the spirit of international comity, a federal court should carefully consider a foreign state's views about the meaning of its own laws. But the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt a foreign government's characterization nor required to ignore other relevant materials. When a foreign government makes conflicting statements, or offers an account in the context of litigation, there may be cause for caution in evaluating the government's submission. Given the world's many and diverse legal systems, and the range of circumstances in which a foreign government's views may be presented, no single formula or rule will fit all cases in which a foreign government describes its own law. Relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN4[] **Federal & State Interrelationships, Erie Doctrine**

If relevant state law is established by a decision of the State's highest court, that decision is binding on the federal courts. But views of the State's attorney general, while attracting respectful consideration, do not garner controlling weight.

Lawyers' Edition Display

Decision

[225]** Federal court determining foreign law under *Federal Rules of Civil Procedure Rule 44.1* (1) should accord respectful consideration to foreign government's submission; but (2) is not bound to accord conclusive effect to foreign government's statements.

Summary

Overview: ISSUE: Whether a federal court determining foreign law under *Fed. R. Civ. P. 44.1* was required to treat as conclusive a submission from the foreign government describing its own law. HOLDINGS: [1]-A federal court should accord respectful consideration to a foreign government's submission, but was not bound to accord conclusive effect to the foreign government's statements. Instead, *Rule 44.1* instructed that, in determining foreign law, the court could consider any relevant material **[**226]** or source whether or not submitted by a party; [2]-The court of appeals erred in deeming the foreign government's submission binding, so long as facially reasonable, because that unyielding rule was inconsistent with *Rule 44.1* and with the Supreme Court's treatment of analogous submissions from States of the United States. The court of appeals did not address other evidence.

Outcome: Judgment vacated and case remanded. Unanimous decision.

Headnotes

Conflict of Laws 4Evidence 461 > FOREIGN NATION -- CONSTRUCTION OF FOREIGN LAW > Headnote:
LEdHN1[] 1

A federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements. Instead, *Fed. R. Civ. P. 44.1* instructs that, in determining foreign law, the court may consider any relevant ma-terial or source whether or not submitted by a party. As the court's determination must be treated as a ruling on a question of law, *Fed. R. Civ. P. 44.1*, the court may engage in its own research and consider any relevant material thus found.

Evidence 461 > DETERMINATION OF FOREIGN LAW > Headnote:
LEdHN2[] 2

Fed. R. Civ. P. 44.1, adopted in 1966, fundamentally changed the mode of determining foreign law in federal courts. The rule specifies that a court's determination of foreign law must be treated as a ruling on a question of law, rather than as a finding of fact. Correspondingly, in ascertaining foreign law, courts are not limited to materials submitted by the parties; instead, they may consider any relevant material or source, whether or not admissible under the Federal Rules of Evidence. Appellate review, as is true of domestic law determinations, is de novo. *Rule 44.1* frees courts to reexamine and amplify material presented by counsel in partisan fashion or in insufficient detail. The obvious purpose of the changes *Rule 44.1* ordered was to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so.

Conflict of Laws 4Evidence 461 > FOREIGN LAW -- CONSTRUCTION BY FEDERAL COURT -- COMITY > Headnote:
LEdHN3[] 3

Federal courts deciding questions of foreign law under *Fed. R. Civ. P. 44.1* are sometimes provided with the views of the relevant foreign government. *Rule 44.1* does not address the weight a federal court determining foreign law should give to the views presented by a foreign government. Nor does any other rule or statute. In the spirit of international comity, a federal court should carefully consider a foreign state's views about the meaning of its own laws. But the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt a foreign government's characterization nor required to ignore other relevant materials. When a foreign government makes conflicting statements, or offers an account in the context of litigation, there may be cause for caution in evaluating the government's submission. Given the world's many and diverse legal systems, and the range of circumstances in which a foreign government's views may be presented, no single formula or rule will fit all cases in which a foreign government describes its own law. Relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

Courts 787.5Courts 793.5 > STATE LAW -- STATE'S CONSTRUCTION -- AUTHORITY > Headnote:
LEdHN4[] 4

If relevant state law is established by a decision of the state's highest court, that decision is binding on the federal courts. But views of the state's attorney general, while attracting respectful consideration, do not garner controlling weight.

Syllabus

[227]** **[*1867]** Petitioners, U. S.-based purchasers of vitamin C (U. S. purchasers), filed a class-action suit, alleging that four Chinese corporations that manufacture and export the nutrient (Chinese sellers), including the two respondents here, had agreed to fix the price and quantity of vitamin C exported to the United States, in violation of *§1 of the Sherman Act*. The Chinese sellers moved to dismiss the complaint on the ground that Chinese law required them to fix the price and quantity of vitamin C exports, thus shielding them from liability under U. S. ***antitrust law***. The Ministry of Commerce of the People's Republic of China (Ministry) filed an *amicus* brief in support of the motion, explaining that it is the administrative authority authorized to regulate foreign trade, and stating that the alleged conspiracy in restraint of trade was actually a pricing regime mandated by the Chinese Government. The U. S. purchasers countered that the Ministry had identified no law or regulation ordering the Chinese sellers' price agreement, highlighted a publication announcing that the Chinese sellers had **[***2]** agreed to control the quantity and rate of exports without government intervention, and presented supporting expert testimony.

[228]** The District Court denied the Chinese sellers' motion in relevant part, concluding that it did not regard the Ministry's statements as "conclusive," particularly in light of the U. S. purchasers' evidence. When the Chinese sellers subsequently moved for summary judgment, the Ministry submitted **[*1868]** another statement, reiterating its stance, and the U. S. purchasers pointed to China's statement to the World Trade Organization that it ended its export administration of vitamin C in 2002. The court denied this motion as well. The case was then tried to a jury, which returned a verdict for the U. S. purchasers.

The Second Circuit reversed, holding that the District Court erred by denying the Chinese sellers' motion to dismiss the complaint. When a foreign government whose law is in contention submits an official statement on the meaning and interpretation of its domestic law, the court concluded, federal courts are "bound to defer" to the foreign government's construction of its own law, whenever that construction is "reasonable." Inspecting only the Ministry's brief **[***3]** and the sources cited therein, the court found the Ministry's account of Chinese law "reasonable."

Held:

A federal court determining foreign law under *Federal Rule of Civil Procedure 44.1* should accord respectful consideration to a foreign government's submission, but the court is not bound to accord conclusive effect to the foreign government's statements.

Rule 44.1 fundamentally changed the mode of determining foreign law in federal courts. Before adoption of the rule in 1966, a foreign nation's laws had to be "proved as facts." Talbot v. Seeman, 5 U.S. 1, 1 Cranch 1, 38, 2 L. Ed. 15. Rule 44.1, in contrast, specifies that a court's determination of foreign law "must be treated as a ruling on a question of law." And in ascertaining foreign law, courts are not limited to materials submitted by the parties, but "may consider any relevant material or source." Appellate review, as is true of domestic law determinations, is *de novo*. The purpose of these changes was to align, to the extent possible, the process for determining alien law and the process for determining domestic law.

Neither Rule 44.1 nor any other rule or statute addresses the weight a federal court determining foreign law should give to the views presented by a foreign government. In the spirit of "international comity," Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U. S. 522, 543, 107 S. Ct. 2542, 96 L. Ed. 2d 461, a federal **[***4]** court should carefully consider a foreign state's views about the meaning of its own laws. The appropriate weight in each case, however, will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials. No single formula or rule will fit all cases, but relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

Judged in this light, the Second Circuit's unyielding rule is inconsistent with Rule 44.1 and, tellingly, with this Court's treatment of analo- **[**229]** gous submissions from States of the United States. If the relevant state law is established by a decision of "the State's highest court," that decision is "binding on the federal courts," Wainwright v. Goode, 464 U. S. 78, 84, 104 S. Ct. 378, 78 L. Ed. 2d 187, but views of the State's attorney general, while attracting "respectful consideration," do not garner controlling weight, Arizonans for Official English v. Arizona, 520 U. S. 43, 76-77, n. 30, 117 S. Ct. 1055, 137 L. Ed. 2d 170. Furthermore, because the Second Circuit riveted its attention on the Ministry's submission, **[***5]** it did not address evidence submitted by the U. S. purchasers. The court also **[*1869]** misperceived the pre-Rule 44.1 decision of United States v. Pink, 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 796. Under the particular circumstances of that case, this Court found conclusive a declaration from the government of the Russian Socialist Federal Soviet Republic on the extraterritorial effect of a decree nationalizing assets: The declaration was *obtained by the United States* through official "diplomatic channels," id., at 218, 62 S. Ct. 552, 86 L. Ed. 796; there was no indication that the declaration was inconsistent with the Russian Government's past statements; and the declaration was consistent with expert evidence in point.

The Second Circuit expressed concern about reciprocity, but the United States has not historically argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant sources. International practice is also inconsistent with the Second Circuit's rigid rule. Pp. ___ - ___, 201 L. Ed. 2d, at 232-236.

837 F. 3d 175, vacated and remanded.

Counsel: Michael J. Gottlieb argued the cause for petitioners.

Brian H. Fletcher argued the cause for petitioner as amicus curiae, by special leave of court.

Carter G. Phillips argued the cause for respondents.

Judges: Ginsburg, J., delivered the opinion for a unanimous Court.

Opinion by: GINSBURG

Opinion

Justice **Ginsburg** delivered the opinion of the Court.

When foreign law is relevant to a case instituted in a federal court, and the foreign government whose law is in contention submits an official **[***6]** statement on the meaning and interpretation of its domestic law, may the federal court look beyond that official statement? The Court of Appeals for the Second Circuit answered generally "no," ruling that federal courts are "bound to defer" to a foreign government's construction of its own law, whenever that construction is "reasonable." *In re Vitamin C Antitrust Litigation, 837 F. 3d 175, 189 (2016)*.

We hold otherwise. ***HN1***[] ***LEdHN[1]***[] [1] A federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements. Instead, *Federal Rule of Civil Procedure 44.1* instructs that, in determining foreign law, "the court may consider any relevant material or source . . . whether or not submitted by a party." As "[t]he court's determination must be treated as a ruling on a question of law," *Fed. Rule Civ. Proc. 44.1*, the court "may engage in **[*1870]** its own research and consider any relevant material thus found," Advisory Committee's 1966 Note on *Fed. Rule Civ. Proc. 44.1*, 28 U. S. C. App., p. 892 (hereinafter Advisory Committee's Note). Because the Second Circuit ordered dismissal of this case on the ground that the foreign government's statements could **[**230]** not be gainsaid, we vacate that court's judgment and remand the case for further consideration.

I

Petitioners, U. **[***7]** S.-based purchasers of vitamin C (hereinafter U. S. purchasers), filed a class-action suit against four Chinese corporations that manufacture and export the nutrient (hereinafter Chinese sellers). The U. S. purchasers alleged that the Chinese sellers, two of whom are respondents here, had agreed to fix the price and quantity of vitamin C exported to the United States from China, in violation of *§1 of the Sherman Act, 15 U. S. C. §1*. More particularly, the U. S. purchasers stated that the Chinese sellers had formed a cartel "facilitated by the efforts of their trade association," the Chamber of Commerce of Medicines and Health Products Importers and Exporters (Chamber). Complaint in No. 1:05-CV-453, Docket No. 1, ¶43. The Judicial Panel on Multidistrict Litigation consolidated the instant case and related suits for pretrial proceedings in the United States District Court for the Eastern District of New York.

The Chinese sellers moved to dismiss the U. S. purchasers' complaint on the ground that Chinese law required them to fix the price and quantity of vitamin C exports. Therefore, the Chinese sellers urged, they are shielded from liability under U. S. ***antitrust law*** by the act of state doctrine, the **[***8]** foreign sovereign compulsion doctrine, and principles of international comity. The Ministry of Commerce of the People's Republic of China (Ministry) filed a brief as *amicus curiae* in support of the Chinese sellers' motion. The Ministry's brief stated that the Ministry is "the highest administrative authority in China authorized to regulate foreign trade," App. to Pet. for Cert. 190a; that the Chamber is "an entity under the Ministry's direct and active supervision" and is authorized to regulate vitamin C exports, *id.,* at 196a; and that the conspiracy in restraint of trade alleged by the U. S. purchasers was in fact "a regulatory pricing regime mandated by the government of China," *id.,* at 197a. [1]

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[1] The Ministry told the District Court: For much of the 20th century, China allowed only state-owned entities to export products. App. to Pet. for Cert. 198a. When China started to allow private enterprises to obtain export licenses, the Ministry established the Chamber to regulate exports under the Ministry's authority and direction. *Ibid.*

In 1997, the Ministry authorized the establishment of the Chamber's Vitamin C Subcommittee. *Id.,* at 202a. That year, the Ministry promulgated a regulation authorizing and requiring the subcommittee to limit the production of vitamin C for export and to set export prices. *Id.,* at 202a-204a. Under the regulation delineating this "Export Licensing System," the Ministry issued export licenses only to manufacturers whose export volume and price complied with the output quota and price coordinated by the Vitamin C Subcommittee. *Id.,* at 204a.

In 2002, the Ministry replaced the Export Licensing System with a "Verification and Chop System." *Id.,* at 208a. As set forth in a 2002 Ministry Notice, the Chamber itself—instead of the Ministry—would inspect each export contract and certify its compliance with the coordinated quotas and price by affixing a special seal, known as a "chop." *Id.,* at 208a-209a. China's Customs would allow export only if the exporter presented its contract bearing the Chamber's "chop." *Id.,* at 209a. According to the Ministry, it

[*1871] In response, the U. S. purchasers disputed that Chinese law required the Chinese sellers to engage in price **[**231]** fixing. Among other things, the U. S. purchasers noted that the Ministry had not identified any written law or regulation expressly ordering the Chinese sellers' price agreement. [2] They also highlighted a Chamber announcement that the manufacturers "were able to reach a self-regulated agreement . . . whereby they would voluntarily control the quantity and pace of exports . . . without any government intervention." **[***9]** App. 109. In addition, the U. S. purchasers presented expert testimony that the Chinese Government's authorization of a Vitamin C Subcommittee within the Chamber did not necessarily mean that the subcommittee's price fixing was mandated by law.

The District Court denied the Chinese sellers' motion to dismiss the complaint in relevant part. *In re Vitamin C Antitrust Litigation, 584 F. Supp. 2d 546, 559 (EDNY 2008)*. That court acknowledged that the Ministry's *amicus* brief was "entitled to substantial deference." *Id., at 557*. The court, however, did not regard the Ministry's statements as "conclusive," emphasizing particularly that the U. S. purchasers had submitted evidence suggesting that the price fixing was voluntary. *Ibid.* The record, the District Court determined, was "too ambiguous to foreclose further inquiry into the voluntariness of [the Chinese sellers'] actions." *Id., at 559*.

After further discovery, focused on whether Chinese law compelled the Chinese sellers to enter into a price-fixing agreement, the Chinese sellers moved for summary judgment. See *In re Vitamin C Antitrust Litigation, 810 F. Supp. 2d 522, 525-526 (EDNY 2011)*. The Ministry submitted an additional statement, reiterating that "the Ministry specifically charged the Chamber . . . with the authority and responsibility . . . for regulating, through consultation, the price of vitamin **[***10]** C manufactured for export." App. 133. The Chinese sellers tendered expert testimony in accord with the Ministry's account, which stressed that the Ministry's "interpretation of its own regulations and policies carries decisive weight under Chinese law." *Id.,* at 142. The U. S. purchasers, in response, cited further materials supporting their opposing view, including China's statement to the World Trade Organization (WTO) that it "gave up export administration of . . . vitamin C" in 2002. *810 F. Supp. 2d, at 532* (internal quotation marks omitted). Denying the Chinese sellers' motion for summary judgment, the District Court held that Chinese law did not require the sellers to fix the price or quantity of vitamin C exports. *Id., at 525*.

The case was then tried to a jury, which returned a verdict for the U. S. purchasers. The jury found that the Chinese sellers had agreed to fix the prices and quantities of vitamin C exports, see App. to Pet. for Cert. 276a-279a, and further found that the Chinese sellers were not "actually compelled" by China to enter into **[**232]** those agreements, *id.,* at 278a. In accord with the jury's verdict, the District Court entered judgment for the U. S. purchasers, awarding some $147 million in treble damages and enjoining **[***11]** the Chinese sellers **[*1872]** from further violations of the *Sherman Act*.

The Court of Appeals for the Second Circuit reversed, holding that the District Court erred in denying the Chinese sellers' motion to dismiss the complaint. *In re Vitamin C Antitrust Litigation, 837 F. 3d 175, 178, 195-196 (2016)*. The Court of Appeals determined that the propriety of dismissal hinged on whether the Chinese sellers could adhere to both Chinese law and U. S. ***antitrust law***. See *id., at 186*. That question, in turn, depended on "the amount of deference" owed to the Ministry's characterization of Chinese law. *Ibid*. Cognizant of "competing authority" on this question, *ibid.,* the Court of Appeals settled on a highly deferential rule: "[W]hen a foreign

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was implicit in this arrangement that vitamin C exporters would remain under an obligation to fix prices and volumes. *Id.,* at 208a.

The effect of China's regime on the Chinese sellers' liability under the *Sherman Act*, we note, is not an issue before the Court today.

[2] The complaint, the U. S. purchasers emphasized, was directed only at conduct occurring after December 2001. As they understood the Ministry's 2002 Notice, see *supra,* at 3, n. 1, vitamin C exporters could have lawfully opted out of price fixing. Beyond that, the Vitamin C Subcommittee had replaced its 1997 Charter with a new 2002 Charter, App. 182-197, which eliminated the 1997 Charter's requirement that subcommittee members "[s]trictly execute" the "coordinated price" set by the Chamber, compare *id.*, at 85, with *id.,* at 185, and granted members an express "[r]igh[t]" to "freely resign from the Subcommittee," *id.,* at 186.

government, acting through counsel or otherwise, directly participates in U. S. court proceedings by providing a [statement] regarding the construction and effect of [the foreign government's] laws and regulations, which is reasonable under the circumstances presented, a U. S. court is bound to defer to those statements," *id., at 189*. The appeals court "note[d] that[,] if the Chinese Government had not appeared in this litigation, the [D]istrict [C]ourt's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both **[***12]** the motion to dismiss and summary judgment stages would have been entirely appropriate." *Id., at 191, n. 10*.

Applying its highly deferential rule, the Court of Appeals concluded that the Ministry's account of Chinese law was "reasonable." In so concluding, the Court of Appeals inspected only the Ministry's brief and sources cited therein. *Id., at 189-190*. Because it thought that "a U. S. court [must] not embark on a challenge to a foreign government's official representation," *id., at 189*, the Court of Appeals disregarded the submissions made by the U. S. purchasers casting doubt on the Ministry's account of Chinese law, *id., at 189-190*. Based solely on the Ministry's statements, the Court of Appeals held that "Chinese law required [the Chinese sellers] to engage in activities in China that constituted antitrust violations here in the United States." *Ibid.*

We granted certiorari to resolve a Circuit conflict over this question: Is a federal court determining foreign law under *Rule 44.1* required to treat as conclusive a submission from the foreign government describing its own law? *583 U. S. ___, 138 S. Ct. 734, 199 L. Ed. 2d 601 (2018)*. [3]

II

At common law, the content of foreign **[**233]** law relevant to a dispute was treated "as a question of fact." Miller, Federal *Rule 44.1* and the "Fact" Approach to Determining Foreign Law: **[***13]** Death Knell for a Die-Hard Doctrine, 65 Mich. L. Rev. 613, 617-619 (1967) (Miller). In 1801, this Court endorsed the common-law rule, instructing that "the laws of a foreign nation" must be "proved as facts." *Talbot v. Seeman, 5 U.S. 1, 1 Cranch 1, 38, 2 L. Ed. 15 (1801)*; **[*1873]** see, *e.g., Church v. Hubbart, 6 U.S. 187, 2 Cranch 187, 236, 2 L. Ed. 249 (1804)* ("Foreign laws are well understood to be facts."). Ranking questions of foreign law as questions of fact, however, "had a number of undesirable practical consequences." 9A C. Wright & A. Miller, Federal Practice and Procedure §2441, p. 324 (3d ed. 2008) (Wright & Miller). Foreign law "had to be raised in the pleadings" and proved "in accordance with the rules of evidence." *Ibid.* Appellate review was deferential and limited to the record made in the trial court. *Ibid.*; see also Miller 623.

HN2[🡅] ***LEdHN[2]***[🡅] [2] *Federal Rule of Civil Procedure 44.1*, adopted in 1966, fundamentally changed the mode of determining foreign law in federal courts. The Rule specifies that a court's determination of foreign law "must be treated as a ruling on a question of law," rather than as a finding of fact. [4] Correspondingly, in ascertaining foreign law, courts are not limited to materials submitted by the parties; instead, they "may consider any relevant material or source . . ., whether or not . . . admissible under the Federal Rules of Evidence." *Ibid.* Appellate review, as is true **[***14]** of domestic law determinations, is *de novo*. Advisory Committee's Note, at 892. *Rule 44.1* frees courts "to reexamine and amplify material . . . presented by counsel in partisan fashion or in insufficient detail." *Ibid.* The "obvious" purpose of the changes *Rule 44.1* ordered was "to make the process of determining alien law identical

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[3] Compare *In re Vitamin C Antitrust Litigation, 837 F. 3d 175 (CA2 2016)* (case below), with *In re Oil Spill by Amoco Cadiz, 954 F. 2d 1279, 1311-1313 (CA7 1992)* (adopting French Government's interpretation of French law, but only after considering all of the circumstances, including the French Government's statements in other contexts); *United States v. McNab, 331 F. 3d 1228, 1239-1242 (CA11 2003)* (noting Honduran Government's shift in position on the question of Honduran law and determining that the original position stated the proper interpretation); *McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F. 3d 1101, 1108-1109, 348 U.S. App. D.C. 160 (CADC 2001)*, vacated in part on other grounds, ***320 F. 3d 280 (CADC 2003)*** (declining to adopt the view of Iranian law advanced by Iranian Government because it was not supported by the affidavits submitted by Iran's experts).

[4] *Federal Rule of Criminal Procedure 26.1* establishes "substantially the same" rule for criminal cases. Advisory Committee's 1966 Note on *Fed. Rule Crim. Proc. 26.1*, 18 U. S. C. App., p. 709.

with the method of ascertaining domestic law to the extent that it is possible to do so." Wright & Miller §2444, at 338-342.

HN3[] ***LEdHN[3]***[] [3] Federal courts deciding questions of foreign law under *Rule 44.1* are sometimes provided with the views of the relevant foreign government, as they were in this case through the *amicus* brief of the Ministry. See *supra,* at 2-3. As the Court of Appeals correctly observed, *Rule 44.1* does not address the weight a federal court determining foreign law should give to the views presented by the foreign government. See *837 F. 3d, at 187*. Nor does any other rule or statute. In the spirit of "international comity," *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U. S. 522, 543, 107 S. Ct. 2542, 96 L. Ed. 2d 461, and n. 27 (1987)*, a federal court should carefully consider a foreign state's views about the meaning of its own laws. See *United States v. McNab, 331 F. 3d 1228, 1241 (CA11 2003)*; cf. *Bodum USA, Inc. v. La Cafetière, Inc., 621 F. 3d 624, 638-639 (CA7 2010)* (Wood, J., concurring). But the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore **[***15]** other relevant materials. **[**234]** When a foreign government makes conflicting statements, see *supra,* at 5, or, as here, offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government's submission.

Given the world's many and diverse legal systems, and the range of circumstances in which a foreign government's views may be presented, no single formula or rule will fit all cases in which a foreign government describes its own law. Relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency **[*1874]** with the foreign government's past positions.

Judged in this light, the Court of Appeals erred in deeming the Ministry's submission binding, so long as facially reasonable. That unyielding rule is inconsistent with *Rule 44.1* (determination of an issue of foreign law "must be treated as a ruling on a question of law"; court may consider "any relevant material or source") and, tellingly, with this Court's treatment of analogous submissions from States of the United States. ***HN4***[] ***LEdHN[4]***[] [4] If the relevant **[***16]** state law is established by a decision of "the State's highest court," that decision is "binding on the federal courts." *Wainwright v. Goode, 464 U. S. 78, 84, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1983)* (*per curiam*); see *Mullaney v. Wilbur, 421 U. S. 684, 691, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)*. But views of the State's attorney general, while attracting "respectful consideration," do not garner controlling weight. *Arizonans for Official English v. Arizona, 520 U. S. 43, 76-77, n. 30, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)*; see, *e.g., Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393-396, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)*. Furthermore, because the Court of Appeals riveted its attention on the Ministry's submission, it did not address other evidence, including, for example, China's statement to the WTO that China had "g[i]ve[n] up export administration . . . of vitamin C" at the end of 2001. *810 F. Supp. 2d, at 532* (internal quotation marks omitted). [5]

The Court of Appeals also misperceived this Court's decision in *United States v. Pink, 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942)*. See *837 F. 3d, at 186-187, 189*. *Pink*, properly comprehended, is not compelling authority for the attribution of controlling weight to the Ministry's brief. We note, first, that *Pink* was a pre-*Rule 44.1* decision. Second, *Pink* arose in unusual circumstances. *Pink* was an action brought by the United States to recover assets of the U. S. branch of a Russian insurance company that had been nationalized in 1918, after the Russian revolution. *315 U. S., at 210-211, 62 S. Ct. 552, 86 L. Ed. 796*. In 1933, the Soviet Government assigned the nationalized assets located in this country to the United States. *Id., at 211-212, 62 S. Ct. 552, 86 L. Ed. 796*. The disposition of the case **[***17]** turned on the extraterritorial effect of **[**235]** the nationalization decree—specifically, whether the decree reached assets of the Russian insurance company located in the United States, or was instead limited to property in Russia. *Id., at 213-215, 217, 62 S. Ct. 552, 86 L. Ed. 796*. To support the position that the decree reached all of the company's assets, the United States obtained an "official declaration of the Commissariat for

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[5] The Court of Appeals additionally mischaracterized the Ministry's brief as a "sworn evidentiary proffer." *837 F. 3d, at 189*. In so describing the Ministry's submission, the Court of Appeals overlooked that a court's resolution of an issue of foreign law "must be treated as a ruling on a question of law." *Fed. Rule Civ. Proc. 44.1*. The Ministry's brief, while a probative source for resolving the legal question at hand, was not an attestation to facts.

Justice" of the Russian Socialist Federal Soviet Republic. *Id., at 218, 62 S. Ct. 552, 86 L. Ed. 796*. The declaration certified that the nationalization decree reached "the funds and property of former insurance companies . . . irrespective of whether [they were] situated within the territorial limits of [Russia] or abroad." *Id., at 220, 62 S. Ct. 552, 86 L. Ed. 796* (internal quotation marks omitted). This Court determined that "the evidence supported [a] finding" that "the Commissariat for Justice ha[d] power to interpret existing Russian law." *Ibid*. "That being true," the Court concluded, the "official declaration [wa]s conclusive so far as the intended **[*1875]** extraterritorial effect of the Russian decree [wa]s concerned." *Ibid.*

This Court's treatment of the Commissariat's submission as conclusive rested on a document *obtained by the United States*, through official "diplomatic channels." *Id., at 218, 62 S. Ct. 552, 86 L. Ed. 796*. There **[***18]** was no indication that the declaration was inconsistent with the Soviet Union's past statements. Indeed, the Court emphasized that the declaration was consistent with expert evidence in point. See *ibid.* That the Commissariat's declaration was deemed "conclusive" in the circumstances *Pink* presented scarcely suggests that all submissions by a foreign government are entitled to the same weight.

The Court of Appeals also reasoned that a foreign government's characterization of its own laws should be afforded "the same respect and treatment that we would expect our government to receive in comparable matters." *837 F. 3d, at 189*. The concern for reciprocity is sound, but it does not warrant the Court of Appeals' judgment. Indeed, the United States, historically, has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant sources. [6]

The understanding that a government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight is also consistent with two international treaties that establish formal mechanisms by which one government may obtain from another **[***19]** an official statement characterizing its laws. Those treaties specify that "[t]he information given in the reply shall not bind the judicial authority from which the request emanated." European Convention on Information on Foreign Law, Art. 8, June 7, 1968, 720 U. N. T. S. 154; see Inter-American Convention on Proof of and Information on Foreign Law, Art. 6, May 8, 1979, O. A. S. T. S. 1439 U. N. T. S. 111 (similar). **[**236]** Although the United States is not a party to those treaties, they reflect an international practice inconsistent with the Court of Appeals' "binding, if reasonable" resolution.

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Because the Court of Appeals concluded that the District Court was bound to defer to the Ministry's brief, the court did not consider the shortcomings the District Court identified in the Ministry's position or other aspects of "the [D]istrict [C]ourt's careful and thorough treatment of the evidence before it." *837 F. 3d, at 191, n. 10*. The correct interpretation of Chinese law is not before this Court, and we take no position on it. But the materials identified by the District Court were at least relevant to the weight the Ministry's submissions should receive and to the question whether Chinese law required the Chinese **[***20]** sellers' conduct. We therefore vacate the judgment of the Court of Appeals and remand the case for renewed consideration consistent with this opinion.

It is so ordered.

References

U.S.C.S. Court Rules, *Federal Rules of Civil Procedure, Rule 44.1*

9 *Moore's Federal Practice §§44.1.04*, *44.1.05* (Matthew Bender 3d ed.)

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[6] The Chinese sellers assert, see Supp. Brief for Respondents 7-8, that the United States sought a greater degree of deference in a 2002 submission to a World Trade Organization panel. In fact, the submission acknowledged that "the Panel is not bound to accept the interpretation [of U. S. law] presented by the United States." Brief for United States as *Amicus Curiae* 29, n. 6 (quoting Second Written Submission of the United States of America, *United States—Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221 ¶11 (Mar. 8, 2002)).

L Ed Digest, Conflict of Laws *§ 4*; Evidence *§ 461*

L Ed Index, Foreign State or Country

Supreme Court's views as to constitutionality, construction, and application of Foreign Sovereign Immunities Act of 1976 (*28 U.S.C.S. §§1330*, *1332(a)(2)-(4)*, *1391(f)*, *1441(d)*, *1602-1611*). *102 L. Ed. 2d 1093*.

Bijan Nikoopour v. Ocwen Loan Servicing, LLC

United States District Court for the Southern District of California

June 14, 2018, Decided; June 14, 2018, Filed

Case No.: 17cv2015-MMA (WVG)

Reporter

2018 U.S. Dist. LEXIS 100828 *; 2018 WL 3007918

BIJAN NIKOOPOUR, an individual, Plaintiff, v. OCWEN LOAN SERVICING, LLC, a Delaware limited liability company; and WESTERN PROGRESSIVE, LLC, a Delaware limited liability company, Defendants.

Subsequent History: Appeal terminated, 01/17/2019

Prior History: *Nikoopour v. Ocwen Loan Servicing, LLC, 2018 U.S. Dist. LEXIS 29761 (S.D. Cal., Feb. 23, 2018)*

Core Terms

allegations, modification, unfair, motion to dismiss, prong, breach of contract claim, judicial notice, non-performance, violations, Notice, fails, incorporate by reference, tender payment, recorded, courts

Counsel: **[*1]** For Bijan Nikoopour, an individual, Plaintiff: Any Moskovian, LEAD ATTORNEY, RA and Associates, APC, Glendale, CA.

For Ocwen Loan Servicing, LLC, a Delaware Limited Liability Company, Western Progressive, LLC, a Delaware Limited Liability Company, Defendants: Peter Lindsey Isola, Renee Choy Ohlendorf, Tyler A Carle, LEAD ATTORNEYS, Hinshaw & Culbertson, LLP, San Francisco, CA.

Judges: HON. MICHAEL M. ANELLO, United States District Judge.

Opinion by: MICHAEL M. ANELLO

Opinion

ORDER GRANTING DEFENDANT OCWEN LOAN SERVICING, LLC'S MOTION TO DISMISS

[Doc. No. 14]

Plaintiff Bijan Nikoopour ("Plaintiff") filed a First Amended Complaint against Ocwen Loan Servicing, LLC ("Ocwen") and Western Progressive, LLC (collectively "Defendants") in the United States District Court for the Southern District of California alleging: (1) breach of contract; and (2) violations of California's Unfair Competition Law ("UCL"). *See* Doc. No. 13 (hereinafter "FAC"). Ocwen moves to dismiss Plaintiff's FAC for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. *See* Doc. No. 14-1. Plaintiff filed an opposition to Ocwen's motion, to which Ocwen replied. *See* Doc. Nos. 16, 19. The Court found the matter suitable for determination on the papers and without oral argument **[*2]** pursuant to *Civil Local Rule 7.1(d)(1)*. *See* Doc. No. 20. For the reasons set forth below, the Court **GRANTS** Ocwen's motion to dismiss.

BACKGROUND[1]

On or about August 31, 2006, Plaintiff obtained a loan in the amount of eight hundred eighty-one thousand two hundred and fifty dollars ($881,250.00) to purchase the property located at 13668 Landfair Road, San Diego, California, 92130. FAC ¶ 22. Plaintiff obtained the loan through Mortgageit, Inc. as the lender of the Note. *Id.* The Note was secured by a Deed of Trust. *Id.*, Exh. A. On or about November 2013, the servicing rights of the Note were transferred to Ocwen. *Id.* ¶ 23.

Due to financial hardships, Plaintiff fell behind on his mortgage payments. *Id.* ¶ 24. Plaintiff inquired with Ocwen about "foreclosure prevention alternatives." *Id.* ¶ 25. Ocwen sent Plaintiff a loan modification application, and on or about December 10, 2014, Plaintiff returned "the completed loan modification application" to Ocwen via mail. *Id.* However, from December 2014 to "approximately July 2015, Plaintiff was given the run around by OCWEN." *Id.* ¶ 26. As such, Plaintiff filed a complaint against Ocwen in state court. *Id.* ¶ 28. Plaintiff dismissed this action without prejudice **[*3]** on or about October 31, 2016. *Id.* ¶ 37.

On or about July 28, 2015, Plaintiff filed for Chapter 13 bankruptcy. *Id.* ¶ 30. Plaintiff alleges that "on or about August or October 2015" or "October-November 2015," Ocwen approved Plaintiff for a step rate loan modification while in bankruptcy. *Id.* ¶¶ 31, 40; *see also id.*, Exh. B. However, Plaintiff alleges that Ocwen representatives provided Plaintiff with four different addresses where Plaintiff could send his payment. *Id.* ¶ 34. As such, "Plaintiff did not know where to send the loan modification payment to." *Id.* When Plaintiff "followed up" with Ocwen in November and December 2015 to inquire about where to send his payments, Ocwen indicated that since it had not received payment by November 1, 2015, "the loan modification was no longer on the table." *Id.* ¶ 35. Plaintiff dismissed the bankruptcy on November 3, 2015. *Id.*

On or about July 2016, Plaintiff claims Ocwen approved him for a second loan modification. *Id.* ¶ 36. Plaintiff was dissatisfied, however, because the "new loan modification was nearly double the interest rate of the initial loan modification approval[.]" *Id.* Plaintiff requested Ocwen "honor" the terms of the first loan modification, **[*4]** but Ocwen "refused." *Id.* Plaintiff believes that Ocwen intends to foreclose upon the property. *Id.* ¶ 38. Based upon these allegations, Plaintiff commenced the instant action against Defendants on August 29, 2017, alleging breach of contract and violations of California's UCL. *See* FAC.

LEGAL STANDARD

A *Rule 12(b)(6)* motion to dismiss tests the sufficiency of the complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." *Fed. R. Civ. P. 8(a)(2)*. However, plaintiffs must also plead "enough facts to state a claim to relief that is plausible on its face." *Fed. R. Civ. P. 12(b)(6)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The plausibility standard thus demands more than a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Instead, the complaint "must contain allegations of underlying facts sufficient to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*.

In reviewing a motion to dismiss under *Rule 12(b)(6)*, courts must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. The court need not take legal conclusions as true merely because they are cast in the form of **[*5]** factual allegations. *Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987)*. Similarly, "conclusory

[1] Because this matter is before the Court on a motion to dismiss, the Court must accept as true the allegations set forth in the complaint. *See* *Hosp. Bldg. Co. v. Trs. Of Rex Hosp., 425 U.S. 738, 740, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*.

allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998)*.

In determining the propriety of a *Rule 12(b)(6)* dismissal, courts generally may not look beyond the complaint for additional facts. *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*. "A court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *Id.*; *see also Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*. "However, [courts] are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295-96 (9th Cir. 1998)*. Where dismissal is appropriate, a court should grant leave to amend unless the plaintiff could not possibly cure the defects in the pleading. *Knappenberger v. City of Phoenix, 566 F.3d 936, 942 (9th Cir. 2009)*.

DISCUSSION

A. Ocwen's Request for Judicial Notice

As an initial matter, Ocwen requests the Court take judicial notice of four public records (Exhibits A-D) relating to Plaintiff's FAC, and further requests that the Court incorporate by reference Exhibit E into Plaintiff's FAC. *See* Doc. No. 14-2. Exhibit A is a Deed of Trust dated August 24, 2009, recorded in the San Diego County Recorder's **[*6]** Office. Exhibit B is a Notice of Default and Election to Sell dated June 22, 2009, recorded in the San Diego County Recorder's Office. Exhibit C is a Notice of Default and Election to Sell dated September 17, 2010, recorded in the San Diego County Recorder's Office. Exhibit D is a Notice of Default and Election to Sell dated January 5, 2015, recorded in the San Diego County Recorder's Office. Exhibit E is a Loan Modification Offer from Ocwen to Plaintiff dated August 6, 2015.

Generally, a district court's review on a *12(b)(6)* motion to dismiss is "limited to the complaint." *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) overruled on other grounds by Galbraith v. Cnty. Of Santa Clara, 307 F.3d 1119, 1125-26 (9th Cir. 2002)* (quoting *Cervantes v. City of San Diego, 5 F.3d 1273, 1274 (9th Cir. 1993))*. However, "a court may take judicial notice of matters of public record," *id. at 689* (internal quotations omitted), and of "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading," *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*, *overruled on other grounds by Galbraith, 307 F.3d at 1125-26*; *see also Fed. R. Evid. 201*.

Here, Plaintiff does not object to Ocwen's request for judicial notice. Having reviewed the five exhibits attached to Ocwen's request for judicial notice, the proffered documents have either been incorporated by reference into the FAC, or are otherwise a matter of public **[*7]** record. *See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*; *Fed. R. Evid. 201(b)*. Accordingly, the Court **GRANTS** Ocwen's request for judicial notice.

B. Ocwen's Motion to Dismiss

In its motion, Ocwen argues that the Court should dismiss Plaintiff's FAC for the following reasons: (1) Plaintiff's breach of contract claim is premised on a contract that did not exist, and on which he failed to perform; and (2) Plaintiff's UCL claim fails because it is premised on the same conduct as Plaintiff's breach of contract claim. *See* Doc. No. 14-1 at 1. The Court addresses Ocwen's arguments in turn.

1. Breach of Contract Claim

Plaintiff alleges he entered into a loan modification agreement with Ocwen, but Ocwen breached the agreement by moving "forward with the non-judicial foreclosure sale proceedings" and failing to honor the loan modification agreement. FAC ¶ 44. The Court previously found that Plaintiff has sufficiently alleged the terms of the loan modification offer. *See* Doc. No. 12 at 7. Ocwen now argues that there are no allegations that Plaintiff ever signed and returned the loan modification offer. *See* Doc. No. 14-1 at 5. Moreover, Ocwen contends the statute of frauds bars Plaintiff's breach of contract claim. *See id.* at 6. Lastly, Ocwen claims that even if Plaintiff **[*8]** could allege the parties entered into a loan modification agreement, Plaintiff concedes he did not perform and has not alleged an excuse for his non-performance. *See id.* at 7.

To bring a cause of action for breach of contract, Plaintiff must prove: "(1) the existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) the resulting damages to the plaintiff." *Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 124 Cal. Rptr. 3d 256, 250 P.3d 1115, 1121 (Cal. 2011)*; *see also* Judicial Council of California Civil Jury Instruction No. 303 (describing the second essential factual element of a breach of contract claim as "[t]hat [Plaintiff] did all, or substantially all, of the significant things that the contract required [or] was excused from doing those things."). The plaintiff bears the burden of establishing each of these elements. *See* *M. v. Superior Court of Sonoma County, 25 Cal. 3d 608, 159 Cal. Rptr. 345, 350, 601 P.2d 572 (Ct. App. 2013)*.

Here, the Court finds that Plaintiff's breach of contract claim fails because even if Plaintiff's allegations are sufficient to allege the existence of a contract[2], Plaintiff concedes that he did not perform under the agreement, and fails to identify an excuse for his non-performance. With respect to performance, Plaintiff asserts that he "was willing, and able to tender the amounts to begin the loan modification," **[*9]** but was unable to because Ocwen provided Plaintiff "four (4) different addresses where payments needed to be sent to." *See* FAC ¶¶ 34, 42. Plaintiff asserts the "contradictory information not only confused Plaintiff, but made it *impossible* for him to tender payments." Doc. No. 13 at 10 (emphasis added). Thus, because Plaintiff admits that he did not perform under the agreement, the Court must determine whether Plaintiff has identified an excuse for his non-performance.

With respect to excuses for non-performance, "California law requires a plaintiff to identify excuses for non-performance with specificity in the pleadings." *Berkeley v. Wells Fargo Bank, 2015 U.S. Dist. LEXIS 141947, 2015 WL 6126815, at *6 (N.D. Cal. Oct. 19, 2015)* (citing *Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1389, 272 Cal. Rptr. 387 (Ct. App. 1990))*. In California, performance is excused when it is "prevented or delayed by the act of the creditor, or by the operation of law[.]" *Cal. Civ. Code § 1511*.

Here, Plaintiff repeatedly claims that Ocwen provided Plaintiff with "four (4) different addresses where payments needed to be sent to." FAC ¶¶ 34, 42. Plaintiff asserts that he "tried to make payments on his Note," but was unable to because "Ocwen never provided Plaintiff with the correct address of where to send his payments," and "Plaintiff did not feel comfortable sending large sums of money **[*10]** to random addresses provided by different representatives[.]" Doc. No. 16 at 8-9. Plaintiff further claims that "Plaintiff did not know where to send the loan modification payment, and Ocwen singlehandedly prevent[ed] Plaintiff from tendering payment." FAC ¶ 42. Plaintiff's allegations, however, are undermined by the loan modification proposal which has been incorporated by reference into Plaintiff's FAC, and the Court is not required to accept the truth of such allegations. *See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)* ("The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit.") The loan modification proposal specifically outlines four different ways to tender payment to various addresses (i.e., overnight delivery, bank wire, money gram, or submitting payment to Western Union). *See* Doc. No. 14-7 at 3. Thus, Plaintiff had multiple options available to him. Lastly, Plaintiff does not allege that he attempted to send his payment to one of the four addresses provided, but was denied. As such, Plaintiff's allegations are insufficient to allege excuse of performance, and

[2] Plaintiff asserts that he has "made it very clear in his Complaint that he accepted the loan modification Agreement." Doc. No. 16 at 7. Plaintiff focuses on language in the loan modification proposal requiring him to contact Ocwen by phone or in writing to confirm his *intent to accept* the offer within 14 days. *See* Doc. No. 14-7 at 2. However, page six of the agreement expressly states that in order for Plaintiff to *accept* the proposal, he must: (1) *sign* the agreement; (2) fax the executed agreement to Ocwen; (3) pay the full initial payment; (4) pay the new monthly payment starting on November 1, 2015; and (5) send proof of insurance coverage. *See id.* at 6. Plaintiff, however, does not allege that he signed the agreement, faxed the executed agreement, remitted payment, or submitted proof of insurance coverage.

Plaintiff cannot state a claim for breach of contract. *See DirectTV, LLC v. E&E Enterprises Global, Inc., 2018 U.S. Dist. LEXIS 19468, 2018 WL 707964, at *2 (C.D. Cal. Feb. 5, 2018)* (dismissing first counterclaim **[*11]** for breach of contract for failure to specifically plead an excuse of performance).

Accordingly, the Court **DISMISSES** Plaintiff's claim for breach of contract.

2. UCL Claim

In his second cause of action, Plaintiff alleges that Ocwen engaged in unfair competition by refusing to "honor the terms of the Agreement by singlehandedly preventing Plaintiff[']s attempt to tender payment on the Agreement." FAC ¶ 52. Ocwen's acts were "willful, oppressive, and malicious, in that [it] engaged in acts of unfair competition with the deliberate intent to injure Plaintiff." *Id.* ¶ 53. Ocwen argues the Court should dismiss Plaintiff's UCL claim again because Plaintiff fails to allege any unfair business practice. *See* Doc. No. 14-1 at 9.[3]

California Business & Professions Code § 17200 "establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (internal quotations omitted). "Because the statute is written in the disjunctive, it is violated where a defendant's act or practice violates any of the foregoing prongs." *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1168 (9th Cir. 2012)*. An action brought under the "unlawful" prong of this statute "borrows" violations of other laws when committed pursuant to business activity. *Farmers Ins. Exchange v. Superior Court, 2 Cal. 4th 377, 383, 6 Cal. Rptr. 2d 487, 826 P.2d 730 (1992)*.

[*12] "The UCL does not define the term 'unfair.'" *Davis, 691 F.3d at 1169*. Under California law, it is well established that "a practice may be deemed unfair under the UCL even if not specifically proscribed by some other law." *Cel-Tech, 20 Cal. 4th at 180*. The California Supreme Court held that "unfair" means "conduct that threatens incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id.* Moreover, "any finding of unfairness to competitors under *section 17200* must be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id.* State appellate court opinions have been divided over whether this definition of unfair should apply to UCL actions brought by consumers. Thus, some courts apply the following balancing test: "[a] business practice is unfair when it 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Herrejon v. Ocwen Loan Servicing, LLC, 980 F. Supp. 2d 1186, 1206 (E.D. Cal. 2013)* (quoting *Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 647, 58 Cal. Rptr. 2d 89 (Ct. App. 1996))*. "The 'unfairness' prong of the UCL 'does not give the courts a general license to review the fairness of contracts.'" *Id. at 1206-07* (quoting *Samura v. Kaiser Found. Health Plan, 17 Cal. App. 4th 1284, 22 Cal. Rptr. 2d 20, 29 n.6 (Ct. App. 1993))*.

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[3] Ocwen also argues that Plaintiff lacks standing to sue under the UCL because Plaintiff fails to allege that he lost money or property as a result of the conduct he challenges. *See* Doc. No. 14-1 at 8-9. "To have standing to assert a *Section 17200* claim, the plaintiff must '(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim.'" *In re Turner, 859 F.3d 1145, 1151 (9th Cir. 2017)* (quoting *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877, 885 (2011))*; *see also Cal. Bus. & Prof. Code § 17204*. Here, Plaintiff claims that as a result of Ocwen's conduct, he has and continues to suffer harm including the possible loss of the subject property, loss of the opportunity to pursue foreclosure alternatives, loss of the opportunity to obtain a loan modification, back dues and interest that has accrued to date, which would not have accrued but for Ocwen's actions, and the cost and expense of the instant litigation. FAC ¶ 54. Such allegations are sufficient to allege standing. *See Segura v. Wells Fargo Bank, N.A., 2014 U.S. Dist. LEXIS 143038, No., 2014 WL 4798890, at *8 (C.D. Cal. Sept. 26, 2014)* (finding the plaintiffs have standing to pursue a UCL claim because the plaintiffs "allege an injury that affected a property interest" and "adequately allege that the practices of which they complain are related to some form of loss they may have suffered related to the property[.]").

Lastly, under the fraudulent prong, a plaintiff must "show deception to some members of the public . . . [or] allege that members of the public are likely to be deceived." *Herrejon, 980 F. Supp. 2d at 1207* (internal quotations and citations omitted). Fraudulent conduct must be pled with particularity. *See* *Kearns v. Ford Motor Co., 567 F.3d 1120, 1127 (9th Cir. 2009)* (noting that *Rule 9(b)* applies to claims in federal court under the UCL).

Here, the Court once again finds that in construing Plaintiff's allegations in the light most favorable to him, Plaintiff's allegations are insufficient to state a claim under the UCL. It appears that Plaintiff relies on the "unlawful" and "unfair" prongs of the UCL in his FAC. *See* FAC ¶ 52; Doc. No. 16 at 9 (discussing the "unlawful" and "unfair" prongs of the UCL). With respect to the "unlawful" prong, *Section 17200* "borrows" violations from other laws by making them independently actionable as unfair competitive practices. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1143, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*. Because Plaintiff predicates his UCL claim on the same allegations and theories alleged in his breach of contract claim, and because Plaintiff fails to state a viable breach of contract claim, Plaintiff's UCL claim based upon unlawful conduct similarly fails. *See* *Hadley v. Kellogg Sales Co., 243 F. Supp. 3d 1074, 1094 (N.D. Cal. 2017)* ("If a plaintiff cannot **[*13]** state a claim under the predicate law, however, [the UCL] claim also fails.") (quoting *Stokes v. CitiMortgage, Inc., 2014 U.S. Dist. LEXIS 125655, 2014 WL 4359193, at *11 (C.D. Cal. Sept. 3, 2014))*; *see also* *Simila v. Am. Sterling Bank, 2010 U.S. Dist. LEXIS 108440, 2010 WL 3988171, at *5 (S.D. Cal. Oct. 12, 2010)* (dismissing claim for unlawful competition because all causes of action which the claim "borrows" are dismissed).

With respect to the "unfair" prong, the Court finds that Plaintiff fails to plead facts to show that Ocwen engaged in an unfair business practice under either the tethering test outlined by the California Supreme Court in *Cel-Tech* or the balancing test. Plaintiff alleges in conclusory fashion that Ocwen "refused to honor the terms of the Agreement by singlehandedly preventing Plaintiff's attempt to tender payment on the Agreement." FAC ¶ 52. Plaintiff claims that Ocwen "failed to provide an address for the payments to be tendered." *Id.* ¶ 34. Yet when Plaintiff contacted Ocwen representatives, such representatives "provided four (4) different addresses where payments needed to be sent to." *Id.* The Court is not required, however, to accept as true these contradictory allegations that are undermined by the loan modification proposal, incorporated by reference into Plaintiff's FAC. *See Sprewell, 266 F.3d at 988*. The loan modification proposal outlines four different ways to tender payment to various addresses **[*14]** (i.e., overnight delivery, bank wire, money gram, or submitting payment to Western Union). *See* Doc. No. 14-7 at 3. Thus, Plaintiff had multiple options available to him. Moreover, Plaintiff does not claim that he ever attempted to submit his payment, but was denied. Rather, Plaintiff was confused about where to send the payments; thus, he did not make any payments. As such, the Court finds that Plaintiff's allegations are insufficient to allege a claim under the "unfair" prong of the UCL.

Accordingly, the Court **DISMISSES** Plaintiff's UCL claim.

CONCLUSION

Based on the foregoing, the Court **GRANTS** Ocwen's motion and **DISMISSES** Plaintiff's FAC **with prejudice**. *See* *Zucco Partners LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009)* (noting that "where the plaintiff previously has been granted leave to amend and has subsequently failed to add the requisite particularity to its claims, the district court's discretion to deny leave to amend is particularly broad") (internal citation and quotation marks omitted). The Clerk of Court is instructed to close the case and enter judgment accordingly.

IT IS SO ORDERED.

Dated: June 14, 2018

/s/ Michael M. Anello

HON. MICHAEL M. ANELLO

United States District Judge

FTC v. Actavis, Inc. (In re Androgel Antitrust Litig. (No. II))

United States District Court for the Northern District of Georgia, Atlanta Division

June 14, 2018, Decided; June 14, 2018, Filed

MDL DOCKET NO. 2084 ALL CASES 1:09-MD-2084-TWT; CIVIL ACTION FILE NO. 1:09-CV-955-TWT

Reporter
2018 U.S. Dist. LEXIS 99716 *; 2018-1 Trade Cas. (CCH) P80,409; 2018 WL 2984873

IN RE: ANDROGEL ANTITRUST LITIGATION (NO. II). FEDERAL TRADE COMMISSION, Plaintiff, v. ACTAVIS, INC., et al., Defendants.

Subsequent History: Class certification denied by *Rochester Drug Co-Operative Inc. v. Unimed Pharms. Inc. (In re Androgel Antitrust Litig.), 2018 U.S. Dist. LEXIS 117760 (N.D. Ga., July 16, 2018)*

Prior History: *FTC v. Actavis, Inc. (In re Androgel Antitrust Litig.), 2017 U.S. Dist. LEXIS 84438 (N.D. Ga., June 1, 2017)*

Core Terms

generic, patent, settlement, antitrust, private plaintiff, infringement, summary judgment motion, manufacturers, Plaintiffs', anticompetitive, causation, cases, parties, summary judgment, anti trust law, brand name, courts, pharmaceutical, conspiracy, consumers, profits, merits, unjustified, invalid, antitrust violation, chance of winning, motion to exclude, procompetitive, certification, Defendants'

LexisNexis® Headnotes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN1[] **Expert Witnesses, Daubert Standard**

Fed. R. Evid. 702 governs the admission of expert opinion testimony. Pursuant to that rule, before admitting expert testimony a court must consider: (1) whether the expert is competent to testify regarding the matters he intends to address; (2) whether the methodology used to reach his conclusions is sufficiently reliable; and (3) whether the testimony is relevant, in that it assists the jury to understand the evidence or determine a fact in issue. In ruling on the admissibility of expert testimony, the focus must be solely on the expert's principles and methodology, not on the conclusions that they generate. If the expert predicates his testimony on an assumption that is belied by the evidence, the expert's testimony is properly excluded. The party offering the expert's testimony has the burden to prove it is admissible by a preponderance of the evidence.

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

HN2[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. The party seeking summary judgment must first identify grounds to show the absence of a genuine issue of material fact. The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. A mere scintilla of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN3[] **Regulated Practices, Monopolies & Monopolization**

Section 1 of the Sherman Act states that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*. *Section 2* of the Sherman Act likewise prohibits agreements to monopolize trade. *15 U.S.C.S. § 2*. And Section 5 of the Federal Trade Commission Act states that unfair methods of competition are illegal, *15 U.S.C.S. § 45(a)*, a prohibition which has long been held to encompass the violations of the Sherman Act.

Legal Ethics > Client Relations > Duties to Client > Effective Representation

HN4[] **Duties to Client, Effective Representation**

Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN5[] **Regulated Practices, Price Fixing & Restraints of Trade**

Under the Sherman Act, *Section 1* claims and *Section 2* conspiracy to monopolize claims require the same threshold showing — the existence of an agreement to restrain trade. A written contract satisfies this requirement only if it embodies an agreement to unlawfully restrain trade.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > Conspiracy to Monopolize

HN6[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Direct evidence of a conspiracy obviates the need for evidence that excludes the possibility of independent action.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

The antitrust laws prohibit conduct that is unreasonable and anticompetitive. A restraint is unreasonable if it has an adverse impact on competition and cannot be justified as a procompetitive measure. Usually this is determined by balancing the effects under the test known as the rule of reason. The rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a procompetitive benefit or justification. Sometimes, however, conduct is so blatantly anticompetitive that courts have found it to be illegal per se.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN8[] **Regulated Practices, Price Fixing & Restraints of Trade**

With respect to "reverse settlements" in patent cases, the Supreme Court made clear in Actavis that avoiding even the possibility of competition, however small, is itself an antitrust violation. Rather than having to litigate the merits of any underlying patent suits or establish a theory of causation, the Supreme Court said that courts can look to the size of the payment to be able to assess its likely anticompetitive effects. Where the size of a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. But where a payment is large and unjustified by these traditional settlement concerns, it is likely directed toward avoiding the risk of competition. Thus, if settlement payments are shown to be larger than what could reasonably be expected to cover such traditional settlement concerns as future litigation costs or the value of services rendered, plaintiffs will have satisfied their burden in showing that settlements violated the antitrust laws.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN9[] **Regulated Practices, Price Fixing & Restraints of Trade**

Comparative valuations of services are not a necessary requirement to show that a reverse payment is large and unjustified. Helpful, certainly, but not necessary. The size of the payment is merely the Supreme Court's proxy for reaching the ultimate question: whether the agreement was entered into for the purpose of avoiding the risk of competition. If a settlement was agreed to for that purpose, it is large and unjustified.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act

HN10[] **Standing, Clayton Act**

Unlike the Federal Trade Commission, which only needs to prove an antitrust violation, private plaintiffs asserting a private right of action under the Clayton Act must also establish antitrust standing. This is separate from Article III standing. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

HN11[] **Private Actions, Standing**

The Eleventh Circuit employs a two-prong test for antitrust standing. First, the plaintiff must establish that it has suffered an antitrust injury. This means the plaintiff must have suffered an injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect of the violation. Second, the plaintiff must be an efficient enforcer of the antitrust laws.

Antitrust & Trade Law > Regulated Practices > Private Actions

HN12[] **Regulated Practices, Private Actions**

As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences.

Antitrust & Trade Law > Business & Corporate Compliance > Antitrust

HN13[] **Antitrust & Trade Law**

Courts generally presume that the introduction of new, better products is a good thing for competition. The attempt to develop superior products is an essential element of lawful competition.

Antitrust & Trade Law > Sherman Act > Remedies

Antitrust & Trade Law > Clayton Act > Remedies

HN14[] **Sherman Act, Remedies**

Federal courts have extensive authority to order equitable relief in antitrust cases. The goal of an equitable antitrust suit is not to simply punish past behavior, nor is it merely to end specific illegal practices. The goal is to effectively pry open to competition a market that has been closed by defendants' illegal restraints. In other words, the goal is to prevent anticompetitive activity in the future, and the courts have a wide range of means at their disposal to do so. It is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. Sometimes, this may even mean that otherwise legal activity may have to be enjoined. The standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct. Because the appropriate remedy fundamentally depends on the nature and scope of any wrongful conduct, it is premature to determine what may or may not be an appropriate remedy at this stage in the litigation, where there has not yet been a decision on liability.

Counsel: **[*1]** For Androgel Antitrust Litigation (No. II), In Re (1:09-md-02084-TWT): Kenneth S. Canfield, Doffermyre Shields Canfield & Knowles, LLC, Atlanta, GA.

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For United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund, on behalf of itself and all others similarly situated, Plaintiff (1:09-md-02084-TWT): Daniel E. Gustafson, LEAD ATTORNEY, Gustafson Gluek PLLC -MN, Minneapolis, MN; David A. Goodwin, Karla M. Gluek, LEAD ATTORNEYS, Gustafson Gluek PLLC, Minneapolis, MN; Kenneth A. Wexler, LEAD ATTORNEY, Wexler Wallace LLP, Chicago, IL; Corey Daniel Holzer, Holzer & Holzer, LLC, Atlanta, GA; Kenneth S. Canfield, Doffermyre Shields Canfield & Knowles, LLC, Atlanta, GA; Marshall P. Dees, Holzer & Holzer, LLC, Atlanta, GA; William Woodhull Stone, Johnson & Weaver, LLP, Marietta, GA.

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For Rochester Drug Co-Operative Inc, Counter Defendant (1:09-md-02084-TWT): Daniel C. Simons, Nicholas Urban, LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA.

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For McKesson Corp., Movant (1:09-md-02084-TWT): Steven H. Winick, Sheppard Mullin Richter & Hampton-CA, Four Embarcadero Center, San Francisco, CA.

For Besins Healthcare, Inc., Movant **[*12]** (1:09-md-02084-TWT): Michael J. Lockerby, PRO HAC VICE, Foley & Lardner - Washington, Washington, DC.

For Murty Pharmaceuticals, Inc., Movant (1:09-md-02084-TWT): Layne M. Kamsler, Bach, Dewberry & Hipes, LLC, Alpharetta, GA.

For Federal Trade Commission, Plaintiff (1:09-cv-00955-TWT-TWT): Randall W. Weinsten, LEAD ATTORNEY, Federal Trade Commission-D.C., Washington, DC; Bradley S. Albert, LEAD ATTORNEY, PRO HAC VICE, Federal Trade Commission-D.C., Washington, DC; Daniel W. Butrymowicz, LEAD ATTORNEY, Federal Trade Commission-D.C., Washington, DC; David B. Schwartz, LEAD ATTORNEY, Federal Trade Commission-D.C., Washington, DC; Garth Warner Huston, LEAD ATTORNEY, Federal Trade Commission-D.C., Washington, DC; Hannah Lamb, LEAD ATTORNEY, Federal Trade Commission -DC, Washington, DC; Heather Marie Johnson, LEAD ATTORNEY, Federal Trade Commission-D.C., Washington, DC; Jennifer Maren Schmidt, LEAD ATTORNEY, Federal Trade Commission-D.C., Washington, DC; Jordy Hur, LEAD ATTORNEY, Federal Trade Commission-D.C., Washington, DC; Kara Lee Monahan, LEAD ATTORNEY, Federal Trade Commission-D.C., Washington, DC; Lauren K. Peay, LEAD ATTORNEY, Federal Trade Commission, Washington, DC; Mark J. Woodward, **[*13]** LEAD ATTORNEY, PRO HAC VICE, Federal Trade Commission-D.C., Washington, DC; Markus

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Judges: THOMAS W. THRASH, JR., United States District Judge.

Opinion by: THOMAS W. THRASH, JR.

Opinion

OPINION AND ORDER

This is an antitrust action brought by the Federal Trade Commission and private antitrust actions transferred to this Court by the Judicial Panel on Multidistrict Litigation. They are before the Court on the Defendant Solvay's Motion for Summary Judgment on the FTC's Claims [FTC Doc. 620], Solvay's Motion for Summary Judgment as to the Par/Paddock Settlement [FTC Doc. 621, MDL Doc. 1551], the Defendants Actavis and Actavis Holdco's Motion for Summary Judgment [FTC Doc. 625, MDL Doc. 1556], Solvay's Motion for Summary Judgment for Lack of Antitrust Injury Against the Private Plaintiffs [MDL Doc. 1550], Solvay's Motion for Summary Judgment as to Retailer's Damages Claims on AndroGel 1.62% Purchases [MDL Doc. 1552], the Defendants Par and Paddock's Motion for Summary Judgment [MDL Doc. 1559], the Defendants Actavis, **[*16]** Inc. and Solvay's Motion to Exclude Plaintiffs' Proposed Patent Law Expert Jack C. Goldstein, Esq. [FTC Doc. 622, MDL Doc. 1553], and the Defendants Solvay, Par, and Paddock's Motion to Exclude in Part Plaintiffs' Expert James R. Bruno [FTC Doc. 630, MDL Doc. 1562].

For the reasons set forth below, Solvay's Motion for Summary Judgment on the FTC's Claims [FTC Doc. 620] is DENIED, Solvay's Motion for Summary Judgment as to the Par/Paddock Settlement [FTC Doc. 621, MDL Doc. 1551] is DENIED, Actavis and Actavis Holdco's Motion for Summary Judgment [FTC Doc. 625, MDL Doc. 1556] is DENIED, Solvay's Motion for Summary Judgment for Lack of Antitrust Injury Against the Private Plaintiffs [MDL Doc. 1550] is DENIED, Solvay's Motion for Summary Judgment as to Retailer's Damages Claims on AndroGel 1.62% Purchases [MDL Doc. 1552] is GRANTED, the Defendants Par and Paddock's Motion for Summary Judgment [MDL Doc. 1559] is DENIED, Actavis, Inc. and Solvay's Motion to Exclude Plaintiffs' Proposed Patent Law Expert Jack C. Goldstein, Esq. [FTC Doc. 622, MDL Doc. 1553] is DENIED, and Solvay, Par, and Paddock's Motion to Exclude in Part Plaintiffs' Expert James R. Bruno [FTC Doc. 630, MDL Doc. 1562] is **[*17]** GRANTED in part and DENIED in part.

I. Background

In the early nineties, Besins Healthcare, S.A. developed the pharmaceutical formulation for AndroGel, a prescription topical gel used to treat low testosterone in men. In August 1995, Besins granted Solvay Pharmaceuticals, Inc., a license to sell AndroGel in the United States.[1] Besins also agreed to manufacture AndroGel and supply it to Solvay once Solvay received FDA approval to sell the drug.

At this point, it is important to understand how new drugs enter the market in the United States. In order to sell a new drug in the United States, a pharmaceutical firm must file a New Drug Application ("NDA") with the Food and Drug Administration.[2] The NDA must contain a complete report about the drug, including safety and efficacy studies, the composition of the drug, a description of how the drug is produced, and proposed labeling.[3] The process to approve new proprietary drugs — known as "brand name" drugs — is both time consuming and costly.

Although the possibility for large profits after FDA approval is often an incentive for pharmaceutical companies to pursue the NDA process for brand name drugs, the cost associated with it may also serve as **[*18]** a significant barrier to entry by generic formulations of the same drug. These high barriers limit competition, which in turn may hurt consumers. This concern led Congress to enact the Hatch-Waxman Act in 1984.[4] The Hatch-Waxman Act enables companies that want to market and sell a generic version of a brand-name drug to avoid filing an NDA. As long as the generic and the brand-name drug are effectively the same thing, generic manufacturers can file a substantially shorter Abbreviated New Drug Application ("ANDA"). This reduces costs for generics manufacturers, which may allow them to charge much lower prices than brand name drugs, therefore benefitting consumers.

In order to prevent generic manufacturers from completely cutting into the profitability of brand name drugs, thereby reducing the incentive for brand name manufacturers to go through the cost and risk of the NDA process, federal law provides two ways for brand name pharmaceutical manufacturers to protect their investment. First, the FDA can grant brand name manufacturers periods of "exclusivity," which means that the FDA will not approve another application to sell the same drug until the exclusivity period (usually three or **[*19]** five years) ends. Second, brand name manufacturers can patent their new drug. Just like any other patent, drug patents grant brand name manufacturers a legal monopoly for a limited period of time. If there are any patents that cover the brand name drug, a generic manufacturer's ANDA must contain an additional certification. The ANDA must certify that (1) the

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[1] Technically speaking, Unimed entered into the Agreements with Besins. Solvay, now known formally as Abbvie Products LLC, later acquired Unimed. However, in order to reduce confusion, the Court will simply use the name Solvay throughout this Opinion.

[2] *21 U.S.C. § 355(a)*.

[3] *21 U.S.C. § 355(b)*.

[4] *Pub.L. No. 98-417, 98 Stat. 1585 (1984)*.

patent has not been listed with the FDA, (2) the patent has expired, (3) the patent will expire on a certain date, or (4) the patent is invalid or will not be infringed by the generic drug.[5] The last certification is known as a Paragraph IV certification. For any ANDA with a Paragraph IV certification, the applicant must also notify the patent holder of the ANDA.[6] If the patent holder decides to file an infringement suit after receiving notice of the Paragraph IV certification, the FDA is then prohibited from approving the generic for market entry for up to thirty months while the litigation proceeds.

In April 1999, Solvay filed an NDA for AndroGel. It was approved by the FDA in February 2000, and Solvay received three years of exclusivity. Solvay was also issued a patent on AndroGel, U.S. Patent No. 6,503,894 ('894 patent). Although AndroGel was not the only available **[*20]** method of testosterone replacement therapy, other methods were not as effective or as popular as AndroGel. The protection afforded Solvay by the exclusivity period and Solvay's patent helped AndroGel to quickly become the most popular form of testosterone replacement therapy. From 2000 to 2007, sales of AndroGel in the United States were over $1.8 billion. In the meantime, other pharmaceutical companies were developing generic versions of AndroGel. Once Solvay's new drug product exclusivity expired in February 2003, the FDA was authorized to approve generic versions of AndroGel. In May 2003, two companies each submitted ANDAs with Paragraph IV certifications for generic AndroGel. Actavis, Inc.[7] submitted the first ANDA, and Paddock Laboratories, Inc. submitted the second. Both companies also sent notice of their ANDAs to Solvay and Besins. In July 2003, Paddock reached an agreement with Par Pharmaceuticals. Par agreed to share any litigation costs with Paddock, and to sell Paddock's generic AndroGel. In return, Paddock agreed to share profits with Par.

Solvay responded to the ANDAs by asserting its rights under the '894 patent. In August 2003, Solvay's subsidiary, Unimed Pharmaceuticals, Inc., **[*21]** filed patent infringement actions against Watson and Paddock (the "Generics") in this Court.[8] Solvay alleged infringement based on the filing of the ANDAs.[9] Because Solvay filed infringement actions against the Generics within the forty-five day window of receiving notice, the FDA stayed approval of their ANDAs for thirty months.

For the next few years, Solvay and the Generics litigated the infringement actions. Both followed a similar schedule. From late 2003 to the middle of 2005, the parties engaged in discovery, scheduling, and other initial litigation matters. By August 2005, the parties had filed motions for claim construction. By December 2005, the Generics had filed motions for summary judgment on the validity of the '894 patent as well as claims construction briefs. All of the motions were fully briefed and ready for decision in early 2006.

While the motions were pending, Actavis and Paddock moved toward entering the market with generic AndroGel. In January 2006, the thirty month stay ended, and the FDA approved Actavis' ANDA. The FDA, however, continued to stay approval of Paddock's ANDA. The first **[*22]** firm to file an ANDA with a Paragraph IV certification receives generic exclusivity upon FDA approval, which is similar to brand-name exclusivity, but shorter. Generic exclusivity means that the FDA will not approve a subsequent ANDA for the same drug until 180 days after the earlier of (1) the date the first filer begins commercial marketing of its generic drug, or (2) the date a district court enters

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[5] *See 21 U.S.C. § 355(j)(2)(A)(vii)*.

[6] *21 U.S.C. § 355(j)(2)(B)*.

[7] Originally known as Watson Pharmaceuticals, the company has since split into two separate entities now known as Actavis, Inc. and Actavis Holdco US, Inc. For the purposes of this Opinion, the Court will refer to these as just Actavis. And while the Court continues to call Solvay by its original name, it will use Actavis' new name to minimize confusion in light of the Supreme Court's opinion in *FTC v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*.

[8] *See Unimed Pharm., Inc. v. Watson Pharm., Inc.*, No. 1:03-CV-2501-TWT, 2003 WL 23824320 (N.D. Ga. Aug. 21, 2003); *Unimed Pharm., Inc. v. Paddock Labs., Inc.*, No. 1:03-CV-2503-TWT, 2003 WL 23824347 (N.D. Ga. Aug. 21, 2003).

[9] *See 35 U.S.C. § 271(e)(2)(A)*(submitting an ANDA is an act of infringement if the branded drug is covered by a patent).

judgment that the patent is invalid or not infringed, whichever date is earlier.[10] Because Actavis was the first to file an ANDA for generic AndroGel, it received generic exclusivity over Paddock. In February 2006, Actavis prepared a report predicting that it would sell generic AndroGel by January 2007 and that the price would be 75 percent less than brand name AndroGel. In the same month, Par prepared a report predicting that Actavis would sell generic AndroGel as early as March 2006 and that Par and Paddock would follow in September 2006.

But before the Court decided the pending motions in the infringement actions, and before anyone entered the market with generic AndroGel, Solvay and the Generics settled the cases. Under the September 13, 2006 settlement between Solvay and Actavis, Solvay **[*23]** agreed to voluntarily dismiss the infringement action, and Actavis agreed not to market generic AndroGel until the earlier of August 31, 2015 or the date another company marketed generic AndroGel.[11] And under the September 13, 2006 settlement between Solvay and Par/Paddock, Solvay agreed to a consent judgment dismissing the infringement action, and Par/Paddock agreed not to market generic AndroGel until the earliest of August 31, 2015 (but only if Actavis did not assert its 180 day generic exclusivity period), the date another company launched generic AndroGel, or February 28, 2016.[12]

On the same day as the settlements, Solvay also entered into business promotion agreements with Actavis, Par, and Paddock. Under the agreement between Solvay and Actavis, Solvay agreed to share profits of AndroGel with Actavis, and Actavis agreed to promote AndroGel to urologists.[13] Under the agreement between Solvay and Par, Solvay agreed to share profits of AndroGel with Par, and Par agreed to promote AndroGel to primary care physicians.[14] And under the agreement between Solvay and Paddock, Solvay agreed to share profits of AndroGel with Paddock, and Paddock agreed to serve as a backup supplier of AndroGel. **[*24]** [15]

Together, these types of settlements are called "reverse payment" settlements, and they have recently become popular in pharmaceutical litigation. Reverse payment settlements are so called because they are the reverse of traditional patent infringement settlements. In a traditional settlement, the party with the claim — in this case, the brand name manufacturer — receives a payment from the defendant — in this case the generic — either equal to or less than the value of its claim.[16] But in a reverse settlement, "a party with no claim for damages (something that is usually true of a paragraph IV litigation defendant) walks away with money simply so it will stay away from the patentee's market."[17]

The reverse payment settlements prompted an investigation by the Federal Trade Commission for violations of antitrust laws. That investigation was completed in 2008. In 2009, the FTC and a number of private parties filed these antitrust actions against Solvay, Actavis, Par, and Paddock. All of the actions were filed in other federal district courts and then transferred to this Court either by change of venue or by order of the United States Judicial Panel on Multidistrict Litigation. **[*25]** On February 22, 2010, applying settled Eleventh Circuit precedent, this Court

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[10] *21 U.S.C. § 355(j)(5)(B)(iv)*.

[11] FTC's Statement of Additional Material Facts ("SAMF") ¶ 174 [FTC Doc. 689].

[12] *Id.* at ¶ 186.

[13] *Id.* at ¶¶ 180-183.

[14] *Id.* at ¶ 185.

[15] *Id.*

[16] *Actavis, 570 U.S. at 152*.

[17] *Id.*

dismissed the FTC action for failure to state a claim.[18] On appeal, the Eleventh Circuit affirmed.[19] However, the Supreme Court granted certiorari, and eventually reversed and remanded the cases in 2013.[20]

So, after five years, everything started all over.[21] The Plaintiffs are divided into three groups: the FTC, the Direct Purchaser Class Plaintiffs, and the Retailers.[22] The Direct Purchaser Class Plaintiffs and the Retailers constitute the Private Plaintiffs. All of the Plaintiffs allege that the Defendants violated federal ***antitrust law***.[23] The Defendants now move for summary judgment on various grounds.

II. Legal Standards

A. Daubert Motions

HN1[] *Federal Rule of Evidence 702* governs the admission of expert opinion testimony. Pursuant to that rule, before admitting expert testimony a court must consider: (1) whether the expert is competent to testify regarding the matters he intends to address; (2) whether the methodology used to reach his conclusions is sufficiently reliable; and (3) whether the testimony is relevant, in that it assists the jury to understand the evidence or determine a fact **[*26]** in issue.[24] In ruling on the admissibility of expert testimony, "[t]he focus must be 'solely' on the expert's 'principles and methodology, not on the conclusions that they generate.'"[25] If the expert predicates his testimony on an assumption that is belied by the evidence, the expert's testimony is properly excluded.[26] The party offering the expert's testimony has the burden to prove it is admissible by a preponderance of the evidence.[27]

B. Summary Judgment

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[18] *In re Androgel Antitrust Litig. (No. II), 687 F. Supp. 2d 1371 (N.D. Ga. 2010)*. The Court also dismissed the Private Plaintiffs' per se claims, and later granted the Defendants' motion for summary judgment on the "sham litigation" claims of the Private Plaintiffs. *In re Androgel Antitrust Litig. (No. II), 888 F. Supp. 2d 1336 (N.D. Ga. 2012)*.

[19] *FTC v. Watson Pharms., Inc., 677 F.3d 1298 (11th Cir. 2012)*, *rev'd and remanded sub nom.* *FTC v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*.

[20] *See* *Actavis, 570 U.S. at 160*.

[21] Now, after five more years, it remains to be seen whether this case or I will first confirm Queen Gertrude's observation: "Thou know'st 'tis common; all that lives must die, passing through nature to eternity." WILLIAM SHAKE-SPEARE, HAMLET, act 1, sc. 2.

[22] The Direct Purchaser Plaintiffs include Rochester Drug Co-Operative, Inc., Louisiana Wholesale Drug Co., Inc., Meijer Inc., and Meijer Distribution, Inc. The Retailers include Rite Aid Corp., Rite Aid Hdqtrs. Corp., JCG (PJC) USA, LLC, Maxi Drug, Inc., Eckerd Corp., CVS Pharmacy, Inc., Caremark L.L.C., Walgreens Co., Safeway, Inc., American Sales Co., Inc., HEB Grocery Co., LP, Supervalu, Inc., and Giant Eagle, Inc.

[23] *See* *Sherman Antitrust Act §§ 1-2*, *15 U.S.C. §§ 1-2*; *Federal Trade Commission Act § 5(a)*, *15 U.S.C. § 45(a)*.

[24] *Fed. R. Evid. 702*; *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.

[25] *KW Plastics v. United States Can Co., 131 F. Supp. 2d 1289, 1292 (M.D. Ala. 2001)* (quoting *Daubert, 509 U.S. at 594-95*).

[26] *Ferguson v. Bombardier Services Corp., 244 Fed. Appx. 944, 949 (11th Cir. 2007)*.

[27] *Allison v. McGhan Medical Corp., 184 F.3d 1300, 1306 (11th Cir. 1999)*.

HN2[] Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law.[28] The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant.[29] The party seeking summary judgment must first identify grounds to show the absence of a genuine issue of material fact.[30] The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist.[31] "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing **[*27]** that the jury could reasonably find for that party."[32]

III. Discussion

The FTC and the Private Plaintiffs allege that the Defendants violated federal ***antitrust law*** by entering into the reverse settlement agreements. HN3[] *Section 1 of the Sherman Act* states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[33] *Section 2* of the Sherman Act likewise prohibits agreements to monopolize trade.[34] And *Section 5* of the Federal Trade Commission Act states that "unfair methods of competition" are illegal,[35] a prohibition which has long been held to encompass the violations of the Sherman Act.[36] Thus, the different claims can be analyzed together.

A. Daubert Motions

1. Jack Goldstein

Solvay and Actavis move to exclude the testimony of Jack Goldstein. The Private Plaintiffs will call Goldstein to testify at trial as to how a reasonable and competent patent attorney would have advised litigants in Solvay's or the Generics' positions at the time they settled the underlying patent litigation on (1) the likelihood of success in the litigation; (2) the likely timing of **[*28]** the litigation's resolution if the parties had not settled; and (3) each of the

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[28] *Fed. R. Civ. P. 56(a)*.

[29] *Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*.

[30] *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

[31] *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

[32] *Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990)*.

[33] *15 U.S.C. § 1*.

[34] *Id.* at *§ 2*.

[35] *Id.* at *§ 45(a)*.

[36] *See, e.g.*, *FTC v. Cement Institute, 333 U.S. 683, 691-93, 68 S. Ct. 793, 92 L. Ed. 1010, 44 F.T.C. 1460 (1948)* ("In other cases this Court has pointed out many reasons which support interpretation of the language 'unfair methods of competition' in *[Section] 5* of the Federal Trade Commission Act as including violations of the Sherman Act. . . . We adhere to our former rulings.").

parties' likely litigation costs had they not settled.[37] The Defendants argue that Goldstein is not qualified to give these opinions, and that his methodology is unreliable. Both arguments are without merit.

The Defendants challenge Goldstein's qualifications, arguing that he does not have the requisite firsthand experience to properly assess the likely outcome, cost, or timing of the litigation. But the Defendants mistakenly argue that in order to testify about these issues, Goldstein needs to have recent, repeated, and specialized experience litigating patent cases arguing the specific legal and factual issues that were at issue in the underlying patent litigation. Goldstein does not need such specialized experience at all. "It is not necessary that the witness be recognized as a leading authority in the field in question . . . . Gaps in an expert witness's qualifications or knowledge generally go to the weight of the witness's testimony—not its admissibility."[38] Further, Goldstein is testifying as to what a reasonable and competent patent attorney would have thought at the time of the settlements. The question, **[*29]** therefore, is whether Goldstein has experience as a reasonable and competent patent attorney.[39]

There can be no doubt that the answer to that question is yes. Goldstein has had a long and distinguished career in the field of patent law. He has studied, interacted with, and litigated patent issues for fifty years.[40] After earning his law and engineering degrees, Goldstein began his legal career as a clerk for a judge on the U.S. Court of Customs and Patent Appeals, one of the predecessor courts to the Federal Circuit.[41] He then went on to work for a law firm specializing in intellectual property for almost thirty years, during which time he also taught patent and copyright law as an adjunct professor at South Texas College of Law in Houston.[42] After leaving the firm in 1997, Goldstein became president of an intellectual property holding company, during which time he enforced the company's IP rights through patent litigation multiple times.[43] Goldstein now serves as a mediator, arbitrator, counsel, and expert in intellectual property matters.[44] In addition, he serves or has served in numerous national intellectual property **[*30]** law professional groups, including as President of the American Intellectual Property Law Association.[45] The experience the Court lists here is only a fraction of that listed on Goldstein's *curriculum vitae*. Goldstein clearly "possess[es] skill or knowledge greater than the average layman,"[46] and is qualified to testify as to what a reasonable and competent attorney would have considered the likely outcome, length, and cost of pursuing the underlying litigation to a complete and final end.

The Defendants also seek to exclude Goldstein's testimony on the grounds that his methodology is unreliable. First, the Defendants argue that Goldstein had no methodology at all for his opinion that a reasonable and competent patent attorney would have advised Solvay that it had a 20% chance of winning the litigation. This is incorrect.

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[37] Goldstein Rep. ¶ 2 [Doc. 1564-33].

[38] *Leathers v. Pfizer, Inc., 233 F.R.D. 687, 692 (N.D. Ga. 2006)* (quoting 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure; Evidence* § 6265 (West 1997)).

[39] ***HN4***[] "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2018).

[40] Goldstein Rep. ¶ 4.

[41] *Id.* at ¶¶ 5, 7.

[42] *Id.* at ¶ 8.

[43] *Id.* at ¶ 12.

[44] *Id.*

[45] *Id.*

[46] *Waldorf v. Shuta, 142 F.3d 601, 625 (3d Cir. 1998)* (quoting *Aloe Coal Co. v. Clark Equip. Co., 816 F.2d 110, 114 (3d Cir.1987))*.

Goldstein began his analysis by using two studies available at the time of the settlement to assess what the average outcomes were in patent cases involving a generic defendant.[47] Using these studies, it is Goldstein's opinion that on average a brand manufacturer plaintiff would have about a 25-30% chance of winning a Hatch-Waxman patent infringement case. **[*31]** [48] Goldstein then examined the merits of the underlying patent litigation in this case to determine whether Solvay's position was stronger or weaker than the average Hatch-Waxman plaintiff.[49] Goldstein found that it was weaker than the average, although not by a lot. Goldstein estimated that a reasonable and competent patent attorney would have discounted Solvay's chances of success by about 10%, meaning that it would have had between a 15-20% chance of succeeding in the underlying litigation.[50] Goldstein clearly has a methodology, even if the Defendants believe it to be a weak one.

Similarly, Goldstein's opinions on the merits, cost, and timing of the litigation are reliable enough to be put to a jury. Although the Defendants argue that his views on the law are unreliable because they are incorrect, that is something on which reasonable and competent patent attorneys can disagree. Indeed, the only people who can say with true 100% certainty what the law is are the Justices of the United States Supreme Court. Further, while using survey data and the Court's statements to estimate cost and timing are not foolproof, they are reliable enough for reasonable jurors to consider. The Defendants' **[*32]** arguments basically boil down to the fact that they disagree with Goldstein's opinions, not their reliability. Such arguments are better addressed through the traditional means of "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."[51] For these reasons, the Defendants' motion to exclude Goldstein's testimony is denied.

2. James Bruno

The Defendants also seek to exclude testimony of the Plaintiffs' expert James Bruno. In particular, the Defendants seek to exclude Bruno's opinions and testimony on the valuation of the Backup Manufacturing Agreement ("BMA") between Solvay and Par/Paddock, including whether Solvay's compensation to Par/Paddock was fair value for services or constituted a large and unjustified payment. The Court agrees, and the Plaintiffs concede, that Bruno does not offer a quantitative valuation of the BMA.[52] As such, Bruno does not and cannot offer testimony as to a specific monetary value for the BMA. To the extent that other experts assign one to the BMA based on Bruno's testimony, such testimony would be inappropriate and should be excluded.

However, the Defendants are incorrect in saying that all of Bruno's testimony **[*33]** regarding the BMA should be excluded. Although Bruno does not offer a specific monetary value to the BMA, such testimony is not necessary to show that a payment is "large and unjustified" under *Actavis*. As discussed later in this Opinion, the key inquiry in determining whether the reverse payment settlements violated the antitrust laws is whether they were entered into for the purpose of avoiding the risk of competition. Bruno's other testimony regarding the BMA, including his opinions that the BMA was out of step with industry practice and the Generics' regular business practices, is certainly relevant to answering that question.[53] Thus, while Bruno's testimony cannot support a specific, monetary valuation for the purpose of mathematically comparing the value of services, his testimony is relevant to answering what the "value" of the settlement was to the Defendants, whether its value was actually in the services provided, or in avoiding the risk of competition. On those grounds, Bruno's testimony would be helpful to the jury, and is allowed.

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[47] Goldstein Rep. ¶¶ 40-46.

[48] *Id.* at ¶ 46.

[49] *Id.* at ¶¶ 46, 53.

[50] *Id.* at ¶¶ 179-181.

[51] *Daubert, 509 U.S. at 596*.

[52] Pls.' Resp. to Defs.' Mot. to Exclude, at 13 [MDL Doc. 1616].

[53] FTC's SAMF at ¶¶ 278-81, 290-93 [FTC Doc. 689].

B. Antitrust Conspiracy

Turning now to the summary judgment motions, Actavis first moves for summary judgment on the theory that the Plaintiffs **[*34]** have failed to demonstrate that Actavis conspired to restrain trade.[54] ***HN5***[] Under the Sherman Act, *Section 1* claims and *Section 2* conspiracy to monopolize claims "require the same threshold showing — the existence of an agreement to restrain trade."[55] A written contract satisfies this requirement "only if it embodies an agreement to unlawfully restrain trade."[56]

Actavis argues that the settlement agreements do not meet this standard because "they evince no agreement or understanding by [Actavis] to 'delay its entry' in exchange for a share of Solvay's monopoly profits . . ."[57] Actavis cites a number of cases that find that the mere existence of a contract between two parties is not sufficient to establish a conspiracy between them.[58] In those cases, however, the contracts were merely *indirect* evidence of a conspiracy from which the factfinder could infer an agreement to violate the antitrust laws. Finding a conspiracy on such *Indirect* evidence raises the concern that "contractual partners would potentially be on the hook for any future conduct the other party engages in under color of the contract."[59]

But that concern is not present in cases with *direct* evidence, such as this one. ***HN6***[] "Direct evidence of a conspiracy **[*35]** 'obviates the need' for evidence that excludes the possibility of independent action."[60] In this case, the settlement agreements specifically address the conduct the Plaintiffs argue is unlawful. The parties negotiated and agreed that in exchange for dropping the patent litigation, providing some services, and delaying generic introduction until 2015, the Generics would receive compensation.[61] Whether that common objective — dropping the patent litigation in exchange for compensation — was an illegal restraint of trade is a separate question. But if it was, then the settlements are clear, direct evidence of an agreement to unlawfully restrain trade.[62] Not only is there enough evidence for a jury to find that there was an agreement, it is doubtful that a reasonable jury could find otherwise. Therefore, Actavis' motion for summary judgment on the issue of conspiracy is denied.

C. Anticompetitive Effect

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[54] *See* Actavis' Mot. for Summ. J. [FTC Doc. 625, MDL Doc. 1556].

[55] *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1576 (11th Cir. 1991)*.

[56] *Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1081 (11th Cir. 2016)*.

[57] Actavis' Mot. for Summ. J. at 13 [MDL Doc. 1556, FTC Doc. 625].

[58] *See* *Procaps, 845 F.3d at 1081* (finding that an agreement which was legal at its conception could not on its own conclusively demonstrate a conspiracy related to later unlawful conduct); *Merced Irrigation District v. Barclays Bank PLC, 165 F. Supp. 3d 122, 139-40 (S.D.N.Y. 2016)* (finding that a series of contracts in furtherance of one party's monopolization efforts could support a *Section 2* claim, but not a *Section 1* claim because there was no evidence of an agreement on the ultimate objective).

[59] *Id.*

[60] *In re Wellbutrin XL Antitrust Litig., 133 F. Supp. 3d 734, 770 (E.D. Pa. 2015)*, aff'd, *868 F.3d 132 (3d Cir. 2017)* [hereinafter *Wellbutrin Summary Judgment*].

[61] *See, e.g.*, FTC's SAMF ¶¶ 174-82 [FTC Doc. 689].

[62] *Wellbutrin Summary Judgment, 133 F. Supp. 3d at 770* (finding settlement agreement to be direct evidence of conspiracy where manufacturer was involved in settlement negotiations, provided sublicenses, and waived its right to launch an authorized generic).

Having disposed of Actavis' conspiracy argument, the Court now turns to what has been the central issue in this case all along: whether the reverse settlement agreements were unlawful.[63] ***HN7***[] The antitrust laws prohibit conduct that is "unreasonable and anticompetitive." **[*36]** [64] "A restraint is unreasonable if it has an adverse impact on competition and cannot be justified as a procompetitive measure."[65] Usually this is determined by balancing the effects under the test known as the "rule of reason." "[T]he rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a procompetitive benefit or justification."[66] Sometimes, however, conduct is so blatantly anticompetitive that courts have found it to be illegal *per se*.[67]

When this case was before the Supreme Court on appeal, the FTC and the Defendants took starkly opposing views on the question of the settlements' effect on competition. The Defendants argued that the settlements were not anticompetitive because they did not delay generic entry past the life of the '894 patent. In other words, as long as the '894 patent would have independently blocked generic entry, the settlements could not possibly be anticompetitive. If anything, the settlements should be considered procompetitive by allowing entry earlier than the expiration of patented exclusivity. The FTC, by contrast, took the view that reverse payment settlements **[*37]** are by their very definition anticompetitive, and should be subject to the per se rule of illegality, because they explicitly and openly involve sharing the profits of a monopoly to buy off competitors and delay generic entry in order to restrict competition.

The Supreme Court took a middle road between these two extremes. While recognizing that a valid patent certainly would have excluded generics from the market, the Court noted that "an invalidated patent carries with it no such right. And even a valid patent confers no right to exclude products or processes that do not actually infringe."[68] Thus, the existence of a patent does not necessarily say anything about whether competition was restricted.

At the same time, the Court said abandoning the rule of reason in favor of the FTC's *per se* approach was not appropriate, because "the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification."[69] Instead, the Court held that when it comes to scrutinizing reverse **[*38]** payment settlements, the "FTC must prove its case as in other rule-of-reason cases."

The parties disagree about what constitutes an anticompetitive harm and what the Plaintiffs must demonstrate to prove it. The Defendants argue that the relevant anticompetitive harm is an *actual* harm to consumers in the form of higher prices through the delay of generic entry into the market. Thus, the Defendants argue the Plaintiffs must show that the settlements *actually* caused a delay in the sale of generic versions of AndroGel.[70] But as the FTC

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[63] This is also why this case is different in that there is direct evidence of an agreement to restrain trade. Unlike other cases, where it is "rare. . .that a plaintiff can establish a conspiracy by showing an explicit agreement," *Gulf States Reorganization Group, Inc. v. Nucor Corp., 822 F. Supp. 2d 1201, 1218 (N.D. Al. 2011)*, the parties here explicitly and openly agreed to the course of conduct. The real question is whether that conduct was illegal.

[64] *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*.

[65] *Seagood, 924 F.2d at 1569*.

[66] *Id.* (citing *Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564, 571 (5th Cir. 1978))*.

[67] *Id. at 1567* ("Some violations of *section 1*, however, are illegal *per se* because of their pernicious effect on competition and lack of any redeeming virtue . . .") (quotations omitted).

[68] *Actavis, 570 U.S. at 147* (emphasis original).

[69] *Id. at 159*.

points out, ***HN8***[] the Supreme Court made clear in *Actavis* that avoiding even the possibility of competition, however small, is itself an antitrust violation.[71] Rather than having to litigate the merits of any underlying patent suits or establish a theory of causation, the Supreme Court said that courts can look to the "size of the payment . . . [to] be able to assess its likely anticompetitive effects . . . ."[72] Where the size of a reverse payment "reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation **[*39]** or a finding of noninfringement."[73] But where a payment is "large and unjustified" by these traditional settlement concerns, it is likely directed toward avoiding the risk of competition. Thus, if the settlement payments are shown to be larger than what could reasonably be expected to cover such traditional settlement concerns as future litigation costs or the value of services rendered, the Plaintiffs will have satisfied their burden in showing that the settlements violated the antitrust laws.[74]

In this case, the Defendants entered into two separate settlement agreements.[75] The first, between Solvay and Actavis, provided that Solvay would drop its patent claims against Actavis and pay Actavis 60 to 70% of AndroGel's profits in exchange for co-promoting AndroGel and delaying generic entry until 2015.[76] The second, between Solvay, Paddock, and Par, likewise had Solvay drop its patent claims and pay $12 million to Par per year in exchange for a delay in generic entry until 2015, as well as co-promotion and manufacturing help from Paddock and Par.[77] Clearly, Solvay agreed to pay the Generics significant sums of money. The only **[*40]** remaining question, therefore, is whether these payments were "large" relative to the services provided or the cost of avoided litigation.

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[70] *See* Defs.' Mot. for Summ. J., at 5-9. *See also* Solvay's Mot. for Summ. J. as to the Par/Paddock Settlement, at 19-27 [FTC Doc. 621, MDL Doc. 1551]; and Par/Paddock's Mot. for Summ. J., at 23-24 [MDL Doc. 1559].

[71] *Actavis, 570 U.S. at 157* ("The owner of a particularly valuable patent might contend, of course, that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm."). Candidly, it seems unlikely that many reverse payments will survive such scrutiny. Virtually all settlements are, to some extent, designed to avoid the risk of competition. *See also* *id. at 173* (Roberts, C.J. dissenting) (Under the majority's opinion, "taking away any *chance* that a patent will be *invalidated* is itself an antitrust problem . . . .") (emphasis in original).

[72] *Id. at 158*.

[73] *Id. at 156*.

[74] *See* *In re Lipitor Antitrust Litigation, 868 F.3d 231, 251-52 (3d Cir. 2017)* (articulating a similar standard at the motion to dismiss stage). Solvay argues that this amounts to a "quick look" test, which the Supreme Court expressly rejected in *Actavis, 570 U.S. at 158-59*, because all the FTC has to do is show that Solvay made a reverse payment. See Solvay Reply in Supp. of Mot. for Summ. J., at 9 [FTC Doc. 681]. But under this standard, the FTC has to prove much more than the simple fact that a reverse payment occurred; it also has to prove that the payment was "large" relative to traditional settlement concerns. *See* *In re K-Dur Antitrust Litig., No. 01CV1652SRCCLW, 2016 U.S. Dist. LEXIS 22982, 2016 WL 755623, at *12 (D.N.J. Feb. 25, 2016)* ("the burden must be on Plaintiffs to show that the settlement delayed the generic company's entry onto the market, that the brand-name company paid the generic company consideration of some kind, and that the consideration exchanged in the settlement exceeded the estimated cost of litigation and the costs of other services and products, in order to establish a prima facie case.").

[75] The two settlements actually contained multiple agreements within them. For example, the Solvay-Actavis settlement included three agreements: a Final Settlement and Release Agreement, a Patent License Agreement, and a Co-Promotion Agreement. FTC's SAMF ¶ 172 [FTC Doc. 689]. The parties do not argue that these should be considered separately, so for simplicity's sake, the Court will refer to the constituent agreements collectively, unless otherwise noted.

[76] FTC's SAMF ¶¶ 178-79, 181-82 [FTC Doc. 689]. Beginning at 60% in 2006, Actavis' share of AndroGel's profits was to increase over time to 70% by 2012. *Id.* at ¶181.

[77] *Id.* at ¶¶ 307, 308

According to the Plaintiffs, Solvay determined that it would be much better off if the Generics delayed entering the market until 2015.[78] However, Solvay also figured out that the Generics would see a loss in value of generic entry compared to continuing the litigation if entry was delayed that long.[79] This made it unlikely that the Generics would agree to such a settlement without added incentives.[80] Consequently, Solvay offered the Co-Promotion Agreements ("CPAs") and Backup Manufacturing Agreement ("BMA") in order to entice the Generics to settle their claims.

The Plaintiffs present significant evidence from the negotiation of the settlements to suggest that the services were merely an afterthought to the Defendants, the proverbial lipstick on the pig that was the delay in generic entry.[81] But even if taken at face value, the Plaintiffs' experts opine that Solvay vastly overpaid for the services it was receiving.[82] The Plaintiffs' experts also will testify that the side agreements did not make much business sense on their own.[83]

[*41] The Defendants respond in two ways. First, they argue that the FTC failed to show that the settlements *actually* delayed entry.[84] That may well be true, but that is not what the FTC needs to prove in order to show an antitrust harm. As discussed above, the FTC only needs to prove that the Defendants entered into the settlements in order to avoid the risk of a competitive market.

The Defendants' second argument focuses only on Solvay's settlement with Par and Paddock. The Defendants argue that the Plaintiffs have failed to show that the Par/Paddock settlement was "large and unjustified" because the Plaintiffs did not supply their own valuation of some of the services in those contracts. While the Plaintiffs' expert valued the CPA between Solvay and Par/Paddock, the Defendants point out that the Plaintiffs' expert never quantitatively valued the BMA, which the Defendants argue must be considered jointly with the CPA. Without their own valuation of the BMA, the Plaintiffs must rely on the defense expert's valuation of the CPA in order to show that the agreements were out of step with the value of the services provided. This, the Defendants argue, inappropriately shifts the burden onto them.

However, ***HN9***[] comparative **[*42]** valuations of services are not a *necessary* requirement to show that a reverse payment is "large and unjustified." Helpful, certainly, but not necessary. The size of the payment is merely the Supreme Court's proxy for reaching the ultimate question: whether the agreement was entered into for the purpose of avoiding the risk of competition. If a settlement was agreed to for that purpose, it is "large and unjustified."

As discussed above, the Plaintiffs have provided evidence to suggest that the BMA and CPA in the Par/Paddock settlement were merely vehicles to facilitate payment to the Generics for delaying entry. In addition to the size of the settlement — $12 million per year — the Plaintiffs' experts opine that the BMA was out of step with industry practice and the Generics' regular business practices.[85] In particular, the Plaintiffs' experts criticize the loose oversight over Paddock, the lack of any assurance that Paddock could meet Solvay's manufacturing needs, Solvay's inability under the contract to cancel if Paddock did not meet its manufacturing needs, and the fact that Paddock was unable to manufacture AndroGel for the vast majority of the agreement's term.[86] In addition, there **[*43]** is evidence that

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[78] *See* FTC's Resp. to Defs.' Mot. for Summ. J., at 8 [FTC Doc. 657].

[79] *Id.*

[80] *Id.*

[81] *See, e.g.*, FTC's SAMF at ¶¶ 88, 100, 109, 133-34 [FTC Doc. 689].

[82] Id. at ¶ 231.

[83] *Id.* at ¶¶ 232-34.

[84] Solvay's Reply in Support of its Mot. for Summ. J., at 3 [FTC Doc. 681].

[85] FTC's SAMF at ¶¶ 278-81, 290-93 [FTC Doc. 689].

the Defendants agreed to the reverse payment amount before negotiating the specifics of any services Par/Paddock were going to render.[87] A reasonable jury could infer from such evidence that the BMA and CPA were merely post-hoc justifications when the true purpose of the settlement was to avoid the risk of competition. This evidence is enough to shift the burden to the Defendants to justify the payments as being procompetitive.

Solvay's counsel suggested at oral argument that one way the Defendants plan to justify the settlements as procompetitive is to argue that the patents were valid and infringed; in other words, the settlements were procompetitive because they allowed generic entry earlier than the patent would have allowed. There are two ways to make this argument. One way would be to provide evidence that shows what Solvay *thought* at the time about the strength of its patents. The other is to argue that Solvay would have won the underlying patent litigation.

While the former is acceptable, the latter is problematic for two reasons. First, as discussed above, the actual validity of the patent is irrelevant to the question of whether the reverse payments violated **[*44]** the antitrust laws. Paying the Generics to stay out of the market for the purpose of avoiding the risk of competition is an antitrust harm, *regardless* of whether or not the patent is actually valid and infringed.[88] Put another way, even if the patent was valid and infringed, the Defendants took away the opportunity to know that for sure by settling before the end of the litigation. If they did so for the purpose of avoiding the risk that a court would find otherwise, however small a risk they considered it to be, that is an antitrust violation under *Actavis*.[89]

Second, for reasons explained more fully elsewhere in this Opinion, even if the actual validity of the patent was relevant, determining the ultimate outcome of the underlying patent litigation is both fundamentally unknowable and procedurally impossible. The underlying litigation was assigned to me. There is no one who can say how I would have ruled on the summary judgment motions, how I would have construed the claims, and whether I would have found infringement. There is no one who can say how the Federal Circuit would have ruled upon any unknowable judgment that may have been rendered. In Actavis, the Supreme Court said "it **[*45]** is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham...)."[90] I will accept the Court's invitation to "structure [this] antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences."[91] Any evidence or argument on actual outcome would be far too speculative to aid a jury in making a reasoned decision. Thus, any arguments based on the actual validity or invalidity of the patent, or about what would have happened in the underlying patent litigation, are inappropriate and will be disallowed regarding the antitrust violation question.

In sum, the Court finds that the Plaintiffs have provided enough evidence for a reasonable jury to find that, by overvaluing these side agreements in the settlement, the Defendants were able to reach agreements that left them better off than any party would have been had the Generics won **[*46]** the patent litigation. A reasonable jury could find that the settlements were structured so as to be more beneficial to everyone involved than a competitive market; everyone, that is, except the consumer. Settling for that purpose is an antitrust harm. Of course, the

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[86] *Id.* at ¶¶ 290-96.

[87] *Id.* at ¶¶ 131-33, 135, 139.

[88] *Actavis, 570 U.S. at 157* ("The owner of a particularly valuable patent might contend, of course, that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm.").

[89] *Id. at 173* (Roberts, C.J. dissenting) (Under the majority's opinion, "taking away any *chance* that a patent will be invalidated is itself an antitrust problem . . . .") (emphasis in original).

[90] *Id. at 157*.

[91] *Id. at 159-60*.

Defendants may still justify the settlements by demonstrating that the payments were for "traditional settlement considerations, such as avoided litigation costs or fair value for services,"[92] but they may not justify the payments on the grounds that the patent was valid and infringed because such an argument is irrelevant and, in any case, impossible to know without relitigating to their conclusion the underlying patent cases. I do not plan to do that. Because the Plaintiffs have shown enough to satisfy their *prima facie* burden, the Defendants' motions for summary judgment on these issues are denied.

D. Antitrust Standing

HN10[] Unlike the FTC, which only needs to prove an antitrust violation, private plaintiffs asserting a private right of action under the *Clayton Act* must also establish antitrust standing.[93] This is separate from Article III standing.[94] "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing **[*47]** requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action."[95]

HN11[] The Eleventh Circuit employs a two-prong test for antitrust standing. "First, the plaintiff must establish that it has suffered an antitrust injury."[96] This means the plaintiff must have suffered an "injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."[97] "The injury should reflect the anticompetitive effect . . . of the violation . . . ."[98] "Second, the plaintiff must be an 'efficient enforcer' of the antitrust laws."[99] The Defendants move for summary judgment only on the first prong.

In this case, the harm "that flows from that which makes the defendants' acts unlawful" — the avoidance of the risk of competition — is higher drug prices. The Private Plaintiffs must therefore prove that they suffered an injury in the form of higher drug prices because of the delay in generic entry caused by the reverse payment settlements. The Private Plaintiffs have offered, at various times, three alternative theories for why the Generics **[*48]** would have entered the market prior to 2015: (1) the Generics ultimately would have prevailed in the underlying patent litigation; (2) the Generics would have come to the market "at risk" during the patent litigation; and (3) the parties would have reached an alternative settlement with an earlier entry date than 2015.

1. Success on the Patent Merits and At-Risk Entry

During oral argument, the Private Plaintiffs disavowed the argument that they would have won the underlying patent litigation, leaving only the latter two theories to show causation. However, the Private Plaintiffs' at-risk theory of causation still ultimately depends on showing that the Generics would have won the underlying patent litigation. The

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[92] *Id. at 156*.

[93] *15 U.S.C. § 15(a)*.

[94] *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*.

[95] *Id.*

[96] *Sunbeam Television Corp. v. Nielsen Media Research, Inc., 711 F.3d 1264, 1271 (11th Cir. 2013)*.

[97] *Id.* at n.16 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*).

[98] *Brunswick, 429 U.S. at 489*.

[99] *Sunbeam, 711 F.3d at 1271*.

Wellbutrin district court stated this point clearly. "The existence of a valid and uninfringed patent would interfere with the plaintiffs' chain of causation: a valid patent independently preclude[s] competition apart from any agreement and an 'at risk' launch is unlawful absent a later finding of patent invalidity or non-infringement."[100] In other words, if the patent was valid, any at-risk launch would have been unlawful if it infringed on the patent, and the law will not allow **[*49]** the Private Plaintiffs to use illegal behavior as a link in their chain of causation.[101] At least three other courts have reached similar results.[102] In order to show that the Generics could have successfully — i.e., legally — launched at-risk, the Private Plaintiffs would therefore need to show that the patent would ultimately have been found either invalid or uninfringed in the underlying patent litigation.

This raises again the central problem raised by *Actavis*: how to determine what the outcome of the underlying patent litigation would have been in a way that is manageable. Do the parties need to accomplish what Judge Carnes called the "turducken task" of litigating "a patent case within an antitrust case about the settlement of the patent case?"[103] Alternatively, can they offer experts to testify as to what would have happened in the but-for world, neatly summarized into each party's percent chance of winning?[104] Is it even possible to do either? It is the Court's opinion that it is not. At least in relation to this particular case, arguments which depend on determining what the ultimate outcome of the underlying patent litigation would have been are simply too procedurally **[*50]** burdensome and speculative to serve as valid theories of causation under *Actavis*. Consider for a moment the particularly thorny issues that would be raised were the Court to consider such a theory at trial. Would the Private Plaintiffs be allowed to make any argument that was potentially available to the Generics, or would they be limited to the arguments the Generics had actually made up to the point the parties settled? The Defendants at various points in their papers assume the latter, but the underlying litigation never came to a final, preclusive decision. It did not even reach summary judgment. Who knows what arguments may have been raised as the litigation went forward?

Further, is the outcome of the underlying litigation a question of fact or law, and who would decide what the outcome would have been — the Court or the jury? If the latter, how could a jury determine what the outcome of a bench trial would have been? Unlike the issue of an antitrust violation, a jury cannot estimate the likelihood of the Generics' success on the patent merits by simply looking to the size of the reverse payment as a proxy.[105] Instead, a jury would have to answer that question by determining **[*51]** how the judge — in this case, me — would have found on the merits. Thus, when combined with the standard of proof in this case, this means that to survive summary judgment, the Private Plaintiffs would have to provide enough evidence to show that a reasonable jury could find it more likely than not that a judge would have found it more likely than not that the Generics did not infringe or that the '894 patent was invalid.[106] On top of that, a jury would have to determine how the judge would have decided various legal issues, including claim construction and summary judgment. If that sounds ridiculously unwieldy, that's because it is. And even if a jury could comprehend that standard, how would the inevitable appeal be handled? Would the case be split, with the antitrust issues going to the Eleventh Circuit, but the patent issues

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[100] *Wellbutrin Summary Judgment, 133 F. Supp. 3d at 764* (quotations omitted).

[101] *Id. at 765* ("Where a regulation—such as patent law—precludes competition, that regulation cuts off the chain of causation.").

[102] See In re Nexium (*Esomeprazole) Antitrust Litig., 842 F.3d 34, 63 (1st Cir. 2016)* (stating that at-risk entry theories ultimately depend on the outcome of the patent litigation); *In re Wellbutrin, 868 F.3d 132, 165 (3d Cir. 2017)* [hereinafter *Wellbutrin Appeal*] (same); *Apotex, Inc. v. Cephalon, Inc., 255 F. Supp. 3d 604, 2017 WL 2473148, at *8 (E.D. Pa. 2017)* (same).

[103] *FTC v. Watson, 677 F.3d at 1315*.

[104] *See, e.g., Wellbutrin Appeal, 868 F.3d at 169* (finding that plaintiffs could not show generics would have won where expert testified they only had a 20% chance of winning).

[105] For a discussion of why the size of the reverse payment does not serve well as a proxy for what the parties thought of the merits, *see Wellbutrin Appeal, 868 F.3d at 167-69*.

[106] *Id. at 169* (using the preponderance of the evidence standard with regard to the patent merits).

going to the Federal Circuit? Clearly, actually litigating the underlying merits would be a procedural and administrative nightmare.

But let us assume for a moment that the procedural issues could somehow be worked out. At least with regard to this case, it is impossible to say what the court would have actually done in the underlying case. Any experts who testify otherwise, **[*52]** like the expert relied upon in *Wellbutrin*,[107] are coming up with probabilities out of whole cloth. Unlike the antitrust issues, where we can assume that the parties would have acted in their best economic interest, such assumptions cannot necessarily be made about courts and juries. One court is not the same as another. Much of a patent case depends on how a claim is construed, and no one can say how I would have construed the claims at issue. Nor can one simply estimate what would have happened based on other cases. Every patent case is inherently different, with numerous variable affecting the outcome. And the issue here is not what would have happened in a generic case, but what would have happened in *this* case.

By contrast, most of the cases which have considered this question and decided otherwise have differed from this case in at least one of two ways. First, at least two of those cases relied upon what this Court views was an improper causation standard, finding that the plaintiffs only needed to show that the generics *could* have won, not that they *would* have won.[108] Obviously it is much easier to provide substantive proof of what could have happened as opposed to what would have **[*53]** happened. Second, the experts offering testimony in those cases had at least some concrete outcome in the underlying litigation on which to base their opinions. For example, in the *Lidoderm* litigation, the defendants had actually gone to trial on the case, but settled before the judge issued his opinion.[109] Thus, the expert was able to rely on statements made by the judge, as well as his claim construction order.[110] And in *Wellbutrin*, where there were two underlying patent suits, the court in one of them had also entered claim construction and summary judgment orders (the plaintiffs did not argue the generic could have won the other).[111] In this case, however, the Court never entered a claim construction or summary judgment order in the underlying patent litigation in this case, let alone actually tried the issues. Any opinion that would purport to state how a particular piece of litigation would turn out without any evidence from the court in question on how it would rule can only be characterized as pure speculation. Such attenuated evidence cannot possibly serve as the basis of a reasonable decision by a jury.

Although this eliminates two of the Private Plaintiffs' theories of causation, as well as a possible procompetitive justification for the settlements, the Court feels it is justified in light of *Actavis*, the other theories available to the parties, and the desire for a logical congruency of outcome. First, as noted earlier, Justice Breyer explicitly states that:

> ***HN12***[] [a]s in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every

[107] *Wellbutrin Appeal, 868 F.3d at 169*.

[108] *See* *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. CV 14-MD-02503, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *14 (D. Mass. Jan. 25, 2018)*; **[*54]** *United Food & Commercial Workers Local 1776 & Participating Employers Health & Welfare Fund v. Teikoku Pharma USA, Inc. (Lidoderm), 296 F. Supp. 3d 1142, 2017 WL 50682533, at *5 (N.D. Cal. 2017)*. The Court views this standard as inappropriate because evidence that the Generics *could* have won gets us no closer than we are now to answering the question of whether the Generics *would* have been able to enter the market in a but-for world, or if a valid patent *would* have prevented them.

[109] *Lidoderm, 74 F. Supp. 3d 1052, 1063 (N.D. Cal. 2014)*.

[110] *Lidoderm, 296 F. Supp. 3d 1142, 2017 WL 50682533, at *28-29 (N.D. Cal. 2017)*.

[111] *Wellbutrin Summary Judgment, 133 F. Supp. 3d at 766-67*.

possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences.[112]

Admittedly, Justice Breyer was speaking only in the context of an antitrust violation, not causation. But his concern for the ability of trial courts to manage the cases before them extends here.

Second, not all theories of causation are now out of bounds for the Private Plaintiffs. As discussed in more detail below, they still have the ability to show that the Defendants would have reached alternative, legal **[*55]** settlements that would have allowed for earlier generic entry without the reverse payments. Indeed, this theory is less attenuated than any theory based on the outcome of the underlying patent litigation because a factfinder can rely on the assumption that the parties are economic actors who would have done what was in their best financial interest.

Lastly, precluding such a basis of causation avoids potentially inconsistent outcomes. As discussed above, the FTC does not need to prove causation to win its case. The Supreme Court was clear, for better or worse, that it merely needs to prove that the Defendants entered into the settlements for the purpose of avoiding the risk, however small, of competition. Consider the incongruity, then, if the FTC should win its case on those grounds, while the Private Plaintiffs lose because the Defendants are able to show the patent would have been declared valid and infringed. How can the Defendants both have a valid patent, and commit an antitrust violation? Such an outcome makes no sense.

The Court recognizes that this solution is not the most appetizing, but it benefits from the sheer distastefulness of the other options available. To quote Churchill, **[*56]** "[i]t has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time."[113] The same is true here. The Court can simply see no way of entertaining arguments that purport to say what the outcome would have been in the underlying patent litigation without relying on wholly speculative evidence or untying a Gordian knot of procedural problems. With that in mind, it is the Court's opinion that such arguments are simply unworkable, and should not be considered further in this litigation.

2. Alternative Settlement Scenario

The Private Plaintiffs' remaining causation theory is that but-for the reverse payment the Defendants would have come to an alternative, legal settlement that would have allowed for generic entry earlier than 2015. In Actavis, the Supreme Court endorsed patent litigation settlements that do not involve reverse payments.[114] The Defendants argue that this alternative settlement theory is ultimately dependent on the outcome of the patent merits because "if the '894 patent was valid and infringed, then Plaintiffs are complaining about the inability to buy an *infringing* product."[115]

This argument is unpersuasive. Unlike the at-risk theory **[*57]** of causation, the Private Plaintiffs are not arguing that they would have done something illegal. Instead, their theory is that Solvay, faced with the uncertain prospect of continuing the litigation and acting in its economic best interest, still would have granted the Generics a license to enter the market before the expiration of the patent. Without a payment, however, the Generics, if confident in their chances at trial and on appeal, would have required an earlier entry date than 2015, the entry date under the actual reverse settlement. Using leverage to negotiate an earlier settlement date is obviously legal. Further, focusing upon

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[112] *Actavis, 570 U.S. at 159-60*.

[113] 444 Parl Deb HC (5th ser.) (1947) col. 207.

[114] *Actavis, 570 U.S. at 158* (Defendants "may, as in other industries, settle in other ways, for example, by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point.").

[115] Solvay's Mot. for Summ. J., at 8 [Doc. 1566-1].

the difference between 2015 and a hypothetical earlier entry date results in the type of injury intended to be prevented by the antitrust laws as interpreted by the Supreme Court in *Actavis*. If the Private Plaintiffs can show that, but-for an illegal reverse payment intended to avoid the risk of a competitive market place, the Generics would have entered earlier, they will have shown they have suffered an antitrust injury.

Other courts have endorsed this approach. In *Wellbutrin*, the district court accepted the plausibility of an alternative settlement **[*58]** scenario, although it granted summary judgment to the defendants because the brand manufacturer had "expressly and unwaveringly refused to settle" without the allegedly anticompetitive provision of the actual settlement.[116] In *Lidoderm*, the court also found that the alternative settlement theory was cognizable, and found there to be sufficient evidence to submit the issue to a jury.[117] And in *Solodyn*, the district court also allowed the plaintiffs to proceed on an alternative settlement theory.[118]

In order to prove this theory, of course, the Private Plaintiffs must have evidence that an alternative settlement *would* have occurred in the but-for world. To do so, the Private Plaintiffs offer three expert opinions, as well as some direct evidence. The first, that of Jack Goldstein, thoroughly evaluates the merits of the underlying patent litigation, comparing it to the average patent case, and concludes that a reasonable and competent attorney would have advised Solvay and the Generics that Solvay had about a 20% chance of winning, if not less.[119]

Independently of Goldstein, the Private Plaintiffs' other two experts, Dr. Leffler and Prof. Elhauge, each reach their own conclusions on what the Defendants **[*59]** considered their chances to be.[120] Dr. Leffler looked to the terms of the actual settlement, and concluded that Solvay likely viewed its chances of winning to be at about 33%.[121] Likewise, Prof. Elhauge looked to the actual terms of the settlement agreement and determined that it would only have been economically rational for Solvay to agree to the actual settlements at issue if it believed its chances of winning were at best 48.8%.[122] This is consistent with the "Project Tulip" evidence which shows that Solvay's executives crafted the settlement with Actavis around a 50% chance of winning the patent litigation.[123]

With these expectations in mind, Dr. Leffler and Prof. Elhauge each agree that it would have been economically rational for Solvay to settle, even without a reverse payment. Using Goldstein's estimate of Solvay's chance of winning the litigation, Dr. Leffler concludes that the Defendants would have agreed to an alternative settlement that allowed for generic entry on January 1, 2008, while Prof. Elhauge concludes the Generics would have entered on May 22, 2009.[124] And using his own estimate of Solvay's belief about the strength of the patent, based upon the actual settlement, Dr. Leffler **[*60]** concludes that the Generics would have entered on October 1, 2010.[125] Under all of these scenarios, the Generics would have entered the market earlier than 2015.

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[116] *Wellbutrin Summary Judgment, 133 F. Supp. 3d at 757*. On appeal, the Third Circuit agreed. *Wellbutrin Appeal, 868 F.3d at 167 & n.57*.

[117] *Lidoderm, 296 F. Supp. 3d 1142, 2017 WL 5068533, at *10-13*.

[118] *Solodyn, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *21-23*.

[119] Goldstein Rep. ¶¶ 181, 193.

[120] The Defendants do not move to exclude either Dr. Leffler or Prof. Elhauge.

[121] Leffler Rep. ¶ 83 [Doc. 1564-22].

[122] Elhauge Rep. ¶ 149 [Doc. 1564-31].

[123] Private Pls.' SAMF ¶ 49 [Doc. 1598].

[124] *Id.* at ¶¶ 15, 26.

[125] *Id.* at ¶ 14.

The Defendants argue that the Private Plaintiffs' evidence is not sufficient because they do not have actual, direct evidence that the Defendants ever negotiated a different date.[126] "Requiring such evidence, however, would be an almost impossible standard to require of Plaintiffs, given that this is a but-for scenario."[127] "Because this case is set in a but-for world, it is not surprising that no evidence shows that defendants were contemplating anything other than the actual settlement."[128] If Solvay and the Generics "were acting unlawfully to eliminate competition throughout their settlement negotiations, then it is unreasonable to expect a paper trail signifying rational, lawful business choices."[129] Any criticism the Defendants have of the experts' methodologies or conclusions are best handled through cross-examination and the production of contrary evidence.

The Defendants also mistakenly argue that Dr. Leffler's and Prof. Elhauge's models assume that a reverse payment always causes delay. Their models assume nothing of the sort. **[*61]** Rather, both experts use their experience and knowledge in the field to conclude that reverse payments cause delay, and they confirm that conclusion in their models addressing the specific settlement at issue in this case.

Indeed, such a conclusion is economically logical, especially at the causation stage, in which the Private Plaintiffs will have already proven that the purpose of the reverse payment was to avoid the risk of competition. It would make no sense for Solvay to pay the Generics tens of millions of dollars if it could get the Generics to enter on the same date without paying them all of that money. Nor would it make sense for the Generics to agree to delay entry for free if they could receive tens of millions of dollars to do the same thing. Solvay paid the Generics a lot of money for something, and if it was not for services or saved litigation costs, it is logical to conclude it was for delay.[130]

Lastly, Par/Paddock argue that even if the Private Plaintiffs prove their case as to the Actavis settlement, they cannot show causation regarding Solvay's settlement with Par/Paddock because Par/Paddock could not have entered before Actavis did.[131] But the fact that Actavis **[*62]** would have had to agree to a settlement before Par/Paddock could have does not vitiate causation, it merely adds another step. If the Private Plaintiffs can show that Solvay and Actavis would have settled earlier without a reverse payment, then they might also be able to show that Par/Paddock would have done so as well. And for all the reasons discussed above regarding the Actavis settlement, the Private Plaintiffs have produced evidence that indeed Par/Paddock and Solvay also would have settled earlier. For these reasons, the Court finds that the Private Plaintiffs have provided enough evidence for an alternative settlement theory of causation to survive summary judgment.

3. Lack of Injury Regarding AndroGel 1.62%

The final antitrust injury related argument involves AndroGel 1.62%. All of the Private Plaintiffs in this case are seeking damages regarding the original AndroGel formula, AndroGel 1%. However, one group of plaintiffs — the Retailers — is also seeking damages related to purchases of a newer formulation, AndroGel 1.62%.[132]

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[126] Solvay's Mot. for Summ. J., at 33-34 [MDL Doc. 1566].

[127] *Solodyn, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *21*.

[128] *Lidoderm, 296 F. Supp. 3d 1142, 2017 WL 5068533, at *34*.

[129] *Solodyn, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *21*.

[130] Other courts have come to the same conclusion. *See, e.g., In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 752 (E.D. Pa. 2014)* ("One can logically infer that, all else equal, with a [reverse payment], a generic would be willing to agree to a later entry date than it would otherwise agree to in order to settle a patent-infringement case.").

[131] Par/Paddock's Mot. for Summ. J., at 16-18 [MDL Doc. 1559].

[132] AndroGel 1.62% was developed in order to increase the ease of application and reduce drying time, thereby increasing patient satisfaction. *See* Solvay's Mot. for Summ. J., at 5 [MDL Doc. 1552].

AndroGel 1.62% was not introduced until 2011, five years after the challenged settlements.[133] It was developed in order to improve upon AndroGel 1%, namely **[*63]** by increasing the ease of application and reducing drying time, thereby increasing patient satisfaction.[134] When it was introduced, AndroGel 1.62% quickly became the leading testosterone replacement therapy.[135] Even after generic versions of AndroGel 1% were introduced to the market, consumers still continued to prefer AndroGel 1.62% by a wide margin despite its significantly higher price.[136]

The Retailers argue that the settlements delayed the launch of generic AndroGel 1% long enough that Solvay could "switch the market" to AndroGel 1.62%.[137] This argument can only work under one of two theories: either Solvay engaged in an anticompetitive "product hop," or AndroGel 1.62% is essentially the same product as AndroGel 1%. The Retailers are adamant that they are not pursuing a "product hop theory," so the Court need not address it.[138] As for the latter theory, there can be no doubt that AndroGel 1.62% is a different product than AndroGel 1%. AndroGel 1.62% is covered by eight different patents that do not cover AndroGel 1%.[139] This is further supported by the fact that, if the products were the same, one would expect consumers in a competitive market place to choose the less expensive of two identical **[*64]** products. But as mentioned above, even when faced with a fully competitive market after 2015 that includes AndroGel 1.62%, and branded and generic AndroGel 1%, consumers have still chosen the significantly higher priced AndroGel 1.62% over generic AndroGel 1% by a wide margin.[140]

In essence, then, the Retailers are arguing that the alleged delay in entry of one product caused them damages by forcing them to pay higher prices for a different, better product. This is the Retailer's "shifting the market" argument, meaning that the reverse settlements gave Solvay the time to "shift the market" to AndroGel 1.62%. But ***HN13***[] courts generally presume that the introduction of new, better products is a good thing for competition. "The attempt to develop superior products is . . . an essential element of lawful competition."[141] Plus, if the '894 patent was valid, the patent itself would have given Solvay the time to "shift the market" by introducing a new product. This is further proof that "shifting the market" is not, in and of itself, a problem.[142] Instead, the proper measure of injury is and must be the comparison between like-products. Given that AndroGel 1.62% and AndroGel 1% are different products, the Retailers **[*65]** cannot claim that they were injured by purchasing AndroGel 1.62% simply because that is what consumers wanted.

E. FTC's Available Remedies

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[133] Solvay's SMF ¶ 23 [MDL Doc. 1567-2].

[134] *See* Solvay's Mot. for Summ. J., at 5 [MDL Doc. 1552].

[135] Solvay's SMF ¶¶ 27, 29-30 [MDL Doc. 1567-2].

[136] *Id.* at ¶¶ 30, 35.

[137] Retailer Pls.' Resp. to Solvay's Mot. for Summ. J., at 1 [MDL Doc. 1610]. The Retailers do not allege that the introduction of AndroGel 1.62% was itself in anyway anticompetitive.

[138] *Id.* at 5-6, 9.

[139] Solvay's SMF ¶ 25 [MDL Doc. 1567-2].

[140] Solvay's Mot. for Summ. J., at 4 [MDL Doc. 1567-1].

[141] *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 286 (2d Cir. 1979)*.

[142] It can potentially be a problem if brand name manufacturers tweak a drug and pull the older version off the shelf just as a generic is about to enter the market. This is the "product hopping" referenced above. It is problematic because it extends a manufacturer's monopoly at the expense of consumer choice. Again, however, the Retailers were clear that they were not pursuing this kind of theory. But even if they were, such an argument would have failed because Solvay never pulled AndroGel 1% off the shelf.

Should the FTC successfully prove that the reverse payment settlements were anticompetitive and violated the antitrust laws, the FTC is seeking broad equitable relief, including preventing the Defendants from entering into any reverse payment agreements in the future, as well as compulsory generic licenses for AndroGel 1.62%.[143] The Defendants argue that these remedies are far too broad, and that they would inappropriately restrain lawful conduct.

But ***HN14***[] federal courts have extensive authority to order equitable relief in antitrust cases.[144] The goal of an equitable antitrust suit is not to simply punish past behavior, "nor is it merely to end specific illegal practices."[145] The goal is to "effectively pry open to competition a market that has been closed by defendants' illegal restraints."[146] In other words, the goal is to prevent anticompetitive activity in the future, and the courts have a wide range of means at their disposal to do so.[147] "[I]t is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed."[148] Sometimes, **[*66]** this may even mean that otherwise legal activity may have to be enjoined.[149] "The standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct."[150] Because the appropriate remedy fundamentally depends on the nature and scope of any wrongful conduct, it is premature to determine what may or may not be an appropriate remedy at this stage in the litigation, where there has not yet been a decision on liability.

IV. Conclusion

For the reasons stated above, Solvay's Motion for Summary Judgment on the FTC's Claims [FTC Doc. 620] is DENIED, Solvay's Motion for Summary Judgment as to the Par/Paddock Settlement [FTC Doc. 621, MDL Doc. 1551] is DENIED, Actavis and Actavis Holdco's Motion for Summary Judgment [FTC Doc. 625, MDL Doc. 1556] is DENIED, Solvay's Motion for Summary Judgment for Lack of Antitrust Injury Against the Private Plaintiffs [MDL Doc. 1550] is DENIED, Solvay's Motion for Summary Judgment as to Retailer's Damages Claims on AndroGel 1.62% Purchases [MDL Doc. 1552] is GRANTED, the Defendants Par and Paddock's Motion for Summary Judgment [MDL Doc. 1559] is DENIED, Actavis, Inc. **[*67]** and Solvay's Motion to Exclude Plaintiffs' Proposed Patent Law Expert Jack C. Goldstein, Esq. [FTC Doc. 622, MDL Doc. 1553] is DENIED, and Solvay, Par, and Paddock's Motion to Exclude in Part Plaintiffs' Expert James R. Bruno [FTC Doc. 630, MDL Doc. 1562] is GRANTED in part and DENIED in part.

SO ORDERED, this 14 day of June, 2018.p

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[143] The FTC abandoned any damages claims it had when it applied for certiorari with the Supreme Court. *See* Petition for Writ of Certiorari, *FTC v. Watson Pharmaceuticals, Inc.*, 2012 WL 4750283, at *31 (U.S.) ("here the FTC seeks only declaratory and prospective injunctive relief . . . .").

[144] *Int'l Salt Co. v. United States, 332 U.S. 392, 400-01, 68 S. Ct. 12, 92 L. Ed. 20 (1947)* *abrogated by* *Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* (District Courts "are invested with large discretion to model their judgments to fit the exigencies of the particular case.").

[145] *Id. at 401*.

[146] *Id.*

[147] *Fed. Trade Comm'n v. Nat'l Lead Co., 352 U.S. 419, 430, 77 S. Ct. 502, 1 L. Ed. 2d 438 (1957)* (Courts are "obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices.").

[148] *Int'l Salt Co., 332 U.S. at 400*.

[149] *Nat'l Lead Co., 352 U.S. at 430* ("...decrees often suppress a lawful device when it is used to carry out an unlawful purpose.").

[150] *Nat'l Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 698, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*.

/s/ Thomas W. Thrash

THOMAS W. THRASH, JR.

United States District Judge

Xitronix Corp. v. KLA-Tencor Corp.

United States Court of Appeals for the Federal Circuit

June 15, 2018, Decided

2016-2746

Reporter
892 F.3d 1194 *; 2018 U.S. App. LEXIS 16203 **; 127 U.S.P.Q.2D (BNA) 1026 ***; 2018-1 Trade Cas. (CCH) P80,414; 2018 WL 2992054

XITRONIX CORPORATION, Plaintiff-Appellant v. KLA-TENCOR CORPORATION, DBA KLA-TENCOR, INC., A DELAWARE CORPORATION, Defendant-Appellee

Prior History: [1]** Appeal from the United States District Court for the Western District of Texas in No. 1:14-cv-01113-SS, Judge Sam Sparks.

Xitronix Corp. v. KLA-Tencor Corp., 882 F.3d 1075, 2018 U.S. App. LEXIS 3173 (Fed. Cir., Feb. 9, 2018)

Core Terms

patent, patent law, regional, inequitable conduct, en banc, issue a patent, antitrust, appeals, malpractice, district court, circuits, cases, fraud issue, invalid, antitrust claim, questions, appellate jurisdiction, substantial issue, federal law, hypothetical, infringement, procuring

Counsel: MICHAEL S. TRUESDALE, Law Office of Michael S. Truesdale, PLLC, Austin, TX, filed a response to the petition for plaintiff-appellant.

AARON GABRIEL FOUNTAIN, DLA Piper US LLP, Austin, TX, filed a petition for panel rehearing and rehearing en banc for defendant-appellee. Also represented by BRIAN K. ERICKSON, JOHN GUARAGNA.

Judges: Before PROST, Chief Judge, NEWMAN, MAYER[1] LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, Circuit Judges. NEWMAN, Circuit Judge, dissents from the denial of the petition for rehearing en banc. LOURIE, Circuit Judge, dissents from the denial of the petition for rehearing en banc without opinion.

Opinion

[*1195] [*1027] ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC**

PER CURIAM.

ORDER

[1] Circuit Judge Mayer participated only in the decisionon the petition for panel rehearing.

Appellee KLA-Tencor Corporation filed a petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by appellant Xitronix Corporation. The petition for rehearing and response were first referred to the panel that heard the appeal, and thereafter, to the circuit judges who are in regular active service. A poll **[**2]** was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on June 22, 2018.

June 15, 2018

Date

Dissent by: NEWMAN

Dissent

NEWMAN, *Circuit Judge*, dissenting from denial of the petition for rehearing en banc.

I write because of the importance of this decision to the judicial structure of patent adjudication, and the future of a nationally consistent United States patent law.

In this case, the complaint states that the asserted violation of patent law may support violation of ***antitrust law***—a *Walker Process* pleading based on charges of fraud or inequitable conduct in prosecution of the patent application in the Patent and Trademark Office.[1] The three-judge panel assigned to this appeal held that the Federal Circuit does not have jurisdiction, did not reach the merits, and transferred the appeal to the Fifth Circuit.[2] This jurisdictional ruling is contrary to the statute governing the Federal Circuit, and contrary to decades of precedent and experience. **[*1196]** Nonetheless, the en banc court now declines to review this panel ruling.

I write in concern for the conflicts and uncertainties created by this unprecedented change in jurisdiction of the Federal Circuit and of the regional courts of appeal. With the panel's unsupported ruling that the Supreme Court now places patent appeals within the exclusive jurisdiction of the regional circuits when the pleading alleges that the patent issue may lead to a non-patent law violation, we should consider this change en banc.

The District Court's Decision was Limited to Patent Issues[3]

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[1] In *Walker Process Equipment, Inc. v. Food Machinery* ***[**3]*** *& Chemical Corp.*, the Supreme Court held that the use of a patent obtained through intentional fraud on the USPTO to create or preserve a monopoly may expose the patent holder to antitrust liability. *382 U.S. 172, 176-77, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. This court has summarized that: "In order to prevail on a *Walker Process* claim, the antitrust-plaintiff must show two things: first, that the antitrust-defendant obtained the patent by knowing and willful fraud on the patent office and maintained and enforced the patent with knowledge of the fraudulent procurement; and second, all the other elements necessary to establish a *Sherman Act* monopolization claim." *TransWeb, LLC v. 3M Innovative Props. Co., 812 F.3d 1295, 1306 (Fed. Cir. 2016)*.

[2] *Xitronix Corp. v. KLA-Tencor Corp., 882 F.3d 1075 (Fed. Cir. 2018)* ("Transfer Order").

The district court received a complaint for "*Walker Process* antitrust claims based on KLA's alleged fraudulent procurement of a patent." *Dist. Ct. Dec., 2016 U.S. Dist. LEXIS 115535, [WL] at *1*. Xitronix alleged that the "entire prosecution" of the patent was tainted by fraud or inequitable conduct in the Patent and Trademark Office. J.A. 54 (¶111); J.A. 63 (¶145).

The panel now rules that the appealed issues of fraud and inequitable conduct in obtaining the patent do "not present a substantial issue of patent law," *Transfer Order, 882 F.3d at 1078*, and therefore that the jurisdiction of the Federal Circuit, *28 U.S.C. § 1295(a)(1)*, does not apply to this appeal. The panel states: "The underlying patent issue in this case, while important to the parties **[**4]** and necessary for resolution of the claims, does not present a substantial issue of patent law," and that "[s]omething more is required to raise a substantial issue of patent law sufficient to invoke our jurisdiction." *Transfer Order, 882 F.3d at 1078*. We are not told what that "[s]omething more" might be.

Neither party had questioned our appellate jurisdiction. The panel raised the question sua sponte, and now holds that a Supreme Court decision on state court malpractice jurisdiction, *Gunn v. Minton, 568 U.S. 251, 133 S. Ct.* ***[***1028]*** *1059, 185 L. Ed. 2d 72 (2013)*, removed Federal Circuit jurisdiction of *Walker Process* patent appeals.

If the issues of inequitable conduct or fraud in procuring the patent are no longer deemed to be a substantial issue of patent law, the court should speak en banc. Here, the district court reviewed the patent prosecution, including the references and other information relevant to examination for patentability; reviewed the applicant's arguments, the examiner's responses, and the examiner's reasoning in allowing the claims; and reviewed information from the concurrent infringement litigation. *Dist. Ct. Dec., 2016 U.S. Dist. LEXIS 115535, [WL] at *5-8*. The district court wrote a detailed opinion, concluding that fraud or inequitable conduct in patent prosecution had not been shown. *2016 U.S. Dist. LEXIS 115535, [WL] at *9*. This is the issue on appeal—the only **[**5]** issue. Xitronix argues on this appeal that the district court erred in its analysis and conclusion, and that the patent is invalid or permanently unenforceable.

The panel holds that patent validity and enforceability are not substantial questions of patent law, and therefore this case does not arise under the patent law. The panel removes the Federal Circuit from jurisdiction over appeals of *Walker Process* claims, and challenges Federal Circuit jurisdiction of all appeals where the complaint includes non-patent issues. This is a vast jurisdictional change for the regional circuits as well as the Federal Circuit.

The Federal Circuit Jurisdictional Statute

> *28 U.S.C. § 1295(a)(1)*. The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from a final decision of a district court . . . in any civil action arising under **[*1197]** . . . any Act of Congress relating to patents or plant variety protection.

The Supreme Court has summarized that for the purpose of "desirable uniformity [] Congress created the Court of Appeals for the Federal Circuit as an exclusive appellate court for patent cases, observing that increased uniformity would 'strengthen the United States patent system **[**6]** in such a way as to foster technological growth and industrial innovation." *Markman v. Westview Instruments, Inc., 517 U.S. 370, 390, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996)* (quoting H.R. Rep. No. 97-312, pp. 20-23 (1981)).

Precedent has construed the clause "civil action arising under . . . any Act of Congress relating to patents," for the creation of the Federal Circuit as a national court raised occasional questions of appellate jurisdiction, as the courts sought to implement the legislative purpose. Precedent considered specific circumstances as they arose: for example, when the district court action included issues in addition to patent issues and the patent issues were not

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[3] *2016 U.S. Dist. LEXIS 115535, 2016 WL 7626575 (W.D. Tex. Aug. 26, 2016)* ("Dist. Ct. Dec.").

appealed; when the patent issue arose only by counterclaim; when the patent issue arose in a contract dispute; when the patent issue arose in connection with various antitrust claims; when the patent issue arose in a state court action; when the patent issue was later removed from the complaint; when the patent issue arose in a malpractice action.

Thus, we and the Supreme Court and the regional circuits have considered the boundaries of "civil action arising under . . . any Act of Congress relating to patents," across an array of diverse circumstances. Those boundaries produced helpful guidance in special **[**7]** or complex cases. However, the present case is simple, for the issue of fraud or inequitable conduct in prosecution of the patent application, the foundation of *Walker Process* jurisprudence, is cemented in its jurisdictional path to the Federal Circuit. If that path is to be changed, such change warrants en banc action.

Supreme Court and Federal Circuit Precedent are Contravened by the Panel Decision

The Supreme Court reviewed Federal Circuit jurisdiction early in our existence, in a case where the Seventh Circuit and the Federal Circuit each "adamantly disavowed jurisdiction" and insisted that the other was the correct appellate body. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 803, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)*. In *Christianson*, a former employee of Colt asserted *Clayton Act* and *Sherman Act* violations by Colt as well as tortious interference with business relationships; the employee requested damages and injunctive and equitable relief. An antitrust allegation related to patent validity. The district court decided for the former employee on both the antitrust and tortious interference claims, and Colt appealed to the Federal Circuit. We held that we did not have jurisdiction **[***1029]** because the case did not arise under the patent law, and transferred the appeal to the **[**8]** Seventh Circuit.

The Seventh Circuit stated that the Federal Circuit was "clearly wrong," and transferred the appeal back to us. The Federal Circuit then decided the appeal "in the interests of justice," while protesting that we lacked jurisdiction. *Christianson, 486 U.S. at 806-07*. The Supreme Court then stepped in, and held that the case did not arise under the patent law, and that the appeal belonged in the Seventh Circuit. The Court observed that the phrase "arising under" the patent law "mask[ed] a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Id. at 808 n.2* **[*1198]** (quoting *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 8, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983))*.

The Court defined "arising under" patent law as requiring:

> a well-pleaded complaint [that] establishe[s] either that federal patent law create[s] the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law was a necessary element of one of the well-pleaded claims.

Id. at 809. This standard has guided ensuing jurisdictional determinations.

As applied to the case at bar, it is not disputed that patent law is a "necessary element" of the antitrust claim, for without determination that a **[**9]** patent was obtained by fraud or inequitable conduct, there can be no antitrust violation. While "a claim supported by alternative theories in the complaint may not form the basis for *§ 1338(a)* jurisdiction unless patent law is essential to each of those theories," *id. at 810*, Xitronix alleged a theory of antitrust violation based solely on patent law. And, as Xitronix states, its purpose is to invalidate the patent or render it unenforceable. However, the panel rules that in *Gunn v. Minton, 568 U.S. 251, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013)*, the Supreme Court changed Federal Circuit jurisdiction such that only the regional circuits now have jurisdiction over *Walker Process* appeals.

Gunn did not make the jurisdictional change ascribed to it. In *Gunn* the Court held that the appeal of a state law attorney malpractice case was properly in the state court, although the malpractice charge related to a patent issue. The Court observed that the patent had been invalidated ten years earlier, and described the patent aspect as "hypothetical" because whatever the attorney's malfeasance, there could be no rights in this long-dead patent. *Id. at*

261 ("No matter how the state courts resolve that hypothetical 'case within a case,' it will not change the real-world result of the prior federal **[**10]** patent litigation. Minton's patent will remain invalid.").

In this context of federal-state authority, *Gunn* discussed the requirements for federal "arising under" jurisdiction. The Court stated, "a case can 'arise under' federal law in two ways. Most directly, a case arises under federal law when federal law creates the cause of action asserted." *Id. at 257* (internal alteration omitted). Even where federal law does not create the cause of action, "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id. at 258*.

Gunn explained that the substantiality inquiry looks "to the importance of the issue to the federal system as a whole," *id. at 260*, and that when the claim "finds its origins in state rather than federal law," it must be "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id. at 258*. The Court's discussion of federal-state balance shows the ill fit between *Gunn* and the panel's application of *Gunn* to remove the jurisdiction of the Federal Circuit over the issues of **[**11]** fraud and inequitable conduct in patent prosecution when an antitrust violation is asserted in the complaint.

I agree that "[w]hile not perfectly translatable to the question before us, the[] guideposts [of *Gunn*] are helpful." *Madstad **[*1199]** Eng'g, Inc. v. USPTO, 756 F.3d 1366, 1370 (Fed. Cir. 2014)*. In *Madstad*, this court considered how adjudication of the constitutional challenge to the *America Invents Act* would affect the "balance [of] matters committed to the jurisdiction of this court and those committed to the regional circuits." *Id. at 1371*. The court stated that the "balance would be upset by placing jurisdiction over interpretations of the AIA and an assessment of its constitutional validity in the hands of **[***1030]** any circuit other than this one." *Id.* The same applies here, as the panel upsets the balance established by Congress and moves to the regional circuits the issue of fraud or inequitable conduct in the PTO.

The case at bar is not a "hypothetical 'case within a case,'" as in *Gunn, 568 U.S. at 261*. The adjudication of fraud in procuring the patent in the PTO is a substantial issue of patent law. The panel states that *Gunn* requires moving the appeal to the Fifth Circuit because in the case at bar "[t]here is no dispute over the validity of claims." *Transfer Order, 882 F.3d at 1078*. This is a puzzling statement, **[**12]** for that is the dispute: Xitronix states that a finding of fraud or inequitable conduct will "result in the '260 patent claims being rendered collaterally invalid and/or unenforceable." Reh'g Resp. Br. 9. The dispute is indeed over the validity and enforceability of the patent. The Court did not obliterate this jurisdiction of the Federal Circuit in *Gunn*'s resolution of state court malpractice jurisdiction.

I turn briefly to Federal Circuit precedent, for this court has traditionally resolved antitrust aspects of *Walker Process* appeals when raised in conjunction with patent prosecution in the PTO.

The Panel Rejects Federal Circuit Precedent

In *Nobelpharma AB v. Implant Innovations, Inc.*, the en banc court considered the question of whether Federal Circuit or regional circuit law should apply to the fraudulent "procuring or enforcing" aspect of a *Walker Process* claim. *141 F.3d 1059, 1068 (Fed. Cir. 1998)*.[4] We held that: "Whether conduct in the prosecution of a patent is sufficient to strip a patentee of its immunity from the antitrust laws is one of those issues that clearly involves our exclusive jurisdiction over patent cases." *Id. at 1068*. The en banc court further explained that "we hereby change our precedent and hold that whether conduct **[**13]** in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law." *Id.*

The panel's ruling contradicts this en banc holding; this alone requires en banc attention, for precedent may not be changed by a panel, *see South Corp. v. United States, 690 F.2d 1368, 1370 n.2 (Fed. Cir. 1982)* (en banc).

[4] This section of *Nobelpharma* was "considered and decided unanimously by an *in banc* court." *141 F.3d at 1068 n.5*.

In re Ciprofloxacin Hydrochloride Antitrust Litigation was a transfer to the Federal Circuit from the Second Circuit, because "the determination of fraud before the PTO necessarily involves a substantial question of patent law." 544 F.3d 1323, 1330 & n.8 (Fed. Cir. 2008), *abrogated on other grounds by* FTC v. Actavis, 570 U.S. 136, 146-47, 160, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013). Although there were also non-patent issues in this litigation, the Second Circuit and Federal Circuit agreed that the patent issues were substantial and that the action arose under the patent law, placing jurisdiction in the Federal Circuit.

[*1200] The panel now announces that *Nobelpharma* and *Ciprofloxacin* were rendered "invalid" by *Gunn*. Transfer Order, 882 F.3d at 1079. *Gunn*, a malpractice case on the question of state-federal authority for attorney discipline, made no such dramatic holding pertaining to patent jurisdiction, even in dictum. The panel's discard of decades of precedent requires more than silent inference from unrelated situations. **[**14]**

Other rulings on our jurisdiction are in tension with the panel's decision. In *Jang v. Boston Scientific Corporation, 767 F.3d 1334, 1337 (Fed. Cir. 2014)*, an action for breach of contract, this court was clear in its rejection of the concept that *Gunn* had broadly deprived the Federal Circuit of jurisdiction: "Here, by contrast [with *Gunn*], the disputed federal patent law issues presented by Jang's well-pleaded complaint are substantial and neither entirely backward-looking nor hypothetical. In addition to infringement, the court may be called upon to determine the extent to which validity is made relevant to the resolution of the breach-of-contract claim by the language of the contract itself." *Id. at 1337*. This court deemed patent validity a "substantial" issue of patent law and explained that appeal of the breach of contract claim was properly to the Federal Circuit:

> Permitting regional circuits to adjudicate questions of patent validity, for example, could result in inconsistent judgments between a regional circuit and the Federal Circuit, resulting in serious uncertainty for parties **[***1031]** facing similar infringement charges before district courts within that regional circuit. Maintaining Federal Circuit jurisdiction over such contractual disputes to avoid such conflicting **[**15]** rulings is important to "the federal system as a whole" and not merely "to the particular parties in the immediate suit."

Id. at 1338 (quoting *Gunn, 568 U.S. at 260*).

By further example, in *Vermont v. MPHJ Technology Investments, LLC*, this court observed that the substantial question of patent law present in a challenge to a Vermont consumer protection law was not like the malpractice issue in *Gunn*, a "'backward-looking . . . legal malpractice claim' that would be unlikely to have any 'preclusive effect' on future patent litigation." *803 F.3d 635, 646 (Fed. Cir. 2015)* (quoting *Gunn, 568 U.S. at 261, 263)*. Such distinction from *Gunn* also applies to the case at hand.

The panel's ruling directly contradicts the court's prior holdings. A contradictory ruling by the panel is improper, for "[t]his court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned *in banc*." *Newell Cos. v. Kenney Mfg. Co., 864 F.2d 757, 765 (Fed. Cir. 1988)*. In the vast number of cases that have raised non-patent issues along with patent issues, no precedent of the Supreme Court or the Federal Circuit supports the panel's ruling on the panel's facts.

The Panel Also Misconstrues Regional Circuit Jurisdictional Rulings

The panel also cites decisions of other circuits to support transfer of this **[**16]** appeal to the Fifth Circuit. None of these cases, not their holdings nor their procedural postures nor their reasoning, supports this transfer.

In re Lipitor Antitrust Litigation, 855 F.3d 126 (3d Cir. 2017), dealt with the antitrust aspects of reverse-payments between the patent owner and generic producers of the patented drug. The panel states that the retention of jurisdiction in the Third Circuit supports removal of the instant appeal from Federal Circuit jurisdiction. **[*1201]** *Transfer Order, 882 F.3d at 1079*. The *Lipitor* litigation raised several antitrust aspects unrelated to patent law. *See 855 F.3d at 146* ("Here, plaintiffs could obtain relief on their *section 2* monopolization claims by prevailing on an alternative, non-patent-law theory . . . ."). The Third Circuit distinguished this case from the Second Circuit's transfer to the Federal Circuit, stating: "But unlike the *Lipitor* and *Effexor* appeals before us, the appeal transferred from the

Second Circuit to the Federal Circuit involved stand-alone *Walker Process* claims." *Id. at 148* (referencing *In re Ciprofloxacin*). The Third Circuit observed that "*Actavis* teaches that reverse-payment antitrust claims do not present a question of patent law" and found patent law was not "necessary for relief on every theory of liability supporting an antitrust claim." *Id. at 146* (citing **[**17]** *570 U.S. at 156-58*). The court further stated that "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation." *Id. at 147* (quoting *LePage's Inc. v. 3M, 324 F.3d 141, 162 (3d Cir. 2003))*. Finding "patent-law related theories" to be but "aspects of an overall monopolistic scheme," the Third Circuit concluded that appellate jurisdiction was properly found in that court. *Id. at 147, 152*.

In contrast, here Xitronix presented no "alternative, non-patent-law theory" for its antitrust claim. *Lipitor, 855 F.3d at 146*. The only basis of Xitronix's claim was the asserted fraud or inequitable conduct in the PTO. The *Lipitor* ruling does not support divesting the Federal Circuit of jurisdiction over appeals where the potential antitrust issue necessarily turns on finding fraud or inequitable conduct in patent prosecution in the PTO.

The panel also cites a Fifth Circuit case in purported support of this jurisdictional change. In *USPPS, Ltd. v. Avery Dennison Corp., 541 F. App'x 386 (5th Cir. 2013)* the issue was breach of fiduciary duty, where a patent applicant sued its licensee and attorneys on various grounds. There was no issue of fraud or inequitable conduct in prosecution of the patent application. The appeal bounced from the Fifth Circuit to the Federal Circuit to the Supreme Court, back to the Federal Circuit, **[**18]** and then back to the Fifth Circuit, which ruled that any patent aspects were "hypothetical" because resolution of the breach of fiduciary duty question would not affect the validity or enforceability of any patent. *Id. at 389-90*. Although the panel cites this case as an example of regional circuit jurisdiction of fraud in the PTO, there was no issue of fraud in the PTO; the asserted fraud was common law **[***1032]** fraud based on contract and fiduciary relationships.

The panel further cites *MDS (Canada) Inc. v. Rad Source Technologies, Inc., 720 F.3d 833 (11th Cir. 2013)*, for the proposition that the regional circuit had jurisdiction of the appeal of a "contract claim with an underlying patent infringement issue." *Transfer Order, 882 F.3d at 1080*. In that contract dispute, the court stated that the case was for breach of a license agreement, and that the question of infringement was not substantial because the patent had expired and "resolution of this issue is unlikely to impact any future constructions of claims." *MDS, 720 F.3d at 842*. The circuit construed the contract and the licensed patents, considered the asserted breaches such as failure to pay the maintenance fees, and certified other contract issues to the Florida Supreme Court. The appeal before us is not such a complex case—the appeal turns on the issue of patent prosecution **[**19]** conduct in the PTO, for which appellate jurisdiction is in this court.

Another regional circuit case on which the panel relies is *Seed Co. Ltd. v. Westerman*, a **[*1202]** malpractice case that was appealed to the D.C. Circuit. *832 F.3d 325, 425 U.S. App. D.C. 187 (D.C. Cir. 2016)*. The asserted malpractice was the attorney's failure to successfully prosecute an application before the PTO. The panel correctly states that the D.C. Circuit had "appellate jurisdiction because the case 'involve[d] no forward looking questions about any patent's validity, but instead solely concern[ed] whether unsuccessful patent applicants can recover against their attorneys.'" *Transfer Order, 882 F.3d at 1079* (quoting *Seed, 832 F.3d at 331*). The Federal Circuit had several years earlier reviewed the patent questions in *Seed*, in an interference proceeding. As in *Gunn*, no patent rights were involved in or affected by this malpractice action. This case does not support the panel's holding that the Federal Circuit does not have jurisdiction over cases based on fraud or inequitable conduct in the PTO.

Until today, there has been stability in the jurisdictional path of *Walker Process* appeals. No precedent deprives the Federal Circuit of jurisdiction of appeals that turn on issues of fraud or inequitable conduct in patent prosecution. These **[**20]** issues are not only substantial, but because they determine patent enforceability and validity, they are fundamental.

To summarize why en banc review of this panel decision is appropriate and necessary:

1) The panel, at its own initiative, raised the question of our jurisdiction of *Walker Process* appeals. Although supplemental briefing was requested of the parties, the ramifications of this jurisdictional change were not exposed in public debate.

2) Precedent is contrary to the panel's rejection of this appeal. Neither *Gunn* nor any other precedent supports the panel's ruling that claims turning on patent invalidity and unenforceability due to fraud or inequitable conduct in patent prosecution do not "arise under" the patent law.

3) The reason for formation of the Federal Circuit as a national court was to stabilize the patent law and provide uniformity throughout the nation. Patent prosecution is a complex and specialized interaction between inventors and examiners. This ruling will require each regional circuit to review patent prosecution in the PTO, creating regional precedent and forum-shopping.

4) Appellate review of cases that arise under the patent law is our assignment and our obligation. **[**21]** The Supreme Court did not silently divest this court of the jurisdiction that was established in 1982.

If the court now wishes to remove itself from jurisdiction of cases that may involve issues in addition to patent issues, we should make this change en banc. From the court's denial of en banc rehearing, I respectfully dissent.

[Malden Transp., Inc. v. Uber Techs., Inc.](#)

United States District Court for the District of Massachusetts

June 18, 2018, Decided; June 18, 2018, Filed

Civil Action No. 16-12538-NMG; Civil Action No. 17-10142-NMG; Civil Action No. 17-10180-NMG; Civil Action No. 17-10316-NMG; Civil Action No. 16-12651-NMG; Civil Action No. 17-10586-NMG; Civil Action No. 17-10598-NMG

Reporter

321 F. Supp. 3d 174 *; 2018 U.S. Dist. LEXIS 101453 **; 2018-1 Trade Cas. (CCH) P80,421

Malden Transportation, Inc. et al., Plaintiffs, v. Uber Technologies, Inc. and Raiser, LLC, Defendants.Anoush Cab, Inc. et al., Plaintiffs, v. Uber Technologies, Inc. and Raiser, LLC, Defendants.Dot Ave Cab, Inc. et al., Plaintiffs, v. Uber Technologies, Inc. and Raiser, LLC, Defendants.Max Luc Taxi, Inc. et al., Plaintiffs, v. Uber Technologies, Inc. and Raiser, LLC, Defendants.Gill & Gill, Inc. et al., Plaintiffs, v. Uber Technologies, Inc. and Raiser, LLC, Defendants.Sycoone Taxi, Inc. et al., Plaintiffs, v. Uber Technologies, Inc. and Raiser, LLC, Defendants.Taxi Maintenance, Inc. et al., Plaintiffs, v. Uber Technologies, Inc. and Raiser, LLC, Defendants.

Prior History: *[Maiden Transp., Inc. v. Uber Techs., Inc., 2017 U.S. Dist. LEXIS 182983 (D. Mass., Oct. 5, 2017)](#)*

Core Terms

antitrust, monopolize, prices, taxi, motion to dismiss, amended complaint, allegations, costs, predatory, plaintiffs'

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For Judge Jennifer C. Boal, Mediator (1:16cv12538, 1:17cv10180, 1:17cv10316): Thomas C. O'Konski, Prince Lobel Tye LLP, Boston, MA USA.

For Anoush Cab, Inc., Arams, Inc., Ararrat, Inc., Atlantic Cab, Inc., Barlow Cab, Inc., Bedros Cab, Inc., Boylston Cab, Inc., Brigham Cab, Inc., Cleveland Cab, Inc., Diamond Cab, Inc., Elsie Cab, Inc., Fenway Taxi, Inc., G&A Cab, Inc., Jordan Cab, Inc., Jubran Cab, Inc., Kilmarnock Cab, Inc., Little Island Cab, Inc., Locust Cab, Inc., Longwood Cab, Inc., M & an Cab, Inc., M.P.E. Cab, Inc., Marbed **[**3]** Cab, Inc., Massis, Inc., Mesrob, Inc., N.E. Cab, Inc., Oriole Cab, Inc., Peterborough Cab, Inc., Queensbury Cab, Inc., Sahag, Inc., Sovereign Cab, Inc., V&A Cab, Inc., Veras, Inc., Vickys, Inc., Yellowbird Cab, Inc., Plaintiffs (1:17cv10142): Edward F. Haber, Michelle H. Blauner, Patrick J. Vallely, Thomas G. Shapiro, LEAD ATTORNEYS, Shapiro Haber & Urmy LLP, Boston, MA USA.

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Cab, Inc., Jo G Cab, Inc., M.L.J. Taxi, Inc., Plaintiffs (1:17cv10316): Daniel J. McGonagle, Paul J. Hayes, Thomas C. O'Konski, Prince Lobel Tye LLP, Boston, MA USA.

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Taxi, Inc., Makonnen Cab, Inc., Yellow Cab of Belmont, Inc., Majid, Inc., Hiram's Taxi, Inc., Joune, Inc., Hare Hare Trans., Inc., Anpaul Cab, Inc., Tabiking Express, Inc., Marcia And Everton Cab, Inc., Ricardo & Joanne Cab, Inc., Patience Taxi, Inc., Turk Trans., Inc., Nativity Cab, Inc., Rose Cab, Inc., Haama Trans, Inc., Tom's Taxi, Inc., Mera Soami, Inc., Mugal Trans., Inc., Khaveeri, Inc., F. Edel, Inc., Angereb, Inc., Tremont Street Taxi, Inc., Ganga, Inc., New Invision, Inc., K. Heyden, Inc., Brent Taxi, Inc., Iraj, Inc., Swami Ji, Inc., Geolange, Inc., Esperanta Taxi, Inc., Singh Cab, Inc., Shiva, JI & Parvati Cab, Inc., Larrouse Cab, Inc., Jave Cab, Inc., Talin Cab, Inc., Lunica, Inc., Nile Express, Inc., Smooth Rider, Inc., E. And Anne Taxi, Inc., Alen's Cab, Inc., Megan Cab, Inc., Samuel Transportation, Inc., Petit Goave Cab, Inc., Michael Cab, Inc., Absolute **[**9]** Taxi of Cambridge, Inc., Alta Taxi, Inc., Tarjan Cab, Inc., Alexandria Trans., Inc., Koshar, Inc., Rival Cab, Inc., Yhwh Sabaoth, Inc., Praise The Lord, Inc., Harvard Square Cab, Inc., Flying Carpet Cab, Inc., Mehrose, Inc., Amar Trans., Inc., Rb Cab, Inc., Croyance Cab, Inc., Promesse Cab, Inc., P.I. Cab, Inc., Homano & Carl Taxi, Inc., Fledo, Inc., J.W. Cab Inc., Pidi Cab, Inc., Godavari, Inc., St. Richard Taxi, Inc., Ruth Cab, Inc., Satkartar, Inc., Eliot Cab, Inc., Wadh Bagh Singh Cab, Inc., My Yasmina Cab, Inc., Two Girls Taxi, Inc., Papeso Cab, Inc., Zahida Trans., Inc., Yves Taxi, Inc., Yung Cab, Inc., Paloma Transportation, Inc., Martha's Trans., Inc., La Boule DE Feu, Inc., Splendide Cab, Inc., Shoopite Cab, Inc., Green Land, Inc., Tr Cab,Inc., Fedsen & Tedsen, Inc., Dieu Est Bon, Inc., Viceroy Cab, Inc., Neges Jr., Cab, Inc., Radha Swami Bias, Inc., Promise Cab, Inc., G.G.M. Cab, Inc., Pable Taxi, Inc., Brothers Cab, Inc., Kassie Cab, Inc., Jazz Taxi, Inc., B Good Cab, Inc., Ohm, Shiva & Ganesh Cab, Inc., L'Oiseau Taxi, Inc., Lysette & Jardus, Inc., Fatima Cab, Inc., Selon Dieu Cab, Inc., M. & D. Brothers, Inc., La Trinite, Inc., Lovely One, Inc., Wilvens Cab, Inc., Good **[**10]** Time Cab, Inc., Dou Dou Cab, Inc., Tara Transportation, Inc., Mgp Taxi, Inc., G. Jose Cab, Inc., Jeahanna Taxi, Inc., Natou Cab, Inc., Clerna Corp., Antonio & Franco, Inc., Guru Tegh Bhadur Cab, Inc., Stefan Turolski, Mona Cab, Inc., Eric & Maria Cab, Inc., Chris And Junior, Inc., Surprise Cab, Inc., Chenal Cab, Inc., Anh Cab, Inc., August Cab, Inc., Kartar Cab, Inc., Nimrah Trans., Inc., Jelus Cab, Inc., Elzira & Luc Cab, Inc., Bkmb, Inc., Only Believe Taxi, Inc., Nada, Inc., Manor Cab, Inc., Galehad Taxi, Inc., A. Tammy Cab, Inc., Garven's Cab, Inc., Arnold Court Taxi, Inc., Bbj Cab, Inc., Silva Cab, Inc., Gumat Cab, Inc., Briol Cab, Inc., Best is Best Cab, Inc., Mj Taxi Cab, Inc., Sami's Taxi, Inc., C.T.P. I, Inc., Era et Labora, Inc., Munny Trans., Inc., Harsh Cab, Inc., Soeg Cab, Inc., Aldine Cab, Inc., Tivy, Inc., God's Blessing Cab, Inc., Isaih Mathew, Inc., Advantage Taxi of Cambridge, Inc., Banwait Trans., Inc., Cayes II Cab, Inc., Jacquet Cab, Inc., Eben-Ezer Taxi Cab, Inc., Yoly-Carvens, Inc., Sheikh Trans., Inc., My Nathalie Cab, Inc., Red Fish Cab, Inc., Azin Taxi, Inc., Lideta Cab, Inc., Meklit Cab, Inc., P & S Taxi Corp., Robenson Taxi, Inc., Rp Excelsior, Inc., Millennium **[**11]** Taxi, Inc., Bb Taxi Express, Inc., Teja Trans., Inc., Rol & G., Inc., Love Cab, Inc., Les Gens DU Nord, Inc., Bhargo Inc., H & L Cab, Inc., Delivrance Cab, Inc., Town Taxi of Cape Cod, Inc., Kurala Trans., Inc., Tina & Nina Trans., Inc., Mava Taxi, Inc., Cambridge Cab Connection, Inc., Hernandez Transportation, Inc., Ril-Tul Cab, Inc., Khalsa Cab, Inc., Alpha Omega Cab, Inc., La Diligence, Inc., T & J Cab, Inc., Mt. Everest, Inc., U & I Corp., Jfl Cab, Inc., Dady-Phone, Inc., R. Candy Taxi, Inc., Victoria Cab, Inc., Selam Transportation, Inc., Pro-Cab, Inc., Yotille Cab, Inc., Abcd Taxi, Inc., Nkb Cab, Inc., Marcus Cab, Inc., Elpoorag, Inc., Kendra Corporation, Britney Cab, Inc., Elan Cab, Inc., Raymy, Inc., Jai Gurudev, Corporation, Dophy Taxi, Inc., Dreamers Cab,Inc., Walger, Inc., Desdunes United, Inc., Patrick Taxi, Inc., Douceur Cab, Inc., Je Crois EN Dieu, Inc., Mt. Carmelle Taxi, Inc., Randah Cab, Inc., M. Angelo Cab, Inc., Virginia Cab, Inc., Desdunes Cab, Inc., Gl Cab, Inc., Ph & Kn, Inc., Nek Fab, Inc., Ariel & Japheth, Inc., Radha Trans., Inc., Addis Cab, Inc., Jacqueline Cab, Inc., Louine Cab, Inc., Bethel Cab, Inc., Dalesha

Taxi, Inc., Gagan Taxi, Inc., Abbed Cab, Inc., **[**12]** Goh Cab, Inc., Jeremie Taxi, Inc., Charlie Cab, Inc., G And E. Cab, Inc., Zando Cab, Inc., Cyrilo Cab, Inc., Windsor Cab, Inc., S & J Inc., 116 Cab, Inc., Nahar Singh Cab, Inc., Coretta, Inc., First Street Cab, Inc., O.D.J. Taxi, Inc., Jean Baptiste, Inc., Elysse Corporation, Onkar Cab, Inc., Two Boys Cab, Inc., Krishna Krishna Trans., Inc., Mirka, Inc., El Chalday, Inc., Keshia Cab, Inc., Rock Solid & Momone, Inc., Roly Cab, Inc., Sasun Cab, Inc., Jv Taxi, Inc., Taxi Technology, Inc., An Yin PA Ta, Inc., Cleo Taxi, Inc., Farb, Inc., Enchante Taxi, Inc., Shree Ganesh Cab, Inc., Green Stripe Cab, Inc., Golden Temple Trans., Inc., Pafou Cab, Inc., Mas Taxi, Inc., Mogadishu Cab, Inc., Ahram Cab, Inc., Shani Taxi, Inc., Hosana Taxi, Inc., Jmf Cab, Inc., Yo YO Cab, Inc., Papu, Inc., Cayes Cab, Inc., You Too Cab, Inc., Renee Taxi, Inc., C.E.F. Cab, Inc., Ita Cab, Inc., Kevin Taxi, Inc., G & J Cab Inc., Anna Cab, Inc., Satnum Cab, Inc., P & P Dumerant Corp., Bay City Taxi, Inc., Eagle Taxi, Inc., Ulysse's Cab, Inc., Hawelti Cab, Inc., Krishana Trans., Inc., Tt, Inc., Cambridge Classic Cab, Inc., Aristocrats Ambiance Taxi, Inc., Jezil Cab, Inc., Lexington Taxi, Inc., Defer Cab, Inc., Elizabeth **[**13]** Cab, Inc., Demosterne, Inc., Rai Transportation, Inc., Sunset Cab, Inc., Nelcheri Cab, Inc., Taylor Taxi, Inc., Guru Trans., Inc., Paul Cab, Inc., Bainet Cab, Inc., Lele Cab, Inc., No no Cab, Inc., Anderson & Joshua Cab, Inc., Ulysse Trans. Holding, Corp., Sea Wall Taxi, Inc., Larrieux Cab, Inc., Melchisedek Cab, Inc., Raavi Trans., Inc., Zicky Cab, Inc., Mit Cab, Inc., Rios Gon Cab, Inc., Joyse Cab, Inc., Symphony Taxi, Inc., Queen Jessica Cab, Inc., Telfort Cab, Inc., Eureka Cab, Inc., P & G Cab, Inc., Naju, Inc., Red Cab of Worcester, Inc., Bibi's Cab, Inc., Central Square, Cab, Inc., Karim Cab, Inc., Giorgio's Cab, Inc., Impeccable Trans, Inc., Mark & S, Inc., Renette & Franlyn, Inc., Jane Mary Cab, Inc., Jehovah Jureh, Inc., Hanef Trans., Inc., Hare Krishna Trans., Inc., Jojo E.M. Cab, Inc., Kalkat Cab, Inc., Tristan & Vanessa Cab, Inc., Cadoux Taxi, Inc., Jeffrey & Tanisha, Inc., Abbas Cab, Inc., You And I Cab, Inc., Meshualekia, Inc., Cathul, Inc., Phatricksey Cab, Inc., Marzeneb, Inc., Binyamin Cab, Inc., Dillons Trans., Inc., Christopher's Cab, Inc., Leyna Cab, Inc., Thomas Family, Inc., Sjp Taxi, Inc., Mobarak Cab, Incorporated, Benito & Roseline Cab, Inc., De Lerebours, **[**14]** Inc., Rosamelia Inc., Reham Cab, Inc., Laracine, Inc., Pal Taxi, Inc., Msw Taxi, Inc., Kbs Cab, Inc., Roody's Cab, Inc., Gadl Cab, Inc., Mahnoor Trans., Inc., Taj Trans., Inc., Paul Paras, M And J Cab, Inc., N M R Cab, Inc., Punjab Trans., Inc., Noor Cab, Inc., Fafou Cab, Inc., Take it EZ Cab, Inc., Youssef, Inc., Deruka Taxi, Inc., C & G Leasing, Inc., Sweet Rose Trans., Inc., Sj Cab, Inc., Iqra Enterprise, Inc., Parvati Cab, Inc., E.D.R. Cab, Inc., Next Cab, Inc., Jason Cab, Inc., Crossroad Trans. Inc., Ti Lou Lou Cab, Inc., Mcg Cab, Inc., Seven Hills Taxi, Inc., Manhar, Inc., Rodney Cab, Inc., Hattie Cab, Inc., Ange & Michelle, Inc., Betru Ami Corp., Himalaya, Inc., Satlouj, Inc., Micasta Cab, Inc., Dalul, Inc., Franklin Taxi, Inc., Les-Mar Taxi, Inc., Debra Cab, Inc., Edward Noel, Inc., Bern. & Y. Cab, Inc., God is Good, Inc., Jude Cab, Inc., Yahweh Cab, Inc., Noma Cab, Inc., C.T.P. Ii, Inc., Orow, Inc., D Q Donne Cab, Inc., Benben Cab, Inc., Kripalu Trans., Inc., Beno Cab, Inc., Rebecca Cab, Inc., Radha Soami, Inc., Le Bon Berger, Inc., Nicky Trans, Inc., Baran Trans., Inc., W.L.E.J., Inc., Willky-Medgene, Inc., J & J Transportation, Inc., Cambridge Taxi, Inc., Sosthene, Inc., **[**15]** Samyr Cab, Inc., P.B. Cab, Inc., Yamuna, Inc., South Sudan Corp, Nel & Son, Inc., Inman Cab, Inc., St. Michel A, Inc., Ripert Cab, Inc., Et Cab, Inc., Hare Ram Trans., Inc., Alganes Cab, Inc., Fern, Inc., Aaa Cab, Inc., Mitachal Cab, Inc., Four J'S Cab, Inc., Grand Canyon, Inc., Zubir, Inc., The 32 Summer St. Corp., Daphne Taxi, Inc., Cecilard Transportation, Inc., Yilma Trans., Inc., Vette Taxi, Inc., Emily & Kelly Cab, Inc., Ketterle Cab, Inc., Addis Ababa, Inc., Twins Brothers Transportation, Inc., Gabrielle Cab, Inc., Loren Cab, Inc., Matelots, Inc., Mew Cab, Inc., On Y VA Taxi, Inc., Nancy Cab, Inc., Baba Nanak Cab, Inc., Carlon Trans., Inc., Plaintiffs (1:16cv12651): Christopher G. Timson, Law Offices of Christopher G. Timson, PC, Norwood, MA USA.

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For Anoush Cab, Inc., Interested Party (1:17cv10586): Edward F. Haber, Shapiro Haber & Urmy LLP, Seaport East, Two Seaport Lane, 6th Flr., Boston, MA USA.

For Taxi Maintenance, Inc., Alice's Cab, Inc., George's Cab, Inc., G&V&R Cab, Inc., Tung's Cab, Inc., Tutun Cab, Inc., Metaxia Motor, Inc., Plaintiffs (1:17cv10598): Darin M. Colucci, LEAD ATTORNEY, Colucci, Colucci & Marcus, P.C., Milton, MA USA; Brendan R. Pitts, Paul K. Flavin, Colucci, Colucci, Marcus & Flavin, P.C., Milton, MA USA.

For Anoush Cab, Inc., Interested Party (1:17cv10598): Edward F. Haber, LEAD ATTORNEY, Shapiro Haber & Urmy LLP, Seaport East, Two Seaport Lane, 6th Flr., Boston, MA USA; Brendan R. Pitts, Colucci, Colucci, Marcus & Flavin, P.C., Milton, MA USA.

Judges: Nathaniel M. Gorton, United States District Judge.

Opinion by: Nathaniel M. Gorton

Opinion

[*177] MEMORANDUM [17] & ORDER**

GORTON, J.

This case involves seven consolidated actions brought by various taxi medallion holders in the Greater Boston area ("plaintiffs"). Plaintiffs allege that Uber Technologies, Inc. and its wholly-owned subsidiary, Raiser, LLC ("Uber" or "defendant") competed unlawfully in the on-demand, ride-hail ground transportation market in and around Boston, Massachusetts. More particularly, plaintiffs complain that the subject competition 1) violates the common law and the Massachusetts Consumer Protection Act, 2) violates state and federal ***antitrust law*** and 3) amounts to a civil conspiracy and the aiding and abetting of unfair competition.

Before the Court is defendant's motion to dismiss the amended antitrust claims in the Malden, Dot Ave, Max Luc and Taxi Maintenance amended complaints (Docket No. 109).

I. Background

Uber entered the Boston market for private transportation services in 2011 and launched its UberX service in 2013. The company provides a digital tool for requesting private vehicles-for-hire by users who download Uber's free "smart phone application" ("the Uber app"). Users who open the Uber app on their mobile phones are shown a map of their location or designated **[**18]** pick-up point and the available Uber-affiliated vehicles in that vicinity.

This litigation involves seven groups of plaintiffs that represent over 800 taxi companies in the Greater Boston area. The seven complaints were filed in this district between December, 2016, and April, 2017. The Court consolidated the cases pursuant to *Fed. R. Civ. P. 42(a)(2)* in October, 2017. See *Malden Transportation, Inc. v. Uber Techs., Inc., No. CV 16-12538-NMG, 2017 WL 6759425 (D. Mass. Oct. 5, 2017)*. In December, 2017, this session ruled on Uber's consolidated motion to dismiss. See *Malden Transportation, Inc. v. Uber Techs., Inc., 286 F. Supp. 3d 264 (D. Mass. 2017)* ("Malden I"). The Court held that plaintiffs had stated claims for 1) unfair competition under the common law and the Massachusetts Consumer Protection Act, *M.G.L. c. 93A, 2*) aiding and abetting unfair competition and 3) civil conspiracy to commit unfair competition. The Court allowed the defendants' motion to dismiss as to two of Uber's founders for want of personal jurisdiction and with respect to plaintiffs' antitrust, tortious interference and civil conspiracy claims. See generally id.

After the issuance of that memorandum and order, plaintiffs amended their complaints. Four of the plaintiff groups have added additional factual allegations, which bear upon the claims of violation of state and federal **[**19]** ***antitrust law***.

Before the Court is Uber's motion to dismiss those amended antitrust claims.

II. Analysis

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim **[*178]** to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In considering the merits of a motion to dismiss, the Court may look only to the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the complaint and matters of which judicial notice can be taken. *Nollet v. Justices of Trial Court of Mass., 83 F.Supp.2d 204, 208 (D. Mass. 2000)*, aff'd, *248 F.3d 1127 (1st Cir. 2000)*. Furthermore, the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Langadinos v. Am. Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000)*. If the facts in the complaint are sufficient to state a cause of action, a motion to dismiss the complaint must be denied. See *Nollet, 83 F.Supp.2d at 208*.

Although a court must accept as true all of the factual allegations contained in a complaint, that doctrine is not applicable to legal conclusions. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Threadbare recitals of the legal elements which are supported by mere conclusory statements do not suffice to state a cause of action. Id. Accordingly, a complaint does not state a claim for relief where the well-pled facts fail to warrant an inference of any **[**20]** more than the mere possibility of misconduct. *Id. at 679*.

1. Attempt to monopolize under the Sherman Antitrust Act, *15 U.S.C. § 2* and the Massachusetts Antitrust Act, *M.G.L. c. 93 § 5*

Plaintiffs assert claims for attempt to monopolize in violation of the Sherman Antitrust Act and the Massachusetts Antitrust Act, *M.G.L. c. 93 § 5*.[1]

Plaintiffs argue that Uber has attempted to drive taxi companies out of business through the use of its allegedly predatorily priced UberX service. Defendants respond that plaintiff has not met the high burden of alleging a predatory pricing claim and has not alleged an injury to competition.

Section 2 of the Sherman Act makes it illegal to monopolize, or attempt to

> monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.

15 U.S.C. § 2.

To state a monopolization claim under *§ 2*, a plaintiff must adequately allege that defendant (1) has monopoly power in the relevant market and (2) has engaged in illicit "exclusionary practices" with "the design or effect of protecting or enhancing its monopoly position." *Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 125 (1st Cir. 2011)* (quoting *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 195 (1st Cir. 1996)* (internal citation omitted)).

One kind of exclusionary practice is the practice of "predatory pricing". In this scheme, **[**21]** a company reduces the price of its product to below cost, hoping to drive competitors out of business and then raise prices once it has achieved a monopoly position. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 584-585, n. 8, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. To succeed on a predatory pricing claim a plaintiff must demonstrate that

> the prices complained of are below an appropriate measure of its rival's costs . . . [and that the competitor had] a dangerous **[*179]** probability of recouping its investment in below-cost prices.

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[1] Neither party contends that the legal standard varies for the state law claim.

Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993).

Because an economically unsound approach by a competitor could actually benefit consumers, plaintiffs must explain with particularity "just what the arrangements were and why they plausibly constituted antitrust violations." See *Am. Steel Erectors v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 815 F.3d 43, 71 (1st Cir. 2016)* (quoting *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 65 (1st Cir. 2004))*.

Plaintiffs fail to allege facts supporting a predatory pricing claim. The new allegations do not cure the deficiencies that doomed the Malden I plaintiffs. See *Malden I, 286 F. Supp. 3d at 279-280*.

Plaintiffs do not allege that Uber's services were priced below Uber's costs. They do not "explain in detail" why Uber's conduct constituted an antitrust violation. See *Am. Steel, 815 F.3d at 71*. The second amended complaint alleges that Uber "deflated the UberX fares to below cost in order to drive out the taxi drivers." But such "threadbare recitals of a cause of action's elements, supported **[**22]** by mere conclusory statements, do not suffice" to survive the motion to dismiss stage. *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 555*).

Basic facts such as what an average or median "ride" in the Boston area costs Uber, or costs a taxi, are absent. Plaintiffs attempt to bolster the factual allegations found lacking in Malden by attaching a report from the Wall Street Journal showing that, worldwide, Uber's costs exceed its revenue. Uber's global performance, however, does not constitute an allegation as to Uber's costs in the "ride-hailing market in the City of Boston." Plaintiffs complain that they are unable to obtain Uber's pricing information without discovery because Uber is a private corporation that does not disclose such figures. But the difficulty of satisfying the pleading standard does not excuse plaintiffs from meeting that standard. See *Affinity LLC v. GfK Mediamark Research & Intelligence, LLC, No. 12-cv-1728-RJS, 2013 U.S. Dist. LEXIS 45921, 2013 WL 1189317, at *4 (S.D.N.Y. Mar. 25, 2013)*, aff'd, *547 F. App'x 54 (2d Cir. 2013)* (dismissing predatory pricing claim because plaintiff failed to plead defendant's actual costs in the relevant market).

In a similar vein, plaintiffs fail to allege facts demonstrating Uber's intent to monopolize. A plaintiff alleging an attempt to monopolize must establish "specific intent" **[**23]** to destroy competition. *Home Placement Serv., Inc. v. Providence Journal Co., 682 F.2d 274, 281 (1st Cir. 1982)* (citing *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 626, 73 S. Ct. 872, 97 L. Ed. 1277 (1953))*. Plaintiffs generally state that Uber's intent to monopolize "has been made clear" through the statements of its former CEO and its advertising materials. However, the amended complaints do not include satisfactory examples of such statements. Finally, plaintiffs argue that the UberX price itself demonstrates specific intent. That argument lacks merit. Without an unlawful intent, "increasing sales and increasing market share are normal business goals," not verboten practices. *U.S. Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 612 n.1, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977)*. Low prices are a reasonable way to achieve those goals. No specific facts in the amended complaint demonstrate that Uber intended to obtain a monopoly in the Boston ride-hailing market.

[*180] Equally important, plaintiff fails to show an injury to Boston consumers. This omission is fatal because antitrust plaintiffs must show that "defendants' actions caused an injury to competition, as distinguished from impact on themselves." *R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478, 487 (1st Cir. 1994)*. According to plaintiff's complaint, Uber's entry caused the supply in the ride-hailing market to increase and the price to diminish. Those allegations fail to demonstrate an injury to competition. See *Sullivan v. Nat'l Football League, 34 F.3d 1091, 1096 (1st Cir. 1994)*, as amended on denial of reh'g (Oct. 26, 1994) ("Anticompetitive **[**24]** effects, more commonly referred to as injury to competition or harm to the competitive process, are usually measured by a reduction in output and an increase in prices in the relevant market.") (internal quotation marks omitted) (citation omitted). A decrease in the value of Boston taxi medallions is immaterial. Plaintiffs' allegation that Uber discriminates against the poor and disabled is similarly irrelevant. The Sherman Act prohibits "attempt[s] to monopolize", not unlawful discrimination. *15 U.S.C. § 2*. See also *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (reiterating that the Sherman Act does not "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce") (quoting *Hunt v. Crumboch 325 U.S. 821, 826, 65 S. Ct. 1545, 89 L. Ed. 1954 (1945))*.

Finally, this Court finds the analysis in *Philadelphia Taxi Ass'n, Inc. v. Uber Techs., Inc., 886 F.3d 332 (3d Cir. 2018)*, applicable and persuasive. In that case, Philadelphia taxicab drivers and taxicab companies alleged that Uber's entry into the Philadelphia taxicab market violated the Sherman Act. *Id. at 336*. Just as plaintiffs do here, the Philadelphia plaintiffs argued that Uber's actions were

> illegal, predatory and led to a sharp drop in the value of taxicab medallions as well as a loss of profits.

Id.

The Third Circuit Court of Appeals ("Third Circuit") affirmed the district court's dismissal of plaintiffs' **[**25]** complaint, holding that the plaintiffs had failed 1) to state a claim for attempted monopolization or 2) to allege a legally cognizable antitrust injury. Id. The Third Circuit reasoned that Uber "bolstered competition", "operate[d] at a lower cost" and attracted taxi drivers "due to its cost efficiency and competitive advantage", but that such conduct does not constitute anticompetitive conduct violative of ***antitrust law***. *Id. at 340-41*. The same can be said here. Moreover, the Circuit found that plaintiffs failed to allege specific intent to monopolize which was significant given that Uber's strategy could "be reasonably viewed as predominantly motivated by legitimate business aims." *Id. at 341* (internal quotation marks omitted) (quoting *Times Picayune Publ'g Co. v. United States, 345 U.S. 594, 627, 73 S. Ct. 872, 97 L. Ed. 1277 (1953))*. The amended complaints here suffer from the same deficiency.

Finally, the Third Circuit observed that plaintiffs had failed to allege antitrust standing because "harm to [plaintiffs'] business does not equal harm to competition." *Id. at 344*. The same applies to the present case. Plaintiffs' amended complaints and legal theories are substantially indistinguishable from those dismissed in Philadelphia Taxi and this Court sees no reason to diverge from the well-reasoned opinion in that **[**26]** case.

ORDER

For the foregoing reasons, defendants' partial motion to dismiss the antitrust **[*181]** claims in the Malden, Dot Ave, Max Luc and Taxi Maintenance amended complaint (Docket No. 109) is **ALLOWED**.

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated June 18, 2018

End of Document

Aya Healthcare Servs. v. AMN Healthcare, Inc.

United States District Court for the Southern District of California

June 19, 2018, Decided; June 19, 2018, Filed

Case No.: 17cv205-MMA (MDD)

Reporter

2018 U.S. Dist. LEXIS 102582 *; 2018-1 Trade Cas. (CCH) P80,422; 2018 WL 3032552

AYA HEALTHCARE SERVICES, INC., AYA HEALTHCARE, INC., Plaintiffs, v. AMN HEALTHCARE, INC., AMN HEALTHCARE SERVICE, INC., AMN SERVICES, LLC, MEDEFIX, INC., and SHIFTWISE, INC., Defendants.

Prior History: *Aya Healthcare Servs. v. AMN Healthcare, 2017 U.S. Dist. LEXIS 201993 (S.D. Cal., Dec. 6, 2017)*

Core Terms

Defendants', rival, travelers, no-poaching, providers, allegations, joint venture, rule of reason, antitrust, medical-traveler, markets, employees, compete, ancillary, no-hire, subcontractor, submarkets, pool, competitors, cartel, Sherman Act, recruiters, regional, motion to dismiss, anticompetitive, barriers, prices, relevant market, solicit, courts

Counsel: **[*1]** For Aya Healthcare Services, Inc., Aya Healthcare, Inc., Plaintiffs: William A Markham, LEAD ATTORNEY, Law Offices of William Markham, P.C., San Diego, CA.

For AMN Healthcare, Inc., Defendant: Amanda Catherine Fitzsimmons, LEAD ATTORNEY, DLA Piper LLP (USA), San Diego, CA; David Henry Bamberger, LEAD ATTORNEY, PRO HAC VICE, DLA Piper LLP (US), Washington, DC; Noah A Katsell, LEAD ATTORNEY, DLA Piper LLP (US), San Diego, CA.

For AMN Healthcare Service, Inc., AMN Services, LLC., MEDEFIS, Inc., Shiftwise, Inc., Defendants: Noah A Katsell, LEAD ATTORNEY, DLA Piper LLP (US), San Diego, CA.

Judges: HON. MICHAEL M. ANELLO, United States District Judge.

Opinion by: MICHAEL M. ANELLO

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

[Doc. No. 30]

Plaintiffs Aya Healthcare Services, Inc. and Aya Healthcare, Inc. (collectively, "Plaintiffs" or "Aya") filed a Second Amended Complaint ("SAC") against Defendants AMN Healthcare, Inc., AMN Service, Inc., AMN Services, LLC, MEDEFIS, Inc., and Shiftwise, Inc. (collectively, "Defendants" or "AMN") alleging three federal antitrust claims: a *per se* claim under *Section 1* of the *Sherman Act* (*15 U.S.C. § 1*); a quick-look and/or rule of reason claim **[*2]** under *Section 1* of the Sherman Act; a claim for attempted monopolization under *Section 2* of the Sherman Act (*15 U.S.C. § 2*); and three California state law claims. *See* SAC. Defendants now move to dismiss Plaintiffs' SAC pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. *See* Doc. No. 30. Plaintiffs filed an opposition to Defendants' motion, to which Defendants replied. *See* Doc. Nos. 31, 32. The Court found the matter suitable for determination on the papers and without oral argument pursuant to *Civil Local Rule 7.1(d)(1)*. *See* Doc. No. 33. For the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' motion to dismiss.

BACKGROUND[1]

Plaintiff Aya Healthcare Services, Inc. is a corporation formed under the laws of Delaware that maintains its headquarters in San Diego, California. SAC ¶ 16. Plaintiff Aya Healthcare, Inc. is a corporation formed under the laws of Delaware that maintains its headquarters in San Diego, California. *Id.* "Plaintiffs are affiliated companies that operate under common control and ownership." *Id.*

Defendant AMN Healthcare Services, Inc. is a corporation formed under the laws of Delaware that maintains its headquarters in San Diego, California. *Id.* ¶ 17. Defendant AMN Healthcare, Inc. is a Nevada corporation that maintains **[*3]** its headquarters in San Diego, California. *Id.* ¶ 18. Defendant AMN Services, LLC is a limited liability company formed under state law that maintains its headquarters in San Diego, California. *Id.* ¶ 19. Defendant MEDEFIS, Inc. is a corporation formed under state law that maintains its headquarters in Omaha, Nebraska. *Id.* ¶ 20. Defendants Shiftwise, Inc. is a corporation formed under state law that maintains its headquarters in Portland, Oregon. *Id.* ¶ 21. Defendant AMN Healthcare Services, Inc. owns and controls Defendant AMN Healthcare, Inc. and the various affiliated companies also sued in this action. *See id.* ¶ 22.

Plaintiffs are two affiliated companies that "sell medical-traveler services to hospitals."[2] *Id.* ¶ 30. Defendants also offer these services and are the dominant providers of such services in the country. *See id.* ¶ 3. Defendants' "pool of travelers is by far the largest and most varied in the country." *Id.* ¶ 35. Moreover, Defendants operate "two software platforms that [their] customers can use to procure travelers from other providers." *Id.* Defendants further operate "the largest subcontractor network in the country, employing virtually all other providers in the United **[*4]** States as [their] subcontractors." *Id.* ¶ 35.

"Travelers are licensed nurses and medical technicians who travel from place to place in order to perform temporary assignments at understaffed hospitals." *Id.* ¶ 31. Hospitals do not directly hire medical travelers, but utilize the services of personnel agencies like Plaintiffs and Defendants. *See id.* These personnel agencies are thus responsible for recruiting qualified medical travelers and coordinating their temporary assignment to hospitals. *See id.*

Generally, Plaintiffs allege that Defendants utilize "a series of mutually reinforcing contractual restraints, including restraints that are unlawful *per se*, to orchestrate the following outcome: (1) Defendants alone will keep control of the only 'pool' of travelers that is sufficiently large and varied to meet the requirements of many or most hospital networks and large hospitals[;]" and "(2) the other rival providers, including Plaintiffs, have been prevented or greatly hindered by Defendants' restraints from developing their own traveler pools and deploying them in order to compete for the large hospitals' business and to compete in general in the medical-traveler markets." *Id.* ¶ 4. Additionally, **[*5]** by using these practices, Defendants have "specifically intended to acquire monopoly power in the medical-traveler markets. On present trends, there exists a dangerous probability that it will succeed in the effort unless there is an antitrust intervention." *Id.* ¶ 330. The Court summarizes the various restraints below.

A. No-Poaching Restraints

Plaintiffs allege that Defendants oblige "all of [their] subcontractor providers and software-platform providers . . . to accept unilateral no-poaching agreements[.]" *Id.* ¶ 123. These no-poaching agreements "forbid the rival providers *in*

[1] Because this matter is before the Court on a motion to dismiss, the Court must accept as true the allegations set forth in the SAC. *See* *Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 740, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*.

[2] "Hospitals" hereinafter refers to both hospitals and other healthcare facilities.

perpetuity to initiate job offers or otherwise solicit any of AMN's designated 'employees,' no matter how or where employed, and even when not currently on assignment for AMN." *Id.* (emphasis in original). Each rival provider "accepts AMN's No-Poaching Restraint as an obligatory condition precedent to receiving spillover assignments or access to one of AMN's software platforms." *Id.* at 125. Defendants have "prevailed on nearly all other providers in the United States to accept and observe [their] unilateral No-Poaching Restraints." *Id.* ¶ 124. Plaintiffs allege that even if a rival provider agrees one time to act as AMN's **[*6]** subcontractor, and then that rival sends a single traveler to a remote hospital for one assignment, the "rival thereafter remains expressly forbidden to initiate at any time in the future an employment discussion for any purpose with any of AMN's 8000 travelers or 2500 recruiters and other professionals." *Id.* ¶ 132. Defendants, on the other hand, are not subject to a reciprocal restraint. *See id.* As a result, Plaintiffs contend Defendants have "successfully organized a unilateral employers' cartel in the medical-traveler markets." *Id.* ¶ 124.

In order to obtain spillover work, Plaintiffs agreed to "more than twenty of AMN's subcontractor agreements, each of which includes its No-Poaching Restraints." *Id.* ¶ 129. Plaintiffs adhered to these restraints from 2010 to May 2015, when they decided to no longer honor them. *See id.* During this five-year period, Plaintiffs "lost opportunities and profits[.]" *Id.* ¶ 263. Plaintiffs assert they continue to suffer harm after ceasing to adhere to Defendants' no-poaching restraints. For example, "[o]ther providers continually solicit Aya's recruits, but not AMN's recruiters." *Id.* ¶ 276. Thus, Defendants' no-poaching restraints place Plaintiffs at a competitive **[*7]** disadvantage because they must "offer inducements to their best employees to avoid losing them to rivals," while Defendants are "insulated from this competition[.]" Doc. No. 31 at 9.

B. No-Hire Restraints

Plaintiffs also allege that Defendants proposed multiple no-hire agreements to them from 2014 to 2016 in exchange for spillover assignments, but Plaintiffs "rejected each proposal." *Id.* ¶ 146. Plaintiffs "believe[] that other direct competitors of AMN have felt constrained to accept its proposed no-hire agreements, and that AMN proposes, monitors and enforces these agreements." *Id.* ¶ 157. In fact, Plaintiffs are aware of facts which confirm that at least one other provider of travelers, Host Healthcare, Inc. ("Host") agreed to a unilateral no-hire agreement. *Id.* ¶¶ 158-59; 171. By enforcing the no-poaching and no-hire restraints, Defendants have "established and operated a non-reciprocal employers' cartel in the medical-traveler markets." *Id.* ¶ 297.

C. Employee Restraints & Sham Litigation

Moreover, Plaintiffs claim that in order to reinforce their no-poaching restraints, Defendants require "all of [their] travelers, recruiters and other employees to accept broadly worded non-solicitation **[*8]** covenants and trade-secret covenants as conditions of their employment at AMN[.]" *Id.* ¶ 172. The alleged employee restraints provide that the names and contact information of Defendants' employees are "classified as AMN's trade secrets, and the designation applies to AMN's present employees as well as all other travelers enrolled on its rosters, including those who have no current assignment from AMN." *Id.* ¶ 173. The employee restraints also include "broad non-solicitation covenants, which forbid any former employee of AMN to solicit any of its designated 'employees' for one year or eighteen months[.]" *Id.*

Plaintiffs allege that if a recruiter working for Defendants accepts employment from a rival provider, and contacts any of the travelers they designate as their trade secrets, Defendants threaten to initiate, and on four occasions have initiated, "objectively baseless claims against both the recruiter and [their] rival[.]" *Id.* ¶ 182. In October 2015, Defendants sued Plaintiffs, and two of Defendants' former recruiters who came to work for Plaintiffs, in California state court. *Id.* ¶ 193. The Superior Court determined in April 2017 that Defendants' claims in the state court action **[*9]** were both "objectively baseless" and "subjectively baseless[.]" *Id.* ¶ 205.

D. Software Platform Restraints and Exclusive Dealings Contracts

Plaintiffs further allege that Defendants use two other kinds of contractual restraints: (1) restrictive covenants in their software-platform agreements and vendor-provider agreements; and (2) mandatory exclusive-dealing contracts with large hospitals. *Id.* ¶ 226. As a result of Defendants' "exclusive-dealing contracts and software-platform sales, AMN has foreclosed competition for 50% of all sales of medical-traveler services in several of the largest, most lucrative regional submarkets, including the Greater Los Angeles Metropolitan Area; the San Francisco Bay Area; the Greater Washington, D.C. Metropolitan Area; [and] the Greater Baltimore Metropolitan Area[.]" *Id.* ¶ 229. Additionally, Defendants have used these practices to substantially foreclose competition in the following regional submarkets: Hawaii (87% market foreclosure); Nebraska (83%); Maine (83%); Vermont (80%); Arkansas (73%); Montana (67%); Nevada (64%); and New Hampshire (61%). *Id.* ¶ 230. "These restrictive conditions exist principally to protect AMN from competitive pressures," yet **[*10]** the conditions "prevent rival sellers from offering innovative or more competitive terms of service and from providing more responsive service[.]" *Id.* ¶ 227.

E. Summary of Plaintiffs' Allegations

In sum, Plaintiffs assert that the "cumulative effect of AMN's no-poaching restraints and Employee Restraints is pernicious and exclusionary for AMN's rivals: the rivals cannot solicit any of AMN's employees, and AMN's recruiters, who are best placed to solicit these employees, dare not leave AMN to work for any rival." *Id.* ¶ 219. "There is therefore a chronic, worsening shortage of available travelers and only one conspicuously large pool of them—AMN's pool." *Id.* ¶ 221. Defendants have utilized "unlawful trade restraints and baseless litigation to prevent and discourage [their] rivals from seeking to make hires from this pool. [Their] purpose is to remain the only provider that can offer such as pool." *Id.*

PROCEDURAL HISTORY

Plaintiffs commenced the instant action on February 2, 2017. *See* Doc. No. 1. Defendants previously moved to dismiss Plaintiffs' First Amended Complaint ("FAC"). *See* Doc. No. 15. The Court held a hearing on Defendants' motion on July 14, 2017 and entertained the oral arguments **[*11]** of counsel. *See* Doc. No. 20. The Court took the matter under submission for further review and consideration, and issued an order granting in part Defendants' motion to dismiss Plaintiffs' FAC. *See* Doc. No. 22. Specifically, the Court found that Plaintiffs failed to sufficiently allege antitrust standing, a requisite element of their Sherman Act claims. *See id.* at 8. The Court deferred ruling on Plaintiffs' state law claims until Plaintiffs could sufficiently allege a federal claim. *See id.*[3]

On January 8, 2018, Plaintiffs filed their SAC asserting six causes of action for: (1) *per se* violations of *Section 1* of the Sherman Act; (2) quick-look/rule of reason violations of *Section 1* of the Sherman Act; (3) attempted monopolization in violation of *Section 2* of the Sherman Act; (4) violations of the *California Cartwright Act*; (5) Tortious Interference with Prospective Economic Relations; and (6) violations of California's *Unfair Competition Law* ("UCL"). *See* SAC. On February 5, 2018, Defendants filed the instant motion, seeking to dismiss Plaintiffs' SAC with prejudice. *See* Doc. No. 30.

LEGAL STANDARD

A *Rule 12(b)(6)* motion to dismiss tests the sufficiency of the complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. A pleading must contain "a short and plain statement of the claim **[*12]** showing that the pleader is entitled to relief. . . ." *Fed. R. Civ. P. 8(a)(2)*. However, plaintiffs must also plead "enough facts to state a claim to relief that is plausible on its face." *Fed. R. Civ. P. 12(b)(6)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct.*

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[3] Because the Court determined that Plaintiffs failed to sufficiently allege antitrust standing in their FAC, the Court did not address the merits of Plaintiffs' claims. The parties now wish to incorporate by reference arguments made in their respective briefs regarding Plaintiffs' FAC. As such, the Court cites to such documents where relevant.

1955, 167 L. Ed. 2d 929 (2007). The plausibility standard thus demands more than a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Instead, the complaint "must contain allegations of underlying facts sufficient to give fair notice and to enable the opposing party to defend itself effectively." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

In reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). The court need not take legal conclusions as true merely because they are cast in the form of factual allegations. Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). Similarly, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998).

In determining the propriety of a Rule 12(b)(6) dismissal, courts generally may not look beyond the complaint for additional facts. United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). "A court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial **[*13]** notice—without converting the motion to dismiss into a motion for summary judgment." *Id.; see also* Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). Where dismissal is appropriate, a court should grant leave to amend unless the plaintiff could not possibly cure the defects in the pleading. Knappenberger v. City of Phoenix, 566 F.3d 936, 942 (9th Cir. 2009).

Discussion

Defendants move to dismiss Plaintiffs' SAC in its entirety, arguing that Plaintiffs fail to allege facts showing that they suffered antitrust injury, and that Plaintiffs fail to sufficiently plead each of their six causes of action. *See* Doc. No. 30-1. The Court addresses Defendants' arguments in turn.

A. Antitrust Injury

As a threshold matter, Defendants argue that Plaintiffs have again failed to allege antitrust injury. *See* Doc. No. 30-1 at 3. The Court previously found Plaintiffs' allegations regarding antirust injury insufficient. *See* Doc. No. 22. Plaintiffs assert that they have cured these deficiencies in their SAC by alleging two types of harm: (1) exclusionary harm; and (2) retaliatory harm. *See* SAC ¶ 262.

"Private suits to enforce the Sherman Act are authorized by Section 4 of the Clayton Act, 15 U.S.C. § 15(a), which provides that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue **[*14]** therefor . . . .'" Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000). The Supreme Court has interpreted "any person" to mean any person who has suffered an "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (emphasis in original)). "An injury caused by an antitrust violation will not count as an antitrust injury 'unless it is attributable to an anti-competitive aspect of the practice under scrutiny.'" Int'l Longshore and Warehouse Union v. ICTSI Or., Inc., 863 F.3d 1178, 1186 (9th Cir. 2017) (quoting Atl. Richfield Co., 495 U.S. at 334). "If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal per se." Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995).

In determining whether a plaintiff has antitrust standing, the Ninth Circuit has outlined various factors for courts to consider: (1) whether the plaintiff's injury is of "the type the antitrust laws were intended to forestall;" (2) the directness of the injury; (3) the speculative nature of the harm; (4) the risk of duplicative recovery; and (5) the complexity of apportioning damages. Knevelbaard Dairies, 232 F.3d at 987. "A showing of the first factor—antitrust injury—is 'necessary, but not always sufficient, to establishing standing under [section] 4 [of **[*15]** the Clayton Act].'" Tawfilis v. Allergan, Inc., 157 F. Supp. 3d 853, 862 (C.D. Cal. 2015) (citing Am. Ad Mgmt. Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999) (internal quotation marks and citation omitted)). The Ninth Circuit also requires "that the injured party be a participant in the same market as the alleged malefactors." Bhan v. NME Hosps., Inc., 772 F.2d 1467, 1470 (9th Cir. 1985). "In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 372 (9th Cir. 2003) (citation omitted).

1. Exclusionary Harm

Plaintiffs first contend that Defendants utilize various anticompetitive practices to impede their rivals, including Plaintiffs.[4] Defendants argue that Plaintiffs fail to allege antitrust standing because Plaintiffs' allegations are conclusory and speculative, Plaintiffs stand to gain from the challenged practices, and Plaintiffs' injury does not flow from any anticompetitive aspect of conduct prohibited under the laws. *See* Doc. No. 30-1 at 5-10.

Here, contrary to Defendants' contention that Plaintiffs' allegations are "conclusory" and "speculative," the Court finds that Plaintiffs have alleged with the requisite specificity facts sufficient to support antitrust injury. Doc. No. 30-1 at 5; *cf.* Twombly, 550 U.S. at 555 (noting a plaintiff cannot merely rely on "labels and conclusions."). For **[*16]** example, Plaintiffs allege that from 2010 to May 2015, Defendants' "restraints appreciably compromised and hindered Aya's efforts to form a large, varied pool of travelers that could compete for large contracts and compete generally in the medical-traveler markets." *Id.* ¶ 263. As a result, Plaintiffs "lost opportunities and profits" during this five-year period of time. *Id.* Plaintiffs also claim they continue to suffer harm after ceasing to adhere to Defendants' no-poaching restraints because "[o]ther providers continually solicit Aya's recruits, but not AMN's recruiters." *Id.* ¶ 276. Thus, Defendants' no-poaching restraints place Plaintiffs at a competitive disadvantage because they must "offer inducements to their best employees to avoid losing them to rivals," while Defendants are "insulated from this competition[.]" Doc. No. 31 at 9.[5]

Moreover, Plaintiffs allege that Defendants enforce employee restraints and conduct sham litigation in order to: (1) disrupt rivals' operations and subject them to unreasonable litigation costs; (2) cast a chilling effect on employees and rival providers in the affected markets; and (3) force rivals to assent to unlawful demands. *See id.* ¶ 208. Plaintiffs **[*17]** claim that through Defendants' "exclusive-dealing contracts and softwareplatform sales, AMN has foreclosed competition for 50% of all sales of medical-traveler services in several of the largest, most lucrative regional submarkets[.]" *Id.* ¶ 229. These conditions "prevent rival sellers from offering innovative or more competitive terms of service and from providing more responsive service[.]" *Id.* ¶ 227. As such, Plaintiffs' allegations are sufficiently detailed.

Further, Defendants' argument that Plaintiffs stand to gain from the challenged practices is unavailing. *See* Doc. No. 30-1 at 6-7. The Ninth Circuit has indicated that "[t]here can be no antitrust injury if the plaintiff stands to gain from the alleged unlawful conduct." Am. Ad Mgmt., Inc., 190 F.3d at 1056. However, Plaintiffs expressly allege that Defendants' no-poaching restraints prevent rivals, including Plaintiffs, from offering traveler pools that can meet the requirements of large customers and compete against Defendants' pool. *See* SAC ¶¶ 126-28, 145. Moreover, Defendants enforce their employee restraints and conduct sham litigation not to improve their services, but to

[4] Defendants do not address Plaintiffs' cumulative exclusionary effect argument, but rather address each of the challenged practices in isolation.

[5] Defendants assert that Plaintiffs cannot show injury-in-fact, as Plaintiffs have alleged no facts to show that they suffered any loss prior to May 2015, and, after that date, Plaintiffs refused to abide by the restrictions. Doc. No. 30-1 at 3 n.4. The Court disagrees. Plaintiffs specifically allege that they lost opportunities and profits from 2010 to May 2015, and continue to suffer harm because other providers solicit Plaintiffs' recruiters, while Defendants are immune from such solicitations. *See* SAC ¶¶ 263, 276. As such, the Court finds that Plaintiffs' allegations relating to the no-poaching restraints are sufficient to show injury-in-fact.

"disrupt" their "rivals' operations and undermine their ability to recruit qualified **[*18]** travelers." *Id.* ¶ 213. Defendants charge major hospital networks and large hospitals "prices that are significantly and durably higher than competitive prices, yet [their] customers largely do not turn to other providers because they believe that they require access to [their] pool of medical travelers, software platforms, and subcontractor network." *Id.* ¶ 97. As such, the Court is "satisfied that [Plaintiffs] stand to suffer, not gain," from Defendants' conduct. *Am. Ad. Mgmt., Inc., 190 F.3d at 1056*.

Finally, Defendants contend that Plaintiffs' alleged injury does not flow from an anticompetitive aspect of conduct prohibited by the antitrust laws. *See* Doc. No. 30-1 at 6. However, Plaintiffs claim that the various trade restraints "have prevented or hindered other providers from developing their own competitive pools of medical-travelers." SAC ¶ 260. As a result, "AMN calls the shots, the large hospitals must submit to its pricing and other terms, its employees become its captive, and numerous smaller rivals are deprived of the opportunity to cobble together better prices, alternative terms and alternative service arrangements for the same pool of qualified travelers." *Id.* "AMN has used a medley of trade restraints in **[*19]** ways that have harmed competition and reinforced its market power." *Id.* ¶ 261. "[T]he central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition . . . that these statutes recognize as vital to the public interest." *Knevelbaard Dairies, 232 F.3d at 988*. Because Plaintiffs allege that Defendants' restraints and practices "prevent competition," Plaintiffs have sufficiently demonstrated that their injury is of the type that the antitrust laws were intended to prevent. Doc. No. 31 at 2.

In sum, Plaintiffs have sufficiently alleged that as a consequence of the alleged restraints, Plaintiffs and other rival suppliers have been prevented from developing their own traveler pools, and are thus unable to compete for business in the medical-traveler markets. *See* Areeda ¶ 348a[6] ("[A] rival clearly has standing to challenge the conduct of rival(s) that . . . tends to exclude rivals from the market, thus leading to reduced output and higher prices."); *Am. Ad. Mgmt., Inc., 190 F.3d at 1057* ("[C]onsumers and competitors are most likely to suffer antitrust injury"). Accordingly, viewing these allegations in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have satisfied the antitrust standing requirement on **[*20]** the basis of exclusionary harm. *See Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008)* (concluding that a rival suffers antitrust injury when a defendant's "[a]nticompetitive conduct . . . tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way."); *Catch Curve, Inc. v. Venali, Inc., 519 F. Supp. 2d 1028, 1035-36 (C.D. Cal. 2007)* (finding competitor sufficiently pleaded antitrust injury where the defendant's conduct "rendered competitors less competitive" and had a "dangerous probability of stifling innovation in the market.") (internal quotation marks and alterations omitted).

2. Retaliatory Harm

Plaintiffs also assert that they have suffered retaliatory harm. Specifically, Defendants have prevailed on "virtually all rival providers" to accept their no-poaching restraints in exchange for spillover work. Doc. No. 31 at 13. Plaintiffs claim that they have "broken ranks with this *de facto* employers' cartel." *Id.* As a result, Defendants subjected Plaintiffs to "costly retaliatory measures to make an example[.]" *Id.* Defendants assert Plaintiffs' amended allegations are insufficient to sufficiently allege retaliatory harm. *See* Doc. No. **[*21]** 32 at 5.

Plaintiffs rely primarily on a decision from the Seventh Circuit, wherein the court stated that "[l]osses inflicted by a cartel in retaliation for an attempt by one member to compete with the others are certainly compensable under the antitrust laws, for otherwise an effective deterrent to successful cartelization would be eliminated." *Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 783 (7th Cir. 1994)*; *see also* *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1102 (9th Cir. 1999)* (noting that retaliation by a cartel member against one member attempting to compete is compensable). The Seventh Circuit later clarified that *Hammes* "holds that antitrust damages may result if a cartel inflicts damage on *one of its own members* in retaliation for that member's attempt to undercut the

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[6] Citations to "Areeda" refer to PHILLIP E. AREEDA & HERBERT HOVENKAMP, AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (4th ed. 2013).

cartel's prices and therefore lower consumer prices." *James Cape & Sons Co. v. PCC Constr. Co., 453 F.3d 396, 401 (7th Cir. 2006)* (emphasis added). The Seventh Circuit went on to note that in the case at bar, the heart of the plaintiff's claim "is that it was never a member of the cartel in the first place;" thus, "[t]he *Hammes* case is . . . inapplicable here." *Id.*

Here, Plaintiffs allege in their SAC that they previously were a member of Defendants' alleged employers' cartel until they decided to compete on the merits with Defendants—a point that Plaintiffs had not sufficiently clarified in the FAC. *See* SAC **[*22]** ¶¶ 263-73. Plaintiffs explain that after they ceased adhering to the no-poaching restraints, Defendants "subjected Aya to various kinds of retaliatory conduct" including: (1) terminating all subcontractor agreements with Plaintiffs; (2) interfering with Plaintiffs' dealings with existing and prospective customers; and (3) litigations "objectively baseless claims" against Plaintiffs and four of Plaintiffs' employees. *Id.* ¶ 281. Accordingly, in light of Plaintiffs' allegations that they were a member of Defendants' alleged cartel, and because retaliation by a cartel member against a member's attempt to compete is compensable, the Court finds that Plaintiffs have also sufficiently alleged antitrust injury on the basis of retaliatory harm. *See* *Big Bear Lodging Ass'n, 182 F.3d at 1102*.[7]

B. Sherman Act *Section 1* and Cartwright Act Claims

Plaintiffs assert two claims pursuant to *Section 1* of the Sherman Act: a *per se* claim (first cause of action) and a quick-look/rule of reason claim (second cause of action). *See* SAC. Plaintiffs further assert a Cartwright Act claim pursuant to *California Business & Professions Code §§ 16720 et seq.* based on the same conduct that allegedly violates *Section 1* of the Sherman Act (fourth cause of action).[8] *See id.*

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the **[*23]** form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. . . ." *15 U.S.C. § 1*; *see also* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (noting that *§ 1* of the Sherman Act outlaws unreasonable restraints of trade). To establish liability under *§ 1*, a plaintiff must show: "(1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade . . .; and (3) the restraint affected interstate commerce." *Am. Ad Mgmt. Inc. v. GTE Corp., 92 F.3d 781, 788 (9th Cir. 1996)*. Defendants focus exclusively on the second element—whether Plaintiffs have sufficiently alleged an unreasonable restraint of trade.

"To sufficiently plead an unreasonable restraint, a plaintiff must include allegations showing that the restraint will fail under one of three rules of analysis: the rule of reason, per se, or quick look." *United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1037 (N.D. Cal. 2013)*. First, the rule of reason is the default level of analysis, requiring courts to examine "a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. "The rule of reason requires the factfinder to decide whether under all the **[*24]** circumstances of the case the agreement imposes an unreasonable restraint on competition." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1387 (9th Cir. 1984)* (citing *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982))*. The purpose of the analysis is to "distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin Creative Leather Prods., Inc., 551 U.S. at 886*.

[7] In light of the Court's conclusion that Plaintiffs have sufficiently alleged antitrust injury, the Court need not address Plaintiffs' third theory of antitrust injury mentioned in Plaintiffs' opposition to the instant motion. *See* Doc. No. 31 at 14.

[8] "[T]he analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act was modeled after the Sherman Act." *Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*. "Thus, if Plaintiffs plead a valid Sherman Act claim, they likewise plead a valid Cartwright Act claim." *In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1114 (N.D. Cal. 2012)*.

Second, in limited circumstances, however, such a detailed inquiry under the rule of reason analysis is unnecessary, where the restraint at issue is "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Texaco, Inc. v. Dagher, 547 U.S. 1, 5, 8, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (quoting *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978))*. A restraint will only be considered *per se* unreasonable if it "always or almost always tend[s] to restrict competition and decrease output" and lacks redeeming value. *Leegin Creative Leather Prods., Inc., 551 U.S. at 886* (internal quotations omitted). Such restraints are illegal *per se*, and once established, do not require any industry analysis otherwise required under the rule of reason.

Third, "[f]alling between the rule of reason and per se condemnation, the 'quick look' analysis is an abbreviated form of the rule of reason that may be used when 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question could **[*25]** have an anticompetitive effect on customers and markets." *eBay, 968 F. Supp. 2d at 1037* (citing *Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999))*.

Defendants argue that the Court should dismiss Plaintiffs' claims arising under *Section 1* of the Sherman Act because Plaintiffs' allegations are insufficient to state a claim under all three rules of analysis. *See* Doc. No. 30-1 at 10, 17. The Court addresses Plaintiffs' *per se* claims before turning to Plaintiffs' quick-look and/or rule of reason claims.

1. ***Per Se* Claims**

Plaintiffs allege that Defendants' conduct constitutes two separate *per se* violations of *Section 1 of the Sherman Act*. SAC ¶¶ 295-97. First, Plaintiffs claim that Defendants' no-poaching restraints are unlawful *per se. See id.* ¶ 295. Second, Plaintiffs contend that Defendants have prevailed on at least one rival to accept a unilateral no-hire agreement, which is also unlawful *per se. See id.* ¶ 296. "By enforcing these restraints, AMN has established and operated a non-reciprocal employers' cartel in the medical-traveler markets." *Id.* ¶ 297. Defendants argue that the no-poaching restraints and alleged employers' cartel do not fall within the *per se* category; thus, Plaintiffs' first cause of action should be dismissed with prejudice. *See* Doc. No. 30-1 at 10.

A. No-Poaching Restraints

Plaintiffs **[*26]** allege that Defendants require their subcontractor providers and software-platform providers "to accept unilateral no-poaching agreements[.]" SAC ¶ 123. The no-poaching restraints "forbid the rival providers *in perpetuity* to initiate job offers or otherwise solicit any of AMN's designated 'employees,' no matter how or where employed, and even when not currently on assignment for AMN." *Id.* (emphasis in original). "Although these restraints appear in contracts that memorialize legitimate business collaborations, they are not 'ancillary' to the collaborations in question." Doc. No. 31 at 17.

Defendants assert that the alleged no-poaching restrictions must be analyzed under the rule of reason standard for three reasons. *See* Doc. No. 30-1 at 11. First, the no-poaching restraints are part of vertical agreements. *See id.* Second, "the rule of reason is the standard for testing restrictive covenants ancillary to a legitimate transaction." *Id.* Third, "[c]ourts do not apply the *per se* standard in cases where the economic impact of the practice is not immediately obvious." *Id.* at 15. The Court proceeds by: (i) analyzing the character of the subcontractor agreements; and (ii) analyzing the character of the **[*27]** no-poaching restraints.

i. Characterizing the Subcontractor Agreements

Defendants argue that the subcontractor agreements are "collaboration agreements" which are which are part of "essentially vertical arrangements[.]" *Id.* at 15, 11. In their SAC, Plaintiffs argue that the subcontractor agreements are properly characterized as joint ventures.[9] *See* SAC ¶¶ 136-145. As the parties acknowledge, the characterization of the agreements in question impacts which rule of analysis applies.

"[T]he Supreme Court has distinguished between agreements made up and down a supply chain, such as between a manufacturer and a retailer ('vertical agreements'), and agreements made among competitors ('horizontal agreements')." *In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1191 (9th Cir. 2015)*. A horizontal agreement or restraint is "[a]n agreement among competitors on the way in which they will compete with one another." *Nat'l Collegiate Athletic Ass'n v. Bd. Of Regents of the Univ. of Okla., 468 U.S. 85, 99, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* (hereinafter "*NCAA*"); *see also Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints"). Unlike horizontal agreements among competitors, "vertical agreements between actual or would-be suppliers and customers are everywhere." Areeda ¶ 1437a. "[B]y definition vertically related firms exist in **[*28]** a buyer-seller relationship, and agreements are essential to buying and selling." Areeda ¶ 1902d. A third category, referred to as a joint venture, is "a form of organization in which two or more firms agree to cooperate in producing some input that they would otherwise have produced individually, acquired on the market, or perhaps done without." Areeda ¶ 2100(a). Importantly, "*Section 1* prohibits agreements that unreasonably restrain trade, no matter the configuration they take or the labels we give them." *In re Musical Instruments, 798 F.3d at 1192*.

Here, taking Plaintiffs' allegations as true, the Court finds that the subcontractor agreements entered into by Defendants and various rival providers can plausibly be characterized as joint ventures. Notably, Plaintiffs allege that "AMN prevails on its subcontractors (rival providers) to accept its trade restraints because many depend upon it for 'spillover' assignments (assignments that AMN refers to another provider when its own travelers are otherwise engaged)[.]" SAC ¶ 119. Unlike agreements made up and down a supply chain between buyers and sellers, Defendants use their no-poaching restraints in their "contracts with virtually all other providers, thereby compromising their ability **[*29]** to compete freely to hire qualified travelers and sell medical-traveler services to hospitals." *Id.* ¶ 143. Further, "in a purely vertical contract the parties to the agreement are not competitors." Areeda ¶ 1902d. Plaintiffs explain that in order to remain in business, "[m]any of the rival providers depend on AMN's spillover assignments and/or software platform assignments and could not survive without them." SAC ¶ 144 n.8.

Accordingly, the Court finds that Plaintiffs have sufficiently alleged that the agreements in question can plausibly be characterized as joint ventures. Therefore, dismissal on the basis that the subcontractor agreements are vertical agreements is improper.

ii. Joint Venture Analysis

Defendants contend that courts "have always evaluated restraints related to collaborations, joint ventures or transactions under the rule of reason." Doc. No. 30-1 at 13. Plaintiffs, in opposition, claim that legitimate joint venture agreements sometimes include naked[10] restraints of trade—i.e., restraints within legitimate joint venture agreements that (1) foreclose some form of direct competition between the parties, but (2) are not reasonably ancillary to their lawful joint-venture. Doc. **[*30]** No. 31 at 17. As explained in Plaintiffs' opposition to Defendants' previous motion to dismiss, "a naked restraint, even though included in a legitimate joint-venture agreement, can be

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[9] In opposition to the instant motion, Plaintiffs indicate that they have "always acknowledged that the agreements between AMN and its subcontractors/rival providers can be characterized as vertical arrangements[.]" Doc. No. 31 at 19. However, Plaintiffs explain in their SAC that a joint venture "is any agreement, *vertical* or horizontal, by which two independent businesses collaborate on a commercial venture in order to develop or furnish products and/or services." SAC ¶ 136 n.7 (emphasis added). As such, the Court does not read Plaintiffs' statement as an admission that Plaintiffs believe the agreements in question are in fact, vertical agreements. *See also* Doc. No. 17 at 2 ("AMN and rival providers participate in legitimate joint-ventures[.]").

[10] "Naked" restraints have "no purpose except stifling of competition." *White Motor v. United States, 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)*.

condemned as a *per se* violation of Section 1." Doc. No. 17 at 7; *see also* In re ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1012 (N.D. Cal. 2008) (citing NCAA, 468 U.S. at 113-15).

"***Antitrust law*** doesn't frown on all joint ventures among competitors—far from it. If a joint venture benefits consumers and doesn't violate any applicable per se rules, it will often be perfectly legal." Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1157 (9th Cir. 2003). "When a plaintiff challenges the joint venture itself, the venture must be judged under the rule of reason standard." In re ATM Fee Antitrust Litig., 554 F. Supp. 2d at 1012 (citing Dagher, 547 U.S. at 6 n.1). However, "[w]hen a plaintiff challenges a provision or practice of the venture as anticompetitive, then per se review may be appropriate depending on the circumstances." *Id.*

Specifically, when a plaintiff challenges a particular restraint of a joint venture that is not economically integrated (i.e., where individual firms function as an economic unit or single entity),[11] the analytical framework is as follows: first, courts consider whether the challenged restraint is a core activity or function of the joint venture (if yes, rule of reason applies); second, if not, courts consider whether the restraint **[*31]** is of a type that is potentially subject to *per se* treatment (if not, rule of reason applies); third, if the restraint is of a type potentially subject to *per se* treatment, courts consider whether the restraint is necessary or reasonably ancillary to achieving a procompetitive objective of the joint venture (if yes, rule of reason applies; if not, *per se* rule applies). *See* id. at 1012-1016; *see also* Med. Ctr. at Elizabeth Place, LLC v. Premier Health Partners, No. 12-CV-26, 2017 U.S. Dist. LEXIS 126499, 2017 WL 3433131, at *14 (S.D. Ohio Aug. 9, 2017) (diagraming analytical framework for joint venture analysis). "Thus, the Supreme Court permits plaintiffs to disaggregate particular conduct from the venture as a whole, and submit that conduct to individual scrutiny." In re ATM Fee Antitrust Litig., 554 F. Supp. 2d at 1012; *see also* Areeda ¶ 2100(f) (explaining the disaggregation of joint venture provisions).

Here, Plaintiffs challenge the no-poaching provisions of the subcontractor agreements—not the joint ventures themselves. In fact, Plaintiffs refer to the joint ventures as "legitimate business collaborations." Doc. No. 31 at 17. As such, Plaintiffs seek to disaggregate specific conduct from the ventures as a whole, and submit that conduct to scrutiny by the Court. Contrary to Defendants' contention, "[t]he Court cannot therefore hold that because the [no-poaching restraints were] established through **[*32]** a joint venture, ergo rule of reason applies." In re ATM Fee Antitrust Litig., 554 F. Supp. 2d at 1012. "Rather, the Court must go further, and inquire into the nature of the venture and the role of the restraint." *Id.*

a. Core Function of Joint Ventures

The Supreme Court has indicated that the *per se* standard is not appropriate if a plaintiff challenges "the core activity of the joint venture itself[.]" Dagher, 547 U.S. at 7. In *Dagher*, the plaintiffs challenged two oil companies' agreement to set a unified price for their gasoline, a practice identified as the venture's core activity. *See* id. at 6-7. Thus, the Supreme Court applied the rule of reason analysis. *See id.*

Here, though not specifically addressed by either party, Plaintiffs do not challenge the core function of the joint ventures. As noted above, Plaintiffs concede that the various agreements are "legitimate" and ensure that the staffing needs of hospitals are met. Doc. No. 31 at 17. Plaintiffs instead challenge the no-poaching restraints, included in these legitimate agreements, as "unlawful restraints of competition between rival employers[.]" *Id.* As such, the Court proceeds to analyze the character of the no-poaching restraints.

b. Characterizing the No-Poaching Restraints

Plaintiffs allege that the no-poaching **[*33]** restraints are horizontal restraints of trade because they permanently eliminate one kind of direct rivalry between competitors. *See* Doc. No. 31 at 19.

Horizontal market allocation agreements typically constitute a *per se* violation of Section 1. *See* United States v. Topco Assocs., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972); United States v. Brown, 936 F.2d 1042, 1044-45 (9th Cir. 2001) ("A market allocation agreement between two companies at the same market level is a classic per se antitrust violation."). "An agreement among employers that they will not compete against each other

[11] The parties do not argue that Defendants and their rivals function as a unit or single entity.

for the services of a particular employee or prospective employee is, in fact, a service division agreement, analogous to a product division agreement." Areeda ¶ 2013b. "Such arrangements must be distinguished from noncompetition agreements that prevent an employee from seeking employment from a rival for a given period after the employee's present employment relationship is terminated. These arrangements are purely vertical, for they involve a single employer's agreement with one or more employees." *Id.*

Here, the Court finds that Plaintiffs' allegations concerning the no-poaching restraints are sufficient to allege that the restraints are of a type that are subject to *per se* treatment. *See* Med. Ctr. at Elizabeth Place, LLC, 2017 U.S. Dist. LEXIS 126499, 2017 WL 3433131, at *14. For example, Plaintiffs allege that Defendants collaborate **[*34]** with smaller, rival providers of medical travelers to deliver their services, which are governed by the subcontractor agreements. SAC ¶ 123. Although the subcontractor agreements are "legitimate," Plaintiffs claim that the non-poaching restraints are not reasonably ancillary to the agreements in which they appear. *Id.* ¶ 133. The no-poaching restraints "permanently prevent nearly all of AMN's direct competitors in the United States from soliciting any of its numerous employees for any purpose." *Id.* ¶ 134. These restraints are non-reciprocal; thus, Defendants are immune from these indefinite restraints. *See id.* Plaintiffs explain that Defendants' no-poaching restraints result in an agreement among rivals about how they will compete for employees.

Accordingly, in disaggregating the no-poaching restraints from the joint ventures, the Court finds that Plaintiffs' allegations, taken as true, are sufficient to allege a type of restraint subject to *per se* treatment. *See* eBay, 968 F. Supp. 2d at 1039. Thus, dismissal on this basis is inappropriate.

c. Whether the No-Poaching Restraints are Reasonably Ancillary to a Procompetitive Business Purpose

Defendants contend the no-poaching restraints are ancillary to legitimate **[*35]** business transactions, and thus must be analyzed under the rule of reason standard. *See* Doc. No. 30-1 at 11. In opposition, Plaintiffs assert that the restraints, "as worded and enforced, vastly exceed any possible scope or purpose of the collaborations in question and exist to prevent AMN's rivals from ever approaching anyone in its pool, even after the collaborations in question have ended." Doc. No. 31 at 19. Moreover, in their SAC, Plaintiffs provide the following hypothetical of Defendants' no-poaching restraints:

> Suppose a rival provider agrees one time to act as AMN's subcontractor. To do so, it must sign one of AMN's standard subcontractor agreements, which invariably include AMN's unilateral No-Poaching Restraint. Suppose AMN gives this rival only one assignment, say in 2010, and the rival performs it by sending a single traveler to a remote hospital in the Kansas prairie. Shortly afterwards, AMN terminates the agreement, or perhaps the rival does so. The rival thereafter remains expressly forbidden to initiate at any time in the future an employment discussion for any purpose with any of AMN's 8000 travelers or 2500 recruiters and other professionals, who are scattered across **[*36]** the United States. AMN, in contrast, labors under no reciprocal restraint.

SAC ¶ 132.

The Court's determination that Plaintiffs have sufficiently alleged that the nopoaching restraints, considered in isolation, are of a type subject to *per se* treatment "does not in and of itself indicate that per se treatment is imminent." eBay, 968 F. Supp. 2d at 1039. In order to make a rule determination, the Court must determine whether no poaching restraints are ancillary to a procompetitive business purpose. *See id.* (citing Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-22, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)); *see also* Areeda ¶ 2013a (explaining that if agreements among employers not to compete for employees "are 'naked' and not immunized, they are illegal per se. . . ."). "[A] challenged restraint must have a reasonable procompetitive justification, related to the efficiency-enhancing purposes of the joint venture[.]" *Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 339 (2d Cir. 2008)* (Sotomayor, J., concurring in the judgment). "If none exists, the challenged restraint must be evaluated on its own and may be per se illegal even if the remainder of the joint venture is entirely lawful." *Id.*

Additionally, "[t]o be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction," **[*37]** i.e., the restraint "serves to make the main transaction more effective in accomplishing its purpose." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224, 253 U.S. App. D.C. 142 (D.C. Cir. 1986)*. "If [the restraint] is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary." *Id.* As the Third Circuit has indicated,

> [t]he quintessential example of an ancillary restraint is a restrictive agreement that is an integral part of a joint venture. An agreement by two competing manufacturers to price a product identically, for instance, would be ancillary if manufacture of the product were a collaborative effort between the two firms and the pricing agreement could reasonably be viewed as a necessary condition of the joint venture, which increased output.

In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 345 (3d Cir. 2010); *see also* *Freeman, 322 F.3d at 1151*. The doctrine of ancillary restraints "seeks to distinguish between those restraints that are intended to promote the efficiencies of a joint venture and those that are simply unrelated." *Salvino, Inc., 542 F.3d at 338-39*.[12]

Moreover, the Court is mindful that the joint guidelines announced by the Department of Justice, Antitrust Division and the Federal Trade Commission in October 2016, make clear that an agreement made between **[*38]** rival employers not to solicit one another's employees will be prosecuted as a criminal violation of *Section 1* if it "is separate from or not reasonably necessary to a larger legitimate collaboration between the employers." *Joint Guidelines of the Department of Justice, Antitrust Division and the Federal Trade Commission* (October 2016).

Plaintiffs urge the Court to follow the district court's ruling in *eBay*. There, the government alleged that eBay and Intuit entered into a no-solicitation/no-hire agreement with each other. *See* *968 F. Supp. 2d at 1038*. The alleged agreement arose out of conversations between eBay executives and Scott Cook, founder of Intuit, who also served on eBay's board. *See* *id. at 1033-34*. The court found that the government had sufficiently alleged a horizontal market allocation agreement. *Id. at 1039*. The defendants argued that the agreement, though horizontal, was ancillary to a legitimate procompetitive business purpose (i.e., Mr. Cook's service on eBay's board), and therefore not amenable to *per se* treatment. *Id.* The government argued the agreement constituted a naked restraint of trade. *Id.* The court noted that just because the government labeled the agreement as "naked" did not make it so; but by the same token, **[*39]** the defendants' claim that the agreement is ancillary similarly does not make it so. *Id.* The court declined to determine at the pleading stage whether to apply the *per se* or rule of reason analysis. The court stated, "[t]hough the parties supply substantial legal argument to support their respective positions, they do so without the benefit of discovery, and thus without sufficient factual evidence to support their contentions." *Id. at 1039-40*. Thus, taking the plaintiff's allegations as true, the court could not determine as a matter of law that *per se* treatment would be inappropriate. *Id.*

Here, the Court finds the district court's reasoning in *eBay* to be persuasive. Defendants assert that the alleged agreement in *eBay* did not involve "any form or joint venture, sub-contract or collaboration." Doc. No. 32 at 7. While the alleged agreement did not involve a joint venture, the defendants in *eBay* did claim that the challenged restraint was ancillary to procompetitive business purposes. *See* *968 F. Supp. 2d at 1039*. Further, a plaintiff challenging a provision or practice of a joint venture can disaggregate such conduct and challenge it in isolation. *See* *In re ATM Litig., 554 F. Supp. 2d at 1012*. In doing so, courts "must consider the reasonably anticipated impact **[*40]** of the particular agreement under scrutiny—measured, of course, against the environment created by the joint venture. If the reasonably intended impact of an agreement is to reduce market output, then that agreement is naked notwithstanding its association with other productive joint activity." Areeda ¶ 1908b.

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[12] The Court notes that Defendants assert that Plaintiffs have "no response to *NCAA* . . ., where the Supreme Court applied the rule of reason, even though the challenged provision restrained the ability of the members to compete on both price and output and was not 'necessary' to market the product." Doc. No. 32 at 7. As explained by the court in *In re ATM Fee Antitrust Litig.*, however, "the Ninth Circuit has since limited the reach of the *NCAA* decision" in *Freeman*. *554 F. Supp. 2d at 1015*. The Ninth Circuit has imposed "an additional burden on defendants, who must now prove not only that their venture requires horizontal restraints, but also that the particular restraint challenged is ancillary to the venture's legitimate aspects." *Id.; see also* *Freeman, 322 F.3d at 1157*. For the reasons discussed below, the Court is unable to determine at this stage of the proceedings whether the challenged restraints are ancillary to the venture's legitimate aspects.

Defendants further argue that Plaintiffs essentially admit "that this **type** of restraint would be ancillary (and judged by the rule of reason) if it were only narrower in scope and duration." Doc. No. 30-1 at 13 (emphasis in original). Defendants are unable "to find **even a single case** holding that a non-solicitation covenant included in a subcontract or joint venture arrangement (of any scope of duration) is *per se* unlawful." *Id.* (emphasis in original). However, courts have addressed the scope of restraints within the context of a larger agreement. In *Hanger v. Berkley Group, Inc.*, the district court distinguished *In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103 (N.D. Cal. 2012)*, and *eBay*. *No. 13-CV-113, 2015 U.S. Dist. LEXIS 68751, 2015 WL 3439255, at *7 (W.D. Va. May 28, 2015)*. The *Hanger* court noted that the challenged restraint at issue is "one piece of a global settlement agreement" ("GSA"), and "[i]t is clear from the terms of the GSA and the context in which it arose that [the challenged restraint] exists to keep the parties **[*41]** from becoming embroiled in future lawsuits[.]" *Id.* The court examined the language of the challenged restraint, which unlike *In re High-Tech Emp. Antitrust Litig*. and *eBay*, "did not contain a blanket, no cold calling or no solicitation agreement." *Id.* Instead, the language reflected an agreement to "honor each other's non-competition, non-solicitation and confidentiality agreements of which they have actual knowledge that are contained in written agreements that have not been held unenforceable by a court of competent jurisdiction as to the particular employee." *Id.* The court made a point to note that "because the restrictive covenants in the Berkley Group employment contracts *are narrowly drawn* in terms of substantive *scope, time and geography*, the alleged restraint posed by the GSA is correspondingly narrow." *Id.* (emphasis added).

Unlike *Hanger*, Plaintiffs allege that the no-poaching restraints last in perpetuity, thereby surviving termination of the joint venture agreements. SAC ¶ 123. The restraints bar rivals forever from soliciting any of Defendants' employees—including recruiters, corporate employees, and medical travelers, despite the fact that the purpose of these subcontractor **[*42]** agreements is for rival providers to send their medical travelers to Defendants' customers. *See id.* ¶¶ 124-28. Lastly, Plaintiffs allege that the no-poaching restraints apply to all of Defendants' "designated 'employees,' no matter how or where employed, and *even when not currently on assignment for AMN*[,]" while Defendants are not bound by the same restraint. *Id.* ¶ 123 (emphasis added).

In disaggregating the alleged no-poaching restraints here, the Court is unable to determine with certainty whether the restraints are ancillary to procompetitive business purposes, or "so broad that part of the restraint suppresses competition without creating efficiency." *Rothery Storage & Van Co., 792 F.2d at 224*; *see also Blackburn v. Sweeney, 53 F.3d 825, 828-29 (7th Cir. 1995)* (noting that the defendants' argument that the advertising agreement is "a legitimate covenant not to compete, ancillary to the dissolution of the partnership, is further undermined by the Agreement's infinite duration. . . . There is no time limit attached to the advertising restrictions. . . . The restriction on advertising is thus naked, not ancillary, and per se illegal to boot."); *United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898)*, modified and aff'd, *175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899)* ("[I]f the restraint exceeds the necessity presented by the main purpose of the contract, it is void . . . ."). **[*43]** As a result, the Court is unable to determine at this stage in the litigation "the level of analysis to apply." *eBay, 968 F. Supp. 2d at 1040*. "The court must instead make that determination based on factual evidence relating to the agreement's formation and character." *Id.* The parties do not have the benefit of discovery or factual evidence to support their contentions. The decision about which rule to apply "is more appropriate on a motion for summary judgment." *In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d at 1122*; *see also* Areeda ¶ 305e ("Often, however, the decision about which rule is to be employed will await facts that are developed *only in discovery*.") (emphasis added).

Accordingly, taking Plaintiffs' allegations as true, the Court finds that Plaintiffs have sufficiently pleaded the existence of a restraint on trade of a type that is subject to *per se* treatment. *See eBay, 968 F. Supp. 2d at 1040*. Thus, the Court is unable to determine as a matter of law that *per se* treatment will be inappropriate with respect to the no-poaching restraints in the context of the joint ventures. *See id.*

B. No-Hire Agreement & Employers' Cartel

Plaintiffs further allege that Defendants' unilateral no-hire agreement with Host is unlawful *per se* under *Section 1* of the Sherman Act. *See* SAC ¶ 296. Plaintiffs **[*44]** believe "Host acquiesced in AMN's demand because it required spillover work from AMN in order to develop its business and remain commercially viable." *Id.* ¶ 166. Plaintiffs claim that Defendants also "proposed various no-hire agreements to Aya at different times from 2014 to 2016, but Aya rejected each proposal." *Id.* ¶ 146. Plaintiffs allege that in order to "retaliate" against them for refusing the no-hire offers and breaching the no-poaching restraints, Defendants filed "objectively baseless claims" against Plaintiffs in state court, terminated their subcontractor agreements with Aya, and temporarily withdrew Plaintiffs' access to "certain accounts on one of [Defendants'] software platforms." *Id.* ¶ 155. Defendants then offered to "drop" their lawsuit against Plaintiffs "if in exchange Aya would agree to . . . enforce . . . an agreement not to hire specified employees for a five-year term." *Id.* ¶ 156. Plaintiffs believe that Defendants have proposed "and possibly concluded no-hire agreements with other providers." *Id.* By enforcing their no-poaching restraints and no-hire agreement, Defendants have "established and operated a non-reciprocal employers' cartel in the medical-traveler **[*45]** markets." *Id.* ¶¶ 297.

Defendants assert that Plaintiffs fail to "identify what the unidentified members of the 'cartel' agreed to and when and how they came to such an agreement, which types of employees supposedly were involved, or any other factual information." Doc. No. 30-1 at 16. A close reading of the SAC reveals that Plaintiffs are not relying on the formation of an employers' cartel as the basis for their *per se* claims. Rather, Plaintiffs assert that the no-poaching restraints and no-hire agreement are each independently unlawful *per se* under *Section 1*. *See* SAC ¶¶ 296-97. Thus, Plaintiffs' failure to identify the members of this alleged cartel is irrelevant to the inquiry at bar.[13] The questions before the Court are similar to those raised in the previous section—whether the alleged no-hire agreement is the type of restraint potentially subject to *per se* treatment, and whether the no-hire agreement is plausibly necessary or ancillary to achieving a procompetitive business purpose. *See In re ATM Fee Antitrust Litig., 554 F. Supp. 2d at 1014*. Aside from summarily stating Plaintiffs' allegations describe "just a two-party subcontract agreement between AMN and Host Healthcare," Defendants do not address either question. Doc. No. 30-1 at 16.

Here, similar to no-poaching restraints, the Court finds that Plaintiffs' allegations concerning the no-hire agreement with Host, and proposed no-hire agreements with Plaintiffs, are sufficient to allege that the restraints are of a type that are subject to *per se* treatment. *See eBay, 968 F. Supp. 2d at 1039* (finding that the government's allegations regarding eBay's no-solicitation/no-hire agreement are sufficient to state a horizontal market allocation agreement); *see also* Areeda ¶ 2013b ("An agreement among employers that they will not compete against each other for the services of a particular employee or prospective employee is, in fact, a service division agreement, analogous to a product division agreement."). Moreover, Plaintiffs assert that Defendants' "no-hire agreements are not reasonably ancillary to any collaboration to which they might refer. Rather, they are naked restraints of trade that are unlawful *per se* under *Section 1*." *Id.* ¶ 147. However, just because Plaintiffs label the restraints as "naked" does "not make it so." *eBay, 968 F. Supp. 2d 1030 at 1039*. For the reasons set forth in the previous section, the Court is unable to determine with certainty, whether the no-hire restraints are ancillary to procompetitive **[*47]** business purposes in the context of the joint ventures. *See Rothery Storage & Van Co., 792 F.2d at 224*.

Accordingly, taking Plaintiffs' allegations as true, the Court finds that Plaintiffs have sufficiently pleaded the existence of a restraint on trade of a type that is subject to *per se* treatment. Thus, the Court is unable to determine as a matter of law that *per se* treatment will be inappropriate with respect to the no-hire restraints. *See eBay, 968 F. Supp. 2d at 1040*.

2. <u>Quick-Look/Rule of Reason Claim</u>

In the alternative, Plaintiffs assert that "[i]f for any reason AMN's No-Poaching Restraints" and no-hire restraints "are not unlawful *per se* under *Section 1*, they nevertheless unreasonably restrain trade and violate *Section 1* under the quick-look standard and/or the rule-of-reason standard." SAC ¶¶ 316, 317. Additionally, *all* of Defendants'

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[13] The Court notes that in the FAC, Plaintiffs specifically alleged that the "employers' cartel constitutes an ongoing, *per* ***[*46]*** *se* violation of *Section 1*[.]" FAC ¶ 239. This allegation differs from the SAC, wherein Plaintiffs claim that by enforcing the no-poaching restraints and no-hire agreement, Defendants have "established and operated a non-reciprocal employers' cartel in the medical-traveler markets." SAC ¶ 297. Plaintiffs do not allege in the SAC, unlike in the FAC, that the alleged employers' cartel in and of itself constitutes a *per se* violation of *Section 1*.

agreements, including the software platform agreements, employee restraints, and exclusive dealing agreements, "unreasonably restrain trade in the medicaltraveler markets. Cumulatively, they have permitted AMN to perpetuate and enlarge its market power, which it has exercised by charging supracompetitive prices and imposing onerous trade restraints on all market participants in the medical-traveler markets." *Id.* ¶ 318. Defendants **[*48]** assert any quick-look claim fails for the same reasons Plaintiffs' *per se* claim fails. *See* Doc. No. 30-1 at 17 n.20. Defendants further contend that a rule-ofreason claim fails because Plaintiffs fail to properly define the relevant markets and plead facts showing harm to competition. *See id.* at 18-19.

As noted above, courts use the quick-look analysis when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question could have an anticompetitive effect on customers and markets." *Cal Dental Ass'n, 526 U.S. at 770*. Moreover, "[w]here a practice has obvious anticompetitive effects . . . there is no need to prove that the defendant possesses market power. Rather, the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraints outweigh the anticompetitive effects under a 'quick look' rule of reason." *Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1020 (10th Cir. 1998)*.

Under the "rule of reason" analysis, the factfinder "must analyze the anticompetitive effects along with any pro-competitive effects to determine whether the practice is unreasonable on balance." *Bhan, 929 F.2d at 1413*. This analysis employs shifting burdens of proof. First, a plaintiff "must show that the activity is the type that restrains **[*49]** trade and that the restraint is likely to be of significant magnitude. Ordinarily, a plaintiff to do this must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly." *Id.* (internal citations omitted). Second, if the plaintiff makes the above showing, the burden shifts to the defendant to justify the restraint by showing that the restraint furthers a legitimate commercial purpose. *See id.* Third, the plaintiff "must then try to show that any legitimate objectives can be achieved in a substantially less restrictive manner." *Id.* "Finally, the court must weigh the harms and benefits to determine if the behavior is unreasonable on balance." *Id.*

Here, Defendants' arguments rest on the assumption that the Court should apply a rule of reason analysis. However, as discussed in the previous section, the Court need not decide which standard applies at this time. "Indeed, that decision is more appropriate on a motion for summary judgment." *In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d at 1122*. Plaintiffs have sufficiently pleaded the existence of restraints on trade of types that are subject to *per se* treatment. As such, Plaintiffs have also sufficiently pleaded "the existence **[*50]** of the type of restraint that may fall under the ambit of the quick look" and rule-of-reason standards. *eBay, 968 F. Supp. 2d at 1040*. "[T]he Court need not engage in a market analysis until the Court decides whether to apply a *per se* or rule of reason analysis." *In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d at 1122*. Because the Court cannot "at this early stage make a determination as to which rule will apply," the Court cannot find as a matter of law that the quick-look and/or rule of reason standards will not apply to the challenged restraints in this case. *eBay, 968 F. Supp. 2d at 1040*.

3. Summary

In sum, taking Plaintiffs' allegations as true, which the Court must do at this stage of the proceedings, the Court finds that Plaintiffs have sufficiently pleaded the existence of restraints on trade of types that are subject to *per se* treatment. *See id.* The Court, however, "cannot determine with certainty the nature of the restraint[s], and by extension, the level of analysis to apply." *Id.* Accordingly, the Court **DENIES** Defendants' motion to dismiss Plaintiffs' first, second, and fourth causes of action.

C. Sherman Act *Section 2* Claim

In their third cause of action, Plaintiffs assert an attempted monopolization claim under *Section 2* of the Sherman Act. Plaintiffs allege that through Defendants' anticompetitive **[*51]** practices, Defendants "intended to acquire monopoly power in the medical-traveler markets." SAC ¶ 330.

"To establish a Sherman Act *§ 2*[14] violation for attempted monopolization, a private plaintiff seeking damages must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving 'monopoly power'; and (4) causal antitrust injury." *Rebel Oil Co., 51 F.3d at 1432-33* (citing *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988))*.

Defendants argue the Court should dismiss Plaintiffs' *Section 2* claim for three reasons: (1) Plaintiffs fail to plead well-defined relevant markets; (2) Plaintiffs fail to allege exclusionary conduct; and (3) Plaintiffs fail to plead facts showing a dangerous probability that Defendants will succeed in becoming a monopoly. *See* Doc. No. 30-1 at 21-23. Because the Court has already concluded that Plaintiffs have sufficiently alleged exclusionary conduct with respect to antitrust standing, the Court proceeds to address Defendants' remaining arguments regarding the relevant markets and probability of success in becoming a monopoly.

1. Well-Defined Relevant Markets

Plaintiffs assert that they have properly pled the markets, **[*52]** explaining why there is no "reasonably interchangeable substitute" for medical-traveler services and "why these services are sold in both a national market and various regional submarkets." Doc. No. 31 at 21. Defendants argue that Plaintiffs fail to sufficiently define the relevant service and geographic markets. *See* Doc. No. 30-1 at 18. The Court addresses the relevant markets in turn.

A. Service Market

With respect to the service market, Defendants contend that "medical-traveler services" is "vague on its face" and ambiguous. Doc. No. 30-1 at 18. "[C]ircumstantial evidence of market power requires that the plaintiff, at the threshold, define the relevant market." *Rebel Oil Co., 51 F.3d at 1434*. "[A] 'market' is the group of sellers or producers who have the 'actual or potential ability to deprive each other of significant levels of business.'" *Id.* (quoting *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989))*. "The goods and services that sellers or producers offer provide the best indicia of who competes in the same market. Thus, a product market is typically defined to include the pool of goods or services that qualify as economic substitutes because they enjoy reasonable interchangeability and use of cross-elasticity of demand." *Thurman Indus., Inc., 875 F.2d at 1374*. "Market definition is crucial. **[*53]** Without a definition of the relevant market, it is impossible to determine market share." *Rebel Oil Co., 51 F.3d at 1434*.

Here, the Court finds that Plaintiffs have sufficiently defined the relevant service market as "[t]he provision of travelers." SAC ¶ 53. For example, Plaintiffs expressly allege that "[t]ravelers are licensed nurses and medical technicians who travel from place to place in order to perform temporary assignments at understaffed hospitals." *Id.* ¶ 31. The travelers work for staffing companies, such as AMN and Aya, "which make all necessary arrangements for them, and which charge fees to the hospitals for their services." *Id.* The "medical-traveler services constitute a relevant service market: when hospitals require these services, there is no other service that they can use instead, since by definition they use the services of travelers only when their staffing needs cannot be met by their own employees or locally available temporary employees." *Id.* ¶ 51. "There is no other service, nor any other kind of employee that can fulfill the hospitals' requirement for travelers under such circumstances." *Id.*

[14] *Section 2* of the Sherman Act provides, "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize ... trade shall be guilty" of an antitrust violation. *15 U.S.C. § 2*.

Further, unlike *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, a case relied upon by Defendants, **[*54]** where the Third Circuit determined that "the dough, tomato sauce, and paper cups . . . used by Domino's stores are interchangeable with dough, sauce and cups available from other suppliers and used by other pizza companies"(*124 F.3d 430, 438 (3d Cir. 1997)*), Plaintiffs assert that there is "no cross-elasticity of demand for medical-traveler services and any other service" (SAC ¶ 52). "If a hypothetical monopolist were to make all sales of medical-traveler services, it could raise its prices by a statistically significant amount for a non-transitory period without losing so many sales as to make the price-increase unprofitable[.]" SAC ¶ 52. "Hospitals would find themselves largely constrained to submit to the monopolist's price increase and to continue employing travelers at the higher prices for want of any suitable alternative." *Id.* Such allegations are sufficient at this stage of the proceedings.

Defendants also claim there is "ambiguity throughout the SAC as to whether the purported service market for medical services provided by the 'medical travelers' includes services provided by those who recruit 'medical travelers.'" Doc. No. 30-1 at 18. The Court disagrees. While Plaintiffs explain that providers of travelers **[*55]** "employ professional recruiters" whose work "is indispensable to medical-traveler providers[,]" Plaintiffs clearly articulate that the relevant service market consists of the sale of medical-traveler services to understaffed hospitals. SAC ¶¶ 49, 51-53.

Accordingly, because the relevant market includes the groups of sellers "who have actual or potential ability to deprive each other of significant levels of business[,]" and in viewing the allegations in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have sufficiently defined the relevant service market. *Thurman Indus., Inc., 875 F.2d at 1374*; *see also* *Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1203 (9th Cir. 1997)* ("Ultimately what constitutes a relevant market is a factual determination for the jury.").

B. Geographic Markets

Regarding the relevant geographic markets, Defendants assert Plaintiffs' submarket allegations are vague and insufficient to support a claim. *See* Doc. No. 30-1 at 19. "In defining the relevant market, a court must look at the 'full range of selling opportunities reasonably open to [competitors], namely all the product and geographic sales they may readily compete for.'" *Stewart v. Gogo, Inc., No. 12-cv-5164 EMC, 2013 U.S. Dist. LEXIS 51895, 2013 WL 1501484, at *4 (N.D. Cal. Apr. 10, 2013)* (quoting *Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997))*. The Supreme Court **[*56]** has indicated that "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*[15]

Here, Plaintiffs allege that the "provision of travelers is a service that is provided in a nationwide market across the United States and in various regional submarkets." SAC ¶ 58. Defendants take issue with only the alleged regional submarkets. Plaintiffs explain that some providers, including AMN and Aya, dispatch travelers to perform assignments at hospitals across the country. *Id.* ¶ 59. Additionally, there are "various submarkets (or smaller markets) for medical-traveler services[.]" *Id.* ¶ 60. Contrary to Defendants' argument that Plaintiffs' allegations are "conclusory" or "not sufficiently definite" (Doc. No. 30-1 at 19), Plaintiffs assert that each submarket "has distinctive **[*57]** regulatory requirements imposed by state, county and/or municipal authorities" (SAC ¶ 60(1)). "Many travelers are qualified to render services only in certain regions" and "the pool of available travelers largely varies from region to region." SAC ¶ 60(2). Moreover, in each regional submarket, "hospitals pay distinct prices for

[15] "Although *Brown Shoe* involved the challenge of a merger under *Section 7* of the Clayton Act, courts have recognized that its submarket analysis is equally applicable to claims brought under the Sherman Act." *In re Live Concert Antitrust Litig., 863 F. Supp. 2d 966, 984-85 (C.D. Cal. 2012)* (citing *Thurman Indus., Inc., 875 F.2d at 1375 n.1*).

traveler services, have distinct staffing requirements, and must address unique seasonal and fluctuating circumstances." *Id.* ¶ 60(3). Further, "[i]t is within the different regional submarkets that providers compete with one another to furnish travelers to hospitals." *Id.* ¶ 64. The Court finds that Plaintiffs have sufficiently alleged how the provision of services can vary in the numerous submarkets due to state, county and/or municipal regulatory requirements, individual preferences, distinct prices, and the unique circumstances of hospitals across the country. *See* *DocMagic, Inc. v. Ellie Mae, Inc., 745 F. Supp. 2d 1119, 1135 (N.D. Cal. 2010)* (noting that "there is no contradiction between the existence of a national . . . market and the simultaneous existence of local . . . markets that compete only at the regional level.").

Accordingly, the Court finds that taking Plaintiffs' allegations as true, Plaintiffs have sufficiently defined **[*58]** the relevant geographic markets: a national market for the provision of travelers, as well as various regional submarkets for the provision of these services. *See* *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1051 (9th Cir. 2008)* (finding that the plaintiff's complaint "sufficiently alleges that IKON customers constitute a submarket according to all of those practical indicia" outlined by the Supreme Court in *Brown Shoe*).

2. Dangerous Probability of Success

Plaintiffs claim "there exists a dangerous probability that [Defendants] will succeed in the effort unless there is an antitrust intervention." SAC ¶ 330.

"To establish a dangerous probability of success, plaintiffs must . . . (1) [ ] define the relevant market and (2) [ ] demonstrate that substantial barriers to entry protect that market." *United States v. Microsoft Corp., 253 F.3d 34, 81, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*; *see also* *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455-56, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* (indicating that a court's evaluation of an attempted monopolization claim must include a definition of the relevant market and the defendant's market share). "The determination whether a dangerous probability of success exists is a particularly fact-intensive inquiry." *Microsoft Corp., 253 F.3d at 80*. The Sherman Act does not specify which activities constitute an attempted monopolization; thus, "the court 'must examine the facts of each case, mindful that the determination of **[*59]** what constitutes an attempt, as Justice Holmes explained, 'is a question of proximity and degree.'" *Id.* (quoting *United States v. Am. Airlines, Inc., 743 F.2d 1114, 1118 (5th Cir.1984)*; *Swift & Co. v. United States, 196 U.S. 375, 402, 25 S. Ct. 276, 49 L. Ed. 518 (1905))*.

Plaintiffs allege Defendants are "the dominant provider of the relevant service (the provision of travelers)." SAC ¶ 331. Defendants make or control "at least 37% of all sales" nationally, and in some regional submarkets, Defendants make or control "at least 50% of all sales." *Id.* ¶¶ 67-68. Defendants contend that Plaintiffs allegations concerning market power and barriers to entry are insufficient to state a claim for attempted monopolization. *See* Doc. No. 30-1 at 23. The Court addresses Defendants' arguments in turn.

A. Market Power

Defendants first argue that Plaintiffs' market power allegations "are obviously padded" and insufficient. *Id.* The Ninth Circuit has indicated that "[m]arket power may be demonstrated through either of two types of proof." *Rebel Oil Co., 51 F.3d at 1434*. The first type of proof is "direct evidence of the injurious exercise of market power." *Id.* "The more common type of proof is circumstantial evidence pertaining to the structure of the market." *Id.* "To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant **[*60]** owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output . . . ." *Id.* "Measurement of market share is necessary to determine whether the defendant possesses sufficient leverage to influence marketwide output." *Id. at 1437*. "Market power need not be pled with specificity, and whether a defendant actually possesses market power is a factual question." *DocMagic, 745 F. Supp. 2d at 1136* (citing *Newcal, 513 F.3d at 1045, 1051)*. The Ninth Circuit has held that in an attempt-to-monopolize claim, a "market share of 44 percent is sufficient as a matter of law to support a finding of market power, if entry barriers are high and competitors are unable to expand their output[.]"

Rebel Oil Co., 51 F.3d at 1438. The Ninth Circuit, however, cautioned that "[c]ourts should be 'wary of the numbers game of market percentage' when considering attempt-to-monopolize claims." Id. n.10 (quoting Dimmitt Agri Indus., Inc. v. CPC Int'l Inc., 679 F.2d 516, 533 n.18 (5th Cir. 1982)).

Here, Plaintiffs plead circumstantial evidence that Defendants already "wield[] monopoly power in six regional submarkets and ha[ve] come dangerously close in several others." Doc. No. 31 at 25. Specifically, Plaintiffs allege Defendants are the "dominant provider of medical-traveler services" in the **[*61]** country. SAC ¶ 66. Nationally, Defendants make or control "at least 37% of all sales." *Id.* ¶ 67. In the following regional submarkets, Defendants make or control at least 50% of all sales: (1) the Greater Los Angeles Metropolitan Area; (2) the San Francisco Bay Area; (3) the Greater Washington, D.C. Metropolitan Area; (4) the Greater Baltimore Metropolitan Area; (5) the Greater Richmond Metropolitan Area; and (6) the Greater Norfolk Metropolitan Area. *Id.* ¶ 68. Moreover, in other regional submarkets, Defendants make or control "a commanding percentage of overall sales: Hawaii (87% market foreclosure); Nebraska (83%); Maine (83%); Vermont (80%); Arkansas (73%); Montana (67%); Nevada (64%); and New Hampshire (61%)." *Id.* ¶ 69.

Defendants contend that the market share percentages are based on Plaintiffs' internal market analysis—not third-party industry data—and that the percentages are "padded" to account for sales that Defendants control. *See* Doc. No. 30-1 at 23. Defendants do not point to, nor is the Court aware of, any binding authority requiring a plaintiff to present third-party industry data at this stage of the litigation in asserting an attempt-to-monopolize claim. Moreover, Plaintiffs **[*62]** expressly state that they have "adjusted each stated market share downward by 5%" to "compensate for possible error." SAC ¶ 79. Plaintiffs indicate that their internal market analysis is what they can "provide at present without the benefit of discovery." *Id.* ¶ 82. As such, the Court finds that Plaintiffs have provided sufficient factual allegations describing Defendants' position to plausibly conclude that Defendants have "sufficient leverage to influence marketwide output." Rebel Oil Co., 51 F.3d at 1437.

B. Entry Barriers

Defendants next argue that Plaintiffs fail "to show that there are any legally significant barriers to entry or expansion by competing firms." Doc. No. 30-1 at 23. Entry barriers are "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." L.A. Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427-28 (9th Cir.1993). "A mere showing of substantial or even dominant market share alone" is insufficient if the plaintiff has not shown that rivals cannot enter the market and that existing competitors could not expand in response to higher prices. Rebel Oil Co., 51 F.3d at 1439; *see also* Spectrum Sports, 506 U.S. at 456 ("In order to determine whether there is a dangerous probability **[*63]** of monopolization, courts have found it necessary to consider . . . the defendant's ability to lessen or destroy competition in that market."). "The main sources of entry barriers are: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale." Rebel Oil Co., 51 F.3d at 1439. In assessing entry barriers, courts focus on the ability not to constrain those already in the market, but "those who would enter but are prevented from doing so." *Id.* (quoting United States v. Syufy Enter., 903 F.2d 659, 672 n.21 (9th Cir. 1990)).

Here, the Court finds Plaintiffs' allegations regarding barriers to entry are sufficient at this stage of the litigation. Plaintiffs assert that Defendants protect their position in the affected markets by utilizing numerous barriers to entry and expansion. *See* SAC ¶ 106. Specifically, Plaintiffs allege the following market barriers: (1) the nursing shortage; (2) Defendants' trade restraints and alleged anticompetitive conduct; (3) brand recognition; (4) regulatory and administrative expertise; and (5) capital requirements. *See id.* at ¶¶ 106-115.

With respect to **[*64]** the alleged trade restraints, Defendants note that rival providers, like Plaintiffs, can and do expand their capacity by subcontracting with other providers, and that Plaintiffs' business is experiencing growth. *See* Doc. No. 30-1 at 24. Thus, Defendants assert the trade restraints do not constitute a barrier to entry. Defendants' argument, however, is misplaced as Plaintiffs allege that due to Defendants' trade restraints, "potential entrants and existing rivals cannot develop their own *comparable* pools to compete against AMN." SAC ¶ 110 (emphasis added). Additionally, as noted previously, Plaintiffs and other rivals "have been prevented or greatly hindered . . . from developing their own traveler pools and deploying them in order to compete for the large hospitals' business and to compete in general in the medical-traveler markets." *Id.* ¶ 4.

Regarding brand recognition, Defendants assert that "it is well-established that reputation is not an entry barrier." Doc. No. 30-1 at 24. The case relied upon by Defendants pre-dates the Ninth Circuit's decision in *Rebel Oil Co.*, which makes clear that "entrenched buyer preferences for established brands" is a market barrier. *51 F.3d at 1439*. Additionally, at **[*65]** the hearing on Defendants' motion to dismiss Plaintiffs' FAC, Plaintiff's counsel explained to the Court that Defendants have "a highly recognized brand[.]" Doc. No. 21 at 24. "In order to enter this market, you [the sellers of traveler services] have to develop a sufficiently trusted brand so that hospitals [the buyers] will hire your medical travelers[.]" *Id.*

Further, Plaintiffs sufficiently allege that providers of medical-traveler services require a certain level of expertise in order to perform their operations (SAC ¶ 113), and that the provision of medical-traveler services "requires substantial capital funding" so that providers can "continually pay [their] travelers for their work months before being paid by hospital customers for services rendered" (*Id.* at ¶ 114). Plaintiffs also assert that the nursing shortage constitutes a market barrier. *See id.* ¶ 107-108. Plaintiffs recognize that the nursing shortage is the result of: (1) accredited nursing schools being unable to accommodate all qualified applicants; and (2) many qualified nurses retiring. *Id.* ¶ 107. However, Plaintiffs indicate that the nursing shortage affects both potential entrants and existing competitors. *See id.* ***[*66]*** Therefore, the Court finds that Plaintiffs have plausibly alleged that there are "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *L.A. Land Co., 6 F.3d at 1427-28*.

3. Summary

In sum, the Court finds that Plaintiffs have sufficiently defined the relevant service market and geographic markets, and that Plaintiffs have sufficiently alleged a dangerous probability that Defendants will succeed in becoming a monopoly. Accordingly, the Court **DENIES** Defendants' motion to dismiss Plaintiffs' third cause of action.

D. Tortious Interference with Prospective Economic Relations Claim

In their fifth cause of action, Plaintiffs contend that Defendants, through use of their various trade restraints, "deliberately and effectually interfered with Aya's prospective relationships with recruiters, travelers, hospitals and vendor-managers." SAC ¶ 349. As a consequence, Defendants "successfully interfered with [Aya's] prospective commercial relationships, which Aya seeks to establish and requires in order to remain a viable competitor in the affected markets." *Id.* ¶ 351. Defendants argue dismissal of Plaintiffs' tortious interference claim is appropriate because the relationships Plaintiffs **[*67]** allege Defendants interfered with are "undefined, conclusory and speculative in nature." Doc. No. 15-1 at 23.[16]

The California Supreme Court set forth the standard for determining whether a plaintiff has stated a claim for tortious interference with prospective business relations in *Buckaloo v. Johnson, 14 Cal. 3d 815, 122 Cal. Rptr. 745, 537 P.2d 865 (Cal. 1975)*. The elements for such a claim are: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the

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[16] Defendants also argue that dismissal is appropriate because Plaintiffs' claim is predicated on antitrust violations, which Plaintiffs have "failed to plead sufficiently." *Id.* However, for the reasons set forth above, the Court disagrees and finds Defendants' argument unpersuasive.

defendant." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)* (internal citations and quotation marks omitted).

Here, Plaintiffs' allegations of tortious interference are insufficient to state a claim. For example, Plaintiffs allege that Defendants have "disrupted relationships that Aya has tried to develop with various recruiters, travelers, hospitals, and vendor-managers." SAC ¶ 350. However, while Plaintiffs need not provide the actual names of such individuals and/or companies, Plaintiffs "must allege a relationship with **[*68]** 'a specific, alebit unnamed' third party." *R Power Biofuels, LLC v. Chemex LLC, No. 16-cv-716-LHK, 2016 U.S. Dist. LEXIS 156727, 2016 WL 6663002, at *16 (N.D. Cal. Nov. 11, 2016)* (quoting *Ramona Manor Convalescent Hospital v. Care Enterprises, 177 Cal. App. 3d 1120, 1133, 225 Cal. Rptr. 120 (Ct. App. 1986))*. Moreover, "it is essential that the Plaintiff allege facts showing that Defendant interfered with Plaintiff's relationship with a particular individual." *Damabeh v. 7-Eleven, Inc., No. 12-cv-1739-LHK, 2013 U.S. Dist. LEXIS 66565, 2013 WL 1915867, at *10 (N.D. Cal. May 8, 2013)*. Because Plaintiffs fail to provide any details about the relationships with specific individuals and/or companies, and because it is impossible to determine how many such relationships existed, the Court finds that Plaintiffs fail to state a claim for tortious interference with prospective economic advantage.

Accordingly, the Court **DISMISSES** Plaintiffs' fifth cause of action for tortious interference with prospective economic relations **with leave to amend**.

E. UCL Claim

Finally, Plaintiffs allege a cause of action for violations of California's UCL because through Defendants' "anticompetitive practices," Defendants have "employed conduct that is unfair, unlawful and/or deceptive." SAC ¶ 355.

California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. The UCL provides a separate theory of liability under **[*69]** each of the three prongs: "unlawful," "unfair," and "fraudulent."[17] *Stanwood v. Mary Kay, Inc., 941 F. Supp. 2d 1212, 1222 (C.D. Cal. 2012)* (citing *Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007))*.

With respect to the "unlawful" prong, for the reasons discussed above, the Court finds Plaintiffs sufficiently allege conduct that falls within the unlawful prong of the UCL. *Section 17200* "borrows" violations from other laws by making them independently actionable as unfair competitive practices. *Korea Supply Co., 29 Cal. 4th at 1143*. Because Plaintiffs allege unlawful conduct under *Section 1* and *Section 2* of the Sherman Act, Plaintiffs also adequately allege a violation of the UCL's unlawful prong.

With respect to the "unfair" prong, the California Supreme Court has adopted the following test in the antitrust context: "[w]hen a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*," unfair in *section 17200* means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 544 (Cal. 1999)*. Here, as discussed in great detail above, Plaintiffs have sufficiently alleged conduct that "threatens or harms competition." *Id.* Plaintiffs allege Defendants' trade restraints **[*70]** have an exclusionary effect on Defendants' rivals: "the rivals cannot solicit any of AMN's employees, and AMN's recruiters, who are best placed to solicit these employees, dare not leave AMN to work for any rival." SAC ¶ 219. Moreover, Defendants have utilized "unlawful trade restraints and baseless litigation

[17] The Court notes that in the SAC, Plaintiffs claim Defendants have "employed conduct that is unfair, unlawful and/or deceptive." SAC ¶ 355. The Court does not construe Plaintiffs' SAC as asserting a claim under the UCL's fraudulent prong, especially in light of the fact that Plaintiffs do not mention "fraud" or "fraudulent" conduct in support of this cause of action, nor do Plaintiffs respond to Defendants' arguments regarding the fraudulent prong of the UCL.

to prevent and discourage [their] rivals from seeking to make hires from this pool. [Their] purpose is to remain the only provider that can offer such as pool." *Id.* at ¶ 221. Thus, Plaintiffs also sufficiently allege a violation of the UCL's unfair prong.

Accordingly, the Court **DENIES** Defendants' motion to dismiss Plaintiffs' sixth cause of action.

CONCLUSION

Based on the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' motion to dismiss Plaintiffs' SAC. The Court **DISMISSES** Plaintiffs' tortious interference with prospective economic relations claim **without prejudice**. Plaintiffs may file a third amended complaint that cures the deficiencies addressed herein with respect to the tortious interference with prospective economic relations claim on or before **June 29, 2018**.

IT IS SO ORDERED.

Dated: June 19, 2018

/s/ Michael M. Anello

HON. MICHAEL M. ANELLO

United States District **[*71]** Judge

John Bean Techs. Corp. v. Morris & Assocs.

United States District Court for the Western District of Arkansas, Fort Smith Division

June 19, 2018, Decided; June 19, 2018, Filed

No. 2:15-CV-02211

Reporter
2018 U.S. Dist. LEXIS 102133 *; 2018 WL 3039734

JOHN BEAN TECHNOLOGIES CORPORATION, PLAINTIFF v. MORRIS & ASSOCIATES, INC., DEFENDANT

Subsequent History: Later proceeding at *John Bean Techs. Corp. v. Morris & Assocs., 2018 U.S. Dist. LEXIS 226077 (W.D. Ark., Dec. 11, 2018)*

Summary judgment granted by, Dismissed by, Motion denied by, As moot *John Bean Techs. Corp. v. Morris & Assocs., 2019 U.S. Dist. LEXIS 151744, 2019 WL 4246696 (W.D. Ark., Sept. 6, 2019)*

Prior History: *Cooling & Applied Tech. v. Morris & Assocs., 2016 U.S. Dist. LEXIS 200557 (W.D. Ark., July 26, 2016)*

Core Terms

auger, chiller, customer, marking, patented, advertising, discovery, sales, reputation, blades, false advertising, competitive injury, summary judgment, alleged false, website, economic injury, admissible evidence, tank, partial summary judgment, proximately cause, Deposition, rebutted, genuine dispute, material fact, no evidence, causation, goodwill, argues, deceptive, additional discovery

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Judges: P.K. HOLMES, III, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: P.K. HOLMES, III

Opinion

OPINION AND ORDER

Before the Court is a motion (Doc. 84)[1] for partial summary judgment filed by Defendant Morris & Associates, Inc. ("Morris"). Morris has also filed a brief in support (Doc. 85) and a statement of facts (Doc. 86). Plaintiff John Bean Technologies Corporation ("JBT") has filed a response in opposition (Doc. 95) and responsive statement of facts (Doc. 96). Morris has filed a reply (Doc. 99). This motion requests partial summary judgment on JBT's "false marking and false advertising claims associated with Morris's advertising of its IntraGrill auger chiller as patented **[*2]** under United States Patent No. 6,308,529 ('the '529 patent')." (Doc. 84, p. 1).

Also before the Court is a separate motion (Doc. 91)[2] for partial summary judgment, a brief in support (Doc. 92) and a statement of facts (Doc. 93) filed by Morris. JBT has filed a response in opposition (Doc. 101) and responsive statement of facts (Doc. 102). Morris has filed a reply (Doc. 105), and JBT has filed a surreply (Doc. 109) with leave of Court. This motion requests partial summary judgment on JBT's "false advertising claims associated with Morris's IntraGrill auger chiller webpage." (Doc. 91, p. 1).

Also before the Court is JBT's motion (Doc. 78)[3] for reconsideration of a protective order (Doc. 77) entered by the Court. JBT has filed a brief in support (Doc. 80) and Morris has filed a response (Doc. 88).

Because JBT cannot show a genuine dispute of material fact with respect to the issue of causation and injury, the motions for partial summary judgment will be granted. Because JBT cannot show that the discovery it seeks is relevant or proportional, the motion for reconsideration will be denied.

I. Procedural Posture

This action was filed in 2015 by Cooling & Applied Technology, Inc. ("CAT").[4] CAT asserted Patent Act false marking claims pursuant **[*3]** to *35 U.S.C. § 292(b)*, Lanham Act false advertising claims pursuant to *15 U.S.C. § 1125*, and various North Carolina and Arkansas State law claims against Morris. CAT's claims involved Morris's IntraGrill auger chiller, marked as patented under the '529 patent, and Morris's COPE product, marked as patented under United States Patent No. 7,470,173 ("the '173 patent") and United States Patent No. 7,588,483 ("the '489 patent"). Morris filed a motion to dismiss the false marking claims and any associated Lanham Act and state law claims. CAT's business was acquired by JBT, and CAT assigned its claims in this lawsuit to JBT without opposition from Morris.

The Court substituted JBT for CAT and denied the motion to dismiss. (Doc. 42). In its opinion and order denying that motion to dismiss, the Court addressed the issue of causation and injury. With respect to the false marking claims related to the '529 patent, the Court explained that JBT would be required to show a competitive injury caused by Morris to succeed on its false marking claim, and noted that JBT alleged that "[u]pon information and belief . . . customers have been reluctant to purchase and, *in some instances, have declined to purchase*, CAT's chillers or certain parts of CAT's chillers as a result of Morris's false marketing." (Doc. 42, p. 9 (quoting Doc. 1, ¶ 102)).

Following entry of this **[*4]** order, the parties filed a second joint *Rule 26(f)* report. (Doc. 45). JBT proposed that the parties engage in full discovery on all claims and defenses. Morris proposed that discovery be bifurcated, and first be limited to discovery regarding intent to deceive and Morris's advice-of-counsel defense. The Court entered an interim scheduling order (Doc. 46) declining to limit discovery as Morris proposed, thereby allowing JBT to seek discovery regarding all claims and defenses. The Court also set a claim construction hearing, which was held on July 19, 2017. JBT then amended its complaint (Doc. 64), primarily adding additional factual allegations in support of its willfulness claims, and maintaining its nonspecific allegations that it had been or was likely to be injured by

[1] Related unredacted documents are filed under seal. (Docs. 87, 97, 98, and 100).

[2] Related unredacted documents are filed under seal. (Docs. 94, 103, 104, and 106).

[3] Related unredacted documents are filed under seal. (Docs. 79 and 81).

[4] Except to avoid confusion, the Court will identify CAT as JBT.

Morris's false marking and false advertising. An unredacted copy (Doc. 65) of the amended complaint was filed under seal.

Thereafter, Morris moved for a protective order (Doc. 69). Morris argued that despite ample opportunity in the course of discovery, JBT had not met its obligation to articulate or provide evidence of a single injury caused by Morris's alleged false marking and false advertising of the IntraGrill auger chiller. **[*5]** Referencing the proportionality principle in *Federal Rule of Civil Procedure 26*, Morris requested that the Court protect Morris from JBT's requests for detailed disclosure of Morris's sales and financial information related to the IntraGrill auger chiller until JBT showed evidence that it had suffered an injury. JBT's response argued that it had been injured by Morris's false marking and false advertising, but the responses to Morris's discovery requests and the evidence cited in support of that response indicated otherwise. JBT's failure to provide evidence of injury not only led the Court to determine that JBT's discovery requests were disproportionate to the needs of the lawsuit, but that summary judgment against JBT may be appropriate at the very least on claims related to the IntraGrill auger chiller marked with the '529 patent. The Court granted the motion for protective order, and further ordered Morris to file a motion for partial summary judgment.

The parties then filed the motions under consideration.

II. Standard of Review

A. Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. **[*6]** The moving party bears the burden of showing the absence of a genuine dispute of material fact and that it is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. It may meet this burden by citing to affidavits, pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. When the moving party has met its burden, the nonmoving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (quoting old *Fed. R. Civ. P. 56(c)*). "The nonmoving party must do more than rely on allegations or denials in the pleadings, and the court should grant summary judgment if any essential element of the prima facie case is not supported by specific facts sufficient to raise a genuine issue for trial." *Register v. Honeywell Fed. Mfg. & Techs., LLC, 397 F.3d 1130, 1136 (8th Cir. 2005)* (citing *Celotex Corp., 477 U.S. at 324*).

In analyzing whether there is a genuine dispute of material fact, the Court draws all reasonable inferences in the nonmoving party's favor. *Matsushita Elec. Indus. Co., 475 U.S. at 587-88*. "[T]he non-moving party must be able to show sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *Binkley v. Entergy Operations, Inc., 602 F.3d 928, 931 (8th Cir. 2010)*. "A party may not rely solely on inadmissible hearsay in opposing a motion for summary judgment, but instead must show that admissible evidence will be available **[*7]** at trial to establish a genuine issue of material fact." *Fin. Timing Publ'ns, Inc. v. Compugraphic Corp., 893 F.2d 936, 942 (8th Cir. 1990)*. "[S]ummary judgment is appropriate when there is 'adequate time' for discovery and not solely when discovery is complete. The district court has discretion to determine when there has been adequate time for discovery . . . ." *Nat'l Bank of Commerce of El Dorado, Ark. v. Dow Chemical Co., 165 F.3d 602, 606 (8th Cir. 1999)* (citation omitted). A party who seeks additional discovery in response to a motion for summary judgment must do more than speculate that additional discovery would be useful—it must show, without conclusory statements that some evidence might possibly be found, how additional discovery would alter the evidence before the court. *Nat'l Bank of Commerce of El Dorado, Ark., 165 F.3d at 606 (8th Cir. 1999)*.

B. Controlling Substantive Federal Law

As a general matter, the Court applies Federal Circuit precedent to patent law issues, but otherwise applies the precedent of the Eighth Circuit. *Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1359 (Fed. Cir. 1999)* (en banc in relevant part), *abrogation on other grounds recognized by Amgen Inc. v. Sandoz Inc., 877 F.3d 1315, 1325-26 (Fed. Cir. 2017)*. The Court applies Federal Circuit precedent to JBT's Patent Act false marking claims. *Panduit Corp. v. All States Plastic Mfg. Co., Inc., 744 F.2d 1564, 1573 (Fed. Cir. 1984)*, *overruled on other grounds by Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985)*. The Court applies Eighth Circuit precedent to JBT's Lanham Act false advertising claims. *Syngenta Seeds, Inc. v. Delta Cotton Co-op, Inc., 457 F.3d 1269, 1273 (Fed. Cir. 2006)*. The Court applies state law to those claims over which it is exercising supplemental jurisdiction under *28 U.S.C. § 1367*. *Felder v. Casey, 487 U.S. 131, 151, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988)* ("[W]hen **[*8]** a federal court exercises diversity or pendent jurisdiction over state-law claims, 'the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.'" (quoting *Guar. Tr. Co. v. York, 326 U.S. 99, 109, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945))*).

C. Protective Orders

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." *Fed. R. Civ. P. 26(b)(1)*. For good cause, the Court may enter a protective order to protect a party from undue burden. *Fed. R. Civ. P. 26(c)(1)*.

III. Facts

JBT and Morris are manufacturers and distributors of auger chillers to poultry processors in the United States. JBT and Morris sell other poultry processing equipment, as well. For purposes of these motions, it is agreed that JBT and Morris are the only two distributors of auger chillers in the relevant market. An auger chiller is a piece of equipment in a processing line which receives chicken carcasses in the middle stages of the butchering process and cools them to prevent contamination. Auger chillers vary in the details of their design, but the general form of an auger chiller is a long, open-topped tank mostly encompassing **[*9]** an auger running the length of the tank. Cold water is run in a current from the far end of the tank to the receiving end to cool the chickens, and the auger slowly rotates on a shaft, driving the chickens against this current to the far end of the tank. Unless another opening in the auger blades, or flights, is present, the water in the tank flows through the small space between the edge of the auger blades and the interior wall of the tank. The flow of water in the center of the tank near the auger shaft is generally slowed by the auger blades, and tends to heat more quickly and cool less effectively than the flowing water at the edge of the blades. When they reach the end of the tank, the chilled chickens are then received by the next stage of the processing line.

Auger chillers are expensive, heavy-duty pieces of equipment that are manufactured to last for many years. Consequently, sales to customers—various processors around the country—are relatively few, highly competitive, and worth a substantial amount of money. Salespeople for JBT and Morris attempt to keep a close relationship with their customers and potential customers to maintain a good reputation in the market and increase **[*10]** the chance of future sales. JBT and Morris also maintain websites, publish brochures for distribution to customers, and attend trade shows in order to improve their reputations with customers and make additional sales.

Morris sells an auger chiller called IntraGrill. In an effort to increase the flow of water throughout the auger chiller tank, Morris has manufactured vertical openings in the auger blades of the IntraGrill auger chiller. These openings run from the shaft to the edge of the blade. Morris calls these openings "water passages."[5] Morris has marked the IntraGrill auger chiller with the '529 patent. Morris advertises its auger chiller as patented on its website, in brochures, on signs at trade shows, and in communication with customers and potential customers. JBT believes Morris has falsely marked its IntraGrill auger chiller as patented and is falsely advertising its IntraGrill auger chiller as patented.

JBT also sells an auger chiller, called FATCAT. FATCAT was manufactured and sold by CAT prior to CAT's purchase by JBT. In 2013, CAT began including openings for water in the blades of its own auger chillers. JBT calls these openings "flow reliefs." JBT's flow reliefs do not run from **[*11]** the shaft to the edge of the blade, but are located only near the shaft. When JBT sold FATCAT auger chillers to customers, flow reliefs could be included at no additional cost.

Morris's website advertises features of its IntraGrill auger chiller. The website represents that Morris's auger chiller is patented. The website includes a caricature of the IntraGrill auger chiller. The website also includes a caricature of an auger chiller that can be identified as the FATCAT auger chiller on account of openings that appear to be flow reliefs in the auger blades. The website also includes a statement that "In other systems, water circulates only around the shaft and through a narrow gap between the auger flights and the tank wall." JBT believes that Morris is falsely advertising IntraGrill as patented on this webpage. JBT also believes that the flow reliefs on the FATCAT caricature are disproportionately small compared to their size on an actual FATCAT, and that this is a literally false comparative advertisement. JBT also believes that the statement about water flow in "other systems" is a literally false comparative advertisement.

IV. Analysis

A. Federal Claims

1. False Marking

Morris has moved **[*12]** for partial summary judgment on JBT's false marking claims related to the IntraGrill auger chiller. Morris argues that there is no genuine dispute of material fact with respect to whether JBT suffered a competitive injury proximately caused by Morris's alleged false marking. JBT responds that summary judgment is improper because Morris's alleged false marking harmed JBT's reputation and goodwill with a major customer and because the marking enhances Morris's reputation, necessarily harming JBT by virtue of the two-player market.

The Federal Circuit has described the "competitive injury" requirement amended into the Patent Act by the America Invents Act as a statutory standing requirement for plaintiffs bringing a false marking claim. *35 U.S.C. § 292(b)*; *Sukumar v. Nautilus, Inc., 785 F.3d 1396, 1400 (Fed. Cir. 2015)*. While issues of statutory standing have been treated by courts "as effectively jurisdictional," the term "statutory standing" is misleading, as the actual issue addressed by a "statutory standing" analysis is whether a plaintiff has a cause of action under the relevant statute. *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S.--, 572 U.S. 118, 134 S.Ct. 1377, 1387, n.4, 188 L. Ed. 2d 392 (2014)* (explaining in the closely-analogous context of Lanham Act false advertising claims that whether there is "prudential standing" or "statutory standing" does not implicate a **[*13]** federal court's subject matter jurisdiction). To succeed on a false marking claim against Morris, JBT must show that Morris's false marking caused a competitive injury to JBT.

A competitive injury is "a wrongful economic loss caused by a commercial rival, such as the loss of sales due to unfair competition; a disadvantage in a plaintiff's ability to compete with a defendant, caused by the defendant's

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[5] To the extent this term, or any other term in this opinion, has a disputed meaning relevant to construction of a patent at issue, the Court does not construe that term in this opinion.

unfair competition." *Sukumar, 785 F.3d at 1400* (quoting Black's Law Dictionary (9th ed. 2009). Competitive injury is analogous to the concept of "injury to competition" found in ***antitrust law***. *Id. at 1401* (citing *Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484, 488 (8th Cir. 1985)*; *Midwest Underground Storage, Inc. v. Porter, 717 F.2d 493, 498 (10th Cir. 1983))*.

> If an article that is within the public domain is falsely marked, potential competitors may be dissuaded from entering the same market. False marks may also deter scientific research when an inventor sees a mark and decides to forego continued research to avoid possible infringement. False marking can also cause unnecessary investment in design around or costs incurred to analyze the validity or enforceability of a patent whose number has been marked upon a product with which a competitor would like to compete.

Forest Grp., Inc. v. Bon Tool Co., 590 F.3d 1295, 1303 (Fed. Cir. 2009) (citation omitted).

JBT argues that competitive injury is a necessary consequence of false marking in **[*14]** a two-player market because Morris's auger chillers gain value from being marked as patented, and the value of JBT's auger chillers necessarily diminishes when the value of Morris's auger chillers increases. JBT argues in the alternative that its reputation and goodwill with a customer were injured when the customer declined to purchase a JBT auger chiller with flow reliefs because Morris's auger chillers were marked as patented, but subsequently asked JBT to retrofit the auger chiller with flow reliefs.

As an initial matter, the Court rejects JBT's argument that its auger chillers are necessarily devalued if the value of Morris's auger chillers increases. This principle supports a rebuttable presumption of economic injury in false advertising cases where a two-player market necessarily makes ads comparative.[6] *See* *Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 162 (2d Cir. 2007)*. Whether a patent marking is comparative is not an issue in false marking cases, and the principle JBT relies on has no clear application to these claims. The Patent Act now affirmatively requires a Plaintiff to demonstrate competitive injury as part of a false marking claim. *35 U.S.C. § 292(b)*. This requirement was amended into the Patent Act against a surge in false-marking qui tam litigation **[*15]** and allows the United States to recover a per-article fine and actually-injured parties to recover compensatory damages, while eliminating litigation brought by unharmed parties. *See* *Sukumar, 785 F.3d 1396 at 1400* (reviewing legislative history of the competitive injury amendment in the America Invents Act). Allowing a plaintiff to proceed to trial with no evidence of actual competitive injury would defeat the purpose of this amendment. *Cf.* *Gravelle v. Kaba Ilco Corp., 684 Fed. App'x 974, 979-80 (Fed. Cir. 2017)* (explaining that the competitive injury causation analysis requires more than general speculation about what could occur).

The evidence JBT cites in support of this argument would establish a genuine dispute of fact with respect to whether marking Morris's auger chiller as patented increases its value, were that issue in dispute, but JBT cites no evidence to support its contention that as Morris's auger chillers increase in value relative to their value before being marked as patented, JBT's auger chillers must simultaneously decrease in value relative to their value before Morris's auger chillers were marked as patented.

For this reason, JBT leans heavily on an instance in which one customer, when purchasing a JBT auger chiller for one processing plant, declined JBT's offer **[*16]** to add flow reliefs to the auger blade, but then later requested that JBT retrofit the auger blade with those flow reliefs. JBT cites no admissible evidence, but only hearsay and speculation, to support its argument that the customer initially declined the flow reliefs because Morris's auger chiller with water passages was marked patented.[7] Even were this evidence admissible, JBT has known of this

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[6] JBT's argument is further addressed in the Court's analysis of JBT's false advertising claims, below.

[7] Even if the evidence were admissible, it would show only that the customer was hesitant to purchase an auger chiller with new features from JBT because the customer had, in the past, been engaged in patent infringement litigation with JBT's sole competitor, Morris. That is, the evidence tends to show that Morris's past litigation actions, the customer's awareness that Morris had patents protecting some of its products, and the customer's reliance on its own legal team's advice (which might have multiple foundations other than Morris's marking) led to the customer's decision to request a JBT auger chiller with no flow reliefs in the auger blade. The inadmissible evidence does not show that the customer's decision was caused by Morris's marking of its own auger chiller as patented, and reaching that conclusion requires speculation, rather than reasonable inference.

incident since 2013, but chose not to disclose it during months of discovery despite being served with interrogatories to which that information was responsive. *Rule 37(c)(1)* precludes its use now. Furthermore, JBT made the sale in question, and later retrofitted the blades at the customer's request, at no additional charge to the customer. JBT thereafter made additional sales to that customer. JBT cites no admissible evidence to support its contention that it lost reputation or goodwill with that customer, and the evidence in the record indicates otherwise.

JBT cites no admissible evidence to support its argument that Morris's alleged false marking caused a competitive injury to JBT. JBT was not dissuaded from entering the auger chiller market. JBT was not deterred from researching improvements to auger **[*17]** chillers or making sales of auger chillers. JBT made and sold auger chillers with flow reliefs in the auger blades, and sold them for the same price whether or not there were flow reliefs. JBT did not make unnecessary investments to design around Morris's IntraGrill—rather, JBT believes its own design to be superior to Morris's design. JBT does not cite any cost incurred to analyze the validity or enforceability of the '529 patent with respect to JBT's auger chiller. Because JBT cannot show that a genuine dispute of material fact exists with respect to whether JBT suffered a competitive injury proximately caused by Morris's alleged false marking of its IntraGrill product, summary judgment for Morris is proper on all false marking claims related to the IntraGrill product.

2. False Advertising

Morris has moved for partial summary judgment on any false advertising claims for damages or injunctive relief related to advertising materials for the IntraGrill auger chiller. Morris argues that there is no genuine dispute of material fact with respect to whether JBT suffered or is likely to suffer an economic injury proximately caused by Morris's alleged false advertising. JBT responds that summary judgment **[*18]** is improper because Morris's alleged false advertising harmed JBT's reputation and goodwill with a major customer, because the advertising enhances Morris's reputation, necessarily harming JBT by virtue of the two-player market, because Morris has not rebutted the presumption of causation and injury that arises from literally false comparative advertising, and because JBT has shown a likelihood of irreparable harm if Morris is not enjoined.

"To establish a claim under the false or deceptive advertising prong of the Lanham Act, a plaintiff must prove [among other things] . . . the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to the defendant or by a loss of goodwill associated with its products." *United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998)*. To make this showing, "a plaintiff suing under *§ 1125(a)* ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and . . . that occurs when deception of consumers causes them to withhold trade from the plaintiff." *Lexmark Int'l, Inc., 134 S.Ct. at 1391*. A plaintiff who makes this showing of economic injury comes within the statute's coverage. *Id. at 1387 n.4*. To obtain injunctive relief preventing **[*19]** a defendant's false advertising, even where economic injury can be presumed, a plaintiff must show it will suffer irreparable harm if an injunction does not issue. *Buetow v. A.L.S. Enters., Inc., 650 F.3d 1178, 1183 (8th Cir. 2011)*.

JBT's argument that it suffered economic or reputational injury involving a major customer as a result of Morris's purported false advertising is unsupported by admissible evidence. JBT relies on the same customer interaction cited above, and that evidence is inadmissible hearsay and excluded from consideration under *Rule 37(c)(1)*. In 2013, JBT began selling auger chillers with flow reliefs in the auger blade. While making a sale of an auger chiller to the customer in question, JBT offered to include flow reliefs in the auger blade at no additional cost. The customer declined, and JBT made a sale of an auger chiller without flow reliefs. At a later date, the customer asked JBT to retrofit the auger blade with flow reliefs, and JBT did so at no cost to the customer. Subsequently to the 2013 sale, JBT also sold that customer an auger chiller with flow reliefs in the auger blade for another of the customer's facilities.

JBT cites no evidence that any Morris advertising played a role in the customer initially declining flow reliefs, and **[*20]** its argument that this occurred is at best speculation based on inadmissible hearsay. JBT also cites no evidence to indicate that JBT suffered reputational injury with that customer. With respect to that customer, or any others, JBT has failed to cite evidence showing that the customer withheld trade from JBT as a result of Morris's alleged false advertising.

Lacking any admissible evidence of actual economic injury, JBT argues that Morris's alleged false advertising enhances Morris's reputation and, in a two-player market, necessarily devalues JBT's reputation. JBT cites to *Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144 (2d Cir. 2007)*, in support of this principle. JBT separately argues for application of the rebuttable presumption of injury and causation that arises when there is proof of a willfully deceptive, literally false comparative advertisement. *See* *Buetow, 650 F.3d at 1183* ("[W]hen a competitor's advertisement, particularly a comparative ad, is proved to be literally false, the court may presume that consumers were misled and grant an irreparably injured competitor injunctive relief without requiring consumer surveys or other evidence of the ad's impact on the buying public.").

The first of these two arguments is merely one prong in the presumption argument. **[*21]** The "two-player market" principle addressed in *Time Warner* is that, in a two-player market, falsely advertising one's own product as better than any alternative product is necessarily understood as comparative to the other competitor's product, even if no direct reference is made to the competitor. *See* *Time Warner Cable, Inc., 497 F.3d at 162* ("As the District Court found, TWC *is* 'cable' in the areas where it is the franchisee. Thus, even though Shatner does not identify TWC by name, consumers in markets covered by the preliminary injunction would undoubtedly understand his derogatory statement, 'settling for cable would be illogical,' as referring to TWC." (citation omitted)). Establishing advertising as comparative does not demonstrate economic injury, but is only one step in showing that a party is entitled to a rebuttable presumption of economic injury. *Buetow, 650 F.3d at 1183*.

Rebuttable presumptions serve only "to control the result where there is an entire lack of competent evidence." *Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S. Ct. 190, 80 L. Ed. 229 (1935)*; *see also* *St. Louis Shipbuilding Co. v. Dir. of Office Workers' Comp. Programs, U.S. Dep't of Labor, 551 F.2d 1119, 1124 (8th Cir. 1977)* ("The presumption serves only to control the result where there is a total lack of competent evidence."). With respect to "statutory standing" issues such as the Lanham Act's competitive injury element, when sufficient proof has been offered to **[*22]** rebut a presumption that a claim is within the coverage of a statute, "it falls out of the case." *St. Louis Shipbuilding Co., 551 F.2d at 1124*; *accord* *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)* ("Our cases make clear that at that point the shifted burden of production became irrelevant: 'If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted,' . . . and 'drops from the case.'" (quoting *Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255, n.10, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981))* (internal citation omitted)). Thereafter, the analysis on summary judgment returns to whether each party has cited to admissible evidence to carry its burden on summary judgment. *Cf.* *Del Vecchio, 296 U.S. at 286-87* (explaining that once the presumption is rebutted, if only one party submits evidence relevant to a dispute of fact, the case must be decided upon that evidence, and only if both parties thereafter submit evidence must that evidence be weighed). A presumption of causation may be rebutted by evidence that establishes a different cause. *See, e.g.,* *In re Am. Milling Co., Ltd., 409 F.3d 1005, 1018 (8th Cir. 2005)* (presumption of negligence can be rebutted by "evidence sufficient to establish some cause other than negligence"); *White v. McDonnell Douglas Corp., 985 F.2d 434, 435 (8th Cir. 1993)* (presumption of employment discrimination can be rebutted by production of evidence that cause of employer's action was "a legitimate, nondiscriminatory reason").

JBT argues that it is entitled **[*23]** to a presumption of economic injury and causation with respect to Morris's statements on its website and elsewhere that its auger chiller is patented, Morris's inclusion on its website of a caricature of JBT's auger chiller that JBT argues misrepresents the size of the flow reliefs cut into JBT auger chiller blades, and Morris's inclusion on its website of a description of water flow in JBT's auger chiller as limited to "around the shaft and through a narrow gap between the auger flights and the tank wall." (Doc. 103-1, p. 4). If the Court assumes without deciding that JBT is entitled to such a presumption for each of these issues, summary judgment on these claims is still proper. Morris cites to evidence in the record rebutting the presumption of causation or injury, and in the absence of the presumption, JBT cites to no evidence establishing a genuine dispute of material fact with respect to causation or injury.

With respect to Morris's statements that its auger chiller is patented, there is evidence in the record that whether processing equipment is advertised as patented does not play a significant role in equipment sales. Multiple deponents familiar with selling auger chillers **[*24]** testified that whether equipment is advertised as patented is all but meaningless to customers seeking to purchase. *See, e.g.*, Deposition of Nate Harrison,[8] (Doc. 87-6, pp. 242:18-243:8 (aware of no lost auger chiller sales due to Morris's marking)); Deposition of Luke Miller (Doc. 87-7, pp. 51:10-23 (customers never inquired about patents); 99:9-100:3 (customers generally unconcerned about patents); 100:1-3 (customers did not keep track of what equipment was patented)); Deposition of Brett Mentzer (Doc. 97-4, p. 141:10-25 (patent not needed or referenced to make sales)); Deposition of William Morris, III (Doc. 97-5, pp. 34:2-35:16 (patents not high on list of things important to customers)).

With respect to Morris's website, there is evidence that customers do not make equipment purchases based on websites. *See, e.g.*, Deposition of Nate Harrison (Doc. 87-6, pp. 102:6-103:4 (website and other advertising unimportant for generating sales, and focus was instead loyalty, relationship, quality, and price)); Deposition of Luke Miller (Doc. 87-7, p. 52:9-14 (customers weren't directed to and never mentioned websites)); Deposition of Brian Kovanda (Doc. 87-8, p. 75:4-9 (customers never mentioned **[*25]** Morris website)).

There is also evidence that JBT's reputation was not hurt and goodwill was not lost as a result of Morris's activity, and further that any decline in reputation and goodwill relevant to this case happened because CAT was sold to JBT. *See, e.g.*, Deposition of Nate Harrison (Doc. 87-6, 104:13-109:4 (noticed customer hesitation after sale of CAT to JBT on account of latter's reputation, but managed to keep sales steady)). There is also evidence that JBT's sales remained strong despite Morris's activity. *See, e.g.*, Deposition of Luke Miller (Doc. 87-7, p. 89:7-13 (2016 and 2017 were good sales years)). In the first paragraph of its statement of facts, Morris cites to evidence that JBT has not lost any sales caused by Morris's alleged false advertising. (Doc. 87, p. 1). JBT's response denies this statement without evidence "because [JBT] has not engaged in any third-party discovery." (Doc. 98-1, p. 1). In the third paragraph of its statement of facts, Morris cites to evidence that JBT has not suffered any quantifiable economic injury caused by Morris's alleged false advertising. (Doc. 87, p. 2). JBT's response denies this statement, making conclusions of injury based on **[*26]** inadmissible evidence and citing only evidence that might give rise to the rebuttable presumption in the first place. (Doc. 98-1, p. 2).

All of the cited admissible evidence is sufficient to rebut any presumption that JBT suffered an economic injury proximately caused by Morris's alleged false advertising. What is more, the same evidence also rebuts any presumption of likelihood of irreparable harm that might justify injunctive relief, and JBT cites no evidence that customers are likely to withhold sales or that its reputation or goodwill are likely to be damaged by Morris's alleged false advertising.

Because JBT has had adequate time for discovery,[9] JBT's failure to come forward with admissible evidence of lost sales, reputation, or goodwill, or the likelihood of such injury, is fatal. *Celotex Corp., 477 U.S. at 322-23* ("In our view, the plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."); *Fed. R. Civ. P. 56(c)(1)*, *(e)(2)*; W.D. Ark. R. 56.1(c). Summary judgment for Morris is proper on all false advertising **[*27]** claims related to the IntraGrill product.

B. State Law Claims

1. North Carolina Unfair and Deceptive Practices Act

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[8] All deposition citations use the document's internal pagination.

[9] JBT's request for additional discovery is addressed later in this opinion.

Under North Carolina law, unfair methods of competition and unfair or deceptive acts are unlawful. *N.C. Gen. Stat. Ann. § 75-1.1*. Anyone harmed by these unlawful acts may bring a civil action. *N.C. Gen. Stat. Ann. § 75-16*. To prevail in such an action, the plaintiff must show that the defendant committed an unfair or deceptive act or practice, the act or practice was in or affected commerce, and the act or practice proximately caused injury to the plaintiff. *Dalton v. Camp, 353 N.C. 647, 548 S.E.2d 704, 711 (N.C. 2001)*. To demonstrate that an alleged misrepresentation is the proximate cause of an alleged injury, the plaintiff must show reliance on the alleged misrepresentation. *Bumpers v. Cmty. of N. Va, 367 N.C. 81, 747 S.E.2d 220, 226-27* (explaining at length that where the unlawful act is a misrepresentation, an injury is only proximately caused by reliance on the misrepresentation).

JBT cites no evidence whatsoever that it relied on Morris's alleged misrepresentations. Without a showing of reliance, JBT cannot show any loss was proximately caused by that reliance. Judgment for Morris is proper on all North Carolina Unfair and Deceptive Practices Act claims related to the IntraGrill product.

2. Arkansas Deceptive Trade Practices Act

The Arkansas Deceptive **[*28]** Trade Practices Act allows a private right of recovery for deceptive trade practices, but only where the claimant can prove that it "suffered an actual financial loss proximately caused by [its] reliance on the use of a practice declared unlawful under this chapter." *Ark. Code Ann. § 4-88-113(f)(2)*. JBT offers no evidence whatsoever that it relied on Morris's alleged deceptive trade practices. Without a showing of reliance, JBT cannot show any loss was proximately caused by that reliance. Judgment for Morris is proper on all Arkansas Deceptive Trade Practices Act claims related to the IntraGrill product.

3. Arkansas Common Law Unfair Competition

Under Arkansas common law, a plaintiff may recover against a defendant for the tort of unfair competition where the defendant engages in "a course of dealing which leads, or is likely to lead, consumers into believing that the goods or services of one supplier are those of another." *Gaston's White River Resort v. Rush, 701 F. Supp. 1431, 1435 (W.D. Ark. 1988)* (citing *Sw. Bell Tel. Co. v. Nationwide Indep. Directory Serv., Inc., 371 F.Supp. 900 (W.D. Ark. 1974)*; *Heuer v. Parkhill, 114 F.Supp. 665 (W.D. Ark. 1951)*; *see also* *Esskay Art Galleries v. Gibbs, 205 Ark. 1157, 172 S.W.2d 924, 926-27 (Ark. 1943)* ("Unfair competition ordinarily consists in the simulation by one person for the purpose of deceiving the public, of the name, symbols, or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing **[*29]** the purchase of his wares and thereby obtaining for himself the benefits properly belonging to his competitor." (quoting 26 RULING CASE LAW 875 (William McKinney & Burdett Rich, eds., 1920))). JBT offers no evidence that Morris's IntraGrill simulates or imitates JBT's FATCAT, nor that any customers were deceived into purchasing an IntraGrill from Morris while believing it to be a FATCAT. Judgment for Morris is proper on all Arkansas common law unfair competition claims related to the IntraGrill product.

C. Additional Discovery

JBT argues that it should be allowed additional time to complete discovery before the Court rules on whether summary judgment is proper on these claims. Additional discovery must be allowed if it is necessary to "prevent a party from being unfairly thrown out of court by a premature motion for summary judgment." *Iverson v. Johnson Gas Appliance Co., 172 F.3d 524, 530 (8th Cir. 1997)*. The Court is within its discretion to deny additional discovery when the nonmovant merely seeks to delay the inevitable or drive up the cost of litigation to force a beneficial settlement. "*Rule 56(f)* does not condone a fishing expedition . . . for documents that might confirm [a plaintiff's] 'information and belief.'" *Gardner v. Howard, 109 F.3d 427, 431 (8th Cir. 1997)*.

JBT represented in its complaint and amended **[*30]** complaint that it has suffered and is likely to suffer economic and competitive injury. JBT now cites hearsay evidence that a customer feared litigation with Morris to argue that shortly after JBT began offering flow reliefs in its auger chillers, that customer declined flow reliefs because of Morris's alleged false marking and false advertising. JBT has known of this incident since 2013, more than a year before the filing of this lawsuit, but has not followed up with the customer for an affidavit or declaration regarding the cause of that customer's decision. This incident is the extent of JBT's disclosed evidence to support its information and belief about its competitive or economic injuries. JBT states that it has not yet conducted any third-party discovery, including into this incident, even though the Court sided with JBT and allowed discovery into general matters from the outset. Finally, JBT appears not to have conducted any customer surveys at any point, indicating that it has consistently intended to rely only on a rebuttable presumption, and not on evidence of actual injury. JBT fails to show that it would be "unfair" to ask it, nearly five years after the customer declined **[*31]** flow reliefs, and two-and-a-half years after initiation of the lawsuit, to provide some admissible evidence that Morris's conduct was the proximate cause of some economic or competitive injury.

D. Reconsideration of the Protective Order

JBT's request that the Court reconsider entry of its protective order will be denied. The Court precluded additional discovery into sales and financial information relevant to the IntraGrill auger chiller because that discovery was not proportional to the needs of the case. At the time the order was entered, JBT had not yet cited to any evidence that it was proximately harmed by Morris's alleged false marking of the IntraGrill auger chiller. Prior to that point, the Court entered a scheduling order (Doc. 46) that denied Morris's request to limit discovery, and JBT had had ample opportunity and time to engage in third-party discovery to support its allegations of competitive and economic injury. It appeared then that allowing JBT access to Morris's financial information to determine the value of damages for a harm JBT could not show had occurred was more akin to a fishing expedition than discovery.

In light of the Court's analysis on the motions for partial **[*32]** summary judgment, and JBT's continued failure to provide any evidence that Morris's alleged false marking or false advertising proximately caused any harm to JBT, the Court's proportionality analysis remains unchanged. Discovery into all of Morris's sales and financial information relevant to the IntraGrill auger chiller is not proportional to the needs of the case. Additionally, because claims associated with Morris's marking and advertising of the IntraGrill auger chiller as patented under the '529 patent will be dismissed, that discovery is not only disproportionate, but is now far less relevant to the remaining claims or defenses.

V. Conclusion

IT IS THEREFORE ORDERED that Defendant Morris & Associates, Inc.'s motions for partial summary judgment (Docs. 84 and 91) are GRANTED, and Plaintiff John Bean Technologies Corporation's false marking, false advertising, and State law claims related to the '529 Patent and Morris's IntraGrill auger chiller are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Plaintiff's motion for reconsideration (Doc. 78) is DENIED.

IT IS SO ORDERED this 19th day of June, 2018.

/s/ P. K. Holmes, III

P.K. HOLMES, III

CHIEF U.S. DISTRICT JUDGE

[NYU Hosps. Ctr. v. League of Voluntary Hosps.](#)

United States District Court for the Southern District of New York

June 20, 2018, Decided; June 20, 2018, Filed

17 Civ. 4465

Reporter

318 F. Supp. 3d 622 *; 2018 U.S. Dist. LEXIS 106458 **; 2018-1 Trade Cas. (CCH) P80,426

NYU HOSPITALS CENTER, Plaintiff, - against - LEAGUE OF VOLUNTARY HOSPITALS AND HOMES OF NEW YORK, et al., Defendants.

Core Terms

argues, allegations, contribution rate, non-League, antitrust, secondary, bargaining, contributions, exemption, asserts, antitrust claim, multiemployer, withdrawal, parties, unlawful agreement, motion to dismiss, non-statutory, collective bargaining, mistake of law, anticompetitive, fails, anti trust law, no allegation, conspiracy, methodology, restitution, coercion, courts, collective bargaining agreement, per se rule

LexisNexis® Headnotes

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

HN1[] **Unfair Labor Practices, Union Violations**

It unlawful for a labor organization to threaten, coerce, or restrain any person where an objective thereof is to force or require any employer to join an employer organization in violation of Section 8(b)(4)(ii)(A) of the National Labor Relations Act, *29 U.S.C.S. § 158(b)(4)(ii)(A)*.

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

HN2[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(B)(6) permits dismissal of a complaint for failure to state a claim upon which relief can be granted. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. This standard is met when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. A court should not dismiss a complaint for failure to state a claim if the factual allegations sufficiently raise a right to relief above the speculative level. However, a complaint should be dismissed if the plaintiff has not offered sufficient factual allegations that render the claim facially plausible. Furthermore, the requirement that a court accept the factual allegations in the complaint as true does not extend to legal conclusions. In adjudicating a *Rule 12(b)(6)* motion, a district court must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.

Antitrust & Trade Law > Sherman Act > Scope

HN3[] Antitrust & Trade Law, Sherman Act

15 U.S.C.S. § 1 of the Sherman Act prohibits any contract, combination in the form of trust or otherwise, or conspiracy, in restraint of interstate trade or commerce. It is clear from caselaw addressing the pleading standards for a *§ 1* claim to survive a motion to dismiss, that allegations in support of a *Section 1* claim must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. Regardless of whether parallel conduct is alleged, it is not enough to make allegations of an antitrust conspiracy that are consistent with an unlawful agreement; to be viable, a complaint must contain enough factual matter taken as true to suggest that an agreement to engage in anticompetitive conduct was made. In other words, the complaint must contain enough factual matter to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Antitrust & Trade Law > Sherman Act > Scope

HN4[] Antitrust & Trade Law, Sherman Act

The restraint of interstate trade or commerce under *15 U.S.C.S. § 1* of the Sherman Act must be unreasonable either under a per se analysis or under the rule of reason. Generally there is a presumption against using the per se analysis. Per se rules of illegality are appropriate only where the agreement at issue is so manifestly anticompetitive that its pernicious effect on competition and lack of any redeeming virtue is conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm it has caused or the business excuse for its use. Per se unlawful conduct includes horizontal and vertical price-fixing, horizontal market division, and certain types of group boycotts.

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

HN5[] Motions to Dismiss, Failure to State Claim

The plausibility standard under *Fed. R. Civ. P. 12(b)(6)* requires more than a sheer possibility that a defendant has acted unlawfully.

Antitrust & Trade Law > Sherman Act > Scope

HN6[] Antitrust & Trade Law, Sherman Act

Generally, there is a presumption against applying the per se rule under *15 U.S.C.S. § 1* of the Sherman Act. The decision to apply the per se rule turns on whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output or instead one designed to increase economic efficiency and render markets more, rather than less, competitive. Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.

Antitrust & Trade Law > Sherman Act > Scope

HN7[] **Antitrust & Trade Law, Sherman Act**

It is an element of a per se case under *15 U.S.C.S. § 1* of the Sherman Act to describe the relevant market in which it may be presumed that the anticompetitive effect would occur.

Antitrust & Trade Law > Sherman Act > Scope

HN8[] **Antitrust & Trade Law, Sherman Act**

Certain practices are so obviously anticompetitive that courts consider these to be per se violations of the Sherman Act. Per se illegal conduct includes price fixing, division of markets, tying arrangements, and certain types of group boycotts. Courts have been reluctant to expand the categories of per se illegality.

Antitrust & Trade Law > Sherman Act > Scope

HN9[] **Antitrust & Trade Law, Sherman Act**

The classic group boycott is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. The Supreme Court has held that precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors. Indeed, the per se rule under the Sherman Act is inapplicable to vertical restraints.

Antitrust & Trade Law > Exemptions & Immunities > Labor

Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Units

HN10[] **Exemptions & Immunities, Labor**

The act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect in part because wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively. The same can be said of multiemployer bargaining units. Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted.

Antitrust & Trade Law > Exemptions & Immunities > Labor

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Unfair Labor Practices > Employer Violations

HN11[] **Exemptions & Immunities, Labor**

Almost any concerted action by employers that touches on a mandatory subject of collective bargaining, no matter how obviously offensive to the policies underlying the nation's antitrust statutes, should be immune from scrutiny so long as a collective-bargaining process is in place. The multiemployer bargaining is a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor. To subject the practice of multiemployer bargaining to ***antitrust law*** is to require antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours, and working conditions is to proceed, the very result that the implicit labor exemption seeks to avoid. And it is to place in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve.

Business & Corporate Compliance > ... > Employee Retirement Income Security Act (ERISA) > Pensions & Benefits Law > ERISA

HN12[] Pensions & Benefits, Employee Retirement Income Security Act (ERISA)

Under Section 403(c) of Employee Retirement Income Security Act (ERISA), *29 U.S.C.S. § 1001 et seq.*, the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan, except that, in the case of a contribution or payment made by an employer to a multiemployer plan by a mistake of fact or law, the return of such contribution or payment to the employer within six months after the plan administrator determines that the contribution was made by such a mistake is not prohibited. *29 U.S.C.S. § 1103(c)*.

Pensions & Benefits Law > ... > Judicial Review > Standards of Review > Arbitrary & Capricious Review

HN13[] Standards of Review, Arbitrary & Capricious Review

There is a limited standard under which courts may review the administrative acts of pension fund trustees. As a general rule federal courts should refrain from interfering with the administration of a pension plan unless its trustee or administrator has acted in an arbitrary or capricious manner. The lawful, discretionary acts of a pension committee should not be disturbed, absent a showing of bad faith or arbitrariness. Moreover, this standard of review must be considered in conjunction with the permissive language of *29 U.S.C.S. § 1103(c)(2)(A)(ii)*, which neither commands nor precludes the payment of refunds, and instead, merely permits the return of contributions mistakenly made Indeed, the statute does not say that payments made under a mistake necessarily will be returned. Nonetheless, an employer is entitled to repayment if it shows that the refusal to repay was arbitrary or capricious and the equities favor restitution.

Pensions & Benefits Law > ... > Administration & Enforcement > Handling of Claims > Judicial Review

HN14[] Handling of Claims, Judicial Review

The fund administrators are in the best position to determine whether the equities of a particular case require a refund or setoff, as opposed to courts making that determination under the rubric of a purported federal common law right to restitution or setoff. Those decisions are therefore left to those vested in the first instance by Employee Retirement Income Security Act (ERISA), *29 U.S.C.S. § 1001 et seq.* with the authority and responsibility to make them.

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

HN15[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 12(b)(6) is not an appropriate vehicle by which to decide what is fundamentally a factual dispute.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

HN16[] **Unfair Labor Practices, Union Violations**

Section 303 of the Labor Management Relations Act, *29 U.S.C.S. § 187*, makes it unlawful for any labor organization to engage in conduct prohibited by § 8(b)(4)(ii)(A) of the National Labor Relations Act (NLRA), *29 U.S.C.S. § 158(b)(4)(ii)(A)*, which in turn makes it an unfair labor practice for a labor organization to threaten, coerce, or restrain any person where an objective thereof is to force or require any employer to join an employer organization. *§§ 187*, *158(b)(4)(ii)(A)*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

HN17[] **Unfair Labor Practices, Union Violations**

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, *29 U.S.C.S. § 158(b)(4)(ii)(A)* currently contains a proviso stating that nothing contained in clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. *29 U.S.C.S. § 158(b)(4)(B)*. Despite the fact that without the proviso, § 8(b)(4)(ii)(B) could be read to cover primary activity, the National Labor Relations Board and the judiciary have construed the statute more narrowly, both before and after the proviso was added, to prohibit only secondary, rather than primary, strikes and picketing. Section 8(b)(4)(ii)(A), however, does not contain the same proviso.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

HN18[] **Union Violations, Secondary Activities**

Section 8(b)(4) of the National Labor Relations Act, *29 U.S.C.S. § 158(b)(4)(ii)(A)* for decades has been dubbed the secondary boycott provision in scores of judicial opinions, administrative decisions, law review articles, treatises, casebooks, and law school classrooms. While § 8(b)(4) does not expressly mention primary or secondary disputes, strikes or boycotts, that section often is referred to in the Act's legislative history as one of the Act's secondary boycott sections.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

HN19[] **Union Violations, Secondary Activities**

Courts, including in the Second Circuit, have found violations of *29 U.S.C.S. § 158(b)(4)(ii)(A)* without requiring proof of a secondary objective. Thus, primary activity has been found to be a cognizable harm. Section *§ 158(b)(4)(ii)(A)* draws no distinction between primary and secondary picketing.

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Judges: Victor Marrero, United States District Judge.

Opinion by: Victor Marrero

Opinion

[*625] DECISION AND ORDER

VICTOR MARRERO, United States District Judge.

In its Amended Complaint (see Dkt. No. 67), NYU Hospitals Center ("NYU") brings claims for (1) unlawful agreement in restraint of trade, in violation of *Section 1* of the *Sherman Act*, *15 U.S.C. Section 1*, against all defendants (Count I); (2) violation of *Section 303* of the *Labor Management Relations Act (the "LMRA")*, *29 U.S.C. Section 187*, against the 1199SEIU United Healthcare Workers East (the "Union") (Count II); and (3) restitution for excessive fund contributions under the *Employee Retirement Income Security Act ("ERISA")*, *29 U.S.C. Section 1001 et seq.*, against the 1199SEIU National Benefit Fund for Health and Human Service Employees (the "Fund") (Count III). Defendants the League of Voluntary Hospitals and Homes of New York (the "League"), the Fund, the Union, and the Mount Sinai Hospital, Montefiore Health System, Inc., the New York and Presbyterian Hospital, and Long Island Jewish Medical Center (collectively, the "Hospital Defendants," and together with the League, the Fund, and the Union, "Defendants"), filed motions to dismiss. For the reasons discussed below, the motions are granted as to Count I of the **[**3]** Amended Complaint, and denied as to Counts II and III of the Amended Complaint.

I. FACTUAL BACKGROUND

In its Amended Complaint, NYU alleges that it was, for many years, a member of the League, which negotiated collective bargaining agreements on behalf of NYU and its competitors with the Union, which in turn represents healthcare workers in the metropolitan area. (See Am. Compl. ¶ 2.) NYU voluntarily withdrew from the League on March 28, 2016, but agreed to continue to abide by the collective bargaining agreement ("CBA") then in effect -- a 2009 CBA that was modified by a memorandum of agreement ("MOA") in July 2014, and later by a letter agreement in October 2014 -- until it terminates on September 30, 2018. (See id. ¶¶ 2, 26, 38.) Following the adoption of the MOA, the Fund, the Union, and the League requested that the actuarial firm of Milliman, Inc. ("Milliman") propose contribution rate methodologies for League member hospitals. (See id. ¶ 32.) In addition to proposing such a methodology, the final actuarial report (the "Milliman Report") also proposed a contribution rate for non-League employers that would go into effect the first full month after an employer withdraws from the **[**4]** League. (See id. II 35, 37.) NYU argues that the higher, "non-League" contribution rates it has been paying since October 2016 constitute a penalty that is the result of anticompetitive concerted action by the League, the Fund, the Union, and the Hospital Defendants. (See id. ¶ 50.)

[*626] In its second claim for relief, NYU asserts that the Union's imposition of the higher, non-League contribution rates on NYU violated *Section 303 of the LMRA*, *29 U.S.C. Section 187*, which makes ***HN1***[] it unlawful for a labor organization to threaten, coerce, or restrain any person where an objective thereof is to force or require any employer to join an employer organization in violation of *Section 8(b)(4)(ii)(A)* of the *National Labor Relations Act ("NLRA")*, *29 U.S.C. Section 158(b)(4)(ii)(A)*. (See id. ¶¶ 75, 77.)

NYU's third cause of action is for restitution of excessive fund contributions against the Fund. (See id. II 83-89.) In particular, NYU alleges that the Fund's denial of NYU's request to reject the Union's instruction to impose the higher, non-League contribution rates on NYU after its withdrawal from the League constituted a "mistake of law and/or fact" which caused harm redressable under ERISA. (See id. ¶ 85.)

A. DEFENDANTS' PRE-MOTION LETTERS TO DISMISS

By letters dated August 23, 2017, Defendants notified **[**5]** the Court of their intention to move to dismiss the complaint. (See Dkt. Nos. 38-41.) These letters respond to the original complaint, first filed on June 14, 2017 (see "Complaint," Dkt. No. 1), and superseded by the Amended Complaint filed on December 19, 2017. As outlined in more detail below, some of the arguments pressed by Defendants overlap while some are unique to each defendant.

In its August 23, 2017 letter, the League first moves to dismiss NYU's Sherman Act claim on the basis that the non-statutory labor exemption to the antitrust laws bars any such challenge. In particular, the League argues that the conduct at issue falls within the exemption from antitrust scrutiny for collective bargaining agreements between a multiemployer bargaining unit and a union where the agreement is so "intimately related" to wages, hours, and working conditions that the union's successful attempt to obtain the agreement through bona fide, arm's length bargaining in pursuit of its own labor union policies, and not at the behest of or in combination with non-labor groups, falls within the protection of the national labor policy. (See Dkt. No. 39 at 2-3.) Indeed, the League argues that NYU concedes **[**6]** that it is bound by the 2009 CBA, as amended in 2014, and that the CBA itself required the Fund, working with actuaries, to develop a contribution rate methodology to be implemented if approved by the Fund's trustees. (See id.) According to the League, these rates were in fact developed by the actuaries, approved by the trustees, and subsequently ratified by the Union and the League. (See id. at 3.) Thus, the League argues, NYU's lawsuit merely challenges the Fund's implementation of CBA terms, and so falls squarely within the non-statutory labor exemption.

Second, the League asserts that NYU fails to state a plausible antitrust claim because: (1) there is no allegation that the League or its member hospitals participated in an antitrust conspiracy -- merely that the Hospital Defendants "encouraged and acquiesced" in conduct by the Union and the Fund, and that a League executive was "aware of and copied on" correspondence between the Union and the Fund; (2) the conduct complained of was expressly contemplated by the CBA between the parties; and (3) NYU has not adequately alleged antitrust standing because there is no allegation that the asserted conduct injured competition in the allegedly **[**7]** restrained market. (See id. at 4.)

In their August 23, 2017 letter, the Hospital Defendants move to dismiss the Complaint on the bases that (1) this dispute falls squarely within the non-statutory labor **[*627]** exemption; (2) the Complaint does not adequately allege any unlawful agreement involving the Hospital Defendants because there is no allegation that the Hospital Defendants had a role in the decision made by the Fund concerning NYU's contributions after it exited the League; (3) the Complaint does not adequately allege harm to competition because NYU has failed to plead conduct that is "per se" unlawful and NYU does not adequately plead a "rule of reason" claim; and (4) the Complaint does not plausibly allege antitrust injury because NYU's alleged injuries did not result from any restraint on competition. (See Dkt. No. 38 at 3-4.)

In its August 23, 2017 letter, the Fund moves to dismiss the Complaint on two grounds. First, the Fund argues that NYU fails to state a claim against the Fund for unlawful agreement in restraint of trade because (1) NYU's allegations are merely conclusory, and (2) as an employee benefit fund affiliated with a union, which can use its assets only for the benefit of employees, **[**8]** the Fund is exempt from the antitrust laws. (See Dkt. No. 40 at 1-2.) Second, the Fund argues that NYU's claim for restitution of excessive fund contributions is not yet ripe because it depends on a contingent future event that may not happen -- namely, that the trustees of the Fund would decide not to reimburse NYU if they were presented with a determination that the contributions were made by a mistake of law or fact. (See id. at 3.)

In its August 23, 2017 letter, the Union first moves to dismiss the Complaint on the ground that NYU has failed to plausibly allege an antitrust conspiracy. In particular, the Union argues that the only allegedly conspiratorial conduct by the Union was a letter sent to the Fund, instructing it to recalculate NYU's contribution rate using the non-League methodology proposed by the Fund's actuaries, and that the Union's alleged encouragement of and acquiescence in the Fund's determination does not amount to an antitrust conspiracy. (See Dkt. No. 41 at 2-3.) Second, the Union argues that its conduct is protected by the non-statutory labor exemption. (See id. at 3-4.) Relatedly, the Union asserts that the question of whether NYU's purported withdrawal from the League was lawful **[**9]** under federal labor law is currently pending before the National Labor Relations Board ("NLRB"), and that resolution of that question could moot the relief requested by NYU here. (See id. at 2 n.1.) Third, the Union argues that NYU has failed to adequately plead that the alleged conduct harms competition. In particular, the Union argues that competition can be harmed only if total, market-wide investments decrease materially, and while NYU pleads in general terms that competition has been harmed because NYU has $25 million less to invest in new facilities, technology, and services, NYU fails to plead allegations suggesting that total investments in healthcare improvements in the market will decrease materially, or at all. (See id. at 4.)

B. NYU'S OPPOSITION

By letters dated September 22, 2017, NYU submitted the proposed Amended Complaint and responded to Defendants' motion to dismiss arguments. (See Dkt. No. 61.)

In response to the Union, NYU argues that (1) it has properly alleged an unlawful agreement (see id. at 2-3); (2) the Union's conduct is not protected by the non-statutory labor exemption[1] (see id. at 3); and (3) NYU has properly alleged harm to competition because it has alleged a per se violation of the antitrust **[**10]** laws (see id. at 4) . **[*628]** NYU also asserts that the Amended Complaint adequately pleads competitive harm. (See id.)

In response to the Hospital Defendants, NYU first argues that it has properly alleged an unlawful agreement, and that the Hospital Defendants are liable for the League's actions because they authorized the League to act as their agent. (See id. at 11-12.) Second, NYU argues that it has properly alleged harm to competition and antitrust injury because it has alleged a per se violation of the antitrust laws. (See id. at 13.)

In response to the League, NYU argues that the Defendants' conduct is not covered by the non-statutory labor exemption. (See id. at 39-40.) First, NYU argues that the challenged conduct is not "intimately related" to wages, hours, and working conditions, nor is it within the scope of traditionally mandatory subjects of collective bargaining; according to NYU, the withdrawal provision "serves no purpose other than to coerce hospital members to remain in the League and to punish those that withdraw." (See id. at 39.) Second, NYU argues that the withdrawal provision serves as a "direct restraint on a business market" by severely impacting NYU's ability to compete in the market for hospital services, by limiting **[**11]** the ability of other League members to withdraw, and by restricting NYU's ability to pursue investments. (See id.)

In response to the Fund, NYU argues that (1) it has stated an antitrust claim against the Fund because the non-statutory labor exemption does not apply to conspiracies between labor groups and non-labor groups (see id. at 47); (2) NYU's restitution claim properly alleges mistakes of fact and law by the Fund in that the withdrawal provision was never incorporated into the CBA between the parties and thus NYU should never have been treated as "[n]on-League" for purposes of the CBA now in force (see id. at 48-49); and (3) NYU's ERISA claim is ripe for review because NYU has adequately pled that the Fund considered and rejected its request for restitution. (See id. at 49.)

C. DEFENDANTS' REPLIES

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[1] NYU disputes the Union's argument that resolution of the NLRB proceeding would moot the relief NYU is seeking in this lawsuit. (See Dkt. No. 61 at 3.)

By letter dated September 29, 2017, the League replied to NYU, arguing that the December 2014 "agreement" among the Defendants that NYU challenges was a document describing the collectively bargained health care rate calculations to which the parties had already agreed in the July 2014 MOA as modified by a collectively bargained amendment in October 2014. (See Dkt. No. 64 at 1.) The League maintains that the challenged **[**12]** benefit rate terms are protected by the non statutory labor exemption, and if NYU has a remedy, it is under labor not ***antitrust law***. (See id. at 2-3.) Finally, the League asserts that, like its original Complaint, NYU's Amended Complaint (1) fails to allege that Defendants joined an unlawful agreement, and (2) fails to allege facts sufficient to establish antitrust standing. (See id. at 3.)

By letter dated October 1, 2017, the Union responded to NYU. (See Dkt. No. 51.) First, the Union argues that the Amended Complaint, like NYU's original Complaint, fails to allege a conspiracy. In particular, the Union argues that there is no reason why the Fund would seek agreement from the League for a rule relating to the contributions due from any institution leaving or joining the League during the term of the MOA when the Fund was in fact authorized by the MOA to develop and implement such a methodology. (See id. at 2.) Moreover, the Union argues, the Amended Complaint is internally inconsistent in that, for example, the change in NYU's contribution rate cannot both be in reaction to NYU's withdrawal from the League and the result of an alleged agreement **[*629]** reached over a year before NYU's withdrawal. (See id. at 2-3.) Furthermore, **[**13]** the Union maintains that its conduct is protected by the non-statutory labor exemption. (See id. at 3.) Second, the Union argues that NYU fails to adequately allege harm to competition in the market at large. (See id.) Finally, the Union contends, NYU's claim, new in its Amended Complaint, against the Union under *Section 303 of the LMRA* fails because NYU's "displeasure" with the application of the Fund's rules regarding contribution rates does not amount to "coercion" or "restraint." (See id.)

By letter dated October 2, 2017, the Hospital Defendants responded to NYU. (See Dkt. No. 63.) First, the Hospital Defendants argue that NYU's Amended Complaint fails to plead that the Hospital Defendants entered into an unlawful agreement. (See id. at 1-2.) In particular, the Hospital Defendants maintain that neither their receipt of emails concerning the calculation of Fund contribution rates nor their alleged acquiescence in the Fund's decision to alter NYU's contribution rate is sufficient to establish unlawful agreement in violation of the Sherman Act. (See id. at 2-3.) Second, the Hospital Defendants argue that they cannot be held liable under an agency theory for the Fund's conduct because the Fund was authorized to act as agent only for **[**14]** the purpose of entering into a collective bargaining agreement, and thus any separate agreement outside the scope of the CBA between the parties would exceed the League's authority. (See id. at 3.) Third, the Hospital Defendants assert that any agreement between the Union and the League (or the Hospital Defendants) is protected by the non-statutory labor exemption. (See id.) Finally, the Hospital Defendants argue that the Amended Complaint does not adequately allege harm to competition or antitrust injury. (See id.)

By letter dated October 11, 2017, the Fund responded to NYU. (See Dkt. No. 62.) First, the Fund argues that NYU fails to state an antitrust claim against it because NYU's obligation to contribute to the Fund resulted from collective bargaining -- to which NYU was a party -- and not from any alleged conspiracy in restraint of trade. (See id. at 1-3.) Indeed, the Fund argues, NYU was made aware of the Milliman Report's contribution methodology for employers changing from League to non-League status as early as December 2014 and it did not then bring any challenge in labor arbitration. (See id. at 2-3.) Second, the Fund argues that NYU has still failed to show that its claim for restitution is ripe. (**[**15]** See id. at 3-4.) More specifically, the Fund asserts that under ERISA, the Fund's trustees have a fiduciary duty to collect and hold NYU's contributions, and there is no basis for them to conclude that any have been made pursuant to a mistake of law or fact unless and until NYU prevails in this litigation. (See id.)

D. TELEPHONE CONFERENCE

The Court held a telephone conference on December 11, 2017 during which it heard arguments from the parties and advised the parties that the Amended Complaint does not appear to state an antitrust claim sufficient to survive a motion to dismiss. (See Dkt. Minute entry for 12/11/2017.) The Court permitted the Fund and the Union to make a joint submission on the LMRA and ERISA claims raised in Counts II and III of the Amended Complaint, and permitted NYU to respond to that submission. (See id.)

E. SUPPLEMENTAL BRIEFING ON ERISA AND LMRA

By letter dated December 15, 2017 (the "December 15 Letter"), the Fund and the Union opposed NYU's ERISA and LMRA **[*630]** claims. (See Dkt. No. 65.) With respect to the ERISA claim, the Fund argues that *Section 403(c)(2)* permits, but does not require, an ERISA plan's trustees to reimburse employer contributions when those contributions are made by reason **[**16]** of a mistake of law or fact. (See id. at 1.) The Fund contends that NYU has not sufficiently alleged a mistake of law or fact because it is clear from the Amended Complaint that NYU's contributions at the non-League rates were not a mistake, but rather were "intentional and in accordance with the CBA." (See id. at 2.)

With respect to the LMRA claim, the Union argues that *Section 8(b) (4) of the NLRA* applies only to coercion or restraint directed at a "neutral/secondary employer (an employer with whom a union does not have a labor dispute) in order to coerce the neutral employer to pressure the primary employer ... to resolve the primary labor dispute." (Id. at 3.) Because the Amended Complaint does not allege that the Union is pressuring a secondary employer, the Union argues that there is no basis for a *Section 303* claim. (See id.) The Union also argues that even if there were a basis for a *Section 303* claim, there is no "coercion" or "restraint": NYU's payment of the non-League contribution rate is merely the application of the required contribution rate under the CBA to which NYU does not dispute that it is a party. (See id.)

By letter dated January 2, 2018 (the "January 2 Letter"), NYU responded to the Fund and the Union's submission on the ERISA and LMRA **[**17]** claims. (See Dkt. No. 69.) First, NYU reargues that its Amended Complaint sufficiently alleges violations of federal ***antitrust law***. (See id. at 1-6.) NYU largely reiterates its arguments from its September 22, 2017 submission (see Dkt. No. 61), and urges that discovery is necessary to reveal whether or not the Milliman Report provision at issue was properly incorporated into the CBA between the parties. (See id. at 4.)

With respect to its ERISA claim, NYU argues that it has sufficiently pled a mistake of fact and law through its allegation that the Milliman Report provision concerning the contribution rate for employers who transferred from League to non-League status was never validly made a part of the CBA between the parties. (See id. at 7.)

With respect to its LMRA claim, NYU argues that the Union is wrong to state that *Section 8(b)(4)(ii)(A)* applies only to union conduct directed at neutral, "secondary employers" with whom there is no primary dispute. (See id. at 7-8.) More specifically, NYU contends that the cases cited by the Union address an old version of the statute, and not the current *Section 8(b) (4)(ii)(A)* which has "never been interpreted as reguiring proof of a secondary objective." (See id. at 8.)

By letter dated January 8, 2018, the Fund wrote to point out **[**18]** a purported misstatement of fact set forth by NYU in its January 2 Letter. (See Dkt. No. 68.) In particular, the Fund notes that in the January 2 Letter, NYU claims that it remained a League member for the duration of the existing collective bargaining agreement, but the Amended Complaint refers to a March 28, 2016 letter whereby NYU resigned from the League "effective immediately," (See id. at 1.)

By letter dated January 9, 2018, NYU responded that the March 28, 2016 letter referenced by the Fund "had the narrow purpose of effecting NYU[]'s immediate withdrawal of future bargaining authority from the League," but that NYU remains a League member for the duration of the existing CBA. (See Dkt. No. 70 at 1.)

The Court now construes Defendants' letters described above as motions to dismiss **[*631]** the Amended Complaint pursuant to *Federal Rule of Civil Procedure 12(b) (6)* ("*Rule 12(b) (6)*").

II. ANALYSIS

A. *RULE 12(B)(6)* LEGAL STANDARD

Rule 12(b) (6) ***HN2***[] permits dismissal of a complaint for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678,* 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). This standard is met "when the plaintiff pleads factual content **[**19]** that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A court should not dismiss a complaint for failure to state a claim if the factual allegations sufficiently "raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. However, a complaint should be dismissed if the plaintiff has not offered sufficient factual allegations that render the claim facially plausible. See Iqbal, 556 U.S. at 678. Furthermore, the requirement that a court accept the factual allegations in the complaint as true does not extend to legal conclusions. See id. In adjudicating a Rule 12(b)(6) motion, a district court must confine its consideration "'to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.'" Leonard F. v. Israel Disc. Bank of New York, 199 F.3d 99, 107 (2d Cir. 1999) (quoting Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991)).

B. ANTITRUST ALLEGATIONS

1. Legal Standard

HN3[] Section One of the Sherman Act prohibits any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of [interstate] trade or commerce." See 15 U.S.C. § 1. It is clear from Twombly, which addressed the pleading standards for a Section 1 claim to survive a motion to dismiss, that allegations in support **[**20]** of a Section 1 claim "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." 550 U.S. at 557.

Regardless of whether parallel conduct is alleged, "it is not enough to make allegations of an antitrust conspiracy that are consistent with an unlawful agreement; to be viable, a complaint must contain 'enough factual matter (taken as true) to suggest that an agreement [to engage in anticompetitive conduct] was made.'" In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007) (alteration in original) (quoting Twombly, 550 U.S. at 556). In other words, the complaint must contain enough factual matter "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Twombly, 550 U.S. at 545.

HN4[] The restraint alleged must be unreasonable either under a "per se" analysis or under the "rule of reason."[2] Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 95-96 (2d Cir. 1998). Generally there is a presumption against using the "per se" analysis. See Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 726, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988). Per se rules of illegality are appropriate only where the agreement at issue is so "manifestly anticompetitive" that its "pernicious **[*632]** effect on competition and lack of any redeeming virtue [is] conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it has] caused or the **[**21]** business excuse for [its] use." Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50-51, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977) (internal quotation marks omitted). Examples of per se unlawful conduct include horizontal and vertical price-fixing, horizontal market division, and certain types of group boycotts. See NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133-34, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998).

2. Relevant Antitrust Allegations

In its Amended Complaint, NYU alleges an unlawful agreement in restraint of trade, in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1, against all Defendants. (See Am. Compl. 11 56-72.) NYU asserts that it voluntarily withdrew from the League on March 28, 2016, but agreed to continue to abide by the CBA then in effect (a 2009 CBA that was modified twice in 2014) until it terminates on September 30, 2018. (See id. 12.) NYU concedes that it agreed to the July 21, 2014 MOA modifying the CBA, and to the October 24, 2014 letter agreement (the "2014 Letter Agreement") between the League and the Union that modified the MOA. (See January 2 Letter at 4.) NYU also asserts that Section 6, Paragraph C of the MOA states that the "Fund administration, together with the actuaries, shall develop a practicable contribution methodology, subject to the approval of the Trustees that effectuates" the two schedules listed in the MOA that contained required contribution rates and caps **[**22]** for both League hospitals and League nursing homes. (See Am. Compl. ¶ 31.)

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[2] A rule of reason claim is not pled in the Amended Complaint.

But NYU asserts that the exercise of "incorporating" the Milliman Report into the CBA and then imposing the non-League contribution rate on NYU did not comply with the applicable collective bargaining process and was therefore inappropriate. (See January 2 Letter at 4.) In particular, NYU alleges that while it signed the 2014 Letter Agreement, there was no mention in the 2014 Letter Agreement of incorporating the Milliman Report in its entirety into the CBA. (See id.) Nonetheless, NYU asserts, the Union and the League created a new version of the CBA that purported to incorporate the entire Milliman Report -- a version that was allegedly neither shared with NYU nor ratified in accordance with the League's rules. (See id.)

As outlined in more detail above, the League disputes the sufficiency of NYU's antitrust allegations on the basis that Fund contribution rates are a mandatory subject of collective bargaining, and therefore exempt from antitrust scrutiny under the non-statutory labor exemption. (See generally Dkt. Nos. 39 & 64.)

The Union urges dismissal of the Amended Complaint because the Union's encouragement **[**23]** of and acquiescence in the Fund's determination to change NYU's contribution rate does not amount to an antitrust conspiracy. (See generally Dkt. Nos. 41 & 51.)

Likewise, the Fund argues that NYU fails to state an antitrust claim because NYU's obligation to contribute to the Fund resulted from collective bargaining — to which NYU was a party -- and not from any alleged conspiracy in restraint of trade. (See generally Dkt. Nos. 40 & 62.)

The Hospital Defendants argue that the Amended Complaint does not adequately allege any unlawful agreement involving the Hospital Defendants because there is no allegation that they had a role in the decision made by the Fund to adjust NYU's contributions after it exited the League. (See generally Dkt. Nos. 38 & 63.)

[*633] 3. Antitrust Allegations Against the Hospital Defendants

As a threshold matter, NYU's antitrust claim against the Hospital Defendants is dismissed because the claim is not supported by specific factual averments of participation in the alleged conspiracy. As the Hospital Defendants note, NYU fails to plead non-conclusory allegations sufficient to state a claim to antitrust relief. (See Dkt. No. 38 at 3.) The Amended Complaint says nothing about **[**24]** who at the Hospital Defendants participated in the alleged agreement. Moreover, there is no allegation that the Hospital Defendants had a role in the decision made by the Fund to change NYU's contribution rate after NYU withdrew from the League. Indeed, there is no allegation as to why the Hospital Defendants' assent would even be necessary for the Union and the Fund to alter NYU's contribution rate. The decision to move NYU to the non-League contribution rate was clearly made without NYU's consent, and there is no allegation as to why the other employer hospitals were at that time differently situated to affect NYU's contribution rate.

The only allegations specifically tying the Hospital Defendants to the alleged conspiracy are that they received two separate communications from the Fund in December 2014 which made reference to the Milliman Report's proposal to adjust the contribution rate for League employers who moved to non-League status, and that the Hospital Defendants did not then raise any objection.[3] (See Am. Compl. ¶¶ 39-40.) On the basis of these facts, NYU alleges in general terms that all Defendants "reached a meeting of the minds at around that time that penalty payments **[**25]** should be imposed on withdrawing Hospital League members, although this was never made a formal part of the collective bargaining agreement." (See id. ¶ 40.)

HN5[] Iqbal's plausibility standard, however, requires more than a "sheer possibility that a defendant has acted unlawfully." See *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 556*) . That is not present here on the face of NYU's Amended Complaint as against the Hospital Defendants. Nor are there any specific allegations regarding the Hospital Defendants that are sufficient to state an antitrust claim. See, e.g., *In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007)* (affirming dismissal of antitrust claim where complaint lacked "any specification of any particular activities by any particular defendant" (internal citations omitted)); *Hinds Cty. v. Wachovia Bank N.A., 620*

[3] NYU does not allege that it raised any objection at this time either.

F. Supp. 2d 499, 518 (S.D.N.Y. 2009) ("[A]negations that particular employees participated in communications in furtherance of the alleged conspiracy cannot make the conspiracy itself more plausible, when those allegations do not contain any other specific details.").

NYU's antitrust claim against the Hospital Defendants is therefore dismissed.

4 . Antitrust Allegations Against All Defendants

NYU alleges that "[b]y imposing the higher 'Non-League' contribution-rate methodology on NYU [] for employee benefits, Defendants have entered into **[**26]** and enforced a per se unlawful contract, combination, or conspiracy to restrain interstate trade and commerce in violation of Section 1 of the Sherman Act." (Am. Compl. ¶ 57.)

HN6[] Generally, there is a presumption against applying the per se rule. See Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 726, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988); Bogan v. Hodgkins, 166 F.3d 509, 514 (2d Cir. 1999) . "The decision to apply the per se rule turns on 'whether the practice facially appears to be **[*634]** one that would always or almost always tend to restrict competition and decrease output ... or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289-90, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985) (alteration in original) (quoting Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)); see also National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 103-04, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.").

As an initial matter, NYU is wrong that "[g]iven the per se nature of the violation of Section 1 of the Sherman Act, allegations with respect to the relevant product market . . . are not required." (See Am. Compl. ¶ 61.) In fact, HN7[] "it is an element of a per se case to describe the relevant market in which we may presume the anticompetitive effect would occur." See, e.g., Bogan, 166 F.3d at 515.

NYU is, however, correct that HN8[] certain practices are "so **[**27]** obviously anticompetitive that courts consider these to be per se violations of the Sherman Act." See id. at 514. Examples of per se illegal conduct include price fixing, division of markets, tying arrangements, and certain types of group boycotts. See Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). "Courts have been reluctant to expand the categories of per se illegality." Bogan, 166 F.3d at 514.

Neither price fixing, nor division of markets, nor tying arrangements are alleged to be at issue here. Only the group boycott could potentially apply to this case.

HN9[] The "classic 'group boycott' is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level." See Smith v. Pro Football, Inc., 593 F.2d 1173, 1178, 193 U.S. App. D.C. 19 (D.C. Cir. 1978). The Supreme Court has held that "precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors." NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998). Indeed, the per se rule is "inapplicable" to vertical restraints. See id. at 136. Here, the dismissal of NYU's antitrust claim as against the Hospital Defendants (NYU's direct competitors) prohibits a finding of a group boycott that would be per se unlawful under Section 1 of the Sherman Act.

Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985), is instructive. There, an employer was expelled from a wholesale purchasing cooperative **[**28]** without any explanation, notice, or hearing. The Supreme Court found that HN10[] the "act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect" in part because "[w]holesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively." See id. at 296. The same can be said of multiemployer bargaining units. The Court in Wholesale Stationers also found that "[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted." Id. Here, there is no allegation that NYU possesses market power or exclusive access to an element essential to effective competition.

[*635] NYU's argument fails for an additional reason. There is no allegation that the multiemployer bargaining unit at issue here as well as the CBA that NYU admits is binding as between the parties amount to a practice that always or almost always tends to restrict competition and decrease output. To the contrary, multiemployer bargaining tends to increase economic **[**29]** efficiency and is in fact widely used in the marketplace. See *Brown v. Pro Football, Inc., 518 U.S. 231, 240, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)* (multiemployer bargaining "plays a significant role in a collective-bargaining process that itself constitutes an important part of the Nation's industrial relations system"); *N.L.R.B. v. Truck Drivers NLRB, 353 U.S. 87, 95, 77 S. Ct. 643, 1 L. Ed. 2d 676 (1957)* (Congress saw multiemployer bargaining as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining."); see also *Charles D. Bonanno Linen Service, Inc. v. N.L.R.B., 454 U.S. 404, 409 n.3, 102 S. Ct. 720, 70 L. Ed. 2d 656 (1982)* (multiemployer bargaining benefits both management and labor, by saving bargaining resources, by encouraging development of industry-wide worker benefit programs that smaller employers could not otherwise afford, and by inhibiting employer competition at the workers' expense).

Indeed, significant policy reasons support dismissal of NYU's antitrust claim here. In elaborating the bounds of the non-statutory labor exemption,[4] the Supreme Court has held that ***HN11***[] "almost any concerted action by employers that touches on a mandatory subject of collective bargaining, no matter how obviously offensive to the policies underlying the Nation's antitrust statutes, should be immune from scrutiny so long as a collective-bargaining process is in place." *Brown, 518 U.S. at 259*. The Court **[**30]** further explained the extent to which multiemployer bargaining is a "well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor." *Id. at 240*. In that context, the Supreme Court explained the significant policy reasons behind its decision:

> [T]o subject the practice [of multiemployer bargaining] to ***antitrust law*** is to require antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours, and working conditions is to proceed -- the very result that the implicit labor exemption seeks to avoid. And it is to place in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve.

Id. at 240-41; see also *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)* (federal labor law's "goals" could "never" be achieved if ordinary anticompetitive effects of collective bargaining were held to violate the antitrust laws).

For the reasons discussed above, the facts NYU alleges here do not fall into the narrow category of conduct that is per se illegal under the antitrust laws, particularly in light of the general presumption against applying the per se rule. On this basis, NYU's antitrust claim is dismissed.

C. ERISA ALLEGATIONS **[**31]**

HN12[] Under *Section 403(c) of ERISA*, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing **[*636]** benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan," except that, in the case of 'a contribution or payment made by an employer to a multiemployer plan by a "mistake of fact or law," the return of such contribution or payment to the employer within six months after the plan administrator determines that the contribution was made by such a mistake is "not prohibit[ed]." *29 U.S.C. § 1103(c)*.

In its Amended Complaint, NYU argues that the Union's instruction to the Fund to recalculate NYU's contribution rate (to the non-League rate) was "improper and based on a mistake of law and/or fact." (See Am. Compl. ¶ 85.) NYU argues that the basis of this mistake of law or fact was that the Milliman Report provision concerning

[4] The Court need not reach the non-statutory labor exemption to dismiss NYU's antitrust claim.

employers who transferred from League to non-League status was "never validly made a part of the collective bargaining agreement." (See January 2 Letter at 7.) NYU also alleges that the "Fund denied [its request to reject the Union's instruction to recalculate NYU's contribution rate] on or **[**32]** about August 16, 2016, and recalculated the required contribution as instructed by [the Union], thereby adopting the mistake of law and/or fact." (See Am. Compl. ¶ 85.) Therefore, NYU asserts, "any subsequent request by NYU [] for a refund would have been futile." (See id.)

In its August 23, 2017 letter motion to dismiss, the Fund disputes that the claim for reimbursement from the Fund is ripe because it depends on a "contingent future event that may not happen at all -- namely, that the Trustees would decide not to reimburse NYU if they were presented with a determination that the contributions were made by a mistake of law or fact." (See Dkt. No. 40 at 3.) In its October 11, 2017 letter motion in support of the motion to dismiss, the Fund clarified that there would be "no basis for the Trustees to conclude that any of NYU' s contributions have been made pursuant to a mistake of law or fact" unless NYU prevails on its antitrust claim in this litigation. (See Dkt. No. 62 at 3.) The Fund maintains that the terms of the CBA require NYU to contribute to the Fund at the non-League contribution rate, and therefore that there has been no "mistake" of law or fact. (See December 15 Letter at **[**33]** 2.) The Fund suggests that while it does not believe that NYU's contributions at the non-League rate were made pursuant to a mistake of fact or law, if the Court were to determine that there has been such a mistake, the Fund may reconsider whether or not to refund NYU's contributions. (See Dkt. No. 40 at 3.)

The Court of Appeals for the Second Circuit has noted that ***HN13***[] there is a "limited standard" under which courts may review the administrative acts of pension fund trustees. See *Dumac Forestry Servs., Inc. v. Int'l Bhd. of Elec. Workers, 814 F.2d 79, 82 (2d Cir. 1987)*. "As a general rule federal courts should refrain from interfering with the administration of a pension plan unless its trustee or administrator has acted in an arbitrary or capricious manner." *Building Trades Emps. Ass'n v. N.Y. State Teamsters Conference Pension & Ret. Fund, 761 F.2d 115, 117 (2d Cir. 1985)*. The Court of Appeals has "consistently held that 'the lawful, discretionary acts of a pension committee should not be disturbed, absent a showing of bad faith or arbitrariness.'" *Dumac, 814 F.2d at 82* (quoting *Miles v. N.Y. State Teamsters Conference Pension & Ret. Fund Emp. Pension Benefit Plan, 698 F.2d 593, 599 (2d Cir. 1983))*.

Moreover, this "standard of review must be considered in conjunction with the permissive language of *section 1103(c)(2)(A)(ii)*," which "neither commands nor precludes the payment of refunds," **[*637]** and instead, "merely permits the return of contributions mistakenly made." *Dumac, 814 F.2d at 82* (internal quotation marks and citation omitted). Indeed, the statute does not say that payments **[**34]** made under a mistake necessarily will be returned. See *Teamsters Local 639-Emp. Health Tr. v. Cassidy Trucking, Inc., 646 F.2d 865, 868 (4th Cir. 1981)*. Nonetheless, the Court of Appeals has held that an employer is entitled to repayment "if it shows that the refusal to repay was arbitrary or capricious and 'the equities favor restitution.'" *Frank L. Ciminelli Constr. Co. v. Buffalo Laborers Supplemental Unemployment Benefit Fund, 976 F.2d 834, 835 (2d Cir. 1992)* (quoting *Dumac, 814 F.2d at 82*).[5]

The Court of Appeals has also held that:

> ***HN14***[] [T]he fund administrators are in the best position to determine whether the equities of a particular case require a refund or setoff, as opposed to courts making that determination under the rubric of a purported federal common law right to restitution or setoff. We therefore leave such decisions to those vested in the first instance by ERISA with the authority and responsibility to make them.

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[5] It is worth noting that there is some tension between some of the Second Circuit case law on this issue. As the Court noted in *Ciminelli, Tuvia Convalescent Center, Inc. v. National Union of Hospital and Health Care Employees, 717 F.2d 726 (2d Cir. 1983)*, "broadly held that employers have no standing to sue under ERISA even if they have been directly injured and the injuries are within the class of interests that ERISA was intended to protect"; but *Dumac Forestry Services, Inc. v. International Brotherhood of Electrical Workers, 814 F.2d 79 (2d Cir. 1987)*, and Ciminelli both permitted suits by employers for the return of overpayments. See *Ciminelli, 976 F.2d at 835 n.1*.

Brown v. Health Care & Ret. Corp. of Am., 25 F.3d 90, 94 n.4 (2d Cir. 1994).

Whether or not the Fund's failure to repay NYU's contributions made at the higher, non-League contribution rate was arbitrary and capricious depends in part upon resolution of whether or not the Milliman Report provision concerning employers who transferred from League to non-League status was validly made a part of the CBA between the parties through the applicable collective bargaining arrangement. ***HN15***[] But *Rule 12(b)(6)* is not an appropriate vehicle by which to decide what is fundamentally **[**35]** a factual dispute. See *Arden Way Assocs. v. Boesky, 664 F. Supp. 855, 857 (S.D.N.Y. 1987)*. Therefore, the Fund's motion to dismiss NYU's ERISA claim is denied.

D. LMRA ALLEGATIONS

Section 303 of the LMRA ***HN16***[] makes it unlawful for any labor organization to engage in conduct prohibited by *Section 8(b)(4)(ii)(A) of the NLRA*, which in turn makes it an unfair labor practice for a labor organization to threaten, coerce, or restrain any person where an objective thereof is to force or require any employer to join an employer organization. See *29 U.S.C. §187*; *29 U.S.C. § 158 (b) (4) (ii) (A)* . In the Amended Complaint, NYU alleges that the purported "penalty instigated by [the Union] and imposed on NYU [] by the agreement of all Defendants constitutes unlawful coercion and restraint within the meaning of *§ 8 (b) (4) (ii)* ." (Am. Compl. ¶ 77.) NYU also alleges that an objective of the Union's conduct has been to "force or require NYU [] to rejoin the [] League." (See id. ¶ 81.)

In its December 15 Letter, the Union argues that *Section 8(b)(4)* applies only to "coercion or restraint directed at a neutral/secondary employer (an employer with whom a union does not have a labor dispute) in order to coerce the neutral employer to pressure the primary employer (the one with whom the union has a dispute) **[*638]** to resolve the primary labor dispute." (See December 15 Letter at 3.) Here, the Union urges, the **[**36]** Amended Complaint does not, and cannot, allege that the Union is pressuring a neutral, secondary employer, but only that the Union is pressuring NYU to resolve the dispute by allegedly forcing it to pay the non-League contribution rates. (See id.) In the alternative, the Union argues that NYU's LMRA claim must fail because NYU's payment of non-League contribution rates does not constitute coercion or restraint -- rather, it is merely the application of the required contribution rate under the terms of the CBA which even NYU admits binds the parties. (See id.)

In the January 2 Letter, NYU disputes the Union's argument that *Section 8(b) (4)* applies only to union conduct directed at neutral, "secondary employers," asserting instead that the cases cited by the Union address an old version of the NLRA and not *Section 8 (b) (4) (ii) (A)* as it currently exists. (See January 2 Letter at 7 & n.5.) Indeed, NYU asserts that the current version of *Section 8(b)(4)(ii)(A)* has "never been interpreted as requiring proof of a secondary objective." (See *id. at 8*.) With respect to coercion, NYU asserts that the non-League contribution rates are "inherently coercive," and that the Union, in a letter to NYU, threatened to work with the League and its members to continue imposing **[**37]** costs on NYU "indefinitely into the future if NYU [] didn't rejoin the League." (See id.)

NYU is correct that *Section 8(b)(4)(ii)(A)* may apply to conduct targeting primary or secondary employers. Under the Landrum-Griffin Act amendments enacted in 1959, *Section 8(b) (4)(ii)(A) of the NLRA* became *Section 8(b) (4)(ii)(B)*, and *Section 8(e)* was added. See *National Woodwork Mfrs. Ass'n v. N.L.R.B., 386 U.S. 612, 614, 87 S. Ct. 1250, 18 L. Ed. 2d 357 (1967)*. *Section 8(b)(4)(ii)(B)* ***HN17***[] currently contains a proviso stating that nothing contained in clause (B) "shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." *29 U.S.C. § 158(b)(4)(B)*. Despite the fact that without the proviso, *Section 8(b) (4)(ii)(B)* could be read to cover primary activity, "the National Labor Relations Board [] and the judiciary have construed the statute more narrowly, both before and after the proviso was added, to prohibit only secondary, rather than primary, strikes and picketing." *N.L.R.B. v. Enter. Ass'n of Steam, Local Union No. 638, 429 U.S. 507, 510, 97 S. Ct. 891, 51 L. Ed. 2d 1 (1977)*; see also *National Woodwork, 386 U.S. at 620* ("Congress meant *[Sections] 8(e)* and *8(b)(4)(ii)(B)* to prohibit only 'secondary' objectives" and this intent "clearly appears from an examination of the history of congressional action on the subject."). *Section 8(b)(4)(ii)(A)*, however, does not contain the same proviso.

But there is support in the case law for the proposition that *Section 8(b) (4) of the NLRA* in its entirety was designed to address secondary conduct. In *National Labor Relations Board v. International Rice Milling Co., 341 U.S. 665, 666 n.1, 71 S. Ct. 961, 95 L. Ed. 1277 (1951)*, for example, the Court noted that *Section 8(b)(4)* has "been referred to by Congress and the courts as the 'secondary **[**38]** boycott section[]' of the Act." See *Production Workers Union, Local 707 v. N.L.R.B., 793 F.2d 323, 324, 253 U.S. App. D.C. 252 (D.C. Cir. 1986)* ("*Section 8(b)(4)* ***HN18***[] of the National Labor Relations Act . . . for decades has been dubbed the 'secondary boycott provision' in scores of judicial opinions, administrative decisions, law review articles, treatises, casebooks, and law school classrooms."); see also *International Union of Electrical, etc. v. NLRB, 366 U.S. 667, 672, 81 S. Ct. 1285, 6 L. Ed. 2d 592 (1961)* ("While *[Section] 8(b)(4)* does not expressly mention 'primary' or 'secondary' disputes, strikes **[*639]** or boycotts, that section often is referred to in the Act's legislative history as one of the Act's 'secondary boycott sections.'" (internal quotation marks omitted)).

Nonetheless, ***HN19***[] courts, including in the Second Circuit, have found violations of *Section 8(b)(4)(ii)(A)* without requiring proof of a secondary objective. In *Local 812, International Brotherhood of Teamsters v. National Labor Relations Board, 947 F.2d 1034, 1040 (2d Cir. 1991)*, for example, the Court of Appeals held that "a labor organization violates *section 8(b) (4)(ii)(A)* whenever it engages in conduct with an object of forcing or requiring an employer or self-employed person to remain a member of a union." The Court did not address whether the conduct at issue was "primary" or "secondary" in nature, thus indicating that the distinction was immaterial to a finding of *Section 8(b)(4)(ii)(A)* liability.

Similarly, in *Frito-Lay, Inc. v. Local Union No. 137, International Brotherhood of Teamsters, 623 F.2d 1354, 1354 (9th Cir. 1980)*, the Court of Appeals for the Ninth Circuit found that "substantial evidence supported the district court's finding that the unions' **[**39]** motive in calling the strike was to force the employers into a multiemployer bargaining unit."

Thus, primary activity has been found to be a cognizable harm under *Section 8(b)(4)(ii)(A)*. See *NLRB v. Musicians Union, AFM Local 6, 960 F.2d 842, 845 (9th Cir. 1992)* (finding substantial evidence to support the NLRB's conclusion that the Union violated *Section 8(b)(4)(ii)(A)* by picketing Lewis, a self-employed musician, with the objective of forcing him to join the union) ; see also *Musicians Union, AFM Local 6, 298 N.L.R.B. 740, 741 (1990)* ("*Section 8(b)(4)(ii)(A)* draws no distinction between primary and secondary picketing."). Accordingly, NYU's claim for relief under the LMRA does not fail as a matter of law.

Alternatively, the Union argues for dismissal on the ground that NYU's LMRA claim fails because NYU's payment of the non-League contribution rates does not constitute coercion or restraint, but is instead the application of the required contribution rate under the terms of the CBA between the parties. This argument depends on resolution of the factual question of whether or not the Milliman Report provision at issue was validly made part of the CBA. Factual disputes of this nature are not appropriately decided at the motion to dismiss stage.

For the reasons mentioned above, the Union's motion to dismiss NYU's LMRA claim is denied.

III. ORDER

For the reasons **[**40]** stated above, it is hereby

ORDERED that the motions (Dkt. Nos. 38-41, 51, 62-64) filed by defendants the League of Voluntary Hospitals and Homes of New York, 1199SEIU United Healthcare Workers East, 1199SEIU National Benefit Fund for Health and Human Service Employees, the Mount Sinai Hospital, Montefiore Health System, Inc., the New York and Presbyterian Hospital, and Long Island Jewish Medical Center, to dismiss the Amended Complaint (Dkt. No. 67) of plaintiff NYU Hospitals Center, are **GRANTED** as to Count I of the Amended Complaint and **DENIED** as to Counts II and III of the Amended Complaint.

SO ORDERED.

Dated: New York, New York

20 June 2018

/s/ Victor Marrero

Victor Marrero

U.S.D.J.

[SG Interests I, Ltd. v. Kolbenschlag](#)

District Court of Colorado, Arapahoe County

June 20, 2018, Decided; June 20, 2018, Filed

Case: 2017 CV 030026

Reporter
2018 Colo. Dist. LEXIS 2867 *; 46 Media L. Rep. 1941

Plaintiffs: SG INTERESTS I, LTD, a Texas limited partnership. v. Defendant: PETER T. KOLBENSCHLAG a/k/a PETE KOLBENSCHLAG

Subsequent History: Affirmed by, Remanded by, Costs and fees proceeding at *SG Interests I, Ltd. v. Kolbenschlag, 2019 Colo. App. LEXIS 1099, 2019 COA 115 (July 25, 2019)*

Core Terms

settlement, fine, bid, summary judgment, leases, anti-trust, motion to dismiss, substantially true, parties, auctions, gas lease, qui tam, defamation, newspaper, summary judgment motion, federal action, collusion, oil, discovery, damages, grounds, libel, Sherman Act, reputation, agreeing, federal government, amended complaint, materially false, colluded, comments

Judges: [*1] Steven L. Schultz, District Court Judge.

Opinion by: Steven L. Schultz

Opinion

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the Defendant's motion seeking summary judgment dismissing the Plaintiffs' libel claim on the grounds that the statement attributed to the Defendant was substantially true. The Plaintiff, SG Interests I, Ltd. ("SGI"), disputes that claim and argues that it has asserted a legally sufficient cause of action. For the reasons set forth below, the Court agrees with the Defendant and grants his request for summary judgment dismissing this action in its entirety.

BACKGROUND OF THE DISPUTE AND PROCEDURAL HISTORY OF THIS ACTION

SGI is a Texas based limited partnership that engages in oil and gas exploration in the State of Colorado. In 2005, SGI entered into a secret agreement with a competitor, Gunnison Energy Corporation ("GEC"), to jointly bid for four gas leases offered by the Bureau of Land Management ("BLM") in the Ragged Mountain Wilderness area. Under that agreement, SGI submitted bids as the nominee for both parties, and then assigned 50% of the interest in the acquired leases to GEC at actual costs. In 2009, a former insider at GEC who had signed the **[*2]** joint agreement with SGI brought a *qui tam* action (Case No. 09 CV 02471) in the federal District Court for the District of Colorado alleging that SGI and GEC had violated the False Claims Act by attesting in the bid documents that there was no collusion. In February of 2012, the United States commenced a separate lawsuit (Case No. 2012 CV 00395) against SGI and GEC charging that the parties' covert joint bidding agreement had constituted a per se violation of *section 1* of the Sherman Act. In that case, the United States asserted that it had received substantially less revenue for the sale of the subject leases than it would have if SGI and GEC had not illegally colluded with one another to rig the bids. The United States sought treble damages for that conduct under the governing statute.

In December of 2012, SGI and GEC attempted to settle both cases by agreeing to each pay $275,000 to the Government. Under that proposal, the United States and the plaintiff in the related *qui tam* action would have received $390,000 and $180,000 respectively. Senior District Court Judge Richard P. Matsch rejected the settlement, finding that it was inappropriate and did not serve the public interest:

> Combining **[*3]** these two actions in a single agreement is inappropriate and misses the point that the purposes of the statutes upon which they are based are different. The False Claims Act prohibits lying to a government agency to obtain a benefit. The Sherman Act is for the protection of free market competition. As noted above, the actual amount of recovery for the combined settlement is only $390,000.00 given that $180,000.00 is to go to Anthony Gale and his attorney. There is no basis for saying that the approval of these settlements would act as a deterrence to these defendants and others in the industry, particularly as GEC considers "joint bidding" to be common in the industry.
>
> In sum, the settlement of this civil action for nothing more than the nuisance value of this litigation is not in the public interest and any settlement of Civil Action No. 09-cv-02471-RBJ-KLM must be separate and apart from this case.
>
> It is ORDERED that the settlement agreements are not approved and the Motion for Entry of Final Judgment (Doc. 18) is denied.

See Exhibit E to Defendant's Motion to Dismiss Amended Complaint filed on May 4, 2017 ("Def. Motion to Dismiss"). The parties to the federal actions subsequently entered **[*4]** into a revised settlement agreement wherein SGI and GEC resolved the anti-trust case by each paying $275,000 to the Government and the qui tam action by separately paying $206,250 and $245,000 to the plaintiff in that case. The revised settlement agreement, which essentially doubled the amounts paid by the Defendants was approved by Judge Matsch on April 23, 2013. *See* Def. Motion to Dismiss, Exhibit F.

The Alleged Libelous Statement

On November 17, 2016, the BLM cancelled all eighteen of SGI's gas leases in the Thompson Divide area. On November 28, 2016, the Glenwood Springs Post Independent newspaper published an article entitled, "Divide lease decision likely to land in court." The article discussed the BLM's decision and SGI's vow "to take legal action based on evidence it says points to collusion between the Obama administration and environmental interests to reach a 'predetermined political decision.'" The next day, the Defendant posted the following comment on the newspaper's website:

> While SGI alleges "collusion" let us recall that it, SGI, was actually fined for colluding (with GEC) to rig bid prices and rip off American taxpayers. Yes, these two companies owned by billionaires **[*5]** thought it appropriate to pad their portfolios at the expense of you and I and every other hard-working American.

See Plaintiff's Initial Complaint at ¶ 10 and Exhibit 2. Some four months later, the Plaintiff commenced this action by filing a single claim alleging that the Defendant's comment was both false and libelous. According to the Plaintiff, SGI had only settled the federal actions as a business decision and had never been fined for its conduct. In its pleading, SGI specifically alleged not only that the Defendant's statement was false, but that people reading the comment would "think significantly less favorably about SGI than they would if they knew the true facts." *Id.* at ¶ 17.

On March 20, 2017, the Defendant filed a motion to dismiss the complaint on the grounds that the Defendant's statement was substantially true and that the Plaintiff had failed to plead actual malice. Following the filing of an amended complaint, the Defendant renewed its motion in May. That motion was fully briefed by both sides by June of that year. In November of 2017, the Court issued an order converting the Defendant's motion to dismiss the

Amended Complaint under *rule 12(b)(5)* to one for summary **[*6]** judgment pursuant to *rule 56*. As the Court made clear in its order, both parties had submitted a substantial amount of additional evidence in support of their respective positions on the dismissal motion, including multiple newspaper articles, pleadings and orders from the two federal actions, and contracts between the Plaintiffs and other entities. Because the Court is prohibited from considering materials outside the four corners of the pleading, it converted the Defendant's request to a summary judgment motion and set an expedited briefing schedule for the parties to submit additional argument and materials to the Court. Finally, the Court advised the parties that it was not necessary for them to re-submit any evidence that had already been put in the record as part of the motion to dismiss. *See* Court's Order, dated November 20, 2017.

Both parties disagreed with the Court's decision. Plaintiff argued that any decision as to summary judgment should be deferred so as to allow the parties to engage in discovery as to its claims under *Rule 56(f)*. The Defendant, in turn, asked the Court to reconsider its order entirely, insisting that the Court could take judicial notice of the reams of additional evidence **[*7]** that had been submitted as part of the motion to dismiss as records in a "related case." Alternately, the Defendant advised the Court that if it proceeded with the summary judgment, it was withdrawing that portion of its motion seeking judgment as a matter of law on the alleged lack of malice. On December 20, 2017, the Court denied both party's motions and opted to proceed under *rule 56*. As a result, the only issue before the Court is whether the amended complaint should be dismissed on the grounds that the Defendant's statement was substantially true.

Findings of Fact

Based upon the parties' filings and the accompanying evidence, the Court makes the following findings of fact:

1. The Bureau of Land Management scheduled a sale of oil and gas leases in the Ragged Mountain Wilderness area of Delta and Gunnison Counties for February 10, 2005. Prior to that date, SGI and GEC had competed against one another as bidders in other government related energy sales.

2. On February 8, 2005, two days prior to the scheduled sale, SGI and GEC executed a memorandum of understanding ("MOU") agreeing to jointly bid for certain of the upcoming oil and gas leases. *See* Def. Motion to Dismiss, Exhibit A. Under that **[*8]** agreement, SGI was tasked to serve as the ostensible nominee for both entities, and GEC agreed to refrain from bidding altogether.

3. If SGI was successful in obtaining a lease, the parties agreed that SGI would immediately assign 50% of the lease to GEC at its actual costs. If SGI was not the successful bidder, then the MOU provided that it would immediately become null and void. *Id.*

4. The existence of the MOU was not disclosed to the B.L.M. prior to the sale.

5. Ultimately, SGI (and by extension GEC) were the successful bidders on 22 separate oil and gas leases in the Ragged Mountain area over the course of several auctions.

The Filing of the *Qui Tam* Complaint

6. On or about October 20, 2009, Anthony Gale commenced an action against GEC and SGI in federal court in the District of Colorado. Mr. Gale was a former senior vice president of GEC and had been the executive who had executed the MOU on behalf of that company. *See* Def. Motion to Dismiss, Exhibit B.

7. In his complaint, Mr. Gale alleged that GEC and SGI had illegally colluded with each other in connection with certain auctions held by the BLM for oil and gas leases in the Ragged Mountain area contrary to *18 U.S.C. §1860*. *Id.*, Exhibit B at ¶ 1. **[*9]**

8. Mr. Gale also alleged that Defendant SGI had falsely certified to federal authorities that it had not engaged in bid rigging in violation of its obligations under *31 U.S.C. §3729(a)(1)(G)* ("The False Claims Act allegations"). As a result of that conduct, Mr. Gale claimed that the United States had been damaged by a loss of auction proceeds. *Id.*

The Anti-Trust Complaint

9. On February 12, 2012, the Department of Justice ("DOJ") on behalf of the United States brought a separate action in federal court in the District of Colorado seeking both legal and equitable remedies against GEC and SGI under *section 1* of the Sherman. Act, *15 U.S.C. § 1*. *See* Def. Motion to Dismiss, Exhibit C.

10. As in the *qui tam* action, the United States alleged that GEC and SGI had violated the Sherman Act by colluding in their bids on certain federal lands offered for lease by the BLM in the Ragged Mountain Area. That allegation was premised again on the MOU that was secretly executed by the companies on February 8, 2005, but limited the anti-trust claims to just four of the leases acquired by the companies in April and May of 2005. *Id.* According to the Complaint, the United States received substantially less revenue from the sale of those leases than it would **[*10]** have had SGI and GEC competed at the auctions.

11. The United States accordingly sought a decree that the MOU between SGI and GEC constituted an illegal restraint of trade in violation of *Section 1* of the Sherman Act. As authorized by that provision, the United States also sought treble damages, costs, and equitable relief "to dissipate the anticompetitive effects" of the Defendant's conduct. *Id.* at ¶¶ 25-27.

The Settlement Agreements

12. On the same day that it filed its complaint, the United States submitted a proposed stipulation that would have resolved both the anti-trust and *qui tam* actions involving GEC and SGI. As noted above, the settlement provided for a total payment of $550,000 with the United States retaining approximately $390,000 of that amount. *See* Def. Motion to Dismiss, Exhibit D. According to DOJ's press release:

> "Today's unprecedented antitrust enforcement action involving illegal bidding at Bureau of Land Management auctions, demonstrates the U.S. government's resolve to ensure there is vigorous competition for federal oil and gas rights," said Sharis A. Pozen, Acting Assistant Attorney General in charge of the Department of Justice's Antitrust Division. "At a time of budgetary **[*11]** constraint, it is crucial that the federal government receive the most competitive prices for these important leases, which ultimately benefits American taxpayers."

Plaintiff's Response, dated May 25, 2017, to Defendant's Motion to Dismiss ("Plaintiff's Response") at Exhibit 1.

13. The federal court supervising the anti-trust action, however, rejected the proposed settlement finding that it did not serve the public interest and was insufficiently punitive towards the Defendants. Def. Motion to Dismiss, Exhibit E at p.11. In a particularly scathing passage, the federal judge overseeing the litigation was highly critical of GEC's claim that it had done nothing wrong and simply settled the case for nuisance value:

> GEC filed a statement responding to the public comments in a manner that demonstrates that this defendant considers this antitrust action to be meritless and the settlement to be nothing more than a payment to be rid of this nuisance. (Doc. 16-7). The unrepentant arrogance of this defendant is so self-evident that a copy of the statement is attached as Exhibit A. It is not in the public interest to approve a final judgment that permits a defendant to leave its civil action in such **[*12]** a smirking, self-righteous attitude.

Id. Judge Matsch accordingly rejected the proposed settlement.

14. As a result, the parties re-negotiated the terms of the settlement and each defendant increased its total proposed payments by more than $200,000. The parties also agreed to treat the settlement of the *qui tam* action separately. In the end, SGI settled the federal anti-trust action for a single payment of $275,000. Judge Matsch approved that revised settlement on April 22, 2013. Def. Motion to Dismiss, Exhibit F.

15. At the time of the approval of the revised settlement, numerous publications reported that the SGI had paid a fine to the federal government in connection with the case. See e.g. Def. Motion to Dismiss, Exhibit G *(National Law Review)* and Exhibit H (Crested Butte News). A more complete listing of the different publications that used the term "fine" to describe the settlement payment made by SGI is set forth on page 4, note 6 of the Defendant's Submission of Additional Materials, dated December 8, 2017, on the converted motion for summary judgment. *See also* pp. 15-16 *infra*. Despite the widespread use of the term "fine" or "fines" by various news sources at the time of the **[*13]** settlement, the Plaintiff never brought any defamation actions against those entities.

The Gravamen of the Current Dispute

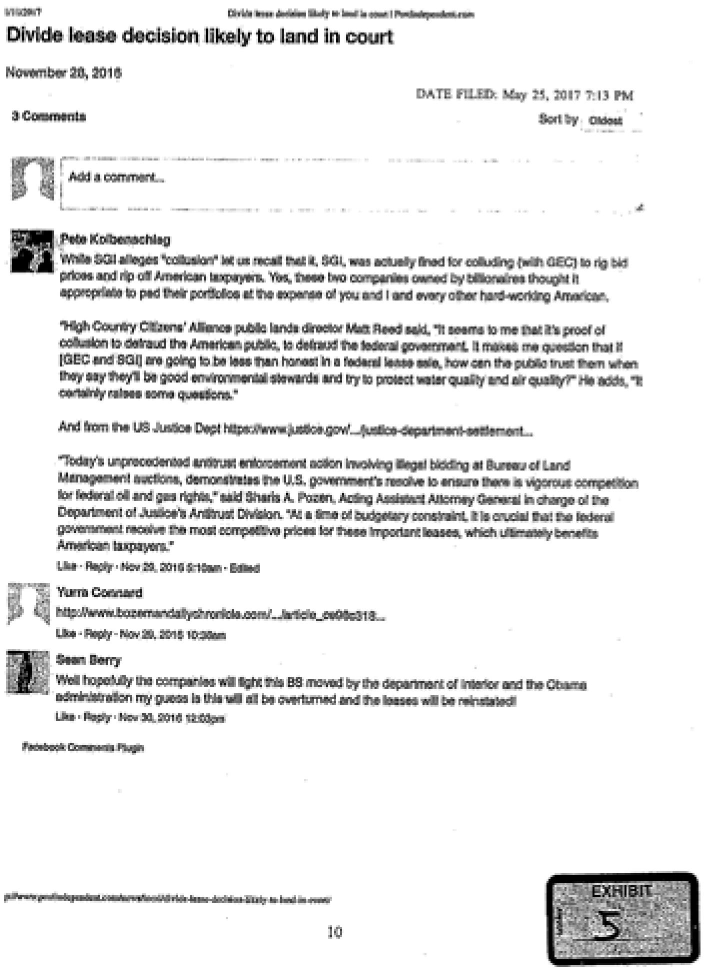
16. On November 17, 2016, the BLM cancelled all eighteen of SGI's gas leases in the Thompson Divide area. Although neither party addressed it in their briefs, it appears that those leases may have been the remaining ones that were the initial focus of the 2009 *qui tam* action.

17. On November 28, 2016, the Glenwood Springs Post Independent newspaper published an article entitled, "Divide lease decision likely to land in court." The article quoted Robbie Guinn, a vice president at SGI, who theorized that the cancellation of the leases was evidence of improper collusion between the Obama administration and unnamed environmental interests to reach a 'predetermined political decision.' *See* Plaintiff's Response, Exhibit 4.

18. Defendant appears to have taken issue with Mr. Guinn's claim, and submitted a written comment to the Post Independent article at 5:10 a.m. the following day. In that comment, the Defendant asserted that SGI had been fined in the federal antitrust action for collusion and ripping off the American taxpayers. *See* pp. 3-4 *supra*; Plaintiff's Response at **[*14]** Exhibit 5. The comment also included a quote from the public lands director of the High County Citizen's Alliance that was issued at the time of the original settlement. Finally, the comment contained a passage from and a link to the Department of Justice press release that was sent out by the government in connection with the initial settlement proposal. *See* ¶ 12 *supra*; Plaintiff's Response, Exhibit 1. Because the Court finds that the entire comment made by the Defendant is relevant in this case, it is reproduced in full on the following page.

19. Two additional comments were submitted on the original Post article just below the Defendant's statement. The first was posted by an individual named Yurra Connard and consisted of a link to an article in the Bozeman Daily Chronicle. *Id.*

20. Reflecting the polarized state of our society, the second comment was posted by an individual under the screen name Sean Berry and dismissed the points raised by the Defendant. Mr. Berry encouraged the companies to fight this "BS moved (*sic*) by the department of the interior and the Obama Administration..." and speculated that the cancellations would be overturned in court and that the leases would be **[*15]** reinstated. *Id.*



Divide lease decision likely to land in court

November 28, 2016

DATE FILED: May 25, 2017 7:13 PM

3 Comments

Sort by Oldest

Add a comment...

Pete Kolbenschlag

While SGI alleges "collusion" let us recall that it, SGI, was actually fined for colluding (with GEC) to rig bid prices and rip off American taxpayers. Yes, these two companies owned by billionaires thought it appropriate to pad their portfolios at the expense of you and I and every other hard-working American.

"High Country Citizens' Alliance public lands director Matt Reed said, "It seems to me that it's proof of collusion to defraud the American public, to defraud the federal government. It makes me question that if [GEC and SGI] are going to be less than honest in a federal lease sale, how can the public trust them when they say they'll be good environmental stewards and try to protect water quality and air quality?" He adds, "It certainly raises some questions."

And from the US Justice Dept https://www.justice.gov/.../justice-department-settlement...

"Today's unprecedented antitrust enforcement action involving illegal bidding at Bureau of Land Management auctions, demonstrates the U.S. government's resolve to ensure there is vigorous competition for federal oil and gas rights," said Sharis A. Pozen, Acting Assistant Attorney General in charge of the Department of Justice's Antitrust Division. "At a time of budgetary constraint, it is crucial that the federal government receive the most competitive prices for these important leases, which ultimately benefits American taxpayers."

Like · Reply · Nov 29, 2016 5:10am · Edited

Yurra Connard

http://www.bozemandailychronicle.com/.../article_ce98c318...

Like · Reply · Nov 29, 2016 10:30am

Sean Berry

Well hopefully the companies will fight this BS moved by the department of interior and the Obama administration my guess is this will all be overturned and the leases will be reinstated!

Like · Reply · Nov 30, 2016 12:03pm

Facebook Comments Plugin

10

EXHIBIT 5

21. Four months after the comments were published on the Post's website, the Plaintiff brought this action asserting a single claim of libel against the Defendant primarily based on the use of the word "fined" in his statement. The summary judgment motion addressing that claim has now been briefed and is ripe for a decision.

LEGAL ANALYSIS

Point I

<u>The Legal Standards for Defamation Claims Under Colorado Law</u>

The legal standards applicable to a motion for summary judgment under *C.R.C.P. 56* are well settled in this State. Summary judgment is a drastic remedy that should only be granted on a clear showing that there are no genuine issues as to any material fact, and that the moving party is entitled to judgment, as a matter of law. *Jones v. Dressel, 623 P.2d 370, 373 (Colo. 1981)*. In considering a motion for summary judgment, the nonmoving party is entitled to all favorable inferences that may reasonably be drawn from the evidence. *See Churchey v. Adolph Coors Co., 759 P.2d 1336, 1355 (Colo. 1988)*. Because the trial court may not assess the weight of the evidence or the credibility of witnesses on summary judgment, the court may not grant the motion when there is a controverted factual issue that must be resolved in a trial. *Roderick v. City of Colorado Springs, 193 Colo. 104, 563 P.2d 3 (Colo. 1977)*; *Moses v. Moses, 180 Colo. 397, 505 P.2d 1302 (Colo. 1973)*. Ultimately, a Court's function in determining a summary judgment **[*16]** motion is not to decide issues of fact, but rather to determine "whether there is an issue of fact to be tried." *Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98, 100 (Colo. 1952)*.

If the moving party demonstrates its entitlement to summary judgment, however, the burden shifts to the non-moving party to establish that there is a triable issue of fact in the case. Continental Airlines, Inc. v. Kennan, 731 P.2d 708, 713 (Colo. 1987). A party opposing a request for summary judgment cannot rest on allegations or general denials in its opposition, but must set forth specific facts, by affidavit or otherwise, showing that there is a genuine issue of fact that must be resolved at trial. See C.R.C.P. 56(e); People in the Interest of J.M.A., 803 P.2d 187, 193 (Colo. 1990). Failure to meet that burden warrants the issuance of summary judgment in the moving party's favor.

Because this case involves a claim of libel, the substantive legal standards are different and more precise. A claim based upon defamation or libel under Colorado law requires, at a minimum, the publication of a false statement of a defamatory nature. Burns v. McGraw—Hill Broad. Co., 659 P.2d 1351, 1360 (Colo.1983). Whether a particular statement is, or is not, defamatory is a question of law. Gordon v. Boyles, 99 P.3d 75, 79 (Colo.App.2004) (citing Walker v. Associated Press, 160 Colo. 361, 417 P.2d 486 (1966)). Where the statement concerns a public figure or a matter of public concern, it triggers certain constitution protections. In those cases, there are competing interests between the **[*17]** protection of a party's reputation and the promotion of uninhibited, robust public debate and discourse. Smiley's Too, Inc. v. Denver Post Corp., 935 P.2d 39, 41 (Colo.App.1996) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). In light of those competing considerations, Colorado law employs a heightened burden and requires that the plaintiff demonstrate the falsity of the underlying statement by clear and convincing evidence. Fry v. Lee, 408 P.3d 843, 848, 2013 COA 100 (Colo. App. 2013). Both of the parties here acknowledge that the litigation over the MOU between GEC and SGI was a matter of public concern. Indeed, the number of newspaper articles that were published at the time of the settlement provides ample evidence of that fact. SGI, as the plaintiff, accordingly bears the burden of showing that the defendant's statement was defamatory by clear and convincing evidence.

Substantial truth is a complete defense to a defamation claim. While the law used to require literal truth, that standard has evolved over time. Modern jurisprudence recognizes that if a statement is substantially true, not every word must be literally accurate. "[I]t is sufficient if the substance, the gist, the sting, of the matter is true." Gomba v. McLaughlin, 180 Colo. 232, 504 P.2d 337, 339 (Colo. 1972). Put another way, the statement must not only be false, but "materially false." Brokers' Choice of America, Inc. v. NBC Universal, Inc., 861 F3d 1081, 1107 (10th Cir. 2017) ("The law of defamation overlooks inaccuracies and focuses **[*18]** on substantial truth.") (citing Schwartz v. Am. Coll. of Emergency Physicians, 215 F.3d 1140, 1146 (10th Cir. 2000). To determine if a challenged statement is substantially true, the trial court must focus on how it would be interpreted by an average person. Fry v. Lee, 408 P.3d at 849. As the 10th Circuit has explained:

> Because [the protection of the plaintiff's reputation] is the particular purpose the defamation tort is aimed at, we assess the materiality of a misstatement by comparing the damage it has done to the plaintiff's public reputation to the damage the truth would have caused... To qualify as *material* the alleged misstatement must be likely to cause reasonable people to think "significantly less favorably" about the plaintiff that they would if they knew the truth; a misstatement is not actionable if the comparative harm to the plaintiff's reputation is real but only modest.

Bustos v. A & E Television Networks, 646 F.3d 762, 764-765 (10th Cir. 2011) (citations omitted). Finally, in determining whether a statement is materially false, it must be examined in context, looking at the totality of the language Brokers' Choice of America, Inc., 861 F.3d at 1108 ("As stated in Brokers' Choice II, determining whether a publication is materially false requires examination of the published statements in context, not in isolation.").

Courts at both the federal and state levels have not hesitated to grant motions to **[*19]** dismiss or motions for summary judgment in connection with defamation claims. See e.g. Fry v. Lee, 408 P.3d at 843 (motion to dismiss); Brokers' Choice of America, Inc., 861 F.3d 1081 (same); Bustos, 646 F.3d 762 (summary judgment). Indeed, because such claims may have a chilling effect on constitutionally protected speech, Colorado law encourages the resolution of such actions at an early stage. Fry v. Lee, 408 P.3d at 849. That rationale applies to cases where, as here, the defendant has argued that the underlying statement was substantially true. See Id. (holding that the trial court properly dismissed complaint on the grounds that the challenged statement was substantially true). In this case, the Defendant moved to dismiss on those very grounds. The Court converted that motion to one for summary judgment given the substantial amount of additional materials that each side submitted as part of their filings. The Court has now carefully reviewed all of that evidence, as well as the parties' legal and factual arguments. The Court ultimately finds that the Defendant's statement was substantially true and therefore not actionable as set forth below.

Point II

Defendant's Statement was Substantially True And Was Not Materially False

According to SGI, the Defendant's use of the term "fined" rendered his newspaper **[*20]** comment untrue because the company merely settled the federal actions as part of a prudent business decision. The Plaintiff also takes issue with the Defendant's assertion that SGI and GEC rigged bid prices to rip off the American taxpayers. The Plaintiff further argues that the juxtaposition of those two assertions makes the entire statement materially false. The Defendant disputes that claim, and points out that SGI paid more than $475,000 to settle the claims of collusion and false certification brought in the federal actions. The Defendant also points to Judge Matsch's decision rejecting the initial settlement offer on the grounds that it did not serve as a sufficient deterrent to the defendants' illegal conduct. Finally, the Defense notes that numerous news sources reported at the time of the settlement that SGI and GEC had been fined by the government. Based on those facts, the Defendant argues that his statement regarding the outcome of the federal actions was substantially true.

The Court agrees with the Defendant. First, the Court finds that the use of the word "fined" by the Defendant in his comment did not render that statement false. The term "fine" is commonly defined as **[*21]** "a sum imposed as punishment for an offense" or "a forfeiture or penalty paid to an injured party in a civil action." See Merriam-Webster.com (2018). In this case, SGI ultimately paid a sum to the federal government to resolve claims brought against it that alleged anti-trust violations under the Sherman Act. SGI also paid a separate sum of money to settle the related *qui tam* action brought by the former GEC insider alleging false certification. The Court does not believe that the terminology used to describe those payments — whether they are called fines, penalties, settlement payments or damages — makes any real difference. Under Colorado law, the Court must evaluate the challenged statement in the light of an ordinary reader. *Fry v. Lee, 408 P.3d at 849*. The Court is aware that SGI settled the cases by paying a specific sum without admitting liability. That is a common practice by companies for a variety of reasons. The Court just does not find that the distinction between paying a settlement and paying a fine is of a sufficient difference to the average reader to support a defamation action on those grounds.

That conclusion is further supported by the contemporaneous press accounts, industry newsletters, **[*22]** and legal commentaries from the time of the underlying federal settlements that characterized SGI's payment as a "fine." See e.g. Seth Mensing, *North Fork Gas Drillers Fined by Feds for Collusion*, Crested Butte News (Feb. 24, 2012) at 1; *Dep't of Justice Antitrust Challenge to Bid Rigging on Mineral Rights Auctioned by the Bureau of Land Mgm't*, Baker Botts, LLP (Feb. 20, 2012) ("On February 15, 2012, the Antitrust Division of the U.S. Department of Justice ("DOJ") fined two companies a combined $550,000 to settle alleged violations of the Sherman Act . . ."); J. Dubrow & S. Barnes, *DOJ Finds Antitrust Violation in Joint Bid for Oil & Gas Leases*, McDermott Will & Emery (Feb. 23, 2012)("[DOJ] recently announced a settlement requiring two companies that allegedly coordinated bids for oil and gas leases to pay a total of $550,00 in fines related to an agreement not to compete."); Tim Mutrie, *Powerful Natural Gas Companies Agree to a Larger Antitrust Fine*, Aspen Daily News (Apr. 22, 2013); *US: Gas cos agree to even steeper penalty, fine nearly doubled*, Competition Policy Int'l J. (Apr. 22, 2013); Joe Hanel, *Driller Starts Super-PAC to Support Tipton*, Durango Herald (Oct. 29, 2012) ("In **[*23]** February, SG and Gunnison Energy agreed to pay a $550,000 fine to settle an antitrust lawsuit by the Justice Department for agreeing not to compete in a 2005 auction of drilling rights in Western Colorado.").[1] The Court finds is telling that the specific distinction that

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[1] *See also* J. Dubrow & C. Cafasso, *Natural Gas Companies Settle Antitrust Suit Stemming from Joint Bidding*, McDermott Will & Emery (April 25, 2013)("Gunnison Energy Corp. (GEC) and SG Interests I Ltd. and SG Interests VII Ltd. (collectively "SGI") will

SGI is attempting to draw in this defamation case was not even followed at the time of the original settlements. Put another way, the Court fails to see how SGI could now argue that the average reader would consider the difference between a "fine" and a "payment in settlement" to be particular meaningful when the reporters, industry insiders and legal commentators in the field disregarded that very same distinction at the time of the underlying events.

The Court would also note that the Plaintiff disregards the full context of the Defendant's statement. It was made in the comments section of a newspaper article. It was not part of any official publication, **[*24]** nor was it even subject to the same journalistic standards as the information in the article above. It was a comment by a member of the public to other members of the public on the equivalent of a chat board about a matter of newsworthy interest. To hold it to the exacting standards that the Plaintiff is proposing would not only be unwarranted, but would be chilling to protected speech. If the Defendant truly wanted to mislead the members of the public to damage Plaintiff's reputation by providing false information as SGI now claims, it seems doubtful that he would have included a comment form and a link to the press release sent out by the DOJ detailing the nature of the underlying case and the terms of the prior settlement. *See* Plaintiff's Response at Exhibit 1. Generally, parties that are trying to mislead others with false factual claims do not include a direct link to other documents containing an accurate rendition of the facts.

Finally, SGI's purported defamation claim fails the second part of the substantial truth test. Not only is the gist or sting of the defendant's comment substantially true, but to the extent that it is inaccurate in its use of the term "fine," that inaccuracy **[*25]** is immaterial. As the Tenth Circuit noted in its prior decision in *Bustos v. A & E Television Networks*, a statement is only considered material if it is "likely to cause reasonable people to think significantly less favorably about the plaintiff than they would if they knew the truth." *Id., 646 F. 3d at 764-765*. The Court has reviewed all of the information submitted by the parties in this case, including the various affidavits, the newspaper articles, and the numerous filings in the underlying federal litigations. The Court finds that the accurate facts in the federal actions are far more damaging to SGI's reputation than the vague commentary made by the Defendant in his newspaper posting.

For example, while the Court is aware that SGI still asserts that the MOU was part of a larger pro-competitive agreement executed with GEC, that claim was expressly rejected by the federal government. In its filing in support of the second proposed settlement, it concluded

> After carefully analyzing the investigatory materials and evaluating the competitive effects of the two agreements in light of all relevant circumstances, the United States concluded that Defendant MOU was a *per se* unlawful restraint of trade in violation **[*26]** of *Section 1* of the Sherman Act, *15 U.S.C. §1*. As stated in the CIS, the MOU was not ancillary to a procompetitive or efficiency-enhancing collaboration between the Defendants...
>
> Defendants had been discussing the possibility of a broad joint venture since October of 2004; however by early February 2005 those discussions had broken down. With the auction imminent, Defendants executed the MOU, which eliminated competitive bidding. Although Defendants continued to entertain the possibility of a broader, efficiency-enhancing collaboration, significantly, at the time they executed the MOU and obtained the leases, any such joint venture remained just that — a vague possibility. The fact that the Defendants ultimately

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each pay a fine of $275,000 to the DOJ to settle allegations of agreeing not to bid against each other in violation of ***antitrust law*** for natural gas leases on government land in western Colorado."); *DOJ, Producers Up Ante in Colorado Gas Settlement*, NGI's Daily Gas Price Index (April 23, 2013) ("A proposed settlement between the U.S. Department of Justice (DOJ) and two independent producers, which allegedly rigged bidding in a government lease sale in Colorado, would nearly double the fines to be paid by the companies, compared with a previous settlement, according to documents filed recently in the United States District Court for the District of Colorado."); T. Mueller and N. Wilberforce, *Cautious about Collaboration: Antitrust Scrutiny in Oli and Gas Exploration* Wilmerhale.com (March 28, 2017) ("The settlement required the companies to pay $550,000 in fines and was the DOJ's first attempt to challenge "an anticompetitive bidding agreement for mineral rights leases."); Edward B. Schwartz, Steptoe & Johnson, *Toughened Oversight Raises Antitrust Hazards of Oil Industry Collaboration*, Oil & Gas J. (Apr. 1, 2013) ("A federal court recently rejected the settlement, noting that a higher fine amount was needed to deter future violations, particularly because such agreements as common in the industry.").

> established such a collaboration does not transform their prior agreement not to compete into a lawful ancillary restraint.

See Plaintiff's Response, Exhibit 2 at p. 16 (citations omitted). The Government was even more critical in an accompanying footnote in which it addressed GEC's claims that the parties' joint agreement to secretly bid together had not damaged the public in any way:

> GEC asserts in its comments that it "believes it can establish that as to some or all of those 4 leases there would **[*27]** not have been competitive bidding even if GEC and SGI had not bid jointly. GEC Cmts at 1. Contemporaneous GEC business documents, however, demonstrate that after the February 2005 auction, senior GEC executives congratulated each other on having successfully avoided a bidding contest with SGI.

Id., Exhibit 2 at p. 16, n. 12.

Ultimately, the investigation by the federal authorities revealed that SGI and GEC had improperly agreed to bid together, that representatives of each company physically attended the BLM auctions for appearances sake, that in accordance with the MOU, GEC never submitted any bids for the leases in question, that SGI subsequently conveyed 50% of the ownership of those leases to GEC after the auctions were over, and that the companies obtained the leases for less than market value as a result of their secret agreement. *See* Plaintiff's Response, Exhibit 2 at p. 4 (Noting, among other things, that SGI and GEC obtained one lease for $2 per acre, the minimum bid possible). SGI and GEC were sued, at least in part, based on the claim of a company insider that the companies had illegally colluded with one another and falsely certified to federal authorities that no such collusion **[*28]** had occurred. Compared to those objective facts — none of which are subject to dispute — the Defendant's use of the term "fine" in his public commentary in place of the words "settlement payment" is immaterial. The Court accordingly concludes that the Defendant's statement was both substantially true and less damaging to the Plaintiff than the actual facts established in the federal cases. His statement is therefore not actionable and summary judgment dismissing the Plaintiff's libel claim is warranted here.

Point III

Plaintiff's Request for Discovery Under *Rule 56(f)* Is Insufficient to Oppose Summary Judgment Here

In their opposition, the Plaintiff suggests that the Court defer ruling on the motion for summary judgment under *rule 56(f)*. *Rule 56* allows the Court to delay the resolution of a pending motion if the opposing party can demonstrate that it cannot obtain the facts necessary to oppose the requested relief without an opportunity to conduct discovery. Opposition to summary judgment under *rule 56(f)*, however, cannot be based on mere conclusory statements. *Bailey v. Airgas-Intermountain, Inc., 250 P.3d 746, 751 (Colo. App. 2010)*. The opposing party must specifically delineate what facts it expects to gain through discovery and how those facts may impact the pending motion. *See Garcia v. United States Air Force, 533 F.3d 1170, 1179-80 (10th Cir. 2008)* (denial of **[*29]** 56(f) request not an abuse of discretion where "the affidavit submitted by [plaintiffs'] counsel failed to identify any specific facts which would create a genuine issue of material fact, let alone identify what steps had been taken to obtain such facts and a plan for the future").

In this case, other than invoking the general language of *rule 56(f)*, the Plaintiff has failed to explain what facts are unavailable or how discovery as to those facts may change the outcome here. As noted above, the Court has concluded that the statement attributed to the Defendant is not actionable because it was substantially true and because any inaccuracy was not material. Both of those arguments were raised and argued by the Defendant in his motion papers. In opposing that request, the Plaintiff suggests that it should have an opportunity to depose Mr. Kolbenschlag to ascertain if he "can validate his claim that his statement was substantially true in light of the true facts [of the federal actions.]" *See* Plaintiff's Response to Defendant's Motion for Summary Judgment under *Rule 56* and Request to Take Discovery under *Rule 56(f)*, dated December 29, 2017 ("Plaintiff SJ Response") at p. 1.

The Court agrees with the Defendant that **[*30]** the ostensible issue raised by the Plaintiff is irrelevant to the pending motion. This is not a case where the Court is addressing actual malice or the Defendant's subjective belief on summary judgment. The Court had granted summary judgment after finding that the term "fined" may also include a settlement payment to an average reader, that the gist or sting of the Defendant's statement was true, and that any inaccuracy was immaterial in light of the actual facts. None of those determinations turn on the Defendant's subjective belief, which has no bearing on the Court's decision on those issues. This is also not a case where the Plaintiff is arguing that Mr. Kolbenschlag has any special or unique knowledge of the underlying federal litigation or its eventual outcome. He was not involved in the decision made at the time by SGI, GEC or the federal government. The Court has given the Plaintiff more than a year to assemble its opposition to the dismissal of this case and to present its best argument as to why its claim should be allowed to go forward. The fact that the Plaintiff has come up short has nothing to do with a lack of discovery and everything to do with the applicable law and **[*31]** the undisputed facts this case. Plaintiff's request to defer ruling on the Defendant's motion for summary judgment under *rule 56(f)* is therefore DENIED.

Conclusion

For the foregoing reason, the Defendant's motion for summary judgment dismissing the amended complaint is GRANTED.

Date: June 20, 2018

BY THE COURT:

/s/ Steven L. Schultz

Steven L. Schultz

District Court Judge

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Ortiz v. Ferrellgas Partners, L.P. (In re Pre -Filled Propane Tank Antitrust Litig.)

United States Court of Appeals for the Eighth Circuit

February 15, 2018, Submitted; June 22, 2018, Filed

No. 16-4086, No. 16-4164

Reporter
893 F.3d 1047 *; 2018 U.S. App. LEXIS 16989 **; 2018-1 Trade Cas. (CCH) P80,428

In re: Pre -Filled Propane Tank Antitrust Litigation;Mario Ortiz; Stephen Morrison; Steven Tseffos, Plaintiffs - Appellants, Sean Venezia; Michael S. Harvey; Gregory Ludvigsen; Arthur Hull; Alan Rockwell; James Halgerson; Thomas R. Clark; Bryce Mander; Alex Chernavsky; Robert Orr; Eric Blum; Paul Toomey, Plaintiffs, William Vincent, Plaintiff - Appellant, David McNally; Steven Lutrell; Ken Cramer, Plaintiffs, Kevin Dougherty, Plaintiff - Appellant, James Ristow; Daniel Kelleher; Richard Pedrick; Dallas May, Jr.; Tom Roberts, Plaintiffs, John Gilbert; Mark Stevens; Richard Paradowski, Plaintiffs - Appellants, Hanz De Perio, Plaintiff, Josh Bartholow, Plaintiff - Appellant, Joseph M. Haala; Scott Zuehlke; Wesley H. McCullough; Richard Sanchez; MaryLou Breed; Jerry Marshall, Plaintiffs, Troy Winters; Thomas Gane; Gary Snow; Nicholas Pulli; Allan Disbrow, Plaintiffs - Appellants, v. Ferrellgas Partners, L.P. a limited partnership; Ferrellgas, L.P. a limited partnership, doing business as Blue Rhino; AmeriGas Propane, L.P. a limited partnership, doing business as AmeriGas Cylinder Exchange; UGI Corporation, a corporation; AmeriGas Propane, Inc.; AmeriGas Partners, L.P., Defendants - AppelleesRobert Orr; Eric Blum; Paul Toomey; William Vincent; David McNally; Steven Lutrell; Ken Cramer; Kevin Dougherty; James Ristow; Daniel Kelleher; Richard Pedrick; Dallas May, Jr.; Tom Roberts; John Gilbert; Mark Stevens; Richard Paradowski; Hanz De Perio; Josh Bartholow; Joseph M. Haala; Scott Zuchlke; Wesley H. McCullough; Richard Sanchez; MaryLou Breed; Jerry Marshall, Plaintiffs - Appellants v. Ferrellgas Partners, L.P.; Ferrellgas, L.P.; AmeriGas Partners, L.P., Defendants - Appellees

Subsequent History: On remand at, Motion granted by, in part, Motion denied by, in part, Dismissed by, in part *In re Pre-Filled Propane Tank Antirust Litig., 2019 U.S. Dist. LEXIS 161394 (W.D. Mo., Aug. 21, 2019)*

Prior History: **[**1]** Appeals from United States District Court for the Western District of Missouri - Kansas City.

In re Pre-Filled Propane Tank, 2016 U.S. Dist. LEXIS 167724 (W.D. Mo., Sept. 2, 2016)

Core Terms

purchasers, indirect, district court, propane, prices, disgorgement, tanks, fill, injunctive relief, subclass, violations, levels, conspiracy, antitrust, en banc, injunction, damages, statute of limitations, orders, supra-competitive, allegations, pounds, suits, injury in fact, consent order, propane tank, statute-of-limitations, conspiring, quotation, recurrent

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN1[] Remedies, Injunctions

An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. To have standing to seek injunctive relief, a plaintiff must show that he is under threat of suffering injury in fact that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury. Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects, or by a sufficient likelihood that the plaintiff will again be wronged in a similar way.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN2[] Pretrial Judgments, Judgment on Pleadings

When deciding *Fed. R. Civ. P. 12(c)* motions courts may rely on matters within the public record.

Civil Procedure > Remedies > Injunctions

HN3[] Remedies, Injunctions

A plaintiff is not entitled to injunctive relief to the extent other existing relief is adequate and provides substantially the same relief.

Civil Procedure > Remedies > Injunctions

HN4[] Remedies, Injunctions

Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief.

Civil Procedure > Remedies > Injunctions

Evidence > Burdens of Proof > Allocation

HN5[] Remedies, Injunctions

The law is clear that public and private antitrust injunctions may coexist without regard for one another. The mere existence of a government consent order does not preclude private injunctive relief. However, the party seeking the injunction nonetheless has the burden of establishing that such cumulative relief is needed through the cognizable danger of recurrent violation standard from Borden. In re Nifedipine Antitrust Litig.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN6[] **Pretrial Judgments, Judgment on Pleadings**

A complaint must allege sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A plausible claim must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard asks for more than a sheer possibility that a defendant has acted unlawfully. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. Rather, the facts alleged must be enough to raise a right to relief above the speculative level. As a general rule, a *Fed. R. Civ. P. 12(c)* motion for judgment on the pleadings is reviewed under the same standard as a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss.

Civil Procedure > Remedies

HN7[] **Civil Procedure, Remedies**

Disgorgement is an equitable remedy that provides a method of forcing a defendant to give up the amount by which he was unjustly enriched.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN8[] **Remedies, Damages**

Only the overcharged direct purchaser, and not others in the chain of manufacture or distribution can sue for antitrust damages under *§ 4 of the Clayton Act*, *15 U.S.C.S. § 15*, which provides a private right of action for violations of *§ 1 of the Sherman Act*.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN9[] **Remedies, Damages**

Under the *Clayton Act*, private parties can already pursue direct purchaser actions for treble damages under *§ 4 of the Clayton Act*. *15 U.S.C.S. § 15*. Permitting disgorgement under *§ 16 of the Clayton Act* would provide yet another route to defendants' allegedly ill-gotten gains, and would therefore heighten the possibility that defendants in antitrust actions could be exposed to multiple liability. While disgorgement would have the additional benefit of permitting compensation for indirect purchasers who are excluded from recovery under current law, the Supreme Court weighed this interest against the threat of duplicative recovery and determined that only direct purchasers have standing under the *Clayton Act*.

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

HN10[] **Supplemental Jurisdiction, Pendent Claims**

Federal courts possess only that power authorized by Constitution and statute. It is well established—in certain classes of cases—that, once a court has original jurisdiction over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy.

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

HN11[] **Supplemental Jurisdiction, Pendent Claims**

Congress unambiguously gave district courts discretion in *28 U.S.C.S. § 1367(c)* to dismiss supplemental state law claims when all federal claims have been dismissed.

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For James Ristow, Daniel Kelleher, Richard Pedrick, Dallas May, Jr., Tom Roberts, John Gilbert, **[**3]** Mark Stevens, Richard Paradowski, Hanz De Perio, Josh Bartholow, Joseph M. Haala, Scott Zuehlke, Wesley H. McCullough, Richard Sanchez, MaryLou Breed, Jerry Marshall, Plaintiffs - Appellants (16-4164): Leonard Wayne Aragon, Robert B. Carey, Attorney, John Michael DeStefano III, Attorney, Hagens & Berman, Phoenix, AZ; Norman Siegel, Barrett Jay Vahle, Stueve & Siegel, Kansas City, MO.

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Judges: Before LOKEN, BENTON, and ERICKSON, Circuit Judges.

Opinion by: BENTON

Opinion

[*1051] BENTON, Circuit Judge.

The plaintiffs sued Ferrellgas Partners, L.P., Ferrellgas, L.P. (collectively "Ferrellgas"), and AmeriGas Partners, L.P., alleging antitrust violations and **[**5]** seeking relief under federal and state law. The district court granted summary judgment for Defendants. Having jurisdiction under *28 U.S.C. § 1291*, this court affirms in part and remands in part.

I.

Ferrellgas[1] and AmeriGas are the nation's largest distributors of pre-filled propane exchange tanks, which come in a standard size. Before 2008, Defendants filled the tanks with 17 pounds of propane. In 2008, due to rising propane prices, Defendants reduced the amount in each tank from 17 to 15 pounds, but maintained the same price. According to the plaintiffs, this "effectively rais[ed] the price charged for propane in those tanks."

In 2009, a group of plaintiffs—indirect purchasers who bought tanks from retailers—filed a class action alleging Defendants conspired to reduce the amount of propane in the tanks while maintaining the price, in violation of *Section 1* of the Sherman Act and state antitrust and consumer protection laws. In 2010, the plaintiffs and AmeriGas settled. *See* ***In re Pre-Filled Propane Tank Mktg. & Sales Practices Litig.**, 2010 U.S. Dist. LEXIS 49527, 2010 WL 2008837 (W.D. Mo. May 19, 2010)* (granting preliminary approval of first amended settlement agreement). Also **[*1052]** in 2010, those plaintiffs again sued Ferrellgas, settling in 2012. (This court refers to those suits collectively **[**6]** as "*Propane I*.") On March 27, 2014, the Federal Trade Commission issued a complaint against Defendants—settled on January 7, 2015, by consent orders—for conspiring to artificially inflate tank prices. *See* ***In re Ferrellgas Partners, L.P.**, 2014 FTC LEXIS 206, 2014 WL 1396496 (Mar. 27, 2014)*.

On May 30, 2014, another group of indirect purchasers ("the *Ortiz* plaintiffs") brought a class action against Defendants, alleging: "Despite their settlements, Defendants continued to conspire, and rather than resuming competition, maintained their illegally agreed-upon fill levels, preserving the unlawfully inflated prices that their conspiracy had produced," and "Defendants continued to have regular communications regarding pricing, fill levels,

1 Ferrellgas does business as "Blue Rhino."

and market allocation until at least late 2010." They seek injunctive relief and disgorgement for violations of *Section 1* of the Sherman Act. They also seek damages under the antitrust laws of 23 states and the District of Columbia—all with statutes allowing indirect-purchaser suits for state-antitrust damages despite *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, which bars those suits for federal-antitrust damages.

The *Ortiz* class action became part of a multidistrict proceeding that included a class action with similar allegations by direct purchasers **[**7]** (who bought tanks directly from Defendants for resale). The direct-purchaser suit seeks federal-antitrust damages, which the district court dismissed as time-barred. The district court explained (1) the statute of limitations accrued on August 1, 2008, the latest "all Defendants began selling fifteen pound tanks"; and (2) new purchases of tanks after that date did not restart the statute of limitations. ***In re Pre-Filled Propane Tank Antitrust Litig.****, 2015 U.S. Dist. LEXIS 193932, 2015 WL 12791756, at *3 (W.D. Mo. July 2, 2015)*. This court—en banc—reversed, holding that "'each sale to the plaintiff[s]' in a price-fixing conspiracy 'starts the statutory period running again'" and is an "overt act, inflicting new and accumulating injury." ***In re Pre-Filled Propane Tank Antitrust Litig.****, 860 F.3d 1059, 1067-68 (8th Cir. 2017)* (en banc) ("***Propane En Banc***"), *cert. denied*, *138 S. Ct. 647, 199 L. Ed. 2d 530 (2018)*, *quoting* ***Klehr v. A.O. Smith Corp.****, 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*.

Before this court issued *Propane En Banc*, the district court made several rulings in *Ortiz*. It dismissed as time-barred the indirect purchasers' state-law-damages claims. The district court ruled that, like direct purchases, new indirect purchases did not restart the statute of limitations. For the same reason, the district court dismissed the indirect purchasers' federal-disgorgement claim. But it allowed the federal-injunctive claim to proceed.

To address the statute of limitations, the *Ortiz* plaintiffs **[**8]** moved for leave to amend to add three new subclasses asserting damages: (1) a six-year statute-of-limitations subclass, for violations of Maine, Vermont, and Wisconsin law; (2) a new-purchaser subclass, for violations of Kansas ***antitrust law***; and (3) a new-purchaser subclass, for violations of the laws of "*Illinois Brick* repealer states." The new-purchaser subclasses included individuals who bought propane tanks for the first time after March 27, 2011. The *Ortiz* plaintiffs also proposed another federal-disgorgement claim.

The district court ruled that the amendments to add the disgorgement claim and the new-purchaser subclasses would be futile because the claims are time-barred. According to the district court, first-time purchases after March 27, 2011, are irrelevant **[*1053]** because the statute of limitations accrued in August 2008, and—as it previously concluded—new purchases did not restart the clock. The district court did, however, rule that the six-year statute-of-limitations subclass raised timely claims. Filed on October 16, 2015, the *Ortiz* amended complaint retains the federal-injunctive claim, in addition to asserting the six-year statute-of-limitations subclass's state-law-damages **[**9]** claim.

The district court later dismissed the federal-injunctive claim under *Fed. R. Civ. P. 12(c)*, concluding (1) the indirect purchasers lack standing, and (2) the doctrine of laches bars the claim. Meanwhile, on July 21, 2016, another group of indirect purchasers ("the *Orr* plaintiffs") not named in the *Ortiz* complaint sued Defendants. The *Orr* complaint—consolidated into the same multidistrict proceeding with *Ortiz*—includes the federal-disgorgement claim and the new-purchaser subclasses that the *Ortiz* plaintiffs tried to add to their complaint, along with a six-year statute-of-limitations subclass damages claim and a federal-injunctive claim.

Ferrellgas moved for summary judgment against the *Ortiz* plaintiffs, arguing the *Propane I* release barred the claims of the six-year statute-of-limitations subclass. The release says:

> [T]he Releasing Persons hereby fully, finally, and forever release, relinquish, and discharge the Released Persons from any and all liabilities, claims, rights, suits, and causes of action, of any kind whatsoever, that the Releasing Persons may have or may have had . . . whether known or unknown, suspected or unsuspected, threatened, asserted, or unasserted . . . that were or could have been **[**10]** sought or alleged in the Litigation related to the filling, purchase, sale or exchange of Ferrellgas's 20-pound propane gas cylinders.

The district court ruled that the release "does not contain the clear language necessary to constitute a release of future claims. Thus, the release provision only bars assertion of claims that had accrued at the time of the release." ***In re Pre-Filled Propane Tank Antitrust Litig.****, 2016 U.S. Dist. LEXIS 167724, 2016 WL 6963058, at *4 (W.D. Mo. Sept. 2, 2016)* (internal citation omitted). The plaintiffs argued that "their current claims are for post *In re Propane I* purchases of propane tanks, and that those purchases could not have accrued into claims until after the purchases were made, and thus, after the release." ***Id.***

The district disagreed, granting Ferrellgas summary judgment, again ruling that the claims accrued only once—"in August 2008"—and the limitations period did not restart upon new purchases. The district court also granted summary judgment for AmeriGas on the basis of standing. Finally, the district court dismissed the *Orr* complaint based on its rulings in *Ortiz*.

The indirect purchasers in *Ortiz* and *Orr* appeal. This court reviews the issues here de novo. ***Propane En Banc****, 860 F.3d at 1063*; ***Montin v. Moore****, 846 F.3d 289, 293 (8th Cir. 2017)*; ***Torgerson v. City of Rochester****, 643 F.3d 1031, 1042 (8th Cir. 2011)* (en banc).

II.

Alleging a Sherman Act violation, the indirect purchasers seek injunctive relief requiring **[**11]** Defendants to: (1) not allocate market share; (2) void any existing co-packing agreements, not make new co-packing agreements, and not share pricing information or information about tank-fill levels; and (3) increase the fill levels of the tanks to 17 pounds of propane. The district court ruled that the indirect purchasers lack standing to seek injunctive relief.

[*1054] ***HN1***[] "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." ***Preiser v. Newkirk****, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975)* (citation omitted). To have standing to seek injunctive relief,

> a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)*. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects," *O'Shea v. Littleton, 414 U.S. 488, 495-96, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)*, or by "a sufficient likelihood that [the plaintiff] will again be wronged in a similar way," *City of Los Angeles v. Lyons, 461 U.S. 95, 111, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)*.

On the first standing element, **[**12]** the indirect purchasers argue that the "continued sale of the propane tanks filled to only fifteen pounds without a corresponding decrease in price constitutes an ongoing injury in fact." ***In re Pre-Filled Propane Tank Antitrust Litig.****, 2016 U.S. Dist. LEXIS 194545, 2016 WL 6963059, at *3 (W.D. Mo. Jan. 13, 2016)*. The district court agreed: "Paying a supra-competitive price as a result of past anti-competitive behavior is a continuing effect, sufficient to establish an injury in fact." ***Id.*** But it concluded that "all three of Plaintiffs' requested injunctions fail for lack of redressability." *2016 U.S. Dist. LEXIS 194545, [WL] at *5*.

Specifically, the district court noted that the January 2015 FTC consent orders provide the same relief as sought in the first two injunction grounds. *See* ***Faibisch v. University of Minnesota****, 304 F.3d 797, 802 (8th Cir. 2002)* (***HN2***[] "When deciding *Rule 12(c)* motions . . . courts may rely on matters within the public record."); ***Brown v. Medtronic, Inc.****, 628 F.3d 451, 459-60 (8th Cir. 2010)* ("documents attached to or incorporated within a complaint are considered part of the pleadings, and courts may look at such documents 'for all purposes,' *Fed.R.Civ.P. 10(c)*, including to determine whether a plaintiff has stated a plausible claim"). ***HN3***[] A plaintiff "is not entitled to injunctive relief to the extent other existing relief is adequate" and provides "substantially the same relief." ***National Farmers' Org., Inc. v. Associated Milk Producers, Inc.****, 850 F.2d 1286, 1309 (8th Cir. 1988)*. On appeal, the indirect purchasers argue that the injunction grounds **[**13]** "exceed[] the scope of that provided for in the FTC Consent Orders."

On the first ground—a ban on allocating market share—the district court focused on how the FTC orders bar Defendants from raising, fixing, maintaining, or stabilizing prices of the tanks through any means. The FTC orders say:

> [Defendants are prohibited from] [e]ntering into, attempting to enter into, adhering to, participating in, maintaining, organizing, implementing, enforcing, inviting, offering or soliciting any combination, conspiracy, agreement, or understanding between or among [Defendants] and any Competitor to raise, fix, maintain, or stabilize prices or price levels of Propane Tanks through any means, including modifying the Fill Level contained in Propane Tanks sold by [Defendants] and/or its Competitors, or coordinating Communications to customers of [Defendants] and/or their Competitors.

[*1055] The indirect purchasers argue: "Even if competitors are enjoined from agreeing to fix prices and stop doing so, they may still agree to allocate markets, and due to the resulting lack of competition, have the ability to charge supra-competitive prices independent of a continuing agreement to do so."

The indirect purchasers, however, **[**14]** ignore the "through any means" language in the FTC orders. In the amended complaint, they allege that market-share allocation is a means of fixing prices: "AmeriGas and Blue Rhino also agreed to allocate customers and markets between themselves in furtherance of their collusion to maintain prices at supracompetitive levels." As the district court noted, "Plaintiffs do not allege the existence of a market share allocation agreement divorced from any allegations of price fixing." ***Pre-Filled Propane**, 2016 U.S. Dist. LEXIS 194545, 2016 WL 6963059, at *5*. Under the indirect purchasers' own theory, market-share allocation violates the FTC orders' ban on fixing prices. The first injunction ground does not exceed the scope of the FTC orders.

On the second ground, the indirect purchasers want Defendants to void any existing co-packing agreements, refrain from making new co-packing agreements, and refrain from sharing pricing information or information about tank fill levels. In the amended complaint, they allege that the co-packing agreements "facilitate[] the exchange of pricing information between two direct competitors" and "present[] ample opportunities for conspiratorial communications." But the FTC orders cover those issues by prohibiting Defendants from exchanging **[**15]** "Competitively Sensitive Non-Public Information." That includes "pricing, pricing strategies, Fill Level strategies, costs, revenues, margins, output, business and strategic plans, marketing, customer information and Communications with customers, advertising, promotion or research and development."

The indirect purchasers counter, asserting that both the first and second injunction grounds are necessary because "there exists some cognizable danger of recurrent violation." ***United States v. Borden Co.**, 347 U.S. 514, 520, 74 S. Ct. 703, 98 L. Ed. 903 (1954)* (citation omitted) (discussing simultaneous use of public and private antitrust injunctions). They contend that the "FTC Consent Orders are relatively weak. In essence, they merely require Defendants to promise not to break the law again." According to them, "[d]iscovery could establish, for example, that Defendants have been violating the terms of the FTC Consent Orders and the FTC either is unaware or has not been adequately enforcing the terms of the Orders—a problem which Plaintiffs would have no standing to address absent an independent suit."

In other words, the indirect purchasers believe that Defendants are engaging in "recurrent violations" of the FTC orders. They focus on how the district court explained:

> ***HN4***[] "Past exposure **[**16]** to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *O'Shea v. Littleton, 414 U.S. 488, 495, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)*. Thus, Defendants' allegedly anti-competitive actions in 2008 are alone insufficient to establish a present injury in fact, entitling Plaintiffs to injunctive relief. However, such past exposure is sufficient if it is accompanied by "continuing, present adverse effects." *Id. at 496*. Paying a supra-competitive price as a result of past anti-competitive behavior is a continuing effect, sufficient to establish an injury in fact.
>
> . . . .

> **[*1056]** [T]he allegation that Defendants colluded to raise prices and the allegation that the prices have remained inflated are not legal conclusion but factual assertions. Accordingly, this Court appropriately accepts them as true and finds that Plaintiffs have alleged a sufficient injury in fact.

Pre—Filled Propane Tank Antitrust Litig., *2016 U.S. Dist. LEXIS 194545, 2016 WL 6963059, at *3-4*. The indirect purchasers argue that the district court's conclusion means that Defendants are recurrently violating the FTC orders, necessitating private injunctive relief.

True,***HN5***[] "the law is clear that public and private antitrust injunctions may coexist without regard for one another." ***Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.***, *602 F.3d 237, 249 (3d Cir. 2010)*, *citing* ***Borden***, *347 U.S. at 518* (in antitrust **[**17]** cases, public and private claims for injunctive relief are "designed to be cumulative, not mutually exclusive"). "[T]he mere existence of [a government consent order] does not preclude private injunctive relief. . . . However, the party seeking the injunction nonetheless has the burden of establishing that such cumulative relief is needed" through the "cognizable danger of recurrent violation" standard from *Borden.* ***In re Nifedipine Antitrust Litig.***, *335 F. Supp. 2d 6, 17 (D.D.C. 2004)* (internal quotation marks omitted), *citing* ***Borden***, *347 U.S. at 518*; *see also* ***Howard Hess***, *602 F.3d at 249* ("nothing in *Borden* intimates that a private litigant is relieved of its evidentiary burden of showing an entitlement to injunctive relief when the government has already obtained its own injunction.").

The indirect purchasers, however, must adequately plead that Defendants are, post-January 2015, conspiring to charge supra-competitive prices, resulting in "some cognizable danger of recurrent violation" of the FTC orders. ***HN6***[] A complaint must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" ***Ashcroft v. Iqbal***, *556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, *quoting* ***Bell Atlantic Corp. v. Twombly***, *550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A plausible claim must plead "factual content that allows the court to draw the reasonable inference that the defendant is **[**18]** liable for the misconduct alleged." ***Id.***, *quoting* ***Twombly***, *550 U.S. at 556*. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." ***Id.***, *citing* ***Twombly***, *550 U.S. at 556*. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" ***Id.***, *quoting* ***Twombly***, *550 U.S. at 555, 557* (citation omitted). Rather, the facts alleged "must be enough to raise a right to relief above the speculative level." ***Twombly***, *550 U.S. at 555*. "As a general rule, a *Rule 12(c)* motion for judgment on the pleadings is reviewed under the same standard as a 12(b)(6) motion to dismiss." ***Ginsburg v. InBev NV/SA***, *623 F.3d 1229, 1233 n.3 (8th Cir. 2010)*; *see also* ***Cafasso v. General Dynamics C4 Sys.***, *637 F.3d 1047, 1054 n.4 (9th Cir. 2011)* (collecting cases from the Second, Fifth, and Sixth Circuits to conclude that the *Twombly* and *Iqbal* standard applies to *Rule 12(c)* motions.).

In *Propane En Banc*, this court considered whether the direct purchasers sufficiently alleged "unlawfully high priced sales during the class period" resulting from a price-fixing conspiracy, an element in determining "whether the amended complaint adequately pleads a continuing violation sufficient to restart the statute of **[*1057]** limitations." **[**19]** ***Propane En Banc***, *860 F.3d at 1068* (internal quotation marks omitted). The direct purchasers pled (1) "Defendants' anticompetitive conduct lasted at least from July 21, 2008 through January 9, 2015," and (2) "Defendants' unlawful communications regarding pricing, fill levels, and market allocation continued until at least late 2010." ***Id.*** *at 1069-70*. This court concluded that those allegations were "naked assertion[s] devoid of further factual enhancement," *Iqbal, 556 U.S. at 678* (internal quotation marks omitted), that do not "raise a right to relief above the speculative level," *Twombly, 550 U.S. at 555*. ***Propane En Banc***, *860 F.3d at 1070*. Other allegations, however, sufficiently "list[ed] relevant individuals, acts, and conversations" in 2008 and 2010 to plead "that the conspiracy continued into the class period." ***Id.*** *at 1069-70*.

The indirect purchasers emphasize how they plead: (1) "Defendants' conspiracy is a continuing conspiracy. Both defendants have continued to maintain the reduced fill levels despite the fact that propane prices have decreased substantially from their 2008 high"; (2) "Despite their settlements [in *Propane I*], Defendants continued to conspire, and rather than resuming competition, maintained their illegally agreed-upon fill levels, preserving the unlawfully inflated prices that their conspiracy had produced"; (3) "The **[**20]** conduct of Defendants is continuing and will continue to impose antitrust injury on class members unless equitable relief is granted"; and (4) "Prices for propane exchange tanks sold by Defendants have been fixed, raised, maintained, and stabilized at artificially high, non-competitive levels throughout each State set forth below."

These allegations echo those found insufficient in *Propane En Banc*—that is—they are "naked assertion[s] devoid of further factual enhancement," *Iqbal, 556 U.S. at 678* (internal quotation marks omitted), that do not "raise a right to relief above the speculative level," *Twombly, 550 U.S. at 555*. *See* ***Propane En Banc**, 860 F.3d at 1069-70*. Yes, the *Ortiz* and *Orr* complaints contain allegations detailing events *in 2008 and through 2010* like those found sufficient in *Propane En Banc* to plead "that the conspiracy continued into the class period."

But neither those allegations nor others in the complaints "list relevant individuals, acts, and conversations, providing 'factual content' to support "the reasonable inference that the defendant is liable for the misconduct alleged," that Defendants are conspiring to charge supra-competitive prices and are engaging in "recurrent violations" of the *January 7, 2015* consent orders. ***Id.**, quoting* ***Iqbal**, 556 U.S. at 678* **[**21]** . The indirect purchasers have not even adequately pleaded that Defendants are currently charging supra-competitive prices, let alone a conspiracy. The issue here is different than that in *Propane En Banc*. But *Propane En Banc's* pleading discussion controls. The indirect purchasers inadequately plead an injury-in-fact.

The indirect purchasers' inadequate pleading of an injury-in-fact also means they lack standing to pursue the third injunction ground (not addressed in the FTC orders)—to increase the fill levels of the tanks to 17 pounds of propane. Even if they had adequately pled an injury-in-fact, as the district court noted, the parties "agree that mandating an increase in the amount of propane in the tanks without a mandate regarding price would not decrease the price per pound of propane tanks." ***Pre-Filled Propane**, 2016 U.S. Dist. LEXIS 194545, 2016 WL 6963059, at *5*. An increase in the fill level **[*1058]** does not mean that the claimed injury will be redressed.

The indirect purchasers in *Ortiz* and *Orr* lack standing to pursue their injunctive-relief claims. This court need not address the argument that the district court erred in ruling that the doctrine of laches bars those claims.

III.

The indirect purchasers seek disgorgement for violations of *Section 1* of the Sherman Act. **[**22]** ***HN7***[] Disgorgement is an equitable remedy that provides "a method of forcing a defendant to give up the amount by which he was unjustly enriched." ***FTC v. Bronson Partners, LLC**, 654 F.3d 359, 372 (2d Cir. 2011)* (citation and internal quotation marks omitted). They plead: (1) "As a direct result of their anticompetitive profits, Defendants have received profits far in excess of those that would have been received in a competitive market"; (2) "Disgorgement of these profits is necessary to divest Defendants of the fruits of their wrongful conduct"; and (3) "In the alternative, Plaintiffs request that Defendants be required to provide class members with propane equal in value to the fill reductions or the cash equivalent based on then existing wholesale prices." The district court dismissed the disgorgement claim as barred by the statute of limitations.

On appeal, the indirect purchasers contend that because disgorgement is an equitable remedy, the doctrine of laches, not the statute of limitations, governs timeliness. The district court apparently applied the statute of limitations because it considered the disgorgement claim a federal-antitrust-damages claim. But under *Illinois Brick*, ***HN8***[] only the "overcharged direct purchaser, and not others in the chain **[**23]** of manufacture or distribution" can sue for antitrust damages under *Section 4 of the Clayton Act, 15 U.S.C. § 15*, which provides a private right of action for violations of *Section 1* of the Sherman Act. ***Illinois Brick**, 431 U.S. at 729*; ***Ginsburg**, 623 F.3d at 1233* (citing *Illinois Brick* to explain: "As indirect purchasers, they may not sue for damages under the *Clayton Act*. But indirect purchasers are private parties who may sue for injunctive relief under *§ 16* of the Act.").

In *Illinois Brick*, the Supreme Court barred indirect-purchaser suits for federal antitrust damages, reasoning that those suits "would create a serious risk of multiple liability for defendants" and "the possibility of inconsistent adjudications." ***Illinois Brick**, 431 U.S. at 730*. The Court was also concerned about the "uncertainties and difficulties in analyzing price and out-put decisions 'in the real economic world' . . . and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." ***Id.*** *at 731-32*.

At the district court, Defendants argued that disgorgement "is a thinly-veiled attempt to circumvent the long-standing holding of *Illinois Brick*." The district court did not address this issue. But other courts have concluded that *Illinois Brick* prohibits indirect **[**24]** purchasers from seeking disgorgement:

> Although the Court's concern [in *Illinois Brick*] for the complexity of the damages proceeding is not implicated by a disgorgement action, permitting disgorgement does raise the specter of duplicative recoveries. ***HN9***[] Under the Clayton Act, private parties . . . can already pursue direct purchaser actions for treble damages under *§ 4*. *15 U.S.C. § 15*. . . . Permitting disgorgement under *§ 16* would provide yet another route to defendants' allegedly ill-gotten gains, and would therefore heighten the possibility **[*1059]** that defendants in antitrust actions could be exposed to multiple liability. While disgorgement would have the additional benefit of permitting [compensation for] indirect purchasers who are excluded from recovery under current law, the Supreme Court weighed this interest against the threat of duplicative recovery and determined that only direct purchasers have standing under the Clayton Act.

FTC v. Mylan Lab., Inc.*, 62 F. Supp. 2d 25, 41 (D.D.C. 1999)*; *see also* ***In re Digital Music Antitrust Litig.****, 812 F. Supp. 2d 390, 412 (S.D.N.Y. 2011)* ("it is beyond peradventure that indirect purchasers may not employ unjust enrichment to skirt the limitation on recovery imposed by *Illinois Brick* . . . . Moreover, there is no clearly established federal common law of restitution for **[**25]** a federal antitrust violation, and Plaintiffs do not suggest that the Court create one. Therefore, absent a basis for restitution in federal law both direct and indirect purchasers may not bring unjust enrichment claims premised solely on a violation of federal law."); ***In re Flonase Antitrust Litig.****, 692 F. Supp. 2d 524, 542 (E.D. Pa. 2010)* ("The policy of *Illinois Brick* prohibits indirect purchasers from suing the manufacturer to recover any ill-gotten gains the manufacturer has obtained by violating antitrust laws. . . . Allowing indirect purchasers to recover and recoup a benefit from the defendant under an unjust enrichment theory would circumvent the policy choice of *Illinois Brick*."); ***In re Terazosin Hydrochloride Antitrust Litig.****, 160 F. Supp. 2d 1365, 1380 (S.D. Fla. 2001)* ("*Illinois Brick* expressed concerns that indirect purchasers actions would lead to complex apportionment disputes among injured parties, undermine the efficient enforcement of antitrust laws, or expose defendants to the risk of multiple liability. The end payors' unjust enrichment claim raises identical concerns. . . . State legislatures and courts that adopted the *Illinois Brick* rule against indirect purchaser antitrust suits did not intend to allow an end run around the policies allowing only direct purchasers to recover.") (internal citations and quotation marks **[**26]** omitted).

This court agrees with those district courts. Here, the indirect purchasers are trying to use disgorgement to get profits, or "propane equal in value to the fill reductions or the cash equivalent based on then existing wholesale prices." Those requests violate the policy concerns in *Illinois Brick*. The indirect purchasers cannot pursue disgorgement, an impermissible attempt to circumvent Supreme Court precedent. *See* ***Brown v. St. Louis Police Dep't of City of St. Louis****, 691 F.2d 393, 396 (8th Cir. 1982)* ("We may . . . affirm on any ground supported by the record").

IV.

The indirect purchasers argue that this court's holding in *Propane En Banc*—that "'each sale to the plaintiff[s]' in a price-fixing conspiracy 'starts the statutory period running again'"—means that the state-law-damages claims of the new purchaser subclasses and the six-year statute-of-limitations subclass are not time-barred. *See* ***Propane En Banc****, 860 F.3d at 1068*, *quoting* ***Klehr v. A.O. Smith Corp.****, 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*. This court declines to address that issue, instead remanding to the district court to consider a threshold issue: assuming timeliness, whether the state-law-damages claims should remain in federal court.

HN10[] Federal courts "possess only that power authorized by Constitution and statute." **[**27]** ***Kokkonen v. Guardian Life Ins. Co. of Am.****, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)*. "[I]t is well established—in certain classes of cases—that, once a court has original jurisdiction **[*1060]** over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy." ***Exxon Mobil Corp. v. Allapattah Servs., Inc.****, 545 U.S. 546, 552, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)*.

But ***HN11***[] "Congress unambiguously gave district courts discretion in *28 U.S.C. § 1367(c)* to dismiss supplemental state law claims when all federal claims have been dismissed." ***Gibson v. Weber****, 431 F.3d 339, 342 (8th Cir. 2005)*. By *§ 1367(c)*:

> The district courts may decline to exercise supplemental jurisdiction over a claim under *subsection (a)* if—
> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Here, this court has affirmed the dismissals of this case's federal claims. And this case appears to raise "novel or complex" issues of the laws of multiple states. This court remands to the district court to analyze under *§ 1367(c)* whether it should exercise supplemental jurisdiction over the state-law claims. *See* ***Lapides v. Board of Regents of [**28] Univ. Sys. of Georgia****, 535 U.S. 613, 624, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002)* (noting that under *§ 1367(c)(3)*, "the District Court may well find that this case, now raising only state-law issues, should . . . be remanded to the state courts for determination."). If the district court decides to exercise supplemental jurisdiction, then this court directs the district court to consider the impact of *Propane En Banc* on the timeliness of the state-law claims.

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The judgment is affirmed in part, and the case remanded for proceedings consistent with this opinion.

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Salone v. Bank of Am., N.A.

United States District Court for the Central District of California

June 22, 2018, Decided; June 22, 2018, Filed

Case No. 5:17-cv-01721-AB (ASx)

Reporter
2018 U.S. Dist. LEXIS 216978 *

BRIAN SALONE, Plaintiff, v. BANK OF AMERICA, N.A., Defendant.

Prior History: Salone v. Bank of Am., N.A., 2017 U.S. Dist. LEXIS 166330 (C.D. Cal., Oct. 6, 2017)

Core Terms

modification, breach of contract, summary judgment, unfair, promise, promissory estoppel, misrepresentation, signed copy, mailed, punitive damages, fair dealing, good faith, consumers, permanent, breach of the implied covenant, fraudulent, nonmoving, damages, copies, attorney's fees, monthly payment, modify

Counsel: **[*1]** For Brian Salone, Plaintiff: Ashishkumar A Patel, LEAD ATTORNEY, Law Office of Ashishkumar Patel APC, Santa Ana, CA USA.

For Bank of America, N.A., national association Defendant: Mark Joseph Kenney, LEAD ATTORNEY, Severson and Werson APC, San Francisco, CA USA; John Owen Campbell, Severson and Werson APC, Irvine, CA USA.

For Rebecca Callahan, Mediator (Adr Panel): Rebecca Callahan, Callahan Law Corporation, Newport Beach, CA USA.

Judges: HONORABLE ANDRÉ BIROTTE JR., UNITED STATES DISTRICT JUDGE.

Opinion by: ANDRÉ BIROTTE JR.

Opinion

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING IT IN PART

On March 30, 2018, Defendant Bank of America, N.A. ("Defendant") filed a motion for summary judgment on all of Brian Salone's claims. Dkt. No. 16. Brian Salone ("Plaintiff") filed an opposition, and Defendant replied. Dkt. Nos. 21, 24. The Court heard oral arguments regarding the motion on June 15, 2018. For the following reasons, the Court **GRANTS** the motion in part and **DENIES** it in part.

I. BACKGROUND

In December 2007, Plaintiff secured a $449,100.00 loan from Defendant with a deed of trust on his property in Corona, CA. Decl. Nichole Williams, ¶ 3, Exs. 1, 2 (Dkt. No. 19). The loan was for a term of 30 **[*2]** years at a fixed rate of 6.25%. Williams Decl., Ex. 1, at p. 2. Plaintiff defaulted on the loan in early 2009 and sought a loan modification from Defendant. Decl. Brian Salone, ¶ 2 (Dkt. No. 23).

In December 2014, Plaintiff again contacted Defendant about obtaining a loan modification. Salone Decl., ¶ 3. Defendant's representatives told Plaintiff that he could not modify his loan because he was in default and encouraged him to pay his arrearages. *Id.* Plaintiff borrowed money to pay off the $21,347.47 of arrearages. *Id.* Then, in January 2016, Defendant presented Plaintiff a Trial Period Plan ("TPP"). Salone Decl., ¶ 5. The TPP specified that, if Plaintiff made three timely, monthly payments, Defendant would offer Plaintiff a permanent loan modification at the monthly rates paid during the TPP. SGI[1] 1-2. Plaintiff did make the three TPP payments, and Defendant sent Plaintiff a permanent loan modification offer (the "Offer"). SGI 3.

The Offer required Plaintiff to do two things to accept the Offer and permanently modify his loan: (1) make the first monthly payment and (2) sign the attached loan modification agreement ("Agreement") and return copies of it to Defendant by May 23, 2016. *Id.* ***[*3]*** Plaintiff timely made the initial payment on May 16, 2016. SGI 4. But, according to Defendant, it never received a signed copy of the Agreement from Plaintiff. SGI 5. Plaintiff, on the other hand, submitted a declaration stating that he sent signed copies of the Agreement to Defendant more than one week before May 23, 2016. Salone Decl., ¶¶ 10, 11.

Plaintiff then attempted to make an additional loan payment on June 1, 2016, but Defendant rejected it. Salone Decl., ¶ 11. Defendant later notified Plaintiff on June 9, 2016 that the Agreement lapsed due to Plaintiff's failure to return the signed Agreement by the due date. SGI 6. The notification stated in bold typeface, "If you believe our decision is incorrect, you have 30 calendar days from the date of this letter to contact us at 800.854.6885 and provide information to show why our determination was in error." *Id.* Plaintiff did not provide Defendant with any documentation that there was a mistake, but did contact Defendant to explain that he had sent in signed copies of the Agreement. SGI 6; Salone Decl., ¶ 13.

On December 2, 2016, Plaintiff filed a complaint in California Superior Court for the County of Riverside. *See* Complaint (Dkt. **[*4]** No. 1-1). It alleges seven causes of action: (1) intentional misrepresentation; (2) breach of contract; (3) negligence; (4) negligent misrepresentation; (5) violations of California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code, §§ 17200, et seq.*; (6) breach of the implied covenant of good faith and fair dealing; and (7) promissory estoppel. *Id.* Defendant removed the case to this Court. Dkt. No. 1.

After Plaintiff filed the lawsuit, Defendant offered another loan modification in February 2017, which required Plaintiff to pay a $32,000 lump sum payment of the monthly amounts that had accrued from June 2016 through February 2017. SGI 8; Salone Decl., ¶ 19. Plaintiff rejected the offer because he could not afford the $32,000 lump sum payment. SGI 9; Salone Decl., ¶ 19. In June 2017, Defendant again offered a loan modification, this time with monthly payments of $3,758.56, a $173.24 increase from the monthly rates set forward in the Agreement. SGI 12.

II. LEGAL STANDARD

A motion for summary judgment must be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of **[*5]** law." *Fed. R. Civ. P. 56(c)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Where the nonmoving party will have the burden of proof at trial, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. *Id.* The nonmoving party then "must set forth specific facts showing that there is a genuine issue for trial." *Anderson, 477 U.S. at 248*.

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[1] "SGI" refers to the Statement of Genuine Issues filed by Plaintiff. Dkt. No. 22.

"Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. The Court must draw all reasonable inferences in the nonmoving party's favor. *In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010)* (citing *Anderson, 477 U.S. at 255*). Nevertheless, inferences are not drawn out of thin air, and it is the nonmoving party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985)*, *aff'd*, *810 F.2d 898 (9th Cir. 1987)*. "[M]ere disagreement or the bald assertion that a genuine issue of material fact exists" does not preclude summary judgment. *Harper v. Wallingford, 877 F.2d 728, 731 (9th Cir. 1989)*.

III. DISCUSSION

Defendant moves for summary judgment on all of Plaintiff's claims. In addition, it seeks a judgment that Plaintiff cannot recover punitive damages or **[*6]** attorneys' fees.

A. Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing

A claim for breach of contract requires the following elements: (1) the existence of a contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) resulting damages to the plaintiff. *Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 821, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 (2011)*. Like a breach of contract claim, a claim for breach of the implied covenant of good faith and fair dealing requires a showing of contract formation and damages. *See* *Rosenfeld v. JPMorgan Chase Bank, N.A., 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010)*. Defendant's argument for summary judgment on Plaintiff's breach of contract and implied covenant claims focuses on the contract formation and damages elements.

1. Acceptance of the Agreement

Defendant argues that Plaintiff failed to properly accept the Offer in the manner required by the Offer. Under California law, an offeror is not bound to the terms of an agreement unless the offeree communicates its acceptance in the manner prescribed by the offer. *Cal. Civ. Code § 1582*. The parties do not dispute that Plaintiff was required to sign and return copies of the Agreement to accept the Offer. SGI 3. Thus, Defendant is not bound by the terms of the Agreement unless Plaintiff properly signed and returned copies of **[*7]** the Agreement. According to Defendant, it never received signed copies of the Agreement, and Plaintiff provides no direct evidence of receipt.

While it is true that no direct evidence establishes that Defendant received signed copies of the Agreement, a triable issue of fact exists as to whether a presumption of receipt should apply. The mailbox rule provides that the "proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee." *Mahon v. Credit Bureau of Placer Cnty. Inc., 171 F.3d 1197, 1202 (9th Cir. 1999)*; *see also* *Cal. Evid. Code § 641* ("A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail."). This presumption serves as "a tool for determining, in the face of inconclusive evidence, whether or not receipt has actually been accomplished." *Schikore v. BankAmerica Supplemental Ret. Plan, 269 F.3d 956, 961 (9th Cir. 2001)*. The common law mailbox rule and its presumption of receipt exist "precisely to aid finders of fact in circumstances where direct evidence of either receipt or non-receipt is not available." *Id.* Thus, if Plaintiff shows that he properly and timely mailed copies of the Agreement, then there is a presumption Defendant received the copies, unless Defendant can present affirmative evidence of non-receipt to rebut the presumption.

To determine **[*8]** whether Plaintiff's signed Agreement was timely, the Court looks to the language of the Agreement for when the return of the documents was due. The due date stipulated in the Agreement is May 23, 2016. SGI 3. "[T]he Postal Service advises its customers that first-class mail takes one to three days for delivery."

Mendez v. Knowles, 556 F.3d 757, 765 (9th Cir. 2009). Plaintiff declared under penalty of perjury he sent the signed copies at least one week before May 23, 2016, leaving at least seven days for transit. Salone Decl., ¶¶ 10, 11. "A sworn statement is credible evidence of mailing for purposes of the mailbox rule." *Schikore, 269 F.3d at 964*. Plaintiff's declaration therefore at least creates a question as to whether Plaintiff established that he properly and timely mailed signed copies of the Agreement to Defendant.

Further, if Plaintiff can invoke the mailbox rule, Defendant must then present affirmative non-receipt evidence to rebut Plaintiff's presumption. *See id.* (holding the document will be presumed to have been received unless the other party can produce affirmative evidence of non-receipt). The Ninth Circuit has held that "the presumption of receipt is a strong one." *Jones v. United States, 226 F.2d 24, 27 (9th Cir. 1955)* (quotations omitted). Defendant claims it did not receive copies of the Agreement **[*9]** from Plaintiff by May 23, 2016 as required by the Offer. Defendant provided a declaration from Nichole Renee Williams, an Assistant Vice President of Bank of America, to corroborate its position. Williams Decl., ¶ 8. Whether this would amount to a successful rebuttal of Plaintiff's presumption of receipt is a close call. *See Jones, 226 F.2d at 27* (holding that a search of the pertinent files in an office which revealed no record of receipt was insufficient to rebut the presumption of delivery). Thus, a reasonable trier of fact could rule in Plaintiff's favor if it believes that Plaintiff properly mailed signed copies of the Agreement, and that Defendant did not make a strong enough showing to rebut the presumption of receipt.

2. Damages

Defendant also claims that Plaintiff cannot establish damages in this case. "A breach of contract is not actionable without damage." *Bramalea California, Inc. v. Reliable Interiors, Inc., 119 Cal. App. 4th 468, 473, 14 Cal. Rptr. 3d 302 (2004)*. "[T]he breaching party is only liable to place the non-breaching party in the same position as if the specific breach had not occurred[,] [o]r . . . give the non-breaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain." *Postal Instant Press, Inc. v. Sealy, 43 Cal. App. 4th 1704, 1709, 51 Cal. Rptr. 2d 365 (1996)*.

According to Defendant, when Plaintiff rejected its renewed loan **[*10]** modification offers in February 2017 and June 2017, Plaintiff refused exactly what he now requests. Motion, at pp. 13-14. Defendant further claims that, because it put Plaintiff in the same position as if the alleged breach had not occurred, there must be no damages. *Id.*

While Defendant did offer Plaintiff loan modifications that were similar to the Agreement, neither offer put him back in the *same* position as if it had provided the loan modification detailed in the Agreement. The first additional loan modification offer required Plaintiff to pay a $32,000 lump sum up front to cover prior unpaid months. He would not have had to pay such a large amount in a single payment if Defendant had implemented the Agreement. While there was not any lump sum back payment in the June 2017 offer, it increased Plaintiff's monthly rates by $173.24, and Plaintiff would not have had to make increased monthly payments had Defendant implemented the Agreement in May 2016. Williams Decl., ¶ 10, Ex. 8; Salone Decl., ¶ 20. Thus, a reasonable trier of fact could determine the Defendant's offers in February 2017 and June 2017 did not place Plaintiff in the same position as if the alleged breach had not occurred. **[*11]** [2]

Because jury questions remain regarding Plaintiff's acceptance of the Agreement and Plaintiff's damages, Defendant is not entitled to summary judgment on Plaintiff's breach of contract and breach of the implied covenant of good faith and fair dealing claims.

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[2] Defendant also points to Plaintiff's responses to form interrogatories, in which Plaintiff stated that he had not incurred certain kinds of damages. Decl. Owen Campbell, ¶ 7, Exs. 6, 7 (Dkt. No. 18). While Plaintiff's responses might provide Defendant useful evidence at trial, they do not conclusively establish that Plaintiff suffered no damages. *See Bradley v. Allstate Ins. Co., 620 F.3d 509, 527 n.21 (5th Cir. 2010)* (noting that "interrogatory responses are not binding judicial admissions").

B. Promissory Estoppel

Defendant argues that the Court must grant summary judgment on Plaintiff's promissory estoppel claim because he cannot concurrently maintain breach of contract and promissory estoppel claims. To succeed on a claim for promissory estoppel, a plaintiff must show (1) a clear and unambiguous promise, (2) his reliance on the promise, (3) that his reliance was reasonable and foreseeable, and (4) injury due to the reliance. *Advanced Choices, Inc. v. Dep't of Health Servs., 182 Cal. App. 4th 1661, 1672, 107 Cal. Rptr. 3d 470 (2010)*. The reliance element of a promissory estoppel claim replaces the consideration requirement that exists in a typical breach of contract claim. *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc., 211 Cal. App. 4th 230, 242, 149 Cal. Rptr. 3d 440 (2012)*. Thus, "a plaintiff cannot state a claim for promissory estoppel when the promise was given in return for proper consideration. The claim instead must be pleaded as one for breach of the bargained-for contract." *Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 275, 129 Cal. Rptr. 3d 467 (2011)* (holding that the plaintiff could not state a claim for promissory estoppel because the defendant's promise was given for proper consideration), **[*12]** *disapproved of on other grounds by* *Yvanova v. New Century Mortg. Corp., 62 Cal. 4th 919, 199 Cal. Rptr. 3d 66, 365 P.3d 845 (2016))*.

Summary judgment is proper on Plaintiff's promissory estoppel claim because Plaintiff undisputedly gave consideration for Defendant's alleged promise to modify his loan. The parties agree that Plaintiff made the initial monthly payment in May 2016 that was required to trigger Defendant's obligation to grant a permanent loan modification. SGI 4. Because Plaintiff provided consideration, Plaintiff's claim is for breach of contract, not promissory estoppel.

C. Intentional and Negligent Misrepresentation

In order to establish a claim for intentional misrepresentation, a plaintiff must show "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Superior Court, 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377, 909 P.2d 981 (1996)* (quotations omitted). The elements for negligent misrepresentation are the same, but "the plaintiff need not [show] the defendant made an intentionally false statement, but simply one as to which he or she lacked any reasonable ground for believing the statement to be true." *Charnay v. Cobert, 145 Cal. App. 4th 170, 184, 51 Cal. Rptr. 3d 471 (2006)*. In either case, the statement must have been false at the time it was made. **[*13]** *See* *Magpali v. Farmers Grp., Inc., 48 Cal. App. 4th 471, 481, 55 Cal. Rptr. 2d 225 (1996)*, *as modified on denial of reh'g* (Aug. 20, 1996). Nonperformance of a promise does not give rise to fraud liability unless the plaintiff proves that the defendant intended not to perform at the time it made the promise. *See id.* (affirming the trial court's grant of a nonsuit on the plaintiff's fraud claim where the evidence established nothing more than failure to keep a promise); *Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153, 159, 2 Cal. Rptr. 2d 861 (1991)* (affirming dismissal of a negligent misrepresentation claim where the plaintiff's allegations simply "involved a promise to perform at some future time").

Here, Plaintiff presents no evidence that Defendant made a promise it knew to be false at the time it was made. In opposing Defendant's motion, Plaintiff claims that "[Defendant] intentionally breached [its] Agreement by failing to sign the Agreement, failing to inform Plaintiff [it] had not received the originally signed Agreement, and failing to accept his June 2016 payment." Opp'n, at p. 11. None of these actions involve false promises or false statements. Instead, they simply represent ways in which Defendant allegedly breached its contractual obligations. Plaintiff may have valid contract claims, but Defendant's potential contractual breach does **[*14]** not subject it to fraud liability.

D. Negligence

In addition to his misrepresentation claims, Plaintiff asserts that Defendant acted negligently throughout the loan modification process. Defendant argues that Plaintiff's negligence claim cannot survive summary judgment under the economic loss rule.

"[T]he economic loss rule prevents the law of contract and the law of tort from dissolving one into the other." *Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 988, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (2004)* (quotations omitted). When a defendant's contractual breach economically injures a plaintiff, the plaintiff ordinarily must recover through a contract claim, not a tort claim. *Id.* "[A] breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law." *Erlich v. Menezes, 21 Cal. 4th 543, 551, 87 Cal. Rptr. 2d 886, 981 P.2d 978 (1999)*. Thus, negligent performance of a contract generally is not actionable through a tort claim. *See* *id. at 554* ("This is a claim for negligent breach of a contract, which is not sufficient to support tortious damages for violation of an independent tort duty.").

Plaintiff identifies no independent duty Defendant breached. He claims Defendant was required to follow through with its agreement to modify his loan, but Defendant would only owe such a duty if a contract imposed one. **[*15]** Indeed, the negligence allegations in Plaintiff's complaint describe Defendant's duties as follows: "[Defendant's] agreement to review Plaintiff for a modification, and offer of a TPP and permanent modification created a duty whereby [Defendant] was required to follow through with permanent modification especially since Plaintiff had honored his part of the Agreement."[3] Complaint, ¶ 45. Because Defendant's relevant duties arose from alleged agreements between the parties, the economic loss rule applies. Defendant is entitled to summary judgment on Plaintiff's negligence claim.

E. UCL

The UCL provides limited civil remedies for unfair competition, defined as "any unlawful, unfair or fraudulent business act or practice." *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 320, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)* (citing *Cal. Bus. & Prof. § 17200*). A plaintiff can maintain a UCL claim for conduct that is (1) fraudulent, (2) unlawful, or (3) unfair. *See* *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1554, 62 Cal. Rptr. 3d 177 (2007)* ("An act can be alleged to violate any or all of the three prongs of the UCL—unlawful, unfair, or fraudulent.").

1. Fraudulent

As explained above, Defendant is entitled to summary judgment on Plaintiff's misrepresentation claims. Plaintiff therefore cannot maintain a UCL claim under the fraud prong.

2. Unlawful

In proscribing unlawful business **[*16]** practices, the UCL borrows violations of other laws and makes them independently actionable. *Belton v. Comcast Cable Holdings, LLC, 151 Cal. App. 4th 1224, 1233, 60 Cal. Rptr. 3d 631 (2007)*. While the unlawful prong is broad, "the UCL is not an all-purpose substitute for a tort or contract action." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1150, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)* (quotations omitted). Thus, "a breach of contract can only form the predicate for *Section 17200* claims, provided it also constitutes conduct that is 'unlawful, or unfair, or fraudulent.'" *Catena v. Capitol Records, LLC, No. CV 12-00806 MMM (JCx), 2012 U.S. Dist. LEXIS 199411, 2012 WL 12942740, at *7 (C.D. Cal. July 11, 2012)* (quoting *Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 645, 72 Cal. Rptr. 3d 903 (2008))*. Because

[3] In his opposition to Defendant's summary judgment motion, Plaintiff briefly mentions a duty of a loan service officer "to review Plaintiff for a modification in good faith once a review is undertaken." Opp'n, at p. 16. Plaintiff neither mentioned this duty in his Complaint nor identifies the source of the obligation.

Plaintiff's only remaining claims are for breach of contract and breach of the implied covenant of good faith and fair dealing, he cannot state a UCL claim under the unlawful prong.

3. Unfair

"The proper definition for the term 'unfair' in a consumer action is uncertain." *Puentes, 160 Cal. App. 4th at 646*. In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, the Supreme Court of California defined "unfair" for purposes of the UCL as "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. However, some cases have limited that definition to the context of disputes **[*17]** between competitors. *Camacho v. Auto. Club of S. California, 142 Cal. App. 4th 1394, 1402, 48 Cal. Rptr. 3d 770 (2006)*. In the consumer context, courts have offered alternative tests for assessing unfairness under the UCL. One test comes from the Federal Trade Commission, pursuant to which: "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Id. at 1403*. Other courts have described unfair practices as conduct that "offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *People v. Casa Blanca Convalescent Homes, Inc., 159 Cal. App. 3d 509, 530, 206 Cal. Rptr. 164 (1984)*, *abrogated on other grounds by* *Cel-Tech, 20 Cal. 4th at 186-87 & n.12 (1999)*; *accord* *McDonald v. Coldwell Banker, 543 F.3d 498, 506 (9th Cir. 2008)*. Under any standard, a breach of contract is only actionable if it is "independently unlawful, unfair, or fraudulent." *Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1152 (9th Cir. 2008)*.

Plaintiff urges the Court to adopt the last standard - that unfair business practices are those that offend an established public policy or are immoral. But even under Plaintiff's preferred definition, Plaintiff cannot establish that Defendant engaged in an unfair business practice. While Plaintiff has created an issue of fact about whether Defendant breached the Agreement, he has not asserted **[*18]** any evidence that Defendant acted intentionally. The core of this case is whether the parties agreed to a permanent home loan modification in Plaintiff's particular case. Defendant may not have followed through with its promises, but such a failure alone does not constitute an unfair business practice. *See* *Prudential Ins. Co. of Am. v. Herman, No. SACV 09-00432-JVS (ANx), 2009 U.S. Dist. LEXIS 135351, 2009 WL 10674431, at *4 (C.D. Cal. Aug. 31, 2009)* (explaining that "[f]ar from being immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers . . . a breach of contract is regarded as a morally neutral act"). Without evidence of intent or some harmful, regular business practice in which Defendant engaged, Plaintiff cannot survive summary judgment on his UCL claim.

F. Punitive Damages

To obtain punitive damages, a plaintiff must show "by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." *Cal. Civ. Code § 3294(a)*. Punitive damages are not available for breaches of contract. *See id.*; *Consol. Data Terminals v. Applied Digital Data Sys., Inc., 708 F.2d 385, 399 (9th Cir. 1983)* ("Punitive damages are not available under California law for mere breaches of contract, no matter how gross or willful."). Because Plaintiff's only remaining claims are for breach of contract and breach of the implied covenant of good faith and **[*19]** fair dealing, it cannot recover punitive damages as a matter of law.

G. Attorneys' Fees

Finally, Defendant's motion seeks summary judgment that Plaintiff is not entitled to attorneys' fees. A party's entitlement to attorneys' fees is generally determined after litigation concludes. The Court finds it premature to rule on Plaintiff's entitlement to attorneys' fees at this juncture in the case.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's motion in part and **DENIES** it in part. The Court grants summary judgment on Plaintiff's intentional misrepresentation, negligent misrepresentation, negligence, promissory estoppel, and UCL claims. It also grants summary judgment on Plaintiff's claim for punitive damages. The Court denies Defendant's motion as it relates to Plaintiff's breach of contract and breach of the implied covenant of good faith and fair dealing claims.

IT IS SO ORDERED.

Dated: June 22, 2018

/s/ André Birotte

HONORABLE ANDRÉ BIROTTE JR.

UNITED STATES DISTRICT COURT JUDGE

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Deslandes v. McDonald's USA, LLC

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

June 25, 2018, Decided; June 25, 2018, Filed

No. 17 C 4857

Reporter

2018 U.S. Dist. LEXIS 105260 *; 2018-1 Trade Cas. (CCH) P80,435; 2018 WL 3105955

LEINANI DESLANDES, Plaintiff, v. McDONALD'S USA, LLC, McDONALD'S CORPORATION, and DOES 1 through 10, Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Motion denied by *Deslandes v. McDonald's USA, LLC, 2019 U.S. Dist. LEXIS 224137, 2019 WL 7480646 (N.D. Ill., July 17, 2019)*

Related proceeding at *Turner v. McDonald's USA, LLC, 2020 U.S. Dist. LEXIS 78435 (N.D. Ill., Apr. 24, 2020)*

Class certification denied by, Motion denied by, Without prejudice, As moot, Motion granted by *Deslandes v. McDonald's USA, LLC, 2021 U.S. Dist. LEXIS 140735, 2021 WL 3187668 (N.D. Ill., July 28, 2021)*

Summary judgment granted by, in part, Summary judgment denied by, in part, Summary judgment denied by, in part, As moot, Motion granted by, in part, Dismissed by, in part, Judgment entered by, in part *Deslandes v. McDonald's USA, LLC, 2022 U.S. Dist. LEXIS 113524 (N.D. Ill., June 28, 2022)*

Core Terms

franchisees, employees, restaurants, no-hire, allegations, hire, horizontal, rule of reason, training, hamburgers, antitrust, franchise agreement, franchise, motion to dismiss, market power, anti trust law, procompetitive, subsidiaries, wages, per hour, anticompetitive, ancillary, consumers, suppliers, competitors, quick-look, promoted, asserts, output, naked

Counsel: **[*1]** For Leinani Deslandes, on behalf of herself and all others similarly situated, Plaintiff: Michele Vercoski, Richard McCune, Jr., LEAD ATTORNEYS, PRO HAC VICE, McCune Wright Arevalo, Ontario, CA; Derek Yeats Brandt, McCune Wright Arevalo, LLP, Edwardsville, IL.

For McDonald's USA, LLC, a Delaware limited liability company, McDonald's Coporation, a Delaware corporation, Defendants: David Jarrett Arp, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn & Crutcher LLP, Washington, DC; Matthew Cameron Parrott, LEAD ATTORNEY, PRO HAC VICE, Gibson, Dunn & Crutcher LLP, Irvine, CA; Rachel Susan Brass, LEAD ATTORNEY, PRO HAC VICE, Gibson, Dunn & Crutcher Llp, San Francisco, CA; Rachael Cecelia Brennan Blackburn, Robert M. Andalman, A & G Law LLC, Chicago, IL.

Judges: JORGE L. ALONSO, United States District Judge.

Opinion by: JORGE L. ALONSO

Opinion

MEMORANDUM OPINION AND ORDER

After a no-hire agreement prevented plaintiff from obtaining a position with a rival employer, plaintiff Leinani Deslandes ("Deslandes") filed suit asserting, among other things, that defendants' no-hire agreement violates the *Sherman Antitrust Act*, *15 U.S.C. § 1*. Defendants McDonald's USA, LLC and McDonald's Corporation move to dismiss. For the reasons set forth below, the **[*2]** Court grants in part and denies in part defendants' motion to dismiss [34].

I. BACKGROUND

Plaintiff's story is one of employment success: she started as an entry-level crew member paid $7.00 per hour at a McDonald's franchise and worked her way up into management. When she applied for a better-paying position with a competing McDonald's restaurant, she was foiled by a no-hire agreement which forbid the competing McDonald's restaurant to hire both current employees of other McDonald's restaurants and anyone who had worked for a competing McDonald's restaurant in the last six months. Given that most individuals in the low-skill employment market do not have the luxury of being unemployed by choice for six months, the no-hire provision effectively prevented competing McDonald's franchises (as well as the company-owned stores) from competing for experienced, low-skill employees. The following facts are from plaintiff's complaint and are taken as true.

Defendant McDonald's USA, LLC is a wholly-owned subsidiary of defendant McDonald's Corporation. Plaintiff generally refers to them collectively as "McDonald's." The ubiquitous purveyor of hamburgers serves 68,000,000 customers per day from some **[*3]** 36,000 outlets around the world. According to plaintiff's complaint, nearly two million people work for McDonald's or its franchisees.

Many McDonald's-brand restaurants are owned and operated by McDonald's Operating Companies ("McOpCos"), which are direct or indirect subsidiaries of McDonald's Corporation. McDonald's also franchises McDonald's-brand restaurants. Thus, many McDonald's-brand restaurants are independently owned and operated by franchisees. McDonald's receives revenue from the franchisees in the form of rent, royalties and fees.

McDonald's restaurants compete with one another. Franchisees are not granted exclusive rights or territories and are specifically warned that they may face competition from other franchisees, new franchisees and restaurants owned by McOpCos. Thus, restaurants owned by McOpCos compete directly with McDonald's franchisees (who, in turn, compete with each other) to sell hamburgers and fries to customers. When franchising restaurants, McDonald's enters a standard franchise agreement with its franchisees.[1] Because the agreement is standard, franchisees know the basic contents of each other's agreements. Generally, each franchise agreement lasts for twenty **[*4]** years. In addition to a franchise fee, franchisees agree to pay McDonald's a percentage of gross revenue. McDonald's has an incentive to promote revenue growth in its franchisees' restaurants and encourages competition between franchisees for food sales.

Under the standard franchise agreement, each franchisee is an independent business responsible for the operation of its particular McDonald's-brand restaurant. Under the agreement, franchisees are required to purchase supplies from approved suppliers. They can, however, seek approval of new suppliers, and they negotiate directly with the suppliers as to purchasing terms, such as price.

Franchisees, as independent business owners, are also responsible for the day-to-day operations of their respective restaurants and for, among other things, employment matters. Franchisees make their own decisions with respect to hiring, firing, wages and promotions. The standard franchise agreement specifically states that franchisees are not agents of McDonald's and that McDonald's is not a joint employer with respect to the franchisees' employees.

[1] Plaintiff alleges that McDonald's Corporation is the franchisor for franchise agreements signed before 2005 and that McDonald's USA, LLC is the franchisor for franchise agreements signed from 2005 to the present.

Although franchisees make most of their employment decisions independently, their hiring decisions are restricted **[*5]** in one respect by the standard franchise agreement. The standard agreement that was used until some point in 2017 contained a no-hire provision. Specifically, the relevant provision stated:

> *Interference With Employment Relations of Others*. During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [] shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months.

(Am. Compl. ¶ 87). Although McDonald's stopped including the no-hire provision in new franchise agreements at some point in 2017, the provision remains in the franchise agreements applicable to some 13,000 currently-operating McDonald's-brand restaurants. McDonald's has applied the same restraint to hiring by the McOpCos.

Franchisees ignore the no-hire provision at their peril. A breach of the no-hire provision gives McDonald's the right not to consent to a transfer of the franchise. With repeated **[*6]** breaches, McDonald's has the right to terminate the franchise. Plaintiff alleges that the provision promoted collusion among franchisees, because each knew the other had signed an agreement with the same provision. Plaintiff alleges that the no-hire provision is against each franchisee's individual interest, because it denies each franchisee opportunities to hire the best employees. Plaintiff also alleges that, so long as the other franchisees also refrain from poaching employees, the no-hire provision helps franchisees keep costs low by allowing them to pay below-market wages to their own employees.

Although franchisees are generally responsible for their own employment decisions (so far as they do not violate the no-hire agreement, anyway), many McDonald's-brand restaurants are staffed in similar ways. Many stores have managers with varying titles, such as swing manager, assistant manager and store manager. Assistant and store managers are responsible for such tasks as payroll processing, time-sheet updating, tracking supplies and orders and training entry-level employees. McDonald's requires franchisees to enroll present and future managers in training programs at McDonald's training **[*7]** centers. The cost of the training is borne by the franchisees.

A McDonald's franchise in Florida ("Bam-B") first hired plaintiff in 2009. Plaintiff started as an entry-level employee earning $7.00 per hour, and, within three months, plaintiff had earned a promotion to shift manager, with a wage bump to $10.00 per hour. By 2011, plaintiff was a Department Manager for Guest Services, earning $12.00 per hour. At that point, plaintiff began coursework to become eligible for a position as General Manager. Plaintiff's employer enrolled her in a week-long training course at McDonald's Hamburger University. The training was scheduled to take place in April 2015, but plaintiff's supervisors canceled her training when they learned plaintiff was pregnant.[2]

Fed up, plaintiff decided to put her skills to work elsewhere. Plaintiff found an opening for a position similar to hers at a nearby McDonald's restaurant. The restaurant was owned and operated by a McOpCo, which was a subsidiary of defendant McDonald's USA, LLC and which was subject to the no-hire provision. The positon at the McOpCo restaurant offered a wage of $13.75 per hour to start, with an expected bump to $14.75 after a 90-day probationary **[*8]** period. Plaintiff applied online and received a call from the store manager, who told plaintiff she would like to hire her. Plaintiff told the store manager that she worked for Bam-B. The next day, plaintiff received a call from a McDonald's corporate employee who told plaintiff the restaurant could neither interview nor hire her unless she was "released" by Bam-B to work for the McOpCo restaurant.

When plaintiff arrived at work the next day, she asked Bam-B to release her to work for the McOpCo restaurant. Bam-B said no, because plaintiff was "too valuable." Plaintiff continued to work for Bam-B for several months, but, ultimately, she took an entry-level job with Hobby Lobby for less money, $10.25 per hour. Plaintiff alleges that some of the skills she developed as a manager of a McDonald's outlet were not transferable to management positions at employers outside of the McDonald's brand, so she had to start over at the bottom elsewhere.

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[2] Bam-B, plaintiff's former employer, is not a defendant in this action, and plaintiff has not asserted a claim for discrimination.

Based on these allegations, plaintiff asserts that defendants violated *§ 1 of the Sherman Antitrust Act*. Plaintiff alleges that defendants and their franchisees engaged in concerted activity to restrict competition among them for employees, thereby lowering **[*9]** their employment costs and limiting the employees' ability to earn higher wages. Plaintiff also asserts that the alleged conduct violates the *Illinois Antitrust Act* and the *Illinois Consumer Fraud and Deceptive Trade Practices Act*. Defendants move to dismiss.

II. STANDARD ON A MOTION TO DISMISS

The Court may dismiss a claim pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* if the plaintiff fails "to state a claim upon which relief can be granted." *Fed.R.Civ.P. 12(b)(6)*. Under the notice-pleading requirements of the Federal Rules of Civil Procedure, a complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. A complaint need not provide detailed factual allegations, but mere conclusions and a "formulaic recitation of the elements of a cause of action" will not suffice. *Twombly, 550 U.S. at 555*. To survive a motion to dismiss, a claim must be plausible. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Allegations that are as consistent with lawful conduct as they are with unlawful conduct are not sufficient; rather, plaintiffs must include allegations that "nudg[e] their claims across the line from conceivable to plausible." *Twombly, 550 U.S. at 570*. In considering a motion to dismiss, the Court accepts as true the factual allegations in the complaint and draws permissible **[*10]** inferences in favor of the plaintiff. *Boucher v. Finance Syst. of Green Bay, Inc., 880 F.3d 362, 365 (7th Cir. 2018)*. Conclusory allegations "are not entitled to be assumed true," nor are legal conclusions. *Ashcroft v. Iqbal, 556 U.S. 662, 680, 681, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (noting that a "legal conclusion" was "not entitled to the assumption of truth[;]" and rejecting, as conclusory, allegations that "'petitioners 'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement"). The notice-pleading rule "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal, 556 U.S. at 678-679*.

III. DISCUSSION

A. Plaintiff's Sherman Act claim

Plaintiff seeks relief under *§ 4 of the Clayton Act*, *15 U.S.C. § 15*, which provides a private right of action for treble damages to any person "injured in his business or property by reason of anything forbidden in the antitrust laws[.]" *15 U.S.C. § 15*.

The antitrust laws protect market competition, which usually, though not always, means the goal is enhancing output and reducing price. *See* *Arizona v. Maricopa Cty. Med. Soc., 457 U.S. 332, 348, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)* ("The *per se* rule 'is grounded on faith in price competition as a market force'") (citations omitted); *Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877, 895, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* ("the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result"). Accordingly, a plaintiff must allege antitrust injury, **[*11]** an injury attributable to "an anti-competitive aspect of the practice under scrutiny[.]" *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. This case involves a restraint affecting competition in the supply of an input (labor) for a final product. Usually a cheaper input means a cheaper final price—something the antitrust laws traditionally prefer. Nonetheless, defendants do not dispute (nor could they) that plaintiff has alleged antitrust injury in this case, just like other suppliers do when they allege a restraint in a supply market. *Eichorn v. AT&T Corp., 248 F.3d 131, 142 (3d Cir. 2001)* (employees challenging no-hire agreement had antitrust standing to sue); *Roman v. Cessna Aircraft Co., 55 F.3d 542, 545 (10th Cir. 1995)* (employee had antitrust standing to challenge agreement between employers not to hire each other's employees); Phillip E. Areeda & Herbert Hovencamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application*, ¶352a (3rd and 4th Editions, 2018 Cum. Supp. 2010-2017) ("Employees may challenge antitrust violations that are premised on restraining the employment market . . .

Standing for employees thus parallels that for 'suppliers' generally[.]"); *Doe v. Arizona Hosp. and Healthcare Ass'n, Case No. CV 07-1292, 2009 U.S. Dist. LEXIS 42871, 2009 WL 1423378 at *3 (D. Ariz. March 19, 2009)* ("Price-fixing agreements among buyers, like those among sellers, are prohibited by the Sherman Act, even where the damages caused by the agreement is to sellers and not **[*12]** consumers."); *cf. Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)* (sugar beet suppliers had antitrust claim for price-fixing against sugar beet refiners). Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . " *15 U.S.C. § 1*. This language has long been interpreted to "outlaw only *unreasonable* restraints" of trade. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Some restraints are deemed so anti-competitive (and, thus, unreasonable) that they are illegal *per se*, while other restraints, which may have procompetitive effects, are judged under the rule of reason (or its subset: the quick look). As the Supreme Court has explained, restraints that are "unlawful *per se*" are those that "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit" that it is obvious they are unreasonable restraints of trade. *Khan, 522 U.S. at 10*. The *per se* rule applies to restraints "'that would always or almost always tend to restrict competition and decrease output.'" *Leegin, 551 U.S. at 886*. Accordingly, the *per se* rule is reserved for restraints with respect to which "courts have had considerable experience" such that they "can predict with confidence that [the restraint] would be invalidated **[*13]** in all or almost all instances under the rule of reason[.]" *Leegin, 551 U.S. at 886-87*. Most restraints are not *per se* unlawful but are instead analyzed under the rule of reason. *Khan, 522 U.S. at 10*. Under the rule of reason, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Khan, 522 U.S. at 10*. Generally, this requires a plaintiff to show the defendant has "market power—that is the ability to raise prices significantly without going out of business—without which the defendant could not cause anticompetitive effects on market pricing." *Agnew v. National Collegiate Athletic Ass'n, 683 F.3d 328, 335 (7th Cir. 2012)*. In this case, market power would be the power to suppress wages.

Courts sometimes apply a third test of reasonableness, the quick look, which is a short form of rule of reason analysis. *Illinois Corp. Travel, Inc. v. American Airlines, Inc., 806 F.2d 722, 727 (7th Cir. 1986)* ("This is the sort of short form or quick look Rule of Reason analysis endorsed in *NCAA v. Board of Regents, 468 U.S. 85, 109-10, 104 S. Ct. 2948, 82 L. Ed. 2d 70 & n. 42 (1984))*. As the Seventh Circuit has explained:

> the quick-look approach can be used when 'an observer with even a rudimentary understanding of economics could conclude that the arrangements **[*14]** in question would have an anticompetitive effect on customers and markets,' but there are nonetheless reasons to examine the potential procompetitive justifications.

Agnew, 683 F.3d at 336 (internal citation omitted) (quoting *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999))*. Under quick-look analysis, if the defendant lacks legitimate justifications for facially anticompetitive behavior then the court "condemns the practice without ado" without resort to analysis of market power. *Agnew, 683 F.3d at 336*; *Chicago Prof. Sports Ltd. Partnership v. NBA, 961 F.2d 667, 674 (7th Cir. 1992)*; *see also National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 109-10 n. 42, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* ("While the 'reasonableness' of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of 'reasonableness.' And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.").

In this case, plaintiff has styled her Sherman Act claim as a restraint that is either unlawful *per se* or is unlawful under quick-look analysis. Defendant disagrees. Defendant argues that the restraint at issue in this case is most appropriately **[*15]** analyzed under the rule of reason such that plaintiff must include allegations of market power in the relevant market in order to state a claim. As defendants point out, plaintiff has not included allegations of market power in a relevant market. To decide which standard to apply, the Court must first consider the alleged restraint.

Here, plaintiff argues that she has alleged the existence of a horizontal agreement in restraint of trade. Plaintiff alleges that McDonald's franchisees signed written franchise agreements pursuant to which each agreed not to hire employees (including former employees who left within the prior six months) from other McDonald's restaurants. Specifically, the franchisees were not allowed to hire anyone who was employed (or had been employed in the prior six months) by "McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant[.]" (Am. Compl. ¶ 87). Plaintiff alleges that the McOpCos were similarly restricted.

Defendants argue that this is merely a vertical restraint, because it was spearheaded by the entity at the top of the chain. The Court agrees that the restraint has vertical elements, but the agreement **[*16]** is also a horizontal restraint. It restrains competition for employees among horizontal competitors: the franchisees and the McOpCos. Plaintiff has alleged that McOpCos run McDonald's-brand restaurants and, thus, compete directly with franchisees for employees. Plaintiff has also alleged that the McOpCos are subsidiaries of defendant McDonald's and that the restraint explicitly restricts franchisees from hiring employees of McDonald's subsidiaries, i.e., the franchisees' competitors. Thus, McDonald's, by including the no-hire provision in its agreement with franchisees, was protecting its own restaurants (i.e., *itself*) from horizontal competition for employees. *Cf. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* ("the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1 of the Sherman Act*"). The Court finds that plaintiff has alleged a horizontal restraint of trade.

Naked horizontal agreements (i.e., those among competitors) to fix prices or to divide markets are *per se* unlawful. *Leegin, 551 U.S. at 886*; *Federal Trade Comm'n v. Superior Court Trial Lawyers Assoc., 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)* (horizontal agreement among lawyers not to accept appointments to represent indigent criminal defendants until fees increased was a naked price restraint and *per se* unlawful); **[*17]** *Blackburn v. Sweeney, 53 F.3d 825, 827 & 828 (7th Cir. 1995)* ("reciprocal agreement [among attorneys] to limit advertising to different geographical regions was . . . an agreement to allocate markets so that the *per se* rule of illegality applies"). This includes naked agreements to set wages. *Arizona Hosp., 2009 U.S. Dist. LEXIS 42871, 2009 WL 1423378 at * 3* (plaintiff's allegations that hospital association set prices for temporary nurses stated claim for *per se* violation of the Sherman Act).

A horizontal agreement not to hire competitors' employees is, in essence, a market division. *See United States v. eBay, Inc., 968 F.Supp. 2d 1030, 1039 (N.D. Cal. 2013)* ("The court thus finds that the United States' allegations concerning agreement between eBay and Intuit [not to hire each other's employees] suffice to state a horizontal market allocation agreement."). The Department of Justice, which enforces rather than interprets the law, has warned employers that it considers naked no-hire agreements to be *per se* unlawful. (Press Release, U.S. Dep't of Justice, *Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How **Antitrust Law** Applies to Employee Hiring and Compensation* (Oct. 20, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.). **[*18]** Thus, because a no-hire agreement is, in essence, an agreement to divide a market, the Court has no trouble concluding that a naked horizontal no-hire agreement would be a *per se* violation of the antitrust laws. Even a person with a rudimentary understanding of economics would understand that if, say, large law firms in Chicago got together and decided not to hire each other's associates, the market price for mid-level associates would stagnate. With no competition for their talent (aside from lower-paying in-house or government jobs), associates would have no choice but to accept the salary set by their firms or to move to another city. Thus, such a claim would be suitable for *per se* treatment.

Not all horizontal restraints are *per se* unlawful, however. Some horizontal restraints are *ancillary* to agreements that are procompetitive, usually in the sense of enhancing output (i.e., producing either a greater quantity of goods or a new good that would not otherwise exist). *Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 188-89 (7th Cir. 1985)* ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor **[*19]** whose success they promote."). A restraint is ancillary if it "promoted enterprise and productivity when it was adopted." *Polk Bros., 776 F.2d at 189*. When a restraint is ancillary, it is judged either under the rule of reason or given a "quick look." For example, nohire agreements that are ancillary to the sale of a business can have procompetitive effects, so they are judged under the rule of reason. *Eichorn v. AT&T Corp., 248 F.3d 131, 144 (3d Cir. 2001)*.

Similarly, where the horizontal restraint is necessary in order for the product to exist at all, a restraint will not be judged *per se* unlawful but rather will be judged under the rule of reason, including by "quick look." *Law v. National Collegiate Athletic Assoc., 134 F.3d 1010 (10th Cir. 1998)*; *see also* *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*; *National Collegiate Athletic Ass'n. v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. In *Law*, a group of college basketball coaches brought suit challenging the NCAA's rule limiting annual salaries for certain assistant basketball coaches to $16,000 per year. Because some restraints were necessary in order to make college sports available, the court concluded that the horizontal price restraint should be analyzed under the rule of reason, and, in particular, the "quick look." *Law, 134 F.3d at 1018 & 1020* ("We find it appropriate to adopt such a quick look rule of reason in this case.")

In this case, plaintiff has alleged a horizontal restraint that is ancillary to franchise agreements **[*20]** for McDonald's restaurants. Each time McDonald's entered a franchise agreement, it increased output of burgers and fries, which is to say the agreement was output enhancing and thus procompetitive. (That is not to say that the provision itself was output enhancing. The very fact that McDonald's has managed to continue signing franchise agreements even after it stopped including the provision in 2017 suggests that the no-hire provision was not necessary to encourage franchisees to sign.) Because the restraint alleged in plaintiff's complaint is ancillary to an agreement with a procompetitive effect, the restraint alleged in plaintiff's complaint cannot be deemed unlawful *per se*. Plaintiff's claim does not rise and fall on *per se* treatment, though. She claims in the alternative that the restraint is unlawful under quick-look analysis.

The next question, then, is whether plaintiff has plausibly alleged a restraint that might be found unlawful under quick-look analyis. The Court thinks she has. Even a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate. Plaintiff herself experienced **[*21]** the stagnation of her wages. A supervisor for a competing McDonald's restaurant told plaintiff she would like to hire plaintiff for a position that would be similar to plaintiff's position but that would pay $1.75-2.75 more per hour than she was earning. Unfortunately for plaintiff, the no-hire agreement prevented the McOpCo from offering plaintiff the job. When plaintiff asked her current employer to release her, plaintiff was told she was too valuable. The Court agrees that an employee working for a below-market wage would be extremely valuable to her employer.

Defendants, nonetheless, argue that their restraint has pro-competitive benefits. Specifically, defendants argue that the no-hire restriction promotes interbrand competition, by which they mean the competition between McDonald's and Burger King, rather than the intrabrand competition between the McDonald's restaurant at, say, 111 W. Jackson and the McDonald's at, say, 233 W. Jackson. It makes sense for McDonald's franchisees and the McOpCos to cooperate to promote intrabrand competition for hamburgers, because a customer who is satisfied with a hamburger she buys today at the McDonald's at 111 W. Jackson might tomorrow prefer a hamburger from **[*22]** the McDonald's at 233 W. Jackson to a hamburger from Burger King. This case, though, is not about competition for the sale of hamburgers to consumers. It is about competition for employees, and, in the market for employees, the McDonald's franchisees and McOpCos within a locale are direct, horizontal, competitors.[3] A way to promote intrabrand competition for employees would be an advertising campaign extolling the virtues of working for McDonald's. That is not what defendants are alleged to have done here. Here, they are alleged to have divided the market for employees by prohibiting restaurants from hiring each other's current or former (for the prior six months, anyway) employees. In the employment market, the various McDonald's stores are competing brands. Dividing the market does not promote intrabrand competition for employees, it stifles interbrand competition.

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[3] Realistically, only restaurants within the same locale compete for employees. A McDonald's restaurant in Chicago does not compete for employees with a McDonald's restaurant in Florida.

Defendants argue that the no-hire restriction promotes intrabrand competition for hamburgers by encouraging franchisees to train employees for management positions. Presumably, the theory is that better service equals happier customers. The Court has no doubt, as defendants argue, that McOpCos and franchisees were concerned about training **[*23]** and then losing employees. The restraint, though, is not limited to management employees who had received expensive training at Hamburger University. The restraint applies even to entry-level employees with no management training. Nor was the restraint limited to a reasonable period of time (say six months) after the employee had received the expensive training at Hamburger University. In any case, every employer fears losing the employees it has trained. That fear does not, however, justify, say, law firms agreeing not to hire each other's associates. Employers have plenty of other means to encourage their employees to stay without resorting to unlawful market division. Those options include paying higher wages/salaries and contracting directly with each employee to set an employment term.

Though the Court has concluded that plaintiff has stated a claim for a restraint that might be unlawful under quick-look analysis, the evidence at a later stage may not support it. As defendants have pointed out, plaintiff has not attempted to plead a claim under the rule of reason. This is perhaps unsurprising. To state a claim under the rule of reason, a plaintiff must allege market power in a **[*24]** relevant market. The relevant market for employees to do the type of work alleged in this case is likely to cover a relatively-small geographic area. Most employees who hold low-skill retail or restaurant jobs are looking for a position in the geographic area in which they already live and work, not a position requiring a long commute or a move. That is not to say that people do not move for other reasons and then attempt to find a low-skill job; the point is merely that most people do not search long distances for a low-skill job with the idea of then moving closer to the job. Plaintiff, though, seeks to represent a nationwide class, and allegations of a large number of geographically-small relevant markets might cut against class certification. Nonetheless, if plaintiff decides she would like to include a claim under the rule of reason, she has leave to amend, but she must do so soon, within 28 days.

B. Plaintiff's state-law claims

Plaintiff also asserts two state-law claims. First, in Count II, plaintiff asserts a claim under the *Illinois Antitrust Act, 740 ILCS 10/1 et seq.* The Illinois Antitrust Act states, in relevant part, that it is unlawful to "[m]ake any contract . . . (a) for the purpose or with **[*25]** the effect of fixing, controlling, or maintaining the price . . . or the fee . . . paid for any service . . . received by the parties thereto[.]" *740 ILCS 10/3(1)(a)*. The Illinois Antitrust Act goes on to state that "'[s]ervice' shall not be deemed to include labor which is performed by natural persons as employees of others." *740 ILCS 10/4*.

Defendants argue that the plaintiff's claim is, thus, excluded from coverage under the Illinois Antitrust Act. The Court agrees that the plain language of the statute excludes plaintiff's claim, which alleges that the no-hire agreement artificially suppressed her wage, i.e., the price paid for her service. *See* *O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1066 (7th Cir. 1997)* ("[T]o the extent [plaintiff's] claims relate to an alleged market for labor services, they are specifically excluded by *§ 10/4 of the [Illinois Antitrust] Act*."). Although plaintiff suggests this is merely an exception for collective bargaining, the statute includes a separate labor exemption. *740 ILCS 10/5(1)* ("No provisions of this Act shall be construed to make illegal: (1) the activities of any labor organization or of individual members thereof which are directed solely to labor objectives which are legitimate under the laws of either the State of Illinois or the United States.").

Accordingly, **[*26]** defendants' motion to dismiss is granted as to Count II, and Count II is dismissed with prejudice.

Next, in Count III, plaintiff asserts a claim for violation of the Illinois Consumer Fraud and Deceptive Trade Practices Act. Defendants move to dismiss, and the Court agrees that plaintiff cannot move forward on this claim.

To begin with, as defendants point out, the Illinois Supreme Court has concluded that the Illinois Consumer Fraud Act aims to protect consumers from fraud, not to provide extra enforcement of the antitrust laws. *Laughlin v. Evanston Hosp., 133 Ill.2d 374, 390, 550 N.E.2d 986, 140 Ill. Dec. 861 (Ill. 1990)*. There, the Illinois Supreme Court said:

> There is no indication that the legislature intended that the Consumer Fraud Act be an additional antitrust enforcement mechanism. The language of the Act shows that its reach was to be limited to conduct that defrauds or deceives consumers or others. The title of the Act is consistent with its content.

Laughlin, 133 Ill.2d at 390. Thus, plaintiff cannot use the ICFA to bring her antitrust claim. According to plaintiff's allegations, she was injured because a no-hire agreement prohibited a potential employer from hiring her. Plaintiff was harmed in her capacity as an employee, which is to say in her capacity as a supplier of services. She was not **[*27]** defrauded as a consumer of hamburgers, and she cannot state a claim under the ICFA. *Hess v. Kanoski & Assocs., 668 F.3d 446, 454 (7th Cir. 2012)* ("[Plaintiff] has no claim under the Illinois Consumer Fraud Act . . . because [she] was an employee, not a 'consumer.'").

Count III is dismissed with prejudice.

IV. CONCLUSION

For the reasons set forth above, the Court grants in part and denies in part defendants' motion to dismiss [34].[4] The motion is denied as to Count I. The motion is granted as to Counts II and III, which are dismissed with prejudice. This case is set for status on 8/15/18 at 9:30 a.m.

SO ORDERED.

ENTERED: June 25, 2018

/s/ Jorge L. Alonso

JORGE L. ALONSO

United States District Judge

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[4] In their motion, defendants also request that the Court dismiss plaintiff's demand for injunctive relief. Defendants have not sufficiently developed this argument, so the request is denied without prejudice.

Ohio v. Am. Express Co.

Supreme Court of the United States

February 26, 2018, Argued; June 25, 2018, Decided

No. 16-1454.

Reporter
138 S. Ct. 2274 *; 201 L. Ed. 2d 678 **; 2018 U.S. LEXIS 3845 ***; 86 U.S.L.W. 4561; 2018-1 Trade Cas. (CCH) P80,427; 27 Fla. L. Weekly Fed. S 471; 2018 WL 3096305

OHIO, et al., Petitioners v. AMERICAN EXPRESS COMPANY, et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: As revised June 25, 2018.

Prior History: [*1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States v. Am. Express Co., 838 F.3d 179, 2016 U.S. App. LEXIS 17502 (2d Cir. N.Y., Sept. 26, 2016)

Disposition: Affirmed.

Core Terms

merchants, card, cardholders, platform, credit-card, provisions, two-sided, network, effects, prices, anticompetitive, customers, shoppers, antisteering, transactions, nondiscrimination, merchant-related, steering, markets, credit card, competitors, rewards, shopper-related, increased price, relevant market, anti trust law, substitutes, market power, output, rule of reason

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

Antitrust & Trade Law > Sherman Act > Scope

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

15 U.S.C.S. § 1 prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. In view of the common law and the law in the United States when the *Sherman Act* was passed, the phrase restraint of trade is best read to mean undue restraint. The United States Supreme Court's precedents have thus understood *§ 1* to outlaw only unreasonable restraints.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN2[] **Per Se Rule & Rule of Reason, Practices Governed by Per Se Rule**

For purposes of *15 U.S.C.S. § 1*, restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable per se because they always or almost always tend to restrict competition and decrease output. Typically only horizontal restraints, restraints imposed by agreement between competitors, qualify as unreasonable per se. Restraints that are not unreasonable per se are judged under the rule of reason. The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition. The goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Vertical Restraints

HN3[] **Per Se Rule & Rule of Reason, Sherman Act**

For purposes of *15 U.S.C.S. § 1*, vertical restraints are restraints imposed by agreement between firms at different levels of distribution. Nearly every vertical restraint should be assessed under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Evidence > Burdens of Proof > Burden Shifting

HN4[] **Per Se Rule & Rule of Reason, Sherman Act**

For purposes of *15 U.S.C.S. § 1*, to determine whether a restraint violates the rule of reason, a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a pro-competitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the pro-competitive efficiencies could be reasonably achieved through less anticompetitive means.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Initial Burden of Persuasion

HN5[] **Sherman Act, Claims**

Plaintiffs under *15 U.S.C.S. § 1* can carry their initial burden of proving that the defendant's action has an anticompetitive effect by making this showing directly or indirectly. Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

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

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

HN6[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Because legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***, courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market. Without a definition of the market there is no way to measure the defendant's ability to lessen or destroy competition. Thus, the relevant market is defined as the area of effective competition. Typically this is the arena within which significant substitution in consumption or production occurs. But courts should combine different products or services into a single market when that combination reflects commercial realities. The definition of the relevant market must correspond to the commercial realities of the industry.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Vertical Restraints

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

HN7[] **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the court first defines the relevant market.

Antitrust & Trade Law > Sherman Act > Claims

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

HN8[] **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. And the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. To be sure, it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Regulated Industries > Financial Institutions

HN9[] **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better understood as supplying only one product, i.e., transactions. In the credit-card market, these transactions are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Regulated Industries > Financial Institutions

***HN10*[ ]** **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, credit-card companies are best understood as supplying only one product, transactions, which is jointly consumed by a cardholder and a merchant. Merchant services and cardholder services are both inputs to this single product.

Antitrust & Trade Law > Sherman Act > Claims

***HN11*[ ]** **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, evaluating both sides of a two-sided transaction platform is necessary to accurately assess competition. Only other two-sided platforms can compete with a two-sided platform for transactions.

Antitrust & Trade Law > Sherman Act > Claims

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

***HN12*[ ]** **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, in two-sided transaction markets, only one market should be defined. Any other analysis would lead to mistaken inferences of the kind that could chill the very conduct the antitrust laws are designed to protect. A court must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition. Courts should avoid increasing the total cost of the antitrust system by prohibiting pro-competitive conduct the antitrust laws should encourage.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Regulated Industries > Financial Institutions

***HN13*[ ]** **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, the credit-card market must be defined to include both merchants and cardholders. Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, plaintiffs must prove that a credit-card company's action increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN14[] **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, market power is the ability to raise price profitably by restricting output. Competitive injury from price and output data will not be inferred absent some evidence that tends to prove that output was restricted or prices were above a competitive level. Where output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand.

Antitrust & Trade Law > Sherman Act > Scope

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Vertical Restraints

HN15[] **Antitrust & Trade Law, Sherman Act**

For purposes of *15 U.S.C.S. § 1*, vertical restraints can prevent retailers from free riding and thus increase the availability of tangible or intangible services or promotional efforts that enhance competition and consumer welfare.

Antitrust & Trade Law > Regulated Practices

HN16[] **Antitrust & Trade Law, Regulated Practices**

It is the promotion of interbrand competition that is the primary purpose of the antitrust laws.

Lawyers' Edition Display

Decision

Credit card company's antisteering provisions to prevent merchants from encouraging customers to use different credit card did not violate Sherman Act in that evidence of price increase on one side of two-sided transaction platform did not demonstrate anticompetitive exercise of market power.

Summary

Overview: HOLDINGS: [1]-In determining whether the antisteering provisions of a credit-card company's contracts that restricted merchants from discouraging use of the company's cards violated *15 U.S.C.S. § 1* of the Sherman Act, the two-sided market for credit-card transactions had to be analyzed as a whole to determine whether the antisteering provisions had been shown to have anticompetitive effects; [2]-The federal government and states failed to show that the antisteering provisions had anticompetitive effects. The company's increased merchant fees reflected increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price, and it was not shown that the antisteering provisions stifled interbrand competition.

Outcome: Judgment affirmed. 5-4 decision; 1 dissent.

Headnotes

Restraints of Trade, Monopolies, and Unfair Trade Practices 5 > SHERMAN ACT -- UNDUE RESTRAINT > Headnote:
LEdHN1.[] 1.

15 U.S.C.S. § 1 prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. In view of the common law and the law in the United States when the Sherman Act was passed, the phrase restraint of trade is best read to mean undue restraint. The United States Supreme Court's precedents have thus understood *§ 1* to outlaw only unreasonable restraints. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 16 > RESTRAINT -- REASONABLENESS > Headnote:
LEdHN2.[] 2.

For purposes of *15 U.S.C.S. § 1*, restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable per se because they always or almost always tend to restrict competition and decrease output. Typically only horizontal restraints, restraints imposed by agreement between competitors, qualify as unreasonable per se. Restraints that are not unreasonable per se are judged under the rule of reason. The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition. The goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 16 > VERTICAL RESTRAINTS -- REASON > Headnote:
LEdHN3.[] 3.

For purposes of *15 U.S.C.S. § 1*, vertical restraints are restraints imposed by agreement between firms at different levels of distribution. Nearly every vertical restraint should be assessed under the rule of reason. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Evidence 343.5 > RESTRAINT -- BURDEN > Headnote:
LEdHN4.[] 4.

For purposes of *15 U.S.C.S. § 1*, to determine whether a restraint violates the rule of reason, a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a pro-competitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the pro-competitive efficiencies could be reasonably achieved through less anticompetitive means. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Evidence 343.5 > RESTRAINT -- CARRYING BURDEN > Headnote:
LEdHN5.[] 5.

Plaintiffs under *15 U.S.C.S. § 1* can carry their initial burden of proving that the defendant's action has an anticompetitive effect by making this showing directly or indirectly. Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > RESTRAINTS -- RELEVANT MARKET > Headnote:
LEdHN6.[] 6.

Because legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***, courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market. Without a definition of the market there is no way to measure the defendant's ability to lessen or destroy competition. Thus, the relevant market is defined as the area of effective competition. Typically this is the arena within which significant substitution in consumption or production occurs. But courts should combine different products or services into a single market when that combination reflects commercial realities. The definition of the relevant market must correspond to the commercial realities of the industry. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > RESTRAINTS -- RELEVANT MARKET > Headnote:
LEdHN7.[] 7.

For purposes of *15 U.S.C.S. § 1*, vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the court first defines the relevant market. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > MARKET -- TWO-SIDED PLATFORM > Headnote:
LEdHN8.[] 8.

For purposes of *15 U.S.C.S. § 1*, due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. And the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. To be sure, it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > MARKET -- TRANSACTION PLATFORMS > Headnote:
LEdHN9.[] 9.

For purposes of *15 U.S.C.S. § 1*, because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better understood as supplying only one product, i.e., transactions. In the credit card market, these transactions are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > MARKET -- CREDIT CARD COMPANIES > Headnote:
LEdHN10.[] 10.

For purposes of *15 U.S.C.S. § 1*, credit card companies are best under-stood as supplying only one product, transactions, which is jointly consumed by a cardholder and a merchant. Merchant services and cardholder services are both inputs to this single product. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 14 > TRANSACTION PLATFORMS -- BOTH SIDES > Headnote:
LEdHN11.[] 11.

For purposes of *15 U.S.C.S. § 1*, evaluating both sides of a two-sided transaction platform is necessary to accurately assess competition. Only other two-sided platforms can compete with a two-sided platform for transactions. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > MARKET -- TWO-SIDED TRANSACTIONS > Headnote:
LEdHN12.[] 12.

For purposes of *15 U.S.C.S. § 1*, in two-sided transaction markets, only one market should be defined. Any other analysis would lead to mistaken inferences of the kind that could chill the very conduct the antitrust laws are designed to protect. A court must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition. Courts should avoid increasing the total cost of the antitrust system by prohibiting pro-competitive conduct the antitrust laws should encourage. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Evidence 343.5Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > CREDIT CARD MARKET -- PROOF REQUIRED > Headnote:
LEdHN13.[] 13.

For purposes of *15 U.S.C.S. § 1*, the credit card market must be defined to include both merchants and cardholders. Focusing on merchant fees alone misses the mark because the product that credit card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit card market as a whole, plaintiffs must prove that a credit card company's action increased the cost of credit card transactions above a competitive level, reduced the number of credit card transactions, or otherwise stifled competition in the credit card market. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Evidence 343.5 > MARKET POWER -- INFERENCES > Headnote:
LEdHN14.[] 14.

For purposes of *15 U.S.C.S. § 1*, market power is the ability to raise price profitably by restricting output. Competitive injury from price and output data will not be inferred absent some evidence that tends to prove that output was restricted or prices were above a competitive level. Where output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 14 > RESTRAINTS -- COMPETITION > Headnote:
LEdHN15.[] 15.

For purposes of *15 U.S.C.S. § 1*, vertical restraints can prevent retailers from free riding and thus increase the availability of tangible or intangible services or promotional efforts that enhance competition and consumer welfare. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 6 > ***ANTITRUST LAW*** -- PURPOSE > Headnote:
LEdHN16.[] 16.

It is the promotion of interbrand competition that is the primary purpose of the antitrust laws. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Syllabus

[*2276] Respondent credit-card companies American Express Company and American Express Travel Related Services Company (collectively, Amex) operate what economists call a "two-sided platform," **[*2277]** providing services to two **[**683]** different groups (cardholders and merchants) who depend on the platform to intermediate between them. Because the interaction between the two groups is a transaction, credit-card networks are a special type of two-sided platform known as a "transaction" platform. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. Unlike traditional markets, two-sided platforms exhibit "indirect network effects," which exist where the value of the platform to one group depends on how many members of another group participate. Two-sided platforms must take these effects into account before making a change in price on either side, or they risk creating a feedback loop of declining demand. Thus, striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms **[***2]** to maximize the value of their services and to compete with their rivals.

Visa and MasterCard--two of the major players in the credit-card market--have significant structural advantages over Amex. Amex competes with them by using a different business model, which focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than the other credit-card companies. Amex must continually invest in its cardholder rewards program to maintain its cardholders' loyalty. But to fund those investments, it must charge merchants higher fees than its rivals. Although this business model has stimulated competitive innovations in the credit-card market, it sometimes causes friction with merchants. To avoid higher fees, merchants sometimes attempt to dissuade cardholders from using Amex cards at the point of sale--a practice known as "steering." Amex places antisteering provisions in its contracts with merchants to combat this.

In this case, the United States and several States (collectively, plaintiffs) sued Amex, claiming that its antisteering provisions violate *§1 of the Sherman Antitrust Act*. The District Court agreed, finding that the credit-card **[***3]** market should be treated as two separate markets--one for merchants and one for cardholders--and that Amex's antisteering provisions are anticompetitive because they result in higher merchant fees. The Second Circuit reversed. It determined that the credit-card market is one market, not two. And it concluded that Amex's antisteering provisions did not violate *§1*.

Held:

Amex's antisteering provisions do not violate federal ***antitrust law***. *Pp. ___ - ___, 201 L. Ed. 2d, at 689-697*.

(a) *Section 1 of the Sherman Act* prohibits "unreasonable restraints" of trade. *State Oil Co. v. Khan, 522 U. S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199*. Restraints may be unreasonable in one of two ways--unreasonable *per se* or unreasonable as judged under the "rule of reason." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U. S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. The parties agree that Amex's antisteering provisions should be judged under the rule of reason using a three-step burden-shifting framework. They ask this Court to decide whether the plaintiffs have satisfied the first step in that framework--*i.e.*, whether they have **[**684]** proved that Amex's antisteering provisions have a substantial anticompetitive effect that harms consumers in the relevant market. *Pp. ___ - ___, 201 L. Ed. 2d, at 689-691*.

(b) Applying the rule of reason generally requires an accurate definition of the relevant market. In this case, both sides of the two-sided credit-card **[***4]** market--cardholders and merchants--must be considered. Only a company with both cardholders **[*2278]** and merchants willing to use its network could sell transactions and compete in the credit-card market. And because credit-card networks cannot make a sale unless both sides of the platform simultaneously agree to use their services, they exhibit more pronounced indirect network effects and interconnected pricing and demand. Indeed, credit-card networks are best understood as supplying only one product--the transaction--that is jointly consumed by a cardholder and a merchant. Accordingly, the two-sided market for credit-card transactions should be analyzed as a whole. *Pp. ___ - ___, 201 L. Ed. 2d, at 691-693*.

(c) The plaintiffs have not carried their burden to show anticompetitive effects. Their argument--that Amex's antisteering provisions increase merchant fees--wrongly focuses on just one side of the market. Evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power. Instead, plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card **[***5]** transactions, or otherwise stifled competition in the two-sided credit-card market. They failed to do so. *Pp. ___ - ___, 201 L. Ed. 2d, at 693-697*.

(1) The plaintiffs offered no evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market. Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. It uses higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes it valuable to merchants. In addition, the evidence that does exist cuts against the plaintiffs' view that Amex's antisteering provisions are the cause of any increases in merchant fees: Visa and MasterCard's merchant fees have continued to increase, even at merchant locations where Amex is not accepted. *Pp. ___ - ___, 201 L. Ed. 2d, at 694*.

(2) The plaintiffs' evidence that Amex's merchant-fee increases between 2005 and 2010 were not entirely spent on cardholder rewards does not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices. This Court will "not infer competitive **[***6]** injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U. S. 209, 237, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. There is no such evidence here. Output of credit-card transactions increased during the relevant period, and the plaintiffs did not show **[**685]** that Amex charged more than its competitors. *P. ___, 201 L. Ed. 2d, at 695*.

(3) The plaintiffs also failed to prove that Amex's antisteering provisions have stifled competition among credit-card companies. To the contrary, while they have been in place, the market experienced expanding output and improved quality. Nor have Amex's antisteering provisions ended competition between credit-card networks with respect to merchant fees. Amex's competitors have exploited its higher merchant fees to their advantage. Lastly, there is nothing inherently anticompetitive about the provisions. They actually stem negative externalities in the credit-card market and promote interbrand competition. And they do not prevent competing credit-card networks from offering lower merchant fees or promoting their broader merchant acceptance. *Pp. ___ - ___, 201 L. Ed. 2d, at 695-696*.

838 F. 3d 179, affirmed.

Counsel: Eric E. Murphy argued the cause for petitioners and state respondents.

Malcolm L. Stewart argued the cause for respondent United States in support of petitioners.

Evan R. Chesler argued the cause for respondents.

Judges: Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Alito, **[***7]** and Gorsuch, JJ., joined. Breyer, J., filed a dissenting opinion, in which Ginsburg, Sotomayor, and Kagan, JJ., joined.

Opinion by: THOMAS

Opinion

[*2279] Justice **Thomas** delivered the opinion of the Court.

American Express Company and American Express Travel Related Services Company (collectively, Amex) provide credit-card **[*2280]** services to both merchants and cardholders. When a cardholder buys something from a merchant who accepts Amex credit cards, Amex processes the transaction through its network, promptly pays the merchant, and subtracts a fee. If a merchant wants to accept Amex credit cards—and attract Amex cardholders to its business—Amex requires the merchant to agree to an antisteering contractual provision. The antisteering provision prohibits merchants from discouraging customers from using their Amex card after they have already entered the store and are about to buy something, thereby avoiding Amex's fee. In this case, we must decide whether Amex's antisteering provisions violate federal ***antitrust law***. We conclude they do not.

I

A

Credit cards have become a primary way that consumers in the United States purchase goods and services. When a cardholder uses a credit card to buy something from a merchant, the **[***8]** transaction is facilitated by a credit-card network. The network provides separate but interrelated services to both cardholders and merchants. For cardholders, the network extends them credit, which allows them to make purchases without cash and to defer payment until later. Cardholders also can receive rewards based on the amount of money they spend, such as airline miles, points for travel, or cash back. For merchants, the network allows them to avoid the cost of processing transactions and offers them quick, guaranteed payment. This saves merchants the trouble and risk of extending credit to customers, and it increases the number and value of sales that they can make.

[686]** By providing these services to cardholders and merchants, credit-card companies bring these parties together, and therefore operate what economists call a "two-sided platform." As the name implies, a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them. See Evans & Schmalensee, Markets With Two-Sided Platforms, 1 Issues in Competition L. & Pol'y 667 (2008) (Evans & Schmalensee); Evans & Noel, Defining Antitrust Markets When Firms **[***9]** Operate Two-Sided Platforms, *2005 Colum. Bus. L. Rev. 667, 668* (Evans & Noel); Filistrucchi, Geradin, Van Damme, & Affeldt, Market Definition in Two-Sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293, 296 (2014) (Filistrucchi). For credit cards, that interaction is a transaction. Thus, credit-card networks are a special type of two-sided platform known as a "transaction" platform. See *id*., at 301, 304, 307; Evans & Noel 676-678. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. See Klein, Lerner, Murphy, & Plache, Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees, 73 Antitrust L. J. 571, 580, 583 (2006) (Klein). For example, no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use the same credit-card network. See Filistrucchi 301.

Two-sided platforms differ from traditional markets in important ways. Most relevant here, two-sided platforms often exhibit what economists call "indirect network effects." Evans & Schmalensee 667. Indirect network effects exist where the value of the two-sided platform to one group of participants depends on how many members of a different **[***10]** group participate. D. Evans & R. Schmalensee, Matchmakers: The New Economics of **[*2281]** Multisided Platforms 25 (2016). In other words, the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases. A credit card, for example, is more valuable to cardholders when more merchants accept it, and is more valuable to merchants when more cardholders use it. See Evans & Noel 686-687; Klein 580, 584. To ensure sufficient participation, two-sided platforms must be sensitive to the prices that they charge each side. See Evans & Schmalensee 675; Evans & Noel 680; Muris, Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets, *2005 Colum. Bus. L. Rev. 515, 532-533* (Muris); Rochet & Tirole, Platform Competition in Two-Sided Markets, 1 J. Eur. Econ. Assn. 990, 1013 (2003). Raising the price on side A risks losing participation on that side, which decreases the value of the platform to side B. If participants on side B leave due to this loss in value, then the platform has even less value to side A—risking a feedback loop of declining demand. See Evans & Schmalensee 675; Evans & Noel 680-681. Two-sided platforms therefore must take **[***11]** these indirect network effects into account before making a **[**687]** change in price on either side. See Evans & Schmalensee 675; Evans & Noel 680-681. [1]

Sometimes indirect network effects require two-sided platforms to charge one side much more than the other. See Evans & Schmalensee 667, 675, 681, 690-691; Evans & Noel 668, 691; Klein 585; Filistrucchi 300. For two-sided platforms, "'the [relative] price structure matters, and platforms must design it so as to bring both sides on board.'" Evans & Schmalensee 669 (quoting Rochet & Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. Econ. 645, 646 (2006)). The optimal price might require charging the side with more elastic demand a below-cost (or even negative) price. See Muris 519, 550; Klein 579; Evans & Schmalensee 675; Evans & Noel 681. With credit cards, for example, networks often charge cardholders a lower fee than merchants because cardholders are more price sensitive. [2] See Muris 522; Klein 573-574, 585, 595. In fact, the network might well *lose* money on the cardholder side by offering rewards such as cash back, airline miles, or gift cards. See Klein 587; Evans & Schmalensee 672. The network can do this because increasing the number **[***12]** of cardholders increases the value of accepting the card to merchants and, thus, increases the number of merchants who accept it. Muris 522; Evans & Schmalensee 692. Networks can then charge those merchants a fee for every transaction (typically a percentage of the purchase price). Striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms to maximize the value of their services and to compete with their rivals.

[*2282] B

Amex, Visa, MasterCard, and Discover are the four dominant participants in the credit-card market. Visa, which is by far the largest, has 45% of the market as measured by transaction volume. [3] Amex and MasterCard trail with 26.4% and 23.3%, respectively, while Discover has just 5.3% of the market.

Visa and MasterCard have significant structural advantages over Amex. Visa and MasterCard began as bank cooperatives and thus almost every bank that offers credit cards is in the Visa or MasterCard network. This makes it very likely that the average consumer carries, and the average merchant accepts, Visa or MasterCard. As a result, the vast majority of Amex cardholders have a Visa or MasterCard, but only a small number of Visa **[***13]** and Master-Card cardholders have an Amex. Indeed, Visa and MasterCard account for **[**688]** more than 432 million cards in circulation in the United States, while Amex has only 53 million. And while 3.4 million merchants at 6.4 million locations accept Amex, nearly three million more locations accept Visa, MasterCard, and Discover. [4]

Amex competes with Visa and MasterCard by using a different business model. While Visa and MasterCard earn half of their revenue by collecting interest from their cardholders, Amex does not. Amex instead earns most of its revenue from merchant fees. Amex's business model thus focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than other networks. Due to its superior

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[1] In a competitive market, indirect network effects also encourage companies to take increased profits from a price increase on side A and spend them on side B to ensure more robust participation on that side and to stem the impact of indirect network effects. See Evans & Schmalensee 688; Evans & Noel 670-671, 695. Indirect network effects thus limit the platform's ability to raise overall prices and impose a check on its market power. See Evans & Schmalensee 688; Evans & Noel 695.

[2] "Cardholders are more price-sensitive because many consumers have multiple payment methods, including alternative payment cards. Most merchants, by contrast, cannot accept just one major card because they are likely to lose profitable incremental sales if they do not take [all] the major payment cards. Because most consumers do not carry all of the major payment cards, refusing to accept a major card may cost the merchant substantial sales." Muris 522.

[3] All figures are accurate as of 2013.

[4] Discover entered the credit-card market several years after Amex, Visa, and MasterCard. It nonetheless managed to gain a foothold because Sears marketed Discover to its already significant base of private-label cardholders. Discover's business model shares certain features with Amex, Visa, and MasterCard. Like Amex, Discover interacts directly with its cardholders. But like Visa and MasterCard, Discover uses banks that cooperate with its network to interact with merchants.

rewards, Amex tends to attract cardholders who are wealthier and spend more money. Merchants place a higher value on these cardholders, and Amex uses this advantage to recruit merchants.

Amex's business model has significantly influenced the credit-card market. To compete for the valuable cardholders that Amex attracts, both Visa and MasterCard have introduced premium cards that, like Amex, charge merchants higher fees and offer **[***14]** cardholders better rewards. To maintain their lower merchant fees, Visa and MasterCard have created a sliding scale for their various cards—charging merchants less for low-reward cards and more for high-reward cards. This differs from Amex's strategy, which is to charge merchants the same fee no matter the rewards that its card offers. Another way that Amex has influenced the credit-card market is by making banking and card-payment services available to low-income individuals, who otherwise could not qualify for a credit card and could not afford the fees that traditional banks charge. See 2 Record 3835-3837, 4527-4529. In sum, Amex's business model has stimulated competitive innovations in the credit-card market, increasing the volume of transactions and improving the quality of the services.

Despite these improvements, Amex's business model sometimes causes friction with merchants. To maintain the loyalty of its cardholders, Amex must continually invest in its rewards program. But, to fund those investments, Amex must charge merchants higher fees than its rivals. **[*2283]** Even though Amex's investments benefit merchants by encouraging cardholders to spend more money, merchants would prefer not to pay the higher fees. **[***15]** One way that merchants try to avoid them, while still enticing Amex's cardholders to shop at their stores, is by dissuading cardholders from using Amex at the point of sale. This practice is known as "steering."

Amex has prohibited steering since the 1950s by placing antisteering provisions in its contracts with merchants. These antisteering provisions prohibit merchants from implying a preference for non-Amex cards; dissuading customers from using Amex cards; persuading customers to use other cards; imposing any special restrictions, conditions, disadvantages, **[**689]** or fees on Amex cards; or promoting other cards more than Amex. The antisteering provisions do not, however, prevent merchants from steering customers toward debit cards, checks, or cash.

C

In October 2010, the United States and several States (collectively, plaintiffs) sued Amex, claiming that its antisteering provisions violate *§1 of the Sherman Act, 26 Stat. 209*, as amended, *15 U. S. C. §1*. [5] After a 7-week trial, the District Court agreed that Amex's antisteering provisions violate *§1*. *United States v. American Express Co., 88 F. Supp. 3d 143, 151-152 (EDNY 2015)*. It found that the credit-card market should be treated as two separate markets—one for merchants and one for cardholders. See *id., at 171-175*. Evaluating the effects on the merchant side **[***16]** of the market, the District Court found that Amex's antisteering provisions are anticompetitive because they result in higher merchant fees. See *id., at 195-224*.

The Court of Appeals for the Second Circuit reversed. *United States v. American Express Co., 838 F. 3d 179, 184 (2016)*. It concluded that the credit-card market is one market, not two. *Id., at 196-200*. Evaluating the credit-card market as a whole, the Second Circuit concluded that Amex's antisteering provisions were not anticompetitive and did not violate *§1*. See *id., at 200-206*.

We granted certiorari, *583 U. S. ___, 138 S. Ct. 355, 199 L. Ed. 2d 261 (2017)*, and now affirm.

II

HN1[] ***LEdHN[1]***[] [1] *Section 1 of the Sherman Act* prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U. S. C. §1*. This Court has long recognized that, "[i]n view of the common law and the law in this country" when the *Sherman Act* was passed, the phrase "restraint of trade" is best read to mean "undue restraint." *Standard Oil Co. of N. J. v. United*

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[5] Plaintiffs also sued Visa and MasterCard, claiming that their anti-steering provisions violated *§1*. But Visa and MasterCard voluntarily revoked their antisteering provisions and are no longer parties to this case.

States, 221 U. S. 1, 59-60, 31 S. Ct. 502, 55 L. Ed. 619 (1911). This Court's precedents have thus understood §1 "to outlaw only *unreasonable* restraints." State Oil Co. v. Khan, 522 U. S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) (emphasis added).

HN2[] **LEdHN[2]**[] [2] Restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable *per se* because they "' "always or almost always tend to restrict competition and decrease output." '" Business Electronics Corp. v. Sharp Electronics Corp., 485 U. S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988). Typically only "horizontal" restraints—restraints **[***17]** "imposed by agreement between **[*2284]** competitors"—qualify as unreasonable *per se*. Id., at 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808. Restraints that are not unreasonable *per se* are judged under the "rule of reason." Id., at 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808. The rule of reason requires courts to conduct a fact-specific assessment of "market power and market structure . . . to assess the [restraint]'s actual effect" on competition. Copperweld Corp. v. Independence **[**690]** Tube Corp., 467 U. S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). The goal is to "distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U. S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007).

In this case, both sides correctly acknowledge that Amex's antisteering provisions are **HN3**[] **LEdHN[3]**[] [3] vertical restraints—*i.e.,* restraints "imposed by agreement between firms at different levels of distribution." Business Electronics, supra, at 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808. The parties also correctly acknowledge that, like nearly every other vertical restraint, the antisteering provisions should be assessed under the rule of reason. See Leegin, supra, at 882, 127 S. Ct. 2705, 168 L. Ed. 2d 623; State Oil, supra, at 19, 118 S. Ct. 275, 139 L. Ed. 2d 199; Business Electronics, supra, at 726, 108 S. Ct. 1515, 99 L. Ed. 2d 808; Continental T. V., Inc. v. GTE Sylvania Inc., 433 U. S. 36, 57, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).

HN4[] **LEdHN[4]**[] [4] To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers **[***18]** in the relevant market. See 1 J. Kalinowski, Antitrust Laws and Trade Regulation §12.02[1] (2d ed. 2017) (Kalinowski); P. Areeda & H. Hovenkamp, Fundamentals of ***Antitrust Law*** §15.02[B] (4th ed. 2017) (Areeda & Hovenkamp); Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 543 (CA2 1993). If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. See 1 Kalinowski §12.02[1]; Areeda & Hovenkamp §15.02[B]; Capital Imaging Assocs., supra, at 543. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. See 1 Kalinowski §12.02[1]; Capital Imaging Assocs., supra, at 543.

Here, the parties ask us to decide whether the **HN5**[] **LEdHN[5]**[] [5] plaintiffs have carried their initial burden of proving that Amex's antisteering provisions have an anticompetitive effect. The plaintiffs can make this showing directly or indirectly. Direct evidence of anticompetitive effects would be "'proof of actual detrimental effects [on competition],'" FTC v. Indiana Federation of Dentists, 476 U. S. 447, 460, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986), such as reduced output, increased prices, or decreased quality in the relevant market, see 1 Kalinowski §12.02[2]; Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380, 390 (CA8 2007); Virginia Atlantic Airways Ltd. v. British Airways PLC, 257 F. 3d 256, 264 (CA2 2001). Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition. See 1 Kalinowski §12.02[2]; Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97 (CA2 1998); Spanish Broadcasting System of Fla. v. Clear Channel Communications, Inc., 376 F. 3d 1065, 1073 (CA11 2004).

Here, the plaintiffs rely exclusively on direct evidence to prove that Amex's **[**691]** antisteering **[***19]** provisions have caused anticompetitive **[*2285]** effects in the credit-card market. [6] To assess this evidence, we must first

[6] Although the plaintiffs relied on indirect evidence below, they have abandoned that argument in this Court. See Brief for United States 23, n. 4 (citing Pet. for Cert. i, 18-25).

define the relevant market. Once defined, it becomes clear that the plaintiffs' evidence is insufficient to carry their burden.

A

HN6[] LEdHN[6][] [6] Because "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in **antitrust law**," Eastman Kodak Co. v. Image Technical Services, Inc., 504 U. S. 451, 466-467, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992), courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market. [7] "Without a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition." Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U. S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965); accord, 2 Kalinowski §24.01[4][a]. Thus, the relevant market is defined as "the area of effective competition." *Ibid.* Typically this is the "arena within which significant substitution in consumption or production occurs." Areeda & Hovenkamp §5.02; accord, 2 Kalinowski §24.02[1]; United States v. Grinnell Corp., 384 U. S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). But courts should "combin[e]" different products or services into "a single market" when "that combination reflects commercial realities." Id., at 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778; see also Brown Shoe Co. v. United States, 370 U. S. 294, 336-337, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962) (pointing out that "the definition of the relevant market" must "'correspond to the commercial realities' of the industry").

As explained, credit-card networks **[**692]** are two-sided **[***20]** platforms. HN8[] LEdHN[8][] [8] Due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. See Evans & Schmalensee 674-675; Evans & Noel 680-681. And the fact that two-sided platforms charge one side a **[*2286]** price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. See Klein 574, 595, 598, 626. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. See *id.,* at 575, 594, 626. Thus, courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.

To be sure, it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor. See Filistrucchi 321-322. Newspapers that sell advertisements, for example, arguably operate a two-sided platform because the value of an advertisement increases as more people read the newspaper. *Id*., at 297, 315; Klein 579. But in the newspaper-advertisement market, **[***21]** the indirect networks effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains. See Filistrucchi 321, 323, and n. 99; Klein 583. Because of these weak indirect network effects, the market for newspaper advertising

[7] The plaintiffs argue that we need not define the relevant market in this case because they have offered actual evidence of adverse effects on competition—namely, increased merchant fees. See Brief for United States 40-41 (citing FTC v. Indiana Federation of Dentists, 476 U. S. 447, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986), and Catalano, Inc. v. Target Sales, Inc., 446 U. S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980) (*per curiam*)). We disagree. The cases that the plaintiffs cite for this proposition evaluated whether horizontal restraints had an adverse effect on competition. See Indiana Federation of Dentists, supra, at 450-451, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (agreement between competing dentists not to share X rays with insurance companies); Catalano, supra, at 644-645, 650, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (agreement among competing wholesalers not to compete on extending credit to retailers). Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive. See Indiana Federation of Dentists, supra, at 460-461, 106 S. Ct. 2009, 90 L. Ed. 2d 445; Catalano, supra, at 648-649, 100 S. Ct. 1925, 64 L. Ed. 2d 580. But vertical restraints are different. See Arizona v. Maricopa County Medical Soc., 457 U. S. 332, 348, n. 18, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982); Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U. S. 877, 888, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007). HN7[] LEdHN[7][] [7] Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market. See id., at 898, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (noting that a vertical restraint "may not be a serious concern unless the relevant entity has market power"); Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 160 (1984) ("[T]he possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power").

behaves much like a one-sided market and should be analyzed as such. See Filistrucchi 321; *Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 610, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*.

But two-sided transaction platforms, like the credit-card market, are different. These platforms facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually. See Klein 583 ("Because cardholders and merchants jointly consume a single product, payment card transactions, their consumption of payment card transactions must be directly proportional"). To optimize sales, the network must find the balance **[***22]** of pricing that encourages the greatest number of matches between cardholders and merchants.

HN9[] ***LEdHN[9]***[] [9] Because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better understood as "suppl[ying] only one product"—transactions. Klein 580. In the credit-card market, these transactions "are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment." *Ibid.* Tellingly, credit cards **[**693]** determine their market share by measuring the volume of transactions they have sold. [8]

[*2287] ***HN11***[] ***LEdHN[11]***[] [11] Evaluating both sides of a two-sided transaction platform is also necessary to accurately assess competition. Only other two-sided platforms can compete with a two-sided platform for transactions. See Filistrucchi 301. A credit-card company that processed transactions for merchants, but that had no cardholders willing to use its card, could not compete with Amex. See *ibid.* Only a company that had both cardholders and merchants willing to **[***23]** use its network could sell transactions and compete in the credit-card market. Similarly, if a merchant accepts the four major credit cards, but a cardholder only uses Visa or Amex, only those two cards can compete for the particular transaction. Thus, competition cannot be accurately assessed by looking at only one side of the platform in isolation. [9]

For all these reasons, ***HN12***[] ***LEdHN[12]***[] [12] "[i]n two-sided transaction markets, only one market should be defined." *Id.*, at 302; see also Evans & Noel 671 ("[F]ocusing on one dimension of . . . competition tends to distort the competition that actually exists among [two-sided platforms]"). Any other analysis would lead to "' "mistaken inferences" '" of the kind that could "' "chill the very conduct the antitrust laws are designed to protect." '" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U. S. 209, 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*; see also *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U. S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* ("'[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition'"); *Leegin, 551 U. S., at 895, 127 S. Ct. 2705, 168 L. Ed. 2d 623* (noting that courts should avoid "increas[ing] the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage"). Accordingly, we will analyze the two-sided market for credit-card **[***24]** transactions as a whole to determine whether the plaintiffs have shown that Amex's antisteering provisions have anticompetitive effects.

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[8] Contrary to the dissent's assertion, *post, at ___ - ___, 201 L. Ed. 2d, at 703*, merchant services and cardholder services are not complements. See Filistrucchi 297 ("[A] two-sided market [is] different from markets for complementary products, in which both products are bought by the same buyers, who, in their buying decisions, can therefore be expected to take into account both prices"). As already explained,***HN10***[] ***LEdHN[10]***[] [10] credit-card companies are best understood as supplying only one product—transactions—which is jointly consumed by a cardholder and a merchant. See Klein 580. Merchant services and cardholder services are both inputs to this single product. See *ibid.*

[9] Nontransaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform. A newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers. See Filistrucchi 301.

B

The plaintiffs have not carried their burden to prove anticompetitive effects in the relevant market. The plaintiffs stake their entire case on proving that Amex's agreements increase merchant fees. We find this argument unpersuasive.

As an initial matter, the plaintiffs' argument about merchant fees wrongly **[**694]** focuses on only one side of the two-sided credit-card market. As explained, ***HN13***[] ***LEdHN[13]***[] [13] the credit-card market must be defined to include both merchants and cardholders. Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions **[***25]** above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market. See 1 Kalinowski §12.02[2]; **[*2288]** *Craftsman Limousine, Inc., 491 F. 3d, at 390*; *Virginia Atlantic Airways Ltd., 257 F. 3d, at 264*. They failed to do so.

1

The plaintiffs did not offer any evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market. As the District Court found, the plaintiffs failed to offer any reliable measure of Amex's transaction price or profit margins. *88 F. Supp. 3d, at 198, 215*. And the evidence about whether Amex charges more than its competitors was ultimately inconclusive. *Id., at 199, 202, 215*.

Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. Amex began raising its merchant fees in 2005 after Visa and MasterCard raised their fees in the early 2000s. *Id., at 195, 199-200*. As explained, Amex has historically charged higher merchant fees than these competitors because it delivers wealthier cardholders who spend more money. *Id., at 200-201*. Amex's higher merchant fees are based on a careful study of how much additional value its cardholders offer merchants. See *id., at 192-193*. On the other side of the market, Amex uses its higher merchant fees to offer its cardholders **[***26]** a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants. *Id., at 160, 191-195*. That Amex allocates prices between merchants and cardholders differently from Visa and MasterCard is simply not evidence that it wields market power to achieve anticompetitive ends. See Evans & Noel 670-671; Klein 574-575, 594-595, 598, 626.

In addition, the evidence that does exist cuts against the plaintiffs' view that Amex's antisteering provisions are the cause of any increases in merchant fees. Visa and MasterCard's merchant fees have continued to increase, even at merchant locations where Amex is not accepted and, thus, Amex's antisteering provisions do not apply. See *88 F. Supp. 3d, at 222*. This suggests that the cause of increased merchant fees is not Amex's antisteering provisions, but rather increased competition for cardholders and a corresponding marketwide adjustment in the relative price charged to merchants. See Klein 575, 609.

2

The plaintiffs did offer evidence **[**695]** that Amex increased the percentage of the purchase price that it charges merchants by an average of 0.09% between 2005 and 2010 and that this increase was not entirely spent on **[***27]** cardholder rewards. See *88 F. Supp. 3d, at 195-197, 215*. The plaintiffs believe that this evidence shows that the price of Amex's transactions increased.

Even assuming the plaintiffs are correct, this evidence does not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices. ***HN14***[] ***LEdHN[14]***[] [14] "Market power is the ability to raise price profitably *by restricting output*." Areeda & Hovenkamp §5.01 (emphasis added); accord, *Kodak, 504 U. S., at 464,* *112 S. Ct. 2072, 119 L. Ed. 2d 265*; *Business Electronics, 485 U. S., at 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. This Court will "not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Brooke Group Ltd., 509 U. S., at 237, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. There is no such evidence in this case. The output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%. See *838 F. 3d, at 206*. "Where . . . output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand." **[*2289]** *Brooke Group Ltd., supra, at 237, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. And, as previously explained, the plaintiffs did not show that Amex charged more than its competitors.

3

The plaintiffs also failed to prove that Amex's antisteering provisions have stifled competition among credit-card companies. To the contrary, while these agreements have been in place, the credit-card market experienced **[***28]** expanding output and improved quality. Amex's business model spurred Visa and MasterCard to offer new premium card categories with higher rewards. And it has increased the availability of card services, including free banking and card-payment services for low-income customers who otherwise would not be served. Indeed, between 1970 and 2001, the percentage of households with credit cards more than quadrupled, and the proportion of households in the bottom-income quintile with credit cards grew from just 2% to over 38%. See D. Evans & R. Schmalensee, Paying With Plastic: The Digital Revolution in Buying and Borrowing 88-89 (2d ed. 2005) (Paying With Plastic).

Nor have Amex's antisteering provisions ended competition between credit-card networks with respect to merchant fees. Instead, fierce competition between networks has constrained Amex's ability to raise these fees and has, at times, forced Amex to lower them. For instance, when Amex raised its merchant prices between 2005 and 2010, some merchants chose to leave its network. *88 F. Supp. 3d, at 197*. And when its remaining merchants complained, Amex stopped raising its merchant prices. *Id., at 198*. In another instance in the late 1980s and early 1990s, competition **[***29]** forced Amex to offer lower merchant fees to "everyday spend" merchants—supermarkets, gas stations, pharmacies, and the like—to persuade them to accept Amex. See *id., at 160-161, 202*.

In addition, Amex's competitors have exploited its higher merchant **[**696]** fees to their advantage. By charging lower merchant fees, Visa, MasterCard, and Discover have achieved broader merchant acceptance—approximately 3 million more locations than Amex. *Id., at 204*. This broader merchant acceptance is a major advantage for these networks and a significant challenge for Amex, since consumers prefer cards that will be accepted everywhere. *Ibid.* And to compete even further with Amex, Visa and MasterCard charge different merchant fees for different types of cards to maintain their comparatively lower merchant fees and broader acceptance. Over the long run, this competition has created a trend of declining merchant fees in the credit-card market. In fact, since the first credit card was introduced in the 1950s, merchant fees—including Amex's merchant fees—have decreased by more than half. See *id., at 202-203*; Paying With Plastic 54, 126, 152.

Lastly, there is nothing inherently anticompetitive about Amex's antisteering provisions. These agreements actually stem **[***30]** negative externalities in the credit-card market and promote interbrand competition. When merchants steer cardholders away from Amex at the point of sale, it undermines the cardholder's expectation of "welcome acceptance"—the promise of a frictionless transaction. *88 F. Supp. 3d, at 156*. A lack of welcome acceptance at one merchant makes a cardholder less likely to use Amex at all other merchants. This externality endangers the viability of the entire Amex network. And it undermines the investments that Amex has made to encourage increased cardholder spending, which discourages investments in rewards and ultimately harms both cardholders and merchants. Cf. **[*2290]** *Leegin, 551 U. S., at 890-891, 127 S. Ct. 2705, 168 L. Ed. 2d 623* (recognizing that ***HN15***[] ***LEdHN[15]***[] [15] vertical restraints can prevent retailers from free riding and thus increase the availability of "tangible or intangible services or promotional efforts" that enhance competition and consumer welfare). Perhaps most importantly, antisteering provisions do not prevent Visa, MasterCard, or Discover from competing against Amex by offering lower merchant fees or promoting their broader merchant acceptance. [10]

In sum, the plaintiffs have not satisfied the first step of the rule of reason. They have not carried their burden of **[***31]** proving that Amex's antisteering provisions have anticompetitive effects. Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions. And ***HN16***[] ***LEdHN[16]***[] [16] it is "[t]he promotion of interbrand competition," after all, that "is . . . 'the primary purpose of the antitrust laws.'" *Id., at 890, 127 S. Ct. 2705, 168 L. Ed. 2d 623*.

[697]** ***

Because Amex's antisteering provisions do not unreasonably restrain trade, we affirm the judgment of the Court of Appeals.

It is so ordered.

Dissent by: BREYER; GINSBURG; SOTOMAYOR; KAGAN

Dissent

Justice **Breyer**, with whom Justice **Ginsburg**, Justice **Sotomayor**, and Justice **Kagan** join, dissenting.

For more than 120 years, the American economy has prospered by charting a middle path between pure *laissez-faire* and state capitalism, governed by an ***antitrust law*** "dedicated to the principle that *markets*, not individual firms and certainly not political power, produce the optimal mixture of goods and services." 1 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶100b, p. 4 (4th ed. 2013) (Areeda & Hovenkamp). By means of a strong ***antitrust law***, the United States has sought to avoid the danger of monopoly capitalism. Long gone, we hope, are the days when the great trusts presided unfettered **[***32]** by competition over the American economy.

This lawsuit is emblematic of the American approach. Many governments around the world have responded to concerns about the high fees that credit-card companies often charge merchants by regulating such fees directly. See GAO, Credit and Debit Cards: Federal Entities Are Taking Actions to Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist 31-35 (GAO-08-558, 2008). The United States has not followed that approach. The Government instead filed this lawsuit, which seeks to restore market competition over credit-card merchant fees by eliminating a contract-ual barrier with anticompetitive effects. The majority rejects that effort. But because the challenged contractual term clearly has serious anticompetitive effects, I dissent.

I

I agree with the majority and the parties that this case is properly evaluated under the three-step "rule of reason" that governs many antitrust lawsuits. **[*2291]** *Ante, at ___ - ___, 201 L. Ed. 2d, at 690-691*. Under that approach, a court looks first at the agreement or restraint at issue to assess whether it has had, or is likely to have,

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[10] The plaintiffs argue that *United States v. Topco Associates, Inc., 405 U. S. 596, 610, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*, forbids any restraint that would restrict competition in part of the market—here, for example, merchant steering. See Brief for Petitioners and Respondents Nebraska, Tennessee, and Texas 30, 42. *Topco* does not stand for such a broad proposition. *Topco* concluded that a horizontal agreement between competitors was unreasonable *per se*, even though the agreement did not extend to every competitor in the market. See *405 U. S., at 599, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515*. A horizontal agreement between competitors is markedly different from a vertical agreement that incidentally affects one particular method of competition. See *Leegin, 551 U. S., at 888, 127 S. Ct. 2705, 168 L. Ed. 2d 623*; *Maricopa County Medical Soc., 457 U. S., at 348, n. 18, 102 S. Ct. 2466, 73 L. Ed. 2d 48*.

anticompetitive effects. *FTC v. Indiana Federation of Dentists, 476 U. S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*. In doing so, the court normally asks whether the restraint **[***33]** may tend to impede competition and, if so, whether those who have entered into that restraint have sufficient economic or commercial power for the agreement to make a negative difference. See *id., at 459-461, 106 S. Ct. 2009, 90 L. Ed. 2d 445.* Sometimes, but not always, a court will try to determine the appropriate market (the market that the agreement affects) and determine whether those entering into that agreement have the power to raise prices above the competitive level in that market. See *ibid.*

It is important here to understand that in cases under *§1 of the Sherman Act* (unlike in cases challenging **[**698]** a merger under *§7 of the Clayton Act , 15 U. S. C. §18*), it may well be unnecessary to undertake a sometimes complex, market power inquiry:

> "Since the purpose [in a *Sherman Act §1* case] of the inquiries into . . . market power is [simply] to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction in output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Indiana Federation of Dentists, supra, at 460-461, 106 S. Ct. 2009, 90 L. Ed. 2d 445* (quoting 7 P. Areeda, ***Antitrust Law*** ¶1511, p. 429 (3d ed. 1986)).

Second (as treatise writers summarize the case law), if an antitrust plaintiff meets **[***34]** the initial burden of showing that an agreement will likely have anticompetitive effects, normally the "burden shifts to the defendant to show that the restraint in fact serves a legitimate objective." 7 Areeda & Hovenkamp ¶1504b, at 415; see *California Dental Ass'n v. FTC, 526 U.S. 756, 771, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*; *id., at 788, 119 S. Ct. 1604, 143 L. Ed. 2d 935* (Breyer, J., dissenting).

Third, if the defendant successfully bears this burden, the antitrust plaintiff may still carry the day by showing that it is possible to meet the legitimate objective in less restrictive ways, or, perhaps by showing that the legitimate objective does not outweigh the harm that competition will suffer, *i.e.*, that the agreement "on balance" remains unreasonable. 7 Areeda & Hovenkamp ¶1507a, at 442.

Like the Court of Appeals and the parties, the majority addresses only the first step of that three-step framework. *Ante, at ___, 201 L. Ed. 2d, at 691*.

II

A

This case concerns the credit-card business. As the majority explains, *ante, ___, 201 L. Ed. 2d, at 686*, that business involves the selling of two different but related card services. First, when a shopper uses a credit card to buy something from a participating merchant, the credit-card company pays the merchant the amount of money that the merchant's customer has charged to his card and charges the merchant a fee, **[***35]** say 5%, for that speedy-payment service. I shall refer to that kind of transaction as a merchant-related card service. Second, the credit-card company then sends a bill to the merchant's customer, the shopper who holds the card; and the shopper pays the card company the sum that merchant charged the shopper for the goods or services he or she bought. The cardholder also often pays the card company a fee, such as an annual fee for the card or an interest charge for delayed payment. I **[*2292]** shall call that kind of transaction a shopper-related card service. The credit-card company can earn revenue from the sale (directly or indirectly) of each of these services: (1) speedy payment for merchants, and (2) credit for shoppers. (I say "indirectly" to reflect the fact that card companies often create or use networks of banks as part of the process—but I have found nothing here suggesting that that fact makes a significant difference to my analysis.)

Sales of the two basic card services are related. A shopper can pay for a **[**699]** purchase with a particular credit card only if the merchant has signed up for merchant-related card services with the company that issued the credit card that the shopper wishes **[***36]** to use. A firm in the credit-card business is therefore unlikely to make money unless quite a few merchants agree to accept that firm's card and quite a few shoppers agree to carry and use it. In general, the more merchants that sign up with a particular card company, the more useful that card is likely to prove to shoppers and so the more shoppers will sign up; so too, the more shoppers that carry a particular card, the more useful that card is likely to prove to merchants (as it obviously helps them obtain the shoppers' business) and so the more merchants will sign up. Moreover, as a rough rule of thumb (and assuming constant charges), the larger the networks of paying merchants and paying shoppers that a card firm maintains, the larger the revenues that the firm will likely receive, since more payments will be processed using its cards. Thus, it is not surprising that a card company may offer shoppers incentives (say, points redeemable for merchandise or travel) for using its card or that a firm might want merchants to accept its card exclusively.

B

This case focuses upon a practice called "steering." American Express has historically charged higher merchant fees than its competitors. **[***37]** App. to Pet. for Cert. 173a-176a. Hence, fewer merchants accept American Express' cards than its competitors'. *Id.,* at 184a-187a. But, perhaps because American Express cardholders are, on average, wealthier, higher-spending, or more loyal to American Express than other cardholders, vast numbers of merchants still accept American Express cards. See *id.*, at 156a, 176a-177a, 184a-187a. Those who do, however, would (in order to avoid the higher American Express fee) often prefer that their customers use a different card to charge a purchase. Thus, the merchant has a monetary incentive to "steer" the customer towards the use of a different card. A merchant might tell the customer, for example, "American Express costs us more," or "please use Visa if you can," or "free shipping if you use Discover." See *id.,* at 100a-102a.

Steering makes a difference, because without it, the shopper does not care whether the merchant pays more to American Express than it would pay to a different card company—the shopper pays the same price either way. But if steering works, then American Express will find it more difficult to charge more than its competitors for merchant-related services, because merchants will respond by steering their customers, **[***38]** encouraging them to use other cards. Thus, American Express dislikes steering; the merchants like it; and the shoppers may benefit from it, whether because merchants will offer them incentives to use less expensive cards or in the form of lower retail prices overall. See *id.,* at 92a, 97a-104a.

In response to its competitors' efforts to convince merchants to steer shoppers to use less expensive cards, American Express **[*2293]** tried to stop, or at least to limit, steering by placing antisteering provisions in most of its contracts with merchants. It called those provisions "nondiscrimination provisions." They prohibited steering of the forms I have described above (and others as well). See *id.,* at 95a-96a, 100a-101a. After placing them in **[**700]** its agreements, American Express found it could maintain, or even raise, its higher merchant prices without losing too many transactions to other firms. *Id.,* at 195a-198a. These agreements—the "nondiscrimination provisions"—led to this lawsuit.

C

In 2010 the United States and 17 States brought this antitrust case against American Express. They claimed that the "nondiscrimination provisions" in its contracts with merchants created an unreasonable restraint of trade. (Initially Visa and MasterCard **[***39]** were also defendants, but they entered into consent judgments, dropping similar provisions from their contracts with merchants). After a 7-week bench trial, the District Court entered judgment for the Government, setting forth its findings of fact and conclusions of law in a 97-page opinion. *88 F. Supp. 3d 143 (EDNY 2015)*.

Because the majority devotes little attention to the District Court's detailed factual findings, I will summarize some of the more significant ones here. Among other things, the District Court found that beginning in 2005 and during the next five years, American Express raised the prices it charged merchants on 20 separate occasions. See *id., at 195-196*. In doing so, American Express did not take account of the possibility that large merchants would respond to the price increases by encouraging shoppers to use a different credit card because the nondiscrimination provisions prohibited any such steering. *Id., at 215*. The District Court pointed to merchants' testimony stating that, had it not been for those provisions, the large merchants would have responded to the price increases by encouraging customers to use other, less-expensive cards. *Ibid.*

The District Court also found that even though American Express raised its **[***40]** merchant prices 20 times in this 5-year period, it did not lose the business of any large merchant. *Id., at 197*. Nor did American Express increase benefits (or cut credit-card prices) to American Express cardholders in tandem with the merchant price increases. *Id., at 196*. Even had there been no direct evidence of injury to competition, American Express' ability to raise merchant prices without losing any meaningful market share, in the District Court's view, showed that American Express possessed power in the relevant market. See *id., at 195*.

The District Court also found that, in the absence of the provisions, prices to merchants would likely have been lower. *Ibid.* It wrote that in the late 1990's, Discover, one of American Express' competitors, had tried to develop a business model that involved charging lower prices to merchants than the other companies charged. *Id., at 213*. Discover then invited each "merchant to save money by shifting volume to Discover," while simultaneously offering merchants additional discounts "if they would steer customers to Discover." *Ibid.* The court determined that these efforts failed because of American Express' (and the other card companies') "nondiscrimination provisions." These provisions, **[***41]** the court found, "denied merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." *Id., at 214*. Because the provisions eliminated any advantage that lower **[**701]** prices might produce, Discover **[*2294]** "abandoned its low-price business model" and raised its merchant fees to match those of its competitors. *Ibid.* This series of events, the court concluded was "emblematic of the harm done to the competitive process" by the "nondiscrimination provisions." *Ibid.*

The District Court added that it found no offsetting pro-competitive benefit to shoppers. *Id., at 225-238*. Indeed, it found no offsetting benefit of any kind. See *ibid.*

American Express appealed, and the U. S. Court of Appeals for the Second Circuit held in its favor. *838 F. 3d 179 (2016)*. The Court of Appeals did not reject any fact found by the District Court as "clearly erroneous." See *Fed. Rule Civ. Proc. 52(a)(6)*. Rather, it concluded that the District Court had erred in step 1 of its rule-of-reason analysis by failing to account for what the Second Circuit called the credit-card business's "two-sided market" (or "two-sided platform"). *838 F. 3d, at 185-186, 196-200*.

III

The majority, like the Court of Appeals, reaches only step 1 in its "rule of reason" **[***42]** analysis. *Ante, at ___, 201 L. Ed. 2d, at 690*. To repeat, that step consists of determining whether the challenged "nondiscrimination provisions" have had, or are likely to have, anticompetitive effects. See *Indiana Federation of Dentists, 476 U. S., at 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445*. Do those provisions tend to impede competition? And if so, does American Express, which imposed that restraint as a condition of doing business with its merchant customers, have sufficient economic or commercial power for the provision to make a negative difference? See *id., at 460-461, 106 S. Ct. 2009, 90 L. Ed. 2d 445*.

A

Here the District Court found that the challenged provisions have had significant anticompetitive effects. In particular, it found that the provisions have limited or prevented price competition among credit-card firms for the business of merchants. *88 F. Supp. 3d, at 209*. That conclusion makes sense: In the provisions, American Express required the merchants to agree not to encourage customers to use American Express' competitors' credit cards, even cards from those competitors, such as Discover, that intended to charge the merchants lower prices. See *id., at 214*. By doing so, American Express has "disrupt[ed] the normal price-setting mechanism" in the market. *Id., at 209*. As a result of the provisions, the District Court found, American Express was able to raise merchant prices **[***43]** repeatedly without any significant loss of business, because merchants were unable to respond to such price increases by encouraging shoppers to pay with other cards. *Id., at 215*. The provisions also meant that competitors like Discover had little incentive to lower their merchant prices, because doing so did not lead to any additional market share. *Id., at 214*. The provisions thereby "suppress[ed] [American Express'] . . . competitors' incentives to offer lower prices . . . resulting in higher profit-maximizing prices across the network services market." *Id., at 209.* Consumers throughout the economy paid higher retail prices as a result, and they were denied the opportunity to accept incentives that merchants might otherwise have offered to use less-expensive cards. *Id., at 216, 220*. **[**702]** I should think that, considering step 1 alone, there is little more that need be said.

The majority, like the Court of Appeals, says that the District Court should have looked not only at the market for the card companies' merchant-related services but also at the market for the card companies' shopper-related services, and that it should **[*2295]** have combined them, treating them as a single market. *Ante, at ___ - ___, 201 L. Ed. 2d, at 693*; *838 F. 3d, at 197*. But I am not aware of any support for that **[***44]** view in ***antitrust law***. Indeed, this Court has held to the contrary.

In *Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 610, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*, the Court held that an antitrust court should begin its definition of a relevant market by focusing narrowly on the good or service directly affected by a challenged restraint. The Government in that case claimed that a newspaper's advertising policy violated the *Sherman Act's* "rule of reason." See *ibid.* In support of that argument, the Government pointed out, and the District Court had held, that the newspaper dominated the market for the sales of newspapers to readers in New Orleans, where it was the sole morning daily newspaper. *Ibid.* But this Court reversed. We explained that "every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space." *Ibid.* We then added:

> "This case concerns solely one of those markets. The Publishing Company stands accused not of tying sales to its readers but only to buyers of general and classified space in its papers. For this reason, dominance in the advertising market, not in readership, must be decisive in gauging the legality **[***45]** of the Company's unit plan." *Ibid.*

Here, American Express stands accused not of limiting or harming competition for shopper-related card services, but only of merchant-related card services, because the challenged contract provisions appear only in American Express' contracts with merchants. That is why the District Court was correct in considering, at step 1, simply whether the agreement had diminished competition in merchant-related services.

B

The District Court did refer to market definition, and the majority does the same. *Ante, at ___ - ___, 201 L. Ed. 2d, at 691-693*. And I recognize that properly defining a market is often a complex business. Once a court has identified the good or service directly restrained, as *Times-Picayune Publishing Co.* requires, it will sometimes add to the relevant market what economists call "substitutes": other goods or services that are reasonably substitutable for that good or service. See, *e.g., United States v. E. I. du Pont de Nemours & Co., 351 U. S. 377, 395-396, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)* (explaining that cellophane market includes other, substitutable flexible wrapping materials as well). The reason that substitutes are included in the relevant market is that they restrain a firm's ability to profitably raise prices, because customers will switch to the substitutes rather **[***46]** than pay the higher prices. See 2B Areeda & Hovenkamp ¶561, at 378.

[703]** But while the market includes substitutes, it does not include what economists call complements: goods or services that are used together with the restrained product, but that cannot be substituted for that product. See *id.,* ¶565a, at 429; *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U. S. 451, 463, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. An example of complements is gasoline and tires. A driver needs both gasoline and tires to drive, but they are not substitutes for each other, and so the sale price of tires does not check the ability of a gasoline firm (say a gasoline monopolist) to raise the price of gasoline above competitive levels. As a treatise on the subject states: "Grouping complementary goods into the same market" is "economic nonsense," and would "undermin[e] the rationale for the policy **[*2296]** against monopolization or collusion in the first place." 2B Areeda & Hovenkamp ¶565a, at 431.

Here, the relationship between merchant-related card services and shopper-related card services is primarily that of complements, not substitutes. Like gasoline and tires, both must be purchased for either to have value. Merchants upset about a price increase for merchant-related services cannot avoid that price increase by becoming **[***47]** cardholders, in the way that, say, a buyer of newspaper advertising can switch to television advertising or direct mail in response to a newspaper's advertising price increase. The two categories of services serve fundamentally different purposes. And so, also like gasoline and tires, it is difficult to see any way in which the price of shopper-related services could act as a check on the card firm's sale price of merchant-related services. If anything, a lower price of shopper-related card services is likely to cause more shoppers to use the card, and increased shopper popularity should make it *easier* for a card firm to raise prices to merchants, not *harder*, as would be the case if the services were substitutes. Thus, unless there is something unusual about this case—a possibility I discuss below, see *infra, at ___ - ___, 201 L. Ed. 2d, at 704-708*—there is no justification for treating shopper-related services and merchant-related services as if they were part of a single market, at least not at step 1 of the "rule of reason."

C

Regardless, a discussion of market definition was legally unnecessary at step 1. That is because the District Court found strong *direct* evidence of anticompetitive effects flowing from the challenged restraint. **[***48]** *88 F. Supp. 3d, at 207-224*. As I said, *supra, at ___, 201 L. Ed. 2d, at 700,* this evidence included Discover's efforts to break into the credit-card business by charging lower prices for merchant-related services, only to find that the "nondiscrimination provisions," by preventing merchants from encouraging shoppers to use Discover cards, meant that lower merchant prices did not result in any additional transactions using Discover credit cards. *88 F. Supp. 3d, at 213-214*. The direct evidence also included the fact that American Express raised its merchant prices 20 times in five years without losing any appreciable market share. *Id., at 195-198, 208-212*. It also included the testimony of numerous merchants that they would have steered shoppers away from American Express cards in response to merchant price increases (thereby checking **[**704]** the ability of American Express to raise prices) had it not been for the nondiscrimination provisions. See *id., at 221-222*. It included the factual finding that American Express "did not even account for the possibility that [large] merchants would respond to its price increases by attempting to shift share to a competitor's network" because the nondiscrimination provisions prohibited steering. *Id., at 215*. It included the District Court's ultimate finding of fact, not overturned by the Court **[***49]** of Appeals, that the challenged provisions "were integral to" American Express' "[price] increases and thereby caused merchants to pay higher prices." *Ibid.*

As I explained above, this Court has stated that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects . . . can obviate the need for" those inquiries. *Indiana Federation of Dentists, 476 U. S., at 460-461, 106 S. Ct. 2009, 90 L. Ed. 2d 445* (internal quotation marks omitted). That statement is fully applicable here. Doubts about the District Court's market-definition analysis are beside **[*2297]** the point in the face of the District Court's findings of actual anticompetitive harm.

The majority disagrees that market definition is irrelevant. See *ante, at ___ - ___, 201 L. Ed. 2d, at 691-692, and n. 7*. The majority explains that market definition is necessary because the nondiscrimination provisions are "vertical restraints" and "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first determines the relevant market." *Ante, at ___, n. 7, 201 L. Ed. 2d, at 691*. The majority thus, in a footnote, seems categorically to exempt vertical **[***50]** restraints from the ordinary "rule of reason" analysis that has applied to them since the *Sherman Act's* enactment in 1890. The majority's only support for this novel exemption is *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U. S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. But *Leegin* held that the "rule of reason" *applied* to the vertical restraint at issue in that case. See *id., at 898-899, 127 S. Ct. 2705, 168 L. Ed. 2d 623*. It said nothing to suggest that vertical restraints are not subject to the usual "rule of reason" analysis. See also *infra, at ___, 201 L. Ed. 2d, at 711*.

One critical point that the majority's argument ignores is that proof of actual adverse effects on competition *is*, *a fortiori*, proof of market power. Without such power, the restraints could not have brought about the anticompetitive effects that the plaintiff proved. See *Indiana Federation of Dentists, supra, at 460, 106 S. Ct. 2009, 90 L. Ed. 2d 445* ("[T]he purpose of the inquiries into market definition and market power is to determine *whether an arrangement has the potential for* genuine adverse effects on competition" (emphasis added)). The District Court's findings of actual anticompetitive harm from the nondiscrimination provisions thus showed that, whatever the relevant market might be, American Express had enough power in that market to cause that harm. There is no reason to require a separate showing of market definition and market power under such circumstances. **[***51]** And so the majority's **[**705]** extensive discussion of market definition is legally unnecessary.

D

The majority's discussion of market definition is also wrong. Without raising any objection in general with the longstanding approach I describe above, *supra, at ___ - ___, 201 L. Ed. 2d, at 702-703*, the majority agrees with the Court of Appeals that the market for American Express' card services is special because it is a "two-sided transaction platform." *Ante, at ___ - ___, ___ - ___, 201 L. Ed. 2d, at 686-687, 691-693*. The majority explains that credit-card firms connect two distinct groups of customers: First, merchants who accept credit cards, and second, shoppers who use the cards. *Ante, at ___, 201 L. Ed. 2d, at 686*; accord, *838 F. 3d, at 186*. The majority adds that "no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use to the same credit-card network." *Ante, at ___, 201 L. Ed. 2d, at 686*. And it explains that the credit-card market involves "indirect network effects," by which it means that shoppers want a card that many merchants will accept and merchants want to accept those cards that many customers have and use. *Ibid.* From this, the majority concludes that "courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market." *Ante, at ___, 201 L. Ed. 2d, at 692*; accord, **[***52]** *838 F. 3d, at 197*.

1

Missing from the majority's analysis is any explanation as to *why*, given the purposes that market definition serves in ***antitrust law***, the fact that a credit-card firm can be said to operate a "two-sided transaction platform" means that its merchant-related **[*2298]** and shopper-related services should be combined into a single market. The phrase "two-sided transaction platform" is not one of antitrust art—I can find no case from this Court using those words. The majority defines the phrase as covering a business that "offers different products or services to two different groups who both depend on the platform to intermediate between them," where the business "cannot make a sale to one side of the platform without simultaneously making a sale to the other" side of the platform. *Ante, at ___, 201 L Ed. 2d, at 686*. I take from that definition that there are four relevant features of such businesses on the majority's account: they (1) offer different products or services, (2) to different groups of customers, (3) whom the "platform" connects, (4) in simultaneous transactions. See *ibid.*

What is it about businesses with those four features that the majority thinks justifies a special market-definition approach for them? **[***53]** It cannot be the first two features—that the company sells different products to different groups of customers. Companies that sell multiple products to multiple types of customers are commonplace. A firm might mine for gold, which it refines and sells both to dentists in the form of fillings and to investors in the form of ingots. Or, a firm might drill for both oil and natural gas. Or a firm might make both ignition switches inserted into auto bodies and tires used for cars. I have already explained that, ordinarily, ***antitrust law*** will not group the two nonsubstitutable products together **[**706]** for step 1 purposes. *Supra, at ___ - ___, 201 L. Ed. 2d, at 702-703*.

Neither should it normally matter whether a company sells related, or complementary, products, *i.e.*, products which must both be purchased to have any function, such as ignition switches and tires, or cameras and film. It is well established that an antitrust court in such cases looks at the product where the attacked restraint has an anticompetitive effect. *Supra, at ___, 201 L. Ed. 2d, at 701*; see *Eastman Kodak, 504 U. S., at 463, 112 S. Ct. 2072, 119 L. Ed. 2d 265*. The court does not combine the customers for the separate, nonsubstitutable goods and see if "overall" the restraint has a negative effect. See *ibid.*; 2B Areeda & Hovenkamp ¶565a. That is because, as I have explained, **[***54]** the complementary relationship between the products is irrelevant to the purposes of market-definition. See *supra, at ___ - ___, 201 L. Ed. 2d, at 702-703*.

The majority disputes my characterization of merchant-related and shopper-related services as "complements." See *ante, at ___, n. 8, 201 L. Ed. 2d, at 70114, n. 693*. The majority relies on an academic article which devotes one sentence to the question, saying that "a two-sided market [is] different from markets for complementary products [*e.g.,* tires and gas], in which both products are bought by the same buyers, who, in their buying decisions, can therefore be expected to take into account both prices." Filistrucchi, Geradin, Van Damme, & Affeldt, Market Definition in Two-Sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293, 297 (2014) (Filistrucchi). I agree that two-sided platforms—at least as some academics define them, but see *infra, at ___ - ___, 201 L. Ed. 2d, at 708*—may be distinct from some types of complements in the respect the majority mentions (even though the services resemble complements because they must be used together for either to have value). But the distinction the majority mentions has nothing to do with the relevant question. The relevant question is whether merchant-related and shopper-related services **[***55]** are *substitutes*, one for the other, so that customers can respond to a price increase for one service by switching to the other service. As I have explained, the two types of services are not substitutes in this way. *Supra, at ___ - ___, 201 L. Ed. 2d, at 702-703*. And so the question remains, just as before: **[*2299]** What is it about the economic relationship between merchant-related and shopper-related services that would justify the majority's novel approach to market definition?

What about the last two features—that the company connects the two groups of customers to each other, in simultaneous transactions? That, too, is commonplace. Consider a farmers' market. It brings local farmers and local shoppers together, and transactions will occur only if a farmer and a shopper simultaneously agree to engage in one. Should courts abandon their ordinary step 1 inquiry if several competing farmers' markets in a city agree that only certain kinds of farmers can participate, or if a farmers' market charges a higher fee than its competitors do and prohibits participating farmers from raising their prices to cover it? Why? If farmers' markets are special, what about travel agents that connect airlines and passengers? What about internet retailers, **[***56]** who, in addition to selling their own goods, allow (for a fee) other **[**707]** goods-producers to sell over their networks? Each of those businesses seems to meet the majority's four-prong definition.

Apparently as its justification for applying a special market-definition rule to "two-sided transaction platforms," the majority explains that such platforms "often exhibit" what it calls "indirect network effects." *Ante, at ___, 201 L. Ed. 2d, at 686*. By this, the majority means that sales of merchant-related card services and (different) shopper-related card services are interconnected, in that increased merchant-buyers mean increased shopper-buyers (the more stores in the card's network, the more customers likely to use the card), and vice versa. See *ibid.* But this, too, is commonplace. Consider, again, a farmers' market. The more farmers that participate (within physical and esthetic limits), the more customers the market will likely attract, and vice versa. So too with travel agents: the more airlines whose tickets a travel agent sells, the more potential passengers will likely use that travel agent, and the more potential passengers that use the travel agent, the easier it will likely be to convince airlines to sell **[***57]** through the travel agent. And so forth. Nothing in ***antitrust law***, to my knowledge, suggests that a court, when presented with an agreement that restricts competition in any one of the markets my examples suggest, should abandon traditional market-definition approaches and include in the relevant market services that are complements, not substitutes, of the restrained good. See *supra, at ____ - ____, 201 L. Ed. 2d, at 702-703*.

2

To justify special treatment for "two-sided transaction platforms," the majority relies on the Court's decision in *United States v. Grinnell Corp., 384 U. S. 563, 571-572, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. In *Grinnell*, the Court treated as a single market several different "central station services," including burglar alarm services and fire alarm services. *Id., at 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778*. It did so even though, for *consumers*, "burglar alarm services are not interchangeable with fire alarm services." *Id., at 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778*. But that is because, for *producers*, the services were indeed interchangeable: A company that offered one could easily offer the other, because they all involve "a single basic service—the protection of property through use of a central service station." *Ibid.* Thus, the "commercial realit[y]" that the *Grinnell* Court relied on, *ibid.*, was that the services being grouped were what economists call "producer substitutes." See 2B Areeda **[***58]** & Hovenkamp ¶561, at 378. And the law is clear that "two products produced interchangeably from the same production facilities are presumptively **[*2300]** in the same market," even if they are not "close substitutes for each other on the demand side." *Ibid.* That is because a firm that produces one such product can, in response to a price increase in the other, easily shift its production and thereby limit its competitor's power to impose the higher price. See *id.*, ¶561a, at 379.

Unlike the various types of central station services at issue in *Grinnell Corp.*, however, the shopper-related and merchant-related services that American Express provides are not "producer substitutes" any more than they are traditional substitutes. For producers as for consumers, the services **[**708]** are instead complements. Credit card companies must sell them together for them to be useful. As a result, the credit-card companies cannot respond to, say, merchant-related price increases by shifting production away from shopper-related services to merchant-related services. The relevant "commercial realities" in this case are thus completely different from those in *Grinnell Corp.* (The majority also cites *Brown Shoe Co. v. United States, 370 U. S. 294, 336-337, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*, for this point, but **[***59]** the "commercial realities" considered in that case were that "shoe stores in the outskirts of cities compete effectively with stores in central downtown areas," and thus are part of the same market. *Id., at 338-339, 82 S. Ct. 1502, 8 L. Ed. 2d 510*. Here, merchant-related services do not, as I have said, compete with shopper-related services, and so *Brown Shoe Co.* does not support the majority's position.) Thus, our precedent provides no support for the majority's special approach to defining markets involving "two-sided transaction platforms."

3

What about the academic articles the majority cites? The first thing to note is that the majority defines "two-sided transaction platforms" much more broadly than the economists do. As the economists who coined the term explain, if a "two-sided market" meant simply that a firm connects two different groups of customers via a platform, then "pretty much any market would be two-sided, since buyers and sellers need to be brought together for markets to exist and gains from trade to be realized." Rochet & Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. Econ. 645, 646 (2006). The defining feature of a "two-sided market," according to these economists, is that "the platform can affect the **[***60]** volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount." *Id.,* at 664-665; accord, Filistrucchi 299. That requirement appears nowhere in the majority's definition. By failing to limit its definition to platforms that economists would recognize as "two sided" in the relevant respect, the majority carves out a much broader exception to the ordinary antitrust rules than the academic articles it relies on could possibly support.

Even as limited to the narrower definition that economists use, however, the academic articles the majority cites do not support the majority's flat rule that firms operating "two-sided transaction platforms" should always be treated as part of a single market for all antitrust purposes. *Ante, at ___ - ___, 201 L. Ed. 2d, at 692-693*. Rather, the academics explain that for market-definition purposes, "[i]n some cases, the fact that a business can be thought of as two-sided may be irrelevant," including because "nothing in the analysis of the practices [at issue] really hinges on the linkages between the demands of participating groups." Evans & Schmalensee, Markets With Two-Sided Platforms, 1 Issues in Competition L. & Pol'y 667, 689 **[***61]** (2008). "In other cases, the fact that a business is two-sided will prove important both by **[*2301]** identifying the real dimensions of competition and focusing on sources of constraints." *Ibid.* That flexible approach, however, is precisely the one the District Court followed in this case, by considering the effects of "[t]he **[**709]** two-sided nature of the . . . card industry" throughout its analysis. *88 F. Supp. 3d, at 155*.

Neither the majority nor the academic articles it cites offer any explanation for why the features of a "two-sided transaction platform" justify always treating it as a single antitrust market, rather than accounting for its economic features in other ways, as the District Court did. The article that the majority repeatedly quotes as saying that "'[i]n two-sided transaction markets, only one market should be defined,'" *ante, at ___ - ___, 201 L. Ed. 2d, at 693* (quoting Filistrucchi 302), justifies that conclusion only for purposes of assessing the effects of a merger. In such a case, the article explains, "[e]veryone would probably agree that a payment card company such as American Express is either in the relevant market on both sides or on neither side . . . . The analysis of a merger between two payment card platforms should **[***62]** thus consider . . . both sides of the market." *Id.,* at 301. In a merger case this makes sense, but is also meaningless, because, whether there is one market or two, a reviewing court will consider both sides, because it must examine the effects of the merger in each affected market and submarket. See *Brown Shoe Co., 370 U. S., at 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510*. As for a nonmerger case, the article offers only *United States* v. *Grinnell* as a justification, see Filistrucchi 303, and as I have already explained, *supra, at ___ - ___, 201 L. Ed. 2d, at 706-707*, *Grinnell* does not support this proposition.

E

Put all of those substantial problems with the majority's reasoning aside, though. Even if the majority were right to say that market definition was relevant, and even if the majority were right to further say that the District Court should have defined the market in this case to include shopper-related services as well as merchant-related services, that *still* would not justify the majority in affirming the Court of Appeals. That is because, as the majority is forced to admit, the plaintiffs *made* the factual showing that the majority thinks is required. See *ante, at ___, 201 L. Ed. 2d, at 694*.

Recall why it is that the majority says that market definition matters: because if the relevant market includes both merchant-related services **[***63]** and card-related services, then the plaintiffs had the burden to show that as a result of the nondiscrimination provisions, "the price of credit-card transactions"—considering both fees charged to merchants and rewards paid to cardholders—"was higher than the price one would expect to find in a competitive market." *Ante, at ___, 201 L. Ed. 2d, at 694*. This mirrors the Court of Appeals' holding that the Government had to show that the "nondiscrimination provisions" had "made *all* [American Express] customers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." *838 F. 3d, at 205*.

The problem with this reasoning, aside from it being wrong, is that the majority admits that the plaintiffs *did* show this: they "offer[ed] evidence" that American Express "increased the percentage of the purchase price that it charges merchants . . . and that this increase was not entirely spent on cardholder rewards." *Ante, ___, 201 L. Ed. 2d, at 695* (citing *88 F. Supp. 3d,* ***[**710]*** *at 195-197, 215)*. Indeed, the plaintiffs did not merely "offer evidence" of this—they persuaded the District Court, which made an unchallenged factual finding that the merchant price increases that resulted from the nondiscrimination provisions "were not wholly offset **[*2302]** by additional rewards expenditures **[***64]** or otherwise passed through to cardholders, and *resulted in a higher net price.*" *Id., at 215* (emphasis added).

In the face of this problem, the majority retreats to saying that even net price increases do not matter after all, absent a showing of lower output, because if output is increasing, "'rising prices are equally consistent with growing product demand.'" *Ante, at ___, 201 L. Ed. 2d, at 695* (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U. S. 209, 237, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*. This argument, unlike the price argument, has nothing to do with the credit-card market being a "two-sided transaction platform," so if this is the basis for the majority's holding, then nearly all of the opinion is dicta. The argument is also wrong. It is true as an economic matter that a firm exercises market power by restricting output in order to raise prices. But the relevant restriction of output is as compared with a hypothetical world in which the restraint was not present and prices were lower. The fact that credit-card use in general has grown over the last decade, as the majority says, see *ante, at ___ - ___, 201 L. Ed. 2d, at 694-695*, says nothing about whether such use would have grown more or less without the nondiscrimination provisions. And because the relevant question is a comparison between reality and a hypothetical state of **[***65]** affairs, to require actual proof of reduced output is often to require the impossible—tantamount to saying that the *Sherman Act* does not apply at all.

In any event, there are features of the credit-card market that may tend to limit the usual relationship between price and output. In particular, merchants generally spread the costs of credit-card acceptance across all their customers (whatever payment method they may use), while the benefits of card use go only to the cardholders. See, *e.g., 88 F. Supp. 3d, at 216*; Brief for John M. Connor et al. as *Amici Curiae* 34-35. Thus, higher credit-card merchant fees may have only a limited effect on credit-card transaction volume, even as they disrupt the marketplace by extracting anticompetitive profits.

IV

A

For the reasons I have stated, the Second Circuit was wrong to lump together the two different services sold, *at step 1.* But I recognize that the Court of Appeals has not yet considered whether the relationship between the two services might make a difference at steps 2 and 3. That is to say, American Express might wish to argue that the nondiscrimination provisions, while anticompetitive in respect to merchant-related services, nonetheless have an adequate offsetting **[***66]** procompetitive benefit in respect to its shopper-related services. I believe that American Express should have an opportunity to ask the Court of Appeals to consider that matter.

American Express might face an uphill battle. A *Sherman Act §1* defendant can rarely, if ever, show that a pro-competitive benefit in the market **[**711]** for one product offsets an anticompetitive harm in the market for another. In *United States v. Topco Associates, Inc., 405 U. S. 596, 611, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*, this Court wrote:

> "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this . . . is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking."

[*2303] American Express, pointing to vertical price-fixing cases like our decision in *Leegin*, argues that comparing competition-related pros and cons is more common than I have just suggested. See *551 U. S., at 889-892, 127 S. Ct. 2705, 168 L. Ed. 2d 623*. But *Leegin* held only that vertical price fixing is subject to the "rule of reason" instead of being *per se* unlawful; the "rule of reason" still applies to vertical agreements just as it applies to horizontal agreements. **[***67]** See *id., at 898-899, 127 S. Ct. 2705, 168 L. Ed. 2d 623*.

Moreover, the procompetitive justifications for vertical price-fixing agreements are not apparently applicable to the distinct types of restraints at issue in this case. A vertically imposed price-fixing agreement typically involves a manufacturer controlling the terms of sale for its own product. A television-set manufacturer, for example, will insist that its dealers not cut prices for the manufacturer's own televisions below a particular level. Why might a manufacturer want its dealers to refrain from price competition in the manufacturer's own products? Perhaps because, for example, the manufacturer wants to encourage the dealers to develop the market for the manufacturer's brand, thereby increasing *interbrand* competition for the same ultimate product, namely a television set. This type of reasoning does not appear to apply to American Express' nondiscrimination provisions, which seek to control the terms on which merchants accept *other brands'* cards, not merely American Express' own.

Regardless, I would not now hold that an agreement such as the one before us can never be justified by procompetitive benefits of some kind. But the Court of Appeals would properly consider procompetitive **[***68]** justifications not at step 1, but at steps 2 and 3 of the "rule of reason" inquiry. American Express would need to show just how this particular anticompetitive merchant-related agreement has procompetitive benefits in the shopper-related market. In doing so, American Express would need to overcome the District Court's factual findings that the agreement had no such effects. See *88 F. Supp. 3d, at 224-238*.

B

The majority charts a different path. Notwithstanding its purported acceptance of the three-step, burden-shifting framework I have described, *ante, at ____ - ____, 201 L. Ed. 2d, at 690-691*, the majority addresses American Express' procompetitive justifications now, at step 1 of the analysis, see *ante, at ____ - ____, 201 L. Ed. 2d, at 695-696*. And in doing so, the majority inexplicably ignores the District Court's factual findings on the subject.

[712]** The majority reasons that the challenged nondiscrimination provisions "stem negative externalities in the credit-card market and promote interbrand competition." *Ante, at ____, 201 L. Ed. 2d, at 696*. The "negative externality" the majority has in mind is this: If one merchant persuades a shopper not to use his American Express card at that merchant's store, that shopper becomes less likely to use his American Express card at other merchants' stores. *Ibid* ***[***69]*** . The majority worries that this "endangers the viability of the entire [American Express] network," *ibid.*, but if so that is simply a consequence of American Express' merchant fees being higher than a competitive market will support. "The antitrust laws were enacted for 'the protection of *competition,* not *competitors.*'" *Atlantic Richfield Co. v. USA Petroleum Co., 495 U. S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. If American Express' merchant fees are so high that merchants successfully induce their customers to use other cards, American Express can remedy that problem by lowering those fees or by spending more on cardholder rewards so **[*2304]** that cardholders decline such requests. What it may not do is demand contractual protection from price competition.

In any event, the majority ignores the fact that the District Court, in addition to saying what I have just said, also rejected this argument on independent factual grounds. It explained that American Express "presented no expert testimony, financial analysis, or other direct evidence establishing that without its [nondiscrimination provisions] it will, in fact, be unable to adapt its business to a more competitive market." *88 F. Supp. 3d, at 231*. It further explained that the testimony that was provided on the topic "was notably inconsistent," with **[***70]** some of American Express' witnesses saying only that invalidation of the provisions "would require American Express to adapt its current business model." *Ibid.* After an extensive discussion of the record, the District Court found that "American Express possesses the flexibility and expertise necessary to adapt its business model to suit a market in which it is required to compete on both the cardholder and merchant sides of the [credit-card] platform." *Id., at 231-232*. The majority evidently rejects these factual findings, even though no one has challenged them as clearly erroneous.

Similarly, the majority refers to the nondiscrimination provisions as preventing "free riding" on American Express' "investments in rewards" for cardholders. *Ante, at ___ - ___, 201 L. Ed. 2d, at 696*; see also *ante, at ___, 201 L. Ed. 2d, at 688* (describing steering in terms suggestive of free riding). But as the District Court explained, "[p]lainly . . . investments tied to card use (such as Membership Rewards points, purchase protection, and the like) are not subject to free-riding, since the network does not incur any cost if the cardholder is successfully steered away from using his or her American Express card." *88 F. Supp. 3d, at 237*. This, I should think, is an unassailable conclusion: **[***71]** American Express pays rewards to cardholders only for transactions in which cardholders use their American Express cards, so if a steering effort succeeds, no rewards are paid. As for concerns about free riding on American Express' fixed expenses, including its investments in its brand, the District **[**713]** Court acknowledged that free-riding was in theory possible, but explained that American Express "ma[de] no effort to identify the fixed expenses to which its experts referred or to explain how they are subject to free riding." *Ibid.*; see also *id., at 238* (American Express' own data showed "that the network's ability to confer a credentialing benefit trails that of its competitors, casting doubt on whether there is in fact any particular benefit associated with accepting [American Express] that is subject to free riding"). The majority does not even acknowledge, much less reject, these factual findings, despite coming to the contrary conclusion.

Finally, the majority reasons that the nondiscrimination provisions "do not prevent Visa, MasterCard, or Discover from competing against [American Express] by offering lower merchant fees or promoting their broader merchant acceptance." *Ante, at ___, 201 L. Ed. 2d, at 696*. But again, **[***72]** the District Court's factual findings were to the contrary. As I laid out above, the District Court found that the nondiscrimination provisions *in fact did prevent* Discover from pursuing a low-merchant-fee business model, by "den[ying] merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." *88 F. Supp. 3d, at 214*; see *supra, at ___, 201 L. Ed. 2d, at 700*. The majority's statements that the nondiscrimination provisions are procompetitive are directly contradicted by this and other factual findings.

***

[*2305] For the reasons I have explained, the majority's decision in this case is contrary to basic principles of ***antitrust law***, and it ignores and contradicts the District Court's detailed factual findings, which were based on an extensive trial record. I respectfully dissent.

References

15 U.S.C.S. § 1

1 Antitrust Laws and Trade Regulation §§1.02, 2.02 (Matthew Bender 2d ed.)

L Ed Digest, Evidence § 343.5; Restraints of Trade, Monopolies, and Unfair Trade Practices §§14, 19

L Ed Index, Letters of Credit and Credit Cards; Sherman Act

What constitutes vertical price fixing in violation of *§ 1* of Sherman Act (*15 U.S.C.S. § 1*)--Supreme Court cases. *168 L. Ed. 2d 847*.

Supreme Court's views as to what constitutes per se illegal “price fixing” under the Sherman Act (**[***73]** *15 U.S.C.S. §§1 et seq.*). *64 L. Ed. 2d 997*.

Pro Slab v. Argos United States Corp.

United States District Court for the District of South Carolina, Charleston Division

June 27, 2018, Decided; June 28, 2018, Filed

Civil Action No. 2:17-3185-BHH

Reporter
2018 U.S. Dist. LEXIS 237916 *

Pro Slab, Inc. and Bremer Construction Management, Inc., on behalf of themselves and all others similarly situated, Plaintiffs, v. ARGOS USA CORP., ARGOS NORTH AMERICA CORP., ARGOS USA LLC, ARGOS READY MIX LLC, ARGOS READY MIX (CAROLINAS) CORP., LAFARGE NORTH AMERICA INC., LAFARGE BUILDING MATERIALS INC., COASTAL CONCRETE COMPANY, INC., COASTAL CONCRETE SOUTHEAST II, LLC, THOMAS CONCRETE, INC., THOMAS CONCRETE OF GEORGIA, INC., THOMAS CONCRETE OF SOUTH CAROLINA, INC., EVANS CONCRETE HOLDINGS, INC., EVANS CONCRETE, L.L.C., ELITE CONCRETE HOLDINGS, LLC, ELITE CONCRETE, LLC, ELITE CONCRETE OF RICHMOND HILL, LLC, and ELITE CONCRETE OF SC, LLC, Defendants.

Subsequent History: Motion granted by *Pro Slab, Inc. v. Argos USA Corp., 2018 U.S. Dist. LEXIS 224133, 2018 WL 6985010 (D.S.C., Dec. 3, 2018)*

Stay granted by, in part, Stay denied by, in part *Pro Slab, Inc. v. USA LLC, 2019 U.S. Dist. LEXIS 242006, 2019 WL 13148033 (D.S.C., Dec. 5, 2019)*

Dismissed by *Pro Slab, Inc. v. Argos USA, LLC, 2021 U.S. Dist. LEXIS 256363, 2021 WL 7366656 (D.S.C., Mar. 24, 2021)*

Core Terms

Concrete, amended complaint, entities, Plaintiffs', affiliated, factual allegations, motion to dismiss, allegations, egos, legal conclusion, Antitrust, alleged conspiracy, Defendants', corporate entity, involvement, conspiracy, meetings, offers, corporate parent, subsidiaries, ready-mix, Coastal, agrees

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For Thomas Concrete of South Carolina Inc, Defendant: Thomas Richmond McPherson III, LEAD ATTORNEY, McGuireWoods LLP (Char NC), Charlotte, NC; Gregory R Hanthorn, LEAD ATTORNEY, PRO HAC VICE, Jones Day, Atlanta, GA; Samuel W Outten, Lindsay Livingston Builder, LEAD ATTORNEYS, Nelson Mullins Riley and Scarborough (G), Greenville, SC; Geoffrey Douglas Oliver, LEAD ATTORNEY, PRO HAC VICE, Jones Day, Washington, DC.

For Bremer Construction Management Inc, Plaintiff: Renae D Steiner, Heins Mills and Olson PLC, Minneapolis, MN; Vincent J Esades, LEAD ATTORNEY, PRO HAC VICE, Heins Mills & Olson PLC, Minneapolis, MN; Chad A McGowan, LEAD ATTORNEY, McGowan Hood Felder and Johnson, Rock Hill, SC; Gregory Paul Hansel, Randall B Weill, Michael Sanford Smith, LEAD ATTORNEYS, PRO HAC VICE, Preti Flaherty Beliveau and Pachios LLP, Portland, ME; Scott D Gilchrist, Irwin B Levin, Richard E Shevitz, Vess A Miller, LEAD ATTORNEYS, PRO HAC VICE, Cohen and Malad LLP, Indianapolis, IN; Russell Thomas Burke, LEAD ATTORNEY, McGowan Hood and Felder LLC, Columbia, SC; Frederick S Bergen, LEAD ATTORNEY, PRO HAC VICE, **[*4]** Bergen and Bergen PC, Savannah, GA; Daniel Richard Karon, LEAD ATTORNEY, PRO HAC VICE, Karon LLC, Cleveland, OH; Jessica N Servais, LEAD ATTORNEY, PRO HAC VICE, Lockridge Grindal and Nauen PLLP, Minneapolis, MN; Karl D Twenge, LEAD ATTORNEY, Twenge and Twombley, Beaufort, SC.

For Evans Concrete LLC, Defendant: Kathryn Susan Mansfield, F Cordes Ford IV, LEAD ATTORNEYS, Bethany Lynne Edmondson, Womble Bond Dickinson US LLP, Charleston, SC; Thomas Richmond McPherson III, LEAD ATTORNEY, McGuireWoods LLP (Char NC), Charlotte, NC; Jeffrey DeLoach, LEAD ATTORNEY, PRO HAC VICE, Epps Holloway DeLoach and Hoipkemier LLC, Watkinsville, GA.

For Forrest Concrete LLC, Plaintiff: Russell Thomas Burke, McGowan Hood and Felder LLC, Columbia, SC.

For Hurley Cook III, also known as, Defendant: Peter Deppish Muller, LEAD ATTORNEY, Goodman McGuffey LLP, Savannah, GA; William James Flynn, LEAD ATTORNEY, Goodman McGuffey LLP, Columbia, SC.

For Hurley Cook III, Trey Cook, Defendant: William James Flynn, LEAD ATTORNEY, Goodman McGuffey LLP, Columbia, SC; Peter Deppish Muller, LEAD ATTORNEY, Goodman McGuffey LLP, Savannah, GA.

For Elite Concrete Holdings LLC, Elite Concrete of SC LLC, Defendants: Katrina L Hodges, **[*5]** LEAD ATTORNEY, PRO HAC VICE, Robert M Brennan, Parker Hudson Rainer and Dobbs, Atlanta, GA; Matthew M McCoy, LEAD ATTORNEY, Catherine Marie Bolger, McCorkle and Johnson, Savannah, GA.

For Argos Ready-mix LLC, Defendant: Thomas Richmond McPherson III, LEAD ATTORNEY, McGuireWoods LLP (Char NC), Charlotte, NC; Howard Feller, Casey Erin Lucier, Johnny Brent Justus, Nicholas J Giles, LEAD ATTORNEYS, PRO HAC VICE, McGuireWoods LLP (Richmond), Richmond, VA.

For Coastal Concrete Southeast II LLC, Defendant: Thomas Richmond McPherson III, LEAD ATTORNEY, McGuireWoods LLP (Char NC), Charlotte, NC; Allan Charles Galis, LEAD ATTORNEY, PRO HAC VICE, David Michael Burkoff, LEAD ATTORNEY, Hunter Maclean Exley and Dunn PC, Savannah, GA.

For Evans Concrete Holdings Inc, Defendant: Jeffrey DeLoach, Epps Holloway DeLoach and Hoipkemier LLC, Watkinsville, GA; Kathryn Susan Mansfield, F Cordes Ford IV, LEAD ATTORNEYS, Womble Bond Dickinson US LLP, Charleston, SC.

For Thomas Concrete Inc, Defendant: Thomas Richmond McPherson III, LEAD ATTORNEY, McGuireWoods LLP (Char NC), Charlotte, NC; Samuel W Outten, Lindsay Livingston Builder, LEAD ATTORNEYS, Nelson Mullins Riley and Scarborough (G), Greenville, SC; Geoffrey **[*6]** Douglas Oliver, LEAD ATTORNEY, PRO HAC VICE, Jones Day, Washington, DC; Gregory R Hanthorn, LEAD ATTORNEY, PRO HAC VICE, Jones Day, Atlanta, GA.

For Elite Concrete LLC, Defendant: Robert M Brennan, Justin P Gunter, LEAD ATTORNEYS, PRO HAC VICE, Katrina L Hodges, Parker Hudson Rainer and Dobbs, Atlanta, GA; Thomas Richmond McPherson III, LEAD ATTORNEY, McGuireWoods LLP (Char NC), Charlotte, NC; Matthew M McCoy, LEAD ATTORNEY, Catherine Marie Bolger, McCorkle and Johnson, Savannah, GA.

For Lafarge Building Materials Inc, Defendant: Robert H Hood, Robert H Hood Jr, LEAD ATTORNEYS, Hood Law Firm, Charleston, SC; Jennifer L Greenblatt, Laura A Sexton, Tarek Ismail, LEAD ATTORNEYS, PRO HAC VICE, Goldman Ismail Tomaselli Brennan and Baum LLP, Chicago, IL.

For Argos USA Corp, Argos USA LLC, Argos Ready Mix (Carolinas) Corp, Defendants: Thomas Richmond McPherson III, McGuireWoods LLP (Char NC), Charlotte, NC.

For Troy D Baird, Elite Concrete of Richmond Hill LLC, Defendants: Matthew M McCoy, LEAD ATTORNEY, McCorkle and Johnson, Savannah, GA.

Judges: Honorable Bruce Howe Hendricks, United States District Judge.

Opinion by: Bruce Howe Hendricks

Opinion

ORDER

Plaintiffs Pro Slab, Inc. and Bremer Construction Management, Inc. ("Plaintiffs") **[*7]** initially filed this proposed class action on November 22, 2017, alleging a claim under *§ 1* of the Sherman Antitrust Act, *15 U.S.C. §§ 1-7*, arising from Defendants' alleged price fixing in the ready-mix concrete market in coastal South Carolina and Georgia from at least January 1, 2012, through the present. On January 15, 2018, Plaintiffs filed an amended complaint alleging that Defendants, "who are the largest Ready-Mix Concrete producers in the Savannah, Georgia to Charleston, South Carolina region," violated *§ 1* of the Sherman Antitrust Act by conspiring to fix the prices of ready-mix concrete, to rig bids for certain projects, and/or to allocate certain territories and customers amongst themselves. (ECF No. 48 ¶ 1.) Plaintiffs allege that the 18 named Defendants conspired with one another to restrain trade in four distinct markets: Savannah, Georgia; Statesboro, Georgia; Hilton Head/Bluffton, South Carolina; and Charleston, South Carolina, "from at least January 1, 2010, through the present." (*Id.*) As purchasers of ready-mix concrete from Defendants, Plaintiffs allege that they paid artificially high prices as a result of the alleged conspiracy.

After Plaintiffs filed their first amended complaint, several **[*8]** Defendants filed a joint motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* (ECF No. 78). Specifically, Defendants Argos USA Corp., Argos North America Corp., Argos USA LLC, Argos Ready Mix LLC, Argos Ready Mix (Carolinas) Corp., Coastal Concrete Southeast II LLC, Thomas Concrete, Inc., Thomas Concrete of Georgia, Inc., Thomas Concrete of South Carolina Inc., Evans Concrete Holdings, Inc., Evans Concrete, LLC, Elite Concrete Holdings, Inc., Elite Concrete, LLC, and Elite Concrete of SC, LLC assert that the amended complaint suffers from three fundamental defects: (1) it does not identify the role allegedly played by each individual Defendant; (2) it offers no factual allegations to support the alleged duration of the purported conspiracy; and (3) it offers no factual allegations to support the inclusion of the Charleston market area.

In addition to the joint motion to dismiss, various Defendants filed separate motions to dismiss. First, Defendants Evans Concrete Holdings, Inc., and Evans Concrete LLC filed a motion to dismiss for lack of personal jurisdiction and improper venue pursuant to *Rules 12(b)(2)* and *(3) of the Federal Rules of Civil Procedure* (ECF No. 77). Next, Defendants Thomas Concrete, Inc., Thomas Concrete of Georgia, Inc., and Thomas Concrete **[*9]** of South Carolina, Inc. filed a motion to dismiss pursuant to *Rule 12(b)(6)* (ECF No. 80), asserting that Plaintiffs fail to state a plausible claim of successor liability. Also, Defendants Elite Concrete, LLC, Elite Concrete Holdings, LLC, and Elite Concrete of SC, LLC filed a motion to dismiss pursuant to *Rule 12(b)(6)* (ECF No. 81), alleging that Plaintiffs' amended complaint is barred by the statute of limitations and that Plaintiffs' allegations of fraudulent concealment are insufficient to toll the limitations period. Defendant Elite Concrete of Richmond Hill, LLC filed a motion to dismiss and to adopt the joint motion to dismiss filed at ECF No. 78 and the other Elite Defendants' motion to dismiss filed at ECF No. 81 (ECF No. 96). Finally, Defendants Lafarge North America Inc. and Lafarge Building Materials Inc., filed a separate motion to dismiss pursuant to *Rules 12(b)(1)* and *(6)* (ECF No. 98), asserting that Plaintiffs fail to state a claim against the Lafarge entities; that the claim is barred by the statute of limitations; and that Plaintiffs lack standing to assert their claim against the Lafarge entities.[1]

STANDARD OF REVIEW

Under *Federal Rule of Civil Procedure 8(a)(2)*, a pleading must contain a "short and plain statement of the claim showing that the **[*10]** pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. As the Supreme Court held in *Bell Atl. Corp. v. Twombly*, the pleading standard set forth in *Rule 8* "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Thus, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement." *Id.* (quoting *Twombly, 550 U.S. at 557*).

A motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* examines the legal sufficiency of the facts alleged on the face of a plaintiff's complaint. *Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999)*. To survive a *Rule 12(b)(6)* motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. The "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). A claim is facially plausible when the factual content allows the court to reasonably infer that the defendant is liable for the misconduct alleged. *Id.* When considering a motion to dismiss, the court must accept as true all of the factual allegations contained in the **[*11]** complaint. *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*.

ANALYSIS

In the joint motion to dismiss (ECF No. 78) and in the motion to dismiss filed by the Lafarge entities (ECF No. 98), all Defendants raise the critical, initial question of whether Plaintiffs' amended complaint fails to allege facts to support Defendants' individual involvement. Specifically, Defendants assert that the Court should dismiss Plaintiffs' amended complaint because it impermissibly lumps together Defendants by corporate families and ascribes liability *to groups rather than to individual entities*. In support of this argument, Defendants rely on the Fourth Circuit Court of Appeals' decision in *SD3, LLC v. Black and Decker (U.S.) Inc.*, where the court affirmed the district court's dismissal of certain corporate parents and subsidiaries because the complaint alleged no facts suggesting corporate unity. *801 F.3d 412 (4th Cir. 2015)*. In *SD3*, the court stated:

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[1] In addition, all Defendants filed a joint motion to stay discovery pending the Court's resolution of the motions to dismiss. (*See* ECF No. 125.) Based on the Court's findings herein, the motion to stay is moot.

> A plaintiff in a *§ 1* case cannot assemble some collection of defendants and then make vague, non-specific allegations against all of them as a group. At trial, a *§ 1* plaintiff will be required to make a "factual showing that each defendant conspired in violation of the antitrust laws." *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 234 (2d Cir. 1999)*; *cf.* *United States v. Foley, 598 F.2d 1323, 1336 (4th Cir.1979)* (examining whether a jury charge in a criminal **[*12]** antitrust case "require[d] a sufficient involvement by each defendant"). Thus, the complaint must forecast that factual showing, and if it fails to allege particular facts against a particular defendant, then the defendant must be dismissed. In other words, the complaint must "specify how these defendants [were] involved in the alleged conspiracy," without relying on "indeterminate assertions" against all "defendants." *In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 905 (6th Cir. 2009)*; *see also* *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 436 (6th Cir. 2008)*; *In re Elevator Antitrust Litig., 502 F.3d 47, 50-51 (2d Cir. 2007)*.

Id. at 422-23.

In *SD3*, the Fourth Circuit Court of Appeals determined that the plaintiff "nakedly alleges that all of the corporate subsidiaries are 'dominated by, and [are] alter ego[s] of,' these corporate parents," but that such an allegation "offers only a legal conclusion, and [the plaintiff] *has alleged no facts suggesting the kind of unity of interests that we usually require a party to plead before permitting them to advance an alter ego theory*." *Id.* (citing *C.F. Trust, Inc. v. First Flight Ltd. P'ship, 306 F.3d 126, 134 (4th Cir. 2002))* (emphasis added). The court stated: "The fact that two separate legal entities may have a corporate affiliation does not alter [the] pleading requirement to separately identify each defendant's involvement in the conspiracy." *Id. at 423* (quoting *In re Aluminum Warehousing Antitrust Litig., No. 13-md-2481 (KBF), 2015 U.S. Dist. LEXIS 26412, 2015 WL 1344429, at *2 (S.D.N.Y. March 4, 2015)*) (internal **[*13]** quotation marks omitted). Ultimately, the Fourth Circuit agreed with the district court that the complaint failed to allege facts pertaining to certain corporate parents and subsidiaries, stating that "*[a]ntitrust law doesn't recognize guilt by mere association, imputing corporate liability to any affiliate company unlucky enough to be a bystander to its sister company's alleged misdeeds*." *Id.* (emphasis added)

Here, Defendants assert that Plaintiffs' amended complaint adopts precisely this rejected approach. Defendants state: "Plaintiffs have sued 18 individual Defendants, yet nowhere in the Amended Complaint's more than 200 paragraphs is there a single allegation that identifies an alleged action taken by or on behalf of an individual entity." (ECF No. 78-1 at 11.) Instead, as Defendants point out, Plaintiffs' amended complaint groups Defendants according to their alleged corporate affiliation, for example, grouping the "LaFarge Defendants" collectively as "LaFarge" or the "Argos Defendants" collectively as "Argos." (*See* Am. Compl., ECF No. 48 ¶¶ 11-36.) As to each particular group of corporate Defendants, Plaintiffs then simply allege that the entities "are actual agents, apparent **[*14]** agents and/or alter egos of one another and operate and identify themselves as one company." (*Id.* ¶¶ 13, 19, 23, 27, 31, and 36.) In other words, as to the "LaFarge" Defendants, for example, Plaintiffs state: "Defendants LaFarge North America Inc. and LaFarge Building Materials Inc. are actual agents, apparent agents and/or alter egos of one another and operate and identify themselves as one company (herein collectively 'LaFarge')."[2] (*Id.* ¶ 13.) Defendants assert that these allegations offer only bald legal conclusions and are insufficient in light of the Fourth Circuit's decision in *SD3* and other cases where courts have dismissed antitrust claims against defendants that have been indiscriminately lumped together into corporate families.

In response, Plaintiffs assert that the amended complaint's allegations exceed the minimal requirements set forth in *Twombly*. Plaintiffs state:

> Given the detailed allegations concerning individuals acting on behalf of Defendants, FAC ¶¶ 112-153, Defendants themselves are in a better position than Plaintiffs to know the relationship between affiliated corporate entities and the conduct of these individuals. Plaintiffs do not know the specific interrelationships **[*15]** and operations of the affiliated corporate Defendants, but they do know that each was

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[2] At times Plaintiffs also appear to refer to the Lafarge entities as "LaFarge Cement" and/or "LaFarge Concrete." (*See* ECF No. 48 ¶¶ 114 and 116.)

> registered to conduct business or had operations (or both), in South Carolina or Georgia (or both) where the conspiracy took place.
>
> In addition, Plaintiffs have pled the role of the named Defendants in far more detail than required. Defendants comprise four conspiring suppliers of Ready Mix Concrete (with some change in ownership during the conspiracy) and are made up of related corporate entities that 'are actual agents or apparent agents of one another *and operate and identify themselves as one company*": LaFarge Concrete, which was purchased by Argos Concrete ("LaFarge/Argos"); Evans Concrete ("Evans"); Elite Concrete ("Elite"); and Coastal Concrete, which was purchased by Thomas Concrete ("Coastal/Thomas"). *Id.* ¶¶ 13, 19, 23, 27, 31 and 36 (emphasis added). Plaintiffs' grouping of corporate Defendants under a single heading is not simply "shorthand;" it is how Defendants operated and identified themselves.

(ECF No. 104 at 9-10.)

According to Plaintiffs, the amended complaint identifies the individuals who engaged in specific conduct on behalf of Defendants, including (1) Greg Melton, Kim Pedrick, **[*16]** and Andy Stankwytch, acting on behalf of LaFarge and Argos, (2) Greg Melton, Troy Baird, and Trey Cook, acting on behalf of Elite, (3) Tim Coughlin and Tim Mahoney, acting on behalf of Coastal, and (4) Tommy Strickland and Bo Strickland, acting on behalf of Evans. Plaintiffs refer to paragraph 37 of the amended complaint, which states that "[t]he acts alleged to have been done by Defendants and their co-conspirators were authorized, ordered and performed by their officers, directors, agents, employees or representatives while engaged in the management, direction, control or transaction of Defendants' business affairs." (ECF No. 48 ¶ 37.) Plaintiffs further assert that the named individuals were employees of Defendants and that several of them own the named Defendants, stating: "Based on these allegations, the Court *may infer* that these individuals acted on behalf of the entities they owned." (ECF No. 104 at 11 (emphasis added).)

In reply, Defendants assert that Plaintiffs are improperly attempting to shift the burden of alleging sufficient factual allegations to them and that the cases cited by Plaintiffs are inapposite. (ECF No. 104 at 9.) After review, the Court agrees with Defendants. **[*17]** In footnote 1 of their response, Plaintiffs cite *Fields v. Norfolk & S. Ry. Co.*, where the court stated: "Defendant . . . given its superior knowledge of the relationship and business activities of north Norfolk Southern Railway Company and Norfolk Southern Corporation, should have known the party Plaintiffs intended to sue." *924 F. Supp. 2d 702, 708 (S.D. W.Va. 2012)*. However, as Defendants point out, *Fields* did not involve an alleged conspiracy and instead was a case where the plaintiffs wrongfully listed the name of Defendant Norfolk Southern Railway Company as "Norfolk and Southern Railway Company d.b.a. Norfolk and Southern Corporation." The court held that the defendant would not be prejudiced if the plaintiffs were allowed to amend the complaint to correct the name because the defendant had notice of the suit and should have known the party that the plaintiff intended to sue. The facts of *Fields* are entirely distinguishable from the instant case, where Defendants allege a fundamental pleading deficiency in Plaintiffs' amended complaint.

Likewise, the Court agrees with Defendants that Plaintiffs' reference to *In re Catfish Antitrust Litigation* is unavailing. *826 F. Supp. 1019 (N.D. Miss. 1993)*. In *Catfish*, the court stated that "in cases which implicate **[*18]** corporate or business fraud, plaintiffs cannot be expected to have knowledge of all the details which undergird the alleged fraudulent scheme. . . . Especially in the early stages of litigation where pleadings are filed before the commencement of discovery, courts are counseled to exercise caution in granting a motion to dismiss based upon *Rule 9(b)* where the facts underlying the claims are within the defendant's control." *Id. at 1029-30*. Here, as Defendants point out, *Catfish* predates the Supreme Court's decision in *Twombly*, and *Catfish* interprets the pleading standard under *Federal Rule of Civil Procedure 9(b)*, which is not at issue in this case. Ultimately, the Court agrees with Defendants that these decisions do nothing to alter the Fourth Circuit's conclusion in *SD3* that "[t]he fact that two separate legal entities may have a corporate affiliation does not alter [the] pleading requirement to separately identify *each defendant's* involvement in the conspiracy." *801 F.3d at 423* (internal quotation marks omitted) (emphasis added).

Plaintiffs assert that they *have* alleged the specific involvement of each Defendant by alleging that the affiliated corporations "operate[d] and identif[ied] themselves as one company, and by alleging that the named individuals **[*19]** and others "participated in meetings, communications and other conduct on behalf of these 'companies' in order to fix the price of ready-mix concrete and enforce their agreements." (ECF No. 104 at 13.) However, in their response Plaintiffs assert that they do not know the interrelationships of the corporate Defendants, so it would appear that any allegation that the individual entities operated as one company "is necessarily pure conjecture." (*See* ECF No. 113 at 8.) Even leaving that issue aside, however, after review of the amended complaint, the Court agrees with Defendants that Plaintiffs offer *no factual allegations* to support the naked assertion that the various corporate entities "are actual agents, apparent agents and/or alter egos of one another and operate and identify themselves as one company." As the Fourth Circuit determined in *SD3*, Plaintiffs "nakedly allege[ ] that all of the corporate subsidiaries are 'dominated by, and [are] alter ego[s] of,' these corporate parents," but such an allegation "offers only a legal conclusion, and [Plaintiffs have] *alleged no facts suggesting the kind of unity of interests that we usually require a party to plead before permitting them* ***[*20]*** *to advance an alter ego theory*." *801 F.3d at 423* (citing *C.F. Trust, Inc. v. First Flight Ltd. P'ship, 306 F.3d 126, 134 (4th Cir. 2002))* (emphasis added).

In support of their assertion that the first amended complaint contains sufficient factual allegations, Plaintiffs cite *Connor v. Honeywell Internat'l Inc., No. 2:12-1421-CWHBHH, 2012 U.S. Dist. LEXIS 181571, 2012 WL 6135193 (D.S.C. Nov. 13, 2013)*; however, *Connor* is distinguishable from this case. In *Connor*, affiliated corporate defendants sought dismissal of the plaintiff's claims under the Telephone Consumer Protection Act, *47 U.S.C. § 227*, by claiming that it was not clear which defendant or defendants were alleged to have committed which wrong. The court stated that it was "initially inclined to allow the plaintiff an opportunity to amend the complaint to clarify which conduct was attributable to which defendant." *Id. 2012 U.S. Dist. LEXIS 181571, [WL] at *1*. However, after the plaintiff represented that it was his view that the defendants were acting in concert to make the calls in question, the court found the complaint adequate. The court stated: "*The Complaint bears witness. In fact, he very precisely avers that on both calls the representative identified as being associate with "ISI/Honeywell*." *Id.* (emphasis added). Thus, the factual allegations in the plaintiffs' complaint in *Connor* supported the assertion that the defendants acted together. In **[*21]** contrast, here, Plaintiffs' amended complaint merely alleges the legal conclusion that the affiliated corporate entities were agents and/or alter egos and operated as one company, but the amended complaint contains *no factual allegations* to support that legal conclusion.

Plaintiffs also rely on *In re Cathode Ray Tube (CRT) Antitrust Litigation, 738 F. Supp. 2d 1011, (N.D. Cal. 2010)*, but again, the Court finds Plaintiffs' reliance on this case misplaced. Plaintiffs state that in *Cathode Ray Tube*, the court denied a motion to dismiss based on the plaintiffs' alleged failure to adequately plead claims against each corporate defendant, and Plaintiffs point out that the court noted that plaintiffs in antitrust actions are not required to "plead detailed, defendant-by-defendant allegations; instead plaintiffs are only required 'to make allegations that plausibly suggest that each Defendant participated in the alleged conspiracy.'" *Id. at 1019* (citing *In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1185 (N.D. Cal. 2009))*. Here again, however, the court in *Cathode Ray Tube* also noted that the complaint contained factual allegations concerning the specific defendants' participation in the alleged conspiracy. The court stated:

> Although Plaintiffs often refer to a corporate family by a single name, they allege that employees engaged in conspiratorial meetings **[*22]** on behalf of members of their corporate families, that participants did not always know the corporate affiliation of their counterparts and did not distinguish between the entities within a corporate affiliation of their counterparts and did not distinguish between entities within a corporate family, and that participants "entered into agreements on behalf of, and reported these meetings and discussions to, their respective corporate families. As a result, the entire corporate family was represented in meetings and discussions by their agents and was a party to the agreements reached in them."

Id. The court also noted that the complaint described the relationships between the parties and alleged that the parent corporation dominated and controlled the other entities. These types of factual allegations are simply not present in this case.

Lastly, the Court agrees with Defendants that Plaintiffs' reliance on *In re Lithium Ion Batteries Antitrust Litigation is unavailing. No. 13-MD-2420-YGR, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377 (N.D. Cal. Oct. 2, 2014)*. There, "NEC Corp. argue[d] that the complaints improperly group[ed] it with NEC Tokin under the label 'NEC' and thus obscure[d] the identity of the alleged conspirator." *Id. 2014 U.S. Dist. LEXIS 141358, [WL] at *33*. The court rejected the argument **[*23]** and noted that the plaintiffs had "directly quote[d] documents where defendants themselves allegedly referred simply to 'NEC,'" and the court found these references sufficient to "implicate both NEC Corp. and NEC Tokin." *Id.* Here, there is no allegation that the affiliated corporate entities referred to themselves in documents or through employees as a single entity. Moreover, as Defendants point out, the court in *Lithium Ion Batteries* also noted that "an allegation that individual members of a corporate group joined the alleged conspiracies through their corporate affiliation alone would be precisely the sort of legal conclusion couched as a factual allegation that *Twombly* and *Iqbal* deemed insufficient to state a claim." *Id.* at 31 (internal quotation marks and citations omitted).

Ultimately, the Court cannot overlook the Fourth Circuit's clear guidance in *SD3*. Plaintiffs' amended complaint simply lumps together members of corporate families and states that the affiliated corporate entities "are actual agents, apparent agents and/or alter egos of one another and operate and identify themselves as one company,"[3] but the amended complaint contains no factual allegations to support this legal conclusion. **[*24]** For example, the amended complaint does not allege any facts showing that the entities failed to observe proper corporate form or that they identified themselves in documents or in meetings as one company, and the amended complaint does not even allege which entity or entities employed the individuals who allegedly attended specific meetings on behalf of the lumped-together entities. As in *SD3*, Plaintiffs' first amended complaint "nakedly alleges that all of the corporate subsidiaries are 'dominated by, and [are] alter ego[s] of,' these corporate parents," but such an allegation "offers only a legal conclusion, and [Plaintiffs have] alleged no facts suggesting the kind of unity of interests that we usually require a party to plead before permitting them to advance an alter ego theory." *801 F.3d 422-23* (citing *C.F. Trust, Inc. v. First Flight Ltd. P'ship, 306 F.3d 126, 134 (4th Cir. 2002))*. As the Fourth Circuit clearly stated: "The fact that two separate legal entities may have a corporate affiliation does not alter [the] pleading requirement to separately identify each defendant's involvement in the conspiracy." *Id.* (quoting *In re Aluminum Warehousing Antitrust Litig., No. 13-md-2481 (KBF), 2015 U.S. Dist. LEXIS 26412, 2015 WL 1344429, at *2 (S.D.N.Y. March 23, 2015))* (internal quotation marks omitted). "***Antitrust law*** doesn't recognize guilt by mere association, **[*25]** imputing corporate liability to any affiliate company unlucky enough to be a bystander to its sister company's alleged misdeeds." *Id.*

For the reasons stated in this order, **the Court grants Defendants' joint motion to dismiss (ECF No. 78) and the Lafarge Defendants' motion to dismiss (ECF No. 98)**[4]; however, in the interests of fairness and justice, the Court dismisses this action as to all Defendants **without prejudice**. Stated simply, the factual allegations that Plaintiffs' complaint *does* contain are not frivolous and to the extent that Plaintiffs can file an action containing sufficient factual allegations as to *each Defendant*, the Court does not believe this dismissal should preclude them from doing so, particularly when this case is still in the early stages.[5]

AND IT IS SO ORDERED.

/s/ Bruce H. Hendricks

The Honorable Bruce Howe Hendricks

United States District Judge

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[3] The inadequacy of Plaintiffs' grouping of Defendants is further highlighted by the fact that Plaintiffs sued both Coastal Concrete Company, Inc., and Coastal Southeast II, LLC, nakedly asserting that these two entities "operate and identify themselves as one company," when in fact the two companies have no common ownership and are not related. On March 29, 2018, Plaintiffs filed a notice voluntarily dismissing Coastal Concrete Company, Inc. from this action. (*See* ECF No. 109.)

[4] This order also has the effect of granting Defendant Elite Concrete of Richmond Hill, LLC's motion (ECF No. 96), wherein Elite Concrete of Richmond Hill, LLC joined the arguments raised in the joint Defendants' motion to dismiss (ECF No. 96), but only for the reasons set forth in this order.

[5] The Court also recognizes that Defendants have raised a number of other issues and defenses in their motions to dismiss, and the Court may face those questions again; however, because it is not clear whether Plaintiffs will re-file this action, or even against which parties Plaintiffs may re-file this action, the Court will reserve its ruling on those questions until an appropriate time.

June 27, 2018

Charleston, South Carolina

FTC v. AbbVie Inc.

United States District Court for the Eastern District of Pennsylvania

June 29, 2018, Decided

CIVIL ACTION NO. 14-5151

Reporter
329 F. Supp. 3d 98 *; 2018 U.S. Dist. LEXIS 109628 **; 2018-1 Trade Cas. (CCH) P80,431

FEDERAL TRADE COMMISSION v. ABBVIE INC., et al.

Subsequent History: Affirmed by, in part, Reversed by, in part, Remanded by *FTC v. AbbVie Inc., 2020 U.S. App. LEXIS 31048 (3d Cir. Pa., Sept. 30, 2020)*

Prior History: *FTC v. AbbVie Inc., 107 F. Supp. 3d 428, 2015 U.S. Dist. LEXIS 59115 (E.D. Pa., May 6, 2015)*

Core Terms

generic, sham, lawsuits, rating, testosterone, sales, injectables, brand-name, patients, launch, defendants', products, patent, infringement, penetration, enhancers, disgorgement, manufacture, subjective intent, gel, pharmaceutical, competitors, notice, patent infringement, monopoly power, baseless, parties, profits, injunction, isopropyl

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Judges: Harvey Bartle III, J.

Opinion by: Harvey Bartle III

Opinion

[*106] FINDINGS OF FACT AND CONCLUSIONS OF LAW

Bartle, J.

The Federal Trade Commission ("FTC") has sued defendants AbbVie Inc., Abbott Laboratories, and Unimed Pharmaceuticals LLC (collectively, "AbbVie"), as well as Besins Healthcare, Inc. ("Besins"), for violation of *section 5(a)* of the *Federal Trade Commission Act ("FTC Act")*, *15 U.S.C. § 45(a)*, which prohibits "[u]nfair methods of competition in or affecting commerce."

AbbVie and Besins together own U.S. Patent No. 6,503,894 ("'894 patent") for a brand-name testosterone replacement drug, AndroGel 1%. In Count I of the complaint, the FTC alleges that AbbVie and Besins maintained an illegal monopoly through the filing of sham patent infringement lawsuits against two potential competitors, Teva Pharmaceuticals USA, Inc. ("Teva") and Perrigo Company ("Perrigo"), to delay entry into the market of their generic versions of AndroGel.[1]

To prevail in this antitrust litigation, the FTC must prove that defendants possessed monopoly power in the relevant market and that defendants willfully acquired or maintained that power. See *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 433 (3d Cir. 2016)*. Here, the FTC asserts **[**3]** that defendants maintained their AndroGel monopoly through the filing of sham litigation against Teva and Perrigo. To prove its case, the FTC must establish: (1) the lawsuits filed by defendants against Teva and Perrigo were objectively baseless; (2) defendants subjectively intended to file such lawsuits; and (3) that defendants possessed monopoly power in the relevant market. See *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* ("PRE"); *In re Wellbutrin XL Antitrust Litig., 868 F.3d 132, 148-49 (3d Cir. 2017)*.

On September 15, 2017, this court ruled that defendants' infringement lawsuits against Teva and Perrigo were objectively baseless and entered summary judgment in favor of the FTC on this issue. See *FTC v. AbbVie Inc., No. 14-5151, 2017 U.S. Dist. LEXIS 149824, 2017 WL 4098688, at *11 (E.D. Pa. Sept. 15, 2017)* (Doc. # 300). Thereafter the court held an approximately three-week nonjury trial on the issues of subjective intent and monopoly power. The court now makes the following findings of fact and conclusions of law.

I

To understand the claim presented in this action, we first set forth the regulatory scheme that governs the testing and approval of new drugs in the United **[*107]** States. That framework is governed by the *Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 et seq.*, as amended by the Drug Price Competition and Patent Term Restoration Act of 1984, which is commonly known as the *Hatch-Waxman Act, 21 U.S.C. § 355* and *35 U.S.C. § 271*. See *Pub. L. No. 98-417, 98 Stat. 1585*.

A drug **[**4]** manufacturer seeking to market a new drug must obtain approval from the U.S. Food and Drug Administration ("FDA"). See *21 U.S.C. § 355(a)*. There are three pathways established by the FDCA and Hatch-Waxman: (1) a section 505(b)(1) New Drug Application ("NDA"); (2) a section 505(b)(2) NDA; and (3) a section 505(j) Abbreviated New Drug Application ("ANDA").

An NDA is a full-length application containing information on the drug's safety and efficacy, an explanation of the drug's ingredients, a description of the methods used in the manufacture and packaging of the drug, samples of the proposed labeling, and samples of the drug itself. See id. *§ 355(b)(1)*. The NDA must also contain a list of any patents covering the drug. Id.

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[1] In count II of the complaint, the FTC alleged that the settlement between Teva and the other defendants constituted an improper restraint of trade in violation of the FTC Act. On May 6, 2015, this court granted the motion of defendants to dismiss count II of the complaint, as well as count I to the extent it was premised on the settlement agreements with Teva. As a result, Teva was dismissed as a defendant in this action and only the claim involving sham lawsuits in Count I remains.

Once the FDA has approved a new brand-name drug, an applicant with a generic version of that drug can obtain approval through the use of abbreviated procedures. See *21 U.S.C. § 355(j)*. Most commonly, the applicant will file a section 505(j) ANDA stating, among other things, that the generic has the same active ingredients and is biologically and pharmacologically equivalent to the brand-name drug. Id. *§ 355(j)(2)(A)*. The applicant may then rely on the safety and efficacy data contained in the NDA for the brand-name drug. Id.

In the alternative, the applicant with a generic drug may file a section 505(b)(2) NDA, which is a **[**5]** hybrid between an ANDA and a full NDA. A section 505(b)(2) NDA is used for generics that have slight modifications from the brand-name drug. See *21 C.F.R. § 314.54*. The applicant must submit additional data to the FDA demonstrating that any differences between the brand-name drug and the generic will not affect safety and efficacy but can otherwise avoid the other studies necessary for a full NDA application. Id.; see also *Ethypharm S.A. France v. Abbott Labs., 707 F.3d 223, 227 (3d Cir. 2013)*. Because the Hatch-Waxman Act allows the applicant to "piggy-back" on the efforts for the approval of the brand-name drug, its provisions "speed the introduction of low-cost generic drugs to market" and thereby promote drug competition. *FTC v. Actavis, Inc., 570 U.S. 136, 142, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)* (quoting *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 405, 132 S. Ct. 1670, 182 L. Ed. 2d 678 (2012)* (alteration omitted)).

Once the FDA approves a generic drug, the applicant may request from the FDA a therapeutic equivalence ("TE") rating. A TE rating is a code that reflects the FDA's determination regarding whether a generic product is pharmaceutically and biologically equivalent to the reference-listed brand-name drug. Products that are determined to be therapeutically equivalent are assigned an "A" or "AB" rating. Generic products for which therapeutic equivalence cannot be determined are assigned a "B" or "BX" rating.[2] An "A" or "AB" rating is **[*108]** extremely **[**6]** desirable. Every state in the United States has generic substitution laws. See *Mylan Pharms. Inc., 838 F.3d at 428*. These laws "either permit or require pharmacists to dispense a therapeutically equivalent, lower-cost generic drug in place of a brand drug absent express direction from the prescribing physician that the prescription must be dispensed as written." Id. (internal quotation marks and citations omitted).

The Hatch-Waxman Act also provides specialized procedures for parties to resolve intellectual property disputes. In submitting an ANDA or section 505(b)(2) NDA, an applicant must certify that any patent currently in force for the referenced brand-name drug "is invalid or will not be infringed by the manufacture, use, or sale" of the proposed generic. *21 U.S.C. § 355(j)(2)(A)(vii)*. This certification is commonly referred to as a paragraph IV notice. *Actavis, 570 U.S. at 143*.

The paragraph IV notice "automatically counts as patent infringement" and thus often leads to an infringement suit by the patentee. Id. (citing *35 U.S.C. § 271(e)(2)(A)*). Upon receiving the paragraph IV notice, the patentee has 45 days to determine whether to file suit for infringement. *21 U.S.C. § 355(j)(5)(B)(iii)*. The notice often includes an offer of confidential access whereby outside counsel **[**7]** for the patentee may review the application submitted to the FDA by the generic applicant to facilitate a determination regarding infringement litigation. If the patentee files an infringement suit against a generic entity within this 45-day period, the FDA is required to withhold approval of the generic drug for 30 months from receipt of the paragraph IV notice or until the infringement action is resolved in the district court, whichever occurs first. Id.

II

AndroGel is a brand-name transdermal testosterone gel product approved by the FDA for the treatment of hypogonadism, a clinical syndrome that results from failure of a man's body to produce adequate amounts of

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[2] "A" and "B" are the two general categories into which the FDA sorts drugs when evaluating therapeutic equivalence. Within these two categories are various subcategories depending on the type of product (i.e., oral, injectable, solution, or powder) and other factors. For our purposes we will focus on "AB," which means "actual or potential bioequivalence problems have been resolved with adequate in vivo and/or in vitro evidence supporting bioequivalence," and "BX," which is "specific drug products for which the data that have been reviewed by the Agency are insufficient to determine therapeutic equivalence." See U.S. Food & Drug Admin., Center for Drug Evaluation & Research, Approved Drug Products with Therapeutic Equivalence Evaluations, at xiii, xx (38th ed. 2018), https://www.fda.gov/Drugs/DevelopmentApprovalProcess/ucm079068.htm#_ftn4 .

testosterone. It is estimated that this condition affects 2-6% of the adult male population in the United States. Hypogonadism is a lifelong condition which causes decreases in energy and libido, erectile dysfunction, and changes in body composition including decreased bone density. Patients with hypogonadism are typically treated with testosterone replacement therapy ("TRT") whereby exogenous testosterone is administered.

The first TRTs approved by the FDA were injectables in which testosterone is dissolved in a liquid and **[**8]** then injected into a muscle of the body. Injectable testosterones were introduced in the 1950s and have been available in generic form for decades. They are administered every one to three weeks. While many patients receive injections at their doctors' office, some patients opt to self-administer injections at home or visit clinics specializing in TRT commonly known as "Low-T" centers. Because they are available in generic form, injectables generally require a five to ten dollar patient copay on most insurance plans and thus are the least expensive treatment method for hypogonadism.

Testosterone injections typically require two needles: a withdrawal needle and an **[*109]** injection needle. The withdrawal needle is typically a 20-gauge wide bore and 1-inch long needle required to withdraw the testosterone from the glass vial. After withdrawal, the patient must switch to a 21- or 22-gauge narrow bore and 1.5-inch long needle to administer the injection. This needle must then be inserted deep into a muscle, typically the buttocks or thigh, until the needle is no longer visible. Because a deep intramuscular injection is required, this treatment method may cause pain and discomfort which will vary **[**9]** from patient to patient. Injectables generally provide an initial peak in testosterone level at the time of injection followed by troughs or valleys as the injection wears off. This variation in testosterone level may cause swings in mood, libido, and energy.

TRTs may also be administered through a gel or patch which is applied to the skin and thereby absorbed into the bloodstream. This group of products is known as topical testosterone replacement therapies or transdermal testosterone replacement therapies ("TTRTs"). Androderm, the first testosterone patch, was released in the 1990s. It is applied once a day to the back, abdomen, thighs, or upper arms. The patch formulation delivers a steady level of testosterone without the peaks or valleys associated with injectables. It is relatively easy to apply, although the patch may cause skin irritation in some patients and may be visible depending on where it is applied. Testoderm, a testosterone patch worn on the scrotum, was also introduced in the 1990s.

AndroGel was launched in 2000 as the first FDA-approved testosterone gel. It is applied once a day to one or more application sites, including the upper arms, shoulders, and abdomen. AndroGel **[**10]** comes in two strengths: (1) 1%, which was the original formulation launched in June 2000; and (2) 1.62%, which was first sold in May 2011. At the time AndroGel 1% came on the market in 2000, it was available only in sachets. In 2004 it became available in a metered-dose pump. AbbVie discontinued manufacture of the AndroGel 1% pump in December 2013.

AndroGel 1% was developed through a collaboration between Unimed and various subsidiaries of Besins' parent company. At the time of its launch, AndroGel 1% was marketed and distributed by Solvay Pharmaceuticals, Inc. ("Solvay"), the parent company of Unimed. Abbott Laboratories acquired Solvay and Unimed in February 2010. At that time Solvay was renamed Abbott Products Inc. In January 2013, AbbVie assumed all of Abbott's proprietary pharmaceutical business, including AndroGel 1%.

As the first gel in the market, AndroGel achieved great commercial success and quickly became one of Solvay's "flagship" products. In 2009, AndroGel's U.S. net sales were approximately $604 million and in 2010, that number grew to $726 million. After AbbVie[3] acquired Solvay and Unimed in 2010, sales of AndroGel continued to grow, and AndroGel became one of AbbVie's **[**11]** blockbuster drugs. In 2011, U.S. net sales for AndroGel reached $874 billion and in 2012, U.S. net sales surpassed $1.15 billion. In 2013, AndroGel's U.S. net sales were approximately $1.035 billion while in 2014, net sales totaled $934 million. After entry of generic versions of AndroGel 1%, AndroGel U.S. net sales fell to $694 million in 2015. Throughout this time, AbbVie maintained a high profit margin of approximately 65% on AndroGel.

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[3] As stated above, AbbVie acquired all of Abbott's proprietary pharmaceutical business in 2013. Hereafter we will refer to Abbott as "AbbVie."

[*110] Transdermal gels have several advantages over the other forms of TRTs. A gel is relatively easy for a patient to apply without the potential for pain or discomfort associated with an injection. It also allows the patient to maintain a steady testosterone level without peaks and troughs. As compared to the patch form of testosterone, it has a lower rate of irritation and is not visible.

Gels such as AndroGel, however, are not without some drawbacks. There is a serious but rare risk of secondary exposure associated with gels, whereby testosterone may be transferred from a patient to others, including women and children, through skin-to-skin contact. Precautions such as washing hands after application and covering the application site with a t-shirt can **[**12]** prevent such exposure. Gels may also cause skin irritation in some patients. Finally, some patients may dislike having to apply the gel daily.

After AndroGel was released in 2000, several other brand-name TTRTs were launched by competing pharmaceutical companies. Testim, a 1% gel available in a five gram tube, was approved in 2002. In 2011, two brand-name testosterone 2% gels were brought to market: (1) Fortesta, a metered-dose pump product applied to the thighs; and (2) Axiron, a solution that is dispensed from a metered-dose pump and is applied to the underarms using a silicon applicator. And in 2014 Vogelxo, another brand-name low-volume testosterone gel, was launched along with an authorized generic version of the same product.

In addition to injectables and TTRTs, several other forms of TRT have been approved by the FDA. Striant, a buccal testosterone tablet that is applied twice daily to gums, was released in 2003. Testopel, a pellet that is surgically inserted in the hip, buttocks, or thigh every three to six months, was approved in 2008. And in 2014 the FDA approved Natesto, a nasal testosterone spray that is administered three times a day.

AndroGel 1% is protected by the '894 patent. That **[**13]** patent is owned by Besins and by Unimed, which as discussed above, was a wholly-owned subsidiary of Solvay until 2010. Laboratoires Besins Iscovesco SA, a subsidiary ultimately owned by Besins' parent company and now known as Laboratoires Besins Iscovesco SAS ("LBI SAS"), licensed to Unimed certain intellectual property rights to AndroGel. In return, Unimed was obligated to pay a royalty on net sales of AndroGel. Under a separate supply agreement, LBI SAS agreed to manufacture and to sell to Unimed AndroGel products for sale and distribution by Unimed in the United States.[4]

We have previously discussed the prosecution history of the '894 patent in our September 15, 2017 Memorandum (Doc. # 300) and therefore need not restate it in detail here. See *AbbVie, 2017 U.S. Dist. LEXIS 149824, 2017 WL 4098688, at *1-4*. In summary, the initial patent application that resulted in the '894 patent claimed a pharmaceutical composition of a testosterone gel including a penetration enhancer, which according to the patent application "is an agent known to accelerate the delivery of the drug through the skin into the bloodstream." *2017 U.S. Dist. LEXIS 149824, [WL] at *1-2*. The patent application claimed all penetration enhancers including isopropyl myristate, the penetration enhancer actually used in AndroGel. *2017 U.S. Dist. LEXIS 149824, [WL] at *2*. The patent examiner **[**14]** at the U.S. Patent and Trademark Office ("PTO") rejected the claim which included **[*111]** all penetration enhancers. Id. Thereafter, Unimed and Besins submitted an amendment narrowing their claim encompassing all penetration enhancers to a claim naming only twenty-four specific penetration enhancers, including isopropyl myristate. *2017 U.S. Dist. LEXIS 149824, [WL] at *2-3*. After a series of additional amendments, Unimed and Besins further narrowed their claim to one penetration enhancer, isopropyl myristate, only. *2017 U.S. Dist. LEXIS 149824, [WL] at *3*. On this basis, the '894 patent was issued on January 7, 2003. *2017 U.S. Dist. LEXIS 149824, [WL] at *4*. It is scheduled to expire on January 6, 2020.

As is often the case with successful pharmaceutical products, generic manufacturers sought entry into the market to compete with AndroGel. In December 2008, Perrigo submitted to the FDA two ANDAs for a generic testosterone 1% gel in both pump and packet form. The ANDAs referenced AndroGel and the '894 patent. However, the Perrigo product contained isostearic acid as its penetration enhancer rather than AndroGel's isopropyl myristate claimed in the '894 patent.

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[4] AbbVie and Besins later amended the license and supply agreements to include AndroGel 1.62%. Royalties on U.S. sales of AndroGel 1.62% are paid to LBI SAS or Besins Healthcare Luxembourg SARL ("BHL SARL").

Pursuant to the procedures established by the Hatch-Waxman Act, Perrigo in June 2009 served paragraph IV notices on both Unimed and Besins as co-owners of the '894 patent. In those notices, Perrigo **[**15]** disclosed the filing of its ANDAs for a generic 1% testosterone gel. Perrigo further asserted that its ANDAs would not infringe the '894 patent for AndroGel because the Perrigo products did not contain "about 0.1% to about 5% isopropyl myristate," the sole penetration enhancer formulation claimed in the patent. Perrigo also stated in its notices that the prosecution history of the '894 patent would estop Unimed and Besins from filing a patent infringement claim. Finally, Perrigo offered to provide to outside counsel representing Unimed and Besins confidential access to the full ANDAs.

Thereafter Unimed and Besins, along with Unimed's parent Solvay, jointly retained the law firm of Finnegan, Henderson, Farabow, Garrett and Dunner, LLP ("Finnegan, Henderson") to assess the Perrigo paragraph IV notices and the Perrigo ANDAs. Finnegan, Henderson obtained confidential access to the full ANDAs and confirmed that Perrigo's ANDAs contained isostearic acid, not isopropyl myristate. Besins also separately retained the law firm of Foley and Lardner LLP ("Foley and Lardner"). Outside counsel at Foley and Lardner did not receive confidential access to the ANDAs.

On July 17, 2009, Solvay and Unimed issued a press release **[**16]** announcing that "[a]fter careful evaluation" the companies had decided not to file a patent infringement suit against Perrigo. The press release explained that the Perrigo product "contains a different formulation than the formulation protected by the AndroGel patent." It further stated that "[t]his distinction played a role in the company's decision not to file patent infringement litigation at this time" but "the company does not waive its right to initiate patent infringement litigation at a later stage based on new or additional facts and circumstances." The ultimate decision not to file suit was made by Solvay in-house attorneys Shannon Klinger, Peter Edwards, and Dominique Dussard. Besins also determined that it was "standing down" from bringing an infringement suit but did not join in the Solvay press release or issue its own public announcement.

Sometime in 2009, the FDA became aware of cases of accidental secondary exposure of children to TTRTs due to skin-to-skin transference from patients using these products. Based on this information, the FDA required safety-related labeling changes and a Risk Evaluation and Mitigation Strategy ("REMS") for transdermal **[*112]** testosterone gel **[**17]** products currently on the market. Thereafter Auxilium Pharmaceuticals, Inc., the manufacturer of Testim, submitted a citizen petition to the FDA regarding a generic version of Testim. To facilitate the drug approval process, the FDA permits private entities to provide comments and opinions by filing citizen petitions. *21 C.F.R. § 10.30*. A petition can request that the FDA "issue, amend, or revoke a regulation or order or take or refrain from taking any other form of administrative action." Id.

In response to the Auxilium citizen petition, the FDA directed on August 26, 2009 that any application for a generic testosterone gel product containing a penetration enhancer different from the referenced brand-name drug would be required to be submitted as a section 505(b)(2) NDA rather than an ANDA. The application must also include certain additional safety studies regarding the risk of secondary exposure.

On April 9, 2010, AbbVie, now the owner of AndroGel, filed its own citizen petition with the FDA. In that petition, AbbVie noted the FDA's ruling in response to the Auxilium citizen petition regarding all generic testosterone products containing penetration enhancers different than those contained in the reference-listed brand-name **[**18]** drug. AbbVie thus sought assurance from the FDA that Perrigo would be required to resubmit its 2009 ANDAs referencing AndroGel as section 505(b)(2) NDAs. AbbVie also requested that Perrigo be directed to provide to the AndroGel patent holders a new paragraph IV notice. Finally, it asked that Perrigo be required to conduct transfer and hand-washing studies as set forth in the FDA's response to the Auxilium petition.

On October 4, 2010, the FDA granted in part and denied in part AbbVie's citizen petition. The FDA directed that any application by a generic manufacturer for a product referencing AndroGel that contained a different penetration enhancer must be submitted as a section 505(b)(2) NDA. It also agreed that the applicants would be required to submit new paragraph IV notices.

On January 13, 2011, Teva filed a section 505(b)(2) NDA for its generic version of AndroGel 1% which described a different penetration enhancer, isopropyl palmitate, than AbbVie used in its brand-name AndroGel. The application sought approval to manufacture and to distribute the product in two different sachet sizes as well as in a pump form. This application superseded an ANDA for generic testosterone that Teva had filed on December 29, 2008, prior to the FDA's ruling on the **[**19]** Auxilium citizen petition.

On March 16, 2011, Teva sent to Solvay, AbbVie, Unimed, and Besins a paragraph IV notice regarding its section 505(b)(2) NDA. Teva asserted that its product did not infringe the '894 patent because "the Teva formulation does not contain isopropyl myristate," the penetration enhancer claimed in the '894 patent. Teva laid out the prosecution history of the '894 patent and its position that, because the claims of the '894 patent were narrowed to disclose only isopropyl myristate, "the prosecution history estops the patentees from asserting infringement under the doctrine of equivalents." Teva also offered confidential access to certain information regarding its section 505(b)(2) NDA to allow the patent holders to assess whether an infringement action would have merit.

AbbVie retained outside counsel at the law firm of Munger, Tolles and Olson LLP ("Munger Tolles") to evaluate the Teva paragraph IV notice. Counsel at Munger Tolles was provided with access to the Teva section 505(b)(2) NDA and provided in-house counsel at AbbVie with its opinion. **[*113]** Besins again retained Foley and Lardner to evaluate the notice. Foley and Lardner was supplied with confidential access to the NDA and submitted its analysis to Besins.

On April 29, 2011, within 45 days after receiving the paragraph IV notice, **[**20]** AbbVie, Unimed, and Besins commenced an action in the U.S. District Court for the District of Delaware alleging the Teva's product infringed the '894 patent.[5] See Abbott Prods., Inc. v. Teva Pharm. USA, Inc., No. 11-384 (D. Del. Apr. 29, 2011). The suit against Teva triggered the Hatch-Waxman automatic stay of FDA approval of the Teva product. Consequently, the FDA could not approve Teva's generic testosterone drug for 30 months after March 16, 2011 or until September 17, 2013 unless the district court resolved the lawsuit sooner.

The intellectual property ("IP") litigation group at AbbVie had direct accountability for patent litigation. Four in-house patent attorneys in that group had final responsibility for evaluating the Teva paragraph IV notice and made the decision to file the patent infringement suit against Teva: (1) Johanna Corbin; (2) Adam Chiss; (3) Anat Hakim; and (4) Jose Rivera. All of these attorneys had extensive experience in patent law and with AbbVie. Corbin is currently vice president of the IP group and the lead IP attorney at AbbVie who has worked in that group since 2005. Chiss was divisional vice president of IP litigation and before that had served as senior counsel in **[**21]** IP litigation. Anat Hakim was divisional vice president and associate general counsel of IP litigation at AbbVie and previously had been a partner at Foley and Lardner. Finally, Rivera was a divisional vice president of the IP group and had previously worked in private practice. The general counsel of AbbVie, Laura Schumacher, also signed off on the final decision. Schumacher has been with AbbVie since 2005. No business persons at AbbVie were involved in the decision to sue. At trial, AbbVie presented evidence that the decision whether to file a complaint is always made solely by the legal department and does not require approval from management.

As for Besins, the decision to sue was made by Thomas MacAllister, its in-house counsel. MacAllister is an experienced intellectual property attorney who previously worked as a patent examiner at the U.S. Patent and Trademark Office. Besins conferred with outside counsel as well as AbbVie about the Teva product and potential litigation. Like AbbVie, Besins or its agents had confidential access to the portions of Teva's NDA that disclosed the formulation of its product prior to filing the complaint against Teva. In addition, in-house counsel **[**22]** for Besins conferred with in-house counsel for AbbVie before making the decision to initiate the lawsuit.

Around this time AbbVie also was preparing for FDA approval and launch of its low-volume formulation of AndroGel, known as AndroGel 1.62%. The FDA issued final approval of brand-name AndroGel 1.62% on April 29, 2011, and AbbVie began selling it in May 2011. The 1.62% formulation is indicated for the same condition and has the same active ingredient but less total gel. Sales of AndroGel 1.62% grew more slowly after launch in 2011 than defendants initially anticipated but by June 2012 constituted the majority of total AndroGel sales. AndroGel 1.62%

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[5] As one witness explained at trial, most patent infringement suits are filed in either the District of Delaware or the District of New Jersey because "they tend to be slow-moving dockets."

accounted for total AndroGel sales as follows: 57% **[*114]** during the last 7 months of 2012, 67% in 2013, 76% in 2014, and 83% in 2015.

In June 2011, Teva submitted a case status report proposing a schedule for early summary judgment proceedings in the patent infringement suit in the District of Delaware. AbbVie, Unimed, and Besins filed a supplemental case status report opposing any summary judgment proceedings. On August 1, 2011, before discovery had commenced, Teva filed a motion for summary judgment. Teva asserted that based on prosecution history **[**23]** estoppel there could be no viable claim of infringement of the '894 patent. On October 25, 2011, the court set trial on the issue of prosecution history estoppel for May 21, 2012.

On August 18, 2011, AbbVie filed a citizen petition with the FDA requesting that it refrain from granting a therapeutic equivalence rating to section 505(b)(2) products referencing AndroGel, including Teva's testosterone product, or in the alternative, requesting that it assign the product a BX rating. If a BX rating was assigned, there could be no automatic substitution at the pharmacy under state law.

Meanwhile, on July 4, 2011 Perrigo re-filed with the FDA its application for approval of a generic testosterone 1% gel as a section 505(b)(2) NDA. On September 20, 2011, Perrigo sent AbbVie, Unimed, and Besins a new paragraph IV notice. As in its 2009 notice, Perrigo certified that the '894 patent was not infringed because its generic testosterone product did not contain "about 0.1% to 0.5% isopropyl myristate," the penetration enhancer claimed in the patent.

Perrigo's letter also explained that the prosecution history of the '894 patent precluded any valid infringement claim. Perrigo stated that "a lawsuit asserting the '894 patent against Perrigo would be objectively baseless and a sham, brought in bad **[**24]** faith for the improper purpose of, inter alia, delaying Perrigo's NDA approval." It further asserted that "a bad faith motive for bringing such a suit would be particularly apparent in light of representations and admissions made, inter alia, in [Solvay's] Friday, July 17, 2009 press release." Perrigo offered confidential access to certain information regarding the NDA. Again, AbbVie and Unimed retained Munger Tolles as outside counsel to analyze Perrigo's NDA. Foley and Lardner evaluated Perrigo's NDA on behalf of Besins and also issued its opinion to Besins.

On October 31, 2011, AbbVie, Unimed, and Besins filed suit in the District of New Jersey alleging that Perrigo's 1% testosterone gel infringed the '894 patent. See Abbott Prods., Inc. v. Perrigo Co., 11-6357 (D.N.J. Oct. 31, 2011). As in the Teva litigation, the filing of the complaint against Perrigo triggered an automatic 30-month stay under the Hatch-Waxman Act. Thus, absent a court ruling or settlement resolving the litigation, the stay would preclude final FDA approval of the Perrigo generic testosterone product until March 20, 2014.

The same four AbbVie in-house attorneys as had made the decision to sue Teva again made the decision **[**25]** to file the suit against Perrigo with approval from the same general counsel. They conferred with outside counsel, who had confidential access to the Perrigo section 505(b)(2) NDA. No AbbVie business person was involved in the decision to file the Perrigo action. After consultation with AbbVie and outside counsel, Besins' same in-house attorney made the decision that it would join in bringing the Perrigo litigation.

AbbVie reached out to Teva to discuss an amicable resolution of the dispute before the complaint was filed in April 2011. Perry Siatis, an in-house attorney for AbbVie, **[*115]** was the main negotiator on behalf of AbbVie.[6] At that time, Siatis was Divisional Vice President of the IP strategy group and head intellectual property attorney at AbbVie. Although that initial contact did not lead to a settlement, AbbVie again raised the subject with Teva during an in-person meeting on October 28, 2011, three days after the court in the Teva litigation had set a trial date. Although Teva at the outset pushed for an entry date as early as September 17, 2013, the final date of the 30-month Hatch-Waxman stay, AbbVie countered with an entry date of January 1, 2015. AbbVie thereafter agreed to an entry date of December 27, **[**26]** 2014, which would allow Teva to make some sales in 2014. On December 20, 2011 the

[6] Siatis had no involvement in the decision to sue either Teva or Perrigo for patent infringement.

parties reached a final settlement in the Teva litigation, in which Teva received a license to launch its product beginning December 27, 2014.[7]

While the Teva negotiations were ongoing, settlement negotiations were taking place in the Perrigo litigation. Sometime on or before November 3, 2011, Siatis approached Perrigo to initiate settlement negotiations. On December 8, 2011 the parties executed a binding term sheet, which included the dismissal of all claims and counterclaims with prejudice. In addition, AbbVie agreed to pay Perrigo $2 million dollars as reasonable litigation expenses.

During the negotiations Perrigo pushed for an earlier entry date but was unsuccessful and ultimately accepted an offer from defendants of January 1, 2015. However, the settlement contained an acceleration clause whereby Perrigo would be permitted to launch if another generic came to market. Andrew Solomon, general counsel for Perrigo, explained that the company had been monitoring the Teva litigation and thought there was "a very good probability Teva could prevail" at the trial scheduled for May 2012 and thereafter launch **[**27]** its product, so "that would provide a much earlier Perrigo license date." As a result of the Teva settlement, Perrigo's licensed entry date was moved up to December 27, 2014 under the acceleration clause.

On February 14, 2012, the FDA approved Teva's section 505(b)(2) NDA for the packet presentation of its TTRT product. During review of the application, the FDA had identified a potential safety concern with the packaging used in the pump presentation of the drug.[8] In response to this concern, Teva withdrew the pump presentation from its application. As a result, the FDA approved Teva's product in sachet form only.

After receiving FDA approval, Teva waited for the FDA Office of Generic Drugs to assign a TE rating for its product. On December 21, 2012, AbbVie filed a citizen petition supplement requesting that the FDA refrain from granting a TE rating to Teva's product or, in the alternative, grant it a BX rating.

Later, on January 31, 2013, the FDA approved Perrigo's section 505(b)(2) NDA for its generic version of AndroGel 1%. Thereafter the FDA considered a TE rating for Perrigo's generic product. During **[*116]** this period, AbbVie filed an additional citizen petition on December 11, 2013. The December 11, 2013 citizen petition supplemented the **[**28]** August 18, 2011 citizen petition and requested that the FDA issue a BX rating for Perrigo's product.

In the months before its December 27, 2014 licensed entry date approached, Perrigo took a number of steps to follow up with the FDA regarding its TE rating. Perrigo sent three letters to the FDA. It received no response other than being informed that the FDA needed more time to evaluate the therapeutic equivalence of the product.

Perrigo filed a lawsuit against the FDA in the United States District Court for the District of Columbia on March 21, 2014. See Perrigo Israel Pharm. Ltd. v. U.S. Food & Drug Admin., No. 14-475 (D.D.C. Mar. 21, 2014). Perrigo asserted that the FDA had engaged in unreasonable delay. It requested that the court enter a mandatory injunction compelling the FDA to publish a TE rating for Perrigo's NDA product as soon as possible. On April 10, 2014, the FDA filed its first response to the lawsuit. The FDA contended that "Perrigo has itself obviated the need for a prompt decision by reaching an agreement with the innovator not to market until December 2014." The FDA further represented that it expected to issue a TE rating for Perrigo's product "by July 31, 2014—some **[**29]** five months before Perrigo's planned product launch."

Prior to the deadline, on July 23, 2014, the FDA determined that Perrigo's section 505(b)(2) NDA product was therapeutically equivalent to AndroGel and issued it an AB rating.[9] That same day, however, the FDA assigned a

[7] During this time AbbVie was negotiating with Teva regarding disputes related to two other drugs, Simcor and TriCor. Agreements related to Simcor and TriCor were executed on the same day as the AndroGel settlement. However, there is no evidence that these negotiations were linked to the AndroGel settlement.

[8] Specifically, during a meeting on June 27, 2011, the FDA recommended that Teva withdraw its pump configuration with the option to resubmit it as a post-approval amendment once the issue was resolved.

[9] Perrigo voluntarily dismissed the lawsuit on July 24, 2014, one day after the FDA issued its TE rating to Perrigo.

BX rating to Teva's product. Specifically, the FDA concluded that the data submitted by Teva was "insufficient to determine TE [therapeutic equivalence] to AndroGel 1%." As a result, under all state laws the Perrigo generic testosterone product would be auto-substitutable at the pharmacy for brand-name AndroGel 1% prescriptions, but the Teva product would not.

Perrigo launched its AB-rated generic version of AndroGel 1% on December 27, 2014, its licensed entry date under the settlement agreement with defendants. Perrigo would not have entered the market without first receiving a decision from the FDA on its TE rating. Perrigo achieved its goal to obtain an AB rating for its product and would have challenged the FDA had it received only a BX rating.

Teva, in contrast, never set in motion the sale of its generic testosterone replacement product. Timothy Crew, Teva's Commercial Operations Officer from the time that Teva filed its NDA until **[**30]** late 2012, was a strong proponent of bringing the Teva product to market even absent an AB rating. Crew identified a "'brand' push through managed care" marketing strategy in which Teva would go directly to managed care organizations and pharmacy benefit managers in an attempt to negotiate preferential formulary placement for a non-AB rated product and thereby influence physicians' prescribing decisions.[10] **[*117]** Crew considered the Teva generic testosterone product his "pet project."

Teva underwent management changes in November 2012. Crew left the company, and Alan Oberman became the new Chief Executive Officer of Teva. Shortly thereafter, Maureen Cavanaugh, Vice President of Customer Operations and Marketing for Teva, recommended to Oberman that Teva not launch the BX rated product. Cavanaugh explained that Teva's generic group had no sales force and had never launched a non-AB rated retail pharmacy product. She further opined that a BX-rated product with no perceived advantage over brand-name AndroGel would capture only 10-11% of the brand-name product's sales and perhaps less than 5%.

Teva faced other obstacles to launching its BX-rated product. Teva had contracted with Cipla, **[**31]** an India-based company, to manufacture its generic testosterone replacement drug. Before it could begin the manufacturing process, Cipla required a $10 million capital expenditure from Teva, which could be paid up front or over time through a 35% royalty on sales. Cipla projected that it would require 12-24 months or more to achieve operational readiness. Pursuant to another contract, Teva was also required to pay a royalty of 5-7.5% on sales to a third company, BioSante.

As discussed above, Teva had received FDA approval for the sachet presentation of its product only. At the time that Teva withdrew the pump presentation from consideration by the FDA, pump sales made up 40-50% of AndroGel sales. Thus the failure to obtain approval for a pump product had a negative impact on the commercial viability of Teva's product.

Ultimately, on May 1, 2015, Teva transferred ownership of the 505(b)(2) NDA product and all intellectual property necessary to market the product to ANI Pharmaceuticals, Inc. ("ANI"), its development partner.

III

To prevail on its claim of illegal monopolization, the FTC must establish that defendants filed sham litigation against Teva and Perrigo as outlined by the Supreme **[**32]** Court in *PRE*. Whether litigation is a sham involves a two part test. We have already resolved the first part of the test, that is, that the lawsuits were objectively baseless in the sense that "no reasonable litigant could realistically expect success on the merits." *AbbVie Inc., 2017 U.S. Dist. LEXIS 149824, 2017 WL 4098688, at *4* (quoting *PRE, 508 U.S. at 60*). The second part of the test requires the court to decide whether defendants subjectively intended to interfere directly with a competitor's business interests by using the government process as an anticompetitive weapon. *PRE, 508 U.S. at 60-61*. Only if the lawsuits were

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[10] A formulary is a "listing of medications for which an insurer or managed care organization provides coverage." See *Saltzman v. Indep. Blue Cross, 384 F. App'x 107, 109 n.3 (3d Cir. 2010)* (citations omitted). Formularies generally divide medications into tiers with different copays for each tier. See *id. at 109*. Typically, the first tier includes generic medications with the lowest copay, while higher tiers include brand-name drugs with higher copays. See id.

both objectively and subjectively baseless will the FTC have demonstrated that defendants engaged in sham litigation.

As stated above, we have already determined that the lawsuits against Teva and Perrigo in 2011 were objectively baseless as a matter of law in light of the undisputed facts concerning the prosecution history of the '894 patent. See *AbbVie Inc., 2017 U.S. Dist. LEXIS 149824, 2017 WL 4098688, at *1-4, *11*. We found that Unimed and Besins secured the '894 patent only by amending their patent application from an initially broad claim covering all penetration enhancers to a narrow claim covering only one penetration enhancer—isopropyl myristate at a particular concentration. See *2017 U.S. Dist. LEXIS 149824, [WL] at *6-8, *10*. Instead of isopropyl myristate, Teva used isopropyl palmitate and **[**33]** Perrigo used isostearic acid as a penetration enhancer in their generic versions of AndroGel. We concluded that "any reasonable person **[*118]** who reads the prosecution history of the '894 patent can reach no other conclusion than that the applicants have purposefully and not tangentially excluded isopropyl palmitate and isostearic acid as penetration enhancers equivalent to isopropyl myristate." *2017 U.S. Dist. LEXIS 149824, [WL] at *11*.

We emphasized that "the purpose of prosecution history estoppel is to protect the patentees' competitors from patent infringement litigation based on the doctrine of equivalents if the prosecution history demonstrates that an equivalent not specifically disclosed in the patent has been purposefully and not tangentially excluded from its scope." *2017 U.S. Dist. LEXIS 149824, [WL] at *11*. Given the patent prosecution history for the '894 patent, AbbVie and Besins did not tangentially exclude all other penetration enhancers and could not reasonably have expected success on the merits in their suits against Teva and Perrigo alleging patent infringement under the doctrine of equivalents.[11] Id. Defendants cannot have it both ways. They cannot, as they did here, purposely surrender claims to all penetration enhancers except one to obtain a patent and then claim infringement **[**34]** when a party uses a penetration enhancer that they deliberately surrendered. See *2017 U.S. Dist. LEXIS 149824, [WL] at *10-11*.

We now focus our inquiry on the subjective component of the FTC's sham litigation claim, which was one of the issues litigated in the nonjury trial held in this action. At the outset, we readily acknowledge that a plaintiff claiming that a lawsuit was a sham faces an uphill battle. The *First Amendment to the United States Constitution* prohibits Congress from making any law respecting "the right of the people . . . to petition the Government for a redress of grievances." *U.S. Const. amend. I*. It is well-established that the *First Amendment* right to petition the government includes the right to have access to the courts. *PRE, 508 U.S. at 56-57*; see also *U.S. Const. amend. I*. Under the Noerr-Pennington doctrine articulated by the Supreme Court, "[t]hose who petition [the] government for redress are generally immune from antitrust liability."[12] *PRE, 508 U.S. at 56*. Noerr-Pennington immunity, however, is not absolute. "[A]ctivity 'ostensibly directed toward influencing governmental action' does not qualify for [*First Amendment*] immunity if it 'is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.'" *Id. at 51* (quoting *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* (alterations in original)).

Later, in City of Columbia v. Omni Outdoor **[**35]** Advertising, Inc., the Supreme Court explained:

> The 'sham' exception to Noerr encompasses situations in which persons use **[*119]** the governmental process—as opposed to the outcome of the process—as an anticompetitive weapon. A classic example is the

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[11] Defendants have moved for reconsideration of that decision. On June 27, 2018, we denied the motion in a separate order (Doc. # 438).

[12] The Noerr-Pennington doctrine originated from two separate antitrust cases, *United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)* and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. Pennington involved efforts by several companies and a union to lobby the Secretary of Labor regarding minimum wage regulations. *381 U.S. at 660*. In Noerr, a group of railroads engaged in a publicity campaign designed to foster the adoption of certain laws and regulations harmful to the trucking industry. *365 U.S. at 129-30*. The doctrine has since been extended to persons who petition the courts, in addition to legislatures and administrative agencies. See *Ca. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 509-10, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*.

> filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of a license but simply in order to impose expense and delay.

499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991) (emphasis omitted).

We must initially decide not only the type of proof but also the burden of proof which are required to establish subjective intent. The parties disagree regarding both. According to defendants, the FTC must show that they brought the patent infringement actions with actual knowledge that actions were baseless. The FTC, in contrast, asserts that actual knowledge or bad faith is not required under PRE. Instead, the FTC argues that the subjective baselessness inquiry concerns only "whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor." See PRE, 508 U.S. at 60-61 (internal citation and quotation marks omitted). Accordingly, the FTC urges the court to focus on the "economic viability" of the lawsuit and whether defendants **[**36]** "sue[d] primarily for the benefit of collateral injuries inflicted through the use of legal process." Id. at 65.

Unfortunately, the Supreme Court in PRE did not elaborate on this issue. In that case, the Court of Appeals had affirmed an order granting summary judgment for the plaintiff on the defendant's counterclaim alleging a sham lawsuit. Id. at 62-65. The Supreme Court agreed with the Court of Appeals that the lawsuit was not objectively baseless and thus did not reach the subjective intent question. Id. at 65-66.

In support of its position, the FTC cites Kilopass Techology, Inc. v. Sidense Corp., 738 F.3d 1302 (Fed. Cir. 2013). That case, however, involved a motion for attorneys' fees under 35 U.S.C. § 285, which provides that a court "in exceptional cases may award reasonable attorneys' fees to the prevailing party." 738 F.3d at 1304, 1312. The Federal Circuit held that "actual knowledge of baselessness is not required" and that "a defendant need only prove reckless conduct to satisfy the subjective component of the § 285 analysis." Id. at 1310. It further explained that courts may "dra[w] an inference of bad faith from circumstantial evidence thereof when a patentee pursues claims that are devoid of merit" and that "[o]bjective baselessness alone can create a sufficient inference of bad faith to establish exceptionality under § 285, unless **[**37]** the circumstances as a whole show a lack of recklessness on the patentee's part." Id. at 1311, 1314.

Since then, the Supreme Court has expressly distinguished the standard for a claim of sham litigation from that applicable to motions for attorneys' fees under § 285. See Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 134 S. Ct. 1749, 1757-58, 188 L. Ed. 2d 816 (2014). The Court reasoned that the Noerr-Pennington doctrine was created as "a narrow exception for 'sham litigation'—to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances." Id. at 1757. It further observed that "[t]he threat of antitrust liability . . . far more significantly chills the exercise of the right to petition than does the mere shifting of attorney's fees." Id. Thus the standard for fee-shifting, which is governed by the statutory language of 35 U.S.C. § 285, is irrelevant to the subjective intent standard for sham litigation under PRE. Id.

[*120] Many of the authorities cited by the FTC are not helpful to our analysis regarding subjective intent. For example, in In re Flonase Antitrust Litigation, the defendant conceded that there was sufficient evidence for plaintiffs to survive summary judgment on subjective intent and as a result the court did not address the issue. 795 F. Supp. 2d 300, 311 (E.D. Pa. 2011). Other authorities cited by the FTC dealt with **[**38]** motions to dismiss and do not contain a fulsome analysis of the evidence required to support the subjective intent prong of PRE. See Moldex Metric, Inc. v. 3M Co., No. 14-1821, 2015 U.S. Dist. LEXIS 15008, 2015 WL 520722, at *7, *9 (D. Minn. Feb. 9, 2015); TransWeb, LLC v. 3M Innovative Props. Co., No. 10-4413, 2011 U.S. Dist. LEXIS 59095, 2011 WL 2181189, at *15 (D.N.J. June 1, 2011); Rochester Drug Coop. v. Braintree Labs., *712 F. Supp. 2d 308, 316, 319-21 (D. Del. 2010)*; In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 643-44 (E.D. Mich. 2000).

After review of the decisions cited by both parties, we conclude that the subjective intent required to overcome Noerr-Pennington immunity is not merely the intent to thwart competition. It is well-established that "the essence of a patent grant is the right to exclude others from profiting by the patented invention" and thereby to interfere with a competitor's business. See Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 215, 100 S. Ct. 2601, 65 L. Ed.

2d 696 (1980). As our Court of Appeals has recognized, the Hatch-Waxman Act "incentivizes brand-name drug manufacturers to promptly file patent infringement suits by rewarding them with a stay of up to 30 months if they do so" and therefore "[w]e are not inclined to penalize a brand-name manufacturer whose litigiousness was a product of Hatch-Waxman." *In re Wellbutrin, 868 F.3d at 157-58* (internal quotation marks and citation omitted). Knowledge that the filing of a lawsuit would trigger the automatic stay is not by itself evidence of a bad-faith motive. Id.; see also *In re Terazosin Hydrochloride Antitrust Litig., 335 F. Supp. 2d 1336, 1365 (S.D. Fla. 2004)*.

As the Supreme Court noted in Omni Outdoor Advertising, a classic example of "sham" activity is the filing of **[**39]** frivolous objections to a license application with no expectation of prevailing but simply in order to impose expense and delay. See *499 U.S. at 380*. Clearly, a frivolous lawsuit under those same circumstances is also a sham. The sham exception under Noerr-Pennington, of course, is narrow so as not to infringe on a party's constitutional right to petition the government for redress of grievances. Consequently, we conclude that the FTC must prove that defendants had actual knowledge that the patent infringement suits here were baseless in order both to meet its burden under *Omni Outdoor Advertising* and *PRE* and to avoid interference with defendants' *First Amendment* rights.

The parties, as noted above, further disagree as to the burden of proof required to establish subjective intent. The FTC contends that it must simply satisfy a preponderance of the evidence standard, the general standard for civil antitrust claims. See, e.g., *LePage's, Inc. v. 3M, 324 F.3d 141, 166-69 (3d Cir. 2003)*. Defendants counter that a finding of subjective intent demands clear and convincing evidence.

The Supreme Court has not addressed this question. Nor has our Court of Appeals. The Courts of Appeals for the Ninth and Seventh Circuits in decisions that predate PRE have both **[**40]** required clear and convincing evidence that defendants prosecuted actions in bad faith to satisfy the subjective prong of a sham litigation claim. See *Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1288-93 (9th Cir. 1984)*; *MCI **[*121]** Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1155 (7th Cir. 1983)*.

In support of their position that clear and convincing evidence is required, defendants point to *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. There, the Supreme Court held that an allegation that the defendant "knowingly and willfully" obtained a patent through fraudulent representations to the Patent Office would not be entitled to Noerr-Pennington immunity for a subsequent lawsuit alleging infringement of that patent. *382 U.S. at 177-78*. The Federal Circuit has since specified that clear and convincing evidence is needed to establish a Walker Process monopolization claim. See *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1364 (Fed. Cir. 1998)*. It observed that "[t]he road to the Patent Office is so tortuous and patent litigation is usually so complex," that there must be "no less than clear, convincing proof of intentional fraud involving affirmative dishonesty." Id. (internal citation omitted).

The authorities cited by the FTC to support its position that a preponderance of the evidence is sufficient are not on point. Those cases concern the standard for an award of attorneys' fees in a patent case under *35 U.S.C. § 285*, not the subjective intent **[**41]** standard for sham litigation antitrust claims. See, e.g., *Kilopass Tech., Inc., 738 F.3d at 1315-16*. As stated above, the Supreme Court has expressly distinguished sham litigation in the Noerr-Pennington context from motions brought under *§ 285*. See *Octane Fitness, LLC, 134 S. Ct. at 1757-58*.

We conclude that the FTC must prove by clear and convincing evidence the subjective intent element of a sham litigation. We do so in light of the Federal Circuit's decision in *C.R. Bard* as well as the importance of the *First Amendment* right to petition the government for a redress of grievances as explained in Noerr, Pennington, and California Motor Transport Co.

Having determined that the FTC has the burden to establish by clear and convincing evidence that defendants had actual knowledge that their infringement suits against Teva and Perrigo were baseless, we now consider the evidence presented at trial and the reasonable inferences to be drawn therefrom.

The FTC puts great emphasis on the 2009 press release by Solvay on behalf of its subsidiary Unimed, co-owner of the '894 patent, before Solvay and Unimed were acquired by AbbVie in February 2010. The press release announced the companies' decision not to sue Perrigo for infringement of the '894 patent after Perrigo filed with the FDA its ANDA for a generic version of **[**42]** AndroGel. Solvay gave as its reason that the Perrigo product "contains a different formulation than the formulation protected by the AndroGel patent." The FTC also presented evidence regarding a July 2009 email written by MacAllister, in-house counsel for Besins, stating that Besins, the co-owner of the '894 patent, was "standing down" from pursuing Perrigo for infringement.

None of the in-house AbbVie attorneys identified as the decision-makers regarding the 2011 suits against Teva and Perrigo was previously employed by Solvay or Unimed. As for Besins, it did not explain whether its decision not to pursue a patent infringement suit was based on the merits or was simply recognizing the reality that it alone could not initiate such a suit without Unimed, the co-owner of the '894 patent. See, e.g., *Int'l Nutrition Co. v. Horphag Research Ltd., 257 F.3d 1324, 1331 (Fed. Cir. 2001)*. While Solvay and its in-house **[*122]** attorneys certainly got it right in 2009, this evidence is not probative as to the subjective intent of defendants' decision-makers here some two years later in 2011.

Both parties also rely on various business planning documents to support their positions on subjective intent. The FTC, for example, points to an August 8, 2011 meeting attended by Jeffrey Stewart, then Vice President **[**43]** of U.S. Proprietary Pharmaceuticals at AbbVie, and several other AbbVie executives and in-house attorneys to discuss AndroGel. This meeting took place shortly after Teva filed its motion for summary judgment in the patent infringement case in which AbbVie had sued it. During that meeting Stewart, looking into the future, drew a chart depicting a dramatic erosion of AndroGel sales following entry of an AB-rated generic after a "lost case" eight months hence in April 2012, the month in which this court had scheduled a hearing to take place on Teva's summary judgment motion.

Thereafter, AbbVie created "AndroGel Scenarios" with various potential dates for generic entry, including: (1) November 2011, the date by which the FDA had agreed to review Teva's section 505(b)(2) NDA[13]; (2) April 2012, the date on which the summary judgment motion could be decided in the Teva matter; and (3) April 2013, an estimate of the date on which a trial on the merits may have concluded in the Teva matter. In an email on September 30, 2011, James Hynd, one of the AbbVie executives responsible for the AndroGel franchise, characterized the April 2012 entry date as "[t]he most likely scenario."

Defendants, meanwhile, point to the **[**44]** official 2012 annual plan for AbbVie's U.S. Proprietary Pharmaceuticals Division. AbbVie began work on that plan in summer of 2011 and finalized it in late fall of 2011. In that plan, AbbVie forecasted increased sales for AndroGel. It also projected an increase in total "Selling, General, and Administrative" ("SG&A") spending for AndroGel from 2011 to 2012. While the plan "assumed LOE [loss of exclusivity]" for several other products, it made no mention of any loss of exclusivity for AndroGel. Defendants also highlight the AbbVie long range plan ("LRP") that was created in 2011. The LRP is a five to ten year business plan that is updated every year through a planning process that generally begins in January and ends in May. The LRP created in 2011 uses as the loss of exclusivity date for AndroGel August 31, 2015, the licensed entry date granted to two other generic competitors, Par Pharmaceutical and Watson Pharmaceuticals, Inc.

We do not find these and other similar business documents to be persuasive or even relevant to the issue of subjective intent. Significantly, none of these corporate documents, as far as we know, was created by or influenced anyone who played a role in the decisions **[**45]** to sue Teva and Perrigo for patent infringement. Nor is there any evidence in the record as to what, if anything, the decision-makers in the legal department told the business people or vice versa about the merits or prospects of the litigation. These corporate documents are simply not probative of the state of mind of the in-house attorneys who made the decisions to sue.

[*123] As evidence of their subjective good faith, defendants also rely on the fact that they obtained favorable settlements in their lawsuits against Teva and Perrigo. Specifically, defendants point out that they initially proposed

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[13] This is commonly known as the ***Prescription Drug User Fee Act ("PDUFA")*** date. Under that Act, the FDA collects a fee from companies applying for drug approval and, in exchange, the FDA provides a "goal date" by which it will review the application. See ***21 U.S.C. § 379h***.

to both Teva and Perrigo a market entry date of January 1, 2015, a date which extended far beyond the maximum 30-month Hatch-Waxman stays applicable to the two lawsuits. Although Teva and Perrigo countered on several occasions with earlier entry dates, defendants held firm to their initial offers in both negotiations. In the end, Teva and Perrigo secured an entry date of December 27, 2014 for their products, just days earlier than defendants' first proposals.[14] Defendants maintain that they would not have insisted on such a late entry date if they knew the infringement suits were frivolous or if **[**46]** they otherwise were motivated only to use the litigation process itself and the automatic Hatch-Waxman stay as an anti-competitive weapon. We find this argument unpersuasive.

Parties often settle litigation for a variety of reasons independent of the merits of the claims. It is true that the settlements prevented Teva and Perrigo from entering the market until after the automatic Hatch-Waxman stays would have expired. On the other hand, the settlements permitted Teva and Perrigo to enter the market years before the '894 patent was set to expire and before any other generic competitor could come to market. They also permitted Teva and Perrigo to limit their litigation costs, and Perrigo obtained $2 million from AbbVie for reasonable litigation expenses. Even frivolous lawsuits can be very costly to defend and to take to trial, especially when plaintiffs, such as the defendants here, have extensive resources.

Charles Cotesworth Pinckney's steadfast response, "not a six-pence, sir," in rejecting a request of French officials for a payment of money in the XYZ Affair, and Representative Robert Goodloe Harper's now famous toast in a similar vein, "Millions for Defense but not a Cent for Tribute," at **[**47]** a dinner in 1798 in Philadelphia, while admirable in many spheres of life, generally have no applicability in the real world when lawsuits are being settled. We find that the terms of the Teva and Perrigo settlements here do not support defendants' subjective good faith.

The FTC points to the various citizen petitions filed by AbbVie regarding the applications submitted by Teva and Perrigo for FDA approval and for TE ratings for its products. For all of these petitions, the FDA granted in part the relief requested by AbbVie. Because they were found to be at least partially meritorious, we do not consider the citizen petitions as evidence of any improper subjective intent by defendants.

The FTC further points to evidence that AbbVie attempted to accelerate the transition of patients from AndroGel 1% to AndroGel 1.62% in summer 2011. Again, there is no evidence that those who decided to bring the infringement actions against Teva and Perrigo played any role in this process.

It is, of course, the FTC which bears the burden of proof by clear and convincing evidence that defendants had the subjective intent to file sham infringement actions against Teva and Perrigo. In determining subjective **[**48]** intent, the court must zoom in on the individuals at AbbVie and Besins who made the decisions to file the infringement actions against Teva and Perrigo and discern what these individuals **[*124]** knew. The state of mind of individual decision-makers is of course imputed to the corporations for which they act. See, e.g., *In re Color Tile Inc., 475 F.3d 508, 513 (3d Cir. 2007)*.

The individuals, as noted above, who made the decision on behalf of AbbVie on whether to file the objectively baseless lawsuits against Teva and Perrigo were four experienced patent attorneys with sign-off from the general counsel of AbbVie. The record reflects that no business executives were in any way involved—not even with a perfunctory sign-off. As for Besins, the decision to sue was likewise made by in-house counsel for the company. Again no business people participated in the decisions to sue or were otherwise involved.

As the finder of fact, the court may consider both direct and circumstantial evidence when evaluating defendants' subjective intent. See *Howard Hess Dental Labs. Inc. v. Dentsply Intern., Inc., 602 F.3d 237, 257-58 (3d Cir. 2010)* (citing *Advo, Inc. v. Phila. Newspapers, Inc., 51 F.3d 1191, 1199 (3d Cir. 1995))*. We may determine what weight and credence to give this evidence and may also draw reasonable inferences therefrom. See id. In making findings of fact, the court, like jurors, should not leave common sense at **[**49]** the courthouse steps.

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[14] As stated above, Perrigo ultimately agreed to an entry date of January 1, 2015 but this date was moved to December 27, 2014 pursuant to an acceleration clause in the contract.

Triers of fact are routinely called upon to determine a party's state of mind. *United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716-17, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983)*. As our Supreme Court has recognized:

> The law often obliges finders of fact to inquire into a person's state of mind. . . . The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else.

Id. (internal citations and quotations omitted). We routinely instruct juries to decide a person's intent in both criminal and civil proceedings:

> Often the state of mind . . . with which a person acts at any given time cannot be proved directly, because one cannot read another person's mind and tell what he or she is thinking. However, [defendants'] state of mind can be proved indirectly from the surrounding circumstances. Thus, to determine [defendants'] state of mind . . . at a particular time, you may consider evidence about what [defendants] said, what [defendants] did and failed to do, how [defendants] acted, and all the other facts and circumstances shown by the evidence that may prove what was in [defendants'] mind **[**50]** at that time. . . .
> You may also consider the natural and probable results or consequences of any acts [defendants] knowingly did, and whether it is reasonable to conclude that [defendants] intended those results or consequences. You may find, but you are not required to find, that [defendants] knew and intended the natural and probable consequences or results of acts [defendants] knowingly did. This means that if you find that an ordinary person in [defendants'] situation would have naturally realized that certain consequences would result from [defendants'] actions, then you may find, but you are not required to find, that [defendants] did know and did intend that those consequences would result from [defendants'] actions.

Third Circuit Model Criminal Jury Instructions § 5.01. This explanation is also reflected in our Circuit's model jury instructions for civil cases where intent is **[*125]** relevant, such as those under civil rights statutes. Those model instructions state that a plaintiff "is not required to produce direct evidence of intent" and that intent "may be inferred from the existence of other facts." See, e.g., Third Circuit Model Civil Jury Instructions § 5.1.2. Because of the difficulty of **[**51]** proving a person's state of mind, intent is usually a matter of inference from evidence in the record both in civil and criminal cases. See *Herman & MacLean v. Huddleston, 459 U.S. 375, 391 n.30, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983)*; *Resolution Tr. Corp. v. Fid. & Deposit Co. of Md., 205 F.3d 615, 642-43 (3d Cir. 2000)*; *McLean v. Alexander, 599 F.2d 1190, 1198 (3d Cir. 1979)*.

None of the attorneys who was a decision-maker at AbbVie testified at the trial. While in-house counsel for Besins did testify, he did not say a word about his reasoning for bringing suit against Teva and Perrigo. Defendants invoked the attorney-client privilege as well as the attorney work product doctrine and did not assert reliance on advice of outside counsel as an affirmative defense.[15] Defendants have cited authority that we may not draw adverse inferences on subjective intent from a party's justifiable reliance on these privileges. We agree. We do not and will not draw any negative inference as to subjective intent based on defendants' decision to invoke the attorney-client privilege and the attorney work product doctrine and thereby to shroud certain information from view.[16] See *Freedom Card, Inc. v. JPMorgan Chase & Co., 432 F.3d 463, 479-80 n.25 (3d Cir. 2005)*.

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[15] The FTC has not challenged the general proposition that attorney-client privilege or the attorney work product doctrine applies but did engage in motion practice regarding whether certain documents were in fact shielded from discovery by these privileges. It also asserted in various pretrial motions and trial briefs that defendants waived these privileges to the extent defendants asserted that the in-house counsel who made the decision to sue acted in good faith.

[16] This is not an unusual situation. It is no different from that faced by courts every day in criminal trials, in which juries are instructed to make findings about intent but not to draw a negative inference based on a defendant's failure to testify. See *United States v. Waller, 654 F.3d 430, 435-38 (3d Cir. 2011)*. We also note that juries in criminal cases may rely on circumstantial evidence to find intent beyond a reasonable doubt, a standard higher than the clear and convincing standard applicable here. See *id. at 436*.

With no direct evidence of the subjective intent of the decision-makers, we must decide whether their subjective intent to file a sham lawsuit has been proven by clear and convincing evidence from the surrounding circumstances and the natural and probable **[**52]** consequences of their knowing acts. It is unrefuted that the attorneys who decided to sue Teva and Perrigo for patent infringement were aware of the paragraph IV notices from Teva and Perrigo. In the paragraph IV notices, Teva and Perrigo declared that their products did not contain as a penetration enhancer isopropyl myristate in the particular concentration claimed in the '894 patent. Outside counsel for defendants had confidential access to the section 505(b)(2) NDAs of Teva and Perrigo, which included the penetration enhancers used by Teva and Perrigo. Both paragraph IV notices called to the attention of the decision-makers that any infringement actions by defendants would be barred by prosecution history estoppel. Perrigo went so far as to assert that any infringement suit against it would be a sham.

The decision-makers at AbbVie and Besins in 2011 knew that Teva and Perrigo used penetration enhancers for their generic products which were distinct from the one penetration enhancer claimed in **[*126]** the '894 patent. We reasonably infer that the decision-makers also were aware of the prosecution history of the '894 patent and specifically that the patent application originally claimed all penetration enhancers including those in the Teva **[**53]** and Perrigo products and that those penetration enhancers used by Teva and Perrigo were ultimately excluded from the protection of the '894 patent. The prosecution history detailed that the original claims covered all penetration enhancers but were ultimately reduced to one, isopropyl myristate. This history is outlined in our prior summary judgment decision. See *AbbVie Inc., 2017 U.S. Dist. LEXIS 149824, 2017 WL 4098688, at *4-11*. As we found there, "any reasonable person who reads the prosecution history of the '894 patent" would know that all penetration enhancers other than isopropyl myristate in particular concentrations were surrendered. *2017 U.S. Dist. LEXIS 149824, [WL] at *11*.

The reason and motivation for the lawsuits against Teva and Perrigo are also proper considerations which inform our decision on subjective intent. See *Omni Outdoor Advertising, Inc., 499 U.S. at 380*. Regardless of what the business people knew or had in mind or what any of AbbVie's specific corporate documents or business people revealed, we reasonably infer that the patent attorneys, some of whom were long-time employees, were generally aware of the extensive financial success of AndroGel. It was no secret that AndroGel was a blockbuster product for defendants. It was bringing in hundreds of millions of dollars annually as of 2011 with a very high profit margin. Sales of AndroGel **[**54]** were $604 million, $726 million, and $874 million in 2009, 2010, and 2011 respectively. The patent attorneys also clearly recognized that the entry of generic versions of AndroGel with their much lower prices would quickly and significantly erode this ideal financial picture. Their reason and motivation for the filing of these objectively baseless actions against potential competitors was to staunch, at least for a time, this looming reversal of fortune.

In sum, all of the decision-makers, we reiterate, were very experienced patent attorneys, who also knew the extensive financial benefits to defendants if generic versions of AndroGel were kept or delayed from entry into the market. It is a compelling inference that they knew the law concerning the prosecution history estoppel and related principles and understood that prosecution history estoppel barred the infringement suits against Teva and Perrigo. They decided to file these lawsuits anyway. Since these experienced patent attorneys filed objectively baseless infringement lawsuits, it is reasonable to conclude that they intended the natural and probable consequences of acts they knowingly did. This leads ineluctably to an inference **[**55]** that the subjective intent of the decision-makers was to file sham lawsuits. We find by clear and convincing evidence that these attorneys had actual knowledge that the infringement lawsuits they initiated in 2011 against Teva in the United States District Court for the District of Delaware and against Perrigo in the United States District Court for the District of New Jersey were baseless and that they acted in bad faith. The only reason for the filing of these lawsuits was to impose expense and delay on Teva and Perrigo so as to block their entry into the TTRT market with lower price generics and to delay defendants' impending loss of hundreds of millions of dollars in AndroGel sales and profits. They had no expectation of prevailing in the lawsuits. See *Omni Outdoor Advertising, Inc., 499 U.S. at 380*. All the findings concerning subject intent are by clear and convincing evidence. The actions and intent of these AbbVie and **[*127]** Besins attorneys, of course, are binding on the defendants.

Again, we recognize the importance of the constitutional right to petition the Government for redress of grievances through the filing of lawsuits. For those reasons, this court understands its responsibility to act with caution before finding that **[**56]** any lawsuit was a sham. Regrettably, this is that exceptional case compelling such a finding.

IV

The FTC alleges that defendants have violated *section 5 of the FTC Act*, which prohibits "[u]nfair methods of competition in or affecting commerce." *15 U.S.C. § 45(a)*. The prohibitions under the FTC Act include, but are not limited to, conduct that violates the *Sherman Act, 15 U.S.C. §§ 1 et seq.* See, e.g., *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454-55, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*. Specifically, the FTC claims that defendants had monopoly power in the TTRT market throughout the United States and unlawfully sought to maintain that power through the filing of the sham lawsuits against Teva and Perrigo so as to prevent or delay the entry into the market of much less expensive generic versions of AndroGel to the detriment of the consuming public.

Thus, to prove its claim the FTC must establish not only that defendants engaged in sham litigation but also that the sham litigation was used to maintain monopoly power in the relevant market. *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007)*. Monopoly power is "the ability to control prices and exclude competition in a given market." Id. "[A] patent does not necessarily confer market power upon the patentee" and therefore the FTC must prove that defendants in fact possessed monopoly power. See *Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. Monopoly power is assessed as of the **[**57]** time of the anticompetitive conduct. See *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 472-73, 481 (3d Cir. 1992)*.

The Supreme Court has ruled that questions of monopoly power must be resolved according the particular facts of each case and that "formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***." *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 466-67, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. Monopoly power may be proven through direct evidence of supra competitive prices and restricted output. *Mylan Pharms. Inc., 838 F.3d at 434*. In the alternative, monopoly power may be proven through indirect evidence. *Id. at 435*. Here, the FTC has presented no direct evidence of monopoly power but instead relies on indirect evidence to establish this part of its claim.[17]

To support a finding of monopoly power through indirect evidence, the FTC must show that: (1) defendants had market power in the relevant market; and (2) barriers existed to entry into that market. Id. Market power is in turn defined as "the power to raise prices above competitive levels without losing so many sales that the price increase is unprofitable." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 445 n.2 (3d Cir. 1997)* (internal citation omitted). Market power **[*128]** can be inferred from a market share significantly greater than 55%. *Dentsply Int'l, Inc., 399 F.3d at 187* (citing *Fineman v. Armstrong World Indus., 980 F.2d 171, 201 (3d Cir. 1992)*). As our Court of Appeals has explained, the size of market share is a primary determinant of whether monopoly **[**58]** power exists. *Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa., 745 F.2d 248, 260 (3d Cir. 1984)*.

We must begin by defining the relevant market. See *Dentsply Intern., 399 F.3d at 187*. The definition of the relevant market "is a question of fact as to which the plaintiff bears the burden of proof." *Mylan Pharms. Inc., 838 F.3d at 435* (quoting *Broadcom Corp., 501 F.3d at 307*). The FTC must prove both the relevant product or products that comprise the market as well as the geographical area for the market. See *Queen City Pizza, Inc., 124 F.3d at 442*. There is no dispute here that the relevant geographic market encompasses the United States.

To determine whether products are in the same market, we ask "if they are readily substitutable for one another," an inquiry that requires us to assess "the reasonable interchangeability of use between a product and its substitute." *Mylan Pharms. Inc., 838 F.3d at 435* (internal citation omitted). The term "'[i]nterchangeability' implies

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[17] Direct evidence of monopoly power is "rare" and would require, among other things, evidence that defendants maintained abnormally high price-cost margins on AndroGel and that they restricted output. See *Mylan Pharms. Inc., 838 F.3d at 434-35 & n.53*. The FTC has not presented such evidence.

that one product is roughly equivalent to another for the use to which it is put." Id. at 436 (quoting Allen—Myland, Inc. v. IBM Corp., 33 F.3d 194, 206 (3d Cir. 1994)). It also means that "while there might be some degree of preference for . . . one [product] over the other, either would work effectively." Id. (quoting Allen-Myland, Inc., 33 F.3d at 206 (alterations in original)). We also look to cross-elasticity of demand, which is defined as "[a] relationship between two products, usually substitutes for each other, in which a price change for one product affects the **[**59]** price of the other." Id. (internal citations omitted). "Cross-elasticity of demand is a measure of the substitutability of products from the point of view of buyers. More technically, it measures the responsiveness of the demand for one product [X] to changes in the price of a different product [Y]." Id. at 437 (quoting Queen City Pizza, Inc., 124 F.3d at 438 n.6).

As the Supreme Court has recognized, "in some instances one brand of a product can constitute [the relevant] market." Eastman Kodak Co., 504 U.S. at 482. However, courts generally approve of single-product markets only "in rare circumstances." Town Sound & Custom Tops, Inc., 959 F.2d at 480; see also Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co., No. 12-3824, 2015 U.S. Dist. LEXIS 50026, 2015 WL 1736957, at *8 (E.D. Pa. Apr. 16, 2015).

The FTC first proposes what is in essence a single-product market: brand-name AndroGel 1% and brand-name AndroGel 1.62% and their generic equivalents. Within this market, defendants held 100% of sales until entry of Perrigo's generic AndroGel 1% product. After that point, 85% of the AndroGel 1% market converted to generic versions of AndroGel 1% within 24 months, and 90% within 31 months.

In seeking to prove its proposed relevant market, the FTC relies on the expert testimony of Dr. Carl Shapiro, a professor at the Haas School of Business at the University of California at Berkley who previously served as a member of the President's Council of Economic Advisors. **[**60]** Dr. Shapiro performed the Hypothetical Monopolist Test ("HMT"). That test begins with a narrow set of products, called the candidate market, and asks whether a hypothetical monopolist selling those products **[*129]** could impose a small but significant non-transitory increase in price ("SSNIP"), which would be a 5% increase or more, without losing too many sales to make the price increase unprofitable. If the answer is yes, then the market is correctly defined because products outside the candidate market are not effective price constraints. If not, then the candidate market is too narrow and the relevant market includes other products.

Dr. Shapiro began with a candidate market of brand-name AndroGel and generic versions of AndroGel.[18] He explained that in this situation, the question under the HMT model is whether defendants, as the manufacturers and distributors of brand-name AndroGel, could prevent the price of AndroGel from falling more than 5% by excluding generic competition.

Using data provided by defendants, Dr. Shapiro first calculated the hypothetical monopoly price, which is the price defendants charged for AndroGel prior to generic entry. He then calculated the change in price for AndroGel **[**61]** after generic entry, using a weighted average price of brand-name and generic AndroGel.[19] Dr. Shapiro performed the test as of the time of the filing of the sham lawsuits in April 2011 and October 2011. He relied on projections of the effect of generic entry created by AbbVie, Teva, and Perrigo. Dr. Shapiro found that entry of an AB-rated generic would cause market prices for AndroGel to decline by at least 41% and that entry of a BX-rated generic would cause a decline of 11%. Based on these calculations, Dr. Shapiro concluded that a hypothetical monopolist of brand-name and generic AndroGel could profitably impose a price increase of more than 5% by excluding

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[18] Dr. Shapiro explained that he included brand-name AndroGel 1.62% in his analysis because the delay in generic entry caused by the sham lawsuits provided defendants with additional time to convert AndroGel 1% sales to AndroGel 1.62%. Dr. Shapiro opined that excluding AndroGel 1.62% from the test market could lead to "artificial and misleading" results. This is consistent with AbbVie's own business projections, which predicted that entry of a generic 1% product would impact AndroGel 1.62% sales.

[19] Dr. Shapiro defines average weighted price as "the market price charged by the pharmaceutical companies" and opines that it "is the best way to measure the disparate impact on different customers [i.e., payors, pharmacy benefit managers, and pharmacies] because it measures 'the total payments that are involved.'"

competition. Thus, he opines that AndroGel and its generic counterparts constitute the appropriate relevant market for our analysis.

To support Dr. Shapiro's reliance on the HMT, the FTC points to our Court of Appeal's decision in *FTC v. Penn State Hershey Medical Center, 838 F.3d 327 (3d Cir. 2016)*. There, the district court applied the HMT to determine the relevant geographic market in evaluating whether a hospital merger violated the antitrust laws. *Id. at 344-45*. On appeal, the Court concluded that the district court failed properly to formulate and apply the test. Id. There is no indication that the HMT **[**62]** test is required or even applicable in a monopolization case such as this.

We find that the analysis used by our Court of Appeals in Mylan is the appropriate one here. In that case, the Court observed that "the pharmaceutical market functions in a unique way." *838 F.3d at 428*. Specifically, it stated:

> [I]n a well-functioning market, a consumer selects and pays for a product after evaluating the price and quality of the product. In the prescription drug market, by contrast, the doctor selects the drug, which creates a certain separation between the buyer and the manufacturer. Moreover, in most cases, a **[*130]** third-party, such as a health insurance company, pays for the drug. As a result, consumer buying behavior may have less of an impact on manufacturer pricing than it otherwise would in a traditional open market.

Id. (internal citations and quotation marks omitted).

Due to the vastly different costs associated with launching generic products as compared to brand-name products, generics can be priced considerably lower than brand-name products.[20] AB-rated generics are often priced at a substantial discount far exceeding 5%. This is the result of an intentional regulatory framework promulgated under the Federal **[**63]** *Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 et seq.*, and the Hatch-Waxman Act which provides incentives for innovators that develop brand-name drugs while also encouraging the introduction of low-cost generic drugs to the market. See *Actavis, Inc., 570 U.S. at 142*. Under this regulatory scheme, application of the HMT would result in a market limited to a brand-name drug and its AB-rated generic in almost every instance.[21] See *In re Remeron Direct Purchaser Antitrust Litig., 367 F. Supp. 2d 675, 682 (D.N.J. 2005)*. This approach thus "would render most brand name pharmaceutical companies as per se monopolists prior to generic entry." See *Id. at 683*.

The facts of Mylan further support our decision. There, the Court of Appeals rejected the plaintiff's contention that the market consisted of only Doryx, a specific brand-name tetracycline approved for the treatment of acne and its generic equivalent. *Mylan Pharms. Inc., 838 F.3d at 436*. It instead agreed with the district court that "the market was much broader and consisted of all oral tetracyclines prescribed to treat acne." Id. In reaching that conclusion, the Court looked to the degree of reasonable interchangeability and cross-elasticity of demand between oral tetracyclines. *Id. at 435-36*. It did not apply the HMT. See Id. We therefore reject the FTC's proposed single-product market as defined under the HMT.

In the **[**64]** alternative, the FTC proposes a product market consisting of all topical testosterone replacement therapies (as stated above, "TTRTs"). While defendants argue for a broader market including injectables, they do not disagree that TTRTs are part of that market. The TTRTs include the following products:

Patches
- Testoderm (launched in 1994)
- Androderm (launched in 1995)

Gels and Solutions

[20] Generics generally may forgo certain research and development, marketing, and other costs that a brand-name product must incur to launch. See *In re Remeron Direct Purchaser Antitrust Litig., 367 F. Supp. 2d 675, 682 (D.N.J. 2005)*.

[21] Furthermore, as Dr. Shapiro himself has recognized, the HMT may also lead to relatively narrow markets that would exclude some competing products when gross margins are high, which is the case in the pharmaceutical industry.

- AndroGel 1% (launched in 2000)
- Testim (launched in 2002)
- AndroGel 1.62% (launched in 2011)
- Axiron (launched in 2011)
- Fortesta (launched in 2011)
- Vogelxo (launched in 2014, along with an authorized generic of the same product)

Buccal Tablets

- Striant (launched in 2003)[22]

[*131] The evidence overwhelmingly demonstrates that all TTRTs, including AndroGel, are reasonably interchangeable. All TTRTs contain the same active ingredient, testosterone. All are approved by the FDA for the treatment of hypogonadism. Furthermore, all TTRTs are consistent with guidelines for the treatment of hypogonadism promulgated by the Endocrine Society, the oldest and largest professional body dedicated to the advancement of clinical care and research in the field of endocrinology.

Defendants presented evidence that some patients have **[**65]** switched between AndroGel and other TTRTs. Defendants' economic expert Dr. Pierre Cremieux presented data from OptumHealth Care Solutions, Inc. showing insurance claims for 18 million patients nationwide, which included 46,000 patients who filed a prescription for AndroGel in the five years preceding generic entry. That dataset demonstrated that 25.8% of all AndroGel patients also used another TTRT product. The OptumHealth data is commonly used in the pharmaceutical industry and has been the basis for hundreds of peer-reviewed publications.

It is true that the various TTRTs may have relative advantages and disadvantages and that an individual patient may prefer one product over another. For instance, some patients may prefer AndroGel over Testim due to Testim's "musky" scent. Certain patients may dislike Fortesta, which is applied to the front and inner thighs, as compared to AndroGel, which is applied to the upper arms, shoulders, and abdomen. However, "[i]nterchangeability is defined by rough equivalence, not perfect correspondence." *Mylan Pharm., Inc., 2015 U.S. Dist. LEXIS 50026, 2015 WL 1736957, at *10* (citing *Queen City Pizza, Inc., 124 F.3d at 436*). Even if more patients prefer AndroGel to other TTRTs, the "test for a relevant market is not commodities reasonably interchangeable by a **[**66]** particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes.'" *Queen City Pizza, Inc., 124 F.3d at 438* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. There is no dispute that, as stated above, all TTRTs contain the same active ingredient and all are approved by the FDA as safe and effective for the treatment of hypogonadism. Accordingly, the fact that certain patients may prefer AndroGel over other TTRTs does not defeat a finding of interchangeability.

Mylan also requires an analysis of cross-elasticity of demand in determining what products are in the relevant market. *838 F.3d at 437*. The record demonstrates and no party disputes that there is cross-elasticity of demand between all TTRTs. During the relevant time period, AndroGel competed on price within the TTRT market by offering rebates to payors to obtain better formulary placement and thereby encourage doctors to prescribe AndroGel. Between 2011 and 2014, AbbVie paid $438 million in rebates to payors, an amount which represented 18.9% of gross sales for AndroGel. Despite these rebates, AndroGel lost several accounts to other TTRTs. Effective July 1, 2011, United Healthcare removed AndroGel from its formulary in favor of Testim, which resulted in a loss of approximately $80 million **[**67]** in sales for AndroGel. When Axiron and Fortesta, two low volume testosterone gels, entered the market in early 2011, rebates on TTRTs increased and AndroGel lost additional business. As of January 1, 2013, CVS Caremark removed AndroGel from its formulary in favor of Fortesta, which resulted in approximately $300 million in lost revenue. **[*132]** And in February 2013, TriCare removed AndroGel from preferred formulary status and replaced it with Fortesta. AbbVie also competed with other TTRTs by developing a copay assistance program. Under that program, AbbVie would bear a portion of a patient's copay, thereby lowering the actual out-of-pocket cost to the patient and encouraging the patient to fill his or her prescription

[22] Natesto, a testosterone nasal spray, was approved by the FDA in 2014 but was not marketed until 2015, after the time period at issue here.

for AndroGel. The other manufacturers of TTRTs also utilized such programs to increase sales. Nonetheless, as will be shown, AndroGel continued to have hundreds of millions of dollars in sales and huge profit margins and retained a high of 71.5% and never lower than in excess of 60% of the TTRT market from 2011 through 2014.

The evidence presented at trial demonstrated that the pharmaceutical companies within the TTRT market spent significant amounts of money on promotional activity **[**68]** to compete for sales. AbbVie employed a sales force of over 1,000 employees to promote its AndroGel franchise and spent significant money on maintaining that sales force. Sales representatives for AndroGel were compensated based in part on their sales compared to other TTRTs. AbbVie also invested in direct-to-consumer media advertising, including in television, print, and internet.

AbbVie itself viewed other TTRTs as competitors to AndroGel. During trial, several AbbVie employees testified that they considered Testim, Axiron, Fortesta, and other TTRTs to be AndroGel's competitors. In addition, many documents introduced into evidence demonstrate that AbbVie tracked the TTRT market and considered other TTRTs as competitors. In particular, AbbVie reported to its Board of Directors as well as to investors regarding AndroGel's sales within the TTRT market. All of this evidence supports our finding that there is cross-elasticity of demand between AndroGel and other TTRTs.

Defendants counter that the relevant market should be defined to include not only TTRTs but also all testosterone replacement therapies (as stated above, "TRTs"), that is TTRTs plus injectables.[23] We reject this position. It **[**69]** is true that injectables contain testosterone, the same active ingredient as AndroGel. It is also true that injectables, like AndroGel, are approved by the FDA as safe and effective for the treatment of hypogonadism. In addition, defendants introduced evidence of some patient switching between AndroGel and injectables.

Some patients prefer AndroGel to injectables due to a fear of needles and the associated potential for pain and discomfort. To administer the injection, a 1.5 inch-long needle must be inserted deep into a muscle, typically the buttocks or thigh, until the needle is no longer visible. Yet some prefer injectables to AndroGel because of the peak in testosterone levels that injectables initially provide. On the other hand, some patients dislike the peaks and troughs associated with injectables and thus prefer the steady dosing provided by AndroGel. However, as noted earlier, individual patient preferences will not defeat a finding of interchangeability as long as there is "rough equivalence" between the products. *Mylan Pharm., Inc., 2015 U.S. Dist. LEXIS 50026, 2015 WL 1736957, at *10*; see also *Queen City Pizza, Inc., 124 F.3d at 438*. Thus, there is reasonable interchangeability of use between AndroGel and injectables.

[*133] But even assuming reasonable interchangeability, there is little **[**70]** cross-elasticity of demand between AndroGel and injectables to include injectables in the relevant market. As noted above, "[c]ross-elasticity of demand is a measure of the substitutability of products from the point of view of buyers. More technically, it measures the responsiveness of the demand for one product [X] to changes in the price of a different product [Y]." *Mylan Pharms. Inc., 838 F.3d at 437* (quoting *Queen City Pizza, Inc., 124 F.3d at 438 n.6*).

Injectables entered the market decades before AndroGel launched in 2000 and the vast majority are generics. As a result, injectables enjoyed the most favorable formulary status with the lowest copay, typically $5-$10 per injection. During the relevant period, the wholesale acquisition cost of injectables was two to three times lower than that of AndroGel. Since launch, AbbVie has consistently raised AndroGel's wholesale acquisition cost, despite the fact that injectables were available at a fraction of the cost. James Hynd, one of the principal AbbVie executives responsible for the AndroGel franchise, confirmed that AbbVie did not price AndroGel against injectables. For example, AbbVie did not offer rebates to payors in an attempt to match the price of injectables.

Furthermore, AbbVie documents show that while **[**71]** the company tracked injectable sales, it did not consider injectables as direct competition to AndroGel. Hynd believed that injectable patients were "not our [AndroGel] patient type."[24] Similarly, Frank Jaeger, Director of Marketing for AndroGel from 2010 through 2014, testified that

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[23] Defendants exclude oral formulations of testosterone, which are distinguishable in efficacy and potential side effects and are generally not recommended within the medical community.

AbbVie did not consider injectables as competition and that the company believed based on market research that it could not transition injectable patients to AndroGel. Instead, as stated above, Jaeger and others identified TTRTs such as Axiron, Fortesta and Testim as AndroGel's true competitors. We credit this testimony of Hynd and Jaeger.

Defendants produced an internal AbbVie document stating that a rise in the copay for AndroGel was correlated with an increase in injectables' sales. However, there is no evidence of the underlying analysis supporting the statement and thus no way to evaluate whether there was in fact a causal relationship between the two events. Moreover, this statement focuses on copays, which are patients' out-of-pocket costs, and does not account for the other levels of pricing applicable in the pharmaceutical industry, such as the amount paid by insurance companies and other payors. **[**72]** In contrast to this statement, the record demonstrates that AbbVie attributed the increase in injectables' sales to a variety of factors, including patient preference, the existence of "Low-T" Centers, and the disproportionate negative publicity testosterone gels received after reports associating TTRTs with heightened cardiovascular risk.

For similar reasons, the patient switching study introduced by Dr. Cremieux is also not evidence of cross-elasticity of demand between AndroGel and injectables. That study does not contain information regarding the reasoning behind the patients' choices. Those patients who moved between injectables and AndroGel may have done so for a variety of reasons, including side effects, personal preferences, and reports of cardiovascular risks from TTRTs, as well as price. Because **[*134]** cross-elasticity of demand focuses on the relationship between pricing for products, evidence of switching for other or unknown reasons is irrelevant to our inquiry on this issue. See *Mylan Pharms. Inc., 838 F.3d at 437*.

Accordingly, we find that all TTRTs including AndroGel had both interchangeability of use and cross-elasticity of demand during the relevant time period. In contrast, there was not the cross-elasticity **[**73]** of demand between TTRTs and injectables so as to include injectables within the relevant market.[25] We therefore define the relevant market as the market for all TTRTs, that is all transdermal testosterone replacement therapies within the United States.

We now turn to the question of whether defendants possessed monopoly power in the defined market. To support a finding of monopoly power, the FTC must prove that defendants had a dominant share in the relevant market and that there were significant barriers to entry into that market. *Broadcom Corp., 501 F.3d at 307*. Generally, as noted, a market share significantly larger than 55% is required to establish prima facie market power. See *Dentsply Int'l, Inc., 399 F.3d at 187*. Barriers to entry include "regulatory requirements, high capital costs, or technological obstacles, that prevent new competition from entering a market in response to a monopolist's supracompetitive prices." *Broadcom Corp., 501 F.3d at 307*.

In the TTRT market, AndroGel was by far the most-prescribed product and was widely-recognized as the "market leader" from before 2011 through 2014.[26] In 2011, AndroGel's annual U.S. net sales exceeded $870 million. By 2012, annual U.S. net sales for the AndroGel franchise grew to $1.152 billion. In 2013, AndroGel's U.S. net sales were **[**74]** approximately $1.035 billion. And in 2014, AndroGel U.S. net sales totaled $934 million. These sales figures are calculated after payment of millions of dollars in rebates and the loss of some accounts.

AndroGel's share of the TTRT market was 71.5% at the time that the first sham lawsuit against Teva was filed in April 2011 and 63.6% at the time that the sham lawsuit against Perrigo was filed at the end of October 2011.

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[24] While Hynd testified that he changed his view and began to recognize injectables as competition, he did not do so until 2014, well after the sham lawsuits were filed and when entry of generic versions of AndroGel was imminent. We do not find credible his change of view.

[25] The TRT market would also include subcutaneous pellets such as Testopel, which constitute a de minimis share of the TRT market. There was no evidence presented at trial regarding cross-elasticity of demand between AndroGel and this product. Pellets, like injectables, are not part of the relevant market here.

[26] The medical experts for both sides testified that they have prescribed AndroGel for hypogonadism more than any other product.

Thereafter AndroGel's share remained above 60% until the end of 2014, when Perrigo's generic 1% testosterone product entered the market. The closest competitor, Testim, had a share of only approximately 20% of the TTRT market at the time of the filing of the first sham lawsuit, but thereafter its share dropped to approximately 12%. Axiron was launched on March 28, 2011 and had captured approximately 14% of the TTRT market by April 2014. No other TTRT product ever held 10% or more of the market during the period from April 2, 2011 through the end of 2014.

AndroGel's market share was always more than four times larger than the market share of any of its brand-name competitors, except for a short period when its market percentage was slightly smaller, but still over three **[**75]** times the market share of Testim. AbbVie was able to maintain its share of the TTRT market with a profit margin of over 65% during the relevant **[*135]** period, even with huge rebates. It was also able to increase the wholesale acquisition cost for AndroGel throughout this time period. We find based on this data that AndroGel had a dominant share of the TTRT market from April 2011 through December 2014.

The monopoly power of AndroGel is supported by the significant barriers to entry into the TTRT market. See *Mylan Pharms. Inc., 838 F.3d at 435*. First, any prospective entrant with a brand-name drug must invest large amounts of time and capital in research and development. There are then significant technical and regulatory requirements in the prescription pharmaceutical market that do not exist with respect to ordinary consumer products. Brand-name products must obtain FDA approval through the submission of an NDA. This process may be lengthy. Among other things, the prospective entrant must demonstrate the capability to manufacture, process, and package the pharmaceutical product in a manner that is adequate "to preserve its identity, strength, quality, and purity." *21 U.S.C. § 355(d)*; see also Id. *§§ 355(b)(1)*, *(c)(4)*. During the FDA approval process, third parties **[**76]** including competitors may file citizen petitions to request that the FDA "issue, amend, or revoke a regulation or order or take or refrain from taking any other form of administrative action" on the NDA, as happened here. See *21 C.F.R. § 10.30*. This may further prolong the approval process.

Once approved, the brand-name drug company generally does not attempt to market directly to patients, the ultimate users. Instead, it must convince physicians to prescribe the drug to patients. This requires a significant and knowledgeable sales force that generally meets with physicians individually. The sale and marketing of prescription drugs is highly regulated. See generally *21 U.S.C. § 331*. For example, the sales force is not permitted to claim that its company's product is better or more effective than a competitor's product, nor is it permitted to promote the drug for uses other than those contained in the drug's labeling. Id.; see also *In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 239-40 (3d Cir. 2012)*. The company must also ensure that pharmacies will stock the drug and that third-party payors will reimburse for it. This requires a team of skilled employees who can negotiate contracts with insurance companies and other payors. If the company seeks patent protection, which is not uncommon, **[**77]** it must endure the rigorous patent approval process before the Patent and Trademark Office.

While the Hatch-Waxman Act provides streamlined procedures for the approval of generic products through the filing of an ANDA or section 505(b)(2) NDA, the FDA may ask for additional information and testing as happened here with Perrigo and Teva. The drug once approved must undergo a further process before a different group at the FDA to obtain a therapeutic equivalence ("TE") rating so that the generic drug developer may take advantage of state auto-substitution laws. Again, Teva and Perrigo both confronted this hurdle.

There can be additional obstacles for generic drug companies where, as here, a brand-name drug manufacturer holds a patent for the reference-listed drug. Generic entrants must also consider the possibility of patent infringement litigation by the owner of the referenced brand-name drug and the accompanying delay caused by the automatic thirty-month stay under the Hatch-Waxman Act before entry into the market, as occurred here.

In short, a prospective entrant to the pharmaceutical market whether with a brand-name drug or a generic drug has significant capital, technical, regulatory, **[*136]** and legal barriers to overcome **[**78]** before being able to enter the TTRT market. Again, this is a far cry from entry into a market to sell an ordinary consumer product. As demonstrated by the record, Teva and Perrigo encountered these barriers, and Teva ultimately decided not to launch its generic testosterone 1% product when it did not receive an AB rating from the FDA.

In order to counter the existence of barriers to entry, defendants reference the fact that three brand-name TTRT products entered the market between 2011 and 2014: (1) Fortesta, manufactured by Endo Pharmaceuticals (February 28, 2011); (2) Axiron, manufactured by Eli Lilly and Co. (March 28, 2011); and (3) Vogelxo, manufactured by Upsher-Smith Laboratories, Inc. (July 2014).[27] These products, however, each maintained a relatively small share of the market compared to AndroGel as discussed in more detail above. Specifically, during the relevant time period Axiron achieved a high of only approximately 14% of the TTRT market, while Fortesta and Volgelxo each held under 10% of the market. Consequently, they did not pose significant competition to defendants' monopolistic conduct.

The barriers enumerated above are sufficiently high to be a factor in our finding **[**79]** of monopoly power. See *Broadcom Corp., 501 F.3d at 307*. The purpose of the FDCA, of course, is to protect the public from products that are not safe and effective. See, e.g., *Wyeth v. Levine, 555 U.S. 555, 566-67, 574, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)*. The barrier to entry into a prescription drug market is rightly a stringent one to ensure that this salutary goal is achieved.[28]

In sum, we find that the FTC has proven that defendants had a dominant share of the TTRT market in the relevant period and that significant barriers existed for entry into that market. The FTC has established the actual market reality that defendants possessed monopoly power and illegally and willfully maintained that monopoly power through the filing of sham litigation. This sham litigation delayed the entry of much less expensive competitive generic products into the TTRT market to the detriment of consumers and protected the defendants against loss of hundreds of millions of dollars in sales and profits.

V

We now move to the issue of the appropriate relief. The FTC seeks equitable relief in the form of disgorgement by defendants of profits which the FTC seeks to return to consumers through the establishment of a fund for this purpose. It also seeks an injunction.

Defendants first contend that *section 13(b) of the FTC Act* does not **[**80]** permit the FTC to seek equitable monetary relief **[*137]** such as disgorgement. This section provides that the FTC "may bring suit in a district court of the United States to enjoin any such act or practice . . . [and] in proper cases the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction." *15 U.S.C. § 53(b)*. Defendants assert that because *section 13(b)* simply references relief in the form of an "injunction," the court may not order disgorgement.

In support of their position, defendants cite *Kokesh v. SEC, 137 S. Ct. 1635, 198 L. Ed. 2d 86 (2017)*. Kokesh addressed the narrow question of whether the five-year statute of limitations in *28 U.S.C. § 2462* applied "to claims for disgorgement imposed as a sanction for violating a federal securities law." *137 S. Ct. at 1639*. According to defendants, Kokesh stands for the proposition that disgorgement is punitive in nature and thus not included among the equitable remedies authorized under the FTC Act. Kokesh, however, did not involve *section 13(b)* but instead dealt with federal securities law. Moreover, the Supreme Court specifically declined to address whether courts possessed authority to order disgorgement in SEC enforcement proceedings. See *id. at 1642, n.3*. We will not stretch Kokesh beyond its holding and will not read it to prevent the court from granting **[**81]** the well-established equitable relief of disgorgement.

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[27] An authorized generic of Vogelxo was also launched at the same time as the brand-name product.

[28] Defendants cited *Barr Laboratories, Inc. v. Abbott Laboratories, 978 F.2d 98 (3d Cir. 1992)*. This case is inapposite. In that private antitrust action, plaintiff claimed attempted monopolization involving oral erythromycin products, which are prescription antibiotics. *978 F.2d at 102*. Unlike the present action, Barr did not involve a patent. Id. In Barr, there were 32 manufacturers and defendant Abbott only held a high of 51.19% of the market in one year. *Id. at 103*. During the relevant time period the number of products competing for sales increased from 111 to 176. Id. Under the circumstances, the Court held that barriers to entry remained low and ultimately concluded that no attempted monopolization existed. *Id. at 113-14*. In contrast, the evidence before the court in this pending action demonstrates that the barriers were significant to entry into the TTRT market.

The Supreme Court, in Mitchell v. Robert De Mario Jewelry, Inc., held that the provision of the *Fair Labor Standards Act*, which specifically authorized courts to restrain violations, includes the power to order reimbursement for loss of wages for unlawful discharge or discrimination. *361 U.S. 288, 296, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960)*. The Supreme Court aptly stated:

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes. As this Court long ago recognized, "there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature."

Id. at 291-92 (quoting *Clark v. Smith, 38 U.S. 195, 203, 10 L. Ed. 123 (1839)*). This language in our view is equally applicable here to the FTC Act. Id.; see also *United States v. Lane Labs-USA, Inc., 427 F.3d 219, 223 (3d Cir. 2005)*.

The weight of authority, in accordance with *Mitchell*, supports the conclusion that the grant of authority in *section 13(b)* to provide injunctive relief includes the full range of equitable remedies, including the power to order a defendant to disgorge illegally obtained funds. See, e.g., *FTC v. Cephalon, Inc., 100 F. Supp. 3d 433, 437-39 (E.D. Pa. 2015)* (Goldberg, J.). Our Court of Appeals has expressed agreement **[**82]** with this position. *FTC v. Magazine Solns., LLC, 432 F. App'x 155, 158 n.2 (3d Cir. 2011)*. This is in line with other appellate precedent in this Circuit, which states that disgorgement "is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs." *Edmonson v. Lincoln Nat. Life Ins. Co., 725 F.3d 406, 415 & n.3 (3d Cir. 2013)* (quoting *SEC v. Huffman, 996 F.2d 800, 802 (5th Cir. 1993)*).

If the defendants' position about *section 13(b)* is correct, the monopolist will be able to retain its ill-gotten gains and simply face an injunction against future wrongdoing but even then only if the wrongdoing is continuing or is likely to continue. This interpretation would eviscerate the FTC Act. As our Court of Appeals has stated, "if the literal application of a statute will produce a result demonstrably **[*138]** at odds with the intentions of its drafters, then we are obligated to construe [the] statute[] sensibly and [to] avoid constructions which yield absurd or unjust results." *Douglass v. Convergent Outsourcing, 765 F.3d 299, 302 (3d Cir. 2014)* (internal quotation marks and citations omitted). We reject defendants' argument concerning our authority to order disgorgement under *section 13(b) of the FTC Act.*

Because disgorgement aims to prevent unjust enrichment, a "court may exercise its equitable power only over the property causally related to the wrongdoing." *Commodity Futures Trading Comm'n v. Am. Metals Exch. Corp., 991 F.2d 71, 78-79 (3d Cir. 1993)* (quoting *SEC v. First City Fin. Corp., 890 F.2d 1215, 1231, 281 U.S. App. D.C. 410 (D.C. Cir. 1989)*). Courts determine the appropriate amount of equitable monetary relief using a two-step burden shifting **[**83]** framework. First, the government must "establish[] a reasonable approximation of the profits tainted by the violation." *SEC v. Teo, 746 F.3d 90, 107 (3d Cir. 2014)*. This requires that the FTC meet a "but-for" standard of causation. *Id. at 105*. The burden of going forward then shifts to the defendant to provide "evidence that the [government's] approximation of profits was unreasonable." *Id. at 107-08*. At this point, the defendant may "point[] to intervening events" that break the chain of causation. *Id. at 105-06* (quoting *First City Fin. Corp., 890 F.2d at 1232*). Under this standard, "doubts concerning the determination of disgorgements are to be resolved against the defrauding party." *SEC v. Hughes Capital Corp., 917 F. Supp. 1080, 1085 (D.N.J. 1996)*; see also *First City Fin. Corp., 890 F.2d at 1231-32*.

To determine the appropriate amount of equitable monetary relief to be awarded here, we must make findings about what would have happened absent the sham lawsuits filed by defendants. See *First City Fin. Corp., 890 F.2d at 1231-32*. The FTC's expert, Dr. Shapiro, constructed a counterfactual world relying on contemporaneous evidence as well as his expert economic analysis. He determined that but for the lawsuits: (1) Teva would have entered the market with a BX-rated product in June 2012; (2) Perrigo would have entered with an AB-rated product in June 2013; and (3) that entry of a generic version of AndroGel 1% would have affected sales of **[**84]** AndroGel 1.62%. He calculated defendants' "incremental revenue," which is the difference between defendants' actual revenue and their counterfactual revenue from June 2012 through the present. Dr. Shapiro then deducted defendants' incremental costs associated with the excess revenue to determine defendants' financial gain attributable to the sham litigation. He determined that this financial gain was $1.35 billion as of the end of March 2018. He opined that this financial gain will continue to accrue until entry of a generic version of AndroGel 1.62%. The FTC also seeks prejudgment interest on this financial gain, compounded quarterly at interest rates promulgated by the Internal Revenue Service ("IRS"). See *26 C.F.R. § 301.6621-1*.

Defendants dispute the FTC's assumptions regarding the entry of Teva and Perrigo as well as the FTC's assumption that entry of a generic 1% would have impacted sales of AndroGel 1.62%. Defendants argue that even absent the sham litigation, Teva would not have entered the market. They concede that Perrigo may have entered the market earlier than it did absent any sham lawsuit but assert that the earliest Perrigo would have entered would have been August 2014. Defendants admit, **[**85]** as they must, that delay in entry of generic 1% would have harmed consumers.

[*139] We must decide when, if ever, Teva would have entered the market in the "but-for" world. In the real world, Teva submitted to the FDA on January 13, 2011 a section 505(b)(2) NDA for its generic version of AndroGel 1% in pump and packet forms. Shortly thereafter, defendants filed their sham lawsuit against Teva. In December 2011, Teva entered into a settlement agreement with defendants and thereby agreed to a licensed entry date of December 27, 2014. On February 14, 2012, Teva received FDA approval of its section 505(b)(2) NDA for the packet presentation of its product only. In July 2014, Teva received from the FDA a BX rating on its product due to discrepancies with the analytical work in Teva's bioequivalence study. Thereafter, Teva decided not to launch its product.

The FTC asserts that, but for the sham lawsuit filed by defendants, Teva would have entered the market with a BX-rated testosterone 1% product in June 2012. The FTC concedes that the filing of the sham lawsuit by defendants did not impact the timing of Teva's FDA approval. Thereafter, the FTC posits that Teva would have continued to move forward with preparations for its launch while waiting for its **[**86]** TE rating. The FTC estimates it would have taken 12-13 months from the time it submitted its section 505(b)(2) NDA to the FDA for Teva to achieve operational readiness.

Defendants dispute whether Teva would have entered the market at all with a BX rating. Teva's generic drug division has never launched a BX-rated retail pharmaceutical product. It has not done so because Teva's generic business model relies on auto-substitution at pharmacies. Without auto-substitution, Teva would have to hire a sales force to promote its BX-rated product. As demonstrated by internal analyses created by Teva, a BX-rated generic without a perceived advantage in the market, such as Teva's product, generally captures only 5% or less of the brand-name product's sales. For this reason, BX-rated generics are rare.

While Tim Crew, Teva's former Commercial Operations Officer, was in particular a strong proponent of a BX-rated launch, Crew left Teva in 2012. Alan Oberman, the Teva executive who replaced Crew, was not a proponent of a BX-rated launch. Maureen Cavanaugh, Vice President of Customer Operations and Marketing for Teva, testified that she, along with the rest of her team, made the recommendation to Teva management to abandon plans for the launch **[**87]** of the testosterone product. She further stated that she did so not because of defendants' infringement litigation but because of Teva's inability to commercialize the product effectively. We find her testimony to be credible.

In addition to its failure to obtain an AB rating, Teva faced other obstacles to the profitable launch of its product. In July 2011, at the suggestion of the FDA, Teva withdrew the pump presentation of its product from consideration due to packaging issues. As a result, the Teva product was approved in packet form only. The pump was preferred by patients over packets because of ease of use. Teva estimated that this setback cut its potential sales opportunity by over 50%. If it intended to continue to pursue a pump presentation for its product, Teva would need to reformulate and then resubmit its section 505(b)(2) NDA to the FDA for consideration. This would have involved significant additional time and expense, and still may have not been successful.

Teva also faced serious manufacturing issues for its testosterone 1% product. It planned to use Cipla, a contract manufacturer based in India, to manufacture its testosterone 1% gel. Cipla demanded that **[*140]** Teva provide approximately $10 million for construction **[**88]** of manufacturing facilities. Teva had the option of making payment in the form of an up-front capital expenditure or over time as a 35% royalty on sales. Teva never reached an agreement with Cipla regarding this investment. The evidence shows that Teva ultimately refused to make this investment unless the FDA issued an AB rating to its product. Cipla could not move forward with preparations for manufacturing until an agreement was reached.

After considering the evidence presented, the FTC has not established that, but for defendants' sham litigation, Teva would have launched its product in June 2012 or at any time thereafter. We find that Teva's failure to launch was due to other intervening events described above and that the sham litigation against it was not a cause. Accordingly, we will not consider any "but-for" entry date of Teva into the TTRT market when calculating defendants' illegal financial gains.

There remains the question of when Perrigo would have entered the market absent defendants' sham litigation against it. In the real world, Perrigo had a December 27, 2014 licensed entry date for its generic version of AndroGel 1% under its settlement with defendants. The FDA approved **[**89]** Perrigo's section 505(b)(2) NDA on January 31, 2013 and thereafter Perrigo waited for a TE rating for its drug. Nearly eighteen months elapsed before the FDA granted its generic TTRT an AB rating. During this time, Perrigo submitted three letters to the FDA, dated April 18, 2013, September 13, 2013, and February 18, 2014, requesting that the FDA issue an AB rating. The last letter threatened litigation if the FDA failed to act by March 19, 2014 and enclosed a draft complaint. On March 21, 2014, Perrigo filed a lawsuit against the FDA in the United States District Court for the District of Columbia alleging violation of the FDCA and the *Administrative Procedures Act* based on the FDA's allegedly unreasonable delay in assigning a TE rating to its product. See Perrigo Israel Pharm. Ltd. v. U.S. Food & Drug Admin., No. 14-475 (D.D.C. Mar. 21, 2014).

On April 10, 2014, the FDA filed a response to Perrigo's motion for a speedy hearing. The FDA asserted that "Perrigo itself has obviated the need for a prompt decision by reaching an agreement with the innovator not to market until December 2014." The FDA further stated that it would issue a TE rating for Perrigo's product by July 31, 2014, some five months before **[**90]** Perrigo's planned launch. In the end, the FDA issued an AB rating to Perrigo on July 23, 2014, and thereafter Perrigo voluntarily dismissed its lawsuit. Perrigo launched its product on December 27, 2014.

We acknowledge that there is no statutory, regulatory, or other deadline within which the FDA is mandated to issue a TE rating. The time that the FDA needs to consider a TE rating depends on the specific facts of each situation, including the reason why the application for approval of a generic drug was submitted as a section 505(b)(2) NDA rather than an ANDA.

It is apparent from the lawsuit Perrigo brought against the FDA that the FDA knew of Perrigo's December 27, 2014 licensed entry date under the settlement agreement. As a result, it had no compelling need, as it implied in its court papers, to grant the TE rating long before Perrigo's entry date. We find that the FDA, absent the sham litigation and the resultant settlement agreement, would not have delayed the issuance of an AB rating for Perrigo's generic drug for nearly eighteen months after approval of its section 505(b)(2) NDA. The FDA is presumed to act in the public interest, which includes **[*141]** the mission of benefitting consumers by approving the entry of safe and effective lower-cost **[**91]** generic drugs into the market. Every month that the FDA would have delayed in issuing a TE rating to a generic drug that was otherwise ready and able to launch would have caused significant financial harm to consumers.

Dr. Kenneth Phelps, the FTC's regulatory expert, testified that in his experience it takes no more than one month for the FDA to assign a TE rating for a section 505(b)(2) drug. The FTC's economic expert, Dr. Shapiro, estimated that, but for the sham litigation, Perrigo would have received its TE rating approximately four months from the date of FDA approval of its section 505(b)(2) NDA. He relied on the approximated four months' time lapse in the real world between Perrigo's filing of the lawsuit against the FDA and the FDA's issuance of the TE rating.

Defendants further point to citizen's petitions filed by AbbVie regarding TE ratings to assert that the FDA would not have issued a TE rating to Perrigo sooner. On August 18, 2011, AbbVie filed a citizen's petition requesting that the

FDA conduct notice-and-comment rulemaking to establish procedures for its assignment of TE ratings for drugs approved under section 505(b)(2). That petition did not relate specifically to Perrigo but rather to general procedures for TE ratings. Contrary **[**92]** to defendants' position, there is no indication that the FDA refrained from issuing TE ratings for generic drugs while this petition was pending. Later in a supplement filed on December 11, 2013, AbbVie requested that the FDA assign a BX rating to Perrigo's product. The FDA ultimately responded to this citizen petition in July 2014 at the same time it issued Perrigo's TE rating. However, a June 2013 launch would have been six months before AbbVie filed its supplemental citizen petition, and therefore we find that this supplemental citizen petition would not have delayed Perrigo's launch in the "but-for" world. Thus, the defendants' citizen petition would not have affected Perrigo's "but-for" entry date.

We find that absent the sham lawsuit, Perrigo would have received its AB rating in June 2013 and would have launched its AB-rated generic product at that time. We reject defendants' contention that Perrigo would not have launched its product until August 2014.

The parties next dispute the effect of the sham litigation on sales of AndroGel 1.62%. In his damages model, Dr. Shapiro opines that entry of a generic version of AndroGel 1% would have caused the market share of AndroGel 1.62% **[**93]** to plateau. According to Dr. Shapiro, the delay of generic 1% entrants caused by the sham litigation allowed defendants to transition more patients from brand-name AndroGel 1% to brand-name AndroGel 1.62% and thus avoid auto-substitution for generic versions of AndroGel 1%. We agree. Consequently, Dr. Shapiro properly includes a portion of defendants' profits from AndroGel 1.62% in his calculation of excess profits.

In the real world, AndroGel 1.62% accounted for total AndroGel sales as follows: 57% during the last 7 months of 2012, 67% in 2013, 76% in 2014, 83% in 2015 and 2016, and 82% in 2017. In the "but-for" world, the FTC asserts that AndroGel 1.62%'s share of total AndroGel sales would have frozen at the time that the first generic version of AndroGel 1% entered the market. We have already determined that but for the sham litigation, Perrigo would have entered the market in June 2013. It follows and we find that the share for AndroGel 1.62% would have frozen **[*142]** at approximately 67%.[29]

In response, defendants contend that AndroGel 1.62% is "superior" to AndroGel 1% and thus prescribers will chose AndroGel 1.62% regardless of the availability of a generic version of AndroGel 1%.[30] In support **[**94]** of their position, they point out that AndroGel 1.62% is not subject to auto-substitution for a generic version of AndroGel 1%. They further maintain that sales of AndroGel 1.62% have come not only from patients who previously used AndroGel 1% but also from patients who used other TRTs or who are new to treatment for hypogonadism. Defendants cite OptumHealth data showing that from the launch of AndroGel 1.62% through March 2016, only 28.1% of AndroGel 1.62% patients had filled an AndroGel 1% prescription within the 12 months preceding their first AndroGel 1.62% prescription. The other sales came from patients who were previously using other TRTs or were new to testosterone replacement therapy. Defendants therefore reason that sales of AndroGel 1.62% would not have been impacted by earlier entry of a generic version of AndroGel 1%. We disagree.

We find in favor of the FTC on this issue. The record shows that sales of AndroGel 1.62% grew more slowly after launch than defendants initially anticipated. Around the time of the filing of the sham lawsuits, defendants were concerned about the impact that entry of a generic version of AndroGel 1% would have on sales for AndroGel 1.62%. Contemporaneous **[**95]** forecasts created by AbbVie during the relevant time period predicted that entry of a generic version of AndroGel 1% would not only erode sales for brand-name AndroGel 1% but would also cause sales of brand-name AndroGel 1.62% to plateau or even decline. For example, in the fall of 2011, AbbVie forecast that sales of AndroGel 1.62% would decrease approximately 30-35% after entry of an AB-rated generic version of AndroGel 1%. In 2014, AbbVie similarly predicted that AndroGel 1.62% could lose 20-27% of its sales after entry of

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[29] As discussed above, the FTC initially took the position that Teva would have entered the market in 2012 with a BX-rated generic version of AndroGel 1%. This would freeze AndroGel 1.62%'s share of the AndroGel market at 51%, which is what the FTC asserts the share would have been during the last seven months of 2012.

[30] AndroGel 1.62% has the same active ingredients and effects as AndroGel 1%, but simply requires half the volume of gel. It thus has a quicker drying time and therefore less risk of transference.

a generic version of AndroGel 1%. Again, in the real world, AndroGel 1.62%'s share of AndroGel sales did in fact plateau after Perrigo entered the market in December 2014, although by that time AndroGel 1.62%'s share of the total AndroGel market had reached 83%.

The filing of the sham lawsuits allowed defendants additional time to increase sales for AndroGel 1.62% without any competition from a lower priced generic version of AndroGel 1%. Although AndroGel 1% and AndroGel 1.62% are distinct products, both include the same active ingredient and are indicated for the same purpose, that is, to treat hypogonadism. The only significant difference in the record between **[**96]** the two drugs is that AndroGel 1.62% requires a smaller volume of gel. As stated above, AndroGel 1% and AndroGel 1.62% compete within the TTRT market, both with each other as well as with all other TTRTs. Under these circumstances, we find that the filing of the sham lawsuits and the resulting delay in generic entry increased defendants' profits on not only AndroGel 1% but also on AndroGel 1.62%.

[*143] The parties further dispute the end date for calculation of defendants' profits subject to disgorgement. As stated above, only profits with a causal connection to the wrongdoing are subject to disgorgement. See *Commodity Futures Trading Comm'n, 991 F.2d at 78-79*. This court has discretion to order disgorgement of profits for the time period in which the effects on the market of defendants' wrongful conduct were continuing, even after the entry of Perrigo at the end of 2014. See id. On the other hand, we must not award disgorgement of profits where the causal connection to defendants' wrongdoing has become too attenuated or remote. See *Teo, 746 F.3d at 106*; *SEC v. MacDonald, 699 F.2d 47, 53-55 (1st Cir. 1983)*.

The FTC takes the position that defendants' financial gain due to the sham lawsuits is ongoing at the rate of $6 million per month until the time in the future when a generic version of AndroGel 1.62% enters **[**97]** the market. We reject this position and instead will award disgorgement of profits through August 2017 only. By that time, Perrigo's generic version of AndroGel 1% had been on the market for 2.5 years and had achieved its maximum penetration rate of approximately 91% of brand-name AndroGel 1% sales. The effect of defendants' wrongful conduct on the TTRT market had largely subsided. We find that any award of disgorgement after that date would be speculative.

Defendants are liable for disgorgement in the amount of $448 million in profits. This amount reflects defendants' financial gain due to the sham lawsuits from June 2013 when Perrigo would have entered the TTRT market through August 2017. In addition, the FTC is entitled to prejudgment interest calculated at the interest rates set forth by the IRS for underpayments. *26 C.F.R. § 301.6621-1*; see also *Teo, 746 F.3d at 109-10*. In reaching this award, we are guided by the Supreme Court's direction that antitrust cases must be resolved according to the "particular facts disclosed by the record" rather than "formalistic distinctions." *Eastman Kodak Co., 504 U.S. at 467-68* (internal citations omitted). We also keep in mind the purpose of our equitable power to grant disgorgement, which is not to provide an award of damages **[**98]** at law but instead to deter violations of ***antitrust law*** and to prevent the unjust enrichment of defendants. See *Teo, 746 F.3d at 105-06*.

We must also decide how liability for the disgorgement award should be apportioned between defendants AbbVie and Besins. Besins contends that it is immune from equitable monetary relief for its violations of ***antitrust law*** because it never received any profits from AndroGel. Instead, royalties on U.S. sales of AndroGel were paid to its European corporate affiliate now known as Laboratoires Besins Iscovesco SAS ("LBI SAS") or to another Besins entity, Besins Healthcare Luxemborg SARL ("BHL SARL"). Here, the FTC has named Besins Healthcare, Inc. (as stated above, "Besins") as a defendant.

Besins is one of the entities that instituted the sham lawsuits against Teva and Perrigo. As co-owner of the '894 patent, the sham lawsuits could not have been filed without Besins. See *Ethicon, Inc. v. U.S. Surgical Corp., 135 F.3d 1456, 1468 (Fed. Cir. 1998)*. We have already determined that Besins, along with AbbVie, filed these objectively baseless lawsuits with actual knowledge that the suits lacked merit with no expectation of prevailing and with the intent to impose expense and delay on Teva and Perrigo and to impede at least for a time the expected loss by defendants **[**99]** of hundreds of millions of dollars in sales. As we discussed above, counsel for Besins was an experienced patent lawyer who had access to the paragraph **[*144]** IV notices, the patent prosecution history, and the analysis of outside counsel who had full access to the Teva and Perrigo section 505(b)(2) NDAs.

He nonetheless made the decision with the requisite subjective intent to join in these objectively baseless lawsuits. Under these circumstances it is appropriate to impose disgorgement on Besins for its role in filing the sham lawsuits.

It is well established that "disgorgement is an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset". *SEC v. McGee, 895 F. Supp. 2d 669, 689 (E.D. Pa. 2012)* (quoting *SEC v. Banner Fund Int'l, 211 F.3d 602, 617, 341 U.S. App. D.C. 175 (D.C. Cir. 2000))*. A wrongdoer such as Besins "may be ordered to disgorge not only the unlawful gains that accrue to the wrongdoer directly, but also the benefit that accrues to third parties whose gains can be attributed to the wrongdoer's conduct." See *SEC v. Contorinis, 743 F.3d 296, 302 (2d Cir. 2014)*. This result obtains because the purpose of equitable disgorgement is both to deprive a wrongdoer of its unjust enrichment as well as to deter others from violating the law. *Teo, 746 F.3d at 105* (citing *SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997))*.

To accept Besins' position would be tantamount to allowing Besins **[**100]** to enrich unjustly its corporate affiliate through the filing of sham lawsuits. See *Contorinis, 743 F.3d at 301-04, 307*. It would also "perpetuate rather than correct an inequity." *Banner Fund Int'l, 211 F.3d at 617*. The Besins entity named as a defendant here is the party that co-owned the '894 patent and the party that filed the sham actions. It is of no import that Besins may have chosen to direct profits from its wrongdoing to affiliated corporate entities LBI SAS and BHL SARL.

Joint and several liability for disgorgement is appropriate "when two or more individuals or entities collaborate or have close relationships in engaging in the illegal conduct." *Hughes Capital Corp., 124 F.3d at 455*. Nonetheless, a court may apportion liability among tortfeasors when it is reasonable and practical to do so, such as when the recipients of ill-gotten profits and the amount each received can be determined from the record. *Id. at 455*. Besins' European affiliates were paid royalties in the amount of 8% of the U.S. net sales of AndroGel through the end of March 2015. As of April 1, 2015, that royalty rate was reduced to 5%. We therefore will apportion liability in those percentages to Besins for the disgorgement award of $448 million plus prejudgment interest according to those percentages.

VI

In addition to disgorgement, **[**101]** the FTC seeks an injunction that in its view would prevent or deter defendants from engaging in similar misconduct in the future. Specifically, the FTC urges an injunction: (1) to prohibit the filing of any claims of patent infringement based on the '894 patent by a product that does not include about 0.1% to about 5% isopropyl myristate; (2) to prohibit defendants from filing any other sham litigation; (3) to prohibit defendants from engaging in any action that misuses government processes for anticompetitive purposes; and (4) to require defendants to certify that any patent infringement litigation or other use of governmental processes has an objectively reasonable basis.

The FTC further contends that an injunction is necessary to restore competitive market conditions. It seeks to compel defendants to license AndroGel 1.62% to one or more generic competitors. It also **[*145]** would command defendants to manufacture and deliver to these generic competitors a supply of generic AndroGel 1.62% until those competitors are independently able to manufacture the drug themselves.

Section 13(b) of the FTC Act allows the FTC to obtain injunctive relief when a defendant "is violating, or is about to violate, any provision of law enforced by **[**102]** the Federal Trade Commission." *15 U.S.C. § 53(b)*. As our Supreme Court has recognized, "[t]he purpose of an injunction is to prevent future violations." *United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)* (citing *Swift & Co. v. United States, 276 U.S. 311, 326, 48 S. Ct. 311, 72 L. Ed. 587 (1928))*. Accordingly, the FTC must demonstrate that there is a "cognizable danger of recurrent violation." Id.; see also *Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 n.3, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994)*. As the moving party, the FTC bears the burden to prove that injunctive relief is warranted. See *W. T. Grant Co., 345 U.S. at 633*.

The FTC has proven that defendants filed two sham infringement lawsuits, one against Teva in April 2011 and another against Perrigo in October 2011. Defendants were able to exclude competition illegally in the TTRT market from June 2013 until the end of December 2014 as a result of sham litigation and the settlement of sham litigation. Nonetheless, the FTC has presented no evidence that defendants are currently violating antitrust laws or about to violate antitrust laws. Generic versions of AndroGel have now been on the market for over three years. AndroGel 1%'s share of the market has shrunk since entry of Perrigo, and the '894 patent expires on January 6, 2020. The FTC has not alleged that defendants have filed any other sham lawsuits.[31] The fact that defendants filed two such lawsuits, without more, does not establish that defendants have a **[**103]** pattern or practice doing so. On this record there is no basis to conclude that defendants' misconduct is likely to reoccur.

We are also concerned that the injunction sought by the FTC is overbroad and punitive in nature. Because it would implicate defendants' *First Amendment* right to petition the government, the injunction must "burden no more speech than necessary to serve a significant government interest." *Madsen, 512 U.S. at 765*. The injunction sought by the FTC involves the defendants' ability to file patent infringement suits or otherwise to use the governmental process with respect to any patent. Given the fact that the '894 patent was the only patent at issue here and there is no evidence that defendants filed sham litigation or otherwise abused the government process with regard to other patents, the injunctive relief sought by the FTC does not meet the test set forth in *Madsen*.

We also see no basis to enter an injunction mandating defendants to license to generic competitors its intellectual property rights to AndroGel 1.62%. There is no evidence that sale of AndroGel 1.62% is currently violating, or will violate, *section 5 of the FTC Act.*

Accordingly, no injunction will be entered.

[*146] VII

Based on defendants' violation of *section 5 of the FTC Act*, the court awards equitable monetary **[**104]** relief in favor of the FTC and against the defendants in the amount of $448 million, which represents disgorgement of defendants' ill-gotten profits from June 2013, when Perrigo would have entered the TTRT market, through August 2017. The FTC is also entitled to prejudgment interest on this award, calculated at the interest rates set forth by the IRS for underpayments as discussed above. See *26 C.F.R. § 301.6621-1*. Liability will be apportioned between AbbVie and Besins according to the royalty rates agreed upon by the parties, which were 8% through March 31, 2015 and thereafter 5%.

The parties shall confer and if possible submit to the court for consideration a joint proposed form of judgment and if the parties cannot agree each party shall submit a proposed form of judgment. The court will enter a judgment after conferring with the parties.

BY THE COURT:

/s/ Harvey Bartle III, J.

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

[*none] ORDER

AND NOW, this 29th day of June, 2018, the court having filed its Findings of Fact and Conclusions of Law, it is hereby ORDERED that:

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[31] The FTC has advised the court that since the filing of the lawsuits against Teva and Perrigo in 2011, defendants have filed numerous other patent infringement suits against competitors, including seven lawsuits related to the '894 patent. The FTC has presented no evidence that these lawsuits were shams, and therefore they do not provide support for the injunctive relief sought here.

(1) the parties shall submit to the court, on or before July 13, 2018, a proposed joint form of judgment and if the parties cannot agree, each party shall submit a proposed form of judgment by that **[**105]** date; and

(2) a conference with counsel for the parties concerning the form of judgment to be entered shall take place in chambers on Tuesday, July 17, 2018 at 10:30 a.m.

BY THE COURT:

/s/ Harvey Bartle III, J.

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McGarry & McGarry LLP v. Bankr. Mgmt. Sols.

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

July 2, 2018, Decided; July 2, 2018, Filed

Case No. 17 CV 5779

Reporter

2018 U.S. Dist. LEXIS 110264 *; 2018 WL 3218659

MCGARRY & MCGARRY LLP, Plaintiff, v. BANKRUPTCY MANAGEMENT SOULTIONS, INC., Defendant.

Subsequent History: Affirmed by *McGarry & McGarry, LLC v. Bankr. Mgmt. Solutions, 2019 U.S. App. LEXIS 26764 (7th Cir. Ill., Sept. 5, 2019)*

Prior History: *McGarry & McGarry, LLP v. Bankr. Mgmt. Sols., Inc., 2017 U.S. Dist. LEXIS 93133 (N.D. Ill., June 16, 2017)*

Core Terms

antitrust, purchaser, anti trust law, conspiracy, software, motion to dismiss, antitrust suit

Counsel: **[*1]** For McGarry & McGarry, LLC, Plaintiff: Marianne C. Holzhall, McGarry & McGarry, LLC, Chicago, IL; William Dunnegan, PRO HAC VICE, Dunnegan & Scileppi LLC, New York, NY.

For Bankruptcy Management Solutions, Inc., Defendant: Jonathan M Herman, LEAD ATTORNEY, Dorsey & Whitney, New York, NY; Kaleb McNeely, LEAD ATTORNEY, PRO HAC VICE, Dorsey & Whitney LLP, New York, NY; Michael Anthony Lindsay, LEAD ATTORNEY, PRO HAC VICE, Dorsey & Whitney LLP, Minneapolis, MN; Michael Irving Leonard, LeonardMeyer LLP, Chicago, IL.

Judges: Joan H. Lefkow, United States District Judge.

Opinion by: Joan H. Lefkow

Opinion

ORDER AND STATEMENT

On September 14, 2016, Plaintiff McGarry & McGarry, LLP, filed in the Northern District of Illinois a putative class action against Bankruptcy Management Solutions, Inc. (BMS). McGarry alleged that BMS participated in a horizontal conspiracy to fix the manner of charging fees for its bankruptcy software services in violation of *Section 1 of the Sherman Act* as well as an identical claim for violation of the *Illinois Antitrust Act, 740 ILCS 10/3*. The court granted BMS's motion to dismiss the Sherman Act count with prejudice and declined to exercise supplemental jurisdiction over the state claim, dismissing it without prejudice. **[*2]** *See McGarry & McGarry, LLP v. Bankr. Mgmt. Soultions, Inc., No. 16 CV 8914, 2017 U.S. Dist. LEXIS 93133, 2017 WL 2619143 (N.D. Ill. June 16, 2017)*. McGarry did not appeal the order. Instead, it filed in Illinois state court a single count against BMS alleging the same horizontal conspiracy to fix the manner of charging fees for its bankruptcy software services in violation of the

Illinois Antitrust Act, 740 ILCS 10/3 (count I), which BMS promptly removed to this court.[1] (*See* Dkt. 1.) BMS now moves to dismiss the count under Federal Rule of Civil Procedure 12(b)(6). (Dkt. 25.) For the reasons stated below, the motion is granted.[2]

BACKGROUND[3]

Like the previous litigation between these two parties, this case involves an alleged horizontal conspiracy among BMS, Epiq Systems, Inc., and TrusteSolutions, LLC—the three largest bankruptcy software providers in the United States—to fix the manner of charging fees for their services. When a debtor files a Chapter 7 petition in bankruptcy, an estate containing the debtor's property is created. The Executive Office of the United States Trustee (EOUST), a division of the United States Department of Justice, then appoints a specific trustee to administer the estate.

Historically, BMS, the largest bankruptcy software provider, directed a trustee who wished to use its software to deposit all of an estate's funds with a partner bank. The partner **[*3]** bank would earn money from the deposit, paying interest to the estate as well as a fee to BMS.[4] But as a result of the financial crisis of 2008, interest rates declined and, not surprisingly, so did the partner bank's ability to pay BMS. In response, BMS decided to implement a new payment structure: it would sell bankruptcy software services only in combination with bankruptcy banking services, and it would charge a set percentage of the funds in the estate's bank account for those combined services. For the new billing structure to succeed in the marketplace, however, BMS needed Epiq and TrusteSolutions to agree to sell their services in the same manner.

Sometime before 2011, BMS approached the two entities, and both agreed to implement a similar billing structure. The plan, however, would potentially violate a EOUST rule that prohibited a trustee from using estate funds to pay bank fees, so the three conspirators appealed to the EOUST to suspend the rule, which it did in April 2011. With that barrier removed, BMS, Epiq, and TrusteSolutions put their conspiracy into motion.

In May 2011, Integrated Genomics, Inc., petitioned in Chapter 7 bankruptcy in this District. Eugene Crane was appointed **[*4]** trustee of the estate. At some point, Crane entered into a contract with BMS. As one condition of the contract, Crane agreed to deposit all (or substantially all) of the estate's funds with Rabobank, BMS's partner bank at the time. (*Id.*) Crane also entered into a contract with Rabobank, authorizing it to automatically withdraw a monthly fee from the Integrated estate's account.

McGarry, a law firm located in Chicago, was an unsecured creditor of the Integrated estate. It received $12,472.55 of its allowed claim of $78,308.94. Following Crane's final account and distribution report filed in April 2014, McGarry learned that a $514.16 fee had been paid to Rabobank from the Integrated account. Rabobank paid most, if not all, of that amount to BMS. McGarry alleges that the amount of money paid to BMS was greater than the amount it would have received absent the alleged conspiracy and, without that overcharge, McGarry would have received a larger distribution from the Integrated estate.[5]

LEGAL STANDARD

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[1] The court has jurisdiction under 28 U.S.C. § 1332. McGarry is a partnership whose members are all citizens of Illinois. BMS shows a good faith basis that the amount in controversy exceeds $75,000.

[2] The court has jurisdiction under 28 U.S.C. § 1332. Venue is proper under 28 U.S.C. § 1391(b).

[3] Unless otherwise noted, the following facts are taken from plaintiff's complaint and are presumed true for the purpose of resolving the pending motion. Active Disposal, Inc. v. City of Darien, 635 F.3d 883, 886 (7th Cir. 2011) (citation omitted).

[4] The court infers that the interest paid to an estate was less than what would be paid to a normal commercial client.

[5] The complaint includes additional allegations that are not pertinent to the disposition of the motion.

A motion to dismiss under Rule 12(b)(6) challenges a complaint for failure to state a claim on which relief may be granted. In ruling on such a motion, the court accepts as true all well-pleaded facts in the **[*5]** plaintiff's complaint and draws all reasonable inferences from those facts in the plaintiff's favor. Active Disposal, 635 F.3d at 886 (citation omitted). To survive a Rule 12(b)(6) motion, the complaint must not only provide the defendant with fair notice of a claim's basis but must also establish that the requested relief is plausible on its face. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The allegations in the complaint must be "enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. At the same time, the plaintiff need not plead legal theories; it is the facts that count. Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 743 (7th Cir. 2010); *see also* Johnson v. City of Shelby, 574 U.S. ___, 135 S. Ct. 346, 346, 190 L. Ed. 2d 309 (2014) (per curiam) ("Federal pleading rules call for 'a short and plain statement of the claim showing the pleader is entitled to relief'; they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." (citations omitted)).

ANALYSIS

In the first action, the court granted BMS's motion to dismiss because McGarry was not the appropriate party to bring a claim under federal ***antitrust law***. BMS moves to dismiss McGarry's single count of violation of the Illinois Antitrust Act (IAA) on the same grounds. To bring an antitrust suit, a plaintiff must show two things: they must have standing to bring an antitrust suit, and they **[*6]** must allege that they have sustained antitrust injury. Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993); Shuffle Tech Int'l, LLC v. Sci. Games Corp., No. 15 C 3702, 2015 U.S. Dist. LEXIS 138741, 2015 WL 5934834, at *9 (N.D. Ill. Oct. 12, 2015). "Illinois courts have adopted a common-law harmonization provision, meaning that they interpret their antitrust laws in harmony with federal-court decisions interpreting federal ***antitrust law***." United States ex rel. Blaum v. Triad Isotopes, Inc., 104 F. Supp. 3d 901, 929-30 (N.D. Ill. 2015); *see also* 740 Ill. Comp. Stat. Ann. 10/11 ("When the wording of [the Illinois Antitrust] Act is identical or similar to that of a federal ***antitrust law***, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act."). This includes questions of standing.[6] O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1066 (7th Cir. 1997) ("Federal antitrust standing rules apply under the Illinois Antitrust Act.").

In the first action, BMS alleged that McGarry was prevented from bringing a federal antitrust suit by the doctrine announced in Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).[7] *Illinois Brick* forbids "a customer of the purchaser who paid a cartel price to sue the cartelist, even if his seller—the direct purchaser from the cartelist—passed on to him some or even all of the cartel's elevated price." Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 821 (7th Cir. 2015), *cert. denied*, *135 S. Ct. 2837, 192 L. Ed. 2d 875 (2015)*. That is, an indirect purchaser generally cannot bring an antitrust suit; rather, the claim belongs to the direct purchaser.[8]

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[6] The language under the federal antitrust statutes regarding who is able to maintain an antitrust claim is substantially similar to that of the IAA. *Compare* 15 U.S.C. § 15 ("any person who shall be injured in his business by reason of anything forbidden in the antitrust laws . . . .) *with* 740 ILCS 10/7 ("Any person who has been injured in his business or property, or is threatened with such injury, by violation of Section 3 of this Act . . . .).

[7] BMS argues that McGarry should be collaterally estopped from arguing that it has standing to bring a state antitrust claim because the court previously found that McGarry lacked standing to bring a federal antitrust claim. In the prior case, McGarry conceded that it was not a purchaser of any kind; therefore, it had not participated in any market. 2017 U.S. Dist. LEXIS 93133, 2017 WL 2619143 at *3. The issue of whether McGarry had standing under the IAA was not decided. While Illinois courts look to federal law to guide their interpretation of the IAA, they are not bound by the decisions of federal courts. *See* Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc., 162 Ill. 2d 99, 103, 642 N.E.2d 470, 472, 204 Ill. Dec. 769 (1994) (stating that federal case law "is merely a guide to use in interpreting" the IAA and that federal decisions are not binding on Illinois courts). Accordingly, McGarry is not estopped from arguing that it has standing to bring a state antitrust claim.

[8] While there are narrow exceptions to this rule, McGarry did not convince the court that it fit within them.

Because, according to McGarry, the Integrated estate was the direct purchaser, **[*7]** this court held that the estate, through its trustee, was the proper party to bring an antitrust claim.[9]

But while "the Supreme Court held [in *Illinois Brick*] that only the immediate purchaser of goods may sue under antitrust laws, Illinois now provides by statute that indirect purchasers may recover as well." *Cty. of Cook v. Philip Morris, Inc., 817 N.E.2d 1039, 1045, 353 Ill. App. 3d 55, 288 Ill. Dec. 389 (2004)*. This difference between Illinois and federal ***antitrust law*** does nothing to help McGarry, however, for it has admitted that it is not a purchaser at all. McGarry first cites to several cases allowing non-purchasers to bring antitrust suits. (Dkt. 28 at 4 (citing *Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*; *In re Zinc Antitrust Litig., 155 F. Supp. 3d 337, 360 (S.D.N.Y. 2016)*; *In re Aluminum Warehousing Antitrust Litig., 95 F. Supp. 3d 419, 441 (S.D.N.Y. 2015)*; *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 172 (3d Cir. 2015)*.) The reasoning underlying the cited circuit and district opinions springs from the Supreme Court's decision in *McCready*. There, the Supreme Court recognized that a party who was neither a purchaser nor competitor in the relevant market could bring an antitrust action if the injury suffered "was inextricably intertwined with the injury the conspirators sought to inflict." *McCready at 484*. "To be inextricably intertwined with the injury to competition, the plaintiff[] must have been manipulated or utilized by [d]efendant as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and **[*8]** geographical market." *In re Zinc Antitrust Litig. at 360*; *In re Aluminum Warehousing Antitrust Litig. at 422* (same). As in the first action, McGarry fails to explain how its injury was inextricably intertwined with the conspiracy to fix the manner of charging fees for bankruptcy software. The plaintiffs in the cited cases, while not purchasers in the markets targeted by the conspiracies, were, however, purchasers in other markets. *See* *Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 482 (7th Cir. 2002)* (stating that *McCready* "recognizes that different injuries in distinct markets may be inflicted by a single antitrust conspiracy"). McGarry has participated in no market. Rather, it is simply a creditor of an estate that allegedly was injured by an antitrust violation. The Seventh Circuit stated more than three decades ago that "[m]erely derivative injuries sustained by employees, officers, stockholders, and creditors of an injured company do not constitute 'antitrust injury' sufficient to confer antitrust standing." *Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1378 (7th Cir. 1987)*; *see also* *Cong. Bldg. Corp. v. Loew's, Inc., 246 F.2d 587, 590 (7th Cir. 1957)* ("The courts have uniformly denied recovery to . . . creditors . . . who claimed injury as the result of alleged antitrust violations."); *Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 533-34, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)* (discussing with approval *Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910)*, which held that a creditor of an injured business does not have standing to assert an antitrust claim). McGarry cites no case where a creditor **[*9]** brought a claim under the IAA or the federal antitrust laws based on an injury sustained by its debtor (nor has the court found one).

Rather, McGarry points out that a bankruptcy estate is different from a company in that the former does not exist to generate a profit. Therefore, the relationship between the Integrated Estate and McGarry "more closely resembles a principal/agent relationship, where the principal has standing to sue despite the general derivative standing rule." (Dkt. 28 at 8.) The court struggles to understand McGarry's argument and does not see how the Integrated Estate would be McGarry's agent, as it would seemingly follow that a bankruptcy estate would be the agent of each of its individual creditors. If anyone is the agent of the bankruptcy estate, it is the trustee. As the court has pointed out, because a trustee in bankruptcy owes a fiduciary duty to an estate's creditors, *Matter of Salzer, 52 F.3d 708, 712 (7th Cir. 1995)*, the trustee could "pursue the debtor's claim against the defendant on behalf of all the debtor's creditors equally, without preference for any particular creditor. That injury is much more efficiently measured on behalf of the debtor, moreover, rather than in fortuitous segments claimed by **[*10]** those creditors who happen to sue." Phillip E. Areeda *et al.*, ***ANTITRUST LAW*** § 353c (4th ed. 2014).

ORDER

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[9] McGarry's motion to reopen the bankruptcy case and for derivative standing to assert antitrust claims was denied, in part because the trustee's refusal to reopen the estate was justified. *See* Order at 5, *In re Integrated Genomics, Inc., 11 B 19086, 2017 Bankr. LEXIS 4596 (Bankr. N.D. Ill. Nov. 21, 2017)*.

Accordingly, BMS's motion to dismiss (dkt. 25) is granted. McGarry's claim is dismissed with prejudice. This case is terminated.

Date: July 2, 2018

/s/ Joan H. Lefkow

U.S. District Judge Joan H. Lefkow

Hackert v. Sutter Med. Found.

Court of Appeal of California, Third Appellate District

July 6, 2018, Opinion Filed

C079903

Reporter

2018 Cal. App. Unpub. LEXIS 4616 *; 2018 WL 3322127

JOHN B. HACKERT, Plaintiff and Appellant, v. SUTTER MEDICAL FOUNDATION et al., Defendants and Respondents.

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

Prior History: **[*1]** Superior Court of Sacramento County, No. 34-2014-00167465-CU-MC-GDS.

Core Terms

provider, noncontracted, health plan, unauthorized, regulations, unfair competition, authorization, nonemergency, enrollees, unfair, emergency service, trial court, prior contract, demurrer, breach of contract, cause of action, contracted, benefits, contends, reimburse, consumer, terminated, obligate, pleaded, surgeon, injunctive relief, allegations, fraudulent, customary, asserts

Judges: HULL, Acting P. J.; ROBIE, J., BUTZ, J. concurred.

Opinion by: HULL, Acting P. J.

Opinion

Plaintiff John B. Hackert, a medical doctor, sued Sutter Medical Foundation and related entities to be reimbursed for services he provided as an assistant surgeon. Sutter, however, had not authorized his services and plaintiff provided those services after he terminated his contract with Sutter and after Sutter informed him it would not pay for unauthorized services. Plaintiff alleged that state law governing managed health care, federal Medicare law, and unfair competition law (as it may apply to a breach of his prior contract with Sutter) entitled him to injunctive relief compelling Sutter to pay for the unauthorized services.

The trial court sustained defendants' demurrer without leave to amend and entered a judgment of dismissal. We reverse, but only to allow plaintiff to plead a common law cause of action for breach of his prior contract. All of his current causes of action fail to state a claim upon which relief may be granted.

We note that defendants are Sutter Medical Foundation, Sutter Medical Group, Sutter Independent Physicians, Sutter Health **[*2]** Sacramento Sierra Region, Sutter Health Plan dba Sutter Health Plus, and Sutter Health. For ease of reference, we refer to the defendants individually and collectively as Sutter.

FACTS AND PROCEEDINGS

The sufficiency of a complaint is a question of law we review do novo. We accept as true all properly pleaded allegations. (*Saunders v. Superior Court (1994) 27 Cal.App.4th 832, 837-838, 33 Cal. Rptr. 2d 438*.)

In 2011, plaintiff entered into a contract with Sutter to perform surgical assistant services. He terminated the contract in 2014, believing Sutter was underpaying claims for his services. When he ended the contract, he expressed his intention to continue to bill Sutter for services he would render on a noncontracted basis.

Sutter informed plaintiff in writing that any services he provided in the future would require Sutter's authorization. Sutter also told him it would not pay for unauthorized services that he might render in the future.

Despite these warnings, plaintiff submitted claims for unauthorized services he performed at the request of other surgeons after plaintiff had terminated his contract. Sutter denied the majority of these claims.

Plaintiff filed this action. In his second amended complaint, he sought injunctive relief ordering Sutter to pay his unauthorized **[*3]** claims pursuant to (1) *section 1300.71 of title 28 of the California Code of Regulations* (*section 1300.71*), a regulation prescribing how provider claims against health plans are to be reimbursed under state law; (2) federal Medicare regulations directing how provider claims are to be reimbursed by health plans that provide certain Medicare coverage; and (3) the state Unfair Competition Law (*Bus. & Prof. Code, § 17200 et seq.*) based on a breach of his *prior* contract. Plaintiff also sought a declaration that Sutter's refusal to pay his claims was unlawful.

The trial court sustained Sutter's demurrer without leave to amend. It held the state and federal regulations did not require Sutter to pay plaintiff for his unauthorized claims. It ruled his claim under the Unfair Competition Law was moot because he terminated his prior contract, failed to allege a fraudulent practice, and lacked standing under federal law to enforce the terms of an employer-sponsored health plan. The trial court also held plaintiff was not entitled to declaratory relief because all of his substantive claims failed as a matter of law.

Plaintiff appeals from the judgment of dismissal. He contends the trial court erred in each of its rulings. He also contends the trial court abused its discretion when it sustained the demurrer without **[*4]** granting him leave to allege a quantum meruit claim.

We disagree with each of plaintiff's contentions.

DISCUSSION

I

Section 1300.71

Plaintiff contends the trial court erred when it determined he could not state a claim for injunctive relief under *section 1300.71*. He asserts the regulation required Sutter to compensate him for nonemergency services he rendered, even though Sutter did not authorize his services, because nothing in the regulation or its related statutes *prohibits* Sutter from paying for services it did not authorize. Simply stating the argument exposes its fallacy.

The Knox-Keene Health Care Service Plan Act of 1975 (the Act) and its related regulations govern health care service plans. (*Health & Saf. Code, § 1340 et seq.*)

The Act defines a "'health care service plan'" as "[a]ny person who undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of the cost for those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees." (*Health & Saf. Code, § 1345, subd. (f)(1)*.) We use the terms "health care service plan," "health plan," and "plan" interchangeably.

The Act requires health plans to reimburse claims for payment made by health care providers and to provide a **[*5]** dispute resolution mechanism to resolve challenged claims. (*Health & Saf. Code, §§ 1367, subd. (h)*, *1371*.)

The Act does not compel a health plan to pay for provider services it does not authorize except in one instance relevant here. It requires a health plan to pay providers for emergency services they render to enrollees "until the care results in stabilization of the enrollee," even if the providers are not contracted with the health plan and the health plan does not authorize the services. (*Health & Saf. Code, § 1371.4, subd. (b)*.) "As long as federal or state law requires that emergency services and care be provided without first questioning the patient's ability to pay, a health care service plan shall not require a provider to obtain authorization prior to the provision of emergency services and care necessary to stabilize the enrollee's emergency medical condition." (*Health & Saf. Code, § 1371.4, subd. (b)*.)

Section 1300.71 sets forth the amount a health plan must pay providers on their claims. *Subdivision (a)(3) of section 1300.71* reads in its entirety:

"'Reimbursement of a Claim' means:

"(A) For contracted providers with a written contract, including in-network point-of-service (POS) and preferred provider organizations (PPO): the agreed upon contract rate;

"(B) For contracted providers without a written contract and non-contracted providers, except **[*6]** those providing services described in paragraph (C) below: the payment of the reasonable and customary value for the health care services rendered based upon statistically credible information that is updated at least annually and takes into consideration: (i) the provider's training, qualifications, and length of time in practice; (ii) the nature of the services provided; (iii) the fees usually charged by the provider; (iv) prevailing provider rates charged in the general geographic area in which the services were rendered; (v) other aspects of the economics of the medical provider's practice that are relevant; and (vi) any unusual circumstances in the case; and

"(C) For non-emergency services provided by non-contracted providers to PPO and POS enrollees: the amount set forth in the enrollee's Evidence of Coverage." (*§ 1300.71, subd. (a)(3)*.

Thus, the amount a health plan must pay depends on whether the provider has a contract with the health plan and whether the provider rendered emergency services. If the provider has a contract with the health plan, the provider receives "the agreed upon contract rate." (*§ 1300.71, subd. (a)(3)(A)*.) If the provider does not have a contract with the plan, the provider receives "the reasonable and **[*7]** customary value" for the services rendered, unless the noncontracted provider renders nonemergency services. (*§ 1300.71, subd. (a)(3)(B)*.) The noncontracted provider who renders nonemergency services is entitled to "the amount set forth in the enrollee's Evidence of Coverage" established by the health plan. (*§ 1300.71, subd. (a)(3)(C)*.)

Although he did not have a contract with Sutter and did not provide emergency services, plaintiff contends the plain language of *section 1300.71, subdivision (a)(3)(B)* "mandates" he be compensated the "reasonable and customary value" of his services regardless of Sutter's decision not to authorize his work. He argues he is entitled to this amount because *section 1300.71* establishes what plans must pay noncontracted providers, and because there is nothing in *section 1300.71* or the Act and its other regulations that conditions payment on the health plan authorizing the noncontracted provider's services. He asserts it is the primary surgeon who must be authorized by Sutter, and the primary surgeon can retain plaintiff to assist on a surgery without being in violation of his or her contract with Sutter.

Each of plaintiff's assertions is incorrect. *If* *section 1300.71* applied here, its plain language would mandate plaintiff be compensated only in the amount set forth in Sutter's evidence of **[*8]** coverage, not the reasonable and customary value. That is because plaintiff rendered nonemergency services without having a contract with Sutter. (*§ 1300.71, subd. (a)(3)(C)*.)

But *section 1300.71* does not apply here, and it does not obligate Sutter to pay plaintiff anything. The Act expressly authorizes Sutter to condition payments to providers who render nonemergency services on obtaining Sutter's authorization. Under the Act, a health plan "may require prior authorization as a prerequisite for payment for necessary medical care following stabilization of an emergency medical condition." (*Health & Saf. Code, § 1371.4, subd. (c)*.) Sutter exercised its authority to condition payment on plaintiff receiving its authorization, and nothing in *section 1300.71* superseded Sutter's statutory right to do so. The regulation establishes what Sutter owes to authorized providers, contracted and noncontracted, and to noncontracted providers who render emergency services. It does not compel Sutter to reimburse an unauthorized provider of nonemergency services.

As plaintiff acknowledges, the "authorization process is ordinarily an obligation of contract, not law." Here, there is no contract that requires Sutter to pay plaintiff for his services. And the only law plaintiff cites that requires health **[*9]** plans to pay providers for unauthorized services imposes that duty when the provider renders emergency services. (*Health & Saf. Code, § 1371.4, subd. (b)*.) Plaintiff did not render emergency services.

Plaintiff's argument that Sutter is compelled to pay him because no law required Sutter to condition payment on its authorization is illogical. That the law did not require Sutter to condition payment on its authorization did not prohibit Sutter from doing so. As already stated, the Act expressly authorized Sutter to condition payment for nonemergency services on authorization.

Moreover, if the Legislature had intended to require health plans to pay for unauthorized nonemergency services, it would have expressly said so, as it did for emergency services. Its clear statement on emergency services and its silence on all other services indicate it did not intend to require plans to pay for unauthorized nonemergency services. "The expression of some things in a statute necessarily means the exclusion of other things not expressed. [Citation.]" (*Gikas v. Zolin (1993) 6 Cal.4th 841, 852, 25 Cal. Rptr. 2d 500, 863 P.2d 745*.) The issue is whether, in the absence of a contract, the Act required Sutter to pay plaintiff for his unauthorized nonemergency services. It did not.

Plaintiff's assertion that authorization **[*10]** was required only from the primary surgeon also fails. He directs us to nothing in the Act or its regulations that empowers a contracted provider to authorize on behalf of the health plan a noncontracted provider to render nonemergency services. Indeed, in his complaint, plaintiff implies Sutter surgeons understand this point, as they are not requesting his services because Sutter has not authorized them.

Finally, plaintiff cites to an unpublished federal district court opinion to support his argument that *section 1300.71* requires payment of the "reasonable and customary amount" for unauthorized, noncontracted nonemergency services. (See *Bernstein v. Health Net Life Insurance Company (S.D.Cal., Nov. 29, 2012, Civ. No. 12-cv-00717 AJB (JMA)) 2012 U.S. Dist. LEXIS 169817, 2012 WL 5989348* (*Bernstein*).) Neither published nor unpublished federal district court opinions are binding precedent on this court. (*Futrell v. Payday California, Inc. (2010) 190 Cal.App.4th 1419, 1432, fn. 6, 119 Cal. Rptr. 3d 513*.) Nor is the case persuasive. It refers to *section 1300.71* only to assert that a health plan's duty under the regulation to pay a reasonable and customary amount is owed to the out-of-network provider, not the enrollee. (*Bernstein, supra, 2012 U.S. Dist. LEXIS 169817, [WL] at p. 3*.) The opinion says nothing about *section 1300.71* obligating a health plan to pay a noncontracted provider for unauthorized nonemergency services. Sutter's request to take **[*11]** judicial notice of the docket and notice of dismissal filed in *Bernstein* is denied as moot.

Because *section 1300.71* did not obligate Sutter to pay plaintiff for his nonauthorized services, the trial court correctly sustained Sutter's demurrer to plaintiff's claim for relief under this regulation.

II

Medicare Regulations

Plaintiff contends the trial court erred when it determined he could not state a claim for injunctive relief under certain Medicare regulations. He asserts the regulations require Sutter to pay for his unauthorized services because they establish the amount Sutter must pay to noncontracted providers. As with the Act, nothing in the Medicare regulations requires Sutter to pay noncontracted providers for unauthorized services except in the case of emergency care.

The regulations at issue concern a Medicare plan known as Medicare Advantage. "Medicare has several component parts: Medicare Part A is hospital insurance, covering inpatient hospital services and post-hospital nursing facility care, and is generally paid on a flat-fee basis; Medicare Part B is medical insurance, covering the costs of physician services and outpatient care, also generally paid on a fee-for-service basis; Medicare **[*12]** Advantage (formerly known as Medicare + Choice [and also known as Part C]) is a plan offered by private companies that contract with Medicare to provide Part A and B benefits, for which Medicare pays a fixed amount per patient per month for care." (*U.S. ex rel. Osheroff v. HealthSpring, Inc. (M.D.Tenn. 2013) 938 F.Supp.2d 724, 726, fn. 2*.)

A health plan that offers a Medicare Advantage plan may provide benefits to enrollees "directly or through arrangements, or by paying for the benefits." (*42 C.F.R. § 422.100(a) (2018)*.) The plan is obligated to maintain "a network of appropriate providers that is supported by written agreements" to provide the benefits. (*42 C.F.R. § 422.112(a)(1)(i) (2018)*.) The plan "may select the providers" to provide benefits to its enrollees so long as they meet certain qualifications. (*42 U.S.C. § 1395w-22(d)(1)*.) If the network providers are unable to meet an enrollee's need for specialty care, the plan "arranges for specialty care outside of the plan provider network." (*42 C.F.R. § 422.112(a)(3) (2018)*.)

As with the Act, an exception to the rule authorizing the health plan to select or arrange for providers exists concerning emergency services. A plan offering a Medicare Advantage plan must provide coverage for emergency services "without regard to prior authorization or the emergency care provider's contractual relationship with the [plan]." **[*13]** (*42 U.S.C. § 1395w-22(d)(1)(E)*.)

Also as with the Act, a health plan offering a Medicare Advantage plan pays noncontracted providers differently based on whether they rendered emergency services. When a noncontracted provider renders emergency and urgently needed services, the plan "must make timely and reasonable payments" to the provider. (*42 C.F.R. § 422.100(b)(1)(i)*, *(ii) (2018)*.) However, when a noncontracted provider renders nonemergency services such as specialty services, the plan must pay "an amount the provider would have received under original Medicare." (*42 C.F.R. § 422.100(b)(2) (2018)*.) The noncontracting provider must accept that amount as payment in full. (*42 C.F.R. § 422.214(a)(1) (2018)*; *42 U.S.C. § 1395cc(a)(1)(O)*.)

Plaintiff essentially contends that because these statutes and regulations establish what a health plan must pay a noncontracted provider, they also require a plan to compensate a noncontracted provider who provides unauthorized nonemergency services. They do not.

Initially, we hold plaintiff cannot sue to enforce the Medicare Advantage statutes and regulations. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. [Citation.]" (*Alexander v. Sandoval (2001) 532 U.S. 275, 286 [121 S. Ct. 1511, 149 L.Ed.2d 517, 528]*.) No right of action exists here. Plaintiff contends *42 Code of Federal Regulations part 422.214(c)* grants him a right of action. It does **[*14]** not. The regulation simply deems a noncontracted provider that seeks reimbursement to be viewed as seeking payment in the amount the provider would have received under original Medicare. It does not provide plaintiff a private right to enforce that or any other part of the Medicare Advantage laws in a court action.

Even if plaintiff had a private right of action, his claim would fail to state a cause of action as a matter of law. Plaintiff argues the parties' obligations under *42 Code of Federal Regulations part 422.214* to pay and accept as full payment "'an amount the provider would have received under original Medicare'" must be interpreted to mean the health plan must pay noncontracted providers for unauthorized nonemergency services. Otherwise, the only alternative interpretation of the regulation's language is that the provider must collect payments from the enrollee, which is prohibited by Medicare regulations. Plaintiff reaches his interpretation—an incorrect interpretation—only by assuming the regulation requires the health plan to pay for unauthorized nonemergency services. Nothing in the regulation imposes that requirement.

The Medicare Advantage statutes and regulations do not require health plans to pay for unauthorized **[*15]** nonemergency services. Those laws obligate the plan to "select" and "maintain" a network of providers and to "arrange" for providers outside the plan's network to provide specialty services when needed. (*42 U.S.C. § 1395w-22(d)(1)*; *42 C.F.R. §§ 422.112(a)(1)*, *(3) (2018)*.) The language indicates the plan authorizes the providers both in and outside its network who will provide services to the plan's enrollees. Nothing in these laws requires a plan to pay for unauthorized services except with regard to emergency services. As with the Legislature when it adopted the Act, Congress's stated intention to restrict a health plan's contracting power in a limited circumstance indicates Congress did not intend to apply the same restriction in other circumstances. (See *Loughrin v. United States (2014) 573 U.S. ___, ___ [134 S. Ct. 2384, 2390, 189 L. Ed. 2d 411, 421]*.)

The Medicare Advantage regulations clearly define where the provision of emergency services ends and the provision of subsequent services requiring plan authorization begins. While authorization is not needed for emergency and urgently needed services, it is needed when maintenance care and post-stabilization care related to an emergency medical condition begin. For those services, the health plan must pay the noncontracting provider only when the provider requests authorization **[*16]** and the plan either grants the request, or the plan does not respond to the request within one hour, cannot be contacted, or it and the treating physician cannot agree on the enrollee's care. (*42 C.F.R. §§ 422.100(b)(1)(iii)*, *422.113(c)(1)*, *(2) (2018)*.) The health plan's financial responsibility for post-stabilization care "it has not pre-approved" ends when a plan physician assumes responsibility for the enrollee's care, the plan and the treating physician agree on the enrollee's care, or the enrollee is discharged. (*42 C.F.R. § 422.113(c)(3) (2018)*.)

These regulations indicate payment for services rendered by a noncontracted provider are contingent on the plan authorizing the service except for emergency services or where Congress or Medicare might otherwise specify. Plaintiff directs us to no statute, regulation, or judicial opinion that requires a plan to pay a noncontracted provider for unauthorized nonemergency services.

Plaintiff mistakenly relies on *St. Charles Parish Hospital Service Dist. No. 1 v. Ochsner Health Plan, Inc. (La.Ct.App. 2004) 874 So.2d 885* (*St. Charles Parish Hospital*) to assert a plan must pay a noncontracted provider for unauthorized nonemergency services. Authorization was not an issue in the case. There, a plan demanded a noncontracted provider to remit overpayments he received for outpatient services he had rendered to the plan's **[*17]** enrollees. The state appellate court ordered summary judgment in the plan's favor, holding *42 Code of Federal Regulations part 422.214* required a noncontracted provider to accept as full payment the amount it would have received under original Medicare. (*St. Charles Parish Hospital, supra, 874 So.2d at p. 889*.) Unlike here, the plan in that case was not challenging its obligation to pay the provider the amount required under the regulation. The plan did not contend it had not authorized the services, unlike the case before us. It simply sought a refund of the amounts it had overpaid the provider. The Louisiana court thus did not consider our issue. "It is axiomatic that cases are not authority for propositions not considered. [Citations.]" (*People v. Ault (2004) 33 Cal.4th 1250, 1268, fn. 10, 17 Cal. Rptr. 3d 302, 95 P.3d 523*.)

Plaintiff's other citations to federal authorities offer him no support, as they, too, did not concern a plan's alleged obligation under Medicare Advantage law to pay a noncontracted provider for unauthorized nonemergency services. (See *New York City Health & Hospitals Corp. v. WellCare of New York, Inc. (S.D.N.Y. 2011) 801 F.Supp.2d 126* [noncontracted provider of emergency services had no private right of action to sue plan for payment based on alleging the plan's failure to pay as required by statute was a breach of the Medicare Advantage contract between the plan and Medicare]; *Canandaigua Emergency Squad, Inc. v. Rochester Area HMO, Inc. (W.D.N.Y. 2011) 780 F.Supp.2d 313* [removal to federal court improper; noncontracted ambulance **[*18]** companies' suit against health plan that withheld payment for services to recoup prior overpayments did not arise under Medicare Act]; *Allina Health Services v. Sebelius (D.D.C. 2010) 756 F.Supp.2d 61* [denial of motion to enjoin Secretary of Health and Human Services from implementing a new formula for calculating certain Medicare payment adjustments for hospitals that serve a disproportionate number of low-income patients].)

Plaintiff also pleaded he is entitled to payment because his services qualified as specialty care by a noncontracted provider that a contracted Sutter surgeon requested. The allegation is irrelevant. The Medicare Advantage regulation states it is the plan that arranges for specialty care outside of its network of providers, not a plan surgeon. (*42 C.F.R. § 422.112(a)(3) (2018)*.)

Similar to the Act, the Medicare Advantage statutes and regulations, by distinguishing between unauthorized emergency services that must be paid and all other services, demonstrate the health plan is not required to pay a noncontracting provider for unauthorized nonemergency services.

III

Unfair Competition Law

Plaintiff contends the trial court erred when it concluded he could not state a claim for relief under the Unfair Competition Law (*Bus. & Prof. Code, § 17200 et seq.*) because the court sat "in law alone **[*19]** and not [in] equity." He sought equitable relief to receive payment of his noncontracted services based on Sutter's alleged breach of his *prior* contract, and he asserts the court should have exercised its equitable power under the Unfair Competition Law to restore the status quo.

Plaintiff correctly states the court sat in law alone. It did not err in doing so because it was ruling only on Sutter's demurrer, a legal issue. A court does not sit in equity when it rules on a demurrer. It cannot exercise its equitable powers under the Unfair Competition Law if plaintiff cannot allege an unfair competition claim.

A demurrer tests the sufficiency of the complaint as a matter of law, and it raises only questions of law. (*Code Civ. Proc., § 589, subd. (a)*.) "[I]n passing upon the question of the sufficiency or insufficiency of a complaint to state a cause of action, it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue. That is always the ultimate question to be determined by the evidence upon a trial of the questions of fact. Obviously, the complaint, when appropriately challenged, whether for want of sufficient facts or for an insufficient or inartificial statement of the facts, **[*20]** must stand or fall by its own force." (*Colm v. Francis (1916) 30 Cal.App. 742, 752, 159 P. 237*.) The court did not err when it did not exercise its equitable powers under the Unfair Competition Law when it sustained Sutter's demurrer.

The court also did not err when it determined plaintiff failed to state a claim under the Unfair Competition Law. That law provides a private right of action against "any unlawful, unfair or fraudulent business act or practice." (*Bus. & Prof. Code, §§ 17200*, *17203*.) It prohibits practices that are either "unlawful," "unfair," or "fraudulent." (*Progressive West Ins. Co. v. Yolo County Superior Court (2005) 135 Cal.App.4th 263, 283, 37 Cal. Rptr. 3d 434*.)

While the law's scope is broad, its remedies are limited. Private plaintiffs may seek only injunctive relief and restitution. (*Bus. & Prof. Code, § 17203*.) They "may not receive damages, much less treble damages, or attorney fees." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 179, 83 Cal. Rptr. 2d 548, 973 P.2d 527* (*Cel-Tech*), italics omitted.) And, in order to obtain injunctive relief, plaintiffs must show there is a threat the wrongful activity will continue. No past events may be enjoined. (*Davis v. Farmers Ins. Exchange (2016) 245 Cal.App.4th 1302, 1326-1327, 200 Cal. Rptr. 3d 315*.)

Plaintiff rightly asserts a trial court, sitting as a court of equity when acting under the Unfair Competition Law, has the power to restore the status quo ante. (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1149, 131 Cal. Rptr. 2d 29, 63 P.3d 937* (*Korea Supply*).) His prayer for relief, however, does not ask the court to restore the status quo. It asks the court to enjoin Sutter to pay for his **[*21]** now out-of-network unauthorized services either "at reasonable and customary value," or to order Sutter to reinstate "and honor" the prior contract plaintiff terminated and pay for the noncontracted services according to the contractual rate.

Neither of these remedies is available under the Unfair Competition Law. Plaintiff cannot obtain injunctive relief because he terminated the contract he now seeks to enforce. There is no threat Sutter will breach that contract in the future. He also cannot obtain an order compelling Sutter to pay for his noncontracted unauthorized services because both of his alternate requests for payment go beyond restitution. They seek payment for services he did *not* render under the contract he claims Sutter breached in violation of the Unfair Competition Law. An order for restitution under the Unfair Competition Law is limited to compelling the defendant to return money or property obtained through an unfair business practice—in this case, the breach of the prior contract—to those persons from whom the property was taken, including money in which the plaintiff had a vested interest. (*Korea Supply, supra, 29 Cal.4th at pp. 1144-1145, 1149*.) Sutter did not obtain money or property from plaintiff's rendition of **[*22]** noncontracted services by breaching the prior contract.

Plaintiff's assumption—"that the court's inherent equitable powers are unrestricted in [an Unfair Competition Law action]—is fundamentally erroneous." (*Alch v. Superior Court (2004) 122 Cal.App.4th 339, 404, 19 Cal. Rptr. 3d 29*.) "A court cannot, under the equitable powers of [the Unfair Competition Law], award whatever form of monetary relief it believes might deter unfair practices." (*Korea Supply, supra, 29 Cal.4th at p. 1148*.)

Although plaintiff cannot obtain his prayed for relief, we look to determine whether he can obtain any relief under the Unfair Competition Law based on Sutter's alleged breach of the prior contract. "[T]he test of the adequacy of a complaint is whether it alleges sufficient *facts* to support a particular cause of action." (*Smith v. Wells Fargo Bank, N.A (2005) 135 Cal.App.4th 1463, 1485, 38 Cal. Rptr. 3d 653*, original italics.)

Plaintiff alleges Sutter committed unlawful, unfair, and fraudulent conduct when it breached his prior contract by underpaying approximately half of his claims for services rendered to enrollees in a Sutter health plan known as SutterSelect. "'[A] breach of contract may . . . form the predicate for [Business and Professions Code s]ection 17200 claims, provided it *also* constitutes conduct that is "unlawful, or unfair, or fraudulent."' [Citations.]" (*Puentes v. Wells Fargo Home Mortgage, Inc. (2008) 160 Cal.App.4th 638, 645, 72 Cal. Rptr. 3d 903* (*Puentes*), original italics & italics **[*23]** added.) Plaintiff, however, has not pleaded anything more than a common law breach of contract.

First, plaintiff does not adequately allege the breach was unlawful for purposes of *Business and Professions Code section 17200*. A breach of contract is not itself an unlawful act for purposes of the Unfair Competition Law. (*Puentes, supra, 160 Cal.App.4th at p. 645*.) "'Contractual duties are voluntarily undertaken by the parties to the contract, not imposed by state [or federal] law.'" (*Smith v. Wells Fargo Bank, N.A., supra, 135 Cal.App.4th at p. 1484*, quoting *Gibson v. World Savings & Loan Assn. (2002) 103 Cal.App.4th 1291, 1302, 128 Cal. Rptr. 2d 19*.) Plaintiff must look beyond the mere breach.

By defining unfair competition to include any "'unlawful . . . business act or practice,'" the Unfair Competition Law "permits violations of other laws to be treated as unfair competition that is independently actionable." (*Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243*.) "[A] violation of another law is a predicate for stating a cause of action under the [Unfair Competition Law's] unlawful prong." (*Berryman v. Merit Property Management, Inc. (2007) 152 Cal.App.4th 1544, 1554, 62 Cal. Rptr. 3d 177*.)

Plaintiff claims Sutter's breach is actionable under *Business and Professions Code section 17200* because the breach violated *Civil Code section 3523*. That statute, one of the "maxims of jurisprudence," states: "He who takes the benefit must bear the burden." Plaintiff asserts he benefited Sutter by performing services for SutterSelect plan members. But *Civil Code section 3523* does not make Sutter's breach unlawful. That statute "does not create substantive rights. '[This] **[*24]** wholesome maxim of jurisprudence . . . can obviously have no application to any but legal wrongs or those wrongs for which the law authorizes or sanctions redress.' [Citations.]" (*County of San Luis Obispo v. Abalone Alliance (1986) 178 Cal.App.3d 848, 865, 223 Cal. Rptr. 846*.) As just stated, a breach of contract is not a legal wrong.

Second, plaintiff cannot allege the breach was fraudulent for purposes of *Business and Professions Code section 17200*. "'Fraudulent,' as used in the statute, does not refer to the common law tort of fraud but only requires a showing members of the public '"are likely to be deceived."' (*Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1267, 10 Cal. Rptr. 2d 538, 833 P.2d 545*.)" (*Saunders v. Superior Court, supra, 27 Cal.App.4th at p. 839*.) Plaintiff cannot allege Sutter's breach of his contract is likely to deceive the public. He can allege only that he was defrauded in the breach.

Third, plaintiff has not alleged the breach was unfair for purposes of *Business and Professions Code section 17200*. A common law breach of contract in an isolated transaction, which is all plaintiff has alleged, is not an "unfair" business act under the Unfair Competition Law. "[R]eliance on general common law principles to support a cause of action for unfair competition is unavailing." (*Textron Financial Corp. v. National Union Fire Ins. Co. (2004) 118 Cal.App.4th 1061, 1072, 13 Cal. Rptr. 3d 586*, disapproved on another ground in *Zhang v. Superior Court (2013) 57 Cal.4th 364, 382, 159 Cal. Rptr. 3d 672, 304 P.3d 163*.)

Virtually any breach of contract could be considered "unfair," as the term is commonly understood. But there is no indication the Legislature intended to provide injunctive and restorative **[*25]** relief under the Unfair Competition Law for every breach of contract. Indeed, an action under the Unfair Competition Law "is not an all-purpose substitute for a tort or contract action." (*Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 173, 96 Cal. Rptr. 2d 518, 999 P.2d 706*.) At a minimum, plaintiff must plead more than a breach of contract.

In cases not involving competitors or consumers, courts have found a breach of contract or a contract clause to be an "unfair" act in limited circumstances. They found unfairness sufficiently pleaded if the complaint alleged facts showing the contract was unconscionable or contained a forfeiture provision that allowed an employer to frustrate the employee's legitimate expectations and contractual rights. (*Zanze v. Snelling Services, LLC (9th Cir. 2011) 412 Fed.Appx. 994, 996-997*; *McCollum v. XCare.net, Inc. (N.D.Cal. 2002) 212 F.Supp.2d 1142, 1154*.) One court held that "'a systematic breach of certain types of contracts (e.g., breaches of standard consumer or producer contracts involved in a class action) can constitute an unfair business practice'" under the Unfair Competition Law. (*Arce v. Kaiser Foundation Health Plan, Inc. (2010) 181 Cal.App.4th 471, 489-490, 104 Cal. Rptr. 3d 545*.) But the parties have directed us to no authority, and we have found none, that declares a common law breach of contract between two parties contracting at arm's length constitutes an "unfair" business act or practice under *Business and Professions Code section 17200*.

We recognize that substantial authority defines an "unfair" act **[*26]** under *Business and Professions Code section 17200* in cases brought by competitors, and substantial, conflicting authority defines an "unfair" act in cases brought by consumers. In the case of competitors, the word "unfair" means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech, supra, 20 Cal.4th at p. 187*.) This definition obviously does not apply here.

In consumer cases, the definition of "unfair" is not settled. Some courts, including this one, determine whether a business practice is "unfair" in a consumer action by weighing """the utility of the defendant's conduct against the gravity of the harm to the alleged victim.""" (*Progressive West Ins. Co. v. Yolo County Superior Court, supra, 135 Cal.App.4th at p. 285*, quoting *Klein v. Earth Elements, Inc. (1997) 59 Cal.App.4th 965, 969-970, 69 Cal. Rptr. 2d 623*.) Other courts have modified the *Cel-Tech* definition and, applying it in consumer actions, will find the business act "unfair" if the claim is tethered to specific constitutional, statutory, or regulatory provisions. (See *Belton v. Comcast Cable Holdings, LLC (2007) 151 Cal.App.4th 1224, 1239-1240, 60 Cal. Rptr. 3d 631*; *Gregory v. Albertson's, Inc. (2002) 104 Cal.App.4th 845, 853-854, 128 Cal. Rptr. 2d 389*.) Still other courts define unfairness under the Federal Trade Commission Act: "'(1) The consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits **[*27]** to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.'" (*Davis v. Ford Motor Credit Co. (2009) 179 Cal.App.4th 581, 597-598, 101 Cal. Rptr. 3d 697*; see *15 U.S.C. § 45(n)*.)

Sutter argues we should apply the modified *Cel-Tech* definition. Plaintiff does not address the issue. Neither party argues why any of these definitions should apply in a case between two noncompeting parties bargaining at arm's length in a nonconsumer context. Given the state of the pleadings, we need not address the issue here.

"An order sustaining a demurrer without leave to amend will constitute an abuse of discretion if there is any reasonable possibility that the defect can be cured by an amendment. This rule is liberally applied to permit further amendment not only where the defect is one of form but also where it is one of substance, provided the pleader did not have "'a fair prior opportunity to correct the substantive defect.'" [Citations.]

"On the other hand, there is nothing in the general rule of liberal allowance of pleading amendment which 'requires an appellate court to hold that the trial judge has abused his discretion if on appeal the plaintiffs can suggest no legal theory or state of facts which they wish to add by way of amendment.' [Citation.] **[*28]** The burden is on the plaintiffs to demonstrate that the trial court abused its discretion and to show in what manner the pleadings can be amended and how such amendments will change the legal effect of their pleadings. [Citations.]" (*Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1387-1388, 272 Cal. Rptr. 387*, italics omitted.) Here, on plaintiff's third complaint, he has not made this showing.

Having reached this conclusion, we recognize a "complaint is adequate if its factual allegations are sufficient to support a cause of action on any available legal theory (whether specifically pleaded or not)." (*Smith v. Wells Fargo Bank, N.A., supra, 135 Cal.App.4th at p. 1485*.) Plaintiff's allegations support a cause of action for breach of his prior contract. While his other legal theories are now precluded, he should be granted leave to amend his complaint, if he chooses, to plead a common law cause of action for breach of contract in order to recover any damages incurred from Sutter's alleged breach of his prior contract. It should be clear by now, however, that those damages do not include payment for the unauthorized nonemergency services he rendered after he terminated the contract.

Finally, Sutter contends, and the trial court found, plaintiff lacked standing to bring this cause of action because under the Employee Retirement **[*29]** Income Security Act of 1974 (ERISA) (*29 U.S.C. § 1001 et seq.*), which governs the SutterSelect plan, a provider who is not contracted to provide services to SutterSelect enrollees "cannot bring claims for benefits on [his] own behalf. [He] must do so derivatively, relying on [his] patients' assignments of their benefits claims." (*Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc. (9th Cir. 2014) 770 F.3d 1282, 1289*.) This ERISA rule does not apply here because plaintiff is not suing to recover benefits promised to enrollees under the SutterSelect plan. He is suing on an implied-in-law provider agreement independent of Sutter's obligations to its enrollees. Such actions against ERISA welfare plans for breach of provider agreements do not fall within the scope of ERISA. (See *Marin General Hospital v. Modesto & Empire Traction Co. (9th Cir. 2009) 581 F.3d 941, 947-948* [provider's suit against plan to recover payment based on plan's oral agreement with provider not subject to ERISA]; *Blue Cross v. Anesthesia Care Associates Medical Group, Inc. (9th Cir. 1999) 187 F.3d 1045, 1054* [providers' suit for breach of provider agreement not subject to ERISA]; *John Muir Health v. Cement Masons Health & Welfare Trust Fund (N.D.Cal 2014) 69 F.Supp.3d 1010, 1015-1021* [provider's quasi-contract claim against plan for reimbursement for services rendered to enrollees is not preempted by ERISA].)

IV

Declaratory Relief

Plaintiff sought a declaration that Sutter's refusal to pay for his unauthorized services was unlawful under the laws and regulations discussed above. The court correctly sustained the demurrer **[*30]** against this claim because it arose from allegations we have concluded do not obligate Sutter to pay plaintiff as a matter of law. "A general demurrer to a declaratory relief cause of action is proper when the plaintiff does not allege facts sufficient to state the derivative claim. [Citations.]" (*Allen v. City of Sacramento (2015) 234 Cal.App.4th 41, 54, 183 Cal. Rptr. 3d 654*.)

V

Quantum Meruit

Plaintiff contends the trial court should have granted him leave to plead a cause of action in quantum meruit. His pleaded facts, however, foreclosed the court from granting him leave.

"'Quantum meruit refers to the well-established principle that "the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered." [Citation.] To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that "the services were rendered under some understanding or expectation of *both* parties that compensation therefor was to be made."' [Citation.]" (*Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore (2008) 162 Cal.App.4th 1331, 1344, 76 Cal. Rptr. 3d 649*, italics added.)

Plaintiff pleaded Sutter had no understanding or expectation whatsoever of compensating him for his unauthorized services. He terminated his contract, and Sutter informed him in writing it would **[*31]** not pay for any unauthorized services.

Thus, to plead quantum meruit in an amended complaint, plaintiff would have to plead facts that directly contradict his current complaint. He cannot do this. "[A] plaintiff may not discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading." (*California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal.App.3d 49, 53, fn. 1, 271 Cal. Rptr. 410*.)

The trial court thus did not err when it denied him leave to amend and allege a claim in quantum meruit.

DISPOSITION

The judgment of dismissal is reversed and the matter remanded with directions to sustain the demurrer with leave to amend solely to allow plaintiff to allege a common law cause of action for breach of his prior contract with Sutter. Each party shall bear its own costs on appeal. (*Cal. Rules of Court, rule 8.278(a)*.)

HULL, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.

MB Realty Grp., Inc. v. Gaston Cty. Bd. of Educ.

United States District Court for the Western District of North Carolina, Charlotte Division

July 10, 2018, Decided; July 11, 2018, Filed

DOCKET NO. 3:17-cv-00427-FDW-DCK

Reporter

2018 U.S. Dist. LEXIS 115458 *; 2018-2 Trade Cas. (CCH) P80,438; 2018 WL 3381427

MB REALTY GROUP, INC., and MATT BECKHAM Plaintiffs, vs. THE GASTON COUNTY BOARD OF EDUCATION, GASTON COUNTY, W. JEFFREY BOOKER, in his capacity as Superintendent of the Gaston County Board of Education and individually, CARSTAPHEN FAMILY FOUNDATION, THE STOWE FOUNDATION, INC., CATHERINE ROBERTS, and TRACY PHILBECK, Defendants.

Subsequent History: Motion denied by, Stay denied by *MB Realty Grp., Inc. v. Gaston Cty. Bd. of Educ., 2019 U.S. Dist. LEXIS 70721 (W.D.N.C., Apr. 25, 2019)*

Summary judgment granted by, Summary judgment granted, in part, summary judgment denied, in part by *MB Realty Grp., Inc. v. Gaston Cty. Bd. of Educ., 2019 U.S. Dist. LEXIS 80764 (W.D.N.C., May 13, 2019)*

Sanctions disallowed by, Motion denied by *MB Realty Grp., Inc. v. Gaston Cty. Bd. of Educ., 2019 U.S. Dist. LEXIS 88899 (W.D.N.C., May 28, 2019)*

Costs and fees proceeding at, Motion denied by *MB Realty Grp., Inc. v. Gaston Cty. Bd. of Educ., 2019 U.S. Dist. LEXIS 109013 (W.D.N.C., June 28, 2019)*

Core Terms

amended complaint, motion to dismiss, immunity, Municipal, allegations, antitrust claim, deceptive trade practices, punitive damages, Counts, unfair, antitrust, governmental immunity, tortious interference, anticompetitive, board of education, official capacity, state law claim, district court, proprietary, conspiracy, pleadings, entities

Counsel: **[*1]** For MB Realty Group, Inc., Matt Beckham, Plaintiffs: Alexander W. Warner, Thurman, Wilson, Boutwell & Galvin, P.A., Charlotte, NC; James Patrick Galvin, Charlotte, NC.

For Gaston County Board of Education, W. Jeffrey Booker, in his capacity as Superintendent of The Gaston County Board of Education and individually, Catherine Roberts, Defendants: Deborah R Stagner, LEAD ATTORNEY, Tharrington Smith, L.L.P., Raleigh, NC.

For Gaston County, Defendant: Martha Raymond Thompson, LEAD ATTORNEY, Stott, Hollowell, Palmer & Windham, Gastonia, NC.

For Carstarphen Family Foundation, The Stowe Foundation, Inc., Defendants: Martin L. White, LEAD ATTORNEY, Charlotte, NC.

For Tracy Philbeck, Defendant: John H. Hasty, LEAD ATTORNEY, Mullen Holland & Cooper P.A., Gastonia, NC.

Judges: Frank D. Whitney, Chief United States District Judge.

Opinion by: Frank D. Whitney

Opinion

ORDER

THIS MATTER is before the Court on several Motions to Dismiss Plaintiffs' Amended Complaint for lack of subject matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)*, for failure to state a claim for which relief may be granted under *Fed. R. Civ. P. 12(b)(6)*, and for judgment on the pleadings under *Fed. R. Civ. P. 12(c)*. (Docs. Nos. 39, 45, 48, 51, 57, & 61). Upon review by the Court, for the reasons below, the Motions to Dismiss the **[*2]** Complaint (Docs. Nos. 21, 23, 26, & 30) are DENIED AS MOOT, and the Motions to Dismiss the Amended Complaint (Docs. Nos. 39, 45, 48, 51, 57, & 61) are GRANTED IN PART and DENIED IN PART.

BACKGROUND

According to the Amended Complaint,[1] Plaintiffs and Defendants are all residents of North Carolina and, in the case of parties that are corporate or government entities, have their principal places of business in North Carolina. (Doc. No. 32, pp. 2-3). Defendants Gaston County, Gaston County Board of Education ("GCBOE"), and Booker are collectively referred to as "Purchasing Defendants." Defendants Carstarphen Family Foundation and Stowe Foundation, Inc., are collectively referred to as "Selling Defendants." Defendants Roberts and Philbeck are collectively referred to as "Publishing Defendants." (Doc. No. 32, pp. 2-3).

Plaintiffs allege they entered into a series of contracts and agreements with Selling Defendants and Purchasing Defendants concerning a parcel of land in Gaston County, North Carolina. (Doc. No. 32). Plaintiffs further allege that Selling Defendants and Purchasing Defendants conspired to dishonor Plaintiffs' contracts with Defendants, causing damage to Plaintiffs' business. (Doc. **[*3]** No. 32, pp. 4-8). Plaintiffs also allege Publishing Defendants publicized or circulated emails containing false or defamatory statements about Plaintiffs. (Doc. No. 32, pp. 5-6).

The Amended Complaint asserts ten separate Counts: (1) fraud against Purchasing Defendants; (2) breach of implied covenant of good faith and fair dealing against Selling Defendants; (3) violation of the *Sherman Antitrust Act* (*15 U.S.C. § 1*) against Purchasing and Selling Defendants; (4) unjust enrichment against Selling Defendants; (5) relief in quantum meruit against Selling Defendants; (6) libel against Publishing Defendants; (7) punitive damages for willful and wanton conduct against all Defendants; (8) violations of North Carolina's unfair and deceptive trade practices statutes (*N.C. Gen. Stat. § 75-1 et seq.*) against all Defendants; (9) tortious interference with contract right against Defendant Gaston County; and (10) tortious interference with prospective economic advantage against Defendants Gaston County and GCBOE. (Doc. No. 32, pp. 8-16).

Defendants moved to dismiss Plaintiffs' original Complaint. (Docs. Nos. 21, 23, 26, & 30). Plaintiff filed an Amended Complaint superseding the original Complaint, thereby rendering the above-referenced Motions **[*4]** to Dismiss moot. Defendants again filed Motions to Dismiss for lack of subject matter jurisdiction and failure to state a claim entitled to relief pursuant to *Fed. R. Civ. P. 12(b)(1)*, *12(b)(6)*, and *12(c)*. (Docs. Nos. 39, 45, 48, 51, 57, & 61).

APPLICABLE LEGAL STANDARD

When a court considers a motion to dismiss for lack of subject matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)*, the burden of proof is on the plaintiff. *Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982)*. The motion shall be granted "if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991)*. If the plaintiff merely fails to properly plead the elements of a federal claim, it is not a truly threshold jurisdictional question, and it

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[1] The Court reads the allegations and assertions of the pleadings and supporting affidavits in the light most favorable to Plaintiff. *Combs v. Bakker, 886 F.2d 673, 676 (4th Cir. 1989)*.

is analyzed as a *Rule 12(b)(6)* question. *Arbaugh v. Y & H Corp., 546 U.S. 500, 514-15, 126 S. Ct. 1235, 163 L. Ed. 2d 1097*

(2006) (explaining that "jurisdictional" elements of federal claims must be explicitly identified as such by statute). In this event, the district court retains the discretion to extend supplemental jurisdiction over pendent state-law claims. See id.

"A motion to dismiss under *Rule 12(b)(6)* tests the sufficiency of a complaint" but "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)*; *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship, 213 F.3d 175, 180 (4th Cir. 2000)*. A complaint attacked by a *Rule 12(b)(6)* motion to dismiss will survive if it "contains 'enough **[*5]** facts to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 697, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*; see also *Robinson v. Am. Honda Motor Co., Inc., 551 F.3d 218, 222 (4th Cir. 2009)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. The Supreme Court has also opined:

> *Federal Rule of Civil Procedure 8(a)(2)* requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.

Erickson v. Pardus, 551 U.S. 89, 93-94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (quoting *Twombly, 550 U.S. at 555-56*) (internal citations omitted).

A motion for judgment on the pleadings applies much the same standard as a motion to dismiss under *Rule 12(b)(6)*. *Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999)*. The district court considers both the complaint and the answer and accepts all allegations as true for the purpose of the motion. *Id. at 244*. The Court will not grant the motion if the complaint and the answer dispute an issue **[*6]** of material fact.

Upon the filing of an amended complaint, the original complaint is superseded, and motions to dismiss the original complaint are rendered moot. *Young v. City of Mount Ranier, 238 F.3d 567, 573 (4th Cir. 2001)*.

ANALYSIS

A. The Antitrust Claim

Purchasing and Selling Defendants argue for dismissal of the antitrust claim in Count 3 because Plaintiffs fail to allege facts in their Amended Complaint implicating interstate commerce or the restraint thereof. Plaintiffs contend an agreement amongst Defendants caused economic harm to *them*. The Court notes, however, Count 3 (the antitrust claim) contains no allegation of intention of harm to competition *generally*. (Doc. No. 32, p. 10).

Local governments are statutorily immune from antitrust claims seeking money damages brought under *Section 4 of the Clayton Act (15 U.S.C. § 15)*[2] when acting within the authority granted by the state. *15 U.S.C. §§ 34-36*. According to Plaintiffs' allegations, Gaston County and GCBOE ("Municipal Defendants") attempted to purchase land to build a new middle school. (Doc. No. 32). North Carolina law authorizes local boards of education and county governments to purchase and develop land for use as public schools. *N.C. Gen. Stat. § 115C-426*.

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[2] While Plaintiffs' claim must meet the elements of a restraint on trade under *15 U.S.C. § 1* as described above, their cause of action as a private party is derived from *15 U.S.C. § 15*.

Assuming the facts in the Amended Complaint are true, Municipal Defendants acted within their **[*7]** statutory authority, rendering their acts immune to a federal antitrust suit.

While local governments enjoy immunity from claims for money damages, this immunity does not extend to petitions for injunctive relief as authorized by *15 U.S.C. § 26*. See *R. Ernest Cohn, D.C., D.A.B.C.O. v. Bond, 953 F.2d 154, 158 (4th Cir. 1991)*. The Amended Complaint pleas for a preliminary injunction, (Doc. No. 32, p. 10), and that portion of their antitrust claim survives a claim of immunity under *15 U.S.C. §§ 35-36*.

As to Purchasing and Selling Defendants more broadly (inclusive of Municipal Defendants), the antitrust claim as a whole is facially insufficient even assuming all facts in the Amended Complaint are true. The elements of a *Section 1* claim under the *Sherman Antitrust Act* are "(1) an agreement, conspiracy, or combination among the defendants in restraint of trade; (2) injury to the plaintiff's business and property as a direct result; (3) damages that are capable of reasonable ascertainment and are not speculative or conjectural." *Wilder Enters., Inc. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1139 n.1 (4th Cir. 1980)* (citing *Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 883-84 (8th Cir. 1978))*. While the plaintiff must be directly injured to have a cause of action, see *15 U.S.C. § 16*, it is not the injury to the plaintiff that satisfies the requirement that there be a "restraint on trade." "The antitrust laws . . . were enacted for the protection of competition *not competitors* ***[*8]*** ." *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (internal quotations omitted) (emphasis added).

In assessing the defendant's effect on competition, courts apply a "rule of reason" analysis to most cases, unless the restraint is "so plainly anticompetitive" as to be unreasonable per se. *Texaco, Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978))*. The classic example of an unreasonable per se restraint is "horizontal price-fixing" (an agreement to fix prices between two competitors in the same market). See id. When using the "rule of reason," it is not a matter of the reasonableness of the business practice or agreement, but rather a question of whether it is reasonable to identify the practice as "anticompetitive." See *Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 688-89*.

Other district courts have made clear that government actions or agreements that merely cause lost profits or advantage for one business are not antitrust violations. See *Wellwoods Dev. Co. v. City of Aurora, 631 F. Supp. 221 (N.D. Ill. 1986)*. In Wellwoods, the city government refused to issue development permits to a real estate developer who owned land next to a municipal airport. *Id. at 222-23*. While this action created business advantages for other parties that owned already developed land, the district court held that this was not sufficiently anticompetitive to stand as an antitrust injury. *Id. at 229*. The decision was analogous to any other competitive **[*9]** business decision in which the only injury is "injury to [the plaintiff's] bottom line in the form of lost potential gains." Id.

The requirement that there be an anticompetitive effect to have an antitrust injury even extends to cases in which the plaintiff plausibly alleged a conspiracy to drive the plaintiff out of business. See *TheMLSonline.com, Inc. v. Reg'l Multiple Listing Serv. of Minn., Inc., 840 F. Supp. 2d 1174, 1182 (D. Minn. 2012)*. In that case, there was no government action, but there was an alleged agreement amongst members of a realtors' association to destroy the plaintiff's business by filing coordinated ethics complaints with the plaintiff's professional association. *Id. at 1177-78*. Even assuming that a conspiracy existed that intended to harm the plaintiff's business, the district court dismissed the antitrust claim because if failed to allege anticompetitive activity that affected prices or general market access. See *id. at 1182*; see also *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp, 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . . .").

In this case, Plaintiffs have offered no allegations to support a plausible claim of anticompetitive behavior on the part of Defendants. There is a conclusory allegation of an "unreasonable restraint on trade," **[*10]** (Doc. No. 32, pp. 7 & 10), but this is insufficient. The facts as alleged by the Amended Complaint show an agreement amongst Defendants that caused economic harm to Plaintiffs by dishonoring prior agreements to buy and sell land. (Doc. No. 32, pp. 4-8). Specifically, Plaintiffs allege Defendants formed a civil conspiracy (Doc. No. 32, p. 7) with the aim of removing Plaintiffs from a multi-party transaction and harming Plaintiffs' business reputation in the community. (Doc. No. 32, p. 6). Plaintiffs' claim for relief makes no mention of any harm or intent to harm competition. (Doc. No. 32, p. 10). Even presuming, without deciding, this alleged conspiracy constituted fraud, deception, breach of contract, or tortious interference, the allegations as a whole do not plausibly lead to a claim of an anticompetitive intent or effect on the relevant market. The allegations merely assert a harm to a *competitor*, not to *competition*. See *Brunswick, 429 U.S. at 488*. Even if Defendants did not enjoy immunity, Plaintiffs' have failed to sufficiently plead the elements of a federal antitrust violation under *Section 1 of the Sherman Act*. Thus, Plaintiffs' antitrust claim fails on its face. Count 3 of the Amended Complaint is dismissed **[*11]** without prejudice.

Notably, the Amended Complaint contains no other claim sufficient to allege a federal question. The Court, however, retains the discretion to extend supplemental jurisdiction to pendent state law claims under *28 U.S.C. § 1367* when the plaintiff's federal question claim fails on non-jurisdictional elements. *Arbaugh v. Y & H Corp., 546 U.S. 500, 514-15, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)*. The Court, in its discretion, will exercise supplemental jurisdiction over the remaining state law claims in this case and resolve the pending motions to dismiss as to those claims.

B. Immunity Defenses

1. Plaintiffs' Claims against Defendant Booker

The Amended Complaint names Defendant Booker in both his individual and official capacities in Counts 1 (fraud), 7 (punitive damages), and 8 (violation of North Carolina unfair and deceptive trade practices laws). Defendant Booker contends dismissal is proper because: (1) he acted in his capacity as a government official, (2) Plaintiffs have alleged the same claims against Booker and Municipal Defendants and are therefore duplicative, and (3) Plaintiffs fail to sufficiently allege facts indicating Booker acted outside his official capacity with regard to the above-listed counts. Plaintiffs contend Defendant Booker acted outside his official **[*12]** capacity and thus can be liable as an individual for the state law claims.

Suits against government officials that assert the same claims against the government entity which the official serves are duplicative. See *Love-Lane v. Martin, 355 F.3d 766, 783 (4th Cir. 2004)*; *May v. City of Durham, 136 N.C. App. 578, 525 S.E.2d 223, 229 (N.C. Ct. App. 2000)*. Redundant claims such as this should be dismissed. *Love-Lane, 355 F.3d at 783*. Accordingly, all Counts against Defendant Booker in his official capacity as Superintendent of Gaston County Schools will be dismissed.

The Amended Complaint makes no specified allegations against Defendant Booker in his individual capacity. Defendant Booker is named in some allegations, such as those about a meeting between Booker and Plaintiffs to discuss purchasing land to build a new school. (Doc. No. 32, p. 4). These allegations describe activity that can only be plausibly classified as Defendant Booker acting in his official capacity. The purchase and development of land for public schools is a statutory authority of boards of education and local governments. See *N.C. Gen. Stat. § 115C-426*. Defendant Booker's actions, as described by the Amended Complaint, concern actions that fit this statutory mandate for boards of education and their employees. Plaintiffs have failed to state any claim against Defendant Booker in his individual capacity, **[*13]** and the motion to dismiss will be granted accordingly. The Court's dismissal of these claims against Defendant Booker is without prejudice.

2. Counts 7 and 8 as against Defendants Gaston County and GCBOE

Plaintiffs allege they are entitled to punitive damages from Defendants because Defendants acted maliciously and Defendants engaged in unfair and deceptive trade practices affecting commerce. Municipal Defendants contend punitive damages are not appropriate for lack of intentional violations of law and, as official government entities, they cannot be sued for unfair and deceptive trade practices under North Carolina law.

Punitive damages cannot be claimed against a municipality unless expressly authorized by statute. *Houpe v. City of Statesville, 128 N.C. App. 334, 497 S.E.2d 82, 93 (N.C. Ct. App. 1998)*. Similarly, North Carolina's unfair and deceptive trade practices laws, as codified in Chapter 75 of the General Statutes, do not permit actions against the state or against municipalities acting with powers granted by the state. See *Rea Constr. Co. v. City of Charlotte, 121 N.C. App. 369, 465 S.E.2d 342, 343 (N.C. Ct. App. 1996)*. According to Plaintiffs' allegations, Municipal Defendants attempted to purchase land to build a new middle school. (Doc. No. 32). North Carolina law authorizes local boards of education and county governments to purchase and develop land **[*14]** for use as public schools. *N.C. Gen. Stat. § 115C-426*. Assuming the facts in the Amended Complaint are true, Municipal Defendants acted within their statutory authority. The Amended Complaint offers no specific statutory authorization for punitive damages against a municipality under these facts. Plaintiffs' claims for punitive damages and violations of *Chapter 75 of the North Carolina General Statutes* are not permitted against Defendants Gaston County and GCBOE. Counts 7 and 8 as against these Defendants are dismissed without prejudice.

3. Governmental Immunity

Whereas Defendants Gaston County and GCBOE are immune from certain claims as a matter of federal ***antitrust law***, it is less clear whether these Defendants enjoy a more general governmental immunity to suit. Municipal corporations are immune to tort claims unless immunity has been expressly waived or a cause of action is provided by statute. See *Data General Corp. v. Cty. of Durham, 143 N.C. App. 97, 545 S.E.2d 243, 246 (N.C. Ct. App. 2001)*; see also *Battle Ridge Cos. v. N.C. Dep't of Transp., 161 N.C. App. 156, 587 S.E.2d 426, 427 (N.C. Ct. App. 2003)*. This immunity only extends to activity which is governmental, rather than proprietary, in nature. *Estate of Williams ex rel. Overton v. Pasquotank Cty. Parks & Recreation Dep't, 366 N.C. 195, 732 S.E.2d 137, 140-41 (N.C. 2012)*. A proprietary action "is one that is 'commercial or chiefly for the private advantage of the compact community.'" *Id. at 141* (quoting *Britt v. City of Wilmington, 236 N.C. 446, 73 S.E.2d 289, 293 (N.C. 1952)*. While older cases have broadly defined this as any function or service that could have been provided by private entities, **[*15]** see *Britt, 73 S.E.2d at 293-94*, courts have more recently refined the inquiry to account for the broad range of services provided for privately. See *Estate of Williams, 732 S.E.2d at 142-43*.

The North Carolina Supreme Court in Estate of Williams noted "[w]hen the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature, other factors are relevant." *Id. at 142*. If the activity can only be undertaken by a governmental entity, it "is necessarily governmental in nature." Id. For activities that can be performed privately and publicly, the court articulated additional, non-dispositive factors for determining whether action should be considered governmental, which include: (1) whether the service is traditionally governmental, (2) whether the service is provided for a fee, and (3) whether the fee covers operating costs or generates a profit. *Id. at 142-43* (noting the fact-intensive nature of the governmental-proprietary distinction cautions against the exclusive use of these factors); see also *Peerless Indem. Ins. Co. v. City of Greensboro, No. 1:13CV1104, 2015 U.S. Dist. LEXIS 59630, 2015 WL 135501, at *3 (M.D.N.C. May 7, 2015)* (Memorandum Opinion and Recommendation of United States Magistrate Judge), *adopted*,*No. 1:13CV1104, 2015 U.S. Dist. LEXIS 174956, 2015 WL 449903 (M.D.N.C. June 23, 2015)*, **[*16]** *aff'd*, *628 F. App'x 202 (4th Cir. 2016)*.

Governmental immunity may be waived by the purchase of liability insurance. *N.C. Gen. Stat. § 153A-435* (applying the waiver to counties); *N.C. Gen. Stat. § 115C-42* (applying the waiver to local boards of education). These waivers only extend as far as the coverage provided by the insurance policy. *N.C. Gen. Stat. § 153A-435(b)* ("To the extent of the coverage of insurance . . . governmental immunity may not be a defense to the action. Otherwise, however, the county has all defenses available to private litigants in any action brought pursuant to this section without restriction, limitation, or other effect . . . ."); see also *Wright v. Gaston Cty., 205 N.C. App. 600, 698 S.E.2d 83, 87 (N.C. Ct. App. 2010)*. This limitation on waiver includes exclusionary clauses reserving all rights to assert sovereign immunity. *Id. at 89* (admitting that such a limitation was "circular," but still upholding the enforceability of the exclusionary clause).

Defendants Gaston County and GCBOE both assert entitlement to general governmental immunity from all of Plaintiffs' allegations. (Docs. Nos. 40 & 62). Plaintiffs assert both Defendants were engaged in proprietary action and waived their immunity by carrying liability insurance. (Docs. Nos. 41 & 63). Plaintiffs also allege Defendants' conduct was essentially *ultra vires* and not entitled to immunity. **[*17]** (Doc. No. 60, p. 6). Defendants claim their liability insurance contains an exclusionary clause similar to the clause that was held sufficient to sustain a claim of immunity in Wright v. Gaston Cty. (Doc. 38-1, p. 17).

Plaintiffs have sufficiently alleged proprietary actions by these Defendants to survive a claim of immunity at this stage. While the purchase and development of land for educational facilities is a statutory government function of municipal corporations, see *N.C. Gen. Stat. § 115C-426*, Plaintiffs have alleged dealings out of session and non-educational purposes for at least part of the land to be purchased. (Docs. Nos. 32 & 60). Plaintiffs contend the Municipal Defendants have admitted to not needing the entire parcel of land for school development intend to sell the remainder for profit. (Doc. No. 60). Defendants deny these claims, but these disputes of material fact warrant further discovery and fact-finding before a determination is made as to these Defendants' claims of governmental immunity. Defendants Gaston County and GCBOE will not be dismissed from the case on the basis of general governmental immunity at this time.

C. Plaintiffs' Other State Law Claims

The Amended Complaint alleges counts **[*18]** under North Carolina state law asserting fraud, breach of the implied covenant of good faith and fair dealing, unjust enrichment, quantum meruit, libel, punitive damages, violation of North Carolina unfair and deceptive trade practices laws, tortious interference with contract, and tortious interference with prospective economic advantage. (Doc. No. 32, pp. 8-16). The Court has given full review to the facts alleged in the Amended Complaint and the applicable law concerning the elements of each of these claims. See *N.C. Gen. Stat. § 1D-15* ("Standards for Recovery of Punitive Damages"); *N.C. Gen. Stat. § 75-1.1* (unfair and deceptive trade practices); *Walker v. Fleetwood Homes of North Carolina, Inc., 362 N.C. 63, 653 S.E.2d 393, 399 (N.C. 2007)* (unfair and deceptive trade practices); *Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494, 500 (N.C. 1977)* (fraud); *Spartan Equipment Co. v. Air Placement Equipment Co., 263 N.C. 549, 140 S.E.2d 3, 11 (N.C. 1965)* (tortious interference with prospective economic advantage); *Heron Bay Acquisition, LLC v. United Metal Finishing, Inc., 245 N.C. App. 378, 781 S.E.2d 889, 894 (N.C. Ct. App. 2016)* (unfair and deceptive trade practices and breach of the implied covenant of good faith and fair dealing); *Boyce & Isley, PLLC v. Cooper, 211 N.C. App. 469, 710 S.E.2d 309, 317 (N.C. Ct. App. 2011)* (libel); *Primerica Life Ins. Co. v. James Massengill & Sons Constr. Co., 211 N.C. App. 252, 712 S.E.2d 670, 676 (N.C. Ct. App. 2011)* (unjust enrichment); *Harty v. Underhill, 211 N.C. App. 546, 710 S.E.2d 327, 333-34 (N.C. Ct. App. 2011)* (tortious interference with contract); *Market America, Inc. v. Christman-Orth, 135 N.C. App. 143, 520 S.E.2d 570, 576 (N.C. Ct. App. 1999)* (libel); *Duffell v. Weeks, 15 N.C. App. 569, 190 S.E.2d 379, 381 (N.C. Ct. App. 1972)* (quantum meruit). Except as explained in the discussion of the antitrust claim and immunity defenses above, the Court finds Plaintiffs have plausibly alleged the elements of these remaining state law claims. As regards Counts 1, 2, 4, 5, 6, 7, 8, 9, and 10 as against all Defendants (except **[*19]** the dismissals ordered above), the Motions to Dismiss (Docs. Nos. 39, 48, 51, 57, 61) are denied without prejudice to raise the issue again at summary judgment.

D. Judgment on the Pleadings

Defendants Gaston County and Philbeck have moved in the alternative for judgment on the pleadings under *Rule 12(c)*. (Docs. Nos. 39 & 57). For the reasons stated herein, disputes as to material facts exist that preclude granting this alternative relief.

CONCLUSION

IT IS THEREFORE ORDERED the Motions to Dismiss the Complaint (Docs. Nos. 21, 23, 26, & 30) are DENIED AS MOOT. Defendant Booker's Motion to Dismiss the Amended Complaint (Doc. No. 45) is GRANTED. The remaining Motions to Dismiss the Amended Complaint (Docs. Nos. 39, 48, 51, 57, & 61) are GRANTED IN PART and

DENIED IN PART. Plaintiffs' federal antitrust claim (Count 3), claims against Defendant Booker, and Counts 7 and 8 as against Defendants Gaston County and GCBOE are DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED.

Signed: July 10, 2018

/s/ Frank D. Whitney

Frank D. Whitney

Chief United States District Judge

In re Domestic Drywall Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

July 17, 2018, Decided; July 17, 2018, Filed

MDL No. 2437 13-MD-2437

Reporter

2018 U.S. Dist. LEXIS 118758 *; 2018-2 Trade Cas. (CCH) P80,442; 2018 WL 3439454

IN RE: DOMESTIC DRYWALL ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: All Direct Purchaser Actions

Prior History: *In re Domestic Drywall Antitrust Litig., 939 F. Supp. 2d 1371, 2013 U.S. Dist. LEXIS 52566 (J.P.M.L., Apr. 8, 2013)*

Core Terms

district court, settlement, attorney's fees, lodestar, class action, cases, Plaintiffs', factors, multiplier, Purchaser, fee award, antitrust, class member, percentage-of-recovery, settlement fund, settlement agreement, nonpayment, discovery, benefits, skilled, common fund, cross-check, parties, weighed, Awards, costs, expenses, Analyzed, courts, fee request

Judges: **[*1]** MICHAEL M. BAYLSON, United States District Judge.

Opinion by: MICHAEL M. BAYLSON

Opinion

MEMORANDUM

Baylson, J.

As part of the class settlement for Direct Purchasers in these cases, Plaintiffs have appropriately filed a Motion for Award of Attorneys' Fees and Expenses. The Court has reviewed the supporting documents filed by Plaintiffs' counsel and the applicable legal precedents and files this Memorandum in support of the award.

As the first step in the outstanding success of Plaintiffs' counsel, this case started as a traditional price-fixing antitrust case. Counsel had located several direct purchasers of drywall, extensively used in construction and renovation work, as Plaintiffs on behalf of class of similarly situated direct purchasers. The initial Complaint in this Court was filed on December 20, 2012, and shortly thereafter a number of other Complaints were filed and the Judicial Panel on Multidistrict Litigation consolidated all of the cases in this Court. An initial pretrial conference and scheduling order set in motion the start of discovery, and the Court determined other relatively routine issues that commonly arise in complex litigation.

The course of this litigation can be succinctly summarized **[*2]** by cross-reference to the major decisions issued by the undersigned on various issues in the case, as a prelude to the award of attorneys' fees:

A. Major Opinions in Drywall

1. Use of contention statements rather than answers to interrogatories

On May 12, 2014, Defendants served interrogatories asking Plaintiffs to state "all acts and omissions that you contend each took in furtherance of the alleged conspiracy." *In re Domestic Drywall Antitrust Litig., 300 F.R.D. 228, 229 (E.D. Pa. 2014)*. Defendants then filed a motion to compel. The Court decided Defendants' request was not premature, but that "[r]ather than compel individual Plaintiffs to answer Defendants' interrogatories at this time, the Court will adopt a sequence of pretrial statements under which Plaintiffs' counsel will be required to set forth facts in their possession supporting their allegations ... Defendants must reciprocate." *Id. at 231*. The contention statements filed by Plaintiffs were detailed, thorough and reflected a great deal of high-quality work in assembling and the results of the discovery which they had conducted on a highly professional basis.

2. Thompson Research Group, LLC's motion to quash

On May 15, 2014, the Court granted in part and denied in part the motion to quash subpoena of a non-party **[*3]** analyst Thompson Research Group, LLC, which had allegedly served as a "conduit" for information regarding pricing among Defendants. *In re Domestic Drywall Antitrust Litig., 300 F.R.D. 234 (E.D. Pa. 2014)*. The Court allowed some discovery as to Thompson, but asked the parties to insure the confidentiality of Thompson Research Group's sources, limit the intrusion into Thompson's investigative files, and required Plaintiffs to pay for the costs of complying with the subpoena. Id. This third party discovery was appropriate and indeed, in retrospect, necessary because one of the theories of liability of the Plaintiffs was that the Defendants had used these third party marketing research firms as "conduits" for providing information from one Defendant to another as to their pricing plans, pricing decisions, and other normally confidential competitive strategies. Although the conduit theory is not completely novel in antitrust litigation, the results of this third party discovery proved to be very important in the Plaintiffs' building a successful dossier of evidence on liability issues as well as damages.

3. Denial of summary judgment as to all Defendants except CertainTeed

Following the direct and indirect purchaser settlements with USG and TIN, the remaining **[*4]** Defendants moved for summary judgment, with voluminous affidavits, deposition testimony and documents, asserting that there were no genuine issues of fact as to any alleged agreement to fix prices, and that the Court should conclude that the Plaintiffs had failed to gather sufficient evidence to warrant a jury trial. On February 18, 2016, the Court granted CertainTeed's motion for summary judgment, finding that "Plaintiffs' evidence as to Defendant CertainTeed is not sufficient to show that CertainTeed participated in the conspiracy," but denied summary judgment as to all other moving Defendants. *In re Domestic Drywall Antitrust Litig., 163 F. Supp. 3d 175, 230-31 (E.D. Pa. 2016)*. The Plaintiffs' responsive briefs were outstanding in all respects, with thorough responses, excellent briefs, and persuasive citations — all of which warranted the Court to deny summary judgment except as to CertainTeed, as noted above.

4. Appointment of independent expert on class issues

The Court decided not to appoint an independent expert on class action issues, but on June 16, 2017, it instead appointed a "technical advisor," Dr. Jeffrey Church of the University of Calgary, to assist the Court on limited econometric issues. (Letter, ECF 601.) Because both Plaintiffs and Defendants had **[*5]** retained highly skilled and knowledgeable expert economists on the class action issue, the Court determined to retain its own expert as to some of the economic issues in this case. Although this independent technical adviser generally sided with the Defendants' view of the economic theories, the Court concluded that the Plaintiffs' evidence warranted certification of a class of Direct Purchasers, but did not warrant a class of Indirect Purchasers.

5. Grant of Direct Purchaser Litigation Class

On August 23, 2017, the Court approved a litigation class of direct purchasers of drywall, finding that the requirements of *Rule 23(a)* and *Rule 23(b)(3)*, as interpreted by the Third Circuit, had been met. *In re: Domestic Drywall Antitrust Litig., 322 F.R.D. 188 (E.D. Pa. 2017)*.

6. Denial of Indirect Purchaser Litigation Class

On August 24, 2017, the Court denied certification of a litigation class of indirect purchasers of drywall. *In re Domestic Drywall Antitrust Litig., No. 13-MD-2437, 2017 U.S. Dist. LEXIS 135758, 2017 WL 3700999 (E.D. Pa. Aug. 24, 2017)*. The Court found that although the indirect purchaser plaintiffs had satisfied the requirements of *Rule 23(a)*, they had not met the Third Circuit's implied ascertainability requirement for *Rule 23(b)(3)* class actions, and had not shown that common issues predominated or that a class action was the superior method for adjudicating their claims, **[*6]** as was required under *Rule 23(b)(3)*.

7. Third Circuit Rulings

The Third Circuit rejected appeals under *Rule 23(f)*, filed by Defendants as to the Court's grant of a Direct Purchaser class action, and filed by Plaintiffs as to the denial of class certification of Indirect Purchasers.

Also, previously, although the undersigned had certified the denial of Defendants' motions for summary judgment for interlocutory appeal under *28 U.S.C. § 1292(b)*, the Third Circuit rejected the interlocutory appeal.

B. Determining Attorneys' Fees in Class Action Common Fund Settlements: the Percentage-of-Recovery Method

There are two methods of calculating attorneys' fees—the percentage-of-recovery method and the lodestar method. Under the percentage-of-recovery method, counsel will typically take a certain percentage of the plaintiffs' total recovery, with the understanding that the attorney is working on a contingent basis. The percentage-of-recovery method is favored in class action settlements involving a common fund, allowing the court to award attorneys' fees "in a manner that rewards counsel for success and penalizes it for failure." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821 (3d Cir. 1995)*. The theory underlying the use of the percentage-of-recovery method is that "the class would be unjustly enriched **[*7]** if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class." Id. Therefore, counsel's compensation depends directly on the value created for the class.

Under the lodestar method, attorneys' fees are calculated by multiplying the hours worked by counsel by the average hourly rate. This method is often used in the context of fee-shifting statutes, or to reward counsel for undertaking socially beneficial litigation in cases where the expected recovery is small enough such that utilizing the percentage-of-recovery method would yield inadequate compensation for counsel. Id. Even though the lodestar method is not the primary method for calculating attorneys' fees in class action common fund settlements, "it is sensible for a court to use [this] second method of fee approval to cross check" the award calculated under the percentage-of-recovery method. *Id. at 820*. What is often referred to as the "lodestar cross-check" is performed by dividing the total recovery requested under the percentage-of-recovery method by counsel's lodestar value, yielding a "lodestar multiplier." Thus, a lodestar multiplier of 2 would mean that under the percentage-of-recovery method, **[*8]** counsel would receive twice the amount of compensation that they would typically request for the same number of hours expended on the litigation.

1. *Krell v. Prudential Ins. Co. of Am. (in Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283 (3d Cir. 1998)*

a. Overview

In Prudential, the Third Circuit established three factors ("the Prudential factors") that courts will consider when determining whether the requested attorneys' fees are appropriate. They are:

(1) whether the entire value of benefits to the class is attributable to the efforts of class counsel;

(2) whether the percentage-of-recovery request reflects the fee that would result from private negotiations; and

(3) whether there are any particularly innovative terms in the settlement.

In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 338-40 (3d Cir. 1998).

These factors supplement the seven *Gunter* factors, discussed *infra*, in the balancing of whether a request for attorneys' fees is reasonable under the settlement agreement. Ultimately, the Third Circuit remanded the issue of attorneys' fees upon a finding that the district court inappropriately (1) failed to separate the value of the settlement created by administrative investigation from the value created by class counsel, and (2) gave weight to the contingency fee rates typical of smaller class actions or individual actions, but found that the district **[*9]** court's consideration of "innovative terms" of settlement was appropriate. Id.

b. Procedural Posture and Factual Background

This case was before the Third Circuit as an appeal of the district court's approval of the settlement of a nationwide class action against Prudential Life Insurance Company, including the district court's creation of a bifurcated attorneys' fee award valued as high as $90 million in a nearly $2 billion settlement.

Beginning in 1994, lawsuits against Prudential Life Insurance Company alleging improper sales and marketing practices were filed across the United States. *Id. at 290*. In response to the growing number of lawsuits against Prudential, the New Jersey Insurance Commissioner assembled a task force to investigate the allegations and develop a remedial plan to compensate injured policyholders. Id. In 1996, the task force issued a remedial action plan creating two options—alternative dispute resolution or "no-fault" basic claim relief—across four types of claims. *Id. at 291*. While the task force was investigating, individual parties and classes continued to file actions against Prudential in both state and federal court. *Id. at 292*. Following the publication of the task force report, lead **[*10]** counsel in the underlying class action and Prudential entered into a settlement agreement in September of 1996. *Id. at 294*. The settlement agreement largely adopted the substance and structure of the task force remedial plan, but the district court found that the settlement made some enhancements. *Id. at 296-97*. Under the Stipulation of Settlement filed in October of 1996, lead counsel would request $90 million in attorneys' fees to be paid by Prudential. *Id. at 329*.

c. The District Court's Analysis of Lead Counsel's Attorneys' Fees Request

The district court found the remedy structure analogous to a common fund, and thus determined that the percentage-of-recovery method was to apply. Id. An expert retained by lead counsel estimated that $863.7 million of the settlement agreement's value of $1.987 billion was created by the task force plan, while the remaining $1.123 billion was created by class counsel. Id. The district court rejected the lead counsel's fee petition, instead creating a bifurcated fee award designed to provide between $45 million and $90 million to class counsel. Id. Notably, the district court recognized that the fee awards in cases where the recovery exceeded $100 million ranged between 4.1 and 17.92%; **[*11]** it also concluded that private parties would likely have negotiated a contingent fee of 10 to 15%. *Id. at 331-332*. The district court calculated that if the full $90 million in attorneys' fees were awarded, this would result in approximately 6.7% of the minimum recovery guaranteed by Prudential under the settlement agreement. *Id. at 332*. With a lodestar value of $17.7 million and expenses at just over $3 million, a $90 million fee would generate a lodestar multiplier of 5.1 at an average hourly rate at $1,148.70. Id.

d. The Third Circuit's Rejection of the District Court's Analysis and Remand on the Issue of Attorneys' Fees

In its analysis of the appropriateness of the attorneys' fees, the Third Circuit primarily took issue with the high value of attorneys' fees despite the presence of substantial government investigation. In remanding the issue of attorneys' fees back to the district court, the Third Circuit emphasized that "[i]t is not clear on the record before us that class counsel had so significant a role in the institution of the Task Force proceedings that the district court was justified in crediting counsel for all of the benefits created under the Task Force plan." *Id. at 337*.

Next, the Third Circuit focused **[*12]** on the district court's conclusion that a contingent fee of 10 to 15% would be privately negotiated in class actions of such a large size. "While such private fee arrangements might be appropriate in smaller class actions or litigation involving individual plaintiffs, we do not believe they provide much guidance in cases involving the aggregation of over 8 million plaintiffs and a potential recovery exceeding $1 billion," it noted. *Id. at 340*. The Third Circuit additionally took issue with the size of the lodestar multiplier of 5.1, stressing that the district court did not "take care to explain how the application of a multiplier is justified by the facts of a particular case." Id.

Finally, though the Court found the above issues to be problematic in the district court's fee structure, it did consider the bifurcated fee award to be "an appropriate and innovative response to the structure of the settlement." *Id. at 334*.

2. *Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000)*

a. Overview

In Gunter v. Ridgewood Energy Corp., the Third Circuit adopted a discrete seven-factor test, listed in subsection d, *infra*, that courts use in determining the reasonableness of attorneys' fees in class action common fund settlements. *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000)*. The Third Circuit also added a separate **[*13]** lodestar cross-check generating a "lodestar multiplier" that is used to gauge the difference between the class counsel's lodestar and the fee under the percentage-of-recovery method. Id. The Gunter factors are typically combined with the Prudential factors (discussed *supra*) in a court's analysis, resulting in a comprehensive ten-factor balancing test. Ultimately, the Third Circuit remanded the issue of attorneys' fees to the district court for a correct and clear articulation of its analysis in determining what amount of attorneys' fees ought to be awarded. *Id. at 192, 196*.

b. Procedural Posture and Factual Background

Gunter was before the Third Circuit on the plaintiffs' appeal of the district court's grant of attorneys' fees at only 18% of the $9.5 million settlement fund, instead of the 33 1/3% fee that the parties agreed to under the settlement agreement. *223 F.3d at 191*. The underlying class action arose from a series of failed oil and gas investments, with the class alleging that the defendants fraudulently marketed and sold about $150 million of interests in partnerships between 1986 and 1990. *Id. at 192*. The class action was brought under the *Racketeer Influenced and Corrupt Organization Act* and **[*14]** *§§ 10(b)* and *20(a) of the Securities Exchange Act of 1934*, as well as various state common law claims. Id. After discovery and pre-trial motion practice, including class certification and a round of summary judgment argument, the parties reached a settlement agreement in June of 1999. *Id. at 193*.

The terms of the settlement included a common fund of $9.5 million, which represented more than half of the total amount lost by class members to the fraudulent practices of the defendants. Id. In its submissions to the district court, class counsel requested reimbursement of $300,000 in costs as well as one third of the $9.5 million common fund (about $3.16 million). Id. Class counsel calculated the lodestar multiplier to be 1.1, and noted that none of the class members objected to the requested fee amount. *Id. at 194*.

c. The District Court's Analysis of Class Counsel's Attorneys' Fees Request

In its brief analysis of class counsel's request for one-third of the common settlement fund, the district court decided to reduce the fee to 18% of the recovery. Gunter v. Ridgewood Energy Corp., No. CIV. 95-438 (WHW), 1999 WL 33266979, at *2 (D.N.J. Nov. 16, 1999), vacated, *223 F.3d 190 (3d Cir. 2000)*. The factors considered by the district court included class counsel's submissions and statements regarding their efforts to settle the **[*15]** litigation, and the number of hours expended. *Id.* The district court ultimately held that "[t]he nature of this litigation, its resolution at this stage without the necessity of trial, the nature of the settlement, and its value, convince the court that it would place a reasonable burden on the class to award attorneys' fees of 18% of the Settlement Fund, or $1,700,000." Id. The district court denied class counsel's motion for reconsideration on the grounds that it was wary of the number of hours class counsel reported, stating "[t]he Court is of the opinion that these hours merely serve as a hindsight prop to the one-third percentage of plaintiffs' recovery sought by counsel as their fee." Gunter v. Ridgewood Energy Corp., Civ. No. 95-438 (WHW), at 2-3 (D.N.J. Dec. 29, 1999). Noting that "[c]ounsel had their opportunity to provide full information to the Court upon their original submission. They did not. And, interestingly, they did not even attempt to do so by their motion for reconsideration." Id.

d. The Third Circuit's Remand of the Issue of Attorneys' Fees Based on Inadequate Reasoning on the Part of the District Court

After analyzing the district court's award of reduced attorneys' fees, the Third Circuit ultimately **[*16]** remanded the issue back to the district court, since "if the district court's fee-award opinion is so terse, vague, or conclusory that we have no basis to review it, we must vacate the fee-award order and remand for further proceedings." *Gunter, 223 F.3d at 196*. The Third Circuit then identified seven factors that courts ought to consider when determining the appropriateness of an attorneys' fee request in common fund class action settlements:

(1) the size of the fund created and the number of persons benefitted;

(2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;

(3) the skill and efficiency of the attorneys involved;

(4) the complexity and duration of the litigation;

(5) the risk of nonpayment;

(6) the amount of time devoted to the case by plaintiffs' counsel; and

(7) the awards in similar cases.

Id. at 195 n.1. It also noted that in mega-fund cases, like those valued at over one billion dollars, courts may give these factors less weight. Id. Finally, the Third Circuit suggested that after a court's has analyzed the seven factors, it should perform a lodestar "cross-check," in which it calculates the lodestar multiplier to determine whether **[*17]** the difference between counsel's lodestar and the fee request is reasonable under the circumstances of the case. Id.

In reviewing the district court's analysis of the factors, the Third Circuit found that, in the original fee award opinion as well as in the opinion denying class counsel's motion for reconsideration, the district court either failed to apply some of the seven factors it identified, or misapplied them. *Id. at 201*. The following analysis does not follow the order of the factors listed explicitly by the Third Circuit, *223 F.3d at 191 n.1*.

i. Third Circuit Review of the First Factor Analyzed by the District Court: The Complexity and Duration of the Litigation

Regarding the first factor analyzed by the district court—the complexity and duration of the litigation—the Third Circuit found, unlike the district court, that the underlying litigation was both complex (involving federal securities law and a plethora of state claims), and that its four-and-a-half year duration weighed in favor of granting class counsel's fee request. *Id. at 197*.

ii. Third Circuit Review of the Second Factor Analyzed by the District Court: The Existence of a Settlement Between the Parties

The Third Circuit then addressed the second factor that the district **[*18]** court analyzed, and found that the district court inappropriately considered the existence of a settlement to warrant a reduction in the attorneys' fee award. *Id. at 198*. The Third Circuit held that "[p]rocuring a settlement, in and of itself, is never a factor that the district court should rely upon to reduce a fee award. To utilize such a factor would penalize efficient counsel, encourage costly litigation, and potentially discourage able lawyers from taking such cases." Id.

iii. Third Circuit Review of the Third Factor Analyzed by the District Court: The Size of the Settlement and the Number of Persons Benefitted

Turning to the next factor the district court analyzed—the size of the settlement and the number of persons benefitted—the Third Circuit found that the district court provided scant analysis of whether the attorneys' fee request was appropriate in light of the litigation in similar cases. Id.

iv. Third Circuit Review of Two Factors Not Analyzed by the District Court: The Absence of Objections from Class Members, and the Risk of Non-Payment

The Third Circuit next identified two factors that the district court failed to include altogether: the absence of objections from class members **[*19]** to class counsel's request for fees, and the risk of non-payment. *Id. at 199*. On the first issue, the Third Circuit did not make any explicit finding on the significance of the lack of objection to the requested fee amount. On the second issue, the Third Circuit noted "it seems that the risk of non-payment in this case was present both because the defendants were close to insolvency, and because other classes of plaintiffs in similar cases against the defendants had lost on similar legal theories." Id.

v. Third Circuit Review of the District Court's Use of the Lodestar Cross-Check

Finally, the Third Circuit found that the district court failed to adequately apply the lodestar cross-check, noting that "the District Court neither reduced its lodestar calculations to writing, nor gave Counsel a chance to justify their hours billed or their hourly rates." Id. While in its opinion denying the motion for reconsideration the district court stated that it had considered the lodestar value in arriving at its original fee award, the Third Circuit observed that any mention or discussion of either the lodestar value or multiplier was notably absent. Id. For all of these reasons—either a lack of analysis or **[*20]** improper analysis—the Third Circuit remanded the issue of attorneys' fees back to the district court. *Id. at 192, 196*. No subsequent district court order or opinion could be found following the Third Circuit's remand.

3. *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d 722 (3d Cir. 2001)*

a. Overview

This case presents an example of where a percentage-of-recovery award appeared to be reasonable on its face, but analysis under the Gunter factors and a lodestar cross-check demonstrated the award's unreasonableness. As in Gunter, the Third Circuit found the district court's analysis to be too cursory, and also determined that the district court had either failed to analyze or mis-analyzed several factors that it had outlined in Gunter. *In re Cendant Corp. Prides Litig., 243 F.3d 722, 733, 735-36 (3d Cir. 2001)*. While a percentage-of-recovery figure of 5.7% appeared reasonable given the range suggested by other cases, the Third Circuit found that such a percentage was materially undermined by a projected lodestar multiplier between 7 and 10. *Id. at 742*. After reviewing the district court's analysis, the Third Circuit vacated the award of attorneys' fees and remanded the issue to the district court. *Id. at 743*.

b. Procedural Posture and Factual Background

This case was before the Third Circuit on appeal of the district court's approval of a class settlement and award of attorneys' **[*21]** fees to lead counsel, and was ultimately remanded by the Third Circuit to the district court for proper analysis under the Gunter factors. Id. The underlying class action was filed on behalf of investors in the Cendant Corporation after it had disclosed some prior "accounting irregularities" in April of 1998. *Id. at 725*. On behalf of one of the classes of the consolidated class action (the "PRIDES class,") a law firm, Kirby, entered into a settlement agreement with Cendant in March of 1999 under which Cendant agreed to issue Rights to new PRIDES (a type of share); with 29,161,474 shares each valued at $11.71, the total approximate value of the settlement agreement was $341,500,000. Id. Under the terms of the settlement agreement, Kirby would not ask for more than 10% of the $341,500,000 stated value, plus reasonable expenses. Id.

c. The District Court's Analysis of Kirby's Attorneys' Fees Request

In June of 1999, the district court approved the settlement, granted Kirby's expenses of $2,367,493, but found that for attorneys' fees, Kirby should receive 5.7% (instead of the 10% requested) of the settlement rights, totaling 1,650,680 rights valued at $19,329,463. *Id. at 726*. The district court's lodestar analysis found **[*22]** that approximately 5,600 hours were expended, and that senior partners charge an hourly rate of $495. *In re Cendant*

Corp. Prides Litig., 51 F. Supp. 2d 537, 542 (D.N.J. 1999). Using this hourly rate, the district court calculated the lodestar multiplier to be 7. Cendant, 243 F.3d at 732. The $495 hourly rate of senior partners artificially lowered the lodestar multiplier, as inferior legal staff expended hours on the litigation. Id.

d. The Third Circuit Review of the District Court's Analysis and Remand on the Issues of Attorneys' Fees

The Third Circuit found the district court's analysis problematic for several reasons, not the least of which was the fact that "[a]s in Gunter, the District Court's fee opinion in this case was too cursory for us to 'have a sufficient basis to review for abuse of discretion.'" Id. at 733 (quoting Gunter, 223 F.3d at 196). The Third Circuit itemized a list of factors that the district court either failed to recognize or misjudged in its analysis of the adequacy of Kirby's attorneys' fee request:

> 1) the case was relatively simple in terms of proof, in that Cendant had conceded liability and no risks pertaining to liability or collection were pertinent;
>
> 2) the case was settled at a very early stage of the litigation, with an agreement being announced two months after Kirby filed for class **[*23]** certification and a proposed settlement being submitted to the District Court two months after that;
> 3) there was a minimal amount of motion practice in this case—before settlement, Kirby submitted only the Complaint and three motions, all on the same day;
>
> 4) discovery was virtually nonexistent—indeed the District Court did not mention any depositions taken or document review conducted by Kirby;
>
> 5) Kirby spent a relatively small amount of time on this case compared to the amount of time expended in most other large class actions."

Id. at 735-36. In other words, the attorneys' fee amount requested by Kirby did not actually reflect the amount of work it expended on litigating the case. Because the high value of the settlement might have arguably come from the number of class members or the values of the PRIDES shares, the law firm might receive a windfall under the requested amount. These notions supported the Third Circuit's observation that "[i]n In re GMC Trucks, we observed that 'one court has noted that the fee awards have ranged from nineteen percent to forty-five percent of the settlement fund.' . . . These varying ranges confirm that a district court may not rely on a formulaic application of **[*24]** the appropriate range in awarding fees but must consider the relevant circumstances of the particular case." Id. at 736 (quoting 55 F.3d at 822) (internal citations omitted).

The Third Circuit noted that the district court failed to compare the requested attorneys' fee to those granted in similar cases. Id. The Third Circuit provided a chart listing class action common fund settlements, their value, and the percentage-of-recovery. Id. at 737. Looking at the cases listed in the chart, the Third Circuit noted that the attorneys' fees awards ranged from 2.8% to 36% of the total common settlement fund. Id. at 738. While the 5.7% fee awarded by the district court appeared to fall within this range, the Third Circuit again emphasized the fact that the work counsel performed was not deserving of an award of that size, writing "a brief review of the facts and posture of these other cases makes clear that, when examined through the seven-factor lens of Gunter, the higher fees awarded in the other cases were far more justified than the high award in this case." Id. (italics added). Finally, the lodestar multiplier would likely fall between 7 and 10, a value the Third Circuit found inappropriately high. Id. at 742. The Third Circuit observed: "[i]n **[*25]** all the cases in which high percentages were applied to arrive at attorneys' fees, the courts explained the extensive amount of work that the attorneys had put into the case, and appropriately the lodestar multiplier in those cases never exceeded 2.99." Id. Thus, this case highlights the importance of the multiplier resulting from the lodestar cross-check, as even low percentage-of-recovery values may nevertheless leave law firms with windfall fee awards.

4. In re AT&T Corp. Sec. Litig., 455 F.3d 160 (3d Cir. 2006)

a. Overview

Where a district court granted the request for an attorneys' fee that was the product of a pre-arranged scale (not a traditional sliding scale where the percentage of recovery decreases as the settlement value increases), the Third Circuit found that because the attorneys' fee award conformed with the Gunter and Prudential factors, the district court did not abuse its discretion in granting the request. *In re AT&T Corp. Sec. Litig., 455 F.3d 160, 175 (3d Cir. 2006)*.

b. Procedural Posture and Factual Background

This case was before the Third Circuit from an appeal of three class members on the issue of attorneys' fees in a class action common fund settlement, specifically that they were excessive and did not employ a traditional sliding scale where the percentage of recovery for attorneys' **[*26]** fees decreases as the size of the settlement increases. *Id. at 163*.

Beginning in October of 2000, several plaintiffs filed federal securities fraud lawsuits under the *Securities and Exchange Act of 1934*, alleging that defendants made knowingly false statements over the course of 7 months regarding anticipated performance for the year of 2000 to artificially inflate stock price. *Id. at 162*. After two years of discovery and two weeks of trial (beginning of October of 2004), the parties entered into a tentative settlement agreement in which AT&T agreed to a $100 million common settlement fund, with attorneys' fees set at 21.25%, or $21,500,000, and costs valued at $5,465,996.79. *Id. at 163*. The district court preliminarily approved the settlement agreement, and after notice was mailed to over one million potential class members, eight objections were received pertaining to the attorneys' fees arrangements. Id.

c. The District Court's Analysis of the Request for Attorneys' Fees

In this securities case brought under the Private Securities Litigation Reform Act, the district court noted that in the Third Circuit, attorneys' fees requests are presumed reasonable unless the district court finds the fee to be clearly excessive on its face. **[*27]** *Id. at 167* (citing *Cendant, 264 F.3d at 220*). The district court found that the sliding scale arrangement between the parties, which resulted in the 21.25% attorneys' fee, was reasonable and had not been shown to be unreasonable by the challengers. Id. The district court concluded that the fee was also reasonable under the Gunter factors, specifically noting that the fee arrangements had been approved by each court-appointed lead plaintiff. Id. The district court subsequently found that a lodestar value of $16.6 million and a lodestar multiplier of 1.28 represented a "truly reasonable fee award." *Id. at 169*. The district court also approved reimbursement of costs. Id.

d. The Third Circuit's Affirmance of the District Court's Approval of Attorneys' Fees

The Third Circuit affirmed the district court's grant of attorneys' fees, finding that "[t]he district court's analysis and discussion demonstrates it considered the fee award reasonableness factors relevant to the facts of the case[.]" Id. The first Gunter factor—the size of the settlement and the number of persons benefitted—did not require any analysis, as the settlement was for $100 million and the class could potentially consist of over a million members. *Id. at 169-70*.

i. The Second Gunter ***[*28]*** *Factor: The Presence of Substantial Objections from Class Members on the Issue of Attorneys' Fees*

The Third Circuit found that with regard to the second Gunter factor, the presence of eight objections out of a potential class of one million members represented a "low level of objection," and thus the district court did not abuse its discretion by not considering these objections "substantial." *Id. at 170*.

ii. The Third and Fourth Gunter Factors: The Skill and Efficiency of Counsel and the Complexity and Duration of Litigation

The Third Circuit found that the third and fourth factors—the skill/efficiency of counsel and the complexity/duration of litigation—also weighed in favor of granting the fee award, as the litigation was long and even began trial, on complex securities law issues. Id.

iii. The Fifth Gunter Factor: The Risk of Non-Payment

There was only a slight risk of nonpayment under the fifth factor, but the Third Circuit found that the district court did not abuse its discretion in finding such a risk. *Id. at 171*.

iv. The Sixth Gunter Factor: The Amount of Time Devoted by Class Counsel

The lengthy litigation lent support to the sixth factor—the amount of time devoted by counsel, which was apparent from **[*29]** the number of pre-trial motions, the scope of discovery, and two weeks of trial. Id. Typically, a discussion of the number of hours devoted takes place under this factor, but such a figure is absent in this Third Circuit opinion.

v. The Seventh Gunter Factor: Awards in Similar Cases

With regard to the seventh factor—awards in similar cases—the district court did not abuse its discretion when it held that objectors had failed to present sufficient evidence to rebut a presumption of reasonableness (under the PSLRA). Id. Thus, under the Gunter factors and the lodestar cross-check, the Third Circuit found that the circumstances weighed toward granting the requested attorneys' fees. *Id. at 173*.

vi. The Prudential Factors: Whether the Entire Value of the Settlement is Attributable to Class Counsel, Whether the Fee Reflects What Private Parties Would Have Negotiated, and Whether the Settlement Contained Innovative Terms

Turning to the Prudential factors, the Third Circuit noted that there was no government investigation into the defendants' conduct, thus class counsel created the value of the settlement on their own. On the issue of privately negotiated contingency fees (the second *Prudential* factor), **[*30]** and in response to the appellants' contention that the percentage of recovery should not increase alongside the value of the settlement, the Third Circuit held that there is "no rule that a district court must apply a declining percentage reduction in every settlement involving a sizable fund." *Id. at 174* (citing *Rite Aid Corp. Sec. Litig., 396 F.3d 294, 303 (3d Cir. 2005))* (internal quotation marks omitted). As there were no particularly innovative terms of the settlement, the final Prudential factor was not analyzed. Thus, the district court's approval of the requested attorneys' fees was affirmed by the Third Circuit.

5. *In re Diet Drugs Prod. Liab. Litig., 582 F.3d 524 (3d Cir. 2009)*

a. Overview

In a case where $567 million in attorneys' fees were requested from a settlement valued at $6.44 billion, the Third Circuit found that the district court did not abuse its discretion in granting the requested amount. Since "the lawyers involved were primarily concerned with obtaining relief for their clients and members of the class," the district court "correctly applied the method better designed to 'reward counsel for success and penalize it for failure.'" *In re Diet Drugs Prod. Liab. Litig., 582 F.3d 524, 541 (3d Cir. 2009)* (citing *GMC, 55 F.3d at 821*).

b. Procedural Posture and Factual Background

In this case, the appellants challenged the district court's findings on three of the Gunter/Prudential factors **[*31]** in its opinion granting attorneys' fees in the amount of 6.75% of a settlement totaling $6.44 billion—a fee award of roughly $567 million. *Id. at 537*. Specifically, appellants challenged the district court's findings on the following factors:

(1) the presence or absence of substantial objections,
(2) the risk of nonpayment, and
(3) the value of benefits attributable to the efforts of other groups.

Id. at 541. Ultimately, the Third Circuit affirmed the findings of the district court, upholding the award of attorneys' fees. *Id. at 553*.

Beginning in 1997, a wave of products liability actions arose after researchers discovered a correlation between some then-commonly prescribed appetite suppressants and a heart disorder known as valvular heart disease ("VHD"). *Id. at 559*. Scientific evidence of serious coronary side effects from the drugs prompted the FDA to issue a public health alert, and prompted the pharmaceutical company responsible for the development of the drugs, Wyeth, to withdraw the drugs from the market. Id. In November of 1999, Wyeth, the plaintiffs' management committee of the class action, and counsel from state court class actions executed a nationwide settlement. *Id. at 530*. The settlement included several options for eligible **[*32]** class members, which were ultimately valued at a total of $6.44 billion. *Id. at 536*. Class counsel from 72 different firms filed a joint petition for attorneys' fees in which they requested a total of approximately $567 million. *Id. at 533*. An auditor reported that the 72 firms had performed 354,431.49 hours of work on the litigation and found a lodestar value of $101,076,658.54. Id.

c. The District Court's Analysis of the Requested Attorneys' Fees

When presented with class counsel's request for $567 million in attorneys' fees, the district court made several findings. First, the plaintiffs' management committee faced significant risk at the beginning of the litigation that their work would ultimately be unsuccessful and uncompensated. *Id. at 534*. Second, that the discovery undertaken by the plaintiffs' management committee paved the way for the class settlement and individual settlements—in other words, the plaintiffs' management committee could rightly be considered to have created the entire value of the settlement benefitting the class. Id. Thirdly and lastly, that the plaintiffs' management committee conferred great benefits on all litigants and performed well. Id. Ultimately, in April of 2008, eleven years **[*33]** after the commencement of litigation against Wyeth, the district court awarded class counsel attorneys' fees in the amount of approximately $567 million. *Id. at 536*.

When applying the percentage-of-recovery method, the district court concluded that an award equaling 6.75% of the recoveries under the settlement agreement was appropriate. *Id. at 536*. The lodestar cross-check yielded a lodestar multiplier of 2.6; while it recognized that this might have been artificially low, the district court was confident that the actual multiplier would not be excessive. Id.

d. The Third Circuit's Review and Affirmance of the District Court's Award of Attorneys' Fees

As to the first factor challenged—the presence or absence of substantial objections—the district court found it "remarkable" that there were fewer than thirty objections out of the approximately six million potential class members. *Id. at 542* (citing *In re Diet Drugs Prods. Liab. Litig., 553 F. Supp. 2d 442, 473 (E.D. Pa. 2008)* (internal quotation marks omitted). In response to appellants' argument that the district court inappropriately relied on the absence of objections to the final joint fee petition, the Third Circuit stated that "[w]hatever weight the Court gave to this factor it gave based on the dearth of objections throughout the settlement **[*34]** and fee adjudication process, instead of focusing only on the objections to the final joint fee petitions." Id. This suggests that the scope of this factor takes into account the nature and volume of objections by class members throughout the litigation process, though arguably this is a fact-intensive inquiry.

As to the second factor challenged, the risk of nonpayment, the appellants argue that the district court erred as a matter of law when it considered the risk of nonpayment only at the beginning of litigation and not throughout the course of the action, as the risk of nonpayment dissipated after a settlement was reached. *Id. at 543*. However, the Third Circuit found that the district court indeed considered the risk of nonpayment throughout the action, specifically when it considered the risk of a "'second wave' of litigation" following the execution of the settlement agreement; the district court found that "[a]t the inception, and throughout this litigation, there was a substantial risk that the efforts of [Class Counsel] would not be successful." Id. (citing *Diet Drugs, 553 F. Supp. 2d at 479*).

As to the third factor challenged, the value of benefits attributable to others, the district court found that while class counsel **[*35]** was somewhat beholden to the researchers who linked the diet drugs to the illness, as well as to the FDA for its efforts to remove the drugs from the market, these entities had not performed the investigative legal work on which class counsel could then rely. *Id. at 544*. The appellants challenged the district court's finding as to this factor, pointing as well to the efforts of Texas lawyers in state litigation. Id. The Third Circuit upheld the reasoning of the district court on this factor, and noted that even if the efforts of the Texas state claim lawyers were undervalued, this alone is not grounds to vacate a fee award. "Our task is to discern whether the Court's percentage-of-recovery analysis, when examined in its totality, supports the fee that it finally determined was appropriate," it held. *Id. at 545*. In Prudential, however, this factor was one of the overwhelming reasons (if not the primary reason) the Third Circuit vacated the fee award. However, this factor is one of degree; that is, the question is not whether there were efforts from outside groups, but rather whether class counsel relied on them to such an extent that it would not be appropriate to grant attorneys' fees based on the entire **[*36]** value of the settlement. The Third Circuit supported this notion when it stated that "the [District] Court determined that, whatever the Texas cases may have added, the recoveries arising from the MDL were due to the 'herculean efforts' of the [plaintiffs' management committee]—in developing the case against [the defendants], in negotiating an agreement that allowed [the defendants] to resolve the claims against it, and in amending the Settlement Agreement when it appeared to be in jeopardy." *Id. at 544* (citing *Diet Drugs, 553 F. Supp. 2d at 474*).

6. *In re Ins. Brokerage Antitrust Litig., 579 F.3d 241 (3d Cir. 2009)*

In this case, the Third Circuit upheld the district court's award of attorneys' fees totaling $29,950,000, where the attorneys' fees were to be paid separately from the settlement fund benefiting class members, which was valued at $100,000,000. *In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 248 (3d Cir. 2009)*. Beginning in October of 2004, various state attorneys general and state insurance departments began investigating alleged bid-rigging and steering activities of insurance brokers and insurers in the property and casualty insurance industry, in violation of ***antitrust law***; at the same time, private parties commenced class actions in federal courts throughout the country (which were consolidated in February of 2005 in the District of New Jersey). Id. One **[*37]** of the defendants, the Zurich Defendants, also subject to state-level investigations, entered into a Memorandum of Understanding ("MOU") with the class plaintiffs in October of 2005, under which the Zurich Defendants would establish a settlement fund valued at $100,000,000. *Id. at 250*. Of the settlement fund, $29,900,000 would be earmarked to fund a separate settlement award. *Id. at 252*. The Zurich Defendants agreed to pay attorneys' fees up to $29,950,000, paid separately from the settlement fund. *Id. at 253*. After preliminary approval of the settlement, class counsel requested the distribution of the $29,950,000 as follows: $3,957,000 for litigation expenses, $150,000 for incentive awards for fifteen class representatives, and $25,803,000 for fees. Id.

The district court found that while attorneys' fees are to be paid separately from the settlement fund, this case was nevertheless analogous to the typical class action common fund settlement, in which attorneys' fees were drawn from the fund under the percentage-of-recovery method. *Id. at 280*. Thus, the value of the settlement would be a combined $129,950,000. Id. The district court then proceeded to engage in an abbreviated Gunter analysis.

7. *In re Linerboard Antitrust Litig., MDL No. 1261, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 (E.D. Pa. June 2, 2004)*

a. Overview

In this case, the district court **[*38]** found that, after analysis of the Gunter/Prudential factors, the requested attorneys' fees of 30% of a $202,572,489 settlement was reasonable. *In re Linerboard Antitrust Litig., MDL No. 1261, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004)*. The district court also approved reimbursement of litigation costs in the amount of $1,391,203.36. Id. The court found that where class counsel was particularly skilled and able to litigate the case with fewer hours expended, attorneys' fees should serve to reward such efficiency, and any downward adjustment would inappropriately punish counsel for skilled lawyering. *2004 U.S. Dist. LEXIS 10532, [WL] at *16*.

b. Procedural Posture/Factual Background

This district court opinion addresses the request for attorneys' fees resulting from an antitrust action involving allegations that a number of US manufacturers of linerboard engaged in a continuing combination of conspiracy and unreasonable restraint of trade and commerce in violation of the *Sherman Act*. *Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *1*. Seven lawsuits were instituted after an administrative complaint was filed by the FTC against defendant Stone Container Corporation was resolved by a consent decree. Id. The lawsuits were consolidated in the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation. Id. The total settlement amount among all the **[*39]** defendants totaled $202,572,489, with class counsel requesting 30% of the settlement value (approximately $60 million) plus reimbursement of $1,391,203.36 in litigation costs. *2004 U.S. Dist. LEXIS 10532, [WL] at *2*.

c. The District Court's Finding that the Requested Fees are Reasonable

i. The First Gunter Factor: The Size of the Fund Created and the Number of Persons Benefitted

The district court found that this factor weighed in favor of approving the attorneys' fees request, on the ground that the size of the fund represented more than half of the claimed damages, and the class size of 80,000 was sufficiently large. *2004 U.S. Dist. LEXIS 10532, [WL] at *4-5*. The plaintiffs had retained an economic expert that estimated that during the class period, the costs of boxes and sheets were 2.7% higher than they would have been absent the alleged conspiracy, representing a total of $478 million. Id. Thus, the settlements represented about 55% of the damages. Id. Furthermore, the class size of 80,000 companies weighed in favor of granting the request. *2004 U.S. Dist. LEXIS 10532, [WL] at *5*.

ii. The Second Gunter Factor: The Presence or Absence of Substantial Objections by Members of the Class to the Fee Request

The district court found that "in this case class members are represented by counsel. Further, the **[*40]** classes in this cases [sic] include many of the largest corporations in America . . . Based on the foregoing, the Court concludes that consideration of the of the second *Gunter* factor . . . supports granting the Fee Petition." *Id.*

iii. The Third Gunter Factor: the Skill and Efficiency of Counsel

The district court found that this factor weighed in favor of granting the requested attorneys' fees, observing that "[t]hroughout every phase of the litigation petitioners managed a major discovery effort . . . In terms of document discovery alone, defendants produced more than 430 boxes of documents containing more than one (1) million pages of records." *2004 U.S. Dist. LEXIS 10532, [WL] at *10*. The district court also observed that "most [of the] informal efforts at resolution [between class and defense counsel] have proved successful and the Court's involvement has only been required on a few occasions." Id. (internal citations omitted). This suggests that under this factor, courts may consider the ability for counsel to resolve issues cooperatively and independently.

iv. The Fourth Gunter Factor: the Complexity and Duration of Litigation

The district court noted that the litigation had been going on for six years, and that there **[*41]** was a high possibility that should the case proceed to trial, it could continue for several more years. Id. The district court also noted that there was previous authority for granting a similar fee award in a case where the settlement occurred much earlier in the litigation process, such as in *In re Ikon Office Solutions Inc. Sec. Litig., 194 F.R.D. 166, 194 (E.D. Pa. 2000)*, where the court had awarded 30% of a $111 million settlement in attorneys' fees after one and a half years of litigation. *Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *10*.

v. The Fifth Gunter Factor: the Risk of Non-Payment

The district court called attention to several important facts in this case pertaining to this factor. First, the district court noted that the FTC investigation into one of the defendants had been, according to one antitrust expert, "at the cutting edge of single firm antitrust liability." *2004 U.S. Dist. LEXIS 10532, [WL] at *11* (internal citations omitted) (internal quotation marks omitted). Because there had "never been a successfully litigated antitrust claim of a single firm attempt to conspire to raise prices or reduce out-put based solely, or even primarily, on market conduct by the defendant firm," the class faced significant risks of non-payment stemming from the uncertainty or the low success rate of this type of litigation. Id. (internal citations **[*42]** omitted) (internal quotation marks omitted).

Second, even though the district court found that the FTC had launched an investigation into one of the defendants, the district court adopted the view of the Second Circuit, which asked whether the defendants' liability was "prima facie established by the government's successful action." Id. (quoting *City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974)*, abrogated on other grounds by *Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000))*. Here, the FTC did not successfully establish, prima facie, the defendant's liability. *Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *11*. The emphasis on this factor may also be considered to be an analysis under one of the Prudential factors, which analyzes the degree to which class counsel has relied on other entities to create the value of the settlement. In this case, the district court found that the FTC investigation had not played any significant role, and therefore class counsel could be considered to have created the entire value of the settlement. Id.

Finally, the defendants stated their intention to exploit several perceived weaknesses in the class' evidence of liability, such as the lack of direct evidence of a meeting among the defendants where the alleged conspiracy to violate antitrust laws would have taken place. This, supplemented by the fact **[*43]** that there might have been other reasons for the increase of prices, made it much more difficult for the class to establish liability at trial. *2004 U.S. Dist. LEXIS 10532, [WL] at *12*.

vi. The Sixth Gunter Factor: the Amount of Time Devoted by Counsel

Where counsel reported spending 51,268 hours on the litigation, the district court found it remarkable that "[f]ewer hours of attorney time were expended in this case than in comparable litigation. . . . This development should be rewarded when it reflects, as in this case, the efficiency of counsel in maximizing total recovery to the class by minimizing attorneys' fees expenses." *2004 U.S. Dist. LEXIS 10532, [WL] at *13*. This weighed in favor toward granting the fee request.

vii. The Seventh Gunter Factor: Awards in Similar Cases

The district court found that this factor weighed in favor of granting the requested attorneys' fees, since "[m]any of the decisions cited by the Third Circuit involved settlements similar in size to the settlement in this litigation and the courts awarded fees in those cases comparable to the 30 percent fee requested by petitioners." *2004 U.S. Dist. LEXIS 10532, [WL] at *13* (citing *Cendant, 243 F.3d at 737*). The district court also took note of a then-recent Judicial Center study finding the median attorney fee awards in federal class actions to range **[*44]** between 27 and 30%. *2004 U.S. Dist. LEXIS 10532, [WL] at *14*. The district court observed that "recent empirical data analyzing fee awards in securities cases indicates that regardless of size, fees average 32 percent of the settlement." Id. (internal citations omitted) (internal quotation marks omitted). The district court found these studies to be persuasive and that this factor weighed in favor of granting the requested fees.

viii. The Lodestar Cross-Check

At an average mixed rate of $440, the lodestar value for 51,268 hours of work would be $22,557,920. *2004 U.S. Dist. LEXIS 10532, [WL] at *16*. This would mean that under the requested 30% fee, the lodestar multiplier would be 2.66. Id. The district court found that since the Third Circuit has found the appropriate lodestar multiplier ceiling to be either 3 (*Cendant, 243 F.3d at 742*), or 4 (*Prudential, 148 F.3d at 341*), a lodestar multiplier of 2.66 was within the appropriate range. Id. Furthermore, the district court took note of empirics suggesting that "during 2001-2003, the average multiplier approved in common fund class actions was 4.35 and during the 30 year period from 1973-2003, the average multiplier approved in common fund class actions was 3.89." Id.

ix. An Exception to the Traditional "Sliding Scale" Approach

While most courts consider a sliding scale approach **[*45]** (where the percentage of recovery decreases as the settlement value increases) to be appropriate for awarding attorneys' fees, here the district court rejected that notion. The district court stated: "[o]ne might argue that a fee award of 20 percent of settlements in excess of $200 [sic] [million] is excessive given the absolute figure, approximately $60 million, that such an award produces. The Court rejects that thinking in this case because the highly favorable settlement was attributable to the petitioners' skill and it is inappropriate to penalize them for their success." *2004 U.S. Dist. LEXIS 10532, [WL] at *16*.

8. *In re Flonase Antitrust Litig., 951 F. Supp. 2d 739 (E.D. Pa. 2013)*

a. Overview

In this case, the district court granted a request for attorneys' fees in the amount of one-third of the settlement fund—$50 million of $150 million—and reimbursement of expenses in the amount of $2,069,433. *In re Flonase Antitrust Litig., 951 F. Supp. 2d 739, 746 (E.D. Pa. 2013)*. While class counsel also requested incentive awards of $85,000 and $75,000 for two of the class representatives, the district court reduced these awards to $50,000 and $40,000, respectively. *Id. at 752*.

b. Procedural Posture and Factual Background

In this opinion, the district court was presented with a request for attorneys' fees in the amount of one-third of the settlement value, reimbursement of costs, and incentive **[*46]** awards. The plaintiff class of 33 direct purchasers of Flonase, a brand-name nasal corticosteroid used to treat nasal inflammation caused by allergies, brought suit alleging that defendant SmithKline Beecham Corporation ("GSK") improperly delayed the entry of a generic version of the drug, resulting in overcharges to the class. *Id. at 741*. The complaint was filed in 2008; discovery began in late 2008 and continued through mid-2010. Id. The class was certified after a round of oral argument in November of 2010. Id. Two years later, in November of 2012, the parties reached a settlement agreement whereby GSK agreed to create a $150 million common settlement fund. *Id. at 742*. The settlement itself was preliminarily approved in January of 2013. Id. Class counsel was requesting $50 million for attorneys' fees, $2,069,433 in costs, and $85,000 and $75,000 in incentive awards to two class representatives. *Id. at 746*.

c. The District Court's Gunter/Prudential Analysis

i. The First Gunter Factor: the Size of the Fund and the Number of Beneficiaries

The district court found that the $150 million settlement, distributed *pro rata* among the 33 class members, to be "sizable." *Id. at 747*. Even though the class size is small as compared to **[*47]** other antitrust litigation, the district court observed that the "immediate and certain payment" to class members weighed in favor of approving the fee. Id.

ii. The Second Gunter Factor: the Presence of Substantial Objections by Class Members to the Requested Fees

Succinctly, the district court found that "there are no objections by any class members to this settlement. This factor strongly supports approval of the requested fee." Id.

iii. The Third Gunter Factor: The Skill and Efficiency of Counsel

The district court found that this factor weighed in favor of granting the request for attorneys' fees, stating that counsel "have extensive experience in plaintiff-side class action, with particular expertise in delayed generic entry cases. Indeed, counsel for both sides were knowledgeable, tenacious, and highly skillful. . . . [T]he $150 million settlement award represents a substantial amount and clearly demonstrates the value of class counsel's efforts." Id.

iv. The Fourth Gunter Factor: the Complexity and Duration of Litigation

With regard to this factor, the district court noted that the action "involve[d] highly complex antitrust issues, FDA bioequivalence standards for suspension nasal **[*48]** spray products, pharmaceutical manufacturing and supply issues, and pharmaceutical regulatory issues, all of which were investigated and litigated for more than four years." *Id. at 743*. Furthermore, the parties settled after performing significant trial preparation, including "litigating *Daubert* challenges, identifying hundreds of trial exhibits, and briefing over a dozen motions in limine between them." Id.

v. The Fifth Gunter Factor: the Risk of Non-Payment

The district court considered the risk of non-payment here "not negligible," as "success in this litigation was in no way guaranteed." *Id. at 747-48*. In addition, it was not enough to say that the plaintiff-class would likely have succeeded on the merits at establishing liability, as "there [was] no guarantee they would have recovered damages." *Id. at 748*. Of course, since most plaintiff-side counsel in class actions work on a contingency-basis, there was a risk of nonpayment in the event that the class was unsuccessful at trial. Id. All of these reasons supported granting the fee request.

vi. The Sixth Gunter Factor: the Time Devoted by Counsel to the Case

According to the declaration of class counsel, more than 40,000 hours was spent in total on the litigation **[*49]** in this case. Id. The district court noted that "[t]he record of this litigation also indicated that the time spent by Plaintiffs' counsel was necessary for the successful prosecution of this case, considering the complexity of the issues and the robust defense mounted by the defendants." Id. The district court found this factor to weigh in favor of granting the fee request.

vii. The Seventh Gunter Factor: Awards in Similar Cases

The district court noted that, at the time of the opinion in 2013, "in the last two-and-a-half years, courts in eight direct-purchaser antitrust actions approved one-third fees." Id. The district court looked more to the subject matter of the underlying litigation when comparing class action settlements than to the size.

viii. The First Prudential Factor: the Value of Benefits Attributable to the Efforts of Class Relative to the Efforts of Other Groups

In this case, there was no government investigation on which class counsel could rely to aid in its litigation efforts. *Id. at 748-49*. This factor weighed strongly in favor of granting the fee request.

ix. The Second Prudential Factor: the Percentage that Would Have Been Negotiated

While other district court opinions have cited **[*50]** to empirical data on the average contingency fee set between parties, the district court here chose to "not give great weight to this hypothetical exercise," thus leaving the factor neutral. *Id. at 749* (quoting *Prudential, 148 F.3d at 340*) (internal quotation marks omitted).

x. The Third Prudential Factor: Innovative Terms of Settlement

The district court also found this factor to be neutral, as the settlement agreement was fairly standard. Id.

xi. Lodestar Cross-Check

The lodestar value, based on nearly 41,000 hours and rates between $120 and $795, was calculated to be $16,750,000 at an average of $407 per hour. *Id. at 750*. The lodestar multiplier was determined to be 2.99, which the district court found to be "generally within the acceptable range." *Id. at 751*.

d. The District Court's Grant of Litigation Costs

With litigation costs reported at $2,069,433, the district court found that the expenses, which were primarily attributable to the payment of experts and document management, to be reasonable. *Id. at 750*.

e. The District Court's Grant of Incentive Awards

Interestingly, the district court adjusted the value of the incentive awards downward from what was requested. While counsel requested $85,000 and $75,000 awards for two of the class representatives, **[*51]** the district court lowered the values to $50,000 and $40,000, respectively. *Id. at 751*. The district court provided a rather cursory reason for the downward adjustment, stating "[t]hough incentive awards are appropriate in this case, the requested amounts are too large." Id. The district court went on to state that "an incentive award of $50,000 and $40,000 is within the range of payments awarded by courts within the Third Circuit in other direct purchaser antitrust litigation." *Id. at 752*.

C. Summary of Conclusions

Considering the outstanding conduct of Plaintiffs' counsel throughout this litigation, as reflected in the opinions cited above, and the Third Circuit precedents on award of attorneys' fees, the Court now turns to counsel's performance in this case and in the context of the factors in *Gunter* and the other cases cited above (not necessarily in order of importance).

1. Plaintiffs' counsel are experienced antitrust lawyers who have been working in this field of law for many years and have brought with them a sophisticated and highly professional approach to gathering persuasive evidence on the topic of price-fixing.

2. The briefs filed by Plaintiffs' counsel were consistently of high quality.

3. Plaintiffs' **[*52]** counsel were up against highly skilled defense counsel, who represented the Defendants in this case with vigor and substantive briefing to try to persuade this Court that Plaintiffs did not have a case, and should not be allowed to represent a class of direct purchasers. The Court considered the defense arguments carefully and

considerably, but generally sided with the Plaintiffs because of the outstanding work of Plaintiffs' counsel as presented in this petition for approval of fees.

4. There was no government case or investigation, on which Plaintiffs could build their own case. Few cases with no government action, or investigation, result in class settlements as large as this one.

5. The Plaintiffs' conduct in discovery, particularly the use of digital searching methods, yielded a number of incriminating documents, which together with deposition testimony and other evidence, persuaded the Court that Defendants' motions for summary judgments should be denied and that a class of direct purchasers should be certified.

6. The use of the conduit theory in pursuing third-party research/marketing firms in this industry was very innovative and important in gathering evidence.

7. The performance **[*53]** of Plaintiffs' counsel on the class action issues was imaginative, bringing forth great quantity of persuasive evidence that common issues predominated and that the Plaintiffs' case had merit.

8. These cases also attracted a number of very large homebuilders, who had filed their own Complaint in the Northern District of California, which was consolidated with these class actions. The Court believes that the Plaintiffs in those cases have benefitted greatly from the work done by the class plaintiffs who have filed this motion for attorneys' fee. The class attorneys are obviously not entitled to any compensation from the individual plaintiffs, but as a "reality check," the Court believes that the homebuilder plaintiffs have benefitted from the work of the class plaintiffs.

9. Number of persons benefitted — the Direct Purchasers of drywall constitute a very large class of both entities involved in distribution and resale of drywall such as major so-called "big box" retailers: Home Depot, Lowe's, e.g., and also Homebuilders (12 large homebuilders, as noted above, have their own litigation pending).

10. Skill and efficiency of the attorneys — although the Court has commented on this above, **[*54]** it bears repeating that the result attained is directly attributable to having highly skilled and experienced lawyers represent the class in these cases. The Court has had personal (and pleasant) experiences with many of the lawyers in this case, representing both Plaintiffs and Defendants, for many years, including during my extensive practice on antitrust litigation while in private practice, and is personally knowledgeable of the high degree of their competence.

11. Antitrust litigation is complex and challenging. This is particularly true for Plaintiffs' counsel in a case where there has been no government investigation.

12. Duration of the litigation — this case was filed in 2013 and although approximately years may seem like a long time for a case to be pending, it is not that long when compared to other antitrust cases brought as class actions.

13. Class action status — although much has been written of some abuses in the bringing of class actions, in the Court's view, the substantial results warrant a conclusion that in an antitrust price-fixing case, class actions have resulted in multi-billion dollars in damages, that have been paid out by defendants who were either convicted **[*55]** of price-fixing in criminal cases, found liable in civil cases, or as in this case, agreed to settle. Thus, as far as antitrust price-fixing cases are concerned, *Rule 23* has been not only generous to the attorneys who bring these cases, but much more so to individuals who have paid higher prices for various goods, over many decades, and would not have collected anything but for the efforts of plaintiffs' class action counsel.

14. Innovative Terms in the Settlement Agreement — the Court is not aware of any innovative terms in this settlement agreement. However, class counsel have had extensive experience in other class settlements in antitrust cases and bring that experience to this case. Also, the Court is assured that the settlement process will be moving forward, including the distribution of the settlement funds to class members, will be handled efficiently and expertly.

15. The Amount of Costs — although the expenses involved are considerable, the costs involved in securing the facts, largely through detailed electronic discovery strategies, which inherently involve consultants and expertise, and through the experts retained on both the class action and liability aspects of the case. In **[*56]** addition, the Court finds that the expenses that will be incurred in the distribution of the funds are reasonable and that class counsel will be using firms with expertise in this area and will supervise them carefully.

Although the above discussion covers most of the Gunter issues, the Court will review them for sake of completeness:

1. The size of the fund created and the number of the class are both large and reflect outstanding work by counsel.

2. There are no objections to this settlement. The only opt-outs are the homebuilders who have filed their own separate case which is still pending on pretrial matters in this Court but will be remanded to the Northern District of California after the completion of pretrial proceedings.

3. As noted above extensively, the class counsel exhibited skill and efficiency at all times.

4. This case is obviously a complex price-fixing case which had large volumes of discovery and legal briefing on many issues.

5. The risk of non-payment is unknown but quite possible that some of the Defendants who were adversely affected by the recent recession may have been at risk of filing for bankruptcy.

6. Although Plaintiffs' counsel spent many hours working on this **[*57]** case, the Court finds that the amount of time was warranted and if Plaintiffs' counsel had not worked as many hours as they did, this case may have resulted in summary judgment being granted for all Defendants, or Plaintiffs being unable to proceed to trial.

7. Awards in similar cases support the award in this case. A cross-check of the percentage awarded with the multiplier, based on total hours multiplied by hourly rates, shows the total fee requested and awarded is not excessive.

8. Under many precedents, the general rubric in this geographical area is that a 1/3 attorneys' fee is often the standard in contingent fee cases in "routine" personal injury and product liability cases, plus reimbursement to counsel for expenses.

CONCLUSION

As the above discussion shows, very few precedents have awarded this percentage amount in antitrust and securities cases. The Court finds the total hours claimed is accurate and reasonable. The lodestar $38,058,631.50 is also reasonable because the rates claimed are well within the range of rates charged by counsel in this district in complex cases. The Court finds the hours and rates to have been presented in an accurate and credible manner.

The Court follows **[*58]** Judge Brody's decision in *In re Flonase Antitrust Litig., 951 F. Supp. 2d 739 (E.D. Pa. 2013)*, which has many similar features to this case.

In considering all of the factors above, the Court has decided to award the requested one-third of the $190,059,056 Combined Settlement Fund as attorneys' fees, in the amount of $63,353,019. A significant factor in awarding the full one-third requested is the delay in payment. Class counsel have labored for approximately six years, including pre-suit investigation, without any payment.

Class counsel will also be awarded expenses in the amount of $2,925,629, and the funds in the opt-out fee and expense account of $610,236. The Court will award incentive awards to the four named Plaintiffs in the amount of $50,000 each as in line with other cases. The Court will not award accrued interest.

A cross-check with the lodestar confirms that this award of attorneys' fees is reasonable. Dividing the net amount of attorneys' fees, $63,353,019, by the lodestar, $38,058,631.50, yields a lodestar multiplier of 1.66, which is reasonable and lower than in some of the cases described above.

Applying a reasonable multiplier of the lodestar, for judicial factors such as contingency, delay and payment risk, etc., the Court finds there **[*59]** is a reasonable correlation between an award of fees of one-third of the Combined Settlement Fund plus costs.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON

United States District Court Judge

ORDER GRANTING DIRECT PURCHASER PLAINTIFFS' MOTION FOR (1) AN AWARD OF ATTORNEYS' FEES, (2) REIMBURSEMENT OF LITIGATION EXPENSES, AND (3) SERVICE AWARDS FOR THE CLASS REPRESENTATIVES

WHEREAS, the Court has granted final approval to Direct Purchaser Plaintiffs' settlements with the following: USG Corporation, United States Gypsum Company and L&W Supply Corporation (collectively, "USG"), dated February 11, 2015; TIN Inc. ("TIN"), dated February 11, 2015; Lafarge North America Inc. ("Lafarge"), dated June 16, 2016; and American Gypsum Company LLC, Eagle Materials Inc., New NGS, Inc., and PABCO Building Products, LLC dated December 29, 2017 (collectively, the "Combined Settlements");

WHEREAS, Direct Purchaser Plaintiffs filed a Motion for (1) An Award of Attorneys' Fees; (2) Reimbursement of Litigation Expenses; and (3) Service Awards for the Class Representatives (the "Motion"),

IT IS HEREBY ORDERED:

1. The Motion is GRANTED.

2. Terms used in this Order that are defined in the Motion are, unless otherwise **[*60]** defined herein, used in this Order as defined in the Motion.

3. The Court finds that the Notice provided to the four settlement classes of Co-Lead Class Counsel's request for an award of attorneys' fees, reimbursement of litigation expenses, and service awards for the Class Representatives meets the requirements of *Rule 23 of the Federal Rules of Civil Procedure* and due process, was the best notice practicable under the circumstances, and constitutes due and sufficient notice to all persons entitled thereto.

4. Direct Purchaser Plaintiffs' Counsel ("Class Counsel") are hereby awarded 33.33% of the Combined Settlement Fund, which amount currently equals $63,353.019.00.

5. Class Counsel are also hereby awarded the funds that have been or will be deposited in the Opt-Out Fee and Expense Accounts created by the Settlement Agreements, which currently equals $610,236.00.

6. Class Counsel are hereby awarded litigation expenses in the amount of $2,925,629.00 to be paid from the Combined Settlement Fund.

7. The awards of attorney fees and expenses shall be allocated among Class Counsel by Co-Lead Class Counsel, Berger & Montague, P.C., Cohen Milstein Sellers & Toll PLLC and Spector Roseman & Kodroff, P.C. in a manner that, in Co-Lead Class Counsel's **[*61]** good-faith judgment, reflects Class Counsel's contributions of time and money to the institution, prosecution and resolution of the litigation.

8. At the request and suggestion of Co-Lead Class Counsel, each of the four named plaintiffs, Sierra Drywall Systems, Inc., Janicki Drywall, Inc., New Deal Lumber & Millwork Co., and Grubb Lumber Co., Inc., is awarded a service award in the amount of $50,000.00, in addition to any distributions as part of the Combined Settlement Fund to which it may be entitled, to compensate it for the time and efforts in leading this case for the benefit of all Direct Purchaser Plaintiff Class Members.

SO ORDERED.

Dated: July 17, 2018

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.

ABG Prime Grp., LLC v. Innovative Salon Prods., LLC

United States District Court for the Eastern District of Michigan, Southern Division

July 19, 2018, Decided; July 19, 2018, Filed

Case No. 17-12280

Reporter

2018 U.S. Dist. LEXIS 120595 *; 2018-2 Trade Cas. (CCH) P80,446; 2018 WL 3474587

ABG PRIME GROUP, LLC, Plaintiff, v. INNOVATIVE SALON PRODUCTS, LLC, d/b/a LOMA, et al., Defendants.

Prior History: *ABG Prime Grp., Inc. v. Innovative Salon Prods., 2018 U.S. Dist. LEXIS 98196 (E.D. Mich., June 12, 2018)*

Core Terms

antitrust, products, misrepresentation, motion to dismiss, conspiracy, selling, competitor, anti trust law, infringement, retailer, fraud claim, allegations, authentic, trademark, third party, complaints, buy

Counsel: **[*1]** For ABG Prime Group, Plaintiff, Counter Defendant: Maxwell J. Goss, Maxwell Goss PLLC, Birmingham, MI; Wade Fink, Wade Fink Law, P.C., Birmingham, MI.

For Innovative Salon Products, Defendant, Counter Claimant: Leigh C. Taggart, Honigman Miller Schwartz and Cohn LLP, Bloomfield Hills, MI.

For David Hanen, Defendant: Leigh C. Taggart, Honigman Miller Schwartz and Cohn LLP, Bloomfield Hills, MI.

For Demonsthenes Prodromitis, Total Image International, LLC, All Alliance Products, Defendants: James M. Matulis, Law Office of James Matulis, Tampa, FL; Jordan S. Bolton, Clark Hill PLC, Birmingham, MI.

Judges: LAURIE J. MICHELSON, UNITED STATES DISTRICT JUDGE. Magistrate Judge R. Steven Whalen.

Opinion by: LAURIE J. MICHELSON

Opinion

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS [24, 33]

ABG Prime Group sells beauty products on Amazon. This included LOMA hair-care essentials. But once LOMA and its founder, David Hanen, discovered LOMA's products on ABG's virtual shelves, ABG says LOMA and Hanen worked to force ABG off Amazon.com's marketplace.

According to ABG, LOMA and Hanen wished to maintain control over Amazon.com's beauty-product market. So they reached out to one of ABG's online competitors, **[*2]** All Alliance. LOMA and Hanen gave All Alliance the opportunity to be the exclusive LOMA retailer on Amazon. ABG says, in exchange, LOMA and Hanen required All Alliance to target ABG's store. To get Amazon to suspend ABG's store, All Alliance (along with LOMA and Hanen) fraudulently complained to Amazon that ABG was stealing LOMA's intellectual property. And, as intended, All Alliance's complaints, when coupled with LOMA's, led the retail giant to temporarily close ABG's store.

In turn, ABG sued LOMA, seeking a declaratory judgment that ABG did not infringe upon LOMA's trademark rights. LOMA counter-sued, alleging trademark infringement. ABG then amended its complaint to add All Alliance and claims of antitrust conspiracy, business tort, and fraud.

Now LOMA and Hanen move to dismiss ABG's antitrust conspiracy and fraud claims. For the reasons set forth below, the Court will grant, in part, and deny, in part, the motions to dismiss.

I.

LOMA and Hanen move to dismiss parts of ABG's amended complaint. So the following well-pled factual allegations from that complaint are accepted as true. *See* *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

Gary and Adam Greenberg along with Bryan Acrich incorporated ABG Prime to sell products on Amazon. **[*3]** (R. 13, PageID.148.) Amazon's platform permits third parties—like ABG Prime—to open the digital equivalent of a brick-and-mortar shop. (*Id.* at PageID.149.) ABG's store, hosted on Amazon.com, relies on Amazon's market share and fulfilment capabilities to generate an average of $10,000 in daily revenue. (*Id.* at PageID.149-150.) Among the products on its virtual shelves, ABG stocks LOMA hair-care essentials. (*Id.* at PageID.153.) ABG purchases LOMA shampoos, conditioners, and other hair-care products from a distributor only to turn around and resell the identical, unopened, and authentic product through its Amazon store. (*Id.* at Page.ID.153.)

In March 2017, LOMA complained to Amazon about ABG's store. According to LOMA's complaint, ABG's sale of LOMA products infringed on LOMA's trademark rights. (*Id.* at PageID.153.) Upon receiving the complaint, Amazon temporarily closed ABG's store, just as LOMA intended. (*Id.* at PageID.153, 156.) But Amazon's policy requires a complainant to complete a "test buy"—a controlled purchase of the allegedly infringing product to determine its authenticity—prior to claiming trademark infringement. (*Id.* at PageID.154.) LOMA had not completed a test buy prior **[*4]** to complaining, so LOMA withdrew the complaint and Amazon permitted ABG to reopen. (*Id.* at PageID.154.)

Once reopened, ABG continued to sell LOMA hair-care products. And in the months after LOMA withdrew its first complaint, LOMA completed two test buys. (*Id.* at PageID.154-155.) And doing so, LOMA confirmed the products' authenticity to ABG's lawyer. *Id.* Yet LOMA again complained to Amazon, but instead of asserting trademark infringement specifically, it more generally asserted that ABG was stealing its intellectual property. (*Id.* at PageID.155.) Amazon again temporarily closed ABG's store, but, this time, permanently barred ABG from selling LOMA products. *Id.*

Sometime after its second suspension, ABG came to believe that a Florida entity, All Alliance Products, was the only third-party storefront selling authentic LOMA goods on Amazon.[1] (*Id.* at PageID.151.) Because All Alliance was the only retailer, ABG suspected that All Alliance and LOMA entered into an exclusive arrangement, (R. 13, PID 152, 157), designed to remove competitors from Amazon (R. 13, PageID.157). Specifically, ABG thinks the arrangement was intended to target and remove ABG. (*Id.* at Page.ID.165.) According to ABG, All **[*5]** Alliance polices the digital marketplace for third-party retailers of LOMA products. (*Id.* at PageID.164.) Upon discovering a third-party retailer, either LOMA or All Alliance file complaints with Amazon. (*Id.* at PageID.165.) Complaining to Amazon results in the third-party retailer temporarily losing its selling privileges. (*Id.* at PageID.166.)

ABG unearthed this conspiracy after Amazon forwarded LOMA's first complaint to ABG. The complaint appeared to be written by Cimos Angelis, LOMA's lawyer. (*Id.* at PageID.153.) But somehow ABG discovered that Demosthenes

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[1] Yet the exhibits ABG attaches to its complaint contradict this assertion. ABG includes screenshots of multiple Amazon retailers selling LOMA products. (*See* R. 13-3, 13-4.)

Prodromitis actually wrote it. (R. 13, PageID.153.) ABG learned that Prodromitis has some connection to All Alliance, (R. 13, PageID.146), and Angelis and Demosthenes Prodromitis have been friends since high school. (R. 13, PageID.152.) So ABG insists that only a conspiracy accounts for the relationship between All Alliance, Prodromitis, Angelis, LOMA, and Hanen. (R. 13, PageID.164.)

Also, ABG alleges LOMA's complaints to Amazon were fraudulent. (R. 13, PageID.165.) The first complaint said ABG's sales infringed on LOMA's trademark rights, but LOMA had yet to complete a test buy, so LOMA had no basis to make such a complaint. **[*6]** (R. 13, PageID.166.) And as LOMA's test buys confirmed ABG sold authentic LOMA products, the second complaint, claiming theft of LOMA's intellectual property, was equally fraudulent. (R. 123, PageID.156.) In ABG's view, LOMA had no factual basis to complain, knew Amazon would forward the complaints to ABG, intended ABG to stop selling LOMA products upon receiving the complaint, and knew Amazon would or could suspend ABG's entire store, resulting in revenue loss to ABG. (R. 13, PageID.156-57, 165.)

Accordingly, ABG amended its complaint to add new allegations and at least four (it is not clear) new counts. Chiefly, ABG adds two antitrust conspiracy claims—one federal and a parallel state one—along with a fraud claim. LOMA and its founder now move to dismiss those claims.

II.

A motion to dismiss allows Hanen and LOMA to test the legal sufficiency of ABG's amended complaint. *See* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. To pass muster at this stage, ABG must plead a set of facts that state a plausible claim for legal relief. *See* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A plausible claim means the complaint contains enough facts for the court to infer that LOMA and Hanen are liable for the alleged misconduct. *See* *Iqbal, 556 U.S. at 678*. Finally, the procedural workings of a motion to dismiss **[*7]** require the Court to cull from the complaint any conclusory statements or rote repetition of claim elements, accept as true all well-pleaded factual content, and make all reasonable inferences in ABG's favor. *Iqbal, 556 U.S. at 678*; *see also* *NicSand, Inc. v. 3M Co., 507 F.3d 442, 449 (6th Cir. 2007)*.

III.

A.

ABG says LOMA and Hanen violated *§ 1* of the Sherman Act. (R. 13, PageID.164.) Specifically, ABG says LOMA and its founder conspired with All Alliance and Prodromitis to create an exclusive dealing arrangement on Amazon.com. (R. 13, PageID.164-66.) The conspiracy had an anti-competitive effect: "forcing out" ABG as an All Alliance competitor. (R. 13, PageID.166.) Specifically, ABG cannot sell LOMA products on Amazon. (*Id.*) So ABG claims it suffered an "antitrust injury that *Section 1* of the Sherman Act is designed to prevent." (R. 13, PageID.166.)

In response, LOMA and its founder say ABG failed to plead any of the necessary elements of an antitrust claim. (R. 24, PageID.235-241.) They also say that ABG has not pled antitrust standing because it merely alleges an injury to itself—a competitor (*Id.* at PageID.241.)

Antitrust standing requires a more searching analysis than the injury, causation, and redressability test for Article III standing.[2] *See* *NicSand, Inc. v. 3M, Co., 507 F.3d 442, 459 (6th Cir. 2007)*. **[*8]** Antitrust standing necessitates ABG plead antitrust injury. *Id.* Because ABG cannot plead antitrust injury, the Court will start—and end—there.

[2] ABG has standing in the traditional sense. *See* *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. ABG was injured when Amazon twice shuttered its store; LOMA and Hanen ostensibly caused the injury by complaining to Amazon; and ABG's plea for monetary damages would redress the lost profits flowing from the injury.

1.

Antitrust injury can fall within one of four categories. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (reasoning that antitrust injury is "of the type the antitrust laws were designed to prevent"; or an injury "that flows from that which makes the defendants' acts unlawful"; or an injury "reflect[ing] the anticompetitive effect either of the violation or of anticompetitive effects made possible by the violation"; or, finally, an injury that "the type of loss that the claimed violations . . . would be likely to cause."); *see also* Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L.J. 697, 747-48 (2003). The Sixth Circuit homes in on two categories: "[p]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Indeck Energy Servs. v. Consumers Energy Co., 250 F.3d 972, 975 (6th Cir. 2000)* (internal quotations omitted); *NicSand, 507 F.3d at 450-51*; *see also Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 109-10, 107 S. Ct. 484, 93 L. Ed. 2d 427*; *Brunswick, 429 U.S. at 488*; *Greater Rockford Energy & Technology Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993)*.

Antitrust injury requires ABG allege an injury to competition "market-wide." *See E & L Consulting, Ltd. v. Doman Indus., 472 F.3d 23, 28 n.3 (2d Cir. 2006)*; *see also NicSand, 507 F.3d at 450-51*. And within the framework of ***antitrust law***, a "market-wide" injury **[*9]** to competition is one that somehow threatens the relevant market's efficiency. *See* 1 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** § 100 (4th ed. 2013); Herbert Hovenkamp, Economics and Federal ***Antitrust Law*** § 14.5 (1985). Normally, threats to market efficiency amount to threats to continued low prices—"the primary goal of antitrust policy." Herbert Hovenkamp, Federal Antitrust Policy § 8.1 (4th ed. 2011); *see also Atl. Richfield Co. v. USA Petrol. Co., 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; *Energy Conversion Devices Liquidation Trust, 833 F.3d at 689-91*. And the paradigmatic examples of threats to low prices are a predatory pricing scheme, *see Energy Conversion Devices Liquidation Trust, 833 F.3d at 689-90*, a recoupment scheme, *id. at 690-91*, or a price-fixing scheme, *see Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-69, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, any of which would suffice to show antitrust injury under *§ 1* of the Sherman Act. *See generally Energy Conversion Devices Liquidation Trust, 833 F.3d at 685-90*.

But the essence of ABG's complaint is injury to ABG. The closest thing to an antitrust injury in ABG's complaint is the alleged exclusive arrangement. Yet the exhibits ABG attaches to the amended complaint contradict any assertion that All Alliance is the exclusive LOMA retailer on Amazon. ABG attaches screenshots of numerous Amazon.com stores selling LOMA products. *See* (R.13-3; 13-4.) So there is no reason to accept as true ABG's allegation of an exclusive arrangement. *See Williams v. CitiMortgage, Inc., 498 F. App'x 532, 536 (6th Cir. 2012)* (internal quotations omitted); *Van Loo v. Cajun Operating Co., 64 F. Supp. 3d 1007, 1020 n.3 (E.D. Mich. 2014)*. Even so, other circuits hold that **[*10]** exclusive arrangements between manufacturer and distributor do not, on their own, run afoul of the Sherman Act. *See, e.g., CDC Techs., Inc. v. IDEXX Lab., Inc., 186 F.3d 74, 80 (2d Cir. 1999)*. Exclusive arrangements may even benefit competition. *See Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 395 (7th Cir. 1984)* (Posner, J.).

Instead of emphasizing threats to competition, ABG emphasizes its own losses, alleging antitrust injury due to the conspiracy's "anti-competitive effect on ABG." (R. 13, PageID.166.) ABG says it cannot sell LOMA products on Amazon, (R. 13, PageID.166), and the temporary suspensions cost it some money (R. 13, PageID.174). But an aggrieved competitor seeking shelter under the antitrust laws must do more than allege an injury to itself. *See Indeck, 250 F.3d at 976*. Indeed, ABG's allegations are blind to the central thrust of the antitrust laws: "the protection of *competition* not *competitors*." *Brunswick, 429 U.S. at 488*; *see also Cargill, 479 U.S. at 109-10*; *NicSand, 507 F.3d at 450*; *Indeck., 250 F.3d at 976*. As ABG does not plead facts sufficient to show a market-wide injury to competition, ABG's injuries are not antitrust injuries. *See Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)* (emphasizing the importance of antitrust injury lest "routine disputes between business competitors . . . be elevated to the status of an antitrust action, thereby trivializing the Act because of its too ready availability.").

2.

The only remaining issue is whether ABG could amend its **[*11]** (amended) complaint to plead antitrust injury. ABG claims it "is prepared to further develop its allegations and would request leave of Court do so." (R. 31, PageID.335.) But ABG never explains how it plans to "do so," and the Court has its doubts. At oral argument, ABG insisted the antitrust injury was grounded in ABG's expulsion from Amazon.com, which, again, is an injury to a solitary competitor (in a solitary distribution channel) that does not amount to antitrust injury. ABG also defines the relevant geographic market as the global reach of Amazon.com (R. 13, PageID.149, 164), and the relevant product market as beauty products (*Id.* at PageID.145, 148, 162). So the Court doubts ABG can plausibly plead, on a good faith basis, a set of facts establishing an injury to competition on Amazon.com's beauty-products market stemming from an exclusive-dealing arrangement between LOMA and All Alliance.[3]

As amendment would be futile, the Court DISMISSES, with prejudice, ABG's antitrust conspiracy claims.

B.

That leaves ABG's fraud claim. In Michigan, fraud has six elements: a defendant must make a material misrepresentation; the misrepresentation must be false; the defendant must make the **[*12]** misrepresentation knowing it to be false; the defendant must have intended the plaintiff to act on the misrepresentation; the plaintiff must act in reasonable reliance on the misrepresentation; and as a result suffer some injury. *See* *SFS Check, LLC v. First Bank of Del., 774 F.3d 351, 358 (6th Cir. 2014)* (citing *Titan Ins. Co. v. Hyten, 491 Mich. 547, 817 N.W.2d 562, 567-68 (Mich. 2012))*.

Hanen and LOMA say ABG's complaint fails to properly plead any of the elements, especially considering the heightened particularity requirement of *Rule 9(b)*. (R. 24, PageID.243, 244-254.) Crucially, Hanen and LOMA insist ABG cannot allege a material misrepresentation because the alleged misrepresentations were all made to Amazon, a third party. (R. 24, PageID.244.) LOMA and Hanen contend the remaining pleading deficiencies all flow from that fatal flaw. (*See, e.g.*, R. 24, PageID.246 ("ABG has not pled reasonable reliance upon any of the Defendants' representations, since no representations were made to ABG by any of the defendants.").)

The Court does not agree with Hanen and LOMA. At least in the context of a business dispute involving monetary damages, ABG can maintain a fraud claim even though the alleged misrepresentation was made to a third party. *See* *Nernberg v. Pearce, 35 F.3d 247, 251 (6th Cir. 1994)* ("[A] plaintiff may maintain an action for fraud even when a misrepresentation has . . . been made **[*13]** to a third party with the intent and expectation that the misrepresentation would be repeated to induce reliance by a principle participant to a business undertaking. . . ."); *Cormack v. American Underwriters Corp., 94 Mich. App. 379, 288 N.W.2d 634, 637 (Mich. Ct. App. 1979)* ("[W]here a party makes false representations to another with the intent or knowledge that they be . . . repeated to a third party for the purpose of deceiving him, that third party can maintain a tort action against the party making the false statements"); *see also* *Restatement (Second) of Torts § 533* (1977) ("The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation . . . is made to a third person and the maker intends or has reason to expect that its terms will be repeated . . . to the other, and that it will influence his conduct in the transaction . . . involved.").[4]

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[3] On the same facts, ABG's amended complaint alleges a violation of the Michigan Antitrust Reform Act. (R. 13, PageID.167.) As Michigan's ***antitrust law*** runs parallel to the Sherman Act, ABG's failure to plead antitrust injury applies to the state claim as well. *See* *Manitou N. Am. v. McCormick Int'l, No. 324063, 2016 Mich. App. LEXIS 198, at *14-17 (Mich. Ct. App. Feb. 2, 2016)*.

[4] Though the parties do not cite it, the Court is aware that a later Michigan Court of Appeals decision appears to suggest otherwise. *See* *International Bhd. of Elec. Workers, Local Union No. 58 v. McNulty, 214 Mich. App. 437, 543 N.W.2d 25, 30 (Mich. Ct. App. 1995)* ("An allegation of fraud based on misrepresentations made to a third party does not constitute a valid fraud claim."). Read in context, however, *McNulty* involves a fraud claim lacking an allegation of reliance. *See* *McNulty, 543 N.W.2d at*

At this stage at least, ABG pleads the elements of fraud with the requisite particularity. ABG claims Hanen and LOMA filed a false complaint with Amazon regarding LOMA's intellectual property rights. (R. 13, PageID.171.) LOMA and Hanen knew the complaint was false because when they filed it they knew ABG was selling authentic LOMA products. (R. 13, PageID.171, **[*14]** 156.) LOMA and Hanen knew Amazon would relay the complaints to ABG (R. 13, PageID.153), and knew Amazon would likely suspend ABG's selling privileges (R. 13, PageID.156, 159). Plus, LOMA and Hanen intended ABG to act in reliance on the complaint by removing LOMA products from its electronic shelves, which it did. (R. 13, PageID.172.) All of the above injured ABG to the tune of lost revenue following Amazon selling suspensions, and the permanent loss of the ability to sell LOMA products. (R. 13, PageID.163, 172, 174.) So ABG's fraud claim survives a motion to dismiss.

IV.

In summary, the Court GRANTS IN PART and DENIES IN PART Hanen's and LOMA's motions to dismiss. (R. 24, 33.) Because ABG cannot plead antitrust injury, ABG's antitrust conspiracy claims fail as a matter of law. Yet ABG has stated a claim for fraud and narrated a set of facts with sufficient particularity to satisfy *Rule 9(b)*'s more robust pleading requirement.

Dated: July 19, 2018

/s/ Laurie J. Michelson

LAURIE J. MICHELSON

U.S. DISTRICT JUDGE

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30 ("The union has not claimed that it acted in reliance on defendants' allegedly false statements."). So whatever *McNulty* may say about fraud claims based on statements made to third-parties, the case is distinguishable from this one. ABG alleges it relied on LOMA's statements to Amazon.

Anderson News, L.L.C. v. Am. Media, Inc.

United States Court of Appeals for the Second Circuit

December 2, 2016, Argued; July 19, 2018, Decided

Docket Nos. 15-2714-cv(L), 15-2889-cv(XAP), 15-2894-cv(XAP), 15-2903-cv(XAP)

Reporter
899 F.3d 87 *; 2018 U.S. App. LEXIS 21735 **; 2018-2 Trade Cas. (CCH) P80,461; 2018 Media L. Rep. 50

ANDERSON NEWS, L.L.C., Plaintiff—Counter-Defendant—Appellant—Cross-Appellee, LLOYD T. WHITAKER, as the Assignee under an Assignment for the Benefit of Creditors for Anderson Services, L.L.C., Plaintiff—Appellant, —v.— AMERICAN MEDIA, INC., TIME INC., HEARST COMMUNICATIONS, INC., Defendants—Counter-Claimants—Appellees—Cross-Appellants, BAUER PUBLISHING CO., LP., CURTIS CIRCULATION COMPANY, DISTRIBUTION SERVICES, INC., HACHETTE FILIPACCHI MEDIA, U.S., INC., KABLE DISTRIBUTION SERVICES, INC., RODALE, INC., TIME WARNER RETAIL SALES & MARKETING, INC., Defendants—Appellees, HUDSON NEWS DISTRIBUTORS LLC, THE NEWS GROUP, LP, Defendants, —v.— CHARLES ANDERSON, JR., Counter-Defendant—Cross-Appellee.

Subsequent History: US Supreme Court certiorari denied by *Anderson News, L.L.C. v. Am. Media, Inc., 2019 U.S. LEXIS 2266 (U.S., Mar. 25, 2019)*

Prior History: Plaintiffs-appellants Anderson News, L.L.C., and Anderson Services, L.L.C., (together, "Anderson") appeal from an award of summary judgment to defendants on Anderson's allegation that, in early 2009, defendants conspired to boycott Anderson and drive it out of business, in violation of *section 1 of the Sherman Act, 15 U.S.C. § 1* **[**1]** . Anderson provided wholesaler services to the single-copy magazine industry: it was responsible for collecting single-copy magazines from publishers, delivering those magazines to retailers, accounting for the number of magazines sold, and recycling unsold magazines. In mid-January 2009, Anderson proposed charging publishers a delivery surcharge of $0.07 per magazine shipped, and called for publishers' agreement to the surcharge before February 2009 "to ensure future distribution." Defendants-appellees, a group of publishers and their distributors (which provide marketing and logistics services to the publishers), refused to pay the proposed surcharge and found wholesalers other than Anderson to deliver their magazines. Anderson sued the publishers and distributors, alleging a conspiracy in violation of antitrust laws to boycott Anderson and making various related state law claims. **[**2]** Some defendants counterclaimed, alleging that Anderson's proposed surcharge was itself the result of an unlawful conspiracy to raise prices.

The District Court granted summary judgment to defendants on Anderson's antitrust and state law claims, and to Anderson on the counterclaims. Reviewing the evidence in light of the totality of the circumstances and under the Matsushita "tends to exclude" standard, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, we conclude that the District Court correctly ruled that Anderson has failed to offer sufficient evidence from which a reasonable jury could infer that defendants entered into such an unlawful agreement. We further conclude that the District Court correctly ruled that defendants did not suffer an antitrust injury and therefore lacked antitrust standing to pursue the stated counterclaims.

Anderson News, L.L.C. v. Am. Media, Inc., 123 F. Supp. 3d 478, 2015 U.S. Dist. LEXIS 110363 (S.D.N.Y., Aug. 20, 2015)
Anderson News, L.L.C. v. Am. Media, Inc., 2015 U.S. Dist. LEXIS 110358 (S.D.N.Y., Aug. 20, 2015)

Disposition: AFFIRMED.

Core Terms

wholesalers, publishers, magazines, retailers, conspiracy, surcharge, defendants', boycott, email, communications, distributors, antitrust, alleged conspiracy, single-copy, ship, summary judgment, announcement, conspire, sales, terms, negotiate, anti trust law, monitoring, quotation, marks, ambiguous, high prices, counterclaim-plaintiffs, motive, costs

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN1[] **Standards of Review, De Novo Review**

The United States Court of Appeals for the Second Circuit reviews the district court's grants of summary judgment de novo, and will affirm only if, after construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inference in its favor, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN2[] **Sherman Act, Claims**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, provides: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal. To prove a *Section 1* claim, a plaintiff must present evidence of a combination or some form of concerted action between at least two legally distinct economic entities in the form of "a conscious commitment to a common scheme designed to achieve an unlawful objective. Once it has sufficiently demonstrated the existence of an agreement, the plaintiff must then establish that the agreement's objective was an unreasonable restraint of trade either per se or under the rule of reason. Only after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint of trade.

Antitrust & Trade Law > Procedural Matters

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

HN3[] Antitrust & Trade Law, Procedural Matters

In the field of ***antitrust law***, summary judgment serves a vital function—it avoids wasteful trials and prevents lengthy litigation that may have a chilling effect on pro-competitive market forces. Summary judgment is not a substitute for a trial, and so if the evidence admits of competing permissible inferences with regard to whether a plaintiff is entitled to relief, summary judgment should be denied. Although the United States Court of Appeals for the Second Circuit reviews the evidence of an alleged conspiracy in the light most favorable to the non-moving party, ***antitrust law*** limits the range of permissible inferences from ambiguous evidence. To permit an inference of conspiracy based on ambiguous evidence—that is, evidence that is equally consistent with independent conduct as with illegal conspiracy--would deter or penalize perfectly legitimate and procompetitive conduct.

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

Evidence > Types of Evidence > Circumstantial Evidence

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

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

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

HN4[] Conspiracy to Monopolize, Elements

To raise a genuine issue of material fact as to an antitrust conspiracy, the plaintiff must present direct or circumstantial evidence that tends to exclude the possibility that the alleged conspirators acted independently. This does not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct; rather, the evidence need be sufficient only to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not. Thus, if the evidence is in equipoise, then summary judgment must be granted against the plaintiff: The question is not whether the plaintiff's inferences are so far-fetched that a trier of fact should not be allowed to consider them, but whether the evidence, though not far-fetched, sufficed to meet the plaintiff's burden of proof.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > Inferences & Presumptions > Inferences

Evidence > Weight & Sufficiency

HN5[] Jury Trials, Province of Court & Jury

Weight to be assigned to competing permissible inferences remains within the province of the fact-finder at a trial. But some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

Evidence > Inferences & Presumptions > Inferences

HN6[] **Sherman Act, Claims**

Carefully circumscribing the range of inferences permissible in the antitrust context is especially important where the challenged conduct—moving business away from a higher cost provider—often is the very essence of competition. Thus, mistaken inferences in such cases are especially costly, because they chill the very conduct the antitrust laws are designed to protect. Under these circumstances, a plaintiff must come forward with more persuasive evidence to support its claim than would otherwise be necessary. Such evidence must tend to exclude the possibility that the defendants acted independently.

Antitrust & Trade Law > Sherman Act

HN7[] **Antitrust & Trade Law, Sherman Act**

A business entity has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

Evidence > Types of Evidence > Circumstantial Evidence

HN8[] **Sherman Act, Claims**

Absent direct evidence of conspiracy, such as an admission by one of the defendants, antitrust plaintiffs must rely on circumstantial evidence to support their conspiracy claims. One powerful form of circumstantial evidence is parallel action—proof that defendants took identical actions within a time period suggestive of prearrangement. But parallel action is not, by itself, sufficient to prove the existence of a conspiracy; such behavior could be the result of coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties. Accordingly, when defendants' parallel behavior forms the basis for a *Sherman Act* claim, a plaintiff must show additional circumstances—so-called "plus factors"—which, when viewed in conjunction with the parallel conduct, would permit a fact finder to infer a conspiracy. These circumstances may include traditional evidence of conspiracy: statements permitting an inference that the defendants entered into an agreement. They may also include evidence of other circumstances giving rise to a less direct inference of conspiracy, such as a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications.

Antitrust & Trade Law > Sherman Act > Claims

HN9[] **Sherman Act, Claims**

In the context of a *Sherman Act* claim, defendants' conduct and communications must be evaluated in context and with the overall picture in mind.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN10[] **Sherman Act, Defenses**

A weak motive to conspire does not save defendants who have clearly, though foolishly conspired. But as a practical matter a conspiracy's objective rationality or motive is a necessary condition for inferring conspiracy from the usual array of evidence, which is usually circumstantial. Also, motive to conspire tends to be negated [1] when a defendant shows that the alleged agreement would harm the alleged conspirators; or [2] when the defendant shows a plausible and justifiable reason for its conduct that is consistent with proper business practice.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Scope

HN11[] **Clayton Act, Claims**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, provides a treble-damages remedy to any person injured in his business or property by reason of anything forbidden in the antitrust laws. Despite the statute's broad language and broad remedial purpose, the U.S. Supreme Court has explained that Congress did not intend the antitrust laws to provide for all injuries that might conceivably be traced to an antitrust violation. The law therefore limits recovery to plaintiffs who can demonstrate that they experienced an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. A plaintiff suffers an antitrust injury only if it is adversely affected by an anticompetitive aspect of the defendant's conduct.

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Judges: Before: LIVINGSTON, CHIN, and CARNEY, Circuit Judges.

Opinion by: SUSAN L. CARNEY

Opinion

[*90] SUSAN L. CARNEY, *Circuit Judge*:

Plaintiffs-appellants Anderson News, L.L.C., and Anderson Services, L.L.C., (together, "Anderson") appeal from an award of summary judgment to defendants on Anderson's allegation that, in early 2009, defendants conspired to boycott Anderson and drive it out of business, in violation of *section 1 of the Sherman Act, 15 U.S.C. § 1*. At the time, Anderson provided wholesaler services to the single-copy magazine industry, in which magazines are published and sold individually to consumers (in contrast to sales by subscription). As a wholesaler, Anderson was responsible for collecting single-copy magazines from publishers, delivering those magazines to retailers, accounting for the number of magazines sold, and recycling unsold magazines.

In an effort to decrease the financial burden imposed on it by publishers' practice of shipping many **[**5]** more magazines than are sold, in mid-January 2009 **[*91]** Anderson announced that it would begin charging publishers a delivery surcharge of $0.07 per magazine shipped, and called for agreement to the surcharge before February 2009 "to ensure future distribution." J.A. 1450.[1] Defendants-appellees, a group of publishers and their distributors (which provide marketing and logistics services to the publishers), refused to pay the proposed surcharge and found wholesalers other than Anderson to deliver their magazines. Anderson sued the publishers and distributors, alleging a conspiracy in violation of antitrust laws to boycott Anderson and making various related state law claims. Some defendants counterclaimed, alleging that Anderson's proposed surcharge was itself the result of an unlawful conspiracy to raise prices.

The District Court granted summary judgment to defendants on Anderson's antitrust and state law claims, and to Anderson on the counterclaims. Anderson now argues that the District Court ignored or too heavily discounted much of the evidence that Anderson presented in support of its claims, and maintains that it has offered sufficient evidence from which a jury could reasonably conclude **[**6]** that defendants entered into an unlawful agreement to refuse to deal with Anderson and to drive it out of business. Reviewing the evidence in light of the totality of the circumstances and under the *Matsushita* "tends to exclude" standard, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, we conclude that the District Court correctly ruled that Anderson has failed to offer sufficient evidence that defendants entered into the alleged unlawful agreement to survive defendants' motions for summary judgment. We further decide that the District Court was correct in ruling that defendants did not suffer an antitrust injury and thus lacked antitrust standing to pursue the stated counterclaims. We therefore AFFIRM the District Court's judgments. 8

BACKGROUND

I. Factual background

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[1] Citations to "J.A." refer to the parties' Deferred Joint Appendix. Citations to "C.A." refer to the parties' Deferred Confidential Joint Appendix, which has been filed under seal.

The following statement of facts is drawn from the District Court's thorough recitation, supplemented by the parties' statements of undisputed fact under Federal Rule of Civil Procedure 56.1 and primary documents such as emails and other correspondence that are contained in the record. Although significant changes have doubtless since transpired, we describe relevant facts in this industry as they stood in 2008-2009, when the events in question occurred, as reflected by the record evidence.

In the United **[**7]** States, in 2009, publishers primarily sold magazines in two ways: by subscription and by single-copy purchase at a newsstand, supermarket, or another retailer. The single-copy magazine industry, which is our focus in this case, had long operated through four distinct levels of enterprise:

First, publishers created and produced magazines. Defendants Time Inc. ("Time"), American Media, Inc. ("AMI"), Bauer Publishing Co., LP. ("Bauer"), Rodale, Inc. ("Rodale"), and Hachette Filipacchi Media, U.S., Inc. ("Hachette") published a variety of magazines ranging from familiar titles like *People* and *Star* to more obscure titles like *Yikes*! and *Twist*. As of 2008, just before the events at issue here took place, sales of defendants' magazines constituted 42% of the U.S. single-copy market.

[*92] Second, distributors provided a variety of services, including marketing and billing services, to publishers. In 2008, four major distributors operated in the United States: defendants Time/Warner Retail Sales & Marketing, Inc. ("TWR"), Curtis Circulation Company ("Curtis"), Kable Distribution Services, Inc. ("Kable"), and non-defendant Comag. TWR represented only Time; Kable represented Bauer; Curtis represented **[**8]** Rodale, AMI, and Hachette; and defendant Distribution Services, Inc. ("DSI"), a wholly owned subsidiary of AMI, provided consulting and marketing services to AMI, Bauer, Rodale, and Hachette. Together, TWR, Curtis, and Kable served as national distributors for 75% of the single-copy magazine market in 2008.

Third, wholesalers served as middlemen between publishers and retailers. Wholesalers received magazines from publishers, delivered magazines to retailers, and set up in-store displays of those magazines for retailers. Once the magazines reached their "off-sale" date (that is, they were no longer current), wholesalers retrieved and disposed of the unsold magazines. In 2008, the U.S. market was occupied by four major wholesalers: Anderson News, Source Interlink Distribution, L.L.C. ("Source"), The News Group, LP ("TNG"), and Hudson News Distributors LLC ("Hudson"). As of late 2008, these wholesalers together distributed 93% of magazines in the single-copy market, and Anderson News served as wholesaler for approximately 30% of all single-copy magazines distributed in the United States.

As an ancillary matter, many wholesalers used logistics affiliates to coordinate the wholesalers' delivery **[**9]** and disposal services. Anderson Services was Anderson News's logistics affiliate. Many wholesalers also engaged delivery services to deliver magazines to retailers. Anderson Services and TNG's logistics affiliate shared ownership of two such services: ProLogix Distribution Services (East), LLC ("ProLogix East") and ProLogix Distribution Services (West), LLC ("ProLogix West").

At the fourth distinct level, retailers sold magazines to customers. During the relevant period, key retailers in the nation included Wal-Mart Stores, Inc. ("Wal-Mart") and The Kroger Co. ("Kroger"). To reduce their logistical costs, retailers generally demanded that all of their retail outlets be serviced by a single wholesaler.

Before the early 2000s, single-copy magazines moved through each level of the industry as follows: Publishers sold magazines to wholesalers at a certain discount from the cover price. Wholesalers in turn sold magazines to retailers at a slightly lower discount, and retailers sold to consumers at the cover price. Wholesalers collected unsold magazines and refunded retailers for them. Publishers then refunded wholesalers for unsold magazines. As the District Court recognized, even with a **[**10]** buy-back guarantee, publishers had an incentive to and therefore did sell wholesalers more magazines in the first instance than are likely to be bought, to prevent retailers from experiencing a shortfall and thereby missing out on potential sales. This overselling practice imposed a burden on wholesalers, which then had to retrieve and account for the unsold magazines.

In the early 2000s, retailers implemented a new accounting and payment method called scan-based trading. In this method, retailers obtain magazines from wholesalers on a consignment basis. They then track sales precisely by using bar codes, and they do not pay wholesalers for magazines until the magazines are actually sold to consumers. This eases the wholesalers' burden of tracking the numbers of unsold magazines at retail outlets. It also, however, forces wholesalers to bear related inventory costs—the cost of magazines sitting **[*93]** on the shelves—because wholesalers must purchase magazines from publishers up front and receive no payment from retailers for those magazines until they are sold.

In January 2009, in an attempt to shift these costs further up the supply chain to publishers, and after some years of debate in the **[**11]** industry on related practices, Anderson—which enjoyed a 30% market share of the wholesaler business—decided to announce that publishers would from that time on be required to assume the inventory costs and pay a surcharge of $0.07 on each magazine that Anderson delivered to retailers on their behalf (the "Program"). Anderson had in the past tried to shift these costs to publishers, but without success: the publishers had resisted its efforts. Given these prior failures, Anderson formulated a new strategy to force publishers to accept the surcharge. This strategy had two parts: First, Anderson obtained commitments from Wal-Mart and Kroger, the two biggest single-copy magazine retailers, to refuse to accept shipments from wholesalers other than Anderson during Anderson's short-fuse negotiations with the publishers. Second, Anderson Services planned to use its ownership share in one of its logistics affiliates, ProLogix East, to pressure publishers by suspending delivery services for all publishers' magazines to retailers within ProLogix East's delivery areas until recalcitrant publishers gave in and agreed to pay the surcharge. These combined actions, Anderson reasoned, would move publishers **[**12]** by depriving them of single-copy magazine income until they and Anderson reached an accord.

Anderson launched its plan in mid-January 2009. On January 12 and 13, Charles Anderson, Jr., the owner of Anderson News and manager of Anderson Services, met privately with a number of publishers, including defendants Time, AMI, and Bauer, and outlined his proposed cost-shifting measures and the $0.07 surcharge. On January 14, Mr. Anderson publicly announced the Program in a conference call hosted by a magazine-industry publication. During the conference call, Mr. Anderson explained his reasons for implementing the Program as stemming in part from how "over the last 10 years [Anderson's] profits have eroded to nothing and into significant losses . . . so we think that the time has come to make some significant changes so that we can continue as a viable, cost effective method of distributing magazines." J.A. 919. When asked whether the publishers' acceptance of the Program would result in a "financially sound magazine distribution channel," though, Mr. Anderson was unable to provide any reassurances about his company's viability: "I can't tell you what the future holds as no one can with unemployment **[**13]** going the way it is. With the factors that we've got today, I'm just not going to predict it." *Id.* at 931. Mr. Anderson was also challenged about the timing of his Program, given the "distress[ed] situation of publishing" and the public announcement made the previous day that "advertising pages for the last quarter of the year fell by 17%, 11% for the whole year . . . ." *Id.* at 926-27. He was asked, "[I]s your request for very substantial publishing financial commitment, is this a good time for it-" *Id.* Mr. Anderson responded, "I am fully cognizant of what is going on in the industry. . . . We know how difficult it is. It's not that we want to do anything like this, is the timing good-Of course not. But now is the time that we have to do this." *Id.* Moreover, Mr. Anderson seemed to suggest that the $0.07 per copy surcharge was not a negotiable figure, noting, "[I]f we negotiated the rate then it would not be fair so the answer is we really believe that the 7 cent number is the number." *Id.* at 922. Mr. Anderson **[*94]** then confirmed that if publishers did not agree to the Program, Anderson would refuse to ship magazines for those publishers as of February 1. *Id.* at 922-23. And finally, he noted the possibility that Anderson might exit **[**14]** the business if not enough publishers signed on to his Program: "[W]hy should we continue to lose money in a business that doesn't . . . give us any return-" *Id.* at 927-28.

On the heels of the announcement, the president of Anderson News, Frank Stockard, wrote to publishers giving them a deadline of January 23 to agree to the proposed surcharge "to ensure future distribution" in February and, implicitly, thereafter. J.A. 1450. Concurrently with Anderson's announcements, by letter dated January 19, Source (a wholesaler in competition with Anderson) wrote to at least several publishers announcing that it, too, would impose a $0.07 surcharge on each magazine it distributed. These announcements followed several phone calls between Mr. Anderson and Source President James Gillis in December 2008 and January 2009.

Anderson's announcement sparked a flurry of communications between and among defendants and between defendants and non-parties, as described in detail by the District Court. *See* Anderson News, L.L.C. v. American

Media, Inc. (Anderson III), 123 F. Supp. 3d 478, 492-94, 504-08 (S.D.N.Y. 2015). Emails, telephone records, and testimony introduced by Anderson reflect that during the short period between Anderson's announcement and the February 1 deadline that it declared, defendant publishers and defendant distributors **[**15]** discussed the proposed surcharge and their planned responses in various settings: defendants discussed it internally; defendant publishers discussed it with their affiliated distributors; defendants discussed it with non-defendant wholesalers and retailers; and defendants discussed it with their direct competitors. Anderson conceded at oral argument before the District Court that "many communications between [distributors and their publisher-clients] were not simply permissible, but necessary—it was critical for Publisher Defendants to communicate with their distributors regarding their responses to the Anderson proposal, and for the Distributor Defendants to discuss the proposal with their publisher clients." *Id. at 492*.

During the short time period between Anderson's January 14 announcement and the February 1 deadline, the defendants' actions varied. When Mr. Anderson described his individual meetings with certain defendants to inform them of the Program on January 12 and 13, Mr. Anderson observed that in contrast to his meetings with Time, AMI, and Hachette, which were "open" and "there was good dialogue," Bauer's immediate reaction was "[N]o, we're not going to do it, absolutely not. And **[**16]** it was firm, it was very, very firm . . . . [I]t was not open dialogue." J.A. 172-73. On January 26, Anderson sent another letter to address "common misconceptions" regarding its Program. In that letter, Anderson asked publishers to respond by January 28, and emphasized that, although " A n d e r s o n has made proposals like this in the past," it was not "bluffing" with the current proposal now that " A n d e r s o n [had been] forced to take urgent action on its own." C.A 300. Thus, as the February 1 deadline approached, many other defendants attempted to negotiate with Anderson: Curtis CEO Robert Castardi reached out to Anderson News President Frank Stockard at least a few times, noting in an email, "I have been asking for discussions with [Anderson] for the past week; to no avail." J.A. 640, 793, 795, 801. An internal email between Stockard and Mr. Anderson noted that Castardi was **[*95]** "trying to help." *Id.* at 795. The record also suggests that Kable expressed willingness to negotiate with Anderson. *Id.* at 131, 1567. Time and TWR seemed to come closest to an agreement with Anderson: On January 27, 2009, TWR requested a deadline extension while offering to provide a two-point discount on Time magazines. That **[**17]** same day, Mr. Anderson rejected Time's proposed deal. Notably, two days after rejecting Time/TWR's request for an extension, Anderson entered into an arrangement similar to that proposed by Time with another publisher, Comag.

By February 1, Hachette and Rodale agreed to pay the proposed surcharge on certain titles for the month of February, and Curtis continued to facilitate shipments on behalf of Hachette and Rodale after the February 1 deadline. AMI continued to ship some of its monthly magazines for February on uncertain terms (although it made alternative arrangements for its other magazines). Time, Hachette, and Bauer ended up rejecting Anderson's proposed surcharge and made alternative shipping arrangements for their magazines in February: they each would ship through TNG instead of Anderson. No defendant agreed before the February 1 deadline to pay the surcharge on a long-term basis. The defendants were not alone in making this decision: Ultimately, 1,484 of 1,570 publishers, or approximately 95% of all publishers nationwide, had not agreed to Anderson's terms as of February 1, 2009.

In the face of this general reaction, immediately after February 1, Anderson implemented what **[**18]** it called its "going dark" strategy—conveying an ultimatum, in a last-ditch effort to convince the publishers to accept the surcharge. It reaffirmed that key retailers Wal-Mart and Kroger would not accept magazines from wholesalers other than Anderson in February and on Saturday, February 7, it announced by press release that on Monday, February 9, its affiliate ProLogix East would halt magazine deliveries to retailers, including deliveries for major wholesaler TNG.

In response, a TNG subsidiary brought suit in the United States District Court for the District of Delaware, seeking a temporary restraining order that would require ProLogix East to deliver TNG's magazines to retailers pending adjudication of its claims against Anderson. On February 9, 2009, the court issued the requested order. According to Mr. Anderson, the issuance of this temporary restraining order meant "game over" for Anderson News. J.A. 225. Soon after, in March 2009, Anderson ceased doing business altogether and began bankruptcy proceedings.

II. Procedural history

On March 10, 2009, Anderson News and Anderson Services filed a complaint in the United States District Court for the Southern District of New York, naming **[**19]** AMI, Bauer, Curtis, DSI, Hachette, Kable, Rodale, Time, and TWR as defendants. They alleged: first, an unlawful group boycott of Anderson in violation of the *Sherman Act*, *15 U.S.C. § 1*; second, tortious interference with business relationships and contracts; and third, civil conspiracy.[2]

Defendants successfully moved under *Rule 12(b)(6)* to dismiss the complaint. *Anderson News, L.L.C. v. American Media, Inc. (Anderson I), 732 F. Supp. 2d 389 (S.D.N.Y. 2010)*. The District Court concluded that the complaint failed to state a claim because it was "implausible that **[*96]** magazine publishers would conspire to deny retailers access to their own products" and "completely plausible" that their respective decisions to use other wholesalers were "unchoreographed behavior, a common response to a common stimulus." *Id. at 397-99*. The District Court also dismissed Anderson's state law claims, ruling that by failing adequately to plead an antitrust violation, the complaint also failed to state a claim for tortious interference and civil conspiracy. Further finding that "[t]he context of the alleged antitrust conspiracy-the Surcharge that Anderson tried to impose on the industry to Anderson's advantage and the disadvantage of everyoneelse—belies the viability of Anderson's antitrust claim," the District Court denied Anderson leave to replead. **[**20]** *Id. at 405*.

Anderson appealed, and in 2012 we vacated the District Court's dismissal and remanded for further proceedings, ruling that Anderson should have been permitted to file an amended complaint. *Anderson News, L.L.C. v. American Media, Inc. (Anderson II), 680 F.3d 162 (2d Cir. 2012)*. We decided that the allegations made in Anderson's proposed amended complaint were "sufficient to suggest that the cessation of shipments to Anderson resulted not from isolated parent-subsidiary agreements but rather from a lattice-work of horizontal and vertical agreements to boycott Anderson." *Id. at 189*. Although "presentation of a common economic offer may well lend itself to innocuous, independent, parallel responses," we explained, "it does not provide antitrust immunity to respondents who get together and agree that they will boycott the offeror." *Id. at 192*. We also rejected the District Court's conclusion that, at the motion-to-dismiss stage, the alleged conspiracy was not plausible because it would not be in the defendant publishers' self-interest. We ruled that defendants might plausibly see some benefit from such a conspiracy: the complaint's allegations made it possible that "the publishers and distributors would feel comfortable dealing with just two wholesalers," especially if, as alleged, those wholesalers **[**21]** were also members of the alleged conspiracy. *Id. at 193-94*.

On remand, in September 2012, Anderson filed an amended complaint and the parties proceeded to discovery. After two years of discovery, defendants moved for summary judgment and Anderson cross-moved for summary judgment on counterclaims filed by AMI, Hearst Communications, Inc. ("Hearst") (as successor to Hachette), and Time, in which those defendants charged Anderson with engaging in an illegal price-fixing conspiracy and unlawfully inducing retailers to boycott non-compliant publishers.

In August 2015, the District Court granted summary judgment for defendants. *Anderson III, 123 F. Supp. 3d at 512*. On what had become a robust factual record, the District Court reiterated its earlier view that Anderson's allegations were not plausible and that it was Anderson's "own ill-conceived and badly executed plan [that] led to its downfall." *Id. at 486*. The District Court observed that, despite extensive discovery, Anderson had not presented any direct evidence that defendants agreed to boycott Anderson. *Id. at 485*. Particularly on such an implausible claim, Anderson had failed to offer the "strong direct or circumstantial evidence" required to survive summary judgment, the District Court ruled. *Id. at 508* (citation **[**22]** omitted).

In conjunction with its merits decision, the District Court issued a separate opinion and order in which it granted in part defendants' motion to exclude some of the testimony offered by one of Anderson's experts, Dr. Leslie Marx. *Anderson News, L.L.C. v. American Media, Inc. (Anderson IV), No. 09 Civ. 2227, 2015 U.S. Dist. LEXIS 110358, 2015 WL 5003528* ***[*97]*** *(S.D.N.Y. Aug. 20, 2015)*. As relevant to the present appeal, the District Court excluded Dr. Marx's testimony in which she averred "that it was in each [d]efendant's independent economic self-interest to

[2] Anderson's initial complaint also included TNG and Hudson as defendants. Anderson voluntarily dismissed its claims against TNG within days of filing the complaint. Over four years later, in December 2013, it settled its claims against Hudson and voluntarily dismissed its claims against that defendant.

continue to supply Anderson News with magazines," *2015 U.S. Dist. LEXIS 110358, [WL] at *3*, because, in its view, the testimony did not contain "any actual analysis regarding [d]efendants' financial incentives to continue supplying Anderson News with magazines," *2015 U.S. Dist. LEXIS 110358, [WL] at *4*, and was based solely on Dr. Marx's interpretation of defendants' statements.

On AMI, Hearst, and Time's counterclaims, the District Court granted summary judgment to Anderson. Defendants argued that Anderson and Source's proposed surcharge was the result of an illegal price-fixing agreement between the two wholesalers that was injurious to defendants. *Anderson III, 123 F. Supp. 3d at 511*. The District Court rejected defendants' arguments, concluding that even if Anderson and Source had so conspired, AMI, Hearst, and Time lacked antitrust standing to press the complaint because they had **[**23]** "not suffered damages of the type the antitrust laws were intended to prevent." *Id. at 512* (internal quotation marks omitted).

Anderson's timely appeal followed, as did the cross-appeal filed by AMI, Hearst, and Time. 9

DISCUSSION

HN1[] We review the District Court's grants of summary judgment *de novo*, and "will affirm only if, after construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inference in its favor, . . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *In re Publ'n Paper Antitrust Litig. (Publ'n Paper), 690 F.3d 51, 61 (2d Cir. 2012)* (internal quotation marks and citation omitted).

I. *Sherman Act* claim

HN2[] *Section 1* of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is . . . illegal." *15 U.S.C. § 1*. To prove a *Section 1* claim, a plaintiff must present evidence of "a combination or some form of concerted action between at least two legally distinct economic entities" in the form of "a conscious commitment to a common scheme designed to achieve an unlawful objective." *United States v. Apple, Inc., 791 F.3d 290, 313, 315 (2d Cir. 2015)* (internal quotation marks omitted). Once it has sufficiently demonstrated the existence of an agreement, the plaintiff must then establish **[**24]** that the agreement's objective was an "unreasonable restraint of trade either per se or under the rule of reason." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993)*. "Only after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint of trade." *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 232 (2d Cir. 1999)*.

All parties on appeal accept that the group boycott alleged (to decline to deal with Anderson and thereby reduce wholesaler competition by putting Anderson out of business) would be illegal. *See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. At issue here, then, is whether Anderson has presented sufficient evidence for a jury reasonably to conclude that defendants shared a "conscious commitment" to such an agreement. *Apple, 791 F.3d at 315*; *see also Anderson II, 680 F.3d at 183* ("Circumstances must reveal 'a unity of purpose or a common design and **[*98]** understanding, or a meeting of minds in an unlawful arrangement.'" (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*). Anderson claims that defendants ceased doing business with Anderson under an agreement aimed at driving Anderson out of business and reducing competition in the wholesaler market. Defendants counter that they each ceased doing business with Anderson because they each did not want to pay the proposed "above-market" price resulting from the surcharge. Anderson must therefore make the "threshold showing" that a **[**25]** reasonable jury could find that defendants' conduct—concurrently refusing to pay the surcharge and ceasing to do business with Anderson—was the result of an agreement intended to reduce competition in the wholesaler market, rather than defendants' independent decisions. *AD/SAT, 181 F.3d at 233*.

HN3[] In the field of ***antitrust law***, "summary judgment serves a vital function"—it "avoid[s] wasteful trials and prevent[s] lengthy litigation that may have a chilling effect on pro-competitive market forces." *Publ'n Paper, 690 F.3d at 61*. "[S]ummary judgment is not a substitute for a trial," and so if "the evidence admits of competing permissible inferences with regard to whether a plaintiff is entitled to relief," summary judgment should be denied. *Id.* Although we review the evidence of an alleged conspiracy in the light most favorable to the non-moving party (here, Anderson), "***antitrust law*** limits the range of permissible inferences from ambiguous evidence." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. To permit an inference of conspiracy based on ambiguous evidence—that is, "evidence that is equally consistent with independent conduct as with illegal conspiracy," *Apple, 791 F.3d at 315*—would "deter or penalize perfectly legitimate" and procompetitive conduct. *Monsanto, 465 U.S. at 763*; *see also* *Matsushita, 475 U.S. at 593*.

Accordingly, ***HN4***[] to raise a genuine issue **[**26]** of material fact as to an antitrust conspiracy, the plaintiff must present direct or circumstantial evidence that "tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita, 475 U.S. at 588* (internal quotation marks omitted). This "[does] not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct"; rather, the evidence need be sufficient only "to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." *Publ'n Paper, 690 F.3d at 63* (quoting Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of* ***Antitrust Law*** § 14.03(b), at 14-25 (4th ed. 2011) (Areeda & Hovenkamp, *Fundamentals*)). Thus, if the evidence is in equipoise, then summary judgment must be granted against the plaintiff: "The question is not . . . whether the plaintiff's inferences are so far-fetched that a trier of fact should not be allowed to consider them, but whether the evidence, though not far-fetched, sufficed to me[e]t the plaintiff's burden of proof." Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 308, at 156-57 (4th ed. 2011) (Areeda & Hovenkamp, ***Antitrust Law***) (internal quotation marks and citation omitted).

Anderson claims that on January 15, **[**27]** 2009, the defendants entered into an illegal agreement with each other to drive Anderson out of business and to reduce competition in the wholesaler market. *See* Areeda & Hovenkamp, ***Antitrust Law***, ¶ 1409, at 64 (noting that to avoid confusion when considering the validity of an antitrust conspiracy claim, we must "ask precisely, 'Who was in agreement with **[*99]** whom and about what-'"). Defendants counter that, after attempting to negotiate the terms of the Program, evaluating how much the Program would cost, gathering industry information, and considering alternative wholesaler options, they each independently rejected the terms of Anderson's Program in favor of hiring an alternative, lower-cost wholesaler. Anderson must therefore present sufficient evidence to show that a reasonable jury could determine that defendants' rejection of Anderson's Program *more likely than not* occurred as a result of an illegal agreement among defendants, rather than due to each defendant's independent business decision to seek a lower cost alternative. If, however, we determine that "the proffered evidence is equally consistent with competition and collusion, then no fact issue of collusion is established," **[**28]** and we must rule in favor of defendants. *Id.* ¶ 308, at 170-71.

A. The alleged agreement

Before considering the evidence Anderson offers to support its allegation that defendants' conduct was the result of an unlawful agreement rather than independent action, we pause to examine the nature of the alleged agreement itself. We do so because, as we explained in *Publication Paper*, the quality of the evidence required to satisfy *Matsushita*'s "tends to exclude" standard varies with the economic "plausibility" of the alleged agreement:

> [W]here a plaintiff's theory of recovery is implausible, it takes strong direct or circumstantial evidence to satisfy *Matsushita*'s tends to exclude standard. By contrast, broader inferences are permitted, and the tends to exclude standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive.

Publ'n Paper, 690 F.3d at 63 (internal quotation marks and citations omitted; italics added); Areeda & Hovenkamp, ***Antitrust Law***, ¶ 308, at 170-71 ("[G]iven evidence must [not] be treated precisely the same way in all cases. . . . [T]he 'range of permissible conclusions' **[**29]** that a fact finder might draw becomes larger as the alleged conspiracy becomes more economically plausible." (quoting *Matsushita, 475 U.S. at 596-97*)). Accordingly, where context reveals that the alleged agreement is one that "simply makes no economic sense," the plaintiff "must come forward with more persuasive evidence to support its claim than would otherwise be necessary." *AD/SAT, 181 F.3d at 235* (internal quotations marks and alterations omitted).

In its amended complaint, Anderson alleged that defendants entered into an "anti-competitive and collusive scheme . . . to destroy" Anderson. J.A. 66. Anderson's asserted rationale for the scheme was that defendants aimed "to avoid individualized and competitive negotiations" with Anderson over the proposed surcharge and to "increase their control over the wholesaler single-copy magazine distribution market." *Id.* With this increased control of distribution, Anderson argued, defendants could "ensure that the increasing costs of magazine distribution were covered by retailers instead of publishers." *Id.* at 78.

At first glance, this rationale appears to make "no economic sense." *AD/SAT, 181 F.3d at 235* (quoting *Matsushita, 475 U.S. at 587*). Publishers rely on wholesalers to deliver their magazines to retailers. Reducing competition in the wholesaler **[**30]** market appears to increase the market power of the remaining wholesalers, and therefore seems likely to embolden those remaining to charge higher prices to all their commercial partners— **[*100]** publishers included—and not just to retailers. On just this reasoning, in fact, the District Court has twice rejected Anderson's theory as not plausible, concluding that defendants would have nothing to gain from Anderson's demise. *See Anderson I, 732 F. Supp. 2d at 397* ("Publishers and national distributors have an economic self-interest in more wholesalers, not fewer; more wholesalers yields greater competition, which is good for suppliers."); *Anderson III, 123 F. Supp. 3d at 501* ("[The] evidence strongly suggests that Defendants wanted more, rather than fewer, wholesalers in the single-copy market, because more wholesalers meant more competition for both retailers' and publishers' business—resulting in more favorable terms for Defendants.").

Anderson's theory that defendants could benefit from Anderson's demise is not completely indefensible, however. The near-term goal of the alleged conspiracy would be relatively easy to accomplish: given the description Anderson gave of its poor financial health in the January 2009 conference call, it was likely that defendants needed **[**31]** to deprive Anderson of magazines for only a short while to secure its demise. In addition, theoretically, the longer-term goal of the alleged conspiracy—reduced competition in the wholesaler market—could have benefited defendants. We suggested as much in our decision vacating the District Court's dismissal of Anderson's claim, where we noted that publishers and distributors might benefit from reduced competition in the wholesaler market if the remaining wholesalers chose to "increase their profits by raising prices to retailers [only]," rather than by "increas[ing] charges to the publishers." *Anderson II, 680 F.3d at 194*.

But on summary judgment, evidence of key facts that would support this theory have not materialized. Notably absent is evidence supporting Anderson's allegation that wholesalers Hudson and TNG were involved in defendants' alleged conspiracy. Although we previously observed at the pleading stage that the alleged conspiracy could be plausible, we emphasized in that opinion the significance of that allegation, and Anderson has now voluntarily dismissed its claims against the wholesalers. *Id. at 193-94*.[3] Thus, the primary evidence now offered in support of Anderson's theory that reduced wholesaler competition **[**32]** would benefit defendants is an expert analysis prepared by an economist, Dr. Leslie Marx. But Dr. Marx's analysis not only fails to demonstrate how defendants would benefit, it also seems to suggest that defendants would ultimately be harmed by reduced wholesaler competition.

First, Dr. Marx's report recognizes that reduced competition in the wholesaler market would result in higher prices, but opines that wholesalers would raise prices only to retailers. She explains that the economic literature on "multi-sided markets"—markets with middlemen or "platforms," such as wholesalers in the single-copy magazine market—suggests that it is "possible that an increase in the market power of platforms leads to higher prices on one side of the market, while having a much smaller impact on prices on the other side." C.A. 1874. She further explains that

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[3] We note further that our observation in requiring that Anderson be allowed to amend its complaint was not determinative of the conspiracy's ultimate "plausibility," because "[a]t the pleading stage . . . the complaint need not offer a plausible reason for the defendants' conspiracy but 'merely needs to allege that they did indeed conspire and give some factual allegations that would support such a claim.'" Areeda & Hovenkamp, ***Antitrust Law***, ¶ 308, at 174 n.101.

the side most likely to bear higher **[*101]** prices is the side that "always chooses to do business with only one platform," *id.* at 1874-75—here, the large retailers, which historically have had a practice of preferring an exclusive relationship with a single wholesaler. Dr. Marx also offers some evidence suggesting that retailers may have paid higher prices **[**33]** for magazines after Anderson's exit from the market, *see id.* at 1945, and states that national distributors had, in the past, "preferred to have magazines wholesaled by a single firm in a given location," *id.* at 1877-78.

In light of the multi-sided market theory presented in Dr. Marx's report, we cannot dismiss Anderson's theory of possible benefit to the publishers as "ridiculous," as the District Court concluded. *Anderson III, 123 F. Supp. 3d at 508*. But even assuming that reduced wholesaler competition would result in higher prices for retailers only, Dr. Marx offers no evidence suggesting that publishers would (or did) in fact experience net benefits as a result. Such a theory is sufficiently speculative to make the alleged conspiracy economically implausible. Whether any benefits of the alleged conspiracy would accrue to defendants under Dr. Marx's theory seems to depend entirely on the wholesalers' benevolence: even if the wholesalers remaining after Anderson's demise would demand higher prices from retailers, Dr. Marx offers no basis for concluding that they would necessarily pass along the fruits of their increased margin to publishers, or refrain from demanding more up the chain from publishers as well.

Second, Dr. Marx's report actually **[**34]** acknowledges that reducing wholesaler competition was risky for the publishers because "the remaining wholesalers . . . might eventually seek to extract more money from publishers as well as retailers." C.A. 1873-74. In fact, even Dr. Marx's assertion that the defendants could achieve some benefit by avoiding the "full cost" of Anderson's Program is explicitly qualified by the observation that the defendants might need to "make some concessions to wholesalers that remained." *Id.* at 1873. Such concessions could, of course, include the very same higher-cost terms required by Anderson's Program.

Finally, even if we credit Dr. Marx's assumption of wholesaler benevolence, her report also explains how higher prices for retailers would *harm* publishers by reducing the sales of single-copy magazines as a whole. She observes that some retailers have completely stopped selling single-copy magazines, and predicts that other retailers would likely "reallocate shelf space to other alternative products." C.A. 1964. Any such reduction in retailer sales of single-copy magazines would translate directly into reduced sales for publishers, too. In fact, while trying to convince publishers to sign on to its Program, **[**35]** Anderson itself observed that

> [r]educed competition will hurt publishers and retailers alike. When competition is eliminated without regulatory oversight all parties lose. Competition is the driving force to innovation and efficiency. Without competition, retailers and publishers risk their existing discounts and the category will lose its relevancy to retailers. Display space will be lost to competing consumer products.

Id. at 299 (Anderson's January 26, 2009 letter to publishers). We are attentive to the legal principle that the ***HN5***[] "weight [to] be assigned to competing permissible inferences remains within the province of the fact-finder at a trial." *Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987)*. But "some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible." *Id.*

[*102] Dr. Marx's report thus presents evidence suggesting only that reducing competition in the wholesaler market could result in higher prices for retailers; it does not show that reducing competition would in any way benefit or has already benefited defendant publishers.

In *AD/SAT, Division of Skylight, Inc. v. Associated Press*, we encountered at summary judgment and rejected a claim that was similarly speculative. **[**36]** *181 F.3d 216, 235 (2d Cir. 1999)*. There, plaintiff AD/SAT claimed that defendants, newspapers affiliated with the Associated Press ("AP"), engaged in a group boycott against AD/SAT, an advertising broker for newspapers, to benefit a subsidiary of AP that provided the same services; the defendants desired to do so, allegedly, because the newspapers were dues-paying members of AP. *Id.* AD/SAT theorized that the newspapers would enjoy lower AP dues if the AP subsidiary succeeded in its service business. *Id.* In light of the minimal economic benefit that AP members would realize under the scenario, we reasoned that "the factual context of each defendant's decision to terminate, or attempt to terminate, its relationship with AD/SAT strongly suggests that the newspaper defendants had no rational economic motive to join the alleged conspiracies." *Id.*

Here, as in *AD/SAT*, even accepting Dr. Marx's theory as possible, the benefit (or, perhaps, harm) that might accrue to defendants from reducing competition among wholesalers strikes us as sufficiently speculative that businesses in defendants' position would have no rational economic motive to join a conspiracy to drive Anderson out of business. We are not persuaded that some **[**37]** "hope" that reduced competition in the wholesaler market might eventually work in defendants' favor "can be said to be a rational motive for joining the conspirac[y] alleged in this case." *Id. at 235*; *see, e.g.*, *Eichman v. Fotomat Corp., 880 F.2d 149, 161-62 (9th Cir. 1989)* (finding implausible a conspiracy between Fotomat and processors to drive franchisees out of business because franchisees generated sales for processors); *see also infra* section I.B.i (discussing unlikely motive to conspire). The kind of broad inferences Anderson urges upon us and that would be permitted if the conspiracy were economically sensible are not appropriate here. *See Publ'n Paper, 690 F.3d at 63*. As we have highlighted, ***HN6***[] carefully circumscribing the range of inferences permissible in the antitrust context is especially important where, as here, the challenged conduct—moving business away from a higher cost provider—"often is the very essence of competition." *Matsushita, 475 U.S. at 594*. "Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* Under these circumstances, Anderson must "come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Id. at 587*. Such evidence must "tend[] to exclude the **[**38]** possibility that the defendants acted independently." *AD/SAT, 181 F.3d at 233*. We turn to examining the available evidence.

B. Evidence of agreement

Given our conclusion that the alleged agreement was implausible, we consider whether the evidence presented is nonetheless sufficient to provide a basis for a reasonable jury to find it more likely than not that defendants ceased doing business with Anderson as a result of a "common scheme designed to achieve an unlawful objective." *Apple, 791 F.3d at 315*. Here, their objective would be to reduce competition in the wholesaler market by driving Anderson out of business. The evidence must tend to exclude the possibility that **[*103]** defendants acted independently and declined to pay the surcharge simply for economic reasons.

The conduct complained of here—refusing to accede to the terms of Anderson's Program on a long-term basis by February 1, 2009—is in our view equally consistent with both a conspiratorial explanation and an independent-action explanation. As we noted in *Anderson II*, ***HN7***[] a business entity "has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Anderson II, 680 F.3d at 183* (quoting *Monsanto, 465 U.S. at 761*) (emphasis omitted). Anderson was not willing, as defendants point out, "to do **[**39]** business with [them] on the same terms as the plaintiff's competitors." Time & Hearst Br. 45. Anderson's proposed surcharge thus provides a legitimate and compelling explanation for each defendant to refuse to deal with Anderson. *See AD/SAT, 181 F.3d at 240* (concluding that availability of "more cost-effective" providers is a "valid business reason[]" for terminating relationship); *First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 279, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)* ("Obviously it would not have been evidence of conspiracy if Cities refused to deal with Waldron because the price at which he proposed to sell oil was in excess of that at which oil could be obtained from others.").

Given Anderson's declared financial instability, and the tight deadline imposed by the terms of Anderson's Program, each defendant also had a legitimate business reason to constantly monitor competitors' behavior to determine Anderson's ongoing viability as part of its own independent assessment of whether to accede to the Program's terms. *See, e.g., In re Text Messaging Antitrust Litig., 782 F.3d 867, 879 (7th Cir. 2015)* ("We can, . . . without suspecting illegal collusion, expect competing firms to keep close track of each other's pricing and other market behavior and often to find it in their self-interest to imitate that behavior rather than try to undermine it . . . ."); *Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1048 (2d Cir. 1976)* ("Given **[**40]** the legitimate function of [creditworthiness] data [of customers, to protect sellers from risk exposure], it is not a violation of [Sherman Act *§] 1* to exchange such information, provided that any action taken in reliance upon it is the result of each firm's independent judgment, and not of agreement."). And the retailers' past preference for maintaining an exclusive relationship with a single wholesaler provides a legitimate reason for defendants' lobbying efforts to persuade each other and also retailers—which Anderson had already pressured to hold firm in their earlier practice—to consider dealing with an alternative wholesaler. *See* *Interborough News Co. v. Curtis Publ'g Co., 225 F.2d 289, 293 (2d Cir. 1955)* (concluding that encouraging other business to "patronize" a new wholesaler was lawful).

Anderson's failure to offer competitive terms does not, however, immunize defendants from antitrust liability, as we have earlier said. *Anderson II, 680 F.3d at 192*. If Anderson presents evidence that sufficiently tends to exclude the legitimate explanations and tends to prove that defendants entered into an agreement to reduce competition in the wholesaler market by driving Anderson out of business, defendants could still be liable for a *Sherman Act* violation. *See Apple, 791 F.3d at 313-15*; *Matsushita, 475 U.S. at 588*.

HN8[] Absent direct evidence of **[**41]** conspiracy, such as an admission by one of the defendants, antitrust plaintiffs must rely on circumstantial evidence to support their conspiracy claims. *See Apple, 791 F.3d at 315* (discussing examples of direct or "circumstantial **[*104]** facts supporting the inference that a conspiracy existed" (quoting *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013))* (emphasis omitted)). One powerful form of circumstantial evidence is parallel action—proof that defendants took identical actions within a time period suggestive of prearrangement. But "[p]arallel action is not, by itself, sufficient to prove the existence of a conspiracy; such behavior could be the result of coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Id. at 315* (internal quotation marks omitted). Accordingly, when defendants' parallel behavior forms the basis for a *Sherman Act* claim, "a plaintiff must show additional circumstances"—so-called "plus factors"—which, "when viewed in conjunction with the parallel conduct, would permit a fact8 finder to infer a conspiracy." *Publ'n Paper, 690 F.3d at 62*. These circumstances may include traditional evidence of conspiracy: statements permitting an inference that the defendants entered into an agreement. They may also **[**42]** include evidence of other circumstances giving rise to a less direct inference of conspiracy, such as "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Apple, 791 F.3d at 315*.

In challenging the District Court's grant of summary judgment to defendants on its claims, Anderson relies on three types of evidence that it presents as reflecting an unlawful agreement: defendants' parallel conduct, as evidenced by their allegedly simultaneous cessation of business with Anderson; certain of defendants' contemporaneous statements, which Anderson argues provides "strong evidence of a collusive scheme"; and evidence of other "plus factors" suggesting that conditions conducive to collusion existed in the single-copy magazine market. After evaluating the evidence of defendants' conduct, statements, and plus factors as a whole, we conclude that Anderson has not offered "sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." *Publ'n Paper, 690 F.3d at 63*; *see also Apple, Inc., 791 F.3d at 315*. The evidence is thus not sufficient for Anderson **[**43]** to survive a motion for summary judgment. *See* *Publ'n Paper, 690 F.3d at 63*.

i. Ambiguous conduct and communications

We consider the first two forms of evidence together: ***HN9***[] defendants' conduct and communications must be evaluated in context and with the "overall picture" in mind. Areeda & Hovenkamp, ***Antitrust Law***, ¶ 308, at 171; *Apple, Inc., 791 F.3d at 315* ("[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." (quoting *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962))*). After evaluating the evidence against each defendant to consider the question of "who was in agreement with whom and about what" and at what point in time, the picture that emerges is too murky for us to conclude that evidence is anything other than ambiguous. *See* Areeda & Hovenkamp, ***Antitrust Law***, ¶ 1409, at 64. A jury could permissibly infer two conclusions from the evidence in this case: (1) an illegal agreement to boycott Anderson; or (2) legal, independent business decisions to reject Anderson's higher cost Program in favor of lower cost alternatives. A jury's choice between these two equally likely explanations for defendants' conduct, one legal and one illegal, **[*105]** would "amount to mere speculation."

See, e.g., Apex Oil, 822 F.2d at 258 (concluding **[**44]** as to one defendant that "inferring the existence of a conspiracy from the remaining conversations would amount to mere speculation").

Anderson's theory is that all of the defendants (publishers and distributors alike) were in agreement with each other to put Anderson out of business and create a two wholesaler system, and that they made this agreement on January 15, 2009.[4] Anderson then argues that the evidence of defendants' parallel conduct and their allegedly incriminating communications allow us to infer that the defendants entered into this agreement. We find this argument unconvincing.

First, defendants' conduct was not, in fact, parallel. At the motion to dismiss stage, we observed that Anderson's "key parallel conduct allegation was that all of the publisher and distributor defendants ceased doing business with Anderson . . . within a span of three business days . . . ." *Anderson II, 680 F.3d at 191* (emphasis and internal quotation marks omitted). But the evidence presented at summary judgment undercuts that allegation and suggests that (1) defendants' responses to Anderson's Program were not uniform, and (2) the tight timeframe for those responses—between January 12-14 and February 1—was of **[**45]** Anderson's own making, not the result of an unlawful agreement. The defendants each reacted in different ways to Anderson's Program: Many defendants (Time/TWR, Kable, AMI) undertook independent efforts to negotiate with Anderson. Some defendants (AMI, Hachette, Curtis, Rodale) even agreed to temporarily pay the surcharge required by Anderson and to distribute magazines through Anderson for the month of February. That these varying courses of action occurred undermines Anderson's assertion that defendants' "parallel" conduct supports an inference of a conspiracy to drive Anderson out of business.

Next, considering defendants' communications in the context of their nonparallel conduct, defendants' actions are at least equally consistent with legitimate, independent, and procompetitive action to reject Anderson's Program by seeking alternative wholesalers that could offer better terms, as with conspiratorial action. Because Anderson gave publishers only two weeks to consider the Program, it was reasonable (and probably prudent) for industry players to gather information about how the market would react and to plan for the possibility that negotiations with Anderson would be unsuccessful **[**46]** and Anderson would follow through on its threat to cut off distribution. In line with this reasoning, courts have rejected arguments that an antitrust claim can survive summary judgment based on evidence that defendants monitored competitors' behavior, **[*106]** *In re Text Messaging Antitrust Litig., 782 F.3d at 879*, engaged in conscious parallelism, *Apex Oil Co., 822 F.2d at 252*, attempted to persuade others to switch to an alternative wholesaler, *Interborough News Co., 225 F.2d at 293*, or communicated extensively with a distributor, *Monsanto Co., 465 U.S. at 762*.

Finally, we consider the factual context of each defendant's actions and communications during the short timeframe between Anderson's announcements of its Program from January 12 to 14, and Anderson's implementation of its "going dark" strategy, cutting off its magazine deliveries after February 1, 2009. *See AD/SAT, 181 F.3d at 234* ("[W]e require a factual showing that each defendant conspired in violation of the antitrust laws, and have not adopted a 'walking conspiracy' theory in place of such a showing."). On this record, Anderson has failed to present sufficient evidence to show that it was more likely than not that defendants agreed on January 15 to put Anderson out of business and reduce wholesaler competition. *Publ'n Paper, 690 F.3d at 63*. We discuss below samples of the evidence adduced.

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[4] Anderson asserts that the district court erred in observing that "Anderson cannot say when the alleged conspiracy started." *See* Appellants' Br. 47-48 n.12 (quoting *Anderson News III, 123 F. Supp. at 486*) ("[T]he evidence indicates the defendants reached agreement by January 15—the day that Parker reported that 'no one will ag[r]ee' to Anderson's proposal."); *see also* Appellants' Reply Br. 46 (the "jury could conclude that the conspiracy was fully formed by January 15"). But Anderson shifts away from the January 15 date when it is convenient—for example, it argues that Time/TWR and Kable did not make their final decisions until February 1, *id.* at 38, 39, and that Bauer did not make its final decision until January 31, *id.* at 44-45. These inconsistencies highlight the fundamental ambiguity of the record before us. Since February 1 was Anderson's threatened shipment cutoff date, the fact that defendants tended to make their decisions around that date just as likely reflected a legitimate reaction to Anderson's Program as it was evidence of collusive behavior.

1) Time/TWR

Evidence in the record **[**47]** as it relates to Time/TWR can be interpreted as either supporting or refuting the inference of an illegal conspiracy. Anderson highlights third party testimony against Time/TWR, but much of that testimony is ambiguous. For example, David Rustad, the President of Qrius Concepts (which handled sales for the retailer Kroger), testified that TWR President Richard Jacobsen told him that "no publishers were going to support the 7-cent surcharge" and that "they were going to teach [Anderson] a lesson." J.A. 2087, 2089. However, Rustad's testimony also points the other way: Rustad testified as well that Jacobsen articulated legitimate business reasons for why no one would support the charge because Anderson's "demands were unrealistic . . . . [T]hey had given Anderson News previous concessions already, and . . . there[] [was] no way they could give additional concessions to Anderson News . . . ." *Id.* at 2089.

Rustad further acknowledged that everyone in the industry, including Kroger, was "trying to dig into" the question of which publishers would acquiesce to the Program "because there was a little bit of contradictory information" and Kroger was "trying to understand what [it was] going to do as well **[**48]** in the event [Anderson] went out of business." *Id.* at 2087-88. This is consistent with legitimate industry monitoring behavior and, therefore, is not evidence (much less persuasive evidence) of conspiracy. *See, e.g., In re Text Messaging Antitrust Litig., 782 F.3d at 879* ("We can . . ., without suspecting illegal collusion, expect competing firms to keep close track of each other's pricing and other market behavior . . . ."); *In re Baby Food Antitrust Litig., 166 F.3d 112, 126 (3d Cir. 1999)* ("Gathering competitors' price information can be consistent with independent competitive behavior.").

Other evidence in the record also tends to contradict Anderson's theory that Time/TWR agreed with the other defendants to boycott Anderson. For example, on January 27, 2009, TWR sent a letter to Anderson asking for "a short period of time during which we could negotiate terms on which Anderson News Company could continue to serve as wholesaler for Time Inc. publications." J.A. 1966. TWR noted that it was "so interested in attempting to reach an agreement with you that instead of proposing a standstill, we are proposing a standstill in which we are providing you with an additional two points of discount on Time Inc. weekly magazines. **[*107]** We hope that you value our relationship sufficiently to allow us a brief period of time to work **[**49]** out a mutually beneficial agreement." *Id.* That same day, Time CEO Ann Moore called Mr. Anderson's brother, Clyde Anderson, to make sure Time's request would not "fall through the cracks," and in the hopes that Clyde Anderson could "save the day." C.A. 1453. After Anderson rejected TWR's proposal, TWR sent a letter to Anderson advising that TWR would no longer ship Time publications to Anderson "[i]n view of [its] unwillingness to suspend the new fee structure . . . even for a short period of time to allow us to attempt to work out a long-term distribution agreement . . . ." J.A. 1467.

Anderson argues that TWR's failed proposal represents a mere "contingency plan in the event the agreement [to boycott] collapsed." Appellants' Reply Br. 48. But it seems at least equally likely that Time/TWR was genuinely interested in continuing its relationship with Anderson when it made this final counterproposal on January 27, 2009—twelve days after (as Anderson alleges) Time/TWR agreed with the other defendants to boycott Anderson.

2) Curtis

The evidence presented against Curtis is similarly ambiguous. For example, Source President James Gillis testified that Curtis CEO Bob Castardi told him, "If Rick **[**50]** [Jacobsen, of TWR] says right, I go right. If he says left, I go left. We're in lockstep. We're doing this together." J.A. 1359. Mr. Anderson also testified that Castardi told him, "Rich [Jacobsen, of TWR] and I are working together on this." *Id.* at 251. Castardi himself testified, however, that Curtis was compelled by economic realities—not necessarily a conspiratorial agreement—to follow Time/TWR. Given Time/TWR's significance in the single-issue magazine copy market, Castardi concluded that its decision alone not to ship to Anderson would put Anderson out of business, rendering Anderson "not . . . a viable place for [Curtis] to send [its] product." C.A. 160; *see also Joseph E. Seagram & Sons v. Hawaiian Oke and Liquors, Ltd., 416 F.2d 71, 80 (9th Cir. 1969)* ("A supplier who becomes dissatisfied with an existing distributor . . . has a legitimate interest in seeing that any new distributor to which it might turn would be viable. Manufacturers' or suppliers' decisions about the distribution of their products are not made in a vacuu[m]." (internal quotation marks omitted)).

Curtis also presented evidence that tends to exclude the possibility that it joined a conspiracy to boycott Anderson on January 15. Emails indicate that Castardi attempted to negotiate with Anderson at least a few **[**51]** times during the period from January 21 to 26, noting that "I have been asking for discussions with [Mr. Anderson] for the past week; to no avail. . . . As I said in the [Jan. 21] meeting, the vast majority of our clients have adamantly decline[d] you[r] offer without any influence from Curtis." J.A. 640; *see also id.* at 793, 795, 801. An internal email between Anderson News President Frank Stockard and Mr. Anderson noted that Castardi "[s]aid he is trying to help." *Id.* at 795. Mr. Anderson did not respond to Castardi's email. *Id.* at 292.

In addition to expressing interest in negotiating with Anderson, Curtis helped facilitate shipments for those of its client publishers, including Rodale and Hachette, that were willing to pay Anderson's $0.07 surcharge for the month of February. Curtis's willingness to facilitate some shipments to Anderson even after the cutoff date of February 1 cuts against Anderson's theory that Curtis entered an unlawful agreement with the other defendants **[*108]** on January 15 with the goal of putting Anderson out of business.

3) Kable

Anderson criticizes Kable for statements that, it contends, demonstrate Kable's involvement in a conspiracy. Such statements arise primarily out of Kable's communications that **[**52]** share information with its competitors, such as an email to Bauer Vice President Richard Parker relating that Kable's clients were "cutting of[f] Source and [Anderson]." C.A. 2854. As discussed above, this sort of information-sharing can be legitimate monitoring behavior. For example, Anderson makes much of Kable CEO Michael Duloc's reference in a January 16, 2009 email to "[t]he plan" involving "Bauer (and AMI)." *See* Appellants' Reply Br. 39; C.A. 2798. But Duloc's email is hardly a smoking gun. Duloc responded to an email asking about other publishers' plans to pay the $0.07 surcharge by explaining that "[t]he plan for Bauer (and AMI) is to[] not pay but ship. Let Anderson be the one to not deliver and then explain to retailers as opposed to publishers looking like the bad guy by not shipping." C.A. 2798. The reference to "the plan," viewed in context, seems to mean each publisher's independent plan, rather than a conspiracy among all of the defendants; it is discussed in the context of monitoring other industry players' behavior to determine how to calibrate Kable's actions. Furthermore, the "plan" as articulated here is to proceed with shipments to Anderson while ignoring the surcharge **[**53]** imposed by Anderson's Program, which is not consistent with Anderson's theory that the defendants agreed among themselves on January 15 that they would halt business with Anderson.

Internal emails at Kable also confirm that on January 14—the day before Kable is alleged to have entered an illegal agreement to boycott Anderson—Duloc specifically instructed an employee not to advise publisher-clients to reject Anderson's Program, expressing concern about a debt of $10 million owed by Anderson to Kable. Other evidence—including emails between Duloc and Anderson News President Stockard—suggests that Kable attempted to negotiate with Anderson on January 28, which is in tension with the theory that Kable had agreed to boycott Anderson on January 15. And, finally, as late as January 31, Duloc left open the possibility that it might stick with Anderson if Time changed course.

4) AMI/DSI

Anderson argues that communications between distributor DSI and its publisher-clients (AMI, Bauer, Rodale, and Hachette) constitute evidence of a conspiracy. We find these communications, too, ambiguous at best, however.

In an email to AMI CEO David Pecker, DSI President Mike Porche noted that Bauer "believes we **[**54]** should start simultaneously using our collective resources and influence to direct business towards [TNG-Wholesaler]." C.A. 1778. In the same email, Porche informed Pecker that Bauer agreed that a "strategy . . . of first offering to test reducing costs for wholesalers by eliminating a large portion of their one way freight and return processing costs"—a test that, in the end, did not happen—"makes sense." *Id.* Porche acknowledged that, if the cost-reduction plan did not work, "we have little option other than to develop our own cooperative distribution system." *Id.* This email is ambiguous at best: it demonstrates that, far from agreeing to a boycott with the goal of driving Anderson out of business, defendants had considered a plan to help make Anderson's business viable. Their concurrent consideration of how they might deal with preparing **[*109]** for the worst-case scenario of having to develop a backup wholesaler is not precluded by ***antitrust law***.

Moreover, the evidence of coordination to which Anderson points is equally consistent with lawful activities. For example, DSI prepared a "Script for Wal-Mart" and persuaded two of its publisher-clients, AMI and Bauer, to place their own phone calls **[**55]** to the retailer. C.A. 2722. Although the similarities between AMI and Bauer's phone calls with Wal-Mart could suggest that they were acting to further a conspiracy, the use of a script is as consistent with a legitimate business activity—ensuring continued access to a major retailer if they switched to a new wholesaler—as with an alleged unlawful boycott. That DSI as a distributor aided AMI and Bauer in their communications with Wal-Mart is hardly convincing evidence that these parties also entered into a separate agreement with the goal of putting Anderson out of business.

As late as January 26, DSI documented in an email between Porche and consultant Mike Roscoe how industry players still remained uncertain about whether to accept Anderson's Program. Porche observed that "Curtis and Bauer both think not shipping Anderson is a mistake" and that he himself had also "gone back and forth" on the decision. C.A. 1788. At the end of the email, Porche also observed that "nobody knows what is going to happen, what I expect to see assuming Bauer and AMI ship is that Anderson will ship some product and not ship others[,] making examples of certain publishers. That is not going to go over very **[**56]** well for the publisher not distributed . . . ." *Id.* This observation illustrates why industry monitoring was required: each defendant had to independently determine the right business decision *for it*, based on what was happening in the industry overall. *See* *In re Text Messaging Antitrust Litig., 782 F.3d at 879*.

Similarly, the "man in bauerland" exchange cited by Anderson is consistent with efforts by AMI, DSI, and Bauer to secure a new wholesaler. On January 30, 2009, Rodale Vice President Richard Alleger emailed DSI executive Jay Wysong, asking, "Our man in bauerland still solid?" C.A. 1795. Wysong responded, "He's solid alright." *Id.* The next day, Wysong told publisher-client Bauer's Vice President, Richard Parker, "This will all work out if we can keep everyone together." C.A. 2761. To be sure, these statements could suggest that DSI's publisher-clients were checking in to make sure that everyone was following through on an illegal agreement to boycott Anderson. But the statements are equally consistent with legitimate efforts to monitor Bauer's response to the Anderson Program in order to determine the likelihood that distributor DSI would need to switch to another wholesaler and secure retailers' approval for that wholesaler.

Perhaps **[**57]** most tellingly, even after the cutoff date of February 1, three of DSI's four clients (AMI, Hachette, and Rodale) ultimately continued making some shipments and paying the requested surcharge to Anderson. This fact cuts deeply against Anderson's theory that AMI/DSI agreed to boycott Anderson on January 15. Although Anderson might have been dissatisfied with a mere one-month commitment to pay the surcharge (as illustrated by its argument that "a one-time payment for the magazines Anderson already possessed is far from 'exactly what Anderson News asked,'" Appellants;' Reply Br. 43), DSI/AMI, Hachette, and Rodale's willingness to make *any* surcharge payments is powerfully at odds with their alleged conspiratorial intent of putting Anderson out of business.

[*110] 5) Hachette

The evidence against Hachette is also ambiguous. For example, in a January 20, 2009 internal email to a Hachette employee, a Hachette Vice President noted that Hachette was "in constant touch with Curtis, DSI, and other publishers. . . . [T]his will come down to who blinks first[,] publishers or ANCO." C.A. 2794. These statements are as consistent with legitimate assessment of industry conditions and monitoring of competitors **[**58]** as with an illegal antitrust conspiracy, however. Moreover, in that same email, the Hachette executive described his plan to "see when potentially each magazine's March issues may be at risk" and "estimate [] the newsstand sales at risk" based on forthcoming updates from other publishers. *Id.* This suggests that, five days after the alleged January 15, 2009 agreement date, Hachette executives were uncertain about their competitors' plans.

More importantly, as discussed above, Hachette ultimately continued making some shipments and paying the requested surcharge to Anderson even after the cutoff date of February 1. This fact severely undermines Anderson's theory that Hachette agreed to boycott Anderson on January 15.

6) Bauer

Anderson points to several "incriminating communications" from Bauer. Appellants' Reply Br. 44. Like those discussed above, the communications it cites are ambiguous at best and do not "tend[] to exclude the possibility that the alleged conspirators acted independently." *Matsushita, 475 U.S. at 588*. For example:

- After meeting with AMI and DSI on January 14, Bauer Vice President Richard Parker wrote a January 15, 2009 email to President Hubert Boehle, stating that Pecker (from AMI) was "with **[**59]** us," along with Ann Moore (from Time). C.A. 2737. "[A]s a matter of fact[,] no one will ag[r]ee," he noted. *Id.* Anderson, surprisingly, identifies this as the point when all of the defendants agreed to boycott Anderson. But the statement that Pecker and Moore are "with us" could either refer to an illegal conspiracy to boycott or an innocent observation that, based on the latest industry information, AMI and Time had also independently decided to reject the Anderson Program. In fact, that same day, Boehle also sent another internal email observing that "right now none of the major publishers seem responsive to Anderson's offensive. I hope it will stay that way, but I am skeptical . . . ." C.A. 2743. This suggests that his initial email about AMI and Time's plans reflected an observation, not a declaration of common intent.

- Boehle emailed Parker on January 25, noting that the Wal-Mart response "doesn't sound encouraging. Are the other publishers holding the line?" C.A. 2754. The import of the phrase "holding the line" is uncertain: on one hand, it could suggest conformity with an illegal agreement to boycott Anderson, but, on the other hand, it could be no more than an informal reference **[**60]** to Bauer's industry monitoring (and its related, reasonable hope that publishers would independently decide not to pay Anderson's surcharge). The context of the email provides support for the latter inference: Parker was having trouble contacting Wal-Mart and explained that Bauer "need[ed] direction from Wal-Mart for distribution **[*111]** beyond February 1, 2009." *Id.* at 2755. Bauer's monitoring of other industry players was necessary for it to determine whether and how to arrange an alternative distribution plan for Wal-Mart.
- Rodale Vice President Richard Alleger emailed Parker to note that Comag announced a tentative understanding with Source, and Parker responded, "Doesn't matter source won't be around much longer. Talk in the AM." C.A. 2758. This is consistent with legitimate activities: namely, monitoring industry movement and predicting how the volatile wholesaler situation would likely unfold to aid Bauer's own independent decision-making.

Bauer, moreover, was the only one among DSI's four clients that decided *not* to continue shipping (and, thus, not to pay the Anderson surcharge after February 1). Mr. Anderson also described Bauer's initial reaction as early as January 13 to be "very, very firm," **[**61]** noting that, in comparison to other publishers which engaged in "good dialogue" with Anderson, there was "not open dialogue" in the Anderson-Bauer meeting. J.A. 173. Bauer's actions seem, at the very least, to be equally consistent with a business strategy not to negotiate with Anderson after it made its surcharge demand as with a January 15 agreement with DSI, AMI, Hachette, and Rodale to boycott Anderson, and the fact that the others, unlike Bauer, seemed at least to consider negotiating with Anderson for ongoing deliveries after February 1 suggests that Bauer did, in fact, act alone.

7) Rodale

Rodale's communications, placed in context, are similarly ambiguous. In an internal email dated January 27 regarding "Wholesaler Updates," Rodale Vice President Richard Alleger observed that "[t]he situation remains very fluid." C.A. 2807. Although Alleger observed that "we all need 'People' magazine to lead the charge," *id.*, that statement could as easily be interpreted as an observation about People's market power as an implicit admission of collusion. Alleger's stated uncertainty about what would happen also suggests that, as late as January 27, Rodale had not reached any agreement with the **[**62]** other Defendants to boycott Anderson.

Moreover, as discussed above, Rodale ultimately instructed Curtis to pay the surcharge for February 2009 and continued making shipments to Anderson even after the cutoff date of February 1. These undisputed facts cut against Anderson's theory that Rodale agreed to boycott Anderson on January 15.

* * *

Based on the above analysis and our review of the record, we conclude that the evidence against each defendant is at best (from Anderson's perspective) in equipoise on the question of whether defendants conspired: What Anderson offers as evidence of the conspiracy could just as easily be characterized as evidence of competition. Without more, such an ambiguous record is insufficient to withstand the scrutiny required by the Supreme Court in *Matsushita*, particularly when, as here, the alleged conspiracy makes little economic sense. We then look at the record with regard to evidence of the remaining "plus factors."

ii. Inconclusive plus factors

As noted earlier, because the basis of Anderson's conspiracy claim is defendants' parallel behavior, Anderson must show evidence of plus factors such as "a common motive to conspire, evidence that shows that the parallel **[**63]** acts were against the apparent individual economic self-interest **[*112]** of the alleged conspirators, and evidence of a high level of interfirm communications." *Apple, 791 F.3d at 315* (quoting *Mayor & City Council of Baltimore, Md., 709 F.3d at 136*). Anderson's arguments regarding the import of certain other plus factors, which it claims bolster an inference of unlawful conspiracy, suffer from two weaknesses. First, as discussed above, we see a factual flaw: defendants did not in fact engage in parallel conduct. Without "parallel acts" to be reviewed "in conjunction with" the circumstantial evidence, *Apple, 791 F.3d at 315* (quoting *Apex, 822 F.2d at 253*), evidence supporting the presence of certain plus factors in the single-copy magazine industry can provide little support for a finding of unlawful conspiracy. Second, even were we to view defendants' responses to the surcharge announcement as suspect parallel conduct, the evidence supporting the presence of certain plus factors—the assertions that defendants had a common motive to conspire and that defendants' conduct in declining to pay the surcharge contravened their individual self-interest, as well as the presence of increased interfirm communications in the relevant period—is also too malleable to fairly support an inference of conspiracy.

To begin, we **[**64]** note that the defendants had an unlikely motive to conspire, given our conclusion that the alleged conspiracy is economically implausible. ***HN10***[] A weak motive to conspire does not "save defendants who have clearly, though foolishly conspired," Areeda & Hovenkamp, ***Antitrust Law***, ¶ 308, at 173-74. But "[a]s a practical matter . . . a conspiracy's 'objective rationality' or motive is a necessary condition for inferring conspiracy from the usual array of evidence, which is usually circumstantial." *Id.* at 174. Also, "[m]otive to conspire tends to be negated [1] when a defendant shows that the alleged agreement would harm the alleged conspirators; or [2] when the defendant shows a 'plausible and justifiable reason for its conduct that is consistent with proper business practice.'" *Id.* at 175-76. Here, both motive-negating factors are present. First, as discussed above, the conspiracy seems implausible because it is likely to harm the defendants by allowing wholesalers to charge higher prices, and because, even if wholesalers charged retailers higher prices instead, that would result in a reduction of magazine sales, which would further harm the defendants. Second, it made perfect business sense for the defendants to **[**65]** constantly monitor industry conditions during the short-term period given by Anderson to consider its ultimatum, before ultimately deciding to independently reject Anderson's higher-cost proposal in favor of lower-cost alternatives.

After considering whether defendants had a common motive to conspire, we look again at the evidence that Anderson offers to support its assertion that the defendants' conduct was against their individual economic self-interest. Anderson again relies on Dr. Marx's report, which the District Court excluded on this point, concluding that her opinions "merely recite what is on the face of documents produced during discovery." *Anderson VI, 2015 U.S. Dist. LEXIS 110358, 2015 WL 5003528, at *4* (internal quotation marks and alterations omitted). We agree with the District Court's decision to exclude those portions of Dr. Marx's opinion that merely interpret defendants' statements. Other portions of her report contain some relevant information, however. For example, her supplemental report provides a chart comparing the sales of *People* and *US Weekly* at Source-serviced retailers in the relevant period, and showing that *US Weekly* sales increased briefly when *People* was not available in February 2009, just after the events at issue **[**66]** here. This temporary spurt **[*113]** provides at least some support for Anderson's assertion that each individual defendant might have had something to gain—at least briefly—from being one of the few magazines shipped by Anderson in February. Accordingly, to the extent the District Court excluded this portion of her opinion, we conclude that the District Court exceeded the permissible bounds of its discretion. We therefore consider this evidence as part of our *de novo* review of the record.

Having done so, however, we think that it accomplishes little. To show that some defendants could have enjoyed short-term gains by continuing to ship through Anderson in the month of February hardly establishes that it would be in defendants' long-term interest to accede to the proposed terms and ship to Anderson. Absent evidence regarding the long-term costs or benefits of acceding to the proposed surcharge and continuing to ship to Anderson, the inferential gap between the evidence presented to the conclusion that refusing to ship was against defendants' economic interests is simply too great. Because Anderson has not offered any evidence to bridge that gap, we decide that the evidence offered in this regard **[**67]** is inconclusive.

In addition, the inference that can reasonably be drawn from the increased level of interfirm communications during the two-week period between Anderson's announcement (January 14) and the deadline to accept the terms of the Program (February 1) amounts to little. Anderson argues that the "pattern and frequency" of communication between competing publishers and distributors during this period "supports an inference of conspiracy." Appellants' Br. 39. Anderson relies again on the views of Dr. Marx, who presents a chart depicting a "nearly ten-fold increase (by duration) in inter-defendant communications" during this period. *Id.* at 40 (citing C.A. 2258). Even if we take these statistics at face value as significant, what exactly they signify eludes us. Although, unlike the District Court, we cannot dismiss these calls altogether as necessarily innocent, in this context their frequency does not weigh heavily in support of an inference of unlawful conspiracy. Even when viewed in conjunction with the evidence showing that a few defendants may have attempted to conceal some communications, that there were increased communications during a compressed period created, in effect, by Anderson **[**68]** itself, is as consistent with permissible activities, such as monitoring competitors' responses to Anderson's proposed surcharge, *see* *In re Text Messaging Antitrust Litig., 782 F.3d at 879*, and creating contingency plans in case Anderson refused to rescind its surcharge, *see* *Interborough, 225 F.2d at 293*, as it is with an unlawful conspiracy to put Anderson out of business. Furthermore, as already discussed in subsection (i) above, each defendant's internal and interfirm communications, when properly viewed in the setting of each defendant's conduct and industry conditions, equally support inferences of competition and conspiracy.

Having considered the totality of the circumstances and the evidence offered by Anderson in support of its allegations, we conclude that a factfinder could not reasonably infer that the conspiratorial explanation is more likely than not. Although some of the evidence discussed above is suggestive of an agreement, when considered in light of the fact that the benefits of alleged conspiracy are at best speculative and the mass of evidence equally compatible with independent action, the evidence does not sufficiently "tend to exclude" the possibility that defendants acted permissibly. Accordingly, we affirm the District Court's grant of summary judgment **[**69]** to **[*114]** defendants on Anderson's *Sherman Act* claims.

State law claims

Anderson also appeals the District Court's grant of summary judgment to defendants on its New York state law claims for tortious interference with business relations and with contract and civil conspiracy. Regarding the tortious interference claim, the District Court concluded that "[t]o the extent [Anderson] breached [its] contracts with retailers, the evidence indicates that it was Anderson's actions, not [d]efendants' actions, that caused Anderson to breach these contracts." *Anderson III, 123 F. Supp. 3d at 510*. As to the civil conspiracy claim, the District Court noted that New York "does not recognize an independent tort of conspiracy" and concluded that, because Anderson has not provided evidence of "an otherwise actionable tort" here—the tortious interference claim—its civil conspiracy claim failed as a matter of law. *Id. at 510-11* (quoting *Kirch v. Liberty Media Corp., 449 F.3d 388, 401 (2d Cir. 2006)*; *Alexander & Alexander of N.Y., Inc. v. Fritzen, 68 N.Y.2d 968, 969, 503 N.E.2d 102, 510 N.Y.S.2d 546 (1986))*.

Anderson argues that we should reinstate its state law claims because the District Court "rejected the tortious-interference claim based solely on its predicate antitrust holding," which Anderson argues was incorrect. Appellants' Br. 59. Because we conclude that Anderson's *Sherman Act* claim fails, and because Anderson has **[**70]** abandoned on appeal any other challenge to the substance of the District Court's grant of summary judgment on the state law claims,[5] we affirm.

Counterclaims

Defendants AMI, Hearst, and Time (collectively, "counterclaim-plaintiffs") filed counterclaims against Anderson News and Charles Anderson, Jr., alleging that Anderson engaged in an illegal price-fixing conspiracy with Source and, in support of that conspiracy, "induced" certain retailers (that is, Kroger and Wal-Mart) to "threaten[] to boycott publishers that attempted to switch to competing wholesalers." C.A. 39-40. The counterclaim-plaintiffs allege that they suffered "tens of millions of dollars" in damages from lost sales as a result of Anderson's "going dark" strategy and because of "ongoing delivery disruptions" in the aftermath of Anderson's exit; they also incurred costs to develop "alternate distribution routes" after Anderson's demise. C.A. 38-39.

The District Court granted summary judgment to Anderson on these counterclaims, concluding that they failed as a matter of law because the counterclaim plaintiffs had not suffered damages "of the type the antitrust laws were intended to prevent" and thus lacked antitrust standing. **[**71]** *Anderson III, 123 F. Supp. 3d at 512* (quoting *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 76 (2d Cir. 2013))*. We agree that counterclaim-plaintiffs lack antitrust standing.

HN11[] *Section 4* of the Clayton Act provides a treble-damages remedy to **[*115]** "[a]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15*. Despite the statute's broad language and broad remedial purpose, *see* *Blue Shield of Va. v. McCready, 457 U.S. 465, 472-73, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*, the Supreme Court has explained that "Congress did not intend the antitrust laws to provide for all injuries that might conceivably be traced to an antitrust violation." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (internal quotation marks omitted). The law therefore limits recovery to plaintiffs who can demonstrate that they experienced an "injury of the type the antitrust laws were intended to prevent" and that "flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. A plaintiff suffers an antitrust injury only if it "is adversely affected by an *anticompetitive* aspect of the defendant's conduct." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (emphasis in original).

The District Court concluded that the injuries the counterclaim-plaintiffs alleged that they suffered—including "lost profits from sales that they would have made, but for Anderson's 'going dark' strategy" and "costs associated with making alternative arrangements to replace Anderson News and Source"—do **[**72]** not "'flow[] from that which

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[5] Anderson argued before the District Court that its tortious interference with contract claim could be "predicated on a plaintiff's breach of its contract with a third-party where, as here, the defendants' actions prevented the contract from being performed." J.A. 1596 (internal citations omitted). Anderson also argued that it had grounds for a tortious interference with business relations claim in defendants' disparaging comments to retailers, which, it argues, persuaded retailers to terminate their relationships with Anderson. Anderson has abandoned these claims on appeal and we do not address them further.

makes'" Anderson's acts unlawful.[6] *Anderson III, 123 F. Supp. 3d at 511-12*. We agree. The counterclaim-plaintiffs' injuries are unrelated to the anticompetitive aspects of the two conspiracies alleged.

First, the counterclaim-plaintiffs' lost profits and withheld payments are the result of Anderson's individual conduct, not the conspiracies that Anderson is claimed to have conducted with Source. Although Anderson's conduct with Kroger and Wal-Mart, as the counterclaim-plaintiffs describe it, might reasonably be questioned, and the resulting injuries might be recoverable in some other type of action, those injuries do not arise from any sort of increase in prices or reduction in the freedom of the marketplace, and are not the type of injuries the antitrust laws were intended to prevent.

Second, the costs associated with securing an alternative wholesaler do not result from the anticompetitive aspect of either the price-fixing claim or the alleged group boycott. Selecting among competing wholesalers and ultimately switching to a lower-cost wholesaler reflects the essence of competition, 1 even if making such a switch turns out to be costly.

In an effort to avoid this straightforward conclusion, the **[**73]** counterclaim-plaintiffs argue that Anderson's "going dark" strategy was an "integral aspect" of its conspiracy to raise prices and to force the publishers to accept the surcharge, and that, therefore, the injuries suffered as a result of that strategy "flowed directly from the anticompetitive scheme put in **[*116]** place by Mr. Anderson and Anderson News." Time & Hearst Br. 71-72. The counterclaim-plaintiffs rely on *Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*, to support this claim, but their comparison to *McCready* is unavailing. In *McCready*, a putative class alleged that Blue Shield of Virginia, an insurance company, conspired with an organization of psychiatrists to boycott clinical psychologists and reduce competition in the general psychotherapy market by refusing to reimburse subscribers for visits to psychologists. *Id. at 469-70*. The lead plaintiff visited a psychologist and was denied reimbursement by her insurer. *Id. at 475*. Although the alleged conspiracy's object was to reduce competition in the psychotherapy market and the lead plaintiff's injury did not result from reduced competition, the Supreme Court held that her injuries were still "inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy **[**74]** market" and therefore constituted an antitrust injury, because denial of reimbursement was the very mechanism by which the boycott operated. *Id. at 484*.

Here, by contrast, Anderson's "going dark" strategy was not the mechanism by which the alleged price-fixing conspiracy operated. It was, instead, one of Anderson's many levers to force publishers to accept the surcharge. Although these actions and the attendant injuries were certainly related to the alleged conspiracy, it is not enough that the injury "be causally linked to the asserted violation." *Gatt Commc'ns, 711 F.3d at 76* (internal quotation marks omitted). Because the counterclaim-plaintiffs' injuries resulted from an action related to, but not "inextricably intertwined with," Anderson's alleged conspiracies, they have not suffered an antitrust injury. *See id. at 76-77* (holding that "mere termination" of a dealership agreement, alleged to be in furtherance of bid-rigging scheme, was not antitrust injury flowing from that which made the bid-rigging scheme unlawful).

Accordingly, we conclude that the counterclaim-plaintiffs lack antitrust standing to pursue the stated counterclaims. We therefore affirm the District Court's grant of summary judgment to Anderson in this regard.

CONCLUSION [75]**

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[6] The counterclaim-plaintiffs correctly note that the District Court held that they lacked antitrust standing for another reason, too: it concluded that the counterclaim-plaintiffs would have suffered the same injuries even if Anderson had been acting alone. This basis for summary judgment was not, they argue, raised before the District Court by the parties and, therefore, could not permissibly serve as the basis for granting summary judgment since the counterclaim-plaintiffs had no notice of the ground and no opportunity to respond. *Fed. R. Civ. P. 56(f)*. Because we agree with the District Court that the counterclaim-plaintiffs' injuries do not flow from that which makes Anderson's alleged acts unlawful, we need not address this argument.

In sum, the evidence presented by Anderson, while perhaps consistent with an unlawful conspiracy among defendants, does not sufficiently "tend[] to exclude" other interpretations of the events that took place in the single-copy magazine industry during several hectic weeks in January 2009. When it introduced the Program, Anderson sought to significantly change the state of the market by suddenly seeking to impose a surcharge and setting an immediate deadline for publishers to take it or leave it. It is not surprising that defendants quickly rejected the proposal in favor of switching to existing wholesalers without surcharges, refusing to accept the terms of Anderson's new business model. No reasonable jury could find on this record that the defendants entered into "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Apple, 791 F.3d at 315*.

For this reason and those discussed above, we **AFFIRM** the District Court's judgments.

Avocent Huntsville, LLC v. ZPE Sys., Inc.

United States District Court for the Northern District of California

July 23, 2018, Decided; July 23, 2018, Filed

Case No. 3:17-cv-04319-WHO

Reporter
2018 U.S. Dist. LEXIS 233681 *; 2018 WL 4859527

AVOCENT HUNTSVILLE, LLC, Plaintiff, v. ZPE SYSTEMS, INC., Defendant.

Prior History: Avocent Huntsville, LLC v. ZPE Sys., 2018 U.S. Dist. LEXIS 19531 (N.D. Cal., Feb. 5, 2018)

Core Terms

Patents, allegations, counterclaims, prior art, network, invalidity, products, inequitable conduct, motion to dismiss, relevant market, serial, references, antitrust, pleaded, servers, console, trade secret, monopolization, prosecuted, purported, declaratory judgment, noninfringement, Disclosure, argues, reasonable inference, affirmative defense, infringement, courts, patent application, management tool

Counsel: [*1] For Avocent Huntsville, LLC an Alabama corporation, Plaintiff: Robert H. Sloss, LEAD ATTORNEY, Procopio, Cory, Hargreaves & Savitch LLP, Palo Alto, CA; Alan Arthur Wright, PRO HAC VICE, McLean, VA; Donald L. Jackson, Davidson Berquist Jackson and Gowdey, LLP, McLean, VA; James D. Berquist, PRO HAC VICE, Davidson Berquist Jackson Gowdey, McLean, VA.

For ZPE Systems, Inc. A California corporation, Defendant: Robert A. Whitman, LEAD ATTORNEY, Mark S. Raskin, Mishcon de Reya New York LLP, New York, NY; Scott Kolassa, Kilpatrick Townsend & Stockton LLP, Menlo Park, CA.

Judges: William H. Orrick, United States District Judge.

Opinion by: William H. Orrick

Opinion

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS COUNTERCLAIMS AND STRIKE AFFIRMATIVE DEFENSES

Re: Dkt. No. 120

INTRODUCTION

Avocent Huntsville, LLC ("Avocent") filed this patent infringement suit against ZPE Systems, Inc. ("ZPE"), and ZPE answered with counterclaims of its own. In short, ZPE contends that Avocent procured its patents by intentionally omitted material prior art from its patent applications. From this premise, it asserts counterclaims for declaratory relief of unenforceability based on Avocent's inequitable conduct and Sherman Act antitrust **[*2]** and attempted antitrust claims. It also raises counterclaims for declaratory relief of no trade secret misappropriation, no breach of contract, invalidity and non-infringement of the patents, and claims for negligent and intentional interference with prospective economic advantage, vexatious litigation and unfair competition under California's Unfair Competition Law. ZPE has plausibly pleaded all but the claims for negligent and intentional interference, which fail because it has not adequately alleged actual damage to an existing economic relationship, and vexatious litigation, which is not a cause of action. In addition, I will strike two of its affirmative defenses—inventorship and failure to join a necessary party—because they are insufficiently pleaded.

BACKGROUND

I. PROCEDURAL HISTORY

On July 28, 2017, Avocent filed suit against ZPE asserting infringement of Avocent's U.S. Patent Nos. 7,478,152 and 7,853,682 (collectively, the "Asserted Patents"). Compl. ¶¶ 18-71 (Dkt. No. 1). On October 17, 2017, it filed a first amended complaint. ("FAC")(Dkt. No. 41). On April 4, 2018, ZPE filed its Answer and Counterclaims (Dkt. No. 84), which Avocent moved to dismiss (Dkt. No. 99), and ZPE responded by filing amended counterclaims **[*3]** and affirmative defenses. Am. Answer and Counterclaims("AAC")((Dkt. No. 113). ZPE raises the following affirmative defenses: (1) patent invalidity, (2) non-infringement, (3) patent unenforceability, (4) claim construction estoppel, (5) prosecution history estoppel, (6) disclaimer, (7) no willful infringement, (8) limitation by prior art, (9) license, (10) limitation of damages, (11) no injunctive relief, (12) inventorship, and (13) failure to join necessary parties. AAC at 8-11. And it alleges counterclaims for: (1) declaratory judgment of no misappropriation of trade secrets, (2) declaratory judgment of no breach of contract, (3) declaratory judgment of invalidity of the Asserted Patents, (4) declaratory judgment of noninfringement of the Asserted Patents, (5) declaratory judgment of unenforceability of the Asserted Patents, (6) vexatious litigation, (7) monopolization in violation of *§ 2* of the Sherman Act, (8) attempted monopolization in violation of *§ 2* of the Sherman Act, (9) negligent interference with prospective economic advantage, (10) intentional interference with prospective economic advantage, and (11) unfair competition under *Cal. Business & Professions Code § 17200*.[1] AAC at 13-51.

In the first two counterclaims, ZPE mentions "Avocent's allegations **[*4]** set forth in its Alabama complaint[.]" AAC ¶¶ 10, 18. These allegations reference Avocent's complaint filed in Alabama state court on December 15, 2017, in which it asserts claims for Trade Secret Misappropriation Pursuant to the Federal Defend Trade Secrets Act and the Alabama Trade Secrets Act, Breach of Contract, Tortious Interference with Business Relations, and Civil Conspiracy. No. 47-cv-2017-902128, Dkt. No. 1 (Madison County Circuit Court). On January 22, 2018, ZPE removed that case to federal court in the Northern District of Alabama, No. 5:18-cv-113 ("the Alabama Action")(Dkt. No. 1), and moved to dismiss for lack of personal jurisdiction. No. 5:18-cv-113 (Dkt. No. 6). ZPE's motion has been fully briefed and remains pending.

II. FACTUAL BACKGROUND [2]

A. The Parties and The Products

Avocent has asserted, and ZPE repeats, that Avocent is "the largest supplier of serial console servers in the market[,]" and Avocent has represented that its market share was over 50 percent. ACC ¶¶ 143-44 (citing Wirts

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[1] ZPE incorrectly numbered counterclaims six through 11 as four through nine; the correct numbers are indicated here.

[2] Because ZPE references Avocent's original complaint, FAC, and the complaint in the Alabama Action, some of those factual allegations are included in this background. Only factual allegations relevant to ZPE's amended counterclaims are included here. For a more thorough recitation of the background, see the Order Denying Motion for Preliminary Injunction and Denying Motions to Dismiss (Dkt. No. 82).

Decl.). In 2013, two prior Avocent employees, Arnaldo Zimmermann and Livio Ceci,[3] formed ZPE, which sells competitive information technology products, including the NodeGrid Serial ConsoleTM **[*5]** out-of-band console switches. ACC ¶¶ 28 - 33 (citing Avocent's complaints and incorporating ZPE's opposition to Avocent's motion for preliminary injunction). Avocent alleges that the NodeGrid Serial ConsoleTM competes directly with its ACS Console Switch products, which "enable IT managers to access and control computers on a network, including those connected to the network over internet connections." FAC ¶ 1.

In late 2016, Avocent began losing business to ZPE. Avocent's complaint and FAC reference ZPE's purported misappropriation of Avocent trade secrets and alleged breaches of a non-disclosure agreement. *See* ACC ¶¶ 9-23.

B. The Patents

1. Prosecution

The patent application that would issue as the '152 Patent was filed in the U.S. Patent and Trademark Office (PTO) on June 29, 2004. ACC ¶ 38. It was assigned application number 10/881,211 ("the '211 application"), and identified purported inventors Graham Holt and Marcio Saito, who assigned the application to their employer at the time, Cyclades Corporation. *Id.* ¶¶ 38-40. Avocent acquired Cyclades in March 2006. *Id.* ¶ 41. On June 26, 2006, Cyclades revoked all previous powers of attorney regarding the prosecution of the '211 application in the PTO, **[*6]** and appointed the law firm Davidson Berquist Jackson & Gowdey LLP power of attorney to prosecute the '211 application. *Id.* ¶ 42. The PTO currently lists Davidson Berquist Jackson & Gowdey LLP attorneys James Berquist, Donald Jackson and John Davidson, among others, as the attorneys responsible for the '152 Patent. *Id.* ¶ 45. In July 2006, Cyclades assigned the '211 application to Avocent's predecessor Avocent Fremont Corporation. *Id.* ¶ 47. The '211 application issued as the '152 Patent on January 23, 2009. *Id.* ¶ 48.

The patent application that would issue as the '682 Patent was filed in the PTO on August 29, 2008, and assigned application number 12/201,899 (the '899 application"). ACC ¶ 49. It identifies the same purported inventors, Holt and Saito. *Id.* ¶ 52. On behalf of Avocent, attorneys at Davidson Berquist Jackson & Gowdey LLP filed a terminal disclaimer limiting the term of the patent that would issue to that of the '152 patent given the similarities of the claims. *Id.* ¶¶ 53-54. The '899 application issued as the '682 patent on December 10, 2010. *Id.* ¶ 57.

"At least Scott Davidson, a named partner of Davidson Berquist Jackson & Gowdey LLP, was intimately involved in the prosecution of the '211 and '899 patent applications before the [PTO], including, **[*7]** for example and among other things, preparing and submitting responses to multiple office actions, preparing and submitting amendments to the then-pending claims, preparing and submitting arguments to office actions, submitting payment of fees, including the issue fees, preparing and submitting information disclosure statements, and preparing and submitting a terminal disclaimer." ACC ¶ 58.

During prosecution of the '211 patent application, the PTO issued an Office Action rejecting the pending claims in view of certain prior art, including U.S. Patent No. 6,526,442 ("Stupek"). Scott Davidson of Davidson Berquist Jackson & Gowdey LLP submitted a response representing that "[t]he key difference between Stupek and the claimed invention lies in the vital distinction between an in-band management system and an out-of-band-management system. . . . Stupek does not . . . claim to be an out-of-band management tool." ACC ¶ 122. He further represented that, "Stupek teaches managed devices, but it does not teach that they are implemented in an out-of-band network. ... ." *Id.*

2. Inequitable Conduct

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[3] Zimmerman and Ceci have worked together for "decades, starting long before [their] work[] at Avocent." Zimmerman Decl. ¶ 3.

a. Competitors' Prior Art Products

ZPE alleges that Avocent concealed material prior art during prosecution, including its own products, **[*8]** products from Cyclades (its competitor prior to acquisition), and current competitors Xceedium Inc. and Raritan Computer (now Raritan Inc.). ACC ¶ 60. "[A]ll of these companies made and sold console management products and related software, and competed head-to-head in the market." *Id.* ¶ 61.

ZPE contends that Avocent, purported inventor Holt, and Davidson Berquist Jackson & Gowdey LLP were all involved in the prosecution of a separate, unrelated patent application filed shortly after the '211 application entitled "Remote Network Node Management System and Method"; this application issued as U.S. Patent No. 7,552,213 (the "'213 Patent"). ACC ¶ 63. This application explicitly referenced the potential for integration "with an access management gateway appliance such as Cyclades AlterPath Manager, Xceedium SSL-UAG+, Avocent DSView, Raritan CommandCenter." *Id.* (quoting '213 Patent at 4:35-39). "DSView is an Avocent management software product and is a key piece of Avocent's DS series operating system." *Id.* ¶ 70. Avocent has offered DSView for sale since at least 2001, three years prior to the filing dates of the Asserted Patents. *Id.* ¶ 71.

"The Raritan CommandCenter product was on sale and in public use since 2001," and "documentation **[*9]** describing the technical function and operation of the Raritan CommandCenter was published and publicly available for many years prior to the effective filing date of the '211 and '899 patent applications." ACC ¶¶ 102-03. The CommandCenter product is covered by U.S. Patent No. 8,176,155 (the "'155 Patent"), filed by Raritan. *Id.* ¶ 105. Avocent and Raritan were involved in an intellectual property dispute between 2001 and 2005, during the pendency of the '211 patent application. *Id.* ¶ 101.

Likewise, the Xceedium SSL-UAG+ product (formerly the Xceedium Xio UAG product) 5 was on sale and in public use, and documentation describing the technical functions and operations of the product was published and publicly available prior to the effective filing date of the Asserted Patents." ACC ¶¶ 113-16.

APE asserts that Avocent, the purported inventors, and attorneys at Davidson Berquist Jackson & Gowdey LLP "intentionally withheld all of this anticipatory, highly-material, prior art evidence ... during the entire prosecution of the Asserted Patents, which comprised more than a sex year period from June 2004 to December 2010." ACC ¶ 73.

b. Avocent's Prior Art Patents

Avocent also owns U.S. Patent No. 6,378,009, (the "'009 Patent"), which issued in 2002 and claims priority to 1998, and was **[*10]** also prosecuted by attorneys Scott Davidson, James Berquist and Donald Jackson (all current partners at Davidson Berquist Jackson & Gowdey LLP), and teaches "[a]n apparatus, method, and system for providing control, status, and security functions in a peripheral switch for connecting one or more computers to one or more user stations." ACC ¶¶ 81-83 (quoting '009 Patent, Abstract). "Avocent and its prosecution counsel, including at least Mr. Davidson, intentionally and with deceptive intent concealed the existence of the '009 Patent from the [PTO] during prosecution of the asserted patents because they knew such information would invalidate the asserted claims, and the claims never would have issued had they disclosed that information to the [PTO]." *Id.* ¶ 86.

Avocent and the same attorneys also prosecuted another patent application that was related to Avocent's DSView management system, U.S. Patent No. 6,633,905 (the "'905 Patent"), which claims priority to 1998 and issued on October 13, 2003. ACC ¶ 88. The '905 Patent includes the following description:

> KEY-VIEW II thus provides network administrators with unconditional access to any network server (Host PC) without requiring either CPU or Local Area Network (LAN) communications support from the Host **[*11]** PC or the network. . . . Using the KEY-VIEW PC multiple PCs may be controlled remotely using a single phone line, LAN node connection or Internet Address. . . . NET-911 Control Modules permit remote power control and serial access to an unlimited number of PCs or other devices, such as routers, printers, copy machines, etc.

> Unlike other remote power control products that require their own phone line, NET-911 modules can be chained together and connected to the serial port of any PC previously set up for remote access. 'Module Management Software' supplied with NET-911 modules may then be installed on this 'Management PC' and remotely activated whenever necessary to control power and serial access to up to 250 devices connected to the PC's serial port.

ACC ¶ 90 (quoting '905 Patent at 3:7-5:28). ZPE alleges that Avocent and its prosecution counsel concealed the existence of the '905 Patent from the PTO during prosecution of the Asserted Patents. *Id.* ¶ 93.

In 2000, Avocent and the same prosecuting attorneys prosecuted another patent, U.S. Patent No. 6,681,250 (the "'250 Patent"), entitled "Network Based KVM Switching System," which incorporates by reference the '905 and '009 patents. ACC ¶ 94. The '250 Patent claims priority to 2000 and issued on January 20, 2004. *Id.* **[*12]** ZPE asserts that Avocent and prosecuting attorneys intentionally concealed the existence of the '250 patent during prosecution of the Asserted Patents. ACC ¶ 98.

3. The Teachings

The background section of the patents provides,

> Data center management professionals commonly use network management tools for monitoring and restoring the operation of network nodes such as computer servers, network appliances, security appliances, storage devices, sensors, and controls. These typical network management tools permits the professional to manage and restore the operations of the network nodes remotely. Typically, these network management tools are divided in two categories: in-band management tools and out-of-band management tools. An in-band management tool relies on the data network connected to the network nodes to transport the management information. An out-of-band management tool creates an alternative path to communicate with the network nodes using alternative hard ware means such as dial up phone lines or separate networks that are used exclusively for management. The out-of-band management tool permits the supervisor to access the managed network nodes even when the network nodes lose network connectivity. **[*13]**

'682 patent at 1:24-41 (Dkt. No. 41-1); '152 patent at 1:16-33 (Dkt. No. 41-2). The summary describes the invention as "a single common aggregation point for a plurality of out-of-band interfaces, offering consolidation close to the managed devices that avoids the transport of disparate data streams across the corporate and public networks." '682 patent at 2:62-66; '152 patent at 2:54-58.

Avocent's Disclosure of Asserted Claims and Infringement Contentions identify its DSView as a "product ... that incorporates" the asserted claims of the '152 and '682 patents. ACC ¶ 66 (citing Avocent's Patent *L.R. 3-1* Disclosures). It alleges that ZPE willfully infringes, both directly and indirectly, claim 1 of the '682 patent and claims 1 and 11 of the '152 patent through the NodeGrid-brand products.

C. The Market

ZPE defines the market as "the serial console server market" with a geographical boundary as the United States. ACC ¶ 147. "Serial console servers are electronic products that enable IT managers to access and control network equipment, including remote computers and other devices." *Id.* Avocent's parent Vertiv recently acquired (in January 2018) market players Geist and Energy Labs, Inc. *Id.* ¶ 149. ZPE is a "minority player" in the market. *Id.* ¶ 147.

Avocent protects its dominant **[*14]** market share through barriers to entry, such as the high costs of developing serial console servers, existing, anticompetitive exclusivity contracts, and so-called "vendor lock-in," which is "when a product from one vendor will only work or communicate with another product from the same vendor." ACC ¶ 148.

LEGAL STANDARD

I. MOTION TO DISMISS COUNTERCLAIMS

Under *Federal Rule of Civil Procedure 12(b)(6)*, a district court must dismiss a claim if it fails to state a claim upon which relief can be granted. To survive a *Rule 12(b)(6)* motion to dismiss, the claimant must allege "enough facts to state a claim to relief that is plausible on its face." *See* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is facially plausible when the claimant pleads facts that "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See* *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citation omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts do not require "heightened fact pleading of specifics," a claimant must allege facts sufficient to "raise a right to relief above the speculative level." *See* *Twombly, 550 U.S. at 555, 570*.

In deciding whether a claimant has stated a claim upon which relief can be granted, the Court accepts the claimant's allegations as true and **[*15]** draws all reasonable inferences in favor of the claimant. *See* *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *See* *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*.

If the court dismisses the claims, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *See* *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)*. In making this determination, the court should consider factors such as "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." *See* *Moore v. Kayport Package Express, 885 F.2d 531, 538 (9th Cir. 1989)*.

II. MOTION TO STRIKE AFFIRMATIVE DEFENSES

Federal Rule of Civil Procedure 12(f) allows the Court to strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. *FED. R. CIV. P. 12(f)*. "The function of a *12(f)* motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010)* (citation and alteration omitted). Motions to strike, however, "are generally disfavored by courts because **[*16]** the motions may be used as delaying tactics and because of the strong policy favoring resolution on the merits." *Barnes v. AT & T Pension Ben. Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010)* (citation omitted). Such motions should only be granted if "the matter has no logical connection to the controversy at issue and may prejudice one or more of the parties to the suit." *New York City Employees' Ret. Sys. v. Berry, 667 F. Supp. 2d 1121, 1128 (N.D. Cal. 2009)*. "Where the moving party cannot adequately demonstrate such prejudice, courts frequently deny motions to strike even though the offending matter literally was within one or more of the categories set forth in *Rule 12(f)*." *Id.* (citation and quotation marks omitted). "Ultimately, whether to grant a motion to strike lies within the sound discretion of the district court." *Cruz v. Bank of New York Mellon, No. 12-00846, 2012 U.S. Dist. LEXIS 95467, 2012 WL 2838957, at *2 (N.D. Cal. July 10, 2012)* (citing *Whittlestone, 618 F.3d at 973*).

DISCUSSION

I. COUNTERCLAIMS 1 & 2: DECLARATION OF NO MISAPPROPRIATION OF TRADE SECRETS AND NO BREACH OF CONTRACT

These counterclaims explicitly attack Avocent's claims in the Alabama Action. ACC ¶¶ 10, 18. ZPE contends that Avocent infused those issues into this action by referencing ZPE's purported trade secret misappropriation and breach of nondisclosure agreement in its complaint and first amended complaint (Dkt. Nos. 1, 41), and alleges that "Avocent has not identified any valid or enforceable trade secrets[,]" "ZPE has **[*17]** not misappropriated any Avocent trade secrets[,]" "Avocent has not identified any valid or enforceable nondisclosure agreements with ZPE or any other person or entity[,]" and "ZPE has not breached or caused to be breached any Avocent nondisclosure agreement." ACC ¶¶ 9-23.

Avocent moves to dismiss these counterclaims because (1) they fail to meet the pleading standard, (2) Avocent was "effectively" first-to-file in federal court, and (3) the court should otherwise decline to exercise jurisdiction over these counterclaims given the Alabama Action. Mot. to Dismiss Am. Counterclaims at 3-5 ("MTD")(Dkt. No. 120). Just as ZPE does not elaborate on its allegations other than those stated in the preceding paragraph, Avocent does not explain why the counterclaims should be dismissed for failure to state a claim, other than to contend that the counterclaims are not truly at issue in this patent infringement action. But Avocent cannot deny that it raised these issues in this action, even if it did not affirmatively assert claims for misappropriation of trade secret and breach of contract. *See* FAC ¶¶ 1-7 (describing how former Avocent employees founded ZPE and explicitly referencing the "Avocent **[*18]** Nondisclosure Agreement" and Avocent's "confidential information" including trade secrets). And even if I agreed that adjudication of those issues was not necessary to resolve Avocent's patent infringement claims, that does not mean that ZPE has failed to state a claim. Jurisdiction over declaratory relief claims exists when there is an actual controversy, *see* *28 U.S.C. § 2201(a)*; Avocent's assertion of these claims in the Alabama Action suggests that an actual controversy exists.

As for Avocent's second argument, Avocent acknowledges that the Alabama Action was not technically the first-filed action, *see* MTD at 3 n.1 (noting that the underlying complaint in the Alabama Action was filed on December 15, 2017), but it narrows its focus on ZPE's amended counterclaims to argue that its Alabama Complaint and ZPE's subsequent removal of that complaint predate ZPE's counterclaims. *See* MTD at 4. The "first to file" rule is "a generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 94-95 (9th Cir. 1982)*. This action is technically the first-filed, and Avocent's narrowly focused arguments to **[*19]** the contrary are unpersuasive.

Moving on to Avocent's third argument, the Declaratory Judgment Act on its face provides for discretion: "[i]n a case of actual controversy within its jurisdiction, ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration... ." *28 U.S.C. § 2201(a)*; *see also* *Wilton v. Seven Falls Co., 515 U.S. 277, 286, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)* ("[T]he Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants."); *Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 533 (9th Cir. 2008)* ("Federal courts do not have a duty to grant declaratory judgment; therefore, it is within a district court's discretion to dismiss an action for declaratory judgment."). As part of Avocent's claims for willful infringement of its patents, I will be presented with evidence of its breach of contract and trade secret misappropriation claims, even though it has not affirmatively asserted those claims here.

Given these circumstances and the unavoidable fact that this is actually the first filed action, I decline to dismiss ZPE's counterclaims for declaratory relief under my discretionary authority.[4] *See* *Wilton, 515 U.S. at 289* ("We

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[4] Avocent acknowledges that I need not consider the *Brillhart* factors under my discretionary authority to hear these declaratory relief claims, but argues that I should nonetheless allow them to guide my analysis. Mot. at 5 (citing *Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 495, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942)*; Reply at 2 ("[T]his Court has discretion to consider whether to dismiss these counterclaims, D.I. 120 at 4-5, and may do so with or without applying the *Brillhart* factors[.]"). The Ninth Circuit has sanctioned consideration of the *Brillhart* factors, even when a case has been removed and there is no pending state court action. *Huth v. Hartford Ins. Co. of the Midwest, 298 F.3d 800, 803 (9th Cir. 2002)*. The *Brillhart* factors dictate that a "district court should avoid needless determination of state law issues; it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation." *Huth, 298 F.3d at 803*.

believe it more consistent with the statute to vest district courts **[*20]** with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp."). Avocent's motion to dismiss these claims is DENIED.

II. COUNTERCLAIMS 3 & 4: NON-INFRINGEMENT AND INVALIDITY

"Declaratory relief is appropriate '(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" *Guerra v. Sutton, 783 F.2d 1371, 1376 (9th Cir. 1986)*. Avocent argues that ZPE's counterclaims for non-infringement and invalidity should be dismissed because the issues will necessarily be decided when adjudicating its affirmative claims for patent infringement. MTD at 8 (citing *Loblaw Cos. Ltd. v. Azimi, No. C-00-3591 WHO, 2001 U.S. Dist. LEXIS 26500, at *39-40 (N.D. Cal. Oct. 17, 2001)*); *see* *Loblaw, 2001 U.S. Dist. LEXIS 26500, at *40* ("Here, the declaratory relief sought is unnecessary and serves no useful purpose, as the issue upon which declaratory relief is sought will be decided in the course of litigating Loblaw's claims.").

But "[a] party seeking a declaratory judgment **[*21]** of invalidity presents a claim independent of the patentee's charge of infringement." *Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 96, 113 S. Ct. 1967, 124 L. Ed. 2d 1 (1993)*. In *Cardinal Chemical*, the Supreme Court rejected the Federal Circuit's practice of vacating judgments on patent validity after finding noninfringement because "[a] finding of noninfringement alone ... does not justify such a result." *Id. at 102*. Even though I will necessarily evaluate ZPE's challenges to the validity of the Asserted Patents in resolving Avocent's claims for patent infringement, ZPE's declaratory judgment claim for invalidity serves an additional useful purpose of informing the public as to the validity of the patents. *See* *id. at 100* (emphasizing "the importance to the public at large of resolving questions of patent validity"). Avocent's motion to dismiss ZPE counterclaim for invalidity is DENIED.

As for its counterclaim for noninfringement, ZPE conceded at the hearing that it serves no purpose beyond Avocent's affirmative claims for patent infringement. Judgment on those claims will necessarily address the content of ZPE's counterclaim for noninfringement. Under these circumstances, dismissal is appropriate. Avocent's motion to dismiss ZPE counterclaim for noninfringement is GRANTED.

III. COUNTERCLAIM [*22] 5: UNENFORCEABILITY BASED ON INEQUITABLE CONDUCT

A. Legal Framework

Inequitable conduct must be pleaded with particularity under *Rule 9(b)*. *Exergen Corp. v. Wal-Mart Stores, Inc., 575 F.3d 1312, 1326 (Fed. Cir. 2009)*. "The substantive elements of inequitable conduct are: (1) an individual associated with the filing and prosecution of a patent application made an affirmative misrepresentation of a material fact, failed to disclose material information, or submitted false material information; and (2) the individual did so with a specific intent to deceive the PTO." *Id. at 1327 n.3*. A party may generally plead specific intent, but the allegations must be sufficient for a court to reasonably infer that a party acted with the requisite state of mind. *Id. at*

Here, the first factor may slightly favor Avocent, since its Alabama complaint asserts claims under Alabama state law. I note, however, that ZPE disputes the choice of law, which Avocent presents as a settled issue. It may be that Alabama law does not apply after all. The second factor clearly favors ZPE—it filed counterclaims here, in the first filed action, after Avocent sued it for patent infringement. It cannot be accused of forum shopping. And, at this point, the third factor favors Avocent since its Alabama complaint asserts these affirmative claims. But ZPE underscores the pending motion to dismiss that complaint for lack of personal jurisdiction, and indicates that it plans to file a motion to transfer that action to this venue, if its motion to dismiss is denied. Given the potential that these actions may still be consolidated here, there is no guarantee of duplicative litigation. In short, the *Brillhart* factors do not add much value to the analysis.

1327. "A pleading that simply avers the substantive elements of inequitable conduct, without setting forth the particularized factual bases for the allegation, does not satisfy Rule 9(b)." Id. at 1326-27. Rather, "Rule 9(b) requires identification of the specific who, what, when, where, and how of the material misrepresentation or omission committed before the PTO." Id. at 1327.

B. Analysis

Avocent challenges ZPE's inequitable conduct counterclaim on three grounds—it takes issue with ZPE's reliance on its own invalidity charts to demonstrate the materiality of the purported prior art references **[*23]** (MTD at 9-10), it contends that ZPE has not adequately pleaded Avocent's knowledge of that materiality during prosecution of the Asserted Patents (*id.* at 10-11), and it argues that ZPE has not included sufficient allegations from which I can reasonably infer Avocent's intent to deceive (*id.* at 11-12). ZPE counters that it has sufficiently identified the who, what, when, and where of the inequitable conduct; namely, "a six-year long campaign by Mr. Davidson ... to conceal at least six categories of anticipatory prior art, including prior art Avocent patents that Mr. Davidson prosecuted, and the very existence of anticipatory prior art products, public uses and sales, of which there is no dispute that Mr. Davidson was well-aware." Opp'n at 6-7.[5]

1. Materiality

An accused infringer claiming that a patentee withheld material prior art references must plead "how an examiner would have used this information in assessing the patentability of the claims." Exergen, 575 F.3d at 1330. To answer this question, ZPE incorporates by reference its Rule 3-3 Invalidity Contentions into its Amended Counterclaims, which draw language from Avocent's Infringement Contentions, thereby linking the claims to information in the purported prior art references. Avocent challenges **[*24]** the invalidity charts as inadequate because they are conclusory and do not construe disputed claims. But it cites no cases supporting its view that claim charts detailing an element by element comparison against a prior art reference are insufficient to allege materiality. Unlike the situation in *Exergen*, the Invalidity Contentions identify the claims, the limitations in those claims, and the information in the prior art references. *Cf.* id. at 1329-30. Avocent cannot legitimately challenge ZPE's allegations on this front.

2. Knowledge of Materiality

During the hearing, Avocent made clear that its strongest argument against inequitable conduct rests under this element. Even if the prior art references are material, Avocent insists that ZPE has not adequately pleaded its knowledge of that materiality. But ZPE highlights Avocent's own disclosures that its DSView was a "product ... that incorporates" the asserted claims of the Asserted Patents (ACC ¶¶ 66, 69; *see* Avocent's November 22, 2017 Patent L.R. 3-1 Disclosure at 3-1(g) at 7-8; Avocent's January 9, 2018 Patent L.R. 3-1 Supplemental Disclosure at 3-1(g) at 8-9 (identifying DSView as practicing '152 Patent claims 1, 2, 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, and 16, and '682 Patent claims 1, 2, 3, 5, **[*25]** 6, and 8)), thereby establishing its materiality, and it alleges that the DSView products were on sale more than a year before the Asserted Patents were filed. *See also* ACC ¶ 76 (citing to ZPE's Rule 3-3 Invalidity Claim Charts comparing prior art references against asserted claims). Avocent points out that it identified the *current* line of DSView products in its disclosures, but "absolutely disputes that all earlier versions of DSView practiced the '152 and '682 patents." Reply at 7. But the specific contours of Avocent's disclosures and the scope of the various product versions are issues best left for resolution at a later stage.

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[5] ZPE mentions the named inventors who "remained Avocent employees through at least the issuance of the '682 Patent on December 10, 2010[,]" ACC ¶ 59, and specifically focuses on purported inventor Graham Holt, who it alleges was aware of and concealed material prior art, *id.* ¶¶ 62, 65-66, 73-75, 79. But it does not appear to argue Holt's deceptive intent in its opposition to Avocent's motion. *See* Opp'n at 10; Reply at 4 n.4 (noting that ZPE "identifie[d] only Mr. Davidson as the alleged 'who'... .").

Even ignoring the different product lines, Avocent argues that ZPE's allegations related to DSView rely on six references, totaling 317 pages, and fail to establish that any individual knew of the materiality of any portion of the references. It cites *Exergen* for the proposition that "[a] reference may be many pages long, and its various teachings may be relevant to different applications for different reasons." *575 F.3d at 1330*. The court found that "one cannot assume that an individual, who generally knew that a reference existed, also knew of the specific material *information* contained in that **[*26]** reference." *Id.*

But, unlike in *Exergen*, ZPE provides a factual basis to infer that a specific individual, Mr. Davidson, owed a duty of disclosure in prosecuting the Asserted Patents, and knew of specific information in prior art, either because he prosecuted the purported prior art patents, participated in litigation involving purported prior art products, or cited to purported prior art in the prosecution of the '213 patent, which overlapped with the prosecution of the Asserted Patents.[6] *Compare* ACC ¶¶ 63, 65, 70-73, 100-101, 117 (alleging Mr. Davidson's knowledge of Raritan's CommandCenter product based on involvement in patent infringement suit and citation to reference during '213 Patent prosecution); *id.* ¶¶ 88-95 (alleging that Avocent's Patent Nos. '905 and '250 were prosecuted by Mr. Davidson and fully anticipate the Asserted Patents); *id.* at ¶ 117 (noting Mr. Davidson's citation to Xceedium's SSL-UAG+ product during prosecution of '213 Patent), *with* *Exergen, 575 F.3d at 1330* ("The pleading, however, provides no factual basis to infer that any specific individual, who owed a duty of disclosure in prosecuting the '685 patent, knew of the specific information in the '808 and '998 patents that is alleged to be material to the claims of the '685 patent.").

Avocent contends that ZPE's knowledge **[*27]** of materiality allegations are conclusory, but I see no need to require it to allege more than it has—materiality of the prior art, knowledge of the prior art, and, as discussed below, an intent to deceive inferred from the allegation that prosecuting attorneys included the disclosures in a simultaneously prosecuted patent application. These allegations are sufficient to support ZPE's non-conclusory inference that Avocent knew of the materiality of the prior art references. *See* *Exergen, 575 F.3d at 1330*.

3. Intent to Deceive

Avocent contends that "ZPE does not and cannot provide any factual basis from which intent to deceive can be reasonably inferred." MTD at 11. It relies on *International Test Solutions, Inc. v. Mipox International Corp., No. 16-cv-00791-RS, 2017 U.S. Dist. LEXIS 74640 (N.D. Cal. May 16, 2017)* and my decision in *ILife Technologies, Inc. v. Aliphcom, No. 14-cv-03345-WHO, 2015 U.S. Dist. LEXIS 20743 (N.D. Cal. Feb. 19, 2015)*. But its arguments fall short.

In *International Test Solutions*, the Hon. Richard Seeborg found that "[g]eneral knowledge of ITS operations is 'not sufficient to support an inference that [Broz or Adams] knew of specific material information contained in the prior art allegedly withheld.'" *2017 U.S. Dist. LEXIS 74640, at *18*. He concluded that the named inventor could be imputed with knowledge of the omitted reference, but Mipox's **[*28]** allegation that the named inventor deliberately withheld that information for commercial and financial benefit went "too far." *2017 U.S. Dist. LEXIS 74640 at *22*; *see id.* ("By Mipox's logic, any individual may reasonably be suspected of fraud on behalf of his employer. Even assuming Humphrey's actual knowledge of the ITS data sheets, Mipox pleads no factual basis to explain why these ordinary economic circumstances would plausibly induce fraud on the PTO."). But unlike the situation in *International Test Solutions*, ZPE has provided factual allegations from which I can reasonably infer that Mr.

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[6] ZPE also alleges that Davidson responded to an Office Action rejecting claims in view of U.S. Patent No. 6,526,442 ("Stupek") representing that "[t]he key difference between Stupek and the claimed invention lies in the vital distinction between an in-band management system and an out-of-band-management system. . . . Stupek does not . . . claim to be an out-of-band management tool." Am. Counterclaims ¶ 122 (quoting October 9, 2007 Response to Office Action). ZPE argues that Davidson had a duty to disclose prior art "known to them to show managed devices that were implemented in out-of-band networks that were implemented in out-of-band networks... ." *Id.*; *see* Opp'n at 13 (arguing that a prosecuting attorney's failure to identify prior art that contradicts his assertion provides a distinct grounds for inequitable conduct under *37 C.F.R. 1.56(b)*).

Davidson, the prosecuting attorney, deliberately omitted prior art references from the applications underlying the Asserted Patents that he included in the simultaneous prosecution of the of other patents. Avocent has not provided a reason for this omission; at this stage, I must accept ZPE's plausible allegations.

In *ILife*, I denied plaintiff's motion to dismiss Aliphcom's counterclaim for inequitable conduct in part because the counterclaim provided "detailed, plausible allegations that both Lehrman [the inventor] and attorney William A. Munck knew of prior art that invalidated European patent application that were similar to **[*29]** the U.S. patents at issue, but failed to disclose it to the PTO." *ILife, 2015 U.S. Dist. LEXIS 20743, at *3*. Avocent seizes on my language that the facts of that case presented "a close question" of whether a named inventor and prosecuting attorney intended to deceive the PTO, and it aims to distinguish the facts of that case. *See* MTD at 11-12 (citing *ILife, 2015 U.S. Dist. LEXIS 20743, at *26)*. But, just as in *ILife*, ZPE alleges that a prosecuting attorney knew of material information and cited that art to the PTO in one matter but not in the applications for the Asserted Patents. *2015 U.S. Dist. LEXIS 20743, at *22*. The difference is that the prosecuting attorney in *ILife* had reason to omit the references after the European patent claims were invalidated. *See id.* Here, ZPE asks me to infer the reason why Davidson omitted material prior art in the applications underlying the Asserted Patents while including it in the application underlying the '213 Patent—because that prior art would invalidate the Asserted Patents.

"The specific intent to commit inequitable conduct may be inferred from indirect and circumstantial evidence." *Ohio Willow Wood Co. v. Alps S., LLC, 735 F.3d 1333, 1351 (Fed. Cir. 2013)*. "But, deceptive intent must be 'the single most reasonable inference drawn from the evidence.'" *Id.* ZPE alleges that Mr. Davidson was "intimately involved" in prosecuting the applications underlying the Asserted Patents, **[*30]** ACC ¶ 58, personally prosecuted Avocent's prior art patents and included references to some of the prior art in applications prosecuted at the same time. Given the closeness in time, the deceptive intent is "the single most reasonable inference" rather than the omissions resulting from mere negligence. *Cf*. *1st Media, LLC v. Elec. Arts, Inc., 694 F.3d 1367, 1374-75 (Fed. Cir. 2012)* (noting in the context of the sufficiency of the *evidence* to sustain a charge of inequitable conduct "it is not enough to argue carelessness, lack of attention, poor docketing or cross-referencing, or anything else that might be considered negligent or even grossly negligent."); *see also* *Cypress Semiconductor Corp. v. GSI Tech., Inc., No. 13-cv-02013-JST, 2014 U.S. Dist. LEXIS 31462, at *21-22 (N.D. Cal. Mar. 9, 2014)* ("GSI has provided facts showing that the prosecution attorney made misrepresentations with regard to the Ryan Reference. Based on this evidence, this Court concludes that GSI has alleged sufficient facts in its pleading from which the Court can reasonably infer that intent to deceive is the single most reasonable inference to be drawn from the evidence.").

ZPE has alleged the who (Mr. Davidson), the what (the particular claims and limitations for which the withheld references are relevant), the when (over a six-year period), the **[*31]** where (locations within the references), and the how (the materiality of those omitted prior art references through claim charts). *See* *Exergen, 575 F.3d at 1329-30* (explaining the who, what, where, why, and how of pleading inequitable conduct); *Coolsystems, Inc. v. Nice Recovery Sys. LLC, No. 16-CV-02958-PJH, 2016 U.S. Dist. LEXIS 145067, 2016 WL 6091577, at *3 (N.D. Cal. Oct. 19, 2016)*("The court finds that the 'who, what, when, where, and how' of this theory are sufficiently pled under *Exergen*. The who is 'at least' Kapur, and the when/where is during prosecution of the ⁄ª910 patent before the PTO. The 'what' is burying Elkins ⁄ª439 among the other references. The 'how' goes to the issue of materiality."). It has also plausibly pleaded the requisite scienter through the actions and omissions of Mr. Davidson. Avocent's motion to dismiss this counterclaim is DENIED.

IV. COUNTERCLAIM 6: VEXATIOUS LITIGATION

ZPE alleges that Avocent filed its initial complaint in this district in July 2017 referencing the "confidential and proprietary Avocent information and trade secrets" and "Avocent Nondisclosure Agreement," and yet, nearly five months later, chose to file a complaint against it and its co-founders in Alabama State Court asserting claims based on these allegations. ACC ¶¶ 125-133. According **[*32]** to ZPE, Avocent had "no reasonable basis" to file these claims, and "intentionally and maliciously filed a separate action for the sole purpose of straining ZPE's limited resources, in an attempt to put ZPE out of business via the expensive litigation process itself." *Id.* ¶¶ 135-38. ZPE alleges that Avocent's and its counsels' strategic decisions renders this action "exceptional" and the Alabama

Action "unreasonable and vexatious[.]" *Id.* ¶¶ 140-41 (citing *35 U.S.C. § 285* and *28 U.S.C. § 1927*). Avocent argues that these allegations do not give rise to separate claims for relief. MTD at 12. ZPE responds that "the question as to whether or not its allegation for *§ 1927* vexatious litigation is set forth in a counterclaim or in its Prayer for Relief may involve 'matters of form' rather than significance[.]" Opp'n at 15 (citing *GMA Accessories, Inc. v. Croscill, Inc., et al., No. 06 Civ. 6236 GEL, 2007 U.S. Dist. LEXIS 17589, 2007 WL 766294, *4 (S.D.N.Y. Mar. 13, 2007))*. But it "does not object to either method." *Id.*

"An assertion of an 'exceptional case' under *35 U.S.C. § 285* is not a separate cause of action, and '[t]herefore, [Plaintiffs] should not be permitted to include a separate count based on exceptional case, or the allegations underlying that nonexistent cause of action.'" *Interaxon Inc. v. Neurotek, LLC, No. 15-cv-05290-KAW, 2017 U.S. Dist. LEXIS 447, at *5 (N.D. Cal. Jan. 3, 2017)*. "Similarly, courts have found that sanctions under *28 U.S.C. § 1927* and **[*33]** *Federal Rule of Civil Procedure 11* are not separate causes of action." *Id.*; *see id.* (collecting cases). Accordingly, ZPE's counterclaim for vexatious litigation is DISMISSED. It can pursue these theories via its prayer for relief. *See* Prayer for Relief, ¶¶ D, F.

V. COUNTERCLAIMS 7 & 8: SHERMAN ANTITRUST ACT CLAIMS

ZPE alleges that "Avocent has monopoly power in, and a dominant and persistent share" of the serial console server marker in the United States. ACC ¶ 147. It further alleges that Avocent has attempted to monopolize the market by "procuring either or both the '152 and '682 patents by knowing and willful fraud and baselessly asserting them in bad faith in litigation against ZPE[.]" *Id.* ¶ 150. It contends that Avocent "promptly served subpoenas on ZPE's customers and prospective customers," which "substantially overlapped" with information it sought or could have obtained from ZPE, and were designed to "discourage ZPE's customers and prospective customers from engaging in business with ZPE." *Id.* ¶ 158.

Avocent argues that ZPE's antitrust claims are barred by the *Noerr-Pennington* doctrine, and otherwise fail to plausibly allege a claim of monopolization and attempted monopolization.

A. Whether *Noerr-Pennington* Bars the Claims

1. [*34] Legal Framework

"The *Noerr—Pennington* doctrine shields individuals from, *inter alia*, liability for engaging in litigation." *Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1047 (9th Cir. 2015)*. It originated in two Supreme Court cases which held that the *First Amendment's Petition Clause* prohibits imposing Sherman Act liability on those who petition the legislature or the executive, and was later expanded to preclude liability for those who petition the courts. *Id.* (citing *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965))*; *see also* *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 51, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*.

Courts have recognized at least two exceptions to *Noerr-Pennington* immunity for antitrust liability: (1) where a party engages in a "sham" petition intended only to "interfere directly with the business relationships of a competitor," and (2) "[u]se of a patent obtained by fraud to exclude a competitor from the market[,]" as articulated in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 175-77, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*; *see also* *TransWeb, LLC v. 3M Innovative Properties Co., 812 F.3d 1295, 1311 (Fed. Cir. 2016)*("[S]ham litigation and *Walker Process* are distinct avenues by which a party can lose *Noerr—Pennington* immunity.").

In *Professional Real Estate Investors*, the Supreme Court outlined a two-part test for defining "'sham" litigation:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably **[*35]** calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," *Noerr, supra, 365 U.S. at 144, 81 S.Ct. at 533* (emphasis added), through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon," *Omni, 499 U.S. at 380, 111 S.Ct. at 1354* (emphasis in original).

508 U.S. at 60-61 (footnote omitted). The court explained that "[t]his two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability." *Id. at 61*.

For a *Walker Process* claim, "the antitrust-plaintiff must show two things: first, that the antitrust-defendant obtained the patent by knowing and willful fraud on the patent office and maintained and enforced the patent with knowledge of the fraudulent procurement; and second, all the other elements necessary to establish a Sherman Act monopolization claim." **[*36]** *TransWeb, 812 F.3d at 1306*.

2. Application

Avocent argues that ZPE cannot establish that Avocent's lawsuit is a sham, at least because its claims are not objectively baseless, as demonstrated by the prior order denying ZPE's motions to dismiss. MTD at 14. ZPE counters that surviving motions to dismiss on infringement and subject matter grounds is insufficient to establish the objective reasonableness of Avocent's suit, since those challenges are "wholly unrelated to the invalidity and unenforceability grounds that serve as the basis for ZPE's allegation that his lawsuit is objectively baseless." Opp'n at 17.

To determine the applicability of the sham litigation exception to *Noerr-Pennington* immunity, I must answer whether a "reasonable litigant could realistically expect success on the merits." *Prof'l Real Estate, 508 U.S. at 60*. Accepting ZPE's allegations as true, it would be a stretch to conclude that a *reasonable* litigant could realistically expect success knowing that its patents are invalid and unenforceable. But I need not answer this question since ZPE's challenges to Avocent's claims are based on invalidity and unenforceability, they are more appropriately analyzed under the *Walker Process* exception. *See* *TransWeb, LLC v. 3M Innovative Properties Co., 812 F.3d 1295, 1306 (Fed. Cir. 2016)*("In *Walker Process* ***[*37]*** , the Supreme Court held that a plaintiff could bring an action under *§ 2* of the Sherman Act based on the alleged maintenance and enforcement of a fraudulently-obtained patent."); *Ritz Camera & Image, LLC v. SanDisk Corp., 772 F. Supp. 2d 1100, 1110 (N.D. Cal. 2011)*(dodging the "sham" exception analysis "because Defendants' alleged conduct clearly comes within the second exception to the *Noerr—Pennington* doctrine.").

ZPE alleges that Avocent obtained the Asserted Patents through fraud on the PTO. "No assertion of a patent known to be fraudulently-obtained can be a proper use of legal process." *TransWeb, 812 F.3d at 1312*. ZPE set forth detailed allegations supporting its claim that Avocent obtained the Asserted Patents by fraud. *See* discussion above section III. Inequitable Conduct. Avocent attacks ZPE's recitation of the elements for a *Walker Process* claim, and emphasizes that the claim requires a "knowing and willful fraud" and "knowledge of the fraudulent procurement." *See* Reply at 10 (quoting *TransWeb, 812 F.3d at 1311*). But, as discussed above, ZPE has plausibly pleaded a claim of inequitable conduct, which supports the applicability of the *Walker Process* fraud exception to *Noerr-Pennington* immunity. *See* *Transweb, 812 F.3d at 1307* (explaining that "the showing required for proving inequitable conduct and the showing required for proving the fraud **[*38]** component of Walker Process liability may be nearly identical."); *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1070 (Fed. Cir. 1998)*(agreeing that a knowingly fraudulent omission before the PTO could expose a patentee to antirust liability because "a fraudulent omission can be just as reprehensible as a fraudulent misrepresentation."); *ESCO Corp. v. Cashman*

Equip. Co., 158 F. Supp. 3d 1051, 1074 (D. Nev. 2016)("Had Defendants' pleading of inequitable conduct satisfied the *Exergen* standard, the Court would be much more inclined to find plausibility as to fraud under the *Walker Process* claim.").

Accepting ZPE's allegations, Avocent is not entitled to *Noerr-Pennington* immunity.

B. Whether ZPE has stated a claim of monopolization

Even if an antritrust claimant has established that an entity is not entitled to *Noerr-Pennington* immunity, it must still establish the elements of a substantive antitrust violation. *Prof'l Real Estate, 508 U.S. at 61*. "There are three essential elements to a successful claim of *Section 2* monopolization: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal 'antitrust' injury." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998 (9th Cir. 2010)*(quoting another source).

1. Relevant Market

Avocent labels as conclusory the relevant market identified by ZPE's allegations and argues that it lacks the specific factual detail necessary to **[*39]** state a claim under the *Sherman Act*. MTD at 17-18. The Ninth Circuit has held that a claim under the Sherman Act "survives a *Rule 12(b)(6)* motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect." *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008)*.[7] The *Newcal* court further noted "that the validity of the 'relevant market' is typically a factual element rather than a legal element," so the "alleged markets may survive scrutiny under *Rule 12(b)(6)* subject to factual testing by summary judgment or trial." *Id.* The court went on to enumerate "some legal principles that govern the definition of an antitrust 'relevant market[,]'" underscoring that "a complaint may be dismissed under *Rule 12(b)(6)* if the complaint's 'relevant market' definition is facially unsustainable." *Id.*

First, "the relevant market must be a *product* market." *Id.* "Second, the market must encompass the product at issue as well as all economic substitutes for the product." *Id.*; *see* *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989)*("For antitrust purposes, defining the product market involves identification of the field of competition: the **[*40]** group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business."). "Third, although the general market must include all economic substitutes, it is legally permissible to premise antitrust allegations on a submarket." *Newcal, 513 F.3d at 1045*; *see* *Brown Shoe, 370 U.S. at 325* ("The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.").

Avocent argues that ZPE fails to adequately allege a relevant antitrust market because it does not reference the rule of reasonable interchangeability and cross-elasticity of demand. MTD at 17 (citing *nSight, Inc. v. PeopleSoft, Inc., 296 F. App'x 555, 557-58 (9th Cir. 2008)* and *Chapman v. N.Y. State Div. for Youth, 546 F.3d 230, 238 (2d Cir. 2008))*. Rather, according to Avocent, ZPE alleges only the general market in which the parties compete, but says "nothing about what other types of servers may compete with serial console servers, or with all servers in general." MTD at 17.

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[7] The Federal Circuit "applies the law of the regional circuit as to market definition." *TransWeb, 812 F.3d at 1307*.

Avocent, however, barely acknowledges ZPE's allegation that there are no substitutes for the serial console servers. *See id.* at 17 n.12; ACC ¶ **[*41]** 147 ("There are no reasonable substitutes for serial console servers for the purpose they serve of enabling IT managers to access and control network equipment, including remote computers and other devices."). And it neglects to recognize that it has previously represented the existence of a "serial console server market." *See, e.g.*, Avocent's Mot. for Prelim. Injunction at 2 ("ZPE recently won several large accounts, taking substantial business away from Avocent in the serial console server market.")(Dkt. No. 17). ZPE substantiates its allegations that there are no reasonable substitutes by citing Avocent's own representation in asserting that it is entitled to lost profits damages: "[a]t all relevant times, there was an absence of acceptable non-infringing alternatives to the patented products and the patented technology." Avocent's L-R 3-8 Damages Disclosure (Whitman Decl. ¶ 4, Ex. 3; Dkt. No. 120-4); *see LendingTree, LLC v. Zillow, Inc., No. 3:10-CV-439-FDW-DCK, 2011 WL 13222698, at *4 (W.D.N.C. Nov. 4, 2011)*("Counterclaimants are reasonable in their inference that Plaintiff's claim for lost profits presupposes the absence of non-infringing substitutes in the market.").

Next, Avocent attempts to distinguish between its use of "the term **[*42]** 'market' in a general or business sense" and "the stricter" use of the term for antitrust purposes, but its attacks lack substance. *See* Reply at 11. It relies on *Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC, 532 F.3d 963 (9th Cir. 2008)*, to argue that ZPE's allegations are inadequate, but *Rick-Mik* does not help it. Rick-Mick alleged violations of the Sherman Act for unlawful tying and unlawful price fixing based on Equilon's alleged market power in the gasoline franchise market. *Id. at 966-68*; *id. at 972*. The Ninth Circuit affirmed the district court's dismissal of the complaint, in part because "Rick—Mik's complaint [did] not allege that Equilon ha[d] market power in the relevant market, which is the market for the tying product—gasoline franchises." *Id. at 972*; *see id.* (noting that the complaint lacked specific allegations as to the franchise market, such as what percentage of gasoline franchises belong to Equilon, as well as the percentage of gasoline retail sales that are made through non-franchise outlets, and the amount of power or control that Equilon has over prospective franchisees, and the relative difficulty of a franchisee to switch brands). It found that Rick-Mik's allegations all "relate[d] to the *retail* gasoline market—a market where Rick—Mik is a seller—not the relevant **[*43]** market for franchises where it is a buyer." *Id. at 973*. It also noted that "the statistics alleged in the complaint do not distinguish between franchise-based sales and other potential types of sales[,]" and concluded that "the complaint fail[ed] to allege market power in the relevant market." *Id.*

Unlike the facts in *Rick-Mik*, ZPE alleges a relevant market based on a product for which there are no substitutes, Avocent's control of that market, and barriers to entering that market. Given "that the validity of the 'relevant market' is typically a factual element rather than a legal element," *Newcal, 513 F.3d at 1045*, these allegations are sufficient to survive an attack on the pleadings.

2. Injury

"Antitrust injury requires the plaintiff to have suffered an injury in the market where competition is being restrained." *American Ad Mgmt., Inc. v. General Telephone Co. of Cal., 190 F.3d 1051, 1057 (9th Cir. 1999)*. Avocent highlights ZPE's prior representations in opposition to Avocent's motion for preliminary injunction in which ZPE's co-founder expressly denied that ZPE is a competitor within the same market at Avocent. *See* Zimmerman Decl. ¶ 22 ("I disagree that Avocent is a competitor with ZPE within the same market. Avocent offers no product with the same features set as ZPE.")(Dkt. No. 32-21). ZPE attempts to brush **[*44]** off these assertions as meaning "nothing more than Avocent's products are inferior to ZPE's." Opp'n at 20 n.7. The statements do suggest that Zimmerman meant to infer that Avocent's products are inferior, but he also explicitly declared that he does not believe the two compete in the same market. This will be grist for cross-examination at trial but does not impact my analysis of the pleadings on a motion to dismiss.

Avocent also contends that ZPE only alleges injuries individual to it, and not on competition as a whole. But ZPE alleges competitive harm in Avocent's attempts to discourage customers from doing business with ZPE and deterring others from competing in the market. *See* ACC ¶¶ 154-59, 173, 175. In addition, ZPE argues that the cost of defending against a sham litigation constitutes an antitrust injury. Opp'n at 21. As the Federal Circuit recently held, when an antitrust defendant's unlawful act is "the bringing of suit based on a patent known to be fraudulently obtained[,]" attorney fees flow directly from the defendant's attempt to gain a monopoly and "are precisely 'the type of loss that the claimed violations would be likely to cause[.]'" *TransWeb, 812 F.3d at 1309-10*. In the particular circumstances **[*45]** of *Walker Process* antitrust claim where a patentee "attempt[s] to gain a monopoly based on [a] fraudulently-obtained patent[,]" *id. at 1309*, ZPE has adequately pleaded an antitrust injury. Avocent's motion to dismiss ZPE's antitrust claim is DENIED.

C. Whether ZPE has stated a claim for attempted monopolization

"A claim for attempted monopolization has three elements: 1) a specific intent to monopolize a relevant market; 2) predatory or anticompetitive conduct; and 3) a dangerous probability of success." *Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 542 (9th Cir. 1991)*. Avocent argues that ZPE's attempted claim fails because it relies on conclusory allegations, fails to plead relevant market or anticompetitive conduct, fails to support a finding that Avocent has a dangerous probability of succeeding in its attempt to monopolize, and fails to allege an antitrust injury. MTD at 20-21. I have rejected three of these arguments above, and now briefly address the fourth (dangerous probability of success).

ZPE stresses its allegations that Avocent dominates the market and that dominance "is protected by significant barriers to entry, such as the high costs associated with developing serial console servers, Avocent's existing, anticompetitive exclusivity contracts, and Avocent's **[*46]** so-called 'vendor lock-in[,]'" so "Avocent's attempts to monopolize the relevant Market ... have had and now have a dangerous probability of success." ACC ¶¶ 186-88. ZPE further alleges that "if Avocent succeeded in its attempt to cause ZPE to exit from the relevant market because of fraudulently-obtained patents and sham litigation, Avocent would obtain a virtually complete monopoly in the relevant market." *Id.* ¶ 191. In reply, Avocent reiterates that ZPE provides no factual bases for its allegations regarding high costs, exclusivity contracts, and vendor lock-in tactics. Reply at 13.

At this stage, ZPE need not provide additional factual support to bolster its allegations. *See United States v. Microsoft Corp., 253 F.3d 34, 80, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*("The determination whether a dangerous probability of success exists is a particularly fact-intensive inquiry."); *Momento, Inc. v. Seccion Amarilla USA, No. C 09-1223 SBA, 2009 U.S. Dist. LEXIS 85295, 2009 WL 10696217, at *7 (N.D. Cal. Sept. 17, 2009)*("Courts typically should not resolve this question at the pleading stage."). Avocent's motion to dismiss this counterclaim is DENIED.

VI. COUNTERCLAIMS 9 & 10: NEGLIGENT AND INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

The elements of intentional interference with prospective **[*47]** economic advantage are:

> (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

Westside Ctr. Assocs. v. Safeway Stores 23, Inc., 42 Cal. App. 4th 507, 521-22, 49 Cal. Rptr. 2d 793 (1996) (internal quotation marks omitted). "[T]he third element also requires a plaintiff to plead intentional *wrongful* acts on the part of the defendant designed to disrupt the relationship." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1154, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)* (emphasis in original). "The tort of negligent interference with prospective business advantage has many of the same elements[,]" *UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc., 117 F. Supp. 3d 1092, 1118 (C.D. Cal. 2015)*, and "also requires an independent wrongful act," but it "need not be willful." *Integrated Storage Consulting Servs., Inc. v. Netapp, Inc., No. 5:12-CV-06209-EJD, 2016 U.S. Dist. LEXIS 88962, 2016 WL 3648716, at *8 (N.D. Cal. July 7, 2016)*.

Avocent argues that ZPE fails to plead an economic relationship with a probable future economic benefit, an independently wrongful act, actual disruption of the economic relationship, and that the disruption was proximately caused by Avocent. MTD at 21-24. ZPE highlights its allegations that Avocent attempted to **[*48]** disrupt its relationship with several prospective customers, including Google, Arista, Apple, Facebook, Visa, and Dell, by telling them that they should not purchase ZPE products given the current litigation, and serving them with subpoenas. ACC ¶¶ 196-98.

But ZPE does not indicate that any of those relationships were *actually* damaged. Rather, it includes that allegation in a general statement that it "has lost business and goodwill because of Avocent's intentional, malicious and tortious interference with its business, and ZPE expects to lose prospective business and goodwill because of Avocent's negligent, intentional and tortious interference with its business and economic advantage." ACC ¶ 199. Because it fails to adequately allege actual disruption of an economic relationship, these claims are DISMISSED. To the extent that ZPE intends to allege damage to relationships with prospective customers Google and Arista, it should make that clear on amendment. *See* ACC ¶¶ 196, 197, 208, 209. It should likewise allege that the damage was caused by Avocent's wrongful conduct.[8]

VII. COUNTERCLAIM 11: UNFAIR COMPETITION

"[A] plaintiff who claims to have suffered injury from a direct competitor's **[*49]** 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. ZPE's UCL claim survives based on my finding that it has adequately pleaded an antitrust claim, as well as its allegations that Avocent has engaged in unfair competition based on its practice of asserting fraudulent patents against ZPE.

VIII. AFFIRMATIVE DEFENSES

Under *Federal Rule of Civil Procedure 12(f)*, a court may strike an "insufficient defense." Avocent argues that ZPE's fourth through seventh (claim construction estoppel, prosecution history estoppel, disclaimer, no willful infringement), and eleventh through thirteenth (no injunctive relief, inventorship, failure to join necessary party) affirmative defenses should be stricken. All of these affirmative defenses, other than inventorship and failure to join a necessary party, are adequately pleaded and Avocent offers no argument of prejudice to support striking them.

As for the other two, Avocent points out that ZPE has not identified **[*50]** any purported missing inventor, nor has it identified any purported necessary party. These affirmative defenses are insufficiently pleaded and are struck. *See, e.g.*, *Finjan, Inc. v. Bitdefender Inc., No. 17-cv-04790-HSG, 2018 U.S. Dist. LEXIS 64765, at *10 (N.D. Cal. Apr. 17, 2018)*("This affirmative defense is entirely devoid of factual content. The Court therefore finds that it does not meet the *Twombly/Iqbal* standard.").

CONCLUSION

In accordance with the foregoing, Avocent's motion to dismiss ZPE's counterclaims and strike its affirmative defenses is GRANTED IN PART and DENIED IN PART with leave to amend. If ZPE chooses to amend, it must do so within 20 days of this Order.

IT IS SO ORDERED.

Dated: July 23, 2018

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[8] The other elements are plausibly pleaded—ZPE identifies third parties as prospective customers, Avocent's knowledge of those relationships, and an independently wrongful act in the form of Avocent's attempted enforcement of patents it knew were invalid and procured through fraud.

/s/ William H. Orrick

William H. Orrick

United States District Judge

K&F Rest. Holdings, Ltd. v. Rouse

United States District Court for the Middle District of Louisiana

July 24, 2018, Decided; July 24, 2018, Filed

CIVIL ACTION NO. 16-293-JWD-EWD

Reporter
2018 U.S. Dist. LEXIS 123154 *; 2018-2 Trade Cas. (CCH) P80,449

K&F RESTAURANT HOLDINGS, LTD., d/b/a IZZO'S ILLEGAL BURRITO, ET AL. VERSUS DONALD J. ROUSE, JR., ET AL.

Subsequent History: affirmed on other grounds by *K&F Rest. Holdings, Ltd. v. Rouse, 798 Fed. Appx. 808, 2020 U.S. App. LEXIS 3099, 2020 WL 502620 (5th Cir. La., Jan. 30, 2020)*

Prior History: *K&F Rest. Holdings, Ltd. v. Rouse, 2016 U.S. Dist. LEXIS 162700 (M.D. La., Sept. 22, 2016)*

Core Terms

conspiracy, allegations, monopolization, amended complaint, monopoly power, Developer, Defendants', lease, tortious interference, market share, food, conspiracy claim, anticompetitive, unfair competition, antitrust claim, state law, horizontal, recipe, trade secret, restaurants, conspired, burrito, grocers, anti trust law, defamation, litigious, percent, business relationship, infringement, substandard

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Judges: JOHN W. deGRAVELLES, UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN W. deGRAVELLES

Opinion

RULING AND ORDER

This matter is before the Court on four Motions to Dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. The first was filed by Donald J. Rouse, Jr. ("Rouse, Jr."); Donald J. Rouse, Sr.; Thomas B. Rouse; Allison Rouse Royster; and Rouse's Enterprises, LLC ("Rouse's," and collectively "the Rouse Defendants"). (Doc. 148). Plaintiffs K&F Restaurant Holdings, Ltd. d/b/a Izzo's Illegal Burrito ("Izzo's"); K&F Restaurant Operations, LLC; G&O Pizza Holdings, Ltd., d/b/a LIT Pizza ("LIT Pizza"); G&O Restaurant Operations, LLC; Osvaldo Fernandez; and A. Gary Kovacs (collectively "Plaintiffs") oppose. (Doc. 164). The Rouse Defendants have filed a Reply in further support of their Motion. (Doc. 172).

The second Motion was filed by Victory Berryland, LLC ("Berryland"). (Doc. 139). Plaintiffs oppose, (Doc. 168), and Berryland has filed a Reply in further support of its Motion, (Doc. 170).

The third Motion was filed by Stephen Keller and Creekstone Juban **[*3]** I, LLC ("Creekstone," and collectively "the Creekstone Defendants"). (Doc. 140). Plaintiffs oppose. (Doc. 165).

The fourth Motion was filed by Russell Mosely and Mosely Holdings, LLC (collectively, "the Mosely Defendants"). (Doc. 143). Plaintiffs oppose, (Doc. 163), and the Mosely Defendants have filed a Reply in further support of their Motion, (Doc. 171).

For reasons discussed below, the Motions will be granted, and this case will be dismissed in its entirety.

I. BACKGROUND

A. Plaintiff's Allegations

In September 2011, Jack Trueting, Rouse's "Director of Perishables," called Fernandez to say that Rouse's was "very impressed with Izzo's products" and was interested in franchising Izzo's burrito restaurants in Rouse's grocery stores. (Doc. 138 at 3). Izzo's declined. (*Id.*). Rouse, Jr., who manages Rouse's, then allegedly formed a "scheme" to steal Izzo's burrito recipes. (*Id.*). Specifically, in 2011, Rouse, Jr. "directed" some of his store managers in Lafayette, Louisiana to make an offer, "essentially a bribe," to Patrick Dartez, manager of an Izzo's in Lafayette, to "defect to Rouse's with Izzo's recipes." (*Id.*). Dartez accepted. (*Id.*). Following the success of the "scheme," Rouse's began **[*4]** selling burritos that were "very similar, if not identical," to Izzo's burritos in some of its stores. (*Id.* at 4). Plaintiffs contend that this constitutes illegal use of Izzo's trade secrets. (*Id.* at 5-6). Plaintiffs also contend that Rouse's uses the phrase "build your own" in connection with its burritos and that this phrase is very similar to "roll your own," which Izzo's uses in connection with its burritos. (*Id.* at 9).

Additionally, in July 2011, Izzo's sought to "acquire a restaurant" at Juban Crossing, a commercial development in Livingston, Louisiana managed by Keller and developed by Creekstone. (*Id.* at 4). In 2012, Izzo's, Keller, and Creekstone signed a letter of intent pursuant to which Izzo's was to lease space at Juban Crossing. (*Id.*). However, in a lease agreement recorded in June 2013, Rouse's agreed to be the anchor tenant at Juban Crossing. (*Id.*; *see also* Doc. 138-5 at 1). One of the conditions of the agreement was that no portion of Juban Crossing would be leased or sold to Izzo's, "K&F Restaurant Management, LLC," or any affiliate of either. (Doc. 138 at 1; *see also* Doc. 138-5 at 4). According to Plaintiffs, Rouse, Jr. justified the condition in "interstate phone calls" occurring in 2012, stating **[*5]** that Izzo's sold "substandard" products and was "litigious." (Doc. 138 at 5). Creekstone refused to lease space to Izzo's, allegedly resulting in "millions of dollars" in lost profits to Izzo's. (*Id.*).

The operative Second Amended Complaint alleges seven "counts." (*Id.* at 6-20). Count I is against Rouse, Jr. for violating the conspiracy provision of the *Racketeer Influenced and Corrupt Organizations Act* ("RICO"), *18 U.S.C. § 1962(d)*. (*Id.* at 6). Plaintiffs contends that Rouse, Jr. "conspired to commit three RICO violations against Izzo's," *i.e.*, violating the Travel Act via the scheme to steal Izzo's recipes, committing wire fraud by stating in phone calls that Izzo's was litigious and sold substandard products, and illegally stealing and using trade secrets. (*Id.* at 6).

Count II is a claim for "Conspiracy To Violate *La. Civ. Code Arts. 2324, et seq.* as to all Defendants." (*Id.* at 6-7). Plaintiffs claim that their factual allegations "set forth a civil conspiracy set forth among the defendants to exclude and group boycott the plaintiffs from highly desirable developments." (*Id.* at 7). Plaintiffs also contend that "each of the defendants' name[d] herein are made in act of the furtherance of the conspiracy by rejecting Izzo's[,] Lit and any other development created by Fernandez and **[*6]** Kovacs." (*Id.*).

Count III alleges "Product Defamation and Disparagement against the Rouse's Defendants." (*Id.* at 7). Plaintiffs claim that "Rouse's" made false statements concerning the quality of Izzo's products and its litigiousness to "several third parties but for certain to each of the co-conspirators herein, Juban, Keller, Long Farms, Mosely, and Berryland." (*Id.* at 7-8). Plaintiffs assert that these statements were false, as evidenced by Rouse's desire to franchise Izzo's restaurants and Izzo's decision not to assert claims against Rouse's when an Izzo's recipe book was recovered from a Rouse's store. (*Id.* at 8).

Count IV[1] alleges "Tortious Interference and Business Relations as to all Defendants." (*Id.* at 8). Plaintiffs contend that "[t]he various aforementioned acts and practices by the Rouse Group and co-conspirators have tortiously interfered and continue to tortiously interfere with lawful business relations between Izzo's and its partners and other developers." (*Id.*). This count also concerns the statements about Izzo's alleged litigiousness and substandard products. (*Id.*).

Count V asserts trademark infringement under *La. Rev. Stat. 51:211 et seq.* "as to Rouse's Defendants" based on the use of the "trade name" "build your own." (*Id.* at 9).

Count **[*7]** VI asserts a "Conspiracy under *Sherman Act* and Restraint of Trade in Transportation Market[,] *15 U.S.C.A. § 1*, *35*, *36* as to All Defendants." (*Id.* at 9-10). Plaintiffs contend that "Defendants have monopolized the Market Area in that it has [sic] power to dictate tenants of its preference and exclude competition in some or all of the Market Area" and have "acquired, exercised, and maintained its monopoly power willfully and intentionally by way of the acts set forth above." (*Id.* at 10). Plaintiffs similarly allege that Defendants have attempted to monopolize or conspired to monopolize the "Market Area." (*Id.*). Count VI states that "unlawful agreements [among the Defendants] are evidenced by, among other things, the leases, the deed, the economic interests of Defendants Rouse's, Keller, Juban, Mosely, Long Farms, and Berryland; the close relationships among Defendants; Defendants' concerns about the competitive threat that Izzo's application posed to the Defendants; the history and anticompetitive practices of Rouse's; and the timing of various anticompetitive actions taken by Rouse's, Keller, Juban, Mosely, Long Farms, and Berryland." (*Id.* at 11). Plaintiffs further contend that "Defendants have engaged in per se anticompetitive **[*8]** behavior, or, alternatively, anticompetitive behavior without procompetitive justification, that has unreasonably retrained trade in violation of *Section 1* of the Sherman Act." (*Id.*). Plaintiffs contend that the product market for this "count" is the "retail food sale market," while the relevant geographic market is the state of Louisiana. (*Id.*).

Count VII asserts a "Complaint for Violation of Federal and Louisiana Antitrust Laws, Unfair Practices, and Unfair Competition *15 U.S.C.A. § 1*, *2*, and *13* as to All Defendants." (*Id.* at 14). Plaintiffs define the "many" product markets for "retail food" as "(i) sale of food for cooking; (ii) the sale of partially prepared food which simply requires heating; (iii) the sale of pre-cooked food, ready to eat; (iv) the sale of pre-cooked food concentration on one type of food; (v) the sale of pre-cooked food with a variety of types of food; and (vi) the combination of selling un-cooked food requiring preparation and cooking along with pre-cooked foods, ready to eat." (*Id.* at 15). Plaintiffs define the "relevant geographic markets for retail food sales" as "the entire United States" and "the states commonly known as the Southeastern United States, including, but not limited to, Louisiana, Mississippi, **[*9]** Alabama and Florida." (*Id.*). Plaintiffs claim that barriers to entry are high given "[t]he high concentration in the Market Area, the sophisticated technology, large expenses, high capital costs, [and] relationship[s] with farmers and wholesalers."

[1] The Second Amended Complaint contains two Count III's. This count and all subsequent counts are renumbered for clarity.

(*Id.* at 16). Plaintiffs contend that "Defendants" have engaged in refusal to deal and collusion with developers, constituting monopolization, attempt to monopolize, and conspiracy to monopolize; unreasonable restraint of trade; and "unfair competition." (*Id.* at 16-19).

Attached to the Second Amended Complaint are numerous exhibits, including, *inter alia*, an affidavit by Fernandez stating that, in a March 2016 meeting, Russell Mosely expressed regret that he could not include an Izzo's in a development, but Rouse, Jr. had told Mosely that there had been an "incident" between Izzo's and Rouse's "years ago" and Izzo's would "never make a dollar off of [him]!" (Doc. 138-6 at 1; *see also* Doc. 138-10 at 7 (Declaration of Covenants excluding "Any Izzo's" from a Mosely property)). Also attached to the Second Amended Complaint is a Notice of Lease between Berryland and Rouse's excluding "[a]ny Izzo's or similar burrito restaurant." (Doc. 138-12 at 6).

B. Procedural History [*10]

This case was filed in state court in April 2016 and removed shortly thereafter. (Doc. 1). The initial Petition for Damages named the Rouse Defendants and raised RICO claims and state law claims for violations of *Louisiana's Unfair Trade Practices and Consumer Protection Act* ("LUTPA"), tortious interference with a contract, product defamation, civil conversion, trademark infringement, and conspiracy. (Doc. 1-1 at 2, 8-13). The Rouse Defendants moved for dismissal of Plaintiffs' state law claims, while Plaintiffs moved to remand. (Docs. 5, 7). The Court denied the Motion to Remand and granted in part and denied in part the Motion to Dismiss. (Docs. 26, 31). Specifically, the Court ruled that the LUTPA claim was untimely and dismissed it with prejudice. (Doc. 31 at 5-7, 14). The Court denied the Motion to Dismiss as to the trademark infringement claim, ruling that Plaintiffs had adequately pled a "protectable right" in the trade name "roll your own" and Rouse's violation of that right. (*Id.* at 12, 14). The Court dismissed the remaining state law claims with leave to amend as inadequately pled. (*Id.* at 7-11, 12-14). Plaintiffs moved for reconsideration and to recuse the then-assigned district judge. (Docs. 38-41).

Plaintiffs **[*11]** later filed an "Amended and Restated Complaint." (Doc. 70). This pleading named all of the defendants currently named (along with one other person) and raised RICO claims, federal antitrust claims, and state law claims for "wrongful conversion of proprietary information," conspiracy, product defamation and disparagement, tortious interference with business relations, trademark infringement, and violation of state ***antitrust law***. (*Id.*). Several defendants moved to dismiss. (*See* Docs. 71, 78, 83).

The Court then denied the outstanding motions for reconsideration and to recuse. (Docs. 102, 117). Five days after reconsideration was denied, Plaintiffs again moved to disqualify the then-assigned district judge. (Doc. 118). Although that judge ruled that the basis upon which disqualification was sought, *i.e.*, a lawsuit brought by Plaintiffs' counsel, was "a transparent attempt to create bias and hostility in an effort to provoke disqualification," the Court granted the motion given that "the machinations to which Plaintiffs' counsel ha[d] resorted to poison and impugn the Court's impartiality" might cause a "thoughtful and objective observer" to question the Court's impartiality. (Doc. 133 **[*12]** at 8-9). The case was thereafter reassigned to this section of the Court.

Following the case's reassignment, the Court held a status conference and granted Plaintiffs' then-pending motion for leave to file a Second Amended Complaint. (Doc. 136; *see also* Doc. 95). The Court informed Plaintiffs' counsel that "this [was] the last amendment to the complaint that [would] be allowed by the Court." (Doc. 136 at 1). The outstanding Motions to Dismiss were denied without prejudice to renewal following the filing of the Second Amended Complaint. (*Id.* at 1-2). The Second Amended Complaint was filed on October 26, 2017.

II. GENERAL STANDARDS

In *Johnson v. City of Shelby, Miss., ___ U.S. ___, 135 S. Ct. 346, 190 L. Ed. 2d 309 (2014)*, the Supreme Court explained that "[f]ederal pleading rules call for a 'short and plain statement of the claim showing that the pleader is entitled to relief,' *Fed. R. Civ. P. 8(a)(2)*; they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *135 S.Ct. at 346-47* (citation omitted).

Interpreting *Rule 8(a)*, the Fifth Circuit has explained:

> The complaint (1) on its face (2) must contain enough factual matter (taken as true) (3) to raise a reasonable hope or expectation (4) that discovery will reveal relevant evidence of each element of a claim. **[*13]** "Asking for [such] plausible grounds to infer [the element of a claim] *does not impose a probability requirement* at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal [that the elements of the claim existed]."

Lormand v. U.S. Unwired, Inc., 565 F.3d 228, 257 (5th Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (emphasis in *Lormand*)).

Applying the above case law, the Western District of Louisiana has stated:

> Therefore, while the court is not to give the "assumption of truth" to conclusions, factual allegations remain so entitled. Once those factual allegations are identified, drawing on the court's judicial experience and common sense, the analysis is whether those facts, which need not be detailed or specific, allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [*Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)]*; *Twombly, [550] U.S. at 556, 127 S. Ct. at 1965*. This analysis is not substantively different from that set forth in *Lormand, supra*, nor does this jurisprudence foreclose the option that discovery must be undertaken in order to raise relevant information to support an element of the claim. The standard, under the specific language of *Fed. R. Civ. P. 8(a)(2)*, remains that the defendant be given adequate notice of the claim and the grounds upon which it is based. The standard **[*14]** is met by the "reasonable inference" the court must make that, with or without discovery, the facts set forth a plausible claim for relief under a particular theory of law provided that there is a "reasonable expectation" that "discovery will reveal relevant evidence of each element of the claim." *Lormand, 565 F.3d at 257*; *Twombly, [550] U.S. at 556, 127 S. Ct. at 1965*.

*Diamond Servs. Corp. v. Oceanografia, S.A. De C.V., No. 10-00177, 2011 U.S. Dist. LEXIS 27358, 2011 WL 938785, at *3 (W.D. La. Feb. 9, 2011)* (citation omitted).

More recently, in *Thompson v. City of Waco, Tex., 764 F.3d 500 (5th Cir. 2014)*, the Fifth Circuit summarized the standard for a *Rule 12(b)(6)* motion:

> We accept all well-pleaded facts as true and view all facts in the light most favorable to the plaintiff . . . To survive dismissal, a plaintiff must plead enough facts to state a claim for relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Our task, then, is to determine whether the plaintiff state a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success.

Id. at 502-03 (citations and internal quotations omitted).

III. THE MOTIONS TO DISMISS

A. The Rouse Defendants

1. The Motion

In support of their Motion to Dismiss, the Rouse Defendants first argue that Plaintiffs' claims for "product defamation **[*15]** and disparagement" fail as vaguely pled and because the challenged statements concerning Izzo's alleged "litigiousness" and "substandard product" are non-actionable matters of opinion. (Doc. 148-1 at 5-6). They also note that defamation claims, like other tort claims, are subject to a one-year prescriptive period. (*Id.* at 5). They similarly argue that Plaintiffs' claim for tortious interference with business relations is conclusorily pled, is prescribed, and does not allege that the Rouse Defendants "acted improperly or with actual malice." (*Id.* at 6-8). The Rouse Defendants then argue that Plaintiffs' trademark infringement claim fails, as "build your own" is a common, descriptive, generic phrase unlikely to cause confusion and not subject to trademark protection. (*Id.* at 8-10). Next, they argue that Plaintiffs' state law conspiracy claims fail because there is no "underlying tort" nor any non-conclusory allegations of a conspiratorial agreement as to a particular unlawful outcome or result. (*Id.* at 10-11). With respect to Plaintiffs' RICO claim, the Rouse Defendants claim that Plaintiffs have failed to plausibly plead the elements of each predicate act alleged or a "pattern" of racketeering activity. (*Id.* at 11-12).

The Rouse Defendants **[*16]** characterize Plaintiffs' antitrust claims as "facially ridiculous" and "lack[ing] each and every component of a plausible claim under either federal or state ***antitrust law***." (*Id.* at 13). First, they observe that Plaintiffs complain of being excluded from a few developments in Louisiana but define the relevant market as essentially all food sales throughout Louisiana, throughout the Southeastern United States, or throughout the whole of the United States. (*Id.* at 13-14). The Rouse Defendants also argue that Plaintiffs fail to adequately plead "antitrust injury," *i.e.*, an injury to competition, not just to Izzo's, particularly given that Plaintiffs' competitors were allowed at some of the developments. (*Id.* at 14-15).

The Rouse Defendants further argue that Plaintiffs' claims of a vertical price-fixing conspiracy or vertical concerted refusal to deal under *Section 1* of the Sherman Act fail for failure to plead market power, particularly given the size of the market. (*Id.* at 16-18). They also claim that any additional conspiracy claims under *15 U.S.C. §§ 1*, *35*, or *36* must be dismissed as duplicative or meritless. (*Id.* at 19). The Rouse Defendants likewise argue that Plaintiffs' claims of monopolization, attempt to monopolize, and conspiracy to monopolize under *Section 2* of **[*17]** the Sherman Act fail for failure to adequately allege market power or market share and specific intent to monopolize. (*Id.* at 19-22). The Rouse Defendants further argue that Plaintiffs fail to allege a "single element" of a claim under *15 U.S.C. § 13*. (*Id.* at 22). The Rouse Defendants also contend that there is no private right of action for "unfair competition" under the Federal Trade Commission Act, and Plaintiffs' LUTPA claims were previously dismissed with prejudice. (*Id.*). Finally, the Rouse Defendants argue that Plaintiffs' state law antitrust claims are interpreted consistent with federal law and fail for the same reasons. (*Id.* at 22-23).

2. The Opposition

Plaintiffs oppose, arguing throughout that a short, plain statement of their claims is all that is required to survive a *Rule 12(b)(6)* motion. (Doc. 164 at 3).

More specifically, Plaintiffs first represent that the Rouse Defendants have stated to co-conspirators that Izzo's "produced substandard product and was extremely litigious," giving rise to a claim for product defamation. (*Id.*). Plaintiffs contend that these statements are false, as Izzo's sole prior lawsuit concerning the recipe book was "100% correct," and Rouse's desire to put Izzo's in its stores belies any contention that **[*18]** Rouse's believed Izzo's product to be "substandard." (*Id.* at 3-4). Plaintiffs also argue that the same allegations give rise to a claim for product disparagement and resulted in Izzo's exclusion from Juban Crossing. (*Id.* at 4-5).

Next, Plaintiffs argues that they have pled malice sufficient to support a claim of tortious interference with a contract, given Rouse, Jr.'s statement that Izzo's would "never make a dollar off of [him]!" and the Rouse Defendants' acknowledgement in prior filings that "the incident" involving the recipe book was extremely embarrassing. (*Id.* at 5; *see also* Doc. 13 at 2). Plaintiffs argue that, as a result of this ill will, Rouse's "demanded that Juban and Keller cancel a signed Letter of Intent to facilitate Rouse's evil plan" and also "lied [to] and coerced other developers" like "Mosley, Long Farms, Victory Berryland, and others." (Doc. 164 at 5-6). Plaintiffs claim that Rouse's is able to dictate and demand restrictions due to its size. (*Id.* at 6).

Next, Plaintiffs argue that their trademark infringement claim is "alive" as law of the case and that arguments to the contrary should be rejected. (*Id.* at 7). Plaintiffs also contend that they have stated a claim for conspiracy based on the aforementioned **[*19]** "embarrassment" and statement of Rouse, Jr. (*Id.*).

Plaintiffs then turn to their RICO claim, arguing that the schemes to bribe an Izzo's employee to steal the recipe book, to exclude Izzo's from Juban Crossing, and to "illegally use Izzo's trade secrets," constitute racketeering activity under RICO. (*Id.* at 8). Plaintiffs contends that the scheme to steal the recipe book violated the *Travel Act* via Rouse, Jr.'s act of state law commercial bribery. (*Id.* at 8-9). The scheme involving Juban Crossing is alleged to have violated the wire fraud statute, as the scheme involved the making of false statements over interstate wires. (*Id.* at 9-10). Finally, Plaintiffs argue that the unlawful use of trade secrets affecting interstate commerce is racketeering activity under RICO. (*Id.* at 10-11). Plaintiffs argue that they have shown a pattern of activity that is "related and continuous," as the activity was all "conducted and carried out by Rouse[,] Jr. for the purpose of retaliating and harming the Plaintiffs after they refused to acquiesce to Rouse[,] Jr.'s request to franchise Izzo's in his grocery stores." (*Id.* at 11-12). Plaintiffs maintain that the pattern is "open-ended," as the trade secret violations "continue unabated." (*Id.* at 12). Plaintiffs also **[*20]** address several other of the Rouse Defendants' "scattershot" arguments. (*Id.* at 12-15).

With respect to an alleged wrongful conversion claim, Plaintiffs contend that the Rouse Defendants "wrongfully argue[]" that a trade secret and trademark cannot be wrongfully converted and that the "conversion continues until the conversion stops." (*Id.* at 15).

Plaintiffs then address their antitrust claims. They argue that the Court should consider the "aggregate effect of the multiple agreements that eliminate [Izzo's and LIT Pizza] from several developments, not just one" and the fact that, if these restaurants were "allowed in these 4 developments, that would create 8 more stores for consumers, and promote competition in the market." (*Id.* at 16). Plaintiffs argue that "Rouse's used its size and leverage to create both horizontal and vertical conspiracies in restraint of trade, which is exactly what the antitrust laws are created to prevent[.]" (*Id.* at 16-17). However, Plaintiffs later contend that, "[b]ecause the conspiracies and contracts are between Rouse's and the other defendants/developers, they are not on the same level, so the here the plaintiffs [sic] allege a vertical level conspiracy between Rouse's and the developers." (*Id.* at 17).

[*21] Plaintiffs maintain that Rouse's is the largest grocery store chain in Louisiana and possesses the largest market share "among grocers, second only to Walmart, (which sells much more than groceries)." (*Id.* at 18). Plaintiffs contend that this gives Rouse's monopoly power, permitting it to "set prices at its choosing," buy land for new stores, and lease from "anyone whom it wishes." (*Id.*). Plaintiffs also contend that Rouse's "has no barriers to entry," but "opening a grocery store has a high level of barriers to entry." (*Id.*).

Plaintiffs further argue that the conspiracies were "reduced to writing in leases and deed restrictions," and that such leases and restrictions "can be found across Louisiana barring Izzo's and its affiliates from entry while Rouse's enjoys all the growth it wants by virtue of its monopoly." (*Id.*). Plaintiffs also argue that the agreements are evidenced by "the economic interests" of Defendants, the "close relationships" among them, Defendants' "concerns about the competitive threat that Izzo's application posed to the Defendants"; the history and anticompetitive practices of Rouse's, and the timing of Defendants' "various anticompetitive actions." (*Id.* at 19). Plaintiffs contend that they have been harmed by Rouse's actions, and consumers are harmed "because customers cannot find Izzo's or Lit Pizza." (*Id.* at 18). Plaintiffs argue that Defendants' conduct is both *per se* anticompetitive and that it violates the rule of reason. (*Id.* at 19-20). Plaintiffs maintain that any benefits flowing from Defendants' "restraints **[*22]** of trade" can be accomplished by less harmful means. (*Id.* at 21).

3. The Reply

The Rouse Defendants' Reply generally reiterates arguments previously made. (Doc. 172 at 1-6). They contend that the Court is free to reconsider and reverse its prior ruling on "the trademark claim" "for any reason it deems sufficient." (*Id.* at 1 n.1). They also reiterate that statements that Izzo's produced "substandard product" or was "extremely litigious" are purely expressions of opinion and cannot support a claim of defamation. (*Id.* at 2). The Rouse Defendants further argue that the Second Amended Complaint contains no wrongful conversion claim and that any claim for misappropriation of trade secrets based on events in 2012 had prescribed when the instant action was filed in 2016. (*Id.* at 2-3 & n.7). The Rouse Defendants also argue that Plaintiffs have not alleged sufficient facts to plausibly suggest a RICO conspiracy, either with respect to an underlying agreement or predicate acts. (*Id.*

at 3-4). The Rouse Defendants further contend that several of the predicate acts undergirding the conspiracy had prescribed by the time this suit was filed. (*Id.* at 4).

B. Berryland

In its Motion, Berryland argues that the restrictive covenants in its lease agreements are common, **[*23]** lawful provisions and that the Second Amended Complaint makes virtually no allegations against Berryland. (Doc. 139-1 at 2-4). Berryland then addresses specific causes of action, contending first that Plaintiffs fail to allege that Berryland acted with "actual malice," as is necessary to support a tortious interference claim. (*Id.* at 5-6). Berryland next addresses Plaintiffs' antitrust claims, arguing that they have failed to adequately allege: (1) any facts in support of a *per se* unreasonable horizontal conspiracy among competitors at the same level; (2) that any vertical conspiracy had anticompetitive effects; (3) that Berryland had a significant share of the food sales market, a "dangerous probability" of achieving monopoly power in that market, or the specific intent to monopolize that market; and (4) any facts in support of a price discrimination claim. (*Id.* at 6-16). Next, Berryland claims that any "unfair competition" claim based on trademark violations does not involve Berryland. (*Id.* at 16). Finally, Berryland argues that, because Plaintiffs' underlying claims fail, there is no viable state law conspiracy claim. (*Id.* at 16-17).

Plaintiffs argue that Berryland's Motion is "absurd and completely lacking in any legitimate **[*24]** argument" and that Berryland was "well aware that Rouse'[s]" participated in a larger practice of excluding Izzo's and its affiliates from developments other than Berryland." (Doc. 168 at 1-2). Plaintiffs contend that Berryland has admitted to engaging in conspiracies in restraint of trade by executing lease provisions prohibiting Plaintiffs from leasing in "desired developments." (*Id.* at 2). Plaintiffs argue that Berryland is liable because Rouse's "could not have carried out their intent to abolish Izzo's without the necessary cooperation from developers, each and every one." (*Id.*).

Plaintiffs further maintain that "[t]he defendants, Rouse's and Berryland, acted with ill-will and ill-motive as they have admitted . . . that getting caught with the recipe book caused them great embarrassment and anger." (*Id.* at 6). Plaintiffs clarify, however, that they are not pursuing wrongful conversion, tortious interference, or product defamation claims against Berryland "except as co-conspirators." (*Id.*). Concerning their RICO claim, Plaintiffs reiterate arguments made in opposition to the Rouse Defendants' Motion. (*Id.* at 7-14).

Concerning their antitrust claims, Plaintiffs allege that, by entering into an agreement **[*25]** with Rouse's, which competes with Izzo's, Berryland created "both horizontal and vertical restraints," although Plaintiffs again acknowledges that, "[b]ecause the conspiracies and contracts are between Rouse's and the other defendants/developers, they are not on the same level, so the here the plaintiffs [sic] allege a vertical level conspiracy between Rouse's and the developers." (*Id.* at 16). Plaintiffs' argument concerning their antitrust claims also generally tracks arguments made in opposition to the Rouse Defendants' Motion. (*Id.* at 16-20).

In reply, Berryland contends that most of the allegations in this action concern the Rouse Defendants' conduct, and "[t]here is nothing talismanic about repeatedly labeling [Berryland] a co-conspirator without substantive supporting allegations, and Plaintiffs cannot survive a motion to dismiss on allegations directed solely against another party." (Doc. 170 at 1-3). Regarding the antirust and civil conspiracy claims, Berryland contends that Plaintiffs wholly fail to address the arguments made in Berryland's Motion. (*Id.* at 1-2). Berryland also argues that, by acknowledging that Izzo's and Berryland are not competitors, Plaintiffs have foreclosed any argument **[*26]** that a horizontal conspiracy exists. (*Id.* at 4).

C. The Creekstone Defendants

The briefing on the Creekstone Defendants' Motion is extremely similar to that on Berryland's Motion. The Creekstone Defendants argue that the lease between Rouse's and Creekstone contains "standard" leasing provisions and exclusions that are in no way improper. (Doc. 140-1 at 2-3). The Creekstone Defendants note that most, if not all, of the leases they execute with tenants exclude some competitive retailers by name. (*Id.* at 3-4). The Creekstone Defendants further argue that: (1) Plaintiffs fail to allege in support of their tortious interference claims that the Creekstone Defendants acted with "actual malice"; (2) the Second Amended Complaint contains no specific factual allegations that any Defendants engaged in anticompetitive activities, whether separately or as a group; (3) Plaintiffs fail to "detail" any "unfair competition" claim against the Creekstone Defendants; and (4) absent an underlying tort, Plaintiffs' state law conspiracy claims fail. (*Id.* at 8-11). Plaintiffs' Opposition largely tracks their opposition to Berryland's Motion; they again note that they are not pursuing wrongful conversion, tortious interference, or product **[*27]** defamation claims against the Creekstone Defendants "except as co-conspirators[.]" (Doc. 165 at 4).

D. The Mosely Defendants

The briefing on the Mosely Defendants' Motion is extremely similar to that on Berryland's and the Creekstone Defendants' Motions. The Mosely Defendants argue that Plaintiffs do not make "a single direct factual allegation of misconduct against the Mosely Defendants . . . and there are few, if any allegations that would actually link the purported conduct of Rouse's to the Mosely Defendants." (Doc. 143-1 at 2). The Mosely Defendants next observe that a state law civil conspiracy claim requires both a showing of "intentional" or "willful" conduct and an underlying tort. (*Id.* at 3-4). The Mosely Defendants argue that "entering into a contract — even a contract with a restrictive covenant — is not an independent basis for a cause of action by a third-party [sic]." (*Id.* at 4). The Mosely Defendants further maintain that Plaintiffs' RICO claim, claims for product defamation and disparagement, claims for tortious interference, and claims for trademark infringement are based solely on conduct by the Rouse Defendants. (*Id.* at 5-7). The Mosely Defendants further argue that there are no plausible allegations **[*28]** that they possess monopoly power in the relevant market and that any claim against them must be a claim of a vertical restraint. (*Id.* at 8-9).). Plaintiffs' Opposition largely tracks their opposition to the Motions by Berryland and the Creekstone Defendants; yet again, they state that they are not pursuing wrongful conversion, tortious interference, or product defamation claims against the Mosely Defendants "except as co-conspirators[.]" (Doc. 163 at 5). In reply, the Mosely Defendants reiterate arguments previously made. (*See generally* Doc. 171).

IV. ANALYSIS

Briefing in this case has revealed that Defendants can be divided into two groups. One consists of Berryland, the Creekstone Defendants, and the Mosely Defendants (collectively the "Developer Defendants"), while the second consists of the Rouse Defendants. Where appropriate, the Court will address the parties' arguments as they apply against a particular set of Defendants. The Court turns first to Plaintiffs' antitrust claims.

A. Antitrust Claims

The Second Amended Complaint raises against all Defendants claims for "conspiracy under [the] Sherman Act and restraint of trade in [the] transportation market" and "violation of federal and Louisiana **[*29]** antitrust laws, unfair practices, and unfair competition[.]" (Doc. 138 at 9, 14 (capitalization altered)). Although this section of the Second Amended Complaint is structured somewhat confusingly and is sometimes repetitive, Plaintiffs purport to state claims under *15 U.S.C. §§ 1*, *2*, *13*, *35*, and *36*. (*Id.*).

1. *15 U.S.C. § 1*

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." To state a claim under this provision, a plaintiff must show that the defendants "(1) engaged in a conspiracy (2) that restrained trade (3) in a particular market." *Tunica Web Adver. v. Tunica Casino Operators Ass'n, 496 F.3d 403, 409 (5th Cir. 2007)*. A "necessary ingredient" of a *Section 1* conspiracy is "a showing of concerted action on the part of the defendants." *Id.* To establish concerted action, the plaintiff must show that the defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective. *See id.*

Section 1 conspiracies are generally analyzed under the "rule of reason," which requires a court to analyze whether the particular agreement at issue in fact unreasonably restrains competition. *Id. at 411-12*. That is, under this rule, an agreement **[*30]** is only unlawful if the plaintiff shows that it actually had an adverse effect on competition. *Id. at 412*. However, some agreements among firms that compete with each other at the same level of the market (*i.e.*, "horizontal" agreements) are viewed as *per se* anticompetitive and generally do not require proof that the agreement was actually anticompetitive. *See id.*

Plaintiffs' stance on whether this case involves horizontal agreements is unclear but, regardless, the only agreements alleged with any specificity in the Second Amended Complaint are between Rouse's and individual Developer Defendants, who are not competitors at the same level of any market alleged. Plaintiffs' remaining allegations concerning "the close relationships among Defendants," their "economic interests," and the "timing" of their actions are vague and therefore unavailing. Therefore, the only agreements alleged with the necessary particularity are not "horizontal" agreements within the meaning of ***antitrust law***, notwithstanding that the agreements may have had "horizontal effects" on Plaintiffs. *See Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730 n.4, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (stating that "a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal **[*31]** agreement" and noting that "all anticompetitive effects are by definition horizontal effects"); *see also Spectators' Commc'n Network Inc. v. Colonial Country Club, 253 F.3d 215, 224 (5th Cir. 2001)* (evidence of sponsors making separate agreements with PGA, but not among themselves, was "hub and spoke sort of proof" insufficient to establish a horizontal conspiracy). This case will be analyzed under the rule of reason, and Plaintiffs will ultimately be required to show an adverse effect on competition. *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412, 417 (5th Cir. 2010)*; *see also Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n, 751 F.3d 368, 374 (5th Cir. 2014)* (regardless of whether *per se* rule or rule of reason applies, "ultimate[] focus" of court's inquiry should be on the "competitive significance" of a restraint).

Here, the Court cannot conclude that Plaintiffs have adequately alleged that further proceedings will reveal meaningful evidence of anticompetitive effects. As Plaintiffs' multiple Oppositions make clear, their arguments of harm to competition are fundamentally that "customers cannot find Izzo's or Lit Pizza," depriving them of that option and causing them to pay higher prices. (Doc. 163 at 15; Doc. 164 at 18; Doc. 165 at 15; Doc. 168 at 17; *see also* Doc. 138 at 19 ("Consumers, who will all need food, have been deprived of food options as a direct result of Defendants' wrongful conduct.")). The Court doubts **[*32]** whether Plaintiffs' exclusion from a handful of developments would constitute a plausible showing of the alleged "destruction" of their own businesses within the relevant markets (alleged to include retail food sales throughout an area at least as large as Louisiana). (Doc. 138 at 11, 13-14). However, antitrust laws exist to protect competition, not individual competitors, and even the total elimination of a competitor does not make a restraint unreasonable as long as "sufficient competitors remain to ensure that competitive prices, quality, and service persist." *See Marucci Sports, L.L.C., 751 F.3d at 376-77*. Plaintiffs have made no non-conclusory, non-speculative allegations of anticompetitive effects within the relevant market, as Plaintiffs have chosen to broadly define it. Plaintiffs' claims under *Section 1* therefore fail.

2. *15 U.S.C. § 2*

Section 2 of the Sherman Act, *15 U.S.C. § 2*, prohibits monopolization, attempting to monopolize, or conspiring to monopolize "any part of the trade or commerce among the several States."

To prevail on a monopolization claim, a plaintiff must show that the defendant: (1) possesses monopoly power in the relevant market, and (2) willfully acquired or maintained that power. *Felder's Collision Parts, Inc. v. Gen. Motors Co., 960 F. Supp. 2d 617, 624 (M.D. La. 2013)*.

To prevail on an attempted monopolization claim, a plaintiff **[*33]** must show: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. *Retractable Techs., Inc. v. Becton Dickinson & Co., 842 F.3d 883, 891 (5th Cir. 2016)*, *cert. denied*, *137 S. Ct. 1349, 197 L. Ed. 2d 522 (2017)*.

Finally, to state a claim for conspiracy to monopolize, the plaintiff must allege: (1) specific intent to monopolize, (2) the existence of a combination or conspiracy to monopolize, (3) an overt act in furtherance of the combination or conspiracy, and (4) an effect upon a substantial portion of interstate commerce. *Felder's Collision Parts, Inc., 960 F. Supp. 2d at 624*.

In connection with monopolization claims, a plaintiff must provide an adequate, plausible definition of the relevant product and geographic markets. *See* *Apani Southwest, Inc. v. Coca-Cola Enters., 300 F.3d 620, 628 (5th Cir. 2002)*; *see also* *id. at 633* (favorably citing *Endsley v. City of Chicago, 230 F.3d 276, 282 (7th Cir. 2000)*, for proposition that, to survive a motion to dismiss, antitrust plaintiff must set forth facts sufficient to create an inference that defendant "had enough market power to create a monopoly"). Monopoly power under *Section 2* requires "something greater" than market power under *Section 1*. *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

None of the Developer Defendants are liable for monopolization or attempted monopolization of the retail food market, as there are no allegations that they participated in that market or came anywhere near achieving monopoly **[*34]** power in that market. Therefore, Plaintiffs' claims against them must be conspiracy claims. However, such conspiracy claims also require a showing of the "existence of a combination or conspiracy to monopolize" and that a defendant acted with "specific intent to monopolize." *Felder's Collision Parts, Inc., 960 F. Supp. 2d at 624*. There are simply no factual allegations that would permit an inference that any of the Developer Defendants' individual leases with Rouse's constituted the joining of such a conspiracy with such an intent. Restrictive covenants in shopping center leases do not violate antitrust laws in and of themselves, (*see, e.g.*, Doc. 143-1 at 10 (collecting cases)), and virtually no other actions taken by any of the Developer Defendants are identified with particularity in the Second Amended Complaint, much less any actions that evince an intent to monopolize. Indeed, Plaintiffs' own exhibits suggest that, after observing that Rouse's restrictive covenants prevented Izzo's from leasing a particular location, Mosely said that he would be "happy to put Izzo's in phase 3 across the street where the restrictions did not apply," (Doc. 138-6 at 1), while a Creekstone representative said that he would "send . . . info on Millerville" **[*35]** once it was "sketched," (Doc. 138-9 at 1). No claims under *Section 2* lie against the Developer Defendants.

With respect to the monopolization claims against the Rouse Defendants, there is similarly no non-conclusory allegation of specific intent or conspiracy to monopolize the retail food services market. Plaintiffs themselves suggest that Rouse's has "facilitated the placement of one of Izzo's competitors in the same location that Izzo's was supposed to be in[.]" (Doc. 164 at 6; *see also* Doc. 138-9 at 2 (email attached to Second Amended Complaint noting that there was a "Moe's" at Juban Crossing already)). There are simply no factual allegations that transform the Rouse Defendants' alleged ill will into an intent to monopolize the retail food market.

Moreover, with respect to the monopoly power required to undergird a claim of monopolization or attempted monopolization, Plaintiffs' Opposition confirms that its allegations of monopoly power are based on Rouse's position as the "largest grocer in Louisiana." (Doc. 164 at 18). As the Eastern District of Louisiana has set forth at some length:

> A nonconclusory allegation that a defendant holds a predominant share of the relevant market will usually **[*36]** satisfy the monopoly power element of a monopolization claim. [*United States v. Grinnell, 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*]; *U.S. Anchor Mfg. Inc. v. Rule Indus., Inc., 7 F.3d 986, 999 (11th Cir. 1993)* (principal measure of monopoly power is market share). The precise market share a defendant must control before it has monopoly power remains undefined, but, the case law supports the conclusion that a market share of more than 70 percent is generally sufficient to support an inference of monopoly power. *See, e.g.,* *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (factfinder can infer monopoly power from an 80 percent market share); *Morgenstern v. Wilson, 29 F.3d 1291, 1296 n. 3 (8th Cir. 1994)* (share of more than 80 percent sufficient);

> *Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 981 (5th Cir. 1977)* (71-76 percent share sufficient); *Int'l Audiotext Network v. Am. Tel. & Tel. Co., 893 F.Supp. 1207, 1217-18 (S.D.N.Y. 1994)* (70 percent market share generally adequate at the pleading stage); *see also* ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments 230-31 (7th ed. 2012) (collecting cases).
>
> In contrast, courts almost never find monopoly power when market share is less than about 50 percent. *American Telephone & Telegraph Co. v. Delta Commc'ns Corp., 408 F. Supp. 1075, 1107 (S.D.Miss. 1976)*, *aff'd per curiam*, *579 F.2d 972 (5th Cir. 1978)* (adopting district court opinion), *modified on other grounds*, *590 F.2d 100 (5th Cir.1979)* (41% share of local prime time television market insufficient to subject television network to *Section 2* monopolization scrutiny); *Bailey v. Allgas, Inc., 284 F.3d 1237, 1250 (11th Cir. 2002)* ("market share at or less than 50% is inadequate as a matter of law to constitute monopoly power"); *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir.1995)* ("Fifty percent is below any accepted benchmark for inferring monopoly power from **[*37]** market share"). The Fifth Circuit adheres to Judge Learned Hand's widely accepted rule of thumb that "while a 90 percent market share definitely is enough to constitute monopolization, 'it is doubtful whether 60 or 64 percent would be enough; and certainly, 33 percent is not.' " *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 489 (5th Cir. 1984)* (citing *United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)*, *approved and adopted, American Tobacco Co. v. United States, 328 U.S. 781, 811-14, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946))*.
> Leading scholars concur that "it would be rare indeed to find that a firm with half of a market could individually control price over any significant period." 3 Areeda & Hovenkamp ¶ 532c, at 250 (2007). The Department of Justice agrees that "as a practical matter, a market share of greater than fifty percent has been necessary for courts to find the existence of monopoly power." Department of Justice Guide/Report, COMPETITION AND MONOPOLY: SINGLE—FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 2008 WL 4606679 (D.O.J.), 24 (noting that the DOJ is not aware of any court that has found that a defendant possessed monopoly power when its market share was less than fifty percent).

In re Pool Prods. Distrib. Mkt. Antitrust Litig., 940 F. Supp. 2d 367, 382-83 (E.D. La. 2013) (Vance, J.) (complaint inadequate where it contained "no specific allegations of a dominant market share and no allegations that allow such an inference").

The Second Amended Complaint's allegations of monopoly power are inadequate to support a claim of monopolization or attempted monopolization. Plaintiffs variously allege that Rouse's is "the **[*38]** largest grocer in Louisiana," with "over 50 stores," (Doc. 138 at 3), that Rouse's market share "exceeds any other grocer in Louisiana," (*id.* at 10), that Rouse's is "one of the largest grocers in Louisiana," (*id.* at 15), and that the "Market Area, more so in Louisiana, are [sic] highly concentrated by [Rouse's]," which is "the primary grocer in Louisiana," (*id.* at 16). Plaintiffs' Opposition reiterates that Rouse's has monopoly power as "the largest grocery store chain in Louisiana[,] . . .possess[ing] the largest market share among grocers, second only to Walmart, (which sells much more than groceries)." (Doc. 164 at 18). The Second Amended Complaint also focuses on certain additional features of the "grocery" market. (*See, e.g.*, Doc. 138 at 17 (because demand for retail food services is inelastic, "it is easier for grocers and wholesalers to set prices collusively")).

Plaintiffs' allegations of market share are vague and often appear inconsistent. Moreover, the most specific numerical figure attached to Plaintiffs' allegations, *i.e.*, that Rouse's operates "over 50 stores," (Doc. 138 at 3), falls well short of plausibly suggesting monopoly power in a geographic market alleged to span at least the entire state **[*39]** of Louisiana.

Plaintiffs' focus on "grocers" as a yardstick for measuring Rouse's market power is also problematic. That is, the relevant product market ("retail food sales," including both grocers and restaurants and focusing in this case particularly on pre-cooked, ready-to-eat food, (*see* Doc. 138 at 14-15)), is defined to include Izzo's, which is a restaurant, not a grocer. Using "grocers" as the measure of monopoly power within this market omits restaurants like Izzo's and likely includes grocery stores lacking the "deli/food court" section that Rouse's has. (*Id.* at 15). As a result, Plaintiffs' allegations of market share, and accordingly of monopoly power or a "dangerous probability" of achieving monopoly power, are inadequate. *See* *Apani Sw., Inc., 300 F.3d at 628, 633*. Plaintiffs' *Section 2* claims fail.

3. *15 U.S.C. §§ 13*, *35*, and *36*

15 U.S.C. § 13(a), the only subprovision of *15 U.S.C. § 13* that might arguably apply in this case, prohibits any person engaged in commerce from discriminating in price "between different purchasers of commodities of like grade and quality" where the effect of that discrimination is to substantially lessen competition or tend to create a monopoly. The Second Amended Complaint does not allege price discrimination or any of the elements necessary to support **[*40]** such a claim. (*See* Doc. 139-1 at 15). To the extent that such a claim is made, it must be dismissed as inadequately pled.

15 U.S.C. §§ 35 and *36* concern the availability of damages and fees available from local government entities, and those acting at their direction, in actions under the *Clayton Act*. They do not give rise to a cause of action.

4. "Unfair Competition"

The section of the Second Amended Complaint concerning Plaintiffs' antitrust allegations ends with a section entitled "unfair competition," which alleges that, by engaging in acts described earlier in the Second Amended Complaint, "Defendants have engaged in unfair competition in violation of the Sherman Act, Clayton Act, RICO, civil conspiracies, theft of trade secrets and infringement of trademarks." (Doc. 138 at 19).

The underlying claims discussed in this "unfair competition" section have been addressed or will be addressed elsewhere in this Ruling and Order, but Plaintiffs provide no legal basis for a standalone "unfair competition" claim and do not identify with particularity the facts upon which it is based. This claim adds nothing to Plaintiffs' lawsuit and will accordingly be dismissed.

5. State Law Antitrust Claims

Louisiana's antitrust **[*41]** laws are "virtually identical" to *Sections 1* and *2* of the Sherman Act, and federal analysis of the Sherman Act is "persuasive, although not controlling." *HPC Biologicals, Inc. v. UnitedHealthcare of Louisiana, Inc., 2016-0585 (La. App. 1 Cir. 5/26/16), 194 So. 3d 784, 792-93*, *reh'g denied* (June 21, 2016). Plaintiffs' federal antitrust claims fail, and neither the Court nor any party has identified any basis upon which their state law antitrust claims should be resolved differently. Plaintiffs' state law antitrust claims therefore fail.

B. Civil Conspiracy Claims

The Court next considers Plaintiffs' state law conspiracy claims. Notably, according to the Second Amended Complaint as clarified by Plaintiffs' Oppositions, Plaintiffs' only remaining claims against the Developer Defendants are state law conspiracy claims. (Doc. 138 at 6-9; Doc. 138 at 6-9; Doc. 168 at 6; Doc. 165 at 4; Doc. 163 at 5).

Louisiana Civil Code article 2324 provides that anyone who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act. If a conspiracy is conceived and executed and injury results, the injured person has a cause of action against all of the conspirators, who may be held civilly liable for damage to a third party resulting therefrom. *Butz v. Lynch, 97-2166 (La. App. 1 Cir. 4/8/98), 710 So. 2d 1171, 1174*, *writ denied*, *98-1247 (La. 6/19/98), 721 So. 2d 473*.

Article 2324 does not **[*42]** itself impose liability for a conspiracy: the "actionable element" is not the conspiracy, but rather the tort which the conspirators agree to perpetrate and "actually commit in whole or in part." *Id.* To demonstrate an Article 2324 conspiracy, a plaintiff must ultimately "provide evidence of the requisite agreement between the parties"; that is, the plaintiff must "establish a meeting of the minds or a collusion between the parties for the purpose of committing wrongdoing." *Thomas v. N. 40 Land Dev., Inc., 2004-0610 (La. App. 4 Cir. 1/26/05), 894 So. 2d 1160, 1174*. Though a conspiracy may be inferred from knowledge of the impropriety of actions taken by a co-conspirator, the plaintiff must prove "an unlawful act and assistance or encouragement that amounts to a conspiracy," and the assistance or encouragement must be "of such quality and character that a jury would be permitted to infer from it an underlying agreement and act[.]" *Id.* A conspiracy claim requires more than negligence: it requires either intentional or willful conduct. *Id. at 1177-78*.

The only specific allegations of agreement in this case concern lease agreements between Rouse's and the Developer Defendants. However, as each of the Developer Defendants correctly argue, restrictive covenants between a lessor and lessee are **[*43]** not themselves unlawful, tortious, or violative of ***antitrust law***. (*See* Doc. 139-1 at 3 n.3; Doc. 140-1 at 2-3; Doc. 143-1 at 10 (collecting cases)). *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC* is not to the contrary, as that case considered whether, under Louisiana law, a restrictive covenant "ran with the land" even though it was not expressed in the land's "title documents," not the general appropriateness of such restrictions. *746 F.3d 1008, 1030-31 (11th Cir. 2014)*. Therefore, the parties' mere entry into leases containing restrictive covenants provides inadequate support for claims of a tortious conspiracy and does not constitute a sufficient "step" toward the completion of an underlying tort to support a plausible claim under Article 2324. Plaintiffs' remaining allegations of conspiracy are conclusory and do not rise to the level of "assistance or encouragement that amounts to a conspiracy[.]" *Thomas, 894 So. 2d at 1174*. Accordingly, Plaintiffs' state law conspiracy claims fail. The Court now turns to the remaining claims against the Rouse Defendants.

C. Product Defamation and Disparagement

In this case, this Court previously noted that, under Louisiana law, a defamation claim requires: "(1) a false and defamatory statement concerning another; **[*44]** (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher and (4) resulting injury." *K&F Rest. Holdings, Ltd. v. Rouse, 2017 U.S. Dist. LEXIS 14601, 2017 WL 465470, at *5 (M.D. La. Feb. 2, 2017)* (citing *Fitzgerald v. Tucker, 98-2313 (La. 6/29/99); 737 So.2d 706, 715)*. Opinions are generally not actionable as defamation. *See* *Thompson v. Lee, 38,930 (La. App. 2d Cir. 2004), 888 So. 2d 300, 304* (press release equating a doctor's behavior to "that found in the Soviet Union or third world countries" was non-actionable opinion). More specifically, an expression of opinion is actionable "only if it implies the existence of underlying facts ascertainable by a reasonable person with some degree of certainty, and the implied factual assertions are false, defamatory, made with actual malice, and concern another." *Fitzgerald v. Tucker, 98-2313 (La. 6/29/99), 737 So. 2d 706, 717*. Similarly, to prove a product disparagement claim, a plaintiff must plead "publication, with malice, of false allegations concerning the property or product, and the causing of pecuniary harm." *K&F Rest. Holdings, Ltd., 2017 U.S. Dist. LEXIS 14601, 2017 WL 465470, at *5* (citing *Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1501 (5th Cir. 1990))*.

In Louisiana, "delictual actions," including those raising defamation claims, are subject to a prescriptive period of one year that begins running when injury is sustained. *See* *Louisiana Civil Code article 3492*; *Alexander v. Times-Picayune L.L.C., 2016-1134 (La. App. 4 Cir. 5/31/17), 221 So. 3d 198, 203*, *reh'g denied* (June 27, 2017), *writ denied*, *2017-1322 (La. 11/6/17), 229 So. 3d 469*. The burden of proving prescription generally lies with the party asserting prescription, but, when a claim has prescribed on its face, the **[*45]** burden shifts to the plaintiff to prove that his claim has not prescribed. *Alexander, 221 So. 3d at 203*.

Plaintiffs allege that Rouse's told the Developer Defendants that Izzo's produced substandard product and was "litigious" or "extremely litigious." (Doc. 138 at 5, 7). Preliminarily, these statements are expressions of opinion in vague and general terms that would not permit a reasonable person to ascertain the existence of underlying facts "with some degree of certainty." *Fitzgerald, 737 So. 2d at 717*. Plaintiffs' own exhibits suggest that Izzo's exclusion from the Mosely Defendants' development did not result from such statements or the Mosely Defendants' understanding of any underlying facts derived from them. (*See* Doc. 138-6 at 1 (Fernandez's affidavit stating that, during a March 2016 meeting, Russell Mosely expressed regret that he could not include Izzo's in a development because of Rouse's demand for a restrictive covenant, but he did not "know the reason" for the restriction and repeatedly asked Fernandez "what happened" between Rouse's and Izzo's)).

Moreover, despite Plaintiffs' assertion that these false statements were made "for certain" to each of the Developer Defendants, (Doc. 138 at 8), the only instance of defamation or **[*46]** disparagement alleged with any particularity in the Second Amended Complaint is the statement by Rouse, Jr. to Creekstone in 2012, (Doc. 138 at 5), which, in or around June 2013, allegedly resulted in Creekstone and Rouse's signing a lease agreement excluding Plaintiffs, (Doc. 138-5 at 8). This lawsuit was filed in April 2016, (*see* Doc. 1-1), far more than a year after the harm arising from this statement occurred. Plaintiffs' defamation and disparagement claims arising from these facts are therefore prescribed on their face, and Plaintiffs have not provided facts or argument meaningfully undermining this conclusion.[2] Therefore, these claims fail.

D. Tortious Interference with Business Relations[3]

To prove tortious interference with business relations, a plaintiff must show that the defendant improperly and maliciously influenced others not to deal with the plaintiff. *See* *Muslow v. A.G. Edwards & Sons, Inc., 18708-Muslow (La. App. 2d Cir. 6/10/87), 509 So. 2d 1012, 1020*, *writ denied*, *512 So. 2d 1183 (La. 1987)*. Louisiana jurisprudence views this cause of action with "disfavor" and has limited it by requiring a plaintiff to show that the defendant acted with actual malice. *Brown v. Romero, 05-1016 (La. App. 3d Cir. 2/1/06), 922 So.2d 742, 747*, *writ denied*, *06-0480 (La. 5/5/06), 927 So.2d 315*; *JCD Marketing, Co. v. Bass Hotels and Resorts, Inc., 01-1096 (La. App. 4th Cir. 3/6/02), 812 So.2d 834, 841*; *see also* George Denegre, Jr., *et al., Tortious Interference* ***[*47]*** *and Unfair Trade Claims: Louisiana's Elusive Remedies for Business Interference*, *45 Loy. L. Rev. 395, 401 (1999)* ("[T]here appear to be no recorded cases in which anyone actually has been held liable for the tort [of tortious interference with business relations]."). Additionally, it is not enough to allege that a defendant's actions affected plaintiff's business interests; the plaintiff must allege that the defendant actually prevented the plaintiff from dealing with a third party. *Bogues v. Louisiana Energy Consultants, Inc., 46,434 (La. App. 2 Cir. 8/10/11), 71 So. 3d 1128, 1135* (claim failed for, *inter alia*, failure to describe "any conversation between a particular plaintiff/lessor and any particular entity with whom LEC was attempting to confect a business relationship").

According to the Second Amended Complaint and attached exhibits, in 2011 or 2012, Izzo's signed a letter of intent to lease space at Juban Crossing but Rouse's demanded that Izzo's be "kept out," claiming in 2012 that Izzo's is "litigious" and produces a "substandard product." (Doc. 138 at 4-5; Doc. 138-5 at 2). Plaintiffs' tortious interference claims appear to be based on this incident as well as unspecified, undescribed incidents involving other developers. (*Id.* at 8-9; *see also* Doc. 164 at 5-7 ("Likewise, Rouse's lied and coerced other developers **[*48]** to exclude Izzo's from their developments. The numerous contracts, leases and deeds entered into by Rouse's all include a provision to exclude Izzo's. . . . Rouse's has interfered with business relations with Juban, Keller, Mosley, Long Farms,

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[2] Plaintiffs attach as an Exhibit to their Oppositions an April 2016 letter from the law firm representing the Rouse Defendants. (*See, e.g.*, Doc. 164-1). The letter states that Rouse's follows a "justifiable policy to locate only in shopping centers where it will not be at risk of baseless allegations from competing businesses." (*Id.*). The Court declines to consider this letter, which was not referenced in or attached to the Second Amended Complaint. In any event, the letter does not suggest that Rouse's made statements concerning this "policy" to any Developer Defendants during the events underlying this lawsuit. Plaintiffs also attempted to file a sur-reply arguing, in part, that all of their claims were "filed timely" and the Rouse Defendants failed to "mention or disprove . . . how these claims are continuing torts and have not prescribed." (Doc. 174-1 at 1). The Court denied leave to file a sur-reply, (Doc. 176), but it notes that the proposed sur-reply argued that the alleged torts were continuing "as you can purchase a burrito from Rouse's," which does not establish that individual instances of alleged defamation or disparagement constitute a continuing tort. *See, e.g., Scott v. Zaheri, 2014-0726 (La. App. 4 Cir. 12/3/14), 157 So. 3d 779, 787* (publication of four anonymous letters constituted four "separate and distinct acts" of defamation, with particular damages flowing from each act, and did not "rise to the level of a continuing tort").

[3] Plaintiffs' Opposition characterizes this claim as "Tortious Interference With a Contract." (Doc. 164 at 5). The Second Amended Complaint, however, describes how the Rouse Defendants "tortiously interfered and continue to tortiously interfere with lawful business relations." (Doc. 138 at 8).

Victory Berryland, and others. Furthermore, other developers have heard of the restrictions that Rouse's has imposed on all of its agreements to exclude Izzo's and made it more difficult for Izzo's to find developers willing to rent space to Izzo's, despite the fact that Izzo's has always been a good tenant and provided an excellent product.")). Plaintiffs' Opposition also argues that Rouse's "interfered with the contract that Izzo's had with its employee, Patrick Dartez[.]" (*Id.* at 5).

Plaintiffs' tortious interference claims fail. The only such claims pled with any specificity and with respect to a particular business relationship or negotiation (rather than Plaintiffs' general business interests) are their claims concerning Dartez and Juban Crossing.[4] However, these events occurred in or before 2012, far more than a year before this action was filed in April 2016. The Rouse Defendants accordingly raise a prescription defense. (Doc. 148-1 at 7-8). Plaintiffs' **[*49]** Opposition does not argue that the prescriptive period was suspended or started later than these dates; rather, it obliquely suggests that the Rouse Defendants' torts are ongoing. (*See* Doc. 164 at 5-7). However, Plaintiffs' allegations of ongoing harm are conclusory and appear to rely on injury to Plaintiffs' general business interests rather than particular business relations with a particular third party. Particularly given the "disfavored" status of tortious interference claims, the Court cannot find such a claim adequately pled.

E. Conversion

Plaintiffs' Opposition purports to address a "wrongful conversion" claim. (Doc. 164 at 15). As the Rouse Defendants correctly observe, however, no conversion claim is raised in the Second Amended Complaint. (Doc. 148-1 at 4 n.16; Doc. 172 at 2-3; *see generally* Doc. 138). The Court accordingly declines to consider any such claim.

F. Trade Name Infringement

The primary issues in a trade name infringement case are (1) whether the party seeking relief has a protectable proprietary right in the name it seeks to exclude others from using, and (2) if so, whether there has been an infringement of that right. *Gulf Coast Bank v. Gulf Coast Bank & Tr. Co., 94-2203 (La. 4/10/95), 652 So. 2d 1306, 1309*.

The Second Amended Complaint contends **[*50]** that Rouse's use of "build your own" in connection with its burrito bars infringes on Plaintiffs' trade name of "roll your own." (Doc. 138 at 9). The previously-assigned district judge ruled that a prior iteration of the Complaint adequately stated a claim concerning the use of "build your own," "declin[ing] to make a determination on the inherent or acquired distinctiveness of ['roll your own']" and finding adequate the Complaint's allegations that Rouse's used "build your own" to cause confusion or mistake and deceive consumers about the origin of "such goods or services." (Doc. 31 at 11-12).

The Rouse Defendants invite the Court to reconsider this ruling, arguing that the Court is generally free to reconsider prior rulings. (Doc. 172 at 1 n.1); *see also* *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc., 677 F.3d 720, 727 (5th Cir. 2012)* (under law of the case doctrine, courts show "deference to decisions already made" but are free to reconsider and reverse interlocutory orders for "any reason [they] deem[] sufficient"; when a successor judge replaces another judge, the successor judge has the same discretion to reconsider the first judge's order). The substance of the Rouse Defendants' argument is that it is implausible that a customer would enter a Rouse's burrito **[*51]** bar and be confused about the source of the burritos, and "build your own" (the term actually used by Rouse's) is a generic, descriptive term not amenable to trademark or trade name protection regardless of how used. (Doc. 148-1 at 8-10); *see also* *Gulf Coast Bank, 652 So. 2d at 1313* ("A generic term is the name of a particular genus or class of which an individual article, service or business is but a member.").

In *Gulf Coast Bank*, the Supreme Court of Louisiana opined that a generic term is not given trademark or trade name protection. *652 So. 2d at 1313*. However, a "descriptive term," which "identifies a characteristic or quality of

[4] The Court reiterates that, as discussed *supra*, a lease containing a restrictive covenant is not inherently tortious.

an article, service or business" and is not ordinarily protectable, may become protected "if it acquires a secondary meaning." *Id.* Among those generic terms listed as examples in the Restatement (Third) of Unfair Competition are "camera," "computer programming," "bank," "light" when used to describe beer, and "diet" when used to describe cola. *Restatement (Third) of Unfair Competition § 15* (1995); *see also* *CG Roxane LLC v. Fiji Water Co. LLC, 569 F. Supp. 2d 1019, 1026 (N.D. Cal. 2008)* (ruling that "bottled at the source" was generic when referring to bottled water because the primary importance of the "mark" was to describe "the product itself" rather than the company that bottled it; comparing "bottled at the source" to "disinfectable **[*52]** nail files," "light beer," and "brick oven pizza"); 2 McCarthy on Trademarks and Unfair Competition § 12:20 (5th ed.) ("The distinction between highly descriptive terms and generic names is difficult to state in the abstract. The best that can be done conceptually is to observe that descriptive terms describe a thing, while generic terms name the thing. But in applying this to actual words, one quickly realizes that there is only a fine line between describing and naming." (footnote omitted)).

The Court agrees with the Rouse Defendants. While the Court recognizes the importance of showing proper deference to the decision of the previously-assigned district judge, the Fifth Circuit has emphatically stated that a successor judge remains entitled to revise an interlocutory order for any "sufficient" reason. *Stoffels, 677 F.3d at 727*. The Court does not disagree with the prior ruling that "roll your own," the term that Plaintiffs seek to protect in this action, may be descriptive and therefore protected under certain circumstances. However, Plaintiffs must also make sufficient allegations of the infringement of their protected rights. *Gulf Coast Bank, 652 So. 2d at 1309*. Plaintiffs' allegations of infringement are that Rouse's use of "build your own" and **[*53]** Izzo's "proprietary information is intended to and is likely to cause confusion or mistake and is intended to and has deceived consumers as to the source of origin of such goods or services." (Doc. 138 at 9). Under *Rule 12(b)(6)*, such an "unadorned, the-defendant-unlawfully-harmed-me accusation" and "formulaic recitation of the elements of a cause of action" will not do. *Iqbal, 556 U.S. at 678*. As the Rouse Defendants persuasively argue, their infringement of any rights in "roll your own" is alleged to arise from their use of a common, generic phrase ("build your own") describing the product itself and distinct from the mark to be protected. *See also* *Urgent Care Inc. v. S. Mississippi Urgent Care Inc., 289 F. App'x 741, 742, 744-45 (5th Cir. 2008)* (reversing grant of preliminary injunctive relief that prevented defendants from using the mark "urgent care"; although "UrgiCare" mark was protectable, "urgent care" was a generic term, and plaintiffs could not "prevent use of the term by registering a similar-sounding, but differently spelled mark"). Thus, even assuming that "roll your own" may be entitled to protection, Plaintiffs have failed to adequately allege that the Rouse Defendants' use of the generic phrase "build your own" is infringing. Plaintiffs' claims of trade name infringement must be dismissed.

G. Civil [*54] RICO

RICO makes it illegal for any person "employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *18 U.S.C. § 1962(c)*. RICO further prohibits conspiring to violate the aforementioned provision. *18 U.S.C. § 1962(d)*.

Civil RICO claims have three common elements: "'(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise.'" *Snow Ingredients, Inc. v. SnoWizard, Inc., 833 F.3d 512, 523-24 (5th Cir. 2016)* (quoting *Abraham v. Singh, 480 F.3d 351, 355 (5th Cir. 2007))*. "'A pattern of racketeering activity consists of two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity.'" *Id. at 524* (quoting *St. Germain v. Howard, 556 F.3d 261, 263 (5th Cir. 2009))*. The predicate criminal acts can be violations of either state or federal law. *Id.* (citing *St. Germain, 556 F.3d at 263*).

"'Predicate acts are "related" if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" *Bordelon v. Wells Fargo Fin. Louisiana, LLC, 2018 U.S. Dist. LEXIS 95065, 2018 WL 2717521, at *2 (E.D. La. June 6, 2018)* (citing *In re Burzynski, 989 F.2d 733, 742 (5th Cir. 1993))*. "To establish continuity, plaintiffs must prove 'continuity **[*55]** of racketeering activity, or its threat.'" *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer, 90*

F.3d 118, 122 (5th Cir. 1996) (quoting H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 241, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)). "This may be shown by either a closed period of repeated conduct, or an open-ended period of conduct that 'by its nature projects into the future with a threat of repetition.'" *Id.* (quoting H.J. Inc., 492 U.S. at 242). Where alleged RICO predicate acts are "part and parcel" of a single, otherwise lawful transaction, a "pattern of racketeering activity" has not been shown. Castrillo v. Am. Home Mortg. Servicing, Inc., 670 F. Supp. 2d 516, 530 (E.D. La. 2009) (Vance, J.) (citing Word of Faith, 90 F.3d at 123) (further ruling that it was immaterial to analyzing continuity that, had the defendants successfully "submitted their forgery," the "fraud would have continued until the note was satisfied"; RICO concerns long-term criminal conduct, not the long-term consequences of isolated or sporadic conduct).

The core of a civil RICO conspiracy claim under 18 U.S.C. § 1962(d) is "an agreement to commit predicate acts," and a complaint alleging such a claim, "at the very least, must allege specifically such an agreement." Crowe v. Henry, 43 F.3d 198, 206 (5th Cir. 1995) (affirming dismissal of civil RICO conspiracy claims where plaintiff had only conclusorily alleged that defendants had "conspired"); *see also* Snow Ingredients, Inc., 833 F.3d at 526 (affirming dismissal of civil RICO conspiracy claims where complaint alleged that attorney defendants should have known that their conduct **[*56]** was unlawful but failed to allege agreement between them).

The Second Amended Complaint raises a civil RICO conspiracy claim against Rouse, Jr. via Rouse's, which Plaintiffs claim is a RICO "enterprise." (Doc. 138 at 6). Specifically, Plaintiffs contend that Rouse, Jr. "agreed" to violate RICO on three separate occasions, in violation of 18 U.S.C. § 1962(d), as part of three separate "schemes": the scheme "to bribe an Izzo's employee to steal its recipe book," the scheme "to exclude Izzo's from the Juban Crossing shopping center," and the scheme to illegally use Izzo's trade secrets, *i.e.*, its recipes. (*Id.* at 4-6). The Rouse Defendants argue that Plaintiffs have failed to adequately allege a pattern of predicate acts or a criminal enterprise, the "continuing threat" posed by that enterprise, or the identity or roles of other participants in the enterprise. (Doc. 148-1 at 11-12).

Plaintiffs' RICO claim fails. Most significantly, the claim is expressly styled only as a conspiracy claim, but the Second Amended Complaint does not adequately allege the identities of Rouse, Jr.'s co-conspirators, the content or nature of the agreement they entered into, or the circumstances under which they entered into it. Crowe, 43 F.3d at 206; Snow Ingredients, Inc., 833 F.3d at 526. Plaintiffs' **[*57]** Opposition re-iterates that its RICO claim is brought under "§ 1962(d), the conspiracy provision," and it argues that "Rouse[,] Jr. conspired with his store managers to steal the burrito recipes." (Doc. 164 at 13 n.10). However, although the Second Amended Complaint refers to unnamed "employee conspirators," the most specific allegation concerning them is that Rouse, Jr. "directed some of his store managers" in Lafayette to approach Dartez with an offer to defect. (Doc. 138 at 3). This falls short of specifically and plausibly alleging agreement supporting a RICO conspiracy. Moreover, Plaintiffs' allegations of a conspiracy (between Rouse, Jr. and his managers or Dartez) are limited to a single alleged crime in 2011 or 2012; there is no meaningful suggestion that the managers or Dartez conspired "to violate any of the provisions of [18 U.S.C. § 1962(c)]," by "conduct[ing] or participat[ing], directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity." Crowe, 43 F.3d at 206; *see also* Tel-Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1140-41 (5th Cir. 1992) (complaint deficient for failure to allege facts "implying any agreement involving each of the Defendants to commit at least two predicate acts"; citing favorably similar standards of First, Second, **[*58]** and Third Circuits); Ellis v. Warner, 2017 U.S. Dist. LEXIS 22109, 2017 WL 634287, at *12 (S.D. Fla. Feb. 16, 2017) (in Eleventh Circuit, RICO conspiracy may be proved by showing defendant's agreement as to an "overall objective" or to commit two predicate acts). Especially damning is the lack of specific allegations that anyone other than Rouse, Jr. participated in or agreed to participate in the only "continuous" RICO violation alleged, *i.e.*, the continuing possession and use of Izzo's trade secrets. *See* Malvino v. Delluniversita, 840 F.3d 223, 231 (5th Cir. 2016) ("continuity" requirement keeps civil RICO "focused on the long term criminal conduct Congress intended it to address, and prevent RICO from becoming a surrogate for garden-variety fraud actions properly brought under state law" (citations and quotation marks omitted)). Moreover, as discussed *supra*, there are no non-conclusory allegations that any of the Developer Defendants conspired with any of the Rouse Defendants to engage in unlawful activity, much less an ongoing pattern of unlawful activity.

Some of the alleged predicate offenses are also insufficiently pled. For example, Plaintiffs contends that the circumstances of the "bribe" violate the Travel Act, *18 U.S.C. § 1952*, but the Rouse Defendants correctly observe that this crime requires travel in interstate or foreign commerce or **[*59]** the use of the mail or a "facility" in interstate commerce. This element is generally not difficult to prove. *See United States v. Rodriguez-Cruz, 681 F. App'x 312, 313 (5th Cir. 2017)* (cell phones are "facilities of interstate commerce," and even wholly intrastate use of a cell phone can satisfy jurisdictional "commerce" element of federal crimes); *BCCI Holdings (Luxembourg) Societe Anonyme v. Khalil, 56 F. Supp. 2d 14, 53 (D.D.C. 1999)*, *aff'd in part, rev'd in part on other grounds and remanded sub nom. BCCI Holdings (Luxembourg), S.A. v. Khalil, 214 F.3d 168, 341 U.S. App. D.C. 408 (D.C. Cir. 2000)* ("use of a facility in commerce" includes interstate wire transfers and use of mail, telephone, or telegrapy). However, Plaintiffs do not allege the use of such a facility in connection with this offense. Particularly, Plaintiffs appear to incorrectly believe that it suffices to allege that Rouse's purchases supplies from out of state, (Doc. 138 at 4; Doc. 164 at 9), without alleging that travel, mail, or a facility of interstate commerce was used in connection with this alleged crime. *Cf. United States v. Marek, 238 F.3d 310, 320 (5th Cir. 2001)* (to satisfy "commerce" element, "the *facility*, not its use, is what must be 'in interstate or foreign commerce.'").

Similarly, even if Rouse, Jr. claimed over interstate wires that Izzo's made "substandard" product and was "litigious," and even if one or more of these statements can be considered "false," *see supra*, the contours of any broader "scheme **[*60]** or artifice to defraud" in connection with Juban Crossing are only vaguely alleged. *See United States v. Brown, 459 F.3d 509, 518 (5th Cir. 2006)* (elements of wire fraud are "(1) the formation of a scheme or artifice to defraud, and (2) use of the wires in furtherance of the scheme"); *United States v. Bajoghli, 785 F.3d 957, 962-63 (4th Cir. 2015)* ("While fraud can be committed simply by engaging in an isolated transaction, a *scheme to defraud* requires a plot, plan, or arrangement that is executed by a fraudulent transaction. *See Black's Law Dictionary* 1546 (10th ed. 2014) (defining "scheme" as "[a] systemic plan; a connected or orderly arrangement"; or "[a]n artful plot or plan, [usually] to deceive others")." (emphasis in original)); *see also United States v. Locke, 643 F.3d 235, 247 (7th Cir. 2011)* ("We have previously noted that the crime comprehended by the mail and wire fraud statutes is the scheme to defraud, not just the isolated iterations of wire transmissions or mailings[.]").

In short, Plaintiffs' RICO conspiracy claim lacks sufficient non-conclusory allegations in support of the alleged agreements underlying it, of more than one of the continuing offenses that it is RICO's purpose to protect against, and indeed of any offense beyond Rouse's alleged continuing possession of trade secrets resulting from the theft of a recipe book. *See United States v. Case, 309 F. App'x 883, 886 & n.2 (5th Cir. 2009)* (suggesting **[*61]** that knowing possession of trade secrets without authorization and with the "inten[t] to convert" under *18 U.S.C. § 1832(a)* is a continuing offense). The civil RICO claim therefore fails.

H. Leave to Amend

"[A] court ordinarily should not dismiss the complaint except after affording every opportunity to the plaintiff to state a claim upon which relief might be granted." *Byrd v. Bates, 220 F.2d 480, 482 (5th Cir. 1955)*. The Fifth Circuit has further stated:

> In view of the consequences of dismissal on the complaint alone, and the pull to decide cases on the merits rather than on the sufficiency of pleadings, district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal.

Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002). Relying on *Great Plains* and other cases from this circuit, one district court in Texas articulated the standard as follows:

> When a complaint fails to state a claim, the court should generally give the plaintiff at least one chance to amend before dismissing the action with prejudice unless it is clear that the defects in the complaint are incurable. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002)*; *see also United States ex rel. Adrian v. Regents of the Univ. of Cal., 363 F.3d 398, 403 (5th Cir. 2004)* **[*62]**

> ("Leave to amend should be freely given, and outright refusal to grant leave to amend without a justification . . . is considered an abuse of discretion.") (internal citation omitted). However, a court may deny leave to amend a complaint if the court determines that "the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face." 6 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1487 (2d ed.1990) (footnote omitted); *see also* Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States of Am. Co., 195 F.3d 765, 771 (5th Cir. 1999) ("A district court acts within its discretion when dismissing a motion to amend that is frivolous or futile.") (footnote omitted).

Tow v. Amegy Bank N.A., 498 B.R. 757, 765 (S.D. Tex. 2013). Finally, one leading treatise explains:

> As [] numerous case[s] . . . make clear, dismissal under Rule 12(b)(6) generally is not immediately final or on the merits because the district court normally will give the plaintiff leave to file an amended complaint to see if the shortcomings of the original document can be corrected. The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that the plaintiff be given every opportunity to cure a formal defect in the pleading. This is true even when the district judge doubts that the plaintiff **[*63]** will be able to overcome the shortcomings in the initial pleading. Thus, the cases make it clear that leave to amend the complaint should be refused only if it appears to a certainty that the plaintiff cannot state a claim. A district court's refusal to allow leave to amend is reviewed for abuse of discretion by the court of appeals. A wise judicial practice (and one that is commonly followed) would be to allow at least one amendment regardless of how unpromising the initial pleading appears because except in unusual circumstances it is unlikely that the district court will be able to determine conclusively on the face of a defective pleading whether the plaintiff actually can state a claim for relief.

5B Charles A. Wright, Arthur R. Miller, *et al., Federal Practice and Procedure* § 1357 (3d ed. 2016).

Further leave to amend is unwarranted. Acting in accordance with "wise judicial practice," the Court previously afforded Plaintiffs multiple opportunities to amend their original Complaint. As a partial result, this case has been pending two years and has not advanced past the pleading stage. These multiple amendments strongly suggest that Plaintiffs have pled their best case. Moreover, the Court **[*64]** has expressly informed the parties that the Second Amended Complaint would be the final complaint in this case. (Doc. 136 at 1). Therefore, further leave to amend is unwarranted and will be denied.

V. CONCLUSION

Accordingly, the Motions, (Docs. 139, 140, 143, 148), are GRANTED, and Plaintiffs' claims are DISMISSED WITH PREJUDICE. The Court will enter judgment consistent with this Ruling and Order.

Signed in Baton Rouge, Louisiana, on July 24, 2018.

/s/ John W. deGravelles

JUDGE JOHN W. deGRAVELLES

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

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

United States District Court for the Central District of California

July 24, 2018, Decided; July 24, 2018, Filed

Case No. SA CV16-01955 JAK (FFMx)

Reporter
2018 U.S. Dist. LEXIS 232779 *; 2018 WL 10231437

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

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

Core Terms

alleges, Products, Grid, Platform, customers, real time, software, markets, competitors, Sherman Act, antitrust, relevant market, facilities, suppliers, foreclose, announcement, standardization, Historian, bundle, anticompetitive, reasons, end-user, functionality, audit, monopolization, sellers, motion to dismiss, market share, certification, terminated

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

Attorneys for Defendants: Not Present.

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

Opinion by: JOHN A. KRONSTADT

Opinion

CIVIL MINUTES — GENERAL

Proceedings: (IN CHAMBERS) ORDER RE DEFENDANT OPERATION TECHNOLOGY, INC. D/B/A ETAP AND OSISOFT LLC'S MOTION TO DISMISS THIRD AMENDED COMPLAINT (DKT. 392); DEFENDANT SCHNEIDER ELECTRIC USA, INC.'S MOTION TO DISMISS THIRD AMENDED COMPLAINT (DKT. 394)

I. Introduction

Power Analytics Corporation ("Plaintiff") brought this action against Operation Technology, Inc. ("ETAP"), OSIsoft LLC ("OSI") and Schneider Electric USA, Inc. ("Schneider") (collectively, "Defendants"). Dkt. 1. On June 21, 2016, Plaintiff filed a First Amended Complaint ("FAC"). Dkt. 38. On June 20, 2017, Plaintiff filed a Second Amended Complaint ("SAC"). Dkt. 285. On January 11, 2018, Plaintiff filed a Third Amended Complaint ("TAC"). Dkt. 377. The TAC advances claims for antitrust violations under the Sherman Act, 15 U.S.C. §§ 1 and 2, violation of the Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 et seq., violation of the North Carolina Unfair and Deceptive Trade

Practices Act, *N.C. Gen. Stat. §§ 75-1*, *75-1.1*, *75-2*, and *75-2.1*, conspiracy and the commission of several business torts.

On February 8, 2018, Schneider brought a Motion to Dismiss the TAC **[*2]** ("Schneider Motion"). Dkt. 394. Plaintiff opposed the Schneider Motion (Dkt. 415), and Schneider replied. Dkt. 428. ETAP and OSI brought a parallel Motion to Dismiss the TAC ("ETAP Motion"). Dkt. 392. Plaintiff opposed the ETAP Motion (Dkt. 416), and ETAP and OSI replied. Dkt. 429. On May 14, 2018, a hearing on the Schneider Motion and the ETAP Motion (collectively, "the Motions") was held, and the Motions were taken under submission.[1] Dkt. 445. For the reasons stated in this order, the Motions are **GRANTED**, without prejudice.

II. Factual Background

A. The Parties

Plaintiff is a Delaware corporation whose principal place of business is in North Carolina. TAC, Dkt. 377 ¶ 1. Plaintiff "is in the business of developing, selling and supporting software products which are used in the operation of electric power distribution systems." *Id.* "Power Analytics' line of products are employed in Power Grid design; control and safety management; the collection, storage and analysis of system data; and the modeling, simulation and visualization of grid operations." *Id.*

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

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

B. Procedural History

This Order addresses the third set of motions to dismiss the operative complaints in this action. On July 22, 2016, Schneider moved to dismiss the non-patent claims in the FAC. Dkt. 42. On the same day, ETAP and OSI moved to dismiss the non-patent claims in the FAC. Dkt. 44. On October 26, 2016, this action was transferred **[*4]** to this District from the District of Delaware. Dkt. 73. On January 30, 2017, a hearing on both motions to dismiss was held and they were taken under submission. Dkt. 158. On May 10, 2017, both motions to dismiss were granted without prejudice as to all but one of the nonpatent claims advanced in the FAC ("FAC Order"). Dkt. 227.[2]

The FAC Order identified several shortcomings in the Sherman Act claims as alleged in the FAC. They included that the FAC failed plausibly to allege any of the following: (i) the existence of de facto exclusive dealing arrangements between or among any of the Defendants; (ii) foreclosure from competition in a relevant market as a result of the alleged exclusive dealing arrangements among the Defendants; (iii) harm to competition; and (iv) antitrust injury. FAC Order at 11-18. The FAC Order also identified deficiencies in the remaining causes of action.

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[1] At the hearing, Plaintiff's counsel raised a refusal to deal as a new basis for certain claims. Defendants sought leave to brief this issue if it would be considered in connection with the present motions. Because this new theory has not been briefed by the parties, it is not addressed in this Order.

[2] The FAC Order dismissed the Clayton Act *Section 3* claim with prejudice. FAC Order at 22-23.

On July 17, 2017, Schneider brought a motion to dismiss the non-patent claims in the SAC. Dkt. 304. ETAP and OSI brought a parallel motion to dismiss. Dkt. 303. On October 2, 2017, a hearing on both motions to dismiss was held and they were taken under submission. Dkt. 345. On December 7, 2017, both motions to **[*5]** dismiss were granted without prejudice as to all claims advanced in the SAC ("SAC Order"). Dkt. 361. The SAC Order identified several of the same deficiencies as the FAC Order.

C. Overview of Technology

1. Power Grids and Microgrids

"Power Grids are networks that move and distribute electric power between generators and other sources for electricity consuming devices." TAC ¶ 14. "Microgrids are small-scale Power Grids used for safe and reliable movement and distribution of electrical power in specific physical facilities, applications, or defined geographic areas" and may operate in isolation while connected to "other Microgrids, or . . . a larger Power Grid." *Id.* ¶ 15. The TAC alleges that "Microgrids are often employed in power generation facilities, (like nuclear power plants), data centers and other commercial and industrial facilities that consume large volumes of electric power." *Id.* ¶ 16. It also alleges that Microgrids are comprised of "Grid Elements, i.e., devices and operational components physically connected to the Grid." *Id.* ¶ 17.

The TAC next alleges that Grid Design and Management Products and Services ("Grid D and M Products") "consist of software and hardware used in the **[*6]** design of, and the safe, stable and efficient operation and management of the Microgrids, that operate in facilities such as nuclear power plants, oil refineries, commercial and industrial buildings, data centers, military installations, and air traffic control centers." *Id.* ¶ 18. The TAC alleges that Grid D and M Products are a "critical and necessary infrastructure component for Power Grids and Microgrids." *Id.* ¶ 19. It alleges that the following three Grid D and M Products are relevant to the claims advanced in this action: (i) Grid Design Products, (ii) Real Time Products, and (iii) Historian Software. *Id.* ¶¶ 19-20.

a) Grid Design Products

The TAC alleges that Plaintiff makes and sells Grid Design Products, which "are software programs used in the engineering, design and subsequent management of Power Grids." *Id.* ¶¶ 22. It alleges that Grid Design Products "provide a functionality unique for use in Power Grids." *Id.* Plaintiff's Grid Design Products include DesignBase ™ and DesignBase Xi ™. *Id.* ¶ 23. The TAC alleges that "ETAP makes and sells Grid Design products that compete with" Plaintiff's Grid Design Products. *Id.* ¶ 24. It alleges that "[c]ertain Grid Design Products and Services **[*7]** offered and sold by" Plaintiff and ETAP are "distinguished by having been audited and certified for use in nuclear facilities, as required by federal law and/or regulation governing operation of such facilities." *Id.* ¶ 25.

b) Real Time Products

The TAC alleges that Plaintiff makes and sells Real Time Products, which "are software products that provide for additional functionality once the Power Grid is installed and deployed." *Id.* ¶¶ 27, 29. It alleges that such functionality "is unique for use in power grids," *id.* ¶ 28, and may include "the monitoring, modeling, simulation, and visualization, [of] the current and future operation of the Power Grid by collecting and utilizing current data in near real time" and the evaluation and tracking of "system failures." *Id.* ¶ 27. It then alleges that Real Time Products enable "Power Grids to run securely, safely, efficiently and without significant interruption" by "evaluat[ing] and track[ing] system failures and avoid[ing] future damaging events by analyzing trends and predicting potentially damaging events." *Id.* It alleges that Plaintiff's Real Time Products "achieve full functionality" only when they are paired with Plaintiff's Grid Design **[*8]** Products. *Id.* ¶ 114.

The TAC alleges that that ETAP and Schneider make and sell Real Time Products that "compete" with Plaintiff's Real Time Products. *Id.* ¶ 32. It alleges that in November 2013, Plaintiff issued a press release announcing its Real Time Product. *Id.* ¶ 84. It alleges that, after ETAP learned about the statements in the press release, it "immediately recognized that [Plaintiff] posed a competitive threat" that could not be tolerated. *Id.* ¶ 85. It alleges that an ETAP employee emailed colleagues regarding the announcement and stated: "Great!!!!! All of our USP [Unique Sales Proposition] will be now for EDSA. We need to kill such competition from these companies. (EDSA, Cyme, DigSilent, PSSE in particular)." *Id.* (alteration in original).

c) Historian Software

The TAC alleges that Real Time Products and Grid Design Products "must interact" with Historian Software if they are "audited and implemented in nuclear facilities . . . in order to meet legal and regulatory requirements." *Id.* ¶ 34. Thus, it alleges that "nuclear power generation facilities" are required by law or regulation "systematically [to] collect and retain time series information related to the operation of the **[*9]** facilities' Power Grid system, to store such information for extended periods of time as 'records' of system performance, and report certain prescribed incidents of system operation to other nuclear facilities using Grid D and M products." *Id.* ¶ 33. The TAC alleges that Historian Software performs this "essential information management function." *Id.*

The TAC alleges that Historian Software "may be sold separately or together with Grid Design and Real Time Products." *Id.* ¶ 35. Plaintiff sells Historian Software. *Id.* ¶ 35. Each of the Defendants sells unique Historian Software. *Id.* ¶¶ 35-38. The Real Time Products of Plaintiff and ETAP both allegedly interface with third-party Historian Software. *Id.*

2. <u>EMS Platforms</u>

The TAC alleges that the relevant products -- Grid Design Products, Real Time Products and Historian Software -- can be combined into "'bundles' of products and services" and "sold to facility owners and managers as a complete 'platform' or 'bundled' product utilized to operate the entire Microgrid." *Id.* ¶ 39. Thus, the TAC defines EMS Platforms as "a bundle of integrated components, specifically marketed and sold as a complete bundle, that optimize, supervise and control power, **[*10]** providing a turnkey to run the entire Power Grid." *Id.* ¶ 40.

D. Overview of the Alleged Relevant Product Markets

The TAC alleges that there are several relevant product markets: (i) the NUPIC Grid Design Market; (ii) the NUPIC Real Time Market and (iii) the EMS Platform Market. *Id.* ¶¶ 60, 61, 119. It alleges as alternatives to the EMS Platform Market the following four end-user EMS platform markets: (i) the Commercial Buildings EMS Platform Market; (ii) the Data Center EMS Platform Market; (iii) the Industrial EMS Platform Market and (iv) the Infrastructure/Grid EMS Platform Market. *Id.* ¶ 161.

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

a) In General

The TAC makes several allegations concerning the common elements of the NUPIC Grid Design Market and the NUPIC Real Time Market (collectively, the "NUPIC Markets"). It alleges that NUPIC stands for "the Nuclear Procurement Issues Committee." *Id.* ¶ 63. It alleges that NUPIC is "an industry partnership among nuclear power plants licensed by the Nuclear Regulatory Commission." *Id.* It alleges that both alleged relevant markets are comprised "almost entirely of nuclear power generation facilities, a small number of other facilities that use or employ nuclear **[*11]** power, and entities who provide design and other services to such nuclear power facilities." *Id.* ¶ 62.

The TAC alleges that "[a]ll North American nuclear facilities are members of NUPIC." *Id.* ¶ 63. It alleges that products used in nuclear facilities attain NUPIC certification through an audit by "at least five separate NUPIC members." *Id.* It alleges that "[o]nce the required number of NUPIC members are satisfied with the audit results, one utility is selected to conduct an audit every three years." *Id.*

The TAC alleges that the "NUPIC audit process makes products and services sold in the NUPIC Grid Design and NUPIC Real Time Markets economically and functionally distinct from other markets" that sell and service non-NUPIC certified versions of these products, including the EMS Platform Market. *Id.* ¶ 64. It alleges that this is the case for several reasons. *First*, products without NUPIC certification cannot, by law or regulation, be substituted for NUPIC-certified products and services. *Id. Second*, NUPIC-certified products "must be manufactured and must perform to meet specific safety and reliability standards" which are not required for non-NUPIC certified products. *Id. Third*, non-NUPIC **[*12]** certified products are not subject to additional operational and reporting requirements imposed on NUPIC-certified products. *Id.* It alleges that because of "these significant added features and recurring service requirements," NUPIC-certified products represent a "distinct relevant product market." *Id.* ¶ 65.

The TAC alleges that companies that seek to compete in the NUPIC Markets face "substantial" barriers to entry. *Id.* ¶ 76. This is allegedly due to two reasons. *First*, NUPIC Markets are "low growth market[s] in terms of new customers and new sites for existing customers." *Id.* ¶¶ 72, 76. *Second*, the NUPIC "audit, certification, product functionality, related personnel and record keeping, reporting, reauditing, Quality Assurance and Software Development standards all impose significant additional financial and operational burdens" on potential entrants into the NUPIC Markets. *Id.* ¶ 76.

b) NUPIC Grid Design Market

The TAC alleges that one relevant product market that is "unreasonably restrained by" ETAP and OSI is the NUPIC Grid Design Market. *Id.* ¶¶ 59-60. The TAC defines that market as one "for the sale and servicing of Grid Design Products to customers who, by law and or regulation **[*13]** may only purchase and deploy Grid Design Products that have been 'certified' by successfully completing a NUPIC audit within the prior three years." *Id.* ¶ 60. The relevant geographic market for the NUPIC Grid Design Market is North America. *Id.* ¶ 71.

The TAC alleges that Plaintiff and ETAP are the only entities that compete within the NUPIC Grid Design Market. *Id.* ¶ 66. It alleges that ETAP and Plaintiff each is authorized to sell its respective Grid Design Products to NUPIC customers. *Id.* ¶¶ 67-68. Further, it alleges that Plaintiff "has historically participated" in the NUPIC Grid Design Market. *Id.* ¶ 68. The TAC alleges that ETAP has made false representations to the public and to NUPIC customers that it "has the only Grid Design Product certified by NUPIC." *Id.* ¶ 67. The TAC alleges that Plaintiff's Grid Design Product "is lower priced than ETAP's competing product and offers additional functionality attractive to NUPIC market customers, such as direct current system design management." *Id.* It alleges that ETAP has a 97% market share in the NUPIC Grid Design Market and "at least 60 of 64 U.S. nuclear power facilities as customers." *Id.* ¶ 74. It alleges that ETAP also has "5 of the **[*14]** 6 Canadian nuclear power facilities and all 3 of the nuclear power facilities in Mexico." *Id.*

The TAC next alleges that there are "a significant number of" companies that manufacture Grid Design Products that have not sought NUPIC certification or completed a NUPIC audit. *Id.* ¶ 77. It alleges that these potential competitors include "SKM, DigSilent, Cyme (Eaton) and PSSE." *Id.* The TAC alleges that "the limited number of competitors" in the NUPIC Grid Design Market is "a direct result of the following" factors:

> the self-admitted market dominance of ETAP for NUPIC certified Grid Design products and the self-admitted market dominance of OSI in Historian Software in the NUPIC market; the high barriers to entry for additional competitors . . . and the illegal anticompetitive agreement . . . between ETAP and OSI to foreclose all others from the NUPIC market.

Id. ¶ 70.

c) NUPIC Real Time Market

The TAC alleges that a second relevant product market is the NUPIC Real Time Market. *Id.* ¶ 61. The TAC defines this market as one for "the sale and servicing of Real Time Products to customers who, by law and or regulation, may only purchase and deploy Real Time Products that have been 'certified' by successfully **[*15]** completing a NUPIC audit within the past three years." *Id.* The geographic market for the NUPIC Real Time Market is North America. *Id.* ¶ 71.

The TAC alleges that Plaintiff is the only company that competes with ETAP that is "capable of obtaining" NUPIC certification for its Real Time Products. *Id.* ¶ 96. It alleges that, based on Plaintiff's knowledge of the relevant markets, no companies have sought NUPIC certification for their Real Time Products, including ETAP. *Id.* ¶ 115. It alleges that Plaintiff has not undertaken a NUPIC audit for its Real Time Products because the alleged anticompetitive agreement between OSI and ETAP "has foreclosed virtually all sale opportunities, creating an insurmountable economic barrier to entry." *Id.* It alleges that this has occurred because Plaintiff's Real Time Products "achieve full functionality" only when they are used with Plaintiff's Grid Design Products. *Id.* ¶ 114. Thus, because the OSI—ETAP Agreement ensures that ETAP continues to enjoy a 97% market share in the NUPIC Grid Design Market, the costs Plaintiff would have to incur to obtain NUPIC certification for its Real Time Products outweigh the potential revenue Plaintiff could reasonably expect **[*16]** to generate if it occupied the remaining 3% of the market. *Id.* ¶ 115. The TAC then alleges that there is a "need and likely demand" for Real Time Products by NUPIC facilities. *Id.*

2. The EMS Relevant Markets

a) The EMS Platform Market

The TAC alleges that the market for the sale and servicing of Energy Management Systems platforms ("EMS Platform Market") is a separate, relevant antitrust product market. *Id.* ¶ 119. The TAC defines EMS Platforms as "the full bundle of automation, monitoring and control software, hardware and related equipment purchased by facility owner/operators for use as an 'EMS Platform.'" *Id.* ¶ 136. Thus, EMS Platforms consist of a bundle of numerous components, including Grid Design Products and Real Time Products. *Id.* ¶ 147. The alleged geographic market for the EMS Platform Market is North America. *Id.* ¶ 156.

The TAC alleges that customers in the EMS Platform Market share "common characteristics" including the following: (i) they operate in low or medium voltage environments, and (ii) they place a premium on the reliability of their electrical power systems and employ "more sophisticated monitoring systems" and "redundant equipment" to prevent power outages. *Id.* **[*17]** ¶¶ 121-22. It alleges that in the EMS Platform Market, "the demand for bundled sales is sufficiently strong so as to restrict competition to sales among firms that are able to provide a complete or nearly complete bundle or Platform," and that such firms include Schneider and certain other competitors. *Id.* ¶ 140. It alleges that "[s]uppliers of Platform components, such as ETAP and Power Analytics are entirely reliant upon platform suppliers such as Schneider to include their component products as choices for customers in constructing EMS Platforms." *Id.* It alleges that Schneider uses its own component parts in EMS Platforms, as well as those from "unaffiliated suppliers." *Id.* ¶ 148.

The TAC alleges that Schneider holds a share of more than 50% of the EMS Platform Market, which allegedly makes it a "critical bridge to a substantial share of the EMS Platform market for suppliers who provide Grid D and M Products." *Id.* ¶¶ 142, 151. It alleges that if component suppliers like Plaintiff do not have access to this critical bridge, they "lack a viable method for selling their Grid D and M Products in the EMS Platform Market." *Id.* ¶ 143. It alleges that, as a result of an alleged "exclusionary agreement" between Schneider and ETAP, ETAP is "the sole and exclusive supplier" of Grid Design Products and Real Time Products to Schneider for use in its EMS Platforms. *Id.* ¶ 149.

The TAC alleges that Schneider competes with others in the EMS Platform Market, including "Eaton, Siemens, GE, ABB, Honeywell and other additional smaller competitors." *Id.* ¶ 152. It alleges **[*18]** that, because the non-Schneider portion of the EMS Platform Market is fragmented, none of Schneider's competitors "represent[s] a viable alternative by which competitors to ETAP, like Power Analytics and others, could reach a meaningful share of EMS platform customers with their Grid D and M Products." *Id.* It alleges that Schneider and its parent company have a dominant share of the EMS Platform Market because they "possess the manufacturing capability for virtually all the equipment needed in EMS Platforms" and EMS platform suppliers that have worked with a customer in the past often work with that customer on new projects. *Id.* ¶¶ 154-55.

The TAC alleges as alternatives to the EMS Platform Market, the following four end-user EMS markets:

> (i) the sale and servicing of Energy Management Systems (EMS) platforms for Commercial Buildings (Commercial Buildings EMS Platform Market); (ii) the sale and servicing of Energy Management Systems (EMS) platforms for Data Centers (Data Center EMS Platform Market); (iii) the sale and servicing of Energy Management Systems (EMS) platforms for Industrial (Industrial EMS Platform Market); and (iv) the sale and servicing of Energy Management Systems (EMS) **[*19]** platforms for Infrastructure/Grid (Infrastructure/Grid EMS Platform Market).

Id. ¶ 161.

b) The End-User EMS Markets

North America is the alleged geographic market for the four end-user markets. *Id.* ¶ 172. The TAC alleges that these end-user markets are distinct "based on the configuration, integration and automation of select components" even though some components are used in more than one end-user platform. *Id.* ¶¶ 162, 165. It alleges that Schneider has publicly stated that it has a "dominant position" in each of the EMS end-user markets. *Id.* ¶ 164.

(1) <u>The Commercial Buildings EMS Platform Market</u>

The TAC alleges that facilities in the Commercial Buildings EMS Platform Market include healthcare, hotel, office and "other similar low and medium voltage power system facilities where the prohibitive costs of power failure and/or power-related accidents require high levels of redundancy and more sophisticated monitoring and modeling software." *Id.* ¶ 173. It alleges that, by having at least a 40% market share, Schneider is the largest EMS platform supplier in the Commercial Buildings EMS Platform Market. *Id.* ¶ 175.

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

The TAC alleges that Data Centers are **[*20]** "low and medium voltage power system facilities where the prohibitive costs of power failure and/or power-related accidents require high levels of redundancy and more sophisticated monitoring and modeling software." *Id.* ¶ 177. It alleges that, by having at least a 50% market share, Schneider is the largest supplier in the Data Center EMS Platform Market. *Id.* ¶ 179. It alleges that this market is concentrated. *Id.*

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

The TAC alleges that the Industrial EMS Platform Market includes "discrete and continuous process facilities, including Packaging, Machine Building, Food and Beverage, Mining, Metals, Minerals, Oil & Gas facilities, among other similar low and medium voltage power system facilities where the prohibitive costs of power failure and/or power-related accidents require high levels of redundancy and more sophisticated monitoring and modeling software." *Id.* ¶ 181. It alleges that, by having at least a 30% market share, Schneider is one of the two largest suppliers in the Industrial EMS Platform Market. *Id.* ¶ 183. It alleges that this market is concentrated. *Id.*

The TAC alleges that facilities in the **[*21]** Infrastructure/Grid EMS Platform Market include "Water & Wastewater plants, Transportation systems, Electric Generation and Transmission Utility facilities and other similar low and medium voltage power system facilities where the prohibitive costs of power failure and/or power-related accidents require high levels of redundancy and more sophisticated monitoring and modeling software." *Id.* ¶ 185. It alleges that, by having at least a 33% market share, Schneider is the largest supplier in the Infrastructure/Grid EMS Platform Market. *Id.* ¶ 187. It alleges that this market is concentrated. *Id.* It alleges that because many of the components used in industrial EMS platforms are also used in infrastructure EMS platforms, the Industrial EMS Platform Market and the Infrastructure/Grid EMS Platform Market constitute a single product market. *Id.* ¶ 189.

E. The Alleged Anticompetitive Arrangement between ETAP and OSI

The TAC alleges that OSI has a "dominant" share of Historian Software in the NUPIC Markets because 76% of "operating nuclear power generators" in the United States and 100% of such facilities in Canada use OSI products. *Id.* ¶ 75. It alleges that OSI is a "critical bridge" to potential **[*22]** customers in the NUPIC Markets as a result of its dominant market share. *Id.* ¶ 97.

The TAC alleges that ETAP and OSI entered an anti-competitive agreement to bundle their products (the "OSI—ETAP Agreement") in September 2014. *Id.* ¶¶ 86, 90. It alleges that the OSI—ETAP Agreement is "not a vertical agreement between a buyer and a seller, or a manufacturer and a retailer" but instead an agreement between "two sellers of independent, but necessarily interconnected products to foreclose and exclude existing and potential competitors from providing products which challenge each of their dominant monopoly positions in the market." *Id.* ¶ 79.[3]

The TAC alleges that, although ETAP and OSI have characterized this agreement "as a 'strategic partnership,'" it was actually "intended and operated . . . to further OSI's express business strategy to find 'partners' that will help it 'lock out competition.'" *Id.* ¶ 86. It alleges that in furtherance of this objective, the OSI—ETAP Agreement includes "unreasonable impediments and conditions intended to preclude and/or deter" existing customers from switching out OSI and ETAP's products with those of Plaintiff's and certain other "actual and potential **[*23]** competitors." *Id.* ¶ 91. It alleges that a 2013 Term Sheet documenting key provisions in the agreement stated that customers who purchase OSI products under the OSI—ETAP Agreement may only use those products in conjunction with ETAP products. *Id.* ¶ 92. Further, it alleges that a Memorandum of Understanding ("MOU") entered by ETAP and OSI requires that OSI exclusively "recommend and promote ETAP Products as a preferred power systems analysis and management platform to all prospective customers" and imposes a reciprocal requirement on ETAP. *Id.* ¶ 94. It alleges that this reciprocal arrangement amounts to an "exclusivity mechanism." *Id.* ¶ 95.

The TAC alleges that the OSI—ETAP Agreement has harmed potential and actual competitors, including Plaintiff. *Id.* ¶ 91. It makes several allegations regarding the business negotiations of Plaintiff and OSI between 2011 and 2014, which allegedly included "multiple meetings, discussions and joint sales efforts." *Id.* ¶ 98. As an example, it alleges that in 2011, Plaintiff approached OSI and proposed the entry of a non-exclusive cooperative relationship through which OSI would serve as the "critical bridge" for Plaintiff's Grid Design Products. *Id.* ¶ 97. **[*24]** It also alleges that Plaintiff and OSI first "worked together" in 2012 on a Microgrid project for the University of California at San Diego. *Id.* ¶ 101. The TAC alleges that at about this time, the CEO of OSI told Plaintiff's former CEO that Plaintiff's Real Time Products represented a growth opportunity in the NUPIC Markets. *Id.*

The TAC then alleges that Plaintiff's employees met with OSI's employees in 2012 to discuss the possibility of targeting OSI's NUPIC customers, which would have allowed Plaintiff "to seek and obtain NUPIC certification for its Real Time Products." *Id.* ¶ 102. It alleges that Plaintiff's employee who prepared the 2011 proposal joined ETAP in 2013, and that shortly thereafter, OSI terminated the aforementioned discussions with Plaintiff. *Id.* ¶ 99. It also alleges that, following the announcement of the OSI—ETAP Agreement, OSI "abruptly" ceased all marketing and joint sales efforts with Plaintiff to NUPIC customers. *Id.* ¶¶ 96, 105. It alleges that before the announcement, Plaintiff paid OSI to obtain access to its Historian Software code to ensure that Plaintiff's Grid Design Products "worked seamlessly with OSI's PI System Historian Software." *Id.* ¶ 100. The TAC **[*25]** alleges that the efforts Plaintiff has made since the OSI—ETAP Agreement was entered to partner with OSI have been "consistently rejected" even though the quality of Plaintiff's products has not changed. *Id.* ¶¶ 106, 108.

The TAC alleges that in "furtherance" of the OSI—ETAP Agreement, ETAP made certain false representations to several of Plaintiff's customers. *Id.* ¶ 109. For example, it alleges that ETAP falsely stated that it was the only NUPIC-certified supplier of Grid Design Products and that Plaintiff was "financially unstable," had "lost its NUPIC certification" and "would not be in the market for long." The TAC alleges that these false statements were made to push Plaintiff out of the NUPIC Markets. *Id.* The TAC then alleges that since the inception of the OSI—ETAP Agreement, Plaintiff has lost four of its NUPIC customers: Duke Energy, Enercon, Atomic Energy of Canada and Energy Northwest. *Id.* ¶ 112. It alleges that collectively these customers represented more than 35% of the business held by Plaintiff prior to the OSI—ETAP Agreement. *Id.* It alleges that, upon information and belief, all four customers "switched from" Plaintiff to ETAP as a result of the OSI—ETAP Agreement. ***[*26]*** *Id.*

The TAC alleges that Plaintiff has "been effectively driven out" of the NUPIC Grid Design Market as a result of the OSI—ETAP Agreement. *Id.* ¶ 110. It alleges that, upon information and belief, no supplier of Grid Design Products other than ETAP has made "a single sale to any nuclear facility" of Grid Design Products since the OSI—ETAP

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[3] The TAC also alleges that, as early as 2013, OSI and ETAP agreed "to maintain and enhance their individual and collective monopoly positions in the NUPIC Market[s] by and through an exclusive arrangement whereby they would sell their products in conjunction with each other in order to foreclose competitors from challenging their market power and to maintain and increase their monopoly positions." *Id.* ¶ 80.

Agreement was entered. *Id.* ¶ 111. It also alleges that as a result of the agreement, Plaintiff has been "completely foreclosed from certifying and offering" its Real Time Products in the NUPIC Real Time Product Market. *Id.* ¶ 110.

The TAC alleges that the OSI—ETAP Agreement unreasonably restrains trade in the NUPIC Markets. *Id.* ¶¶ 105, 109, 117-18. In support of this contention, it is alleged that:

> ETAP's high market share of 97% in the NUPIC Grid Design Market confirms ETAP's monopoly power in the NUPIC Grid Design Market. The other party to the anticompetitive arrangement, OSI, has a monopoly market share for Historian software used by NUPIC customers in excess of 80%. This arrangement has operated to unreasonably constrain the availability of OSI's entrenched Historian products for use in conjunction with ETAP's competitors NUPIC Grid Design products, **[*27]** foreclosing actual and potential competition to ETAP in 80% of the NUPIC Grid Design Market.

Id. ¶ 116.

The TAC alleges that there are significant "financial and operational incentives that bind" OSI and ETAP to the OSI—ETAP Agreement. *Id.* ¶ 117. For example, it is alleged that the OSI—ETAP Agreement "protects" OSI because it "links OSI to the entrenched monopoly shareholder . . . ETAP." *Id.* ¶ 83.

F. The Alleged Anticompetitive Arrangement between ETAP and Schneider

As noted, the TAC alleges that Schneider is an EMS Platform supplier that has "control over which other suppliers' products will be offered to customers" in its EMS Platforms. *Id.* ¶¶ 136, 147. The TAC alleges that there is an "express" anticompetitive agreement between ETAP and Schneider (the "Schneider—ETAP Agreement") that is "not a vertical agreement between a buyer and seller, or a manufacturer and a retailer," but an agreement "between two sellers of components in a bundle offered to EMS Platform customers, where one of the two suppliers controls the contents of the bundle and has substantial market power." *Id.* ¶ 197.

The TAC alleges that the Schneider—ETAP Agreement arose from the December 2012 decision by Schneider and **[*28]** ETAP to enter a "cooperative agreement" to bundle their respective products. *Id.* ¶ 198. Its terms include the launch of a module that combined Schneider's electrical power analysis and simulation solution software with ETAP's Grid D and M Products. *Id.* ¶¶ 199-200. It is alleged that the Schneider—ETAP Agreement was "confirmed" as an "exclusive and sole-sourced arrangement with ETAP, excluding other competitive alternatives across all EMS Platforms . . . with the announcement in 2015 that Schneider had 'standardized' all of its EMS Platform Grid D and M Products components on ETAP products." *Id.* ¶ 203. It is also alleged that, based on Plaintiff's knowledge of the industry, "standardized" means that all EMS Platforms offered by Schneider "would only include ETAP Grid Design and Management and Real Time products as components." *Id.* ¶ 204. The TAC then alleges that as a byproduct of this standardization, Schneider's employees "would only have access to, be trained to use, and support ETAP Products" in terms of the maintenance, auditing and upgrading of EMS Platforms. *Id.*

The TAC includes an excerpt of the 2015 standardization announcement. It alleges that the excerpt describes the exclusive **[*29]** nature of the Schneider—ETAP Agreement. The announcement, which was called "Schneider Electric Standardizes on ETAP Across its Services Division," states, in relevant part:

> Schneider Electric, a global leader in energy management and engineering solutions has chosen ETAP . . . as its strategic platform for its engineering services business. Schneider Electric recently completed a significant purchase of ETAP suite of power system software which is currently being deployed within the company's Engineering Services business.
>
> Schneider Electric decided to standardize the use of ETAP for its projects in order to leverage the advanced, next-generation technology of the integrated ETAP software suite to further increase its productivity through greater efficiencies. . . .
>
> Our deployment is already reducing costs and improving productivity across our business. We look forward to expanding the use of ETAP across all our projects and enhanc[ing] our partnership with ETAP.

Id.

The TAC alleges that Schneider met with ETAP in April 2013 "to expand [the parties'] initial arrangement." *Id.* ¶¶ 201-02. It also alleges that Schneider has acknowledged the exclusive nature of the Schneider—ETAP Agreement **[*30]** several times. *Id.* ¶ 205-06. For example, it alleges that Schneider confirmed the exclusive nature of the agreement in a YouTube video in which the words "ETAP was the only choice" appear. *Id.* ¶ 206. Further, it alleges that internal ETAP correspondence from 2016 includes statements that "Both SEL and SE [Schneider Electric] will be only looking at ETAP for RT PSMS [Real Time Power System Monitoring Software] software and integration support of our software." *Id.* ¶ 216.

The TAC also alleges that the Schneider—ETAP Agreement has harmed competition by "substantially foreclosing and excluding lower cost, and more efficient and innovative Grid D and M products that would otherwise be available to EMS Platform customers from competing component suppliers," including Plaintiff. *Id.* ¶ 208. It also alleges that Plaintiff has been harmed for the following reasons:

> First, Power Analytics' competing products and, on information and belief, the competing products of other competitors to ETAP, have consistently been priced significantly below those of ETAP. Second, at least Power Analytics' competing products offer automated system auditing, automated system change testing and visualization, and **[*31]** automated safety auditing and similar functions that substantially reduce the need for, and high costs associated with, expensive manual studies that must be performed by Schneider engineering staff. These manual studies substantially raise the post-sale costs of ownership for Schneider EMS Platform customers and provide Schneider with substantial additional profits derived from such unnecessary, high cost Engineering Services.

Id. ¶ 209.

The TAC also alleges that through the Schneider—ETAP Agreement

> ETAP has effectively realized its stated goal, admitted in corporate documents in 2013, to focus on methods to "kill competition" in the market by foreclosing named competitors including Power Analytics, Cyme (Eaton), DigSilent, PSSE and others. Through its exclusive anticompetitive agreement with Schneider it has achieved that express goal and has eliminated all competition . . . in a substantial line of commerce -- more than 50% of the EMS platform market.

Id. ¶ 217.

The TAC alleges that before the Schneider—ETAP Agreement was entered, Schneider included Plaintiff's Grid Design Products and Real Time Products in several EMS platform bids. *Id.* ¶ 190. For example, it alleges that in 2010, Schneider **[*32]** "consider[ed] offering" Plaintiff's products in a bid to Bank of America. *Id.* ¶ 193. It also alleges that in 2010, Schneider included Plaintiff's products "in discussions regarding a potential, multiple location EMS Platform project for Citibank." *Id.* ¶ 194. It alleges that Plaintiff "continued its efforts" to partner with Schneider "up until the time of the public announcement of" the Schneider—ETAP Agreement and "thereafter" until the 2015 standardization announcement. *Id.* ¶ 195.

The TAC alleges that since the Schneider—ETAP Agreement was entered, Schneider "has refused to recommend or use" Plaintiff's component parts "in any EMS Platform that Schneider has bid on, sold or managed, even though certain project specification requirements could only be satisfied by using [Plaintiff's] technology and functionality." *Id.* ¶ 196. It alleges that Schneider repeatedly has rejected Plaintiff's requests to include its component parts in Schneider's EMS Platforms, which "confirm[s] the exclusive" nature of the Schneider—ETAP Agreement. *Id.* ¶ 195. The TAC also alleges that Schneider and ETAP have "powerful incentives" that bind them to the Schneider—ETAP Agreement. *Id.* ¶ 219. Thus, it alleges **[*33]** that this agreement "enables ETAP to capture for itself Schneider's dominant 50+% share of the EMS Platform Market." It also alleges that Schneider benefits from the exclusive nature of the agreement because it "eliminates any competitive alternative" that might drive prices down in the EMS Platform Market. *Id.*

G. Evidence Submitted by ETAP and OSI

In support of the ETAP Motion, ETAP and OSI submitted a declaration prepared by their counsel in this action. *See* Declaration of Trevor v. Stockinger ("Stockinger Decl."), Dkt. 392-1. Stockinger attaches to his declaration four documents that are referenced in the TAC. These include the OSI Umbrella Partnership Agreement (the "Umbrella Partnership Agreement") and the Partner Program OEM Addendum (the "Addendum"). Each is dated November 4, 2013 and was signed by OSI and ETAP. *Id.* ¶¶ 2-3; *see* Exs. A-B to Stockinger Decl., Dkt. 392-1. The other two documents are the Memorandum of Understanding ("MOU") and the OEM Term Sheet ("Term Sheet"). Stockinger Decl. ¶¶ 4-5; *see* Exs. CD to Stockinger Decl., Dkt. 392-1. The Court may consider these documents when evaluating the Motions. *Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008)* (a court "need not accept as true allegations contradicting documents **[*34]** that are referenced in the complaint").

Section 1.1 of the Addendum states that ETAP is a "nonexclusive" Original Equipment Manufacturer ("OEM") for OSI's products. Ex. B to Stockinger Decl. (Addendum) § 1.1. Section 1.2 of the Addendum states that OSI grants to ETAP a "non-exclusive, nontransferable license" to distribute OSI's products. *Id.* The remaining two documents, the MOU and the Term Sheet, reiterate these terms. *See* Ex. C to Stockinger Decl., Dkt. 392-1 at 30 ("OSIsoft agrees to grant ETAP a nonexclusive, non-transferrable license to distribute and license the OSIsoft Products only in combination with ETAP Products."); *see also* Ex. D to Stockinger Decl., Dkt. 392-1 at 39 (same).

H. Claims Asserted in the TAC

1. Federal Claims

The TAC alleges that Defendants violated *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*. TAC ¶¶ 246-74, 277-90.

a) Sherman Act *Section 1*

The TAC alleges that Defendants violated *Section 1* through the OSI—ETAP Agreement. *Id.* ¶ 257. It alleges that this agreement restrains trade in the NUPIC Grid Design Market and the NUPIC Real Time Market. *Id.* ¶ 249. It alleges that the agreement has had "a direct, substantial adverse effect on competition including (i) foreclosing competition from lower cost, higher quality products and **[*35]** services in those markets; (ii) reducing customer choice within those markets; . . . (iii) foreclosing innovation in those markets, and (iv) reducing consumer welfare . . . ." *Id.* ¶ 251.

The TAC also alleges that Defendants violated *Section 1* through the Schneider—ETAP Agreement. *Id.* ¶ 272. It alleges that this agreement illegally restrains trade in the EMS Platform Market, or, alternatively, in the four end-user markets. *Id.* ¶¶ 161, 263-64. Further, it alleges that this agreement has "harmed competition by denying end use[r] customers access to price competition and innovative products offered by Power Analytics and other competitors for the sale of Power Grid D and M Products to the EMS Platform Market." *Id.* ¶ 267.

The TAC alleges that both agreements have reduced Plaintiff's share of the relevant markets to levels "significantly lower" than they would be in the absence of these agreements. *Id.* ¶¶ 253, 269. It also alleges that Defendants "have no *bona fide* pro-competitive justifications for their anticompetitive agreements, and any business justifications for these agreements are decidedly outweighed by [their] adverse effect on competition in the relevant markets." *Id.* ¶¶ 252, 268.

b) Sherman **[*36]** Act *Section 2*

The TAC also alleges violations of *Section 2* through ETAP's monopolization and attempted monopolization of the NUPIC Grid Design Market. *Id.* ¶¶ 284, 286. It alleges that this conduct constitutes predatory conduct that violates *Section 2*. *Id.* ¶ 285.

The TAC alleges that, because ETAP has a 97% share in the NUPIC Grid Design Market, it has monopoly power there. *Id.* ¶¶ 278-79. It also alleges that ETAP has the power to control prices and exclude actual and potential competitors in the NUPIC Grid Design Market and potential entrants to the NUPIC Real Time Market. It is alleged that ETAP can do so because of its exclusive agreement with OSI and the high barriers to entry in the market due to the high cost of obtaining NUPIC certification. *Id.* ¶¶ 280-83. Further, it alleges that even if ETAP does not have monopoly power in the NUPIC Grid Design Market, "its anticompetitive conduct constitutes an attempt to monopolize." *Id.* ¶ 286. It also alleges that because of ETAP's high market share, there is a "dangerous likelihood" that it will achieve monopoly power in the NUPIC Grid Design Market. *Id.* ¶ 287.

The TAC alleges that the foregoing conduct has caused harm to Plaintiff and other competitors, as well as **[*37]** consumers and potential consumers, in the NUPIC Grid Design and NUPIC Real Time Markets. *Id.* ¶¶ 288-89.

2. State Law Claims

The TAC brings a Cartwright Act claim, *Cal. Bus. & Prof. Code §§ 16700 et seq.*, that parallels the ones brought under *Section 1* of the Sherman Act. *Id.* ¶¶ 275-76. It also alleges that the basis for liability under the Sherman Act gives rise to a claim against Defendants under the North Carolina Unfair and Deceptive Trade Practices Act (the "UDTPA"), *N.C. Gen. Stat. §§ 75-1*, *75-1.1*, *75-2*, and *75-2.1* (*id.* ¶¶ 224-45, 291-95), and California's Unfair Competition Law, *Cal. Bus. & Prof Code §§ 17200 et seq.* (*id.* ¶¶ 296-97). The TAC also restates certain allegations made as to its *Section 1* claim in support of its UDPTA claim. These include that ETAP entered into the OSI—ETAP Agreement for the purpose of "kill[ing] competition" and that OSI entered into the OSI—ETAP Agreement in order to stifle competition. *Id.* ¶ 234. The TAC next alleges that the "near total exclusion of competition effectuated by the agreement between OSI and ETAP is an unfair and deceptive trade practice" that violates the UDTPA. *Id.* ¶ 236. The TAC makes similar allegations as to the Schneider—ETAP Agreement. *Id.* ¶¶ 237-40.

The TAC also appears to ground the UDTPA claim in two other bases: (i) the misrepresentations ETAP allegedly **[*38]** made to NUPIC customers that Plaintiff had lost its NUPIC certification, was in financial turmoil and would soon withdraw from the NUPIC Markets; and (ii) Schneider's alleged concealment and withholding of information from customers in the EMS Platform Market regarding "the substantial cost benefits of alternative Grid D and M and Real Time Products." *Id.* ¶¶ 226, 229-31, 240.

The TAC also brings a claim for tortious interference with prospective economic advantage based on allegedly lost sales to four commercial entities with which Plaintiff had ongoing commercial relationships. *Id.* ¶¶ 298-302. Finally, the TAC advances a related claim for civil conspiracy. *Id.* ¶¶ 303-08.

III. Analysis

A. Legal Standards

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action." *Id. at 555*. "The plausibility standard is not akin to a 'probability requirement,' **[*39]** but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (internal quotation marks and citations omitted).

Pursuant to *Fed. R. Civ. P. 12(b)(6)*, a party may bring a motion to dismiss a cause of action that fails to state a claim. It is appropriate to grant such a motion only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*. In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (citing *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001))*.

The Supreme Court "has cautioned against permitting antitrust cases to proceed to discovery without a plaintiff demonstrating 'plausibility' because of the high cost of discovery in antitrust **[*40]** cases in particular." *Pro Search Plus, LLC v. VFM Leonardo, Inc., No. SACV 12-2102-JST ANx, 2013 U.S. Dist. LEXIS 107895, 2013 WL 3936394, at *1 (C.D. Cal. July 30, 2013)*; *see also* *Twombly, 550 U.S. at 558* ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.").

B. Application

1. Antitrust Claims

a) Sherman Act *Section 1*

(1) Statutory Standards and Relevant Allegations in the TAC

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

"Exclusive dealing involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 996 (9th Cir. 2010)*. "The main antitrust objection to exclusive dealing is its tendency to 'foreclose' existing competitors or new entrants from competition in the **[*41]** covered portion of the relevant market during the term of the agreement." *Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997)* (footnote omitted) (citing *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 393 (7th Cir. 1984)* (Posner, J.)).

There are "well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition." *Id.* "[A]n exclusive-dealing arrangement does not constitute a per se violation of *section 1*." *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291, 1303-04 (9th Cir. 1982)*. This is because "virtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from *some* portion of the market, namely the portion consisting of what was bought." *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 236 (1st Cir. 1983)* (Breyer, J.); *see also* *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012)* ("Exclusive dealing agreements are often entered into for entirely procompetitive reasons, and generally pose little threat to competition."). Therefore, "the rule of reason rather than a per se analysis" is applied to exclusive dealing arrangements. *Aerotec Int'l, 836 F.3d at 1180 n.2*. "Under the antitrust rule of reason, an exclusive dealing arrangement violates *Section 1* only if its effect is to 'foreclose competition in a substantial share of the line of commerce affected.'" *Allied Orthopedic Appliances, 592 F.3d at 996* (quoting *Omega, 127 F.3d at 1162*); *see also* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* (O'Connor, J., concurring) ("Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal."); *ZF Meritor, 696 F.3d at 271* ("[A]n **[*42]** exclusive dealing arrangement is unlawful only if the 'probable effect' of the arrangement is to substantially lessen competition.").

The TAC alleges that ETAP entered separate agreements with OSI and Schneider, and that each unreasonably restrains trade. TAC ¶¶ 116, 221. It alleges that the OSI—ETAP Agreement illegally restrains trade in the NUPIC Grid Design Market and the NUPIC Real Time Market because it "included unreasonable impediments and conditions intended to preclude and/or deter NUPIC Market customers from choosing to swap out OSI and ETAP's products for those of a number of actual and potential competitors." *Id.* ¶¶ 91, 249. It alleges that this agreement has had "a direct, substantial adverse effect on competition." *Id.* ¶ 251.

The TAC alleges that through the Schneider—ETAP Agreement, ETAP became the sole supplier of Grid Design and Real Time Products to Schneider for use in its EMS Platforms. *Id.* ¶ 198. As noted, it alleges that this agreement "was confirmed as . . . exclusive and sole-sourced" through Schneider's 2015 standardization announcement. *Id.* ¶ 203. The TAC alleges that, based on Plaintiff's knowledge of the industry, "standardization" means that "customers would **[*43]** be offered no other choice of competing products in the Schneider EMS Platform bundle." *Id.* ¶ 204. The TAC next alleges that the Schneider—ETAP Agreement has "harmed competition by denying end use[r] customers access to price competition and innovative products offered by Power Analytics and other competitors for the sale of Power Grid D and M Products to the EMS Platform Market." *Id.* ¶ 267.

Defendants contend that the TAC fails plausibly to allege the existence of exclusive dealing arrangements, relevant markets, harm to competition and antitrust injury.

(2) Exclusive Dealing Arrangements

"[A] prerequisite to any exclusive dealing claim is an agreement to deal exclusively." *ZF Meritor, 696 F.3d at 270*. Courts have recognized two types of exclusive dealing arrangements -- those that are expressly exclusive and those that are de facto exclusive. *See* *id. at 282 n.14* (an exclusive dealing claim "does not require a contract that imposes an express exclusivity obligation"). But to establish a de facto exclusive dealing claim, a plaintiff must still "show that [the] contracts that were induced were exclusive rather than run-of-the-mill contracts, which inevitably foreclose or exclude alternative sellers from *some* portion of the market, **[*44]** namely the portion consisting of what was bought." *Aerotec Int'l, 836 F.3d at 1182* (internal quotation marks and alterations omitted). Thus, to show a de facto exclusive dealing arrangement, a plaintiff must show that "implied contractual terms in fact substantially foreclosed dealing with a competitor for the same good or service." *Id.* The Ninth Circuit has "not explicitly recognized a 'de facto' exclusive dealing theory," but has not rejected it. *Id. at 1181*.

Courts generally focus on the terms of a challenged agreement to determine if it is a de facto exclusive arrangement. *See id.* (exclusive arrangements include those with "requirements terms, . . . volume or market share targets, or long-term contracts that prevent meaningful competition by taking potential purchasers off the market" (citations omitted)); *see also* *id. at 1182* ("In certain limited situations, discounts and rebates conditioned on a promise of exclusivity or on purchase of a specified quantity or market share of the seller's goods or services may be understood as 'de facto' exclusive dealing contracts because they coerce buyers into purchasing a substantial amount of their needs from the seller.").

The TAC alleges that the Schneider—ETAP Agreement is "an express anticompetitive **[*45]** agreement." TAC ¶ 197. The TAC does not specify whether the alleged exclusive dealing arrangement between OSI and ETAP is express or de facto. *See id.* ¶ 79. The TAC does not, however, plausibly allege the existence of either. Thus, for the reasons stated below, it does not plausibly allege that either agreement requires exclusivity.

(a) Schneider—ETAP Agreement

The TAC alleges that the Schneider—ETAP Agreement is not a vertical one, but an "express anticompetitive agreement between two sellers of components in a bundle offered to EMS Platform customers, where one of the two suppliers controls the contents of the bundle and has substantial market power." TAC ¶ 197. It alleges that this agreement was formed on December 11, 2012, when Schneider and Etap announced a cooperative agreement to bundle their respective products. *Id.* ¶ 199. It then alleges that the Schneider—ETAP Agreement "was confirmed as an exclusive and solesourced arrangement . . . with the announcement in 2015 that Schneider had 'standardized' all of its EMS Platform Grid D and M Products components on ETAP products." *Id.* ¶ 203. The TAC alleges that this agreement illegally restrains trade in the EMS Platform Market. *Id.* ***[*46]*** ¶ 119.

As noted, the TAC alleges that the exclusive nature of the Schneider—ETAP Agreement is "describe[d]" in the 2015 standardization announcement, which provides in relevant part:

> Schneider Electric, a global leader in energy management and engineering solutions has chosen ETAP . . . as its strategic platform for its engineering services business. Schneider Electric recently completed a significant purchase of ETAP suite of power system software which is currently being deployed within the company's Engineering Services business.

> . . . .
> Our deployment is already reducing costs and improving productivity across our business. We look forward to expanding the use of ETAP across all our projects and enhanc[ing] our partnership with ETAP.

Id. ¶ 204. The TAC alleges that the Schneider—ETAP Agreement ultimately extended across "all EMS Platform Markets in addition to data centers." *Id.* ¶ 205.

The TAC alleges that Schneider confirmed the exclusive nature of the agreement in a YouTube video which includes the statement "ETAP was the only choice." *Id.* ¶ 206. It also alleges that internal ETAP correspondence from 2016 includes statements that "[b]oth SEL and SE [Schneider Electric] will be only **[*47]** looking at ETAP for RT PSMS [Real Time Power System Monitoring Software] software and integration support of our software." *Id.* ¶ 216. It alleges that this "'standardization is . . . an exclusionary mechanism" that has excluded "actual and potential competitors capable of offering Grid D and M products as components of Schneider's EMS Platforms, including Power Analytics." *Id.* ¶ 207. It also alleges that, since entering into this agreement, Schneider has "refused to recommend or use" Plaintiff's component parts in any EMS Platform that Schneider has "bid on, sold or managed, even though certain project specification requirements could only be satisfied by using Power Analytics' technology and functionality." *Id.* ¶ 196. It alleges that Schneider's refusal to do so "confirm[s] the exclusive" nature of the Schneider—ETAP Agreement. *Id.* ¶ 195. Further, it alleges that Schneider and ETAP have "powerful incentives" that bind them to the Schneider—ETAP Agreement. *Id.* ¶ 219. Thus, the agreement provides ETAP access to Schneider's share of the EMS Platform Market and from Schneider's perspective "eliminates any competitive alternative to ETAP." *Id.*

Schneider argues that Plaintiff's exclusive **[*48]** dealing claim fails because the TAC does not plausibly allege that the Schneider—ETAP Agreement is exclusive. Thus, it contends that the TAC does not plausibly allege an exclusivity mechanism. Schneider contends that the allegations as to Schneider's 2015 standardization announcement are not sufficient because it only stated that Schneider standardized with ETAP's software within the company's own Engineering Services business. Schneider also emphasizes that the new allegations in the TAC do not cure the deficiencies identified in the FAC Order or the SAC Order. In response, Plaintiff argues that the TAC plausibly pleads the existence of an exclusive dealing arrangement because it alleges that, through the Schneider—ETAP Agreement, Schneider committed to use only ETAP's Grid D and M Products in its EMS Platform offerings.

The TAC does not plausibly allege the existence of an express dealing arrangement between Schneider and ETAP. As noted, it alleges that the Schneider—ETAP Agreement was "confirmed as an exclusive and sole-sourced arrangement . . . excluding other competitive alternatives" through the 2015 standardization announcement. *Id.* ¶ 203. It alleges that standardization constitutes **[*49]** an "exclusionary mechanism" because the term "standardized" in the industry generally means that a seller of a bundled product, such as Schneider, will only include a certain supplier's component parts in its product offerings. *Id.* ¶¶ 204, 207. The TAC does not, however, plausibly allege that the 2015 standardization announcement used the term "standardized" in this way, *i.e.*, to state that Schneider would only include ETAP's Grid Design and Real Time Products in its EMS Platform offerings. Indeed, applying that definition to "standardization" would be inconsistent with the excerpt of the announcement included in the TAC. *See id.* ¶ 204. The announcement does not mention Schneider's products offerings. Instead, it states, *inter alia*, that Schneider has deployed ETAP's "power system software . . . *within the company's Engineering Services business*" and that such deployment is "already reducing costs and improving productivity *across our business*." *Id.* (emphasis added). That the TAC alleges that following the announcement, Schneider expanded the use of ETAP "across all EMS Platform Markets," *id.* ¶ 205, does not warrant a different outcome. That allegation is conclusory.

Accordingly, the **[*50]** TAC does not plausibly allege that Schneider's decision regarding standardization results in exclusivity as to Schneider's product offerings in the EMS Platform Market. Thus, the standardization announcement does not show that the Schneider—ETAP Agreement prevents Schneider from bundling its products with those of ETAP's competitors in its product offerings to customers in that market. This conclusion is reinforced by the absence of any plausible allegations as to the benefits Schneider derives from the alleged exclusive arrangement. The TAC alleges that Schneider benefits from this arrangement because it "eliminates any competitive alternative to ETAP," but does not explain how the elimination of competition among suppliers of Grid

Design Products -- entities that sell their products to suppliers of EMS Platforms -- benefits Schneider. Indeed, the TAC alleges that Plaintiff and other suppliers of Grid Design Products offer products comparable and/or superior to ETAP's at lower prices. TAC ¶¶ 208-09.

The remaining allegations in the TAC are also insufficient. These include that, since the entry of the Schneider—ETAP Agreement, Schneider "has refused to recommend or use Power Analytics' **[*51]** Grid Design, Real Time and Arc Flash Products in any EMS Platform that Schneider has bid on, sold or managed, even though certain project specification requirements could only be satisfied by using Power Analytics' technology and functionality." *Id.* ¶ 196. It is also alleged that, prior to entering the agreement, Schneider included Plaintiff's Grid D and M Products in several EMS Platform bids and had discussions with Plaintiff in 2010 regarding specific potential business opportunities in the future. *Id.* ¶¶ 190-95. It alleges that Plaintiff engaged in further business discussions with Schneider "up until the time of the public announcement of the . . . agreement in 2012 and thereafter until the formal announcement of Schneider's exclusive standardization on ETAP in 2015 on numerous occasions." *Id.* ¶ 195.

These allegations are not sufficient plausibly to state that the Schneider—ETAP Agreement was exclusionary, *i.e.*, more than a commonplace agreement to bundle two complementary products. *Aerotec Int'l, 836 F.3d at 1181*. Thus, the TAC does not give rise to the plausible inference that Schneider has refused to do business with Plaintiff as a result of the Schneider—ETAP Agreement. Indeed, as noted, the TAC alleges **[*52]** that, for a period of approximately three years after the agreement was entered, Schneider explored the possibility of partnering with Plaintiff. TAC ¶ 195. That Schneider allegedly decided not to do so does not warrant a different outcome. A refusal to deal is not, without more, an antitrust violation. *See* *Aerotec Int'l, 836 F.3d at 1184* ("As the Supreme Court has repeatedly emphasized, there is 'no duty to deal under the terms and conditions preferred by [a competitor's] rivals.'" (quoting *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 457, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009))*).

(b) OSI—ETAP Agreement

The TAC alleges that the OSI—ETAP Agreement is "not a vertical agreement between a buyer and a seller, or a manufacturer and a retailer" but instead one between "two sellers of independent, but necessarily interconnected products to foreclose and exclude existing and potential competitors from providing products which challenge each of their dominant monopoly positions in the market." *Id.* ¶ 79. It alleges that this agreement "illegally restrains trade" in the NUPIC Grid Design Market and the NUPIC Real Time Market. *Id.* ¶ 249.

The TAC alleges that the OSI—ETAP Agreement includes "unreasonable impediments and conditions intended to preclude and/or deter" existing customers from switching from OSI and ETAP's **[*53]** products to those of Plaintiffs and certain other "actual and potential competitors," including Honeywell and Aspen Tech. *Id.* ¶ 91. It also alleges that the Term Sheet documenting "key provisions" of the agreement required that ETAP include in its licensing agreement a provision requiring that customers only use OSI products purchased under the agreement in conjunction with ETAP products. *Id.* ¶ 92. Further, it alleges that the parties' MOU obligates them "exclusively [to] recommend and promote" each other's products as "preferred" to prospective customers. *Id.* ¶ 94. The TAC also alleges that there are significant "financial and operational incentives that bind" OSI and ETAP to the OSI—ETAP Agreement. *Id.* ¶ 117. It alleges, for example, that the OSI—ETAP Agreement "protects" OSI because it "links OSI to the entrenched monopoly shareholder . . . ETAP." *Id.* ¶ 83.

As noted, counsel for ETAP and OSI submitted copies of the Umbrella Partnership Agreement, the Addendum, the MOU and the Term Sheet in connection with the ETAP Motion. The MOU states that OSI "will recommend and promote ETAP Products as a preferred power systems analysis and management platform in customer installations" and that **[*54]** ETAP "will recommend and promote [OSI] as a preferred real-time historian/data infrastructure product in customer installations." Ex. C to Stockinger Decl., Dkt. 392-1 at 30. Thus, it states that ETAP and OSI will each promote and recommend the other's products as "preferred." It does not state that they have agreed to deal with one other on an exclusive basis, or exclusively to promote and/or recommend each other's products. Accordingly, the terms of the MOU do not plausibly allege an exclusivity mechanism.

ETAP and OSI contend that the Umbrella Partnership Agreement and the Addendum constitute what is alleged to be the OSI—ETAP Agreement in the TAC. ETAP's Motion at 19. As noted, the Addendum states that the partnership between ETAP and OSI is "nonexclusive." Addendum §§ 1.1-1.2. There are no conditions in either document that would "preclude and/or deter" existing customers from switching to non-ETAP products. These documents are inconsistent with the allegation that the agreement includes "unreasonable impediments and conditions intended to preclude and/or deter" NUPIC customers from substituting in Plaintiff's products for those of OSI and ETAP. This is not dispositive as to the present **[*55]** motions to dismiss. A complete factual record has not been presented, and the present one shows questions of fact as to whether the Umbrella Partnership Agreement and the Addendum represent the entirety of the business relationship between OSI and ETAP.

The TAC also alleges that a Term Sheet documenting "key provisions" of the agreement states that customers who purchased OSI Historian Software "under the ETAP/OSI arrangement" could only use that software in conjunction with ETAP products. *Id.* ¶ 92. Even assuming the truth of this allegation, it does not sufficiently state the existence of an agreement to deal exclusively. Thus, this allegation does not address whether the agreement prohibited OSI from partnering with other suppliers of Grid D and M Products or ETAP from partnering with other suppliers of Historian Software. Indeed, it anticipates that OSI might partner with competing suppliers, and that under such circumstances, OSI's customers would bear the burden of purchasing a second copy of its Historian Software. *See id.* ¶ 93 ("Any customer that wished to switch to a competitor's Grid D and M Products, having already made one payment for the use of OSI's Historian software, **[*56]** would . . . shoulder[] the additional cost of another duplicative license to the same OSI Historian Software . . . ."). Finally, this allegation is contradicted by the Term Sheet submitted by ETAP. *See* Ex. D to Stockinger Decl., Dkt. 392-1 at 38.

Consequently, the TAC does not plausibly allege that the strategic partnership entered by OSI and ETAP precluded OSI from entering into similar arrangements with Plaintiff and other suppliers of Grid D and M Products. That OSI is allegedly a "critical bridge" in the NUPIC Markets because more than 80% of existing NUPIC facilities use its Historian Software, TAC ¶ 82, is not sufficient to state this element of a *Section 1* claim, which is based on alleged de facto exclusive dealing.

* * *

For the foregoing reasons, the TAC does not plausibly allege the existence of express or de facto exclusive dealing arrangements between or among any of the Defendants. *Aerotec Int'l, 836 F.3d at 1183* ("Just as in any exclusive dealing claim, however, the court first had to be satisfied that specific features of the agreement required exclusivity.").

(3) Harm to Competition: Anticompetitive Effects

The "ultimate question" in an exclusive dealing case is "whether the defendant's conduct harmed competition." **[*57]** *McWane, Inc. v. F.T.C., 783 F.3d 814, 835 (11th Cir. 2015)*. "A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects." *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)*. "The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market." *Id.* Thus, "[p]roving injury to competition in a rule of reason case . . . requires a claimant to prove the relevant market and to show the effects upon competition within that market." *Oltz v. St. Peter's Comm. Hosp., 861 F.2d 1440, 1445 (9th Cir. 1988)*.

An exclusive dealing arrangement violates *Section 1* only where its effect is to foreclose competition "in a substantial share" of the relevant market. *McWane, 783 F.3d at 835*. Foreclosure occurs when "'the opportunities for other traders to enter or remain in [the] market [are] significantly limited' by the exclusive dealing arrangements." *Id.* (alterations in original) (quoting *United States v. Microsoft Corp., 253 F.3d 34, 69, 346 U.S. App. D.C. 330 (D.C. Cir. 2001))*. "'Substantial share' has been quantified as foreclosure of 40% to 50% of the relevant market." *Feitelson v. Google Inc., 80 F. Supp. 3d 1019, 1030 (N.D. Cal. 2015)* (citing *Microsoft Corp., 253 F.3d at 70*).

Therefore, to state a valid claim under the Sherman Act, a plaintiff must allege "both that a 'relevant market' exists and that the defendant has power within that market." *Newcal Indus. v. Ikon Office Solution, 513 F.3d 1038, 1044*

(9th Cir. 2008). "The term relevant market encompasses notions of geography as well as product use, quality, and description. The geographic **[*58]** market extends to the area of effective competition . . . where buyers can turn for alternate sources of supply." *Oltz, 861 F.2d at 1446* (internal quotation marks omitted). "The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Id.*; *see also* *Omega, 127 F.3d at 1162* (a relevant market "includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations") (quoting 2A Phillip E. Areeda et al., ***Antitrust Law*** ¶ 570b1 (1995))).

Although "[d]efining the relevant market is a factual inquiry ordinarily reserved for the jury," *Oltz, 861 F.2d at 1446*, "[f]ailure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Tanaka, 252 F.2d at 1063*. A complaint may be dismissed under *Rule 12(b)(6)* if its "relevant market definition is facially unsustainable." *Newcal Indus., 513 F.3d at 1045*. Thus, "[f]irst and foremost, the relevant market must be a *product* market. The consumers do not define the boundaries of the market; the product or producers do." *Id.* (emphasis in original) (footnote omitted). "While a relevant product market can be limited to a portion of customers, such a limitation **[*59]** must be based on a distinction in the product sold to those customers." *T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc., 931 F.2d 816, 824 (11th Cir. 1991)*. Furthermore, antitrust allegations may be premised "on a submarket" only if it is "economically distinct from the general product market" in terms of "practical indicia" such as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Newcal Indus., 513 F.3d at 1045* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*.

Defendants argue that, even if the TAC plausibly alleged the existence of exclusive dealing arrangements, it does not allege that these arrangements harmed competition in a relevant market. They also argue that the TAC does not plausibly allege the existence of product markets that consist of distinct products. Defendants contend that the TAC continues to define the alleged relevant markets in terms of customers, rather than distinct products sold to them. ETAP Motion at 22; Schneider Motion at 23. ETAP and OSI also argue that the TAC does not plausibly allege that the alleged agreements create significant anticompetitive effects. ETAP Motion at 22-24.

(a) Schneider—ETAP Agreement **[*60]**

Schneider argues that the TAC does not adequately allege a relevant market for purposes of the alleged anticompetitive effects of the Schneider—ETAP Agreement. The TAC alleges that the Schneider—ETAP Agreement has unreasonably restrained competition in the market for the sale and servicing of EMS Platforms. TAC ¶ 119. The TAC defines EMS Platforms as "the full bundle of automation, monitoring and control software, hardware and related equipment purchased by facility owner/operators for use as an 'EMS Platform.'" *Id.* ¶ 136.

The TAC alleges that customers in the EMS Platform Market share "common characteristics," including: (i) they operate in "low or medium voltage environments," (ii) they "place a premium on the reliability of their electrical power systems" and (iii) they employ "more sophisticated monitoring systems" to prevent power outages. *Id.* ¶¶ 121-22; *see also id.* ¶ 123 ("The distinguishable demands of EMS Platform consumers is evidenced by the sophistication of the monitoring equipment and levels of redundancy included in their electric power grid systems.").

The TAC alleges as alternatives to the EMS Platform Market the following four end-user EMS platform markets: (i) the Commercial **[*61]** Buildings EMS Platform Market; (ii) the Data Center EMS Platform Market; (iii) the Industrial EMS Platform Market and (iv) the Infrastructure/Grid EMS Platform Market. *Id.* ¶ 161. It alleges that "[a]lthough each end-user EMS Platform provides many of the same functions, the four end-user EMS Platforms are distinguishable from one another based on the configuration, integration and automation of select components." *Id.* ¶ 162; *see also id.* ¶ 165 ("While some EMS Platform components are used in more than one end-user platform, the platforms themselves are not substitutable across the four groups of end-users."). The TAC then distinguishes the four end-user EMS platform markets based on customer type and/or industry. *See id.* ¶¶ 173, 177, 181, 185. The TAC also alleges that, because many of the components used in industrial EMS platforms are used in infrastructure EMS platforms, the Industrial EMS Platform Market and the Infrastructure/Grid EMS Platform Market should be deemed a single antitrust market. *Id.* ¶ 189.

Schneider contends that the EMS Platform Market and the four end-user markets are implausible. The premise for this position is that the TAC does not plausibly allege that that **[*62]** the products Plaintiff sells to customers in those markets are distinct. Schneider Motion at 23; ETAP Motion at 22. Schneider argues in the alternative that the TAC does not plausibly plead substantial foreclosure in any of the alleged relevant markets. In support of this position, Schneider notes that the TAC alleges that it competes with other companies in the EMS Platform Market. Schneider also contends that the alleged relevant markets are not sufficiently stated because Plaintiff is neither a buyer nor a seller in any of them. In response, Plaintiff contends that the EMS Platform Market and the four end-user markets constitute relevant product markets because they are not defined in terms of customers, but in terms of "a bundle of products/services." Opposition to Schneider Motion at 16.

It is not necessary to decide in this Order whether the TAC plausibly pleads that the EMS Platform Market is a relevant market. Even if the EMS Platform Market is plausibly pleaded, the TAC does not plausibly allege that competition has been substantially foreclosed in that market. The TAC alleges that Schneider has more than 50% of the EMS Platform Market, but competes there with several others, **[*63]** including Eaton, Siemens, GE, ABB, Honeywell and other "smaller competitors." *Id.* ¶ 152. The TAC does not allege how the Schneider—ETAP Agreement has affected Plaintiff's ability to partner with those competitors. Although it alleges that the "non-Schneider" portion of the EMS Platform Market is fragmented, it does not plausibly allege why Schneider's competitors do not "represent a viable alternative" for component suppliers like Plaintiff.[4] *Id.* ¶ 15; *cf. Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 66 (1st Cir. 2004)* ("[H]arm does not mean a simple loss of business . . . but an impairment of the competitive structure of the market."); *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 394 (7th Cir. 1984)* ("The exclusion of competitors is cause of antitrust concern only if it impairs the health of the competitive process itself."). Furthermore, for the reasons stated above, the TAC does not plausibly allege that the Schneider—ETAP Agreement has foreclosed Plaintiff from partnering with Schneider, *i.e.*, it does not plausibly plead exclusivity. Therefore, the allegations in the TAC are not sufficient as to substantial foreclosure from a relevant product market.

(b) OSI—ETAP Agreement

The TAC alleges that the OSI—ETAP Agreement unlawfully restrains trade in two distinct markets: the NUPIC Grid Design Market and **[*64]** the NUPIC Real Time Market. *Id.* ¶ 249. It defines the NUPIC Grid Design Market as one for "the sale and servicing of" Grid Design Products to customers who are required to use Grid Design Products that are NUPIC certified. *Id.* ¶ 60. It defines the NUPIC Real Time Market as one for "the sale and servicing of" Real Time Products to customers who are required to use Real Time Products that are NUPIC certified. *Id.* ¶ 61. ETAP and OSI contend that these allegations do not plausibly plead the existence of relevant markets because each is defined as a subset of customers. They also contend that the TAC fails plausibly to allege preclusion in those markets. ETAP Motion at 22.

The TAC plausibly alleges a NUPIC Grid Design Market, and that Plaintiff has been excluded from it. As noted, "[w]hile a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the product sold to those customers." *T. Harris Young & Assocs., 931 F.2d at 824*; *see* TAC ¶¶ 60-64. Earlier versions of the complaint in this action failed to identify a distinction between the Grid Design Products sold in the NUPIC Grid Design Market and those sold elsewhere. The TAC corrected this shortcoming. Thus, it alleges **[*65]** that NUPIC-certified Grid Design Products are manufactured with "additional operational components[,] including a Quality Assurance Plan and Software Development Standards." *Id.* ¶ 64. It also alleges that they must "be manufactured and . . . perform to meet specific safety and reliability standards" and "maintain specifically mandated historical and ongoing performance documentation and records." *Id.* It then alleges that these

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[4] Eaton is an exception in this regard. Thus, the TAC alleges that Eaton "has its own captive suite" of Grid D and M Products. *Id.* ¶ 152. No similar allegations are made with respect to the remaining alleged competitors in the EMS Platform Market — Siemens, GE, ABB, Honeywell and the other "additional smaller competitors." *Id.*

additional features and service requirements result in a significantly higher "cost structure" for NUPICcertified Grid Design Products. *Id.* ¶ 65.

Although the TAC does not expressly allege that non-NUPIC customers would not purchase Grid Design Products with these characteristics, that is a plausible inference from its allegations. Thus, it can plausibly be inferred from the allegations that NUPIC-certified Grid Design Products are priced higher and offer more features than their non-certified counterparts. For these reasons, the TAC plausibly alleges that sales of NUPIC-certified Grid Design Products are restricted to the NUPIC Grid Design Market. Further, it alleges that ETAP has a 97% share and OSI has an 80% share of the NUPIC Grid Design Market. These allegations **[*66]** are sufficient plausibly to plead a relevant market comprised of distinct products and that ETAP and OSI have power within that market. The TAC also plausibly pleads substantial foreclosure in that market. Thus, it alleges that no sales of non-ETAP Grid D and M Products have been made to any nuclear facility since the OSI—ETAP Agreement was entered. *Id.* ¶ 111.

In contrast, the TAC does not plausibly allege that the OSI—ETAP Agreement has substantially foreclosed competition in the NUPIC Real Time Market. The TAC alleges that Plaintiff is the only company "capable of obtaining" NUPIC certification for its Real Time Products other than ETAP and that neither company has sought or obtained such certification. *Id.* ¶¶ 96, 115. It alleges that Plaintiff has not undertaken a NUPIC audit for its Real Time Products because the alleged anticompetitive agreement between OSI and ETAP "has foreclosed" Plaintiff from doing so. It alleges that this is because Plaintiff's Real Time Products "achieve full functionality" only when they are used with Plaintiff's Grid Design Products. *Id.* ¶ 114. These allegations are not sufficient to plead this element of a *Section 1* claim. Thus, the TAC expressly pleads that it **[*67]** is a characteristic of how Plaintiff's Real Time Products are designed and manufactured, *i.e.*, that they achieve full functionality only when they are paired with Plaintiff's Grid Design Products, that has caused Plaintiff's exclusion from the market. Nor does the TAC plausibly plead that ETAP has market power in the NUPIC Real Time Market. Indeed, the TAC alleges that ETAP has not certified its own Real Time Products.

* * *

For the foregoing reasons, the TAC fails plausibly to allege that competition has been substantially foreclosed in the EMS Platform Market and the NUPIC Real Time Market as a result of the alleged exclusive dealing arrangements between Schneider and OSI and OSI and ETAP. *Omega, 127 F.3d at 1163* ("If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether [exclusive dealing arrangements] foreclose from competition *any* part of the relevant market." (emphasis in original)). However, the TAC plausibly pleads substantial foreclosure in the NUPIC Grid Design Market. Nevertheless, for the reasons stated above, the TAC does not plausibly allege the existence of any mechanism that makes the OSI—ETAP **[*68]** Agreement exclusionary.

(4) Antitrust Injury and Antitrust Standing

Antitrust injury "is a substantive element of an antitrust claim, and the fact of injury or damage must be alleged at the pleading stage." *Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)*. Antitrust injury requires "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1055 (9th Cir. 1999)*. The injured party must also "'be a participant in the same market as the alleged malefactors,' meaning 'the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market.'" *Somers, 729 F.3d at 963* (quoting *Glen Holly Entm't, Inc. v. Tektronix, Inc., 343 F.3d 1000, 1008 (9th Cir. 2003))*.

"[C]ourts tend to be skeptical of [exclusive dealing] claims because it is not in the long-term interest of the company that grants the 'exclusive deal' to drive out of business competitors of the grantee." *Stop & Shop Supermarket, 373 F.3d at 66*. Exclusive dealing agreements will "generally only be unlawful where the market is highly concentrated, the defendant possesses significant market power, and there is some element of coercion present." *ZF Meritor, 696 F.3d at 284*. Courts generally require a showing of specific anticompetitive conduct, such **[*69]** as coercion, because "virtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from *some* portion of the market, namely the portion consisting of what was bought." *Barry Wright Corp., 724 F.2d at 236*. Without a showing that one of the parties was coerced to enter an agreement or that there was similar anticompetitive conduct, an exclusive dealing agreement may function simply as appropriate competition. *See* *PNY Techs., Inc. v. SanDisk Corp., 2014 U.S. Dist. LEXIS 90649, 2014 WL 2987322, at *6 (N.D. Cal. July 2, 2014)* ("PNY's assertion that SanDisk's agreements constitute exclusive dealing based on the fact that retailers have entered into and continually renew contracts with SanDisk is not plausible because PNY has not pleaded (beyond naked assertions) facts showing that it failed to win contracts despite offering better terms or that SanDisk somehow thwarted its efforts to secure business through conduct other than competition on the merits."). "That a manufacturer has a longstanding exclusive relationship with a retailer does not mean that their agreement constitutes actionable exclusive dealing." *Id.*; *see also id.* ("Absent allegations of predatory pricing or some other anticompetitive conduct, that is the essence of competition.").

Further, "the case law generally supports the contention that exclusive **[*70]** contracts of short duration that are readily terminable do not run afoul of the antitrust laws." *Pro Search Plus, 2013 U.S. Dist. LEXIS 107895, 2013 WL 3936394, at *2*. "[T]he short duration and easy terminability of . . . agreements negate substantially their potential to foreclose competition." *Omega, 127 F.3d at 1163* (footnote omitted). "If the contracts at issue are shortterm or easily terminated, 'a competing manufacturer need only offer a better product or a better deal' to get contracts of its own." *PNY Techs., 2014 U.S. Dist. LEXIS 90649, 2014 WL 2987322, at *4* (quoting *Omega, 127 F.3d at 1164*).

As the Third Circuit has explained:

> There is no set formula for evaluating the legality of an exclusive dealing agreement, but modern ***antitrust law*** generally requires a showing of significant market power by the defendant, substantial foreclosure, contracts of sufficient duration to prevent meaningful competition by rivals, and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects. Courts will also consider whether there is evidence that the dominant firm engaged in coercive behavior, and the ability of customers to terminate the agreements. The use of exclusive dealing by competitors of the defendant is also sometimes considered.

ZF Meritor, 696 F.3d at 271-72 (internal citations omitted).

(a) Schneider—ETAP Agreement

The TAC alleges that the **[*71]** Schneider—ETAP Agreement has injured competition in the relevant markets by "substantially foreclosing and excluding competition from lower cost, and more efficient and innovative Grid D and M products that would otherwise be available to EMS Platform customers." *Id.* ¶ 208. It alleges that as a result, buyers have paid higher prices for EMS Platforms than they would have paid in the absence of the alleged anticompetitive agreement. *Id.* ¶ 210; *see also id.* ¶ 214 ("This has harmed competition by raising the total cost of ownership for EMS Platform purchasers, and blocking technological advancements that would improve efficiency and safety of end users' facility grids.").

Schneider contends that the TAC does not plausibly plead antitrust injury because it does not sufficiently allege that the Schneider—ETAP Agreement is unlawful. Schneider also contends that the TAC does not plausibly allege antitrust injury because the TAC alleges that Plaintiff competes "in the *upstream* market for the sale of *components* of EMS Platforms" but not in the EMS Platform Market itself. Schneider Motion at 24 (emphasis in original). In response, Plaintiff argues that there is no requirement that a plaintiff **[*72]** be the defendant's consumer or competitor in order to establish antitrust injury.

The TAC does not plausibly plead that the Schneider—ETAP Agreement is an unlawful exclusive dealing arrangement. For the reasons stated above, it does not plausibly plead an exclusivity mechanism. It also does not contain any allegations as to coercion, ease of termination, or duration. Thus, it does not allege that the agreement is the product of anticompetitive conduct, that ETAP compelled Schneider to enter into the agreement or that it is a long-term arrangement. Further, it does not plausibly allege that the agreement is not easily terminable.

The allegations in the TAC as to the significant financial incentives that Schneider derives from the challenged agreements do not plausibly show that the agreement is difficult to terminate. *See* TAC ¶ 219. Even if Schneider currently has a financial incentive to remain in the challenged agreement, the TAC does not plausibly allege why it would not have an equal incentive to terminate the agreement, if Plaintiff offered one with more attractive terms. *Cf. Allied Orthopedic Appliances, 592 F.3d at 997* ("The easy terminability of an exclusive dealing arrangement negate[s] substantially [its] potential to **[*73]** foreclose competition." (internal quotations omitted)); *see also Maxim Integrated Prods., Inc. v. Analog Devices, Inc., 79 F.3d 1153, 1996 WL 117425 (Table), at *2 (9th Cir., 1996)* (that an agreement alleged to be exclusive may be terminated "without penalty . .. strongly favors a finding of no unreasonable restraint on competition").

In sum, the allegations do not plausibly show that the Schneider—ETAP Agreement was entered for reasons other than to advance the business interests of Schneider. Therefore, the allegations are not sufficient to support the inference that the agreement is the result of unlawful, anticompetitive conduct. For all of these reasons, the TAC does not plausibly allege that Plaintiff has suffered an antitrust injury arising from the Schneider—ETAP Agreement.

(b) OSI—ETAP Agreement

OSI and ETAP contend that the allegations in the TAC as to antitrust injury and standing are insufficient because they are conclusory. In response, Plaintiff argues that all four elements of antitrust injury are plausibly alleged.

The TAC alleges that the OSI—ETAP Agreement is unlawful and has harmed competition. It alleges that no suppliers of Grid Design Products other than ETAP have made "a single sale to any nuclear facility" of Grid Design Products since the agreement was entered. *Id.* ¶ 111. It **[*74]** alleges that the OSI-ETAP Agreement has resulted in "reduced output in the form of new products and functionality, has stifled innovation and customer choice, and has de facto eliminated any source of price competition" in the NUPIC Grid Design Market. *Id.* ¶ 116. The TAC also alleges that since the OSI—ETAP Agreement was entered, Plaintiff has lost four NUPIC customers. *Id.* ¶ 112. It alleges that "Plaintiff "has been damaged by loss of past and future sales and profits, the inability to develop economies of scale to permit it to compete in the market, and inability to develop and offer new innovative products." *Id.* ¶ 273.

For the same reasons stated above with respect to the Schneider—ETAP Agreement, the TAC does not plausibly allege that the OSI—ETAP Agreement is the result of anticompetitive conduct. Thus, there are no allegations as to coercion, lack of ease of termination and/or duration of the OSI—ETAP Agreement. Therefore, because there are no plausible, specific allegations of unlawful conduct giving rise to antitrust injury, the TAC does not plausibly allege this element of Plaintiff's *Section 1* claim.

* * *

For the foregoing reasons, the TAC does not plausibly state a claim for violation **[*75]** of *Section 1* of the Sherman Act. Although the TAC remedies some of the deficiencies identified by the Court in the FAC Order and SAC Order, it still fails plausibly to allege that either of the challenged agreements constituted express or de facto exclusive dealing arrangements. Accordingly, the Motions are **GRANTED** as to the *Section 1* claim and it is **DISMISSED**, without prejudice.

b) Sherman Act *Section 2*

The TAC alleges that ETAP violated *Section 2* of the Sherman Act through acts of monopolization and attempted monopolization in the NUPIC Grid Design Market. TAC ¶¶ 277-90. *Section 2* applies to "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*. "There are three essential elements to a successful claim of *Section 2* monopolization: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury." *Allied Orthopedic Appliances, 592 F.3d at 998* (internal quotation marks omitted). "To demonstrate attempted monopolization a plaintiff must prove '(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific **[*76]** intent to monopolize and (3) a dangerous probability of achieving monopoly power.'" *John Doe 1 v. Abbott Labs., 571 F.3d 930, 933 n.3 (9th Cir. 2009)* (quoting *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008))*.

ETAP and OSI contend that the *Section 2* claim is deficient for the same reasons discussed above as to the *Section 1* claim. They also contend that Plaintiff has not sufficiently alleged that ETAP intended to monopolize the NUPIC Grid Design Market. ETAP Motion at 25. Plaintiff responds that the TAC plausibly states all elements of a *Section 2* claim because it alleges that ETAP has a 97% share of the NUPIC Grid Design Market, and that it attained and maintained such market power by entering into an exclusionary agreement with OSI for the express purpose of "kill[ing] competition." Opposition to ETAP Motion at 27-28. Plaintiff also contends that the TAC sufficiently alleges antitrust injury. Plaintiff further argues that the TAC plausibly alleges a claim for attempted monopolization because it alleges that ETAP acted with the specific intent to achieve the exclusion of Plaintiff.

For the same reasons discussed earlier with respect to the *Section 1* claim, the TAC fails plausibly to allege anticompetitive conduct that caused antitrust injury sufficient to state a claim under *Section 2*. The attempted monopolization claim is also deficient **[*77]** because it fails adequately to allege that ETAP willfully acquired monopoly power in the NUPIC Grid Design Market or had the specific intent to do so.

As part of its opposition to the ETAP Motion, Plaintiff relies on the allegation in the TAC that an ETAP employee sent an email to colleagues in which the employee stated: "We need to kill such competition from these companies. ([Plaintiff], Cyme, DigSilent, PSSE in particular)" after hearing Plaintiff's announcement regarding its Real Time Products. TAC ¶¶ 84-86. As noted, the market in which ETAP allegedly has market power is the NUPIC Grid Design Market, *i.e.*, the market for the sale and servicing of Grid Design Products to customers who require NUPIC certification. This statement does not show ETAP's willful acquisition or intent to acquire market power in the NUPIC Grid Design Market for two reasons. *First*, it refers to "kill[ing] competition" from entities that the TAC alleges do not compete in that market. TAC ¶ 66 (Plaintiff and ETAP are the only "competitors with audited 'certified' products in the NUPIC Grid Design Market"). *Second*, this statement followed Plaintiff's announcement regarding its Real Time Products -- not its **[*78]** Grid Design Products. The TAC does not allege that ETAP possesses market power in the NUPIC Real Time Market. Indeed, it alleges that there are currently no competitors in that market. *Id.* ¶ 115. This allegation therefore does not plausibly plead that ETAP acted with the specific intent to monopolize the NUPIC Grid Design Market.

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

2. State Law Claims

a) The Cartwright Act

The Cartwright Act "generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices . . . and declares that, with certain exceptions, every trust is unlawful, against public policy and void." *In re Cipro Cases I & II, 61 Cal. 4th 116, 136, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (2015)* (quoting *Pac. Gas & Elec. Co. v. Cty. of Stanislaus, 16 Cal. 4th 1143, 1147, 69 Cal. Rptr. 2d 329, 947 P.2d 291 (1997)* (internal citations omitted)). "The analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act . . . was modeled after the Sherman Act." *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*; *see also* *Nova Designs, Inc. v. Scuba Retailers Ass'n, 202 F.3d 1088, 1092 (9th Cir. 2000)* ("Our disposition of [the plaintiff's] Sherman Act claims disposes of its claims under the California Cartwright Act. The Cartwright Act is patterned after the Sherman Act, and 'federal cases **[*79]** interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.'" (quoting *Marin Cty. Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 925, 130 Cal. Rptr. 1, 549 P.2d 833 (1976)* (en banc)).

Plaintiff acknowledges that its Cartwright Act claim is subject to the same limitations and requirements that apply to its claims under the Sherman Act. For the same reasons the TAC does not plausibly allege a claim against any Defendant under the Sherman Act, it does not plausibly allege a claim under the Cartwright Act.

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

b) North Carolina UDTPA Claim

"In order to state a claim under the UDTPA, a plaintiff must show (1) defendant committed an unfair or deceptive act or practice; (2) the action in question was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff." *Ellis v. La.-Pac. Corp., 699 F.3d 778, 787 (4th Cir. 2012)* (internal quotation marks omitted). "Whether conduct is unfair or deceptive is a legal issue for the court to decide." *Id.*

Plaintiff's UDTPA claim appears to be premised on three broad categories of conduct: (i) the alleged bases for the violations of the Sherman Act, TAC ¶¶ 224-29, 231-39; (ii) the alleged false statements ETAP made to NUPIC customers about Plaintiff, *id.* ¶¶ 230-31, and (iii) **[*80]** Schneider's alleged "concealment" from EMS Platform customers "of the substantial cost benefits of alternative Grid D and M and Real Time products," such as those produced by Plaintiff, *id.* ¶ 240. Schneider acknowledges that anticompetitive conduct may be actionable under the UDTPA even if it does not violate the Sherman Act. However, it argues that the elements of such a cause of action are not plausibly pleaded as to any of the three aforementioned categories of conduct. Schneider Motion at 26-28. ETAP and OSI make similar arguments in the ETAP Motion. ETAP Motion at 26-27. Plaintiff responds that all elements of a UDTPA claim are plausibly pleaded. In support of this argument, it emphasizes that the UDTPA is broader than the Sherman Act. Thus, conduct may violate the UDTPA even if it does not rise to the level of a Sherman Act violation. Opposition to Schneider Motion at 27-28.

To the extent that Plaintiff's UDTPA claim is derivative of the conduct alleged to violate the Sherman Act, it is not plausibly pleaded. Thus, even if the UDTPA prohibits unfair and deceptive conduct that does not satisfy the elements of a claim under the Sherman Act, for the reasons stated above, the TAC **[*81]** does not plausibly plead that the challenged agreements were anticompetitive, exclusive dealing arrangements. *See R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 396 (M.D.N.C. 2002)* (courts have interpreted the UDTPA as prohibiting "commercial unfairness and deception beyond traditional antitrust concepts" but dismissing the plaintiffs' UDTPA cause of action because the complaint did not allege "any unfair and deceptive trade practices" apart from the deficient Sherman Act allegations).

Plaintiff's UDTPA claim is also not plausibly pleaded to the extent it is premised on Schneider's alleged concealment of lower-priced Grid D and M Products from EMS Platform customers. The essence of these allegations is that, in furtherance of the Schneider—ETAP Agreement, Schneider failed to inform its customers that other suppliers of Grid D and M and Real Time Products charge prices below those of ETAP. *See* TAC ¶ 240. Plaintiff has cited to no legal authority for the proposition that the alleged failure of a commercial entity to inform its customers that one of its competitors offers lower prices, constitutes an "unfair or deceptive act or practice" within the meaning of the UDTPA. Therefore, the TAC fails plausibly to plead a violation of the UDTPA based on this **[*82]** conduct.

The TAC also fails plausibly to allege a violation of the UDPTA based on the alleged false statements ETAP made to the public and certain of Plaintiff's customers about its financial viability. Thus, the TAC does not allege how such statements proximately caused any injury to Plaintiff. For example, the TAC does not allege that any of the customers to whom these alleged statements were made terminated relationships with Plaintiff or refused to partner with Plaintiff. *See* TAC ¶¶ 67, 109, 140, 230-31.

Because no acts of unfair or deceptive conduct are plausibly alleged in the TAC, the Motions are **GRANTED** as to this claim and it is **DISMISSED**, without prejudice.

c) California Unfair Competition Law

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

Defendants argue that the TAC fails to state a claim under the UCL because this cause of action is derivative of the Sherman Act claims. Schneider **[*83]** Motion at 28. Plaintiff acknowledges that its UDTPA claim is derivative of its

Sherman Act claims. Opposition to Schneider Motion at 26. Therefore, for the same reasons the TAC does not plausibly allege a claim under *Section 1* or *Section 2* of the Sherman Act, it does not plausibly allege a claim under the UCL.

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

d) Tortious Interference with Prospective Economic Advantage

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

Defendants argue **[*84]** that the TAC has not alleged facts that, if established, would show that Defendants acted with malice or without justification. Schneider also argues that the TAC does not identify particular contracts with which Schneider allegedly interfered and that the customers Plaintiff allegedly lost are in the NUPIC Market -- not the EMS Platform Market. Schneider Motion at 28-29. Plaintiff responds that the TAC states a plausible tortious interference claim because it alleges that the Schneider—ETAP Agreement is "an independently wrongful act" that interfered with Plaintiff's "opportunities to sell into the EMS Platform [M]arket." Opposition to Schneider Motion at 28.

The TAC alleges that Defendants "intentionally interfered" with Plaintiff's ability to "sell and service" its Grid D and M Products in the EMS Platform Market, the four end-user markets, the NUPIC Grid Design Market and the NUPIC Real Time Market. TAC ¶¶ 299-300. It then alleges that such interference caused Plaintiff "to lose sales to at least the following entities with whom [it] had pre-existing commercial relations: Duke Energy, Enercon, Atomic Energy of Canada and Energy Northwest." It also alleges that Defendants' conduct **[*85]** harmed Plaintiff "in the form of lost contracts, lost sales and profits, and lost opportunities to expand its business with purchasers and operators of Power Grids." *Id.* ¶¶ 300-02.

The TAC does not state a plausible tortious interference with prospective economic advantage claim against Schneider. The only specific business relations with which the challenged agreements allegedly interfered involved customers in the NUPIC Market. Schneider does not compete in that market. The TAC also does not state a plausible tortious interference claim against OSI or ETAP. Thus, it does not allege that either interfered with Plaintiff's pre-existing commercial relations with malice or for purposes unrelated to a legitimate business interest. *See Cobra Capital, 266 F. Supp. 2d at 439* (dismissing the plaintiff's complaint because it contained "no factual allegations that would raise an inference of malice or an illegitimate business interest on the part of [the defendant]" in determining that a business opportunity with the plaintiff was not in its economic interest). In sum, the TAC alleges only that these four customers "switched from" Plaintiff to ETAP "as a direct result of" the OSI—ETAP Agreement. TAC ¶ 112. This allegation is conclusory. **[*86]** Thus, it does not allege that these four customers terminated their respective relationships with Plaintiff as a result of the challenged agreement. Further, to the extent this claim is predicated on the allegations regarding the misrepresentations ETAP made to the public and certain unidentified customers, it is not sufficiently pleaded. Thus, the TAC does not plausibly allege that these claimed misrepresentations induced specific customers "to refrain from" contracting with Plaintiff. *DaimlerChrysler Corp., 148 N.C. App. at 585*.

For the foregoing reasons, the TAC does not plausibly state a claim for tortious interference with economic advantage. Therefore, the Motions are **GRANTED** as to this claim and it is **DISMISSED**, without prejudice.

e) Conspiracy Claim

The TAC does not plausibly allege a claim for civil conspiracy. The supporting allegations are conclusory. They state the elements of the tort, but with few factual predicates. *See* TAC ¶¶ 303-08. Further, to the extent that this claim is premised on the alleged violations of *Section 1* of the Sherman Act or the other claims addressed above, it fails for the same reasons stated as to those claims. Nor has Plaintiff remedied the deficiencies in the allegations pleaded in support of this **[*87]** claim that were identified in the SAC Order. *Compare* SAC ¶¶ 381-86 *with* TAC ¶¶ 303-08.

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

IV. Conclusion

For the reasons stated in this Order, the Motions are **GRANTED**, without prejudice. Any amended complaint shall be filed no later than July 31, 2018.

IT IS SO ORDERED.

Charych v. Siriusware, Inc.

United States District Court for the Eastern District of New York

July 30, 2018, Decided; July 30, 2018, Filed

CV 17-468 (JS) (GRB)

Reporter

2018 U.S. Dist. LEXIS 128341 *; 2019-2 Trade Cas. (CCH) P80,982

HAROLD CHARYCH and MOUNTAIN PASS SYSTEMS, LLC, Plaintiffs, -against- (1) SIRIUSWARE, INC., United States subsidiary of a United Kingdom entity; (2) ACCESSO TECHNOLOGY GROUP, PLC, United Kingdom parent entity of SIRIUSWARE, INC.; (3) AXESS NORTH AMERICA, LLC, United States subsidiary of an Austrian entity; (4) AXESS, AG, Austrian parent entity of AXESS NORTH AMERICA, LLC; (5) ACTIVE NETWORK, LLC, Formerly Resort Technology Partners, LLC, (6) VISTA EQUITY PARTNERS, LLC, Parent company of Active Network, LLC, (7) SKIDATA, INC., United States subsidiary of an Austrian entity; (8) SKIDATA, AG, Austrian parent entity of SKIDATA, INC., Defendants.

Subsequent History: Adopted by, Objection overruled by, Dismissed by *Charych v. Siriusware, Inc., 2018 U.S. Dist. LEXIS 170968 (E.D.N.Y., Sept. 25, 2018)*

Core Terms

allegations, interface, ski, plaintiffs', antitrust, Sherman Act, Network, ticket, anticompetitive, customers, documents, Mountain, software, motion to dismiss, competitors, Technology, conclusory, report and recommendation, service of process, defendants', Convention, conspiracy, monopolize, mail, personal jurisdiction, ski resort, monopoly, products, sharing, rivals

Counsel: **[*1]** For Harold Charych, Plaintiff: Robert G. Leino, LEAD ATTORNEY, Robert G. Leino, Esq., New York, NY.

For Siriusware, Inc., United States subsidiary of a United Kingdom entity, Accesso Technology Group, PLC, United Kingdom parent entity of Siriusware, Inc., Defendants: Gaspare Bono, LEAD ATTORNEY, PRO HAC VICE, John Lomas, PRO HAC VICE, Dentons US LLP, Washington, DC.

For Axess North America, LLC, United States subsidiary of an Austrian entity, Defendant: Natalie C. Segall, LEAD ATTORNEY, PRO HAC VICE, SEGALL & BANKO, Park City, UT.

For Axess International, AG, Austrian parent entity of Axess North America, LLC, Defendant: Daniel L. Brown, LEAD ATTORNEY, Sheppard, Mullin, Richter & Hampton, New York, NY.

For Active Network, LLC, formerly known as Resort Technology Partners, LLC, Vista Equity Partners, LLC, Parent company of Active Network, LLC, Defendants: Alex Stone Zuckerman, Matthew Solum, Kirkland & Ellis LLP, New York, NY.

For Skidata, Inc., United States subsidiary of an Austrian entity, Skidata, AG, Austrian parent entity of Skidata, Inc., Defendants: Douglas F. Broder, LEAD ATTORNEY, K&L Gates LLP, New York, NY; Anthony Peter Badaracco, Thomas Anthony Warns, K & L Gates LLP, New York, **[*2]** NY.

Judges: GARY R. BROWN, United States Magistrate Judge.

Opinion by: GARY R. BROWN

Opinion

REPORT AND RECOMMENDATION

GARY R. BROWN, United States Magistrate Judge:

In this antitrust action, plaintiffs seek recovery based on allegations purporting to demonstrate that defendants acted unlawfully in connection with the distribution and marketing of automated ski resort validation systems. Defendants have moved to dismiss the fourth amended complaint pursuant to *Fed. R. Civ. P. 12(b)(2)*, *(5)* and *(6)* for lack of jurisdiction, failure of service and failure to state a claim, respectively, and said motions have been referred to the undersigned by the Honorable Joanna Seybert for Report and Recommendation. DE 80. For the reasons set forth herein, the undersigned respectfully recommends that defendants' motion be granted and the matter dismissed with prejudice.

ALLEGATIONS OF THE COMPLAINT

The fourth amended complaint ("Complaint") in this action, DE 67, alleges the following:

Many larger ski resorts utilize management software sold by Defendants Accesso Technology Group, PLC with its subsidiary Siriusware, Inc. (together "Accesso Technology") and defendant Active Network, LLC. ("Active Network"). Compl. ¶ 14. The solutions provided by these companies—which **[*3]** represent approximately 80% of the market—include production of ski lift tickets that include unique barcodes, which can be visually read by employees or scanned by mobile barcode readers. *Id.* Notwithstanding these safeguards, theft of services continues to present issues, including through improper lift ticket transfers among skiers. *Id.* ¶¶ 15-17.

To add additional security and greater efficiency, companies have developed automated ski lift access gates employing Radio Frequency Identification ("RFID") technology—essentially an EZ Pass for skiers. *Id.* ¶¶ 18-19. Active Network has partnered with the Skidata defendants to offer these products to its ski resort customers. *Id.* ¶¶ 22-24. Similarly, the Accesso Technology has made joint efforts with the Axess defendants to provide a unified RFID solution to their ski resort customers. *Id.* ¶¶ 25-28. The Complaint alleges, in a most conclusory manner, that all defendants have "significant contacts" with the State of New York, through, among other things, efforts to purchase or sell products to or from businesses in New York and attending trade shows and conferences. *Id.* ¶ 12. With respect to the three non-US defendants—Axess AG, Vista and **[*4]** Skidata AG (together, the "foreign defendants")—plaintiffs fail to articulate any particularized allegations as to these entities, relying instead upon broad legal theories. *See, e.g., id.* ¶¶ 284-87 (allegations against Axess AG suggesting that defendant "is *or may be liable* for the conduct of [Axess] under principles of *respondeat superior . . . and/or some other type of vicarious liability*") (emphasis added).

Plaintiffs developed, at a cost of $350,000, an RFID ski gate system that, they claim, offers superior features and a lower price point than the systems marketed by Axess and Skidata. *Id.* ¶¶ 31, 82. One technical difference of plaintiffs' system is the incorporation of ultra high frequency ("UHF") technology that purportedly offers a greater read range and more robust detection of RFID tickets. *Id.* ¶ 37. The complaint catalogs a series of features and advantages of plaintiffs' system that allegedly render it preferable to those produced by defendants. *Id.* ¶¶ 31-54. Following that description, plaintiffs describe testing their system at Loon Mountain in Lincoln, NH, Pico Mountain in Mendon, VT, and Sunday River in Newry, ME, and their unsuccessful efforts to market their system **[*5]** to Gore Mountain in North Creek, NY, Sunapee Mountain in Newbury, NH, and Wachusett Mountain Ski Area in Princeton, MA. *Id.* ¶¶ 56-79, 119-25. According to the allegations, the later, unsuccessful efforts to market their system turned on an unwillingness by Accesso Technology and Active Network to render their existing systems compatible for integration of plaintiffs' products or to provide interface information to allow plaintiffs to effect such integration. *Id.*

The complaint describes additional efforts by plaintiffs to sell their system to other ski resorts, including Boyne Resorts and Powdr Resorts, entities which own groups of ski facilities. *Id.* ¶¶ 84-100. According to the complaint, all of these efforts were waylaid by defendants by the exercise of market power generally and, more specifically, failure to provide the interface for defendants' systems. *Id.* In one particular instance, Active Network indicated to Boyne Resorts that the cost of providing such an interface would run several hundred thousand dollars. *Id.* ¶ 100; *id.* Ex. S. Similarly, in connection with the Gore Mountain project, plaintiffs received information from the customer that providing an interface to the Accesso **[*6]** software "would not be cheap." *Id.* ¶ 115. In several other instances, plaintiffs cite, in support of their claims of restraint of trade, communications from potential customers asking questions about the nature of plaintiffs' relationship with Accesso Technology and Active Networks, as well as allegedly abrupt decision-making on the part of customers rejecting plaintiffs' products. *See generally id.*

Based on these allegations, the Complaint purports to set forth the following correspondingly numbered causes of action:

Count(s)	**Defendants**	**Nature of Count**
I, III, V, VII, IX, XI, XIII, XV	Siriusware, Accesso, Axess, Axess AG, Active, Vista, Skidata, Skidata AG	Restraint of Trade (*Sherman Act*, *§ 1*)
II, IV, VI, VIII, XII, XIV, XVI	Siriusware, Accesso, Axess, Axess AG, Active, Skidata, Skidata AG	Agreement to Monopolize (*Sherman Act, § 2*)

In their *ad damnum* provision, plaintiffs seek actual damages exceeding $18 million (a figure drawn from income projections contained in plaintiffs' business plan), treble damages under the Sherman Act and other costs and fees. *Id.*

DISCUSSION

Lack of Personal Jurisdiction and Insufficient Service

As a threshold matter, the foreign defendants move to dismiss for lack of personal **[*7]** jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(2)* and for insufficient service of process pursuant to *Fed. R. Civ. P. 12(b)(5)*. With respect to personal jurisdiction, the Second Circuit has held that:

> A plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit. *In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 206 (2d Cir. 2003)* (per curiam). "In order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a *prima facie* showing that jurisdiction exists." *Thomas v. Ashcroft, 470 F.3d 491, 495 (2d Cir. 2006)*. Such a showing entails making "legally sufficient allegations of jurisdiction," including "an averment of facts that, if credited[,] would suffice to establish jurisdiction over the defendant." *In re Magnetic Audiotape, 334 F.3d at 206* (internal quotation marks and ellipsis omitted).

Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 34-35 (2d Cir. 2010), *certified question accepted*, *15 N.Y.3d 744, 933 N.E.2d 205, 906 N.Y.S.2d 807 (N.Y. 2010)*, *& certified question answered*, *16 N.Y.3d 295, 946 N.E.2d 159, 921 N.Y.S.2d 171 (N.Y. 2011)*. As noted above, with respect to the foreign defendants, plaintiffs make only conclusory allegations of "minimum contacts." Compl. ¶ 12. Furthermore, one defendant submitted a declaration which calls into question such conclusory assertions. *See* DE 74-3, ¶¶ 4-11 (declaring that Axess AG is an Austrian entity that is not registered to do business and does not maintain addresses, offices, telephone number or agents for services of process anywhere **[*8]** in the United States). In response, plaintiffs offer nothing but speculation on the question. DE 75 at 16 ("[T]here is bound to be a ski convention or conference in New York that the defendant attended . . . .").[1]

However, as to the foreign defendants, plaintiffs have run aground based upon the question of service. Plaintiffs have failed to provide any proof of service consistent with *Rule 4(l)(1)*. While that failure alone could form the basis for the instant motion, *Reyes v. N. Shore-Long Island Jewish Health Sys., No. 00 CIV 8968 BSJ AJP, 2001 U.S. Dist. LEXIS 4636, 2001 WL 395166, at *1 (S.D.N.Y. Apr. 16, 2001)* (report and recommendation) (recommending the district court dismiss the action where "no affidavit of service on file with the Clerk's Office"), the undersigned will overlook this technical objection and examine the propriety of the underlying efforts to serve the foreign defendants. Because plaintiff failed to file affidavits of service, the only evidence of record describing the method used to provide notice to the foreign defendants is a declaration by Axess AG indicating that the complaint was sent to Austria "via a Federal Express mail delivery" and with no translations of the documents so delivered. DE 74-3, ¶ 12.

Service of process must comport both with the statute under which service is effectuated as well as **[*9]** due process requirements, and, of course, *Fed. R. Civ. P. 12(b)(5)* permits motions to dismiss for insufficient service. In this case, the statutory authority for service is the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention"), as noted in *Fed. R. Civ. P. 4(f)(1)*. *See Ackermann v. Levine, 788 F.2d 830, 838 (2d Cir. 1986)*. "As a ratified treaty, the [Hague] Convention is of course 'the supreme law of the land.'" *Id.* (quoting *U.S. Const. art. VI, cl. 2*).

Article 10 of the Hague Convention states that "[p]rovided the State of destination does not object, the present Convention shall not interfere with the freedom to send judicial documents, by postal channels, directly to persons abroad." *Id. at 839* (internal quotation marks omitted). The Second Circuit has long held the view that where a country "has made no objection to the use of 'postal channels' under Article 10(a), service of process by registered mail remains an appropriate method of service." *Id.* Recently, the Supreme Court reaffirmed this interpretation:

> Article 10(a) simply provides that, as long as the receiving state does not object, the Convention does not "interfere with ... the freedom" to serve documents through postal channels. In other words, in cases governed by the Hague **[*10]** Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law.

Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1513, 197 L. Ed. 2d 826 (2017) (citing *Brockmeyer v. May, 383 F.3d 798, 803-04 (9th Cir. 2004))*.

So the relevant inquiry is whether Austrian law permits service of process by mail. The Eleventh Circuit has upheld a lower court determination that such "service . . . was prohibited by the law of Austria." *Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries, 353 F.3d 916, 923 (11th Cir. 2003)* (further holding that actual notice did not cure the deficient service). Another court held that "[i]n Austria, like many other European civil law countries, the direct service of foreign legal documents by foreign authorities or by private individuals without the assistance or consent of Austrian authorities is regarded as an infringement of Austria's sovereignty." *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000, No. 1428 (SAS), 01 CIV. 7342, 2003 U.S. Dist. LEXIS 5575, 2003 WL 1807148, at *7 (S.D.N.Y. Apr. 4, 2003)* (holding that the service of untranslated documents without consent is invalid under Austrian law). Additionally, on this motion, Axess AG presents a detailed, sworn declaration from an Austrian law professor which concludes as follows:

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[1] Plaintiffs have, however, for the first time on this motion, *see* DE 75 at 16-17, made a "request for further discovery on the question of personal jurisdiction." *In re Magnetic Audiotape Antitrust Litig., 334 F.3d at 206*. Having done so, limited discovery on this issue would be permitted to proceed, provided plaintiffs' action should survive the balance of the motion. *Id.* As set forth below, it should not.

> Austrian law prohibits "direct" service of process via postal services, **[*11]** a private courier service or directly through the Plaintiff or Plaintiffs counsel. It demands that the foreign courts avail themselves of the legal assistance of Austrian authorities, *i.e.*, the Austrian Federal Ministry of Justice. On this basis, service of process will be performed by the competent Austrian courts and in accordance with the Austrian Federal Service Statutes.
>
> From an Austrian law perspective, "direct" service of court documents without the involvement of the competent Austrian authorities is both contrary to Austrian due process principles and an infringement of Austrian territorial sovereignty. It is therefore prohibited and does not qualify as due service of process under Austrian law.

DE 74-2 at ¶¶ 15-16. In response to this detailed showing, plaintiffs offer neither evidence nor argument.

Accordingly, it is the recommendation of the undersigned that the action be dismissed without prejudice as against the foreign defendants for insufficient service of process pursuant to *Fed. R. Civ. P. 12(b)(5)*.

Failure to State a Claim Under the Sherman Act

Standard of Review

Under *Fed. R. Civ. P. 12(b)(6)*, a defendant may move to dismiss the complaint for "failure to state a claim upon which relief can be granted." "In considering **[*12]** a motion to dismiss under *Rule 12(b)(6)*, a court must accept as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor." *Henry v. Nannys for Grannys Inc., 86 F. Supp. 3d 155, 157 (E.D.N.Y. 2015)* (citing *Ruotolo v. City of New York, 514 F.3d 184, 188 (2d Cir. 2008))*. However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

To survive, a complaint must supply "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly, 550 U.S. at 570*); *see* *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt., LLC, 595 F.3d 86, 91 (2d Cir. 2010)*. A claim is plausible when the plaintiff sets forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 663*.

In applying this standard in the context of an antitrust conspiracy action brought under *§ 1* and *§ 2* of the Sherman Act, the Second Circuit observed:

> We affirm the district court's dismissal of the conspiracy claims because plaintiffs are unable to allege facts that would provide "plausible grounds to infer an agreement," *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007)*. "Considerable uncertainty" surrounds the breadth of the Supreme Court's recent decision in *Twombly. Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir.2007)*. But we **[*13]** need not draw fine lines here; our precedents support application of *Twombly* to the conspiracy claims asserted under both *Section 1* and *Section 2*. To survive a motion to dismiss under *Twombly*, it is not enough to make allegations of an antitrust conspiracy that are consistent with an unlawful agreement; to be viable, a complaint must contain "enough factual matter (taken as true) to suggest that an agreement [to engage in anticompetitive conduct] was made." *Twombly, 127 S.Ct. at 1965* (citation and internal quotation marks omitted). While *Twombly* does not require heightened fact pleading of specifics, it does require enough facts to "nudge [plaintiffs'] claims across the line from conceivable to plausible." *Twombly, 127 S.Ct. at 1974*.

In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007) (footnotes omitted) (affirming district court's dismissal under *Fed. R. Civ. P. 12(b)(6)*). Importantly, in reaching its decision, the Court in *Elevator Antitrust Litigation* was swayed neither by "conclusory allegations of agreement," nor allegations of "parallel conduct," elements which represent cornerstones of plaintiffs' complaint here. *Id.*

Twombly, a Sherman Act decision, provides that a *§ 1* claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *550 U.S. at 556*. Notably, *Twombly* held that "[w]ithout more, **[*14]** parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a *§ 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id. at 556-57*. The parties agree that to state a claim under *§ 2*, plaintiffs must allege "(1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize." *Electronics Communs. Corp. v. Toshiba Am. Consumer Prods., 129 F.3d 240, 246 (2d Cir. 1997)* (internal quotation marks omitted) (quoting *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988))*. Importantly, the Supreme Court cautioned that "[i]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive." *Twombly, 550 U.S. at 546* (internal citation omitted).

Fed. R. Civ. P. 12(b)(6) Analysis of the Sherman Act Claims

While defendants raise a laundry list of potential deficits with respect to the restraint of trade and agreements to monopolize claims, one factual issue dominates the analysis: plaintiffs' claims turn on the alleged failure of Accesso Techonology and Active **[*15]** Network to create and provide a software interface that would permit plaintiffs' products to function in IT environments run by those defendants' management software systems. The problem for plaintiffs, however, is that according to the allegations of the complaint and the documents annexed thereto, the cost of providing such an interface for the Active Network system was estimated in the hundreds of thousands of dollars. Compl. ¶ 100; *id.* Ex. S. Plaintiffs conclusorily allege that such an estimate constituted an "outlandish amount for a very small effort." *Id.* ¶ 101. Yet, in an entirely separate allegation relating to Accesso's system, the complaint provides that creating an interface "would not be cheap." *Id.* ¶ 115. Plaintiffs offer no allegations or exhibits refuting this notion. Moreover, despite their efforts to minimize the effort involved, plaintiffs concede, in the allegations of the complaint, that creating such an interface would take "several weeks." *Id.* ¶ 71. Therefore, assuming the truth of the matters alleged, the creation of interfaces for these systems would be, by any measure, a costly endeavor.

The issue of a business's right to refuse to deal with a competitor has **[*16]** been comprehensively addressed by the Supreme Court:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing-a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*.
>
> However, "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985)*. Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive **[*17]** conduct and violate *§ 2*. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive

conduct by a single firm. The question before us today is whether the allegations of respondent's complaint fit within existing exceptions or provide a basis, under traditional antitrust principles, for recognizing a new one.

The leading case for § 2 liability based on refusal to cooperate with a rival, and the case upon which respondent understandably places greatest reliance, is *Aspen Skiing, supra.* The Aspen ski area consisted of four mountain areas. The defendant, who owned three of those areas, and the plaintiff, who owned the fourth, had cooperated for years in the issuance of a joint, multiple-day, all-area ski ticket. After repeatedly demanding an increased share of the proceeds, the defendant canceled the joint ticket. The plaintiff, concerned that skiers would bypass its mountain without some joint offering, tried a variety of increasingly desperate measures to re-create the joint ticket, even to the point of in effect offering to buy the defendant's tickets at retail price. *Id. at 593-594, 105 S.Ct. 2847*. The defendant refused even **[*18]** that. We upheld a jury verdict for the plaintiff, reasoning that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor." *Id. at 608, 105 S.Ct. 2847*.

Aspen Skiing is at or near the outer boundary of § 2 liability. The Court there found significance in the defendant's decision to cease participation in a cooperative venture. *See id., at 608, 610-611, 105 S.Ct. 2847*. The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Ibid.* Similarly, the defendant's unwillingness to renew the ticket even if compensated at retail price revealed a distinctly anticompetitive bent. [ ]

The refusal to deal alleged in the present case does not fit within the limited exception recognized in *Aspen Skiing*. The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal-upon whether its regulatory **[*19]** lapses were prompted not by competitive zeal but by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior. In *Aspen Skiing*, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly.

The specific nature of what the 1996 Act compels makes this case different from Aspen Skiing in a more fundamental way. In Aspen Skiing, what the defendant refused to provide to its competitor was a product that it already sold at retail-to oversimplify slightly, lift tickets representing a bundle of services to skiers. Similarly, in *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973)*, another case relied upon by respondent, the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers. *Id. at 370-371, 377-378, 93 S.Ct. 1022*. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public. The sharing obligation imposed by the 1996 Act **[*20]** created "something brand new"-"the wholesale market for leasing network elements." *Verizon Communications Inc. v. FCC, 535 U.S., at 528, 122 S.Ct. 1646*. The unbundled elements offered pursuant to § 251(c)(3) exist only deep within the bowels of Verizon; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort. New systems must be designed and implemented simply to make that access possible-indeed, it is the failure of one of those systems that prompted the present complaint.

Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407-10, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) (footnote omitted).

Here, the allegations do not even give rise to a conclusion that defendants refused to provide the sought after interface; rather, defendants were simply unwilling to bear the costs of developing an interface without reimbursement. Compl. ¶¶ 100-15. Even assuming, *arguendo*, that the single conclusory allegation of an inflated estimate for developing an interface could be construed as a refusal to deal with plaintiffs, the conduct alleged cannot reasonably be construed as falling within the narrow exception to defendants' recognized right to such refusal. *See* *Int'l Bus. Machs. Corp. v. Platform Sols., Inc., 658 F. Supp. 2d 603, 613-14 (S.D.N.Y. 2009)* (holding that allegations that IBM cease supporting and licensing a particular operating system could not give rise to a Sherman Act claim). **[*21]** "A refusal to deal is generally not unlawful unless it is done for the purpose of monopolization," the Second Circuit has observed. *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 124 (2d Cir. 2007)* (citing *Colgate & Co., 250 U.S. at 307*). "The absence of a legitimate business purpose for the defendant's refusal to deal has been seen as circumstantial evidence of improper intent." *Id.* (citing *Aspen Highlands Skiing Corp., 472 U.S. at 608*). In this case, the legitimate business purposes of defendants' actions in seeking payment for the creation of a software interface, or even refusing to engage in such a significant undertaking, are self-evident from the allegations of the complaint. Thus, the complaint is facially deficient.

Equally important, the actions alleged do not exclude the possibility that the alleged actions by Accesso and Active represent independent (and, under the circumstances, seemingly reasonable) business actions rather than the demonstration of an anticompetitive agreement. *See, e.g., Vedder Software Grp. Ltd. v. Ins. Servs. Office, Inc., 545 F. App'x 30, 33 (2d Cir. 2013)* ("The insurers' alleged demand to require use of Xactimate fails to show an agreement because it does not 'tend[ ] to exclude the possibility of independent action.' *Twombly, 550 U.S. at 555*. Such a demand would assure an insurance company and its vendors utilize compatible software to achieve consistency in estimates and ease in sharing data. **[*22]** Thus, the alleged demand could be expected of an insurer acting independently from its competitors.") This is particularly true where, as here, plaintiffs rely on a theory of parallel conduct by two groups of competitors. "[A]llegations of parallel conduct must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id. at 32* (alterations omitted). In this case, as in *Twombly*, "the complaint leaves no doubt that plaintiffs rest their *§ 1* claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the [defendants]." *550 U.S. at 564*.

Defendants raise several additional meritorious arguments, including the following: First, as plaintiffs' allegations describe only injuries to their efforts to enter the market, the complaint fails to set forth a cognizable injury under the Sherman Act. *Wellnx Life Scis. Inc. v. Iovate Health Scis. Research Inc., 516 F. Supp. 2d 270, 289 (S.D.N.Y. 2007)* (quoting *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 507 (2d Cir. 2004)* ("'Because the antitrust laws protect competition as a whole, evidence that plaintiffs have been harmed as individual competitors will not suffice.'") Second, defendants correctly argue that the plaintiffs' claims are predicated upon a "shared monopoly" theory, which has been expressly **[*23]** rejected by the Second Circuit. *RxUSA Wholesale, Inc. v. Alcon Labs., Inc., 661 F. Supp. 2d 218, 235 (E.D.N.Y. 2009)* (citing *H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1018 (2d Cir.1989))* ("The Second Circuit has specifically rejected monopolization claims under *Section 2* based on a shared monopoly theory of liability"), *aff'd sub nom., RxUSA Wholesale Inc. v. Alcon Labs., 391 F. App'x 59 (2d Cir. 2010)*; *see* *Siemens Med. Sys., Inc., 879 F.2d at 1018* (stating that "the district court correctly concluded that the market shares of [defendants] could not be aggregated to establish an attempt to monopolize in violation of Sherman Act *section 2*, *15 U.S.C. § 2 (1982)*"). Finally, defendants raise several other issues that would otherwise require further consideration, including the failure to allege actionable anticompetitive behavior, a properly defined product market or market power. However, because the fundamental factual premise here, to wit: that the software providers were somehow compelled to design a software interface for plaintiffs either without charge or at a better cost, is so flawed, these arguments need not be reached.

It is clear, based on the foregoing, that plaintiffs have failed to allege either a *§ 1* or *§ 2* claim under the Sherman Act. As such, the Complaint should be dismissed.

CONCLUSION

Based on the foregoing, it is respectfully recommended that defendants' motions be granted in all respects, and the case be dismissed with prejudice.

OBJECTIONS

A copy of **[*24]** this Report and Recommendation is being provided to the parties via ECF, and defendant should serve a copy upon plaintiff, and file an appropriate affidavit of service. Any written objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this report. *28 U.S.C. § 636(b)(1) (2006 & Supp. V 2011)*; *Fed. R. Civ. P. 6(a)*, *72(b)*. Any requests for an extension of time for filing objections must be directed to the district judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. **Failure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by the District Court or Court of Appeals.** *Thomas v. Arn, 474 U.S. 140, 145, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)* ("[A] party shall file objections with the district court or else waive right to appeal."); *Caidor v. Onondaga County, 517 F.3d 601, 604 (2d Cir. 2008)* ("[F]ailure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision.").

Dated: Central Islip, New York

July 30, 2018

/s/ Gary R. Brown

GARY R. BROWN

United States Magistrate Judge

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Butler v. Jimmy John's Franchise, LLC

United States District Court for the Southern District of Illinois

July 31, 2018, Decided; July 31, 2018, Filed

Case No. 18-cv-0133-MJR-RJD

Reporter

331 F. Supp. 3d 786 *; 2018 U.S. Dist. LEXIS 128149 **; 2018-2 Trade Cas. (CCH) P80,459; 2018 WL 3631577

SYLAS BUTLER, on behalf of himself and all others similarly situated, Plaintiffs, v. JIMMY JOHN'S FRANCHISE, LLC, et al., Defendants.

Subsequent History: Motion denied by *Conrad v. Jimmy John's Franchise, LLC, 2019 U.S. Dist. LEXIS 94411 (S.D. Ill., May 21, 2019)*

Motion denied by *Conrad v. Jimmy John's Franchise, LLC, 2019 U.S. Dist. LEXIS 149892, 2019 WL 4596762 (S.D. Ill., Aug. 5, 2019)*

Stay granted by, in part, Stay denied by, in part, Motion granted by, in part, Motion denied by, in part *Conrad v. Jimmy John's Franchise, LLC, 2020 U.S. Dist. LEXIS 162146, 2020 WL 5293805 (S.D. Ill., Sept. 4, 2020)*

Motion granted by *Conrad v. Jimmy John's Franchise, LLC, 2020 U.S. Dist. LEXIS 263000, 2020 WL 13180381 (S.D. Ill., Sept. 23, 2020)*

Motion granted by, Motion denied by *Conrad v. Jimmy John's Franchise, LLC, 2021 U.S. Dist. LEXIS 33933, 2021 WL 718320 (S.D. Ill., Feb. 16, 2021)*

Class certification denied by, Motion denied by *Conrad v. Jimmy John's Franchise, LLC, 2021 U.S. Dist. LEXIS 142272, 2021 WL 3268339 (S.D. Ill., July 23, 2021)*

Core Terms

franchisees, horizontal, no-hire, employees, Toys, manufacturers, Antitrust, vertical, allegations, franchise agreement, brand, franchise, anti trust law, sandwiches, discount, restraint of trade, anticompetitive, competitors, third-party, quick-look, restaurant, boycott, per se rule, Sherman Act, conspiracy, amongst, effects, argues, wages

Counsel: **[**1]** For Sylas Butler, on behalf of himself and all others similarly situated, Plaintiff: Derek Y. Brandt, LEAD ATTORNEY, McCune Wright Arevalo LLP, Edwardsville, IL; Michele M. Vercoski, Richard D. McCune, Jr., PRO HAC VICE, McCune Wright, LLP, Ontario, CA.

For Jimmy John's Franchise, LLC, a Delaware limited liability company, Jimmy John's Enterprises, LLC, a Delaware limited liability company, Jimmy John's LLC, a Delaware limited liability company, Defendants: Russell K. Scott, LEAD ATTORNEY, Greensfelder, Hemker & Gale PC - Swansea, Swansea, IL; Caeli A. Higney, Rachel Susan Brass, PRO HAC VICE, Gibson Dunn & Crutcher LLP - San Francisco, San Francisco, CA; Kahn A. Scolnick, PRO HAC VICE, Gibson, Dunn & Crutcher, LLP, Los Angeles, CA.

Judges: MICHAEL J. REAGAN, United States District Judge.

Opinion by: MICHAEL J. REAGAN

Opinion

[*789] MEMORANDUM AND ORDER

REAGAN, Chief Judge:

Section 1 of the *Sherman Act* prohibits certain agreements that restrain trade. This class action asks whether franchisees of the national sandwich chain "Jimmy John's" violated *Section 1* by agreeing amongst themselves and with corporate headquarters not to hire employees that have worked at another Jimmy John's location within the preceding year. The defendants—Jimmy John's **[**2]** Franchise, LLC, Jimmy John's Enterprises, LLC, and Jimmy John's LLC (together, "Jimmy John's")—have now moved to dismiss the complaint under *Federal Rules of Civil Procedure 12(b)(1)* & *(6)* for a lack of standing and for failure to state a claim. (ECF No. 28.) For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the motion to dismiss.

I. BACKGROUND

Jimmy John's sells and delivers deli-style sandwiches. The chain has over 2,700 locations in more than 40 states plus the District of Columbia. (Compl. ¶ 36, ECF No. 1.) About 98% of these locations are franchisees that are independently owned and operated as separate entities from Jimmy John's corporate; the other two percent are owned and operated by Jimmy John's itself. (*Id.*) Basically, when a franchisee contracts with Jimmy John's, the franchisee signs a ten-year franchise agreement for a fee of $35,000. (*Id.* at ¶ 40.) Those agreements then allow the franchisee to utilize the Jimmy John's brand in the operation of an independently owned store. (*Id.* at ¶ 42.)

According to the plaintiff, these agreements give the franchisees significant amounts of independence. Not only do the contracts explicitly provide that the franchisees are independent of Jimmy John's, but the **[**3]** agreements also state that the franchisees (1) are responsible for developing the restaurant, including all obligations and liabilities of the business; (2) do not receive an exclusive territory; (3) and may **[*790]** face competition from other franchisees, including in the same delivery area. (*Id.* at ¶¶ 50, 61-63.) Moreover, a franchisee must identify itself as the owner of its specific store in all dealings with external entities, and it must place notices of independent ownership on any forms, business cards, advertising, or any other materials that Jimmy John's requires. (*Id.* at ¶ 52.) Most importantly, the franchise agreements outright disclaim that Jimmy John's and the franchisees are agents, joint venture partners, or employees of the other "for any purpose." (*Id.* at ¶ 51.) The President and CEO of Jimmy John's has testified under oath in another case that the franchisees "independently own[] and operate[] a franchise business that stands in an arm's length contractual relationship with Jimmy John's," and that franchisees and Jimmy John's are not agents or partners "for any purpose"—just as stated in the franchise agreements. (*Id.* at ¶ 54.)

This case arises from something that Jimmy John's **[**4]** *does* make the franchisees do. The franchise agreements order that the franchisee must not "solicit or initiate recruitment of any person then employed, or who was employed within the preceding twelve (12) months, by [Jimmy John's], any of [Jimmy John's] affiliates, or another Jimmy John's Restaurant franchisee." (*Id.* at ¶ 78) (hereinafter the "no-hire provision.") In plain language, this means that one Jimmy John's franchisee cannot hire the employee of another Jimmy John's franchisee, unless that employee has not worked at a Jimmy John's shop in over a year. If a franchisee violates the no-hire provision, Jimmy John's headquarters considers it a non-curable default of the franchise agreement that is grounds for termination of the entire contract. (*Id.* at ¶ 80.) Termination also subjects the franchisee to liquidated damages in the form of up to three years' worth of restaurant royalties, which the franchisee must pay within 15 days of termination. (*Id.* at ¶ 81.) The penalties are even higher if the employee in question is a manager. (*Id.* at ¶ 83.)

The franchise agreements have another common thread that is crucial to the theory of this case: The agreements state that all current and **[**5]** future franchisees are third-party beneficiaries" of the no-hire provision. (*Id.* at ¶ 85.) As a third-party beneficiary, each franchisee enjoys an independent right to enforce the no-hire provision against another franchisee, which could lead to a $50,000 fine against the at-fault franchisee. (*Id.* at ¶ 91.) And if a franchisee wants to avoid this whole affair, it is required to obtain written permission from the other franchisee before recruiting that franchisee's current or former employee. (*Id.* at ¶ 89.)

So in order to protect themselves, the franchisees made their employees sign non-compete agreements—designed by Jimmy John's—which set a few ground rules: (1) Employees could not work or have any interest in any other business that sells "submarine, hero-type, deli-style, pita, and/or wrapped or rolled sandwiches" within a few miles of any Jimmy John's franchisee in the United States, both during their employment and for two years afterwards; (2) employees must immediately notify the franchisee of any employment offers made by any competitor; and (3) an employee who violated the agreement would have to reimburse the franchisee and Jimmy John's for all costs and expenses—including **[**6]** attorney's fees—incurred to enforce the agreement against that employee. (*Id.* at ¶¶ 92-97.)

Plaintiff Sylas Butler used to work at a Jimmy John's franchise owned by Kidds Restaurant, Inc. (*Id.* at ¶ 145.) While at the store, Butler worked as both a delivery driver and as an in-store employee. (*Id.* at ¶ 147.) Over the course of about 17 months, **[*791]** Butler's supervisor reduced Butler's hours to about four hours of work per week, even though Butler wanted to work more. (*Id.* at ¶ 148.) But because Butler was subject to the non-compete agreement, he was unable to transfer to a competing Jimmy John's franchisee or to another sandwich store—so his only options were to (1) stay stagnant at his current Jimmy John's store; or (2) quit and start another entry-level job at a non-sandwich shop. (*Id.* at ¶¶ 146, 149.) Butler ended up quitting. (*Id.*)

Now, Butler brings this class action lawsuit on behalf of a nationwide class of persons who are current or former employees at a Jimmy John's franchise restaurant. (*Id.* at ¶ 156.) The complaint alleges that Jimmy John's utilized the employee no-hire agreements in violation of three statutes: (1) *Section 1* of the Sherman Antitrust Act, *15 U.S.C. § 1, et seq.*; (2) the **[**7]** *Illinois Antitrust Act, 740 ILCS 10/1, et seq.*; and (3) the *Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, et seq.* Specifically, Butler alleges that Jimmy John's employees have "suffered reduced wages, reduced hours, reduced employment benefits, loss of professional growth opportunities, and worsened, illegal working conditions because of the express restraint of trade among Jimmy John's franchisees, as orchestrated by Jimmy John's itself." (*Id.* at ¶ 150.) Butler also points out that the no-hire agreement affects potentially tens of thousands of businesses in the United States that also sell sandwiches, as Jimmy John's employees are not allowed to go work at those other businesses either. (*Id.* at ¶ 154.)

II. LEGAL STANDARDS

A. *Federal Rule of Civil Procedure 12(b)(1)* & Article III Standing

A plaintiff must have standing under Article III of the United States Constitution in order to bring suit; otherwise, the Court does not have jurisdiction to hear the case. *Lujan v. Defs. of Wildlife, 504 U.S. 555, 559, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. For a plaintiff to state a case or controversy pursuant to Article III, he must "prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 691-92 (7th Cir. 2015)* (quoting *Hollingsworth v. Perry, 570 U.S. 693, 704, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013))*. At the motion to dismiss stage, "general factual allegations of injury resulting **[**8]** from the defendant's conduct may suffice." *Lujan, 504 U.S. at 561*.

Antitrust cases have a more rigorous standing requirement. A plaintiff must show an "antitrust injury," which is an injury stemming from conduct that the antitrust laws are actually meant to prevent. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. Antitrust injury can result from either the legal violation itself or anticompetitive actions made possible by the violation. *Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 716 (7th Cir. 2006)* (citing *Brunswick Corp., 429 U.S. at 489*).

With those ideas in mind, Federal Rule of Civil Procedure 12(b)(1) is the proper vehicle to challenge a plaintiff's standing. Silha v. ACT, Inc., 807 F.3d 169, 174 (7th Cir. 2015). That rule allows the Court to consider dismissing a case for lack of subject-matter jurisdiction; but when doing so, the Court treats all well-pleaded allegations in the complaint as true and draws all reasonable factual inferences **[*792]** in the plaintiff's favor. Bultasa Buddhist Temple of Chicago v. Nielsen, 878 F.3d 570, 573 (7th Cir. 2017). Conclusory allegations in the complaint, however, will not suffice—the allegations must be specific and give rise to a plausible right to relief. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *see also* Silha, 807 F.3d 169 at 174 (holding that *Iqbal* and *Twombly* apply to Rule 12(b)(1)).

B. Federal Rule of Civil Procedure 12(b)(6)

Rule 12(b)(6) operates in a similar manner to Rule 12(b)(1). The rule allows the Court to dismiss a complaint when it fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Just like with Rule 12(b)(1), the Court must construe "the complaint in the light most favorable to the plaintiff, **[**9]** accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [the plaintiff's] favor." Hecker v. Deere & Co., 556 F.3d 575, 580 (7th Cir. 2009) (quoting Tamayo v. Blagojevich, 526 F.3d 1074, 1081 (7th Cir. 2008)). And as always, the complaint must provide specific allegations that give rise to a plausible right to relief—not one that is merely "conceivable" or "speculative." Twombly, 550 U.S. 544 at 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929; Iqbal, 556 U.S. at 678. Moreover, this heightened pleading standard becomes even more stringent in the antitrust context: Discovery in these cases can be incredibly expensive and thus "gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case," especially when "bare allegations of conspiracy are almost impossible to defend against." Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008).

C. The Sherman Act

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. To state a plausible violation of Section 1, a plaintiff must plead enough evidentiary facts to show a (1) "contract, combination, or conspiracy"; (2) by which those involved intend to unreasonably harm or restrain trade or commerce; and (3) which actually injures, harms, or restrains trade or commerce. 15 U.S.C. § 1; Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217, 1220 (7th Cir. 1993). Section 4 of the Clayton Act—which provides **[**10]** that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue...and shall recover threefold the damages by him sustained"—allows Butler to sue for a violation of the Sherman Act.

In order to determine whether the alleged collusion "unreasonably" restrains trade, a plaintiff must first distinguish whether the collusion is a horizontal agreement or a vertical agreement. Horizontal agreements—agreements made among direct competitors—are typically per se violations of Section 1 because they "always or almost always tend to restrict competition and decrease output." Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979). Under the per se standard, an agreement is deemed unreasonable "without any inquiry into the market context in which the restraint operates." Agnew v. NCAA, 683 F.3d 328, 336 (7th Cir. 2012) (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70). Price fixing amongst **[*793]** horizontal competitors is the classic example of a per se violation of Section 1. *Id.*

Vertical agreements, however—those made up and down the supply chain—are generally subject to a more lenient "rule of reason" analysis, which focuses on "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978). A plaintiff has a much higher burden here: He must show the existence **[**11]** of anticompetitive effects in the relevant product and geographical markets, in which the defendant must have market power. Agnew, 683 F.3d at 335-36 (citing Reifert v. S. Cent. Wis. MLS Corp., 450 F.3d 312, 321 (7th Cir. 2006).

The burden then shifts to the defendant to show procompetitive justifications for the restraint. *Id.* (citing Areeda, ***Antitrust Law***, ¶ 1507b, at 397 (1986)).

There is also a third, albeit rarely-used test: The quick-look approach. Courts will use this test where the per se framework is inappropriate—such as when the restraint is a vertical agreement—but where the anticompetitive effects of the agreement are so obvious, even "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental Ass'n v. F.T.C., 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. The quick-look approach may also be appropriate in scenarios where the per se rule would usually apply, but "a certain degree of cooperation is necessary if the [product at issue] is to be preserved." *Agnew, 683 F.3d at 636*. (citing *Bd. of Regents, 468 U.S. at 117*; Hovenkamp, ***Antitrust Law***, ¶ 1911c, at 274 (1998)). Under the quick-look approach, if the plaintiff can demonstrate that there are no legitimate justifications for the anticompetitive behavior, then the plaintiff is not required to explain the relevant **[**12]** markets and provide evidence of market power. *Agnew, 683 F.3d at 336* (citing *Bd. of Regents, 468 U.S. at 109*; *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 674 (7th Cir. 1992))*. But if the defendant can then show that there are pro-competitive justifications for the restraint, then the burden shifts back to the plaintiff and a full rule-of-reason analysis may be necessary. *Id.* (citing *Chicago Professional Sports Ltd. Pshp. v. NBA, 95 F.3d 593, 600 (7th Cir. 1996))*.

III. ANALYSIS

A. Standing

To begin, Jimmy John's argument about standing is a non-starter. They first argue that Butler has not alleged an injury-in-fact because he "does not allege a single fact that demonstrates any connection between the challenged provision and any injury he claims to have suffered, much less facts that could ever establish causation," but that is far from the truth. Butler explicitly stated in his complaint that (1) his store required him to sign to employee non-competition agreement, which the franchisees force on their employees in order to enforce the no-hire provision between stores; (2) his store reduced his hours to about four per week, despite Butler's protests; and (3) because of the non-competition agreement—which is in place because of the no-hire provision—Butler could not transfer to another Jimmy John's store or even another sandwich shop in his area. (Compl. at ¶¶ 145-49.) And as described **[**13]** above, the third-party beneficiary provision would allow Butler's store to bring an action against any Jimmy John's store that Butler would have transferred to anyways.

[*794] Butler then describes in pages of extensive detail how these provisions suppress employee wages and mobility. For example, one paragraph of the complaint quotes the Attorney General of Illinois in a related case against Jimmy John's, where she stated: "By locking low-wage workers into their jobs and prohibiting them from seeking better paying jobs elsewhere, the companies have no reason to increase their wages or benefits." (*Id.* at ¶ 103.) Another paragraph explains that "[a] no-hire agreement like the agreement among Jimmy John's franchisees reduces workers' outside options and attempts to lower employee quit rate, thereby increasing the share of net-returns captured by employers. Further, a franchise-wide no-hire agreement increases the specificity of human capital investment, as training that is productive throughout the franchise chain can be used only by a single franchisee pursuant to the agreement." (*Id.* at ¶ 144.) And perhaps the best example is this paragraph:

> By adhering to the no-hire agreement, franchisees **[**14]** artificially restrict their own ability to hire other employees in a manner that is inconsistent with their own unilateral economic interests. By acting in concert, however, they also artificially protect themselves from having their own employees poached by other franchises that see additional value in those employees, such as the employees' training, experience and/or work ethic. This allows franchisees to retain their best employees without having to pay market wages to these employees or to compete in the marketplace relative to working conditions and promotion opportunities.

(*Id.* at ¶ 115.)

Just last year, the Seventh Circuit said that "concrete financial injuries, namely deprivation of wages...and financial injuries are prototypical of injuries for the purposes of Article III standing." *Milwaukee Police Ass'n v. Flynn, 863 F.3d 636, 639 (7th Cir. 2017)*, *reh'g denied* (Aug. 14, 2017) (citing *United States v. Kerner, 895 F.2d 1159, 1162 (7th Cir. 1990))*. And pursuant to the *Rule 12(b)(1)* standard, this Court treats all well-pleaded allegations in the complaint as true and draws all reasonable factual inferences in the Butler's favor. *Bultasa Buddhist Temple of Chicago, 878 F.3d at 573*. Accordingly, there should be no dispute at this stage that Butler has Article III standing in this case.

Jimmy John's also argues that Butler does not have antitrust standing because he **[**15]** quit because of "scheduling issues," rather than because the no-hire provision "precluded him from seeking employment from a third-party employer." (Defs.'s Mot. to Dismiss 7, ECF No. 28-1) (quoting *Eichorn v. AT & T Corp., 248 F.3d 131, 142 (3d Cir. 2001))*. But that is an impermissibly narrow reading of the complaint. As noted above, Butler described the allegations in this case in great detail, including how the no-hire provision led to the employee non-competition agreements and how those agreements harm the labor market for Butler and all other current and former Jimmy John's employees. And "[i]t is well settled that an agreement among employers to control a material term of employment harms competition in the labor market at issue." *Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1095 (7th Cir. 1992)* (citing *Radovich v. National Football League, 352 U.S. 445, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)*; *Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332 (7th Cir. 1967)*) (further internal citations omitted). Moreover, antitrust laws are meant protect the labor market—among other markets—because "employer conspiracies controlling employment terms...tamper with the employment market and thereby **[*795]** impair the opportunities of those who sell their services there." *Eichorn, 248 F.3d at 141 (3d Cir. 2001)* (holding that employees have standing to litigate a *Section 1* claim when a no-hire agreement impeded their abilities to sell their labor to three other companies in the market) (quoting Phillip Areeda & Herbert Hovenkamp, **[**16]** ***Antitrust Law*** ¶ 377c (rev. ed. 1995)). So just like with the Article III issue, there should be no real dispute at this stage that Butler has properly alleged an antitrust injury.

B. The Sherman Act Claim

The next issue is whether Butler has stated a plausible-enough claim under the Sherman Act to survive a *Rule 12(b)(6)* motion. This question is much more complex than the standing issue. The first puzzle is how to define the agreements in question: Are they vertical, horizontal, or a combination of the two? Jimmy John's argues that the no-hire agreements are purely vertical: Jimmy John's corporate enters into franchise agreements—which contain the no-hire provision—directly with the franchisees, while the franchisees do not enter into any explicit agreements with each other. Butler, on the other hand, argues that he has pled a strictly horizontal agreement between the franchisees: His idea is that Jimmy John's headquarters orchestrated an agreement amongst the franchisees not to hire each other's employees, and while the contract in question may have been vertical, the *effects* are felt strictly at the horizontal level: Between the franchisees, not between any given franchisee and Jimmy John's corporate. **[**17]** (*See, e.g.*, Compl. ¶¶ 9, 109, 154, 167, 179, ECF No. 1.) Those horizontal effects are even more apparent, according to Butler, given the third-party beneficiary provision that allows franchisees to enforce the no-hire provision against other franchisees.

At this early stage, Butler has carried his burden and stated a plausible violation pursuant to his orchestration theory. Some circuits refer to this as a "hub-and-spoke" conspiracy, where the "hub" firm enters into a collection of vertical agreements with other firms—the "spokes"—and those spokes then enter into a collection of horizontal agreements that make up the "wheel." *In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1192 (9th Cir. 2015)*. The idea here is that since the hub orchestrated the horizontal wheel, it can be held per se liable for that horizontal agreement—even though the hub did not enter into a horizontal agreement itself.

The Seventh Circuit has described that same pattern without explicitly using the phrase "hub-and-spoke." *See generally* *Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928 (7th Cir. 2000)*. In *Toys "R" Us*, a dominant toy retailer—unsurprisingly, Toys "R" Us—was afraid of growing competition from discount clubs like Costco. *Id. at 932*. So Toys "R" Us flexed its muscles and basically forced a collection of vertical agreements on ten toy **[**18]** manufacturers—

including Hasbro and Mattel—that limited the ability of those manufacturers to sell toys to discount clubs, with the goal of cutting off the supply of toys to discount clubs over time. *Id. at 932-34*. The manufactures signed the agreements, but only on the condition that their competing manufacturers were doing the same thing—otherwise, those rogue competitors would become a dominant supplier of the discount clubs and climb in market share. *Id. at 932, 936*. So the Toys "R" Us President of Merchandising communicated this message to each toy manufacturer, and those manufacturers ended up signing the vertical agreements with that understanding—which resulted in a significant boycott of discount clubs by toy manufacturers. *Id. at 932-33*.

[*796] Following a Federal Trade Commission opinion on the matter, the Seventh Circuit was faced with determining whether Toys "R" Us could be held per se liable for a horizontal boycott by the toy manufacturers against the discount clubs. Toys "R" Us argued that their agreements with the toy manufacturers were simply a collection of vertical agreements, so a rule of reason analysis would govern. *Id. at 935*. But the Seventh Circuit disagreed: Since there was substantial evidence that the toy companies **[**19]** were afraid of Toys "R" Us and would only agree to the behemoth's demands if other competing manufacturers did the same thing—and then because Toys "R" Us went out, communicated those fears, and ensured that each competing manufacturer signed the agreement—Toys "R" Us was per se liable for facilitating the horizontal boycott of the discount clubs. *Id. at 936-37*.

The scheme in this case is similar to the scheme in *Toys "R" Us*. The franchisees are independently-owned horizontal competitors, just like the toy manufacturers. Jimmy John's corporate enters into a franchise agreement with each franchisee, which contains the no-hire provision. The franchisees tacitly agree amongst each other to enforce the no-hire provision through austere enforcement of the employee non-compete contracts. And most damningly, **the franchise agreements give the franchisees a contractual right to enforce the no-hire agreements directly against each other through the third-party beneficiary provision**. That is a horizontal agreement. *See United States v. Apple, Inc., 791 F.3d 290, 297 (2d Cir. 2015)* (holding that when determining whether an agreement is horizontal or vertical, courts should focus on the effects of the restraint rather than the characters who imposed it), *cert. denied*, **[**20]** *136 S. Ct. 1376, 194 L. Ed. 2d 360 (Mar. 7, 2016)*. And the effect of the scheme is two-fold: (1) a horizontal boycott of certain employees; and (2) a horizontal price-fixing scheme to suppress the price of labor for said employees—just as Butler has pled. *See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222-23, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* ("Under the Sherman Act[,] a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se," even where the fixing is not "fixed in the sense that [it was] uniform and inflexible...."); *F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 422, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)* (horizontal boycott among competing firms aimed at influencing pay rates is per se illegal); *Todd v. Exxon, 275 F.3d 191, 198 (2d Cir. 2001)* (wage-fixing by purchasers of labor can be per se illegal).

But there is one massive elephant in the room that distinguishes this case from *Toys "R" Us*. All of the firms in this case deal in the same brand: Jimmy John's sandwiches. That is quite different from Toys "R" Us going to manufacturers like Hasbro and Mattel in order to injure Costco, because as Jimmy John's points out, ***antitrust law*** is more concerned with *inter*brand restrains, not *intra*brand restraints. *See, e.g., Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-56, 58, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (holding that an agreement restricting trade within one brand could not be per se illegal because the **[**21]** agreement achieved certain efficiencies within that brand, stimulating competition against competing brands in the market as a whole). But to complicate matters more, Butler has pled in the complaint that Jimmy John's franchisees enjoy very high levels of independence. The franchise agreements state that a particular franchisee may be subject to competition from other **[*797]** franchisees, and that franchisees are not agents, joint venture partners, or employees of the other "for any purpose." (Compl. at ¶ 51.) This level of independence may be much more than your typical franchise business may enjoy. And at this stage, the Court must accept all well-pleaded allegations in the complaint as true.

This dichotomy puts these proceedings in murky waters: Should the per se rule apply to a horizontal price fixing and group boycott scheme, even though the horizontal agreement is amongst firms dealing in the same brand? Butler recognizes this distinction, considering he pleads in the alternative that the Court should apply the quick-look rule rather than the per se rule. The Seventh Circuit has instructed that the quick-look rule applies in scenarios where the per se rule would usually apply, but "a **[**22]** certain degree of cooperation is necessary if the [product at issue] is to be preserved." *Agnew, 683 F.3d at 636*. (citing *Bd. of Regents, 468 U.S. at 117*; Hovenkamp, ***Antitrust Law***, ¶ 1911c, at 274 (1998). This case could prove to be a hornbook example of that rule: Although the franchisees are dealing in the same brand, they are still competitors, and anyone with a rudimentary understanding of economics would understand that the no-hire agreements have an anticompetitive effect on the labor market targeted by those firms. *California Dental Ass'n, 526 U.S. at 770*. And if the quick-look approach applies, Butler would not be required to go through the industry and market power analysis, and Jimmy John's would be able to argue the procompetitive intrabrand justifications for the agreements.

Ultimately, however, the Court cannot decide at this early stage in the proceedings which rule will apply. If the evidence in this case shows that the franchisees are truly as independent as Butler pleads, this case will likely result in a quick look analysis. If the evidence of franchisee independence is Herculean, then the per se rule might even apply. And if the evidence of franchisee independence is weak, or if Jimmy John's carries its burden under the quick look approach, then the rule **[**23]** of reason may rear its head and burn this case to the ground. But that is a matter for a later stage in these proceedings. At this point, for the foregoing reasons, Butler has stated a plausible claim for relief under *Section 1* of the Sherman Act.

C. The State Law Claims

The state law claims can be quickly disposed of. Jimmy John's first argues that the Illinois Antitrust Act claim fails because Butler pled that Jimmy John's violated the Act by harming competition "in the market for employee labor among Jimmy John's restaurants," even though the Illinois Antitrust Act expressly states that it does not apply to "labor which is performed by natural persons as employees of others." *740 ILCS 10/4*. Jimmy John's is correct: The Seventh Circuit has already said that the Illinois Antitrust Act specifically excludes claims "relate[d] to an alleged market for labor services." *O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1066 (7th Cir. 1997)*. That is exactly what Butler pleads, and thus his claim is barred. (*See* Compl. ¶¶ 178, 180.)

Second, Jimmy John's argues that Butler's claim under the Illinois Consumer Fraud and Deceptive Business Practices Act fails because (1) Butler has not alleged any conduct that deceives consumers; and (2) Butler cannot convert the statute into an enforcement **[**24]** mechanism for an antitrust claim that is already uncognizable under the Illinois Antitrust Act. Both of these arguments are correct. First of all, Butler and his proposed class are suppliers of labor—not consumers. *See, e.g., See* **[*798]** *Hess v. Kanoski & Assocs., 668 F.3d 446, 454 (7th Cir. 2012)*. Moreover, the Illinois Supreme Court has instructed that plaintiffs cannot use the Illinois Consumer Fraud and Deceptive Business Practices Act to get around the fact that their theory does not fly under the Illinois Antitrust Act: That "gamesmanship" would be "incongruous" with the state legislature's intent. *Laughlin v. Evanston Hosp., 133 Ill. 2d 374, 390-91, 550 N.E.2d 986, 140 Ill. Dec. 861 (1990)*; *see also* *Gaebler v. N.M. Potash Corp., 285 Ill. App. 3d 542, 544, 676 N.E.2d 228, 221 Ill. Dec. 707 (1996)*. Accordingly, this claim is barred as well.

There is one more matter to address: Butler asked the Court for leave to amend if the Court found any aspect of his complaint to be deficient. *See* *Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*. Both of Butler's state-law claims are deficient. Although the Court is dubious as to whether Butler will be able to plead around the issues in the case and save those state-law claims, the Court will nevertheless grant Butler 30 days to file an amended complaint—if he so chooses.

IV. **CONCLUSION**

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Jimmy John's motion to dismiss. (ECF No. 28.) The Court **DISMISSES WITHOUT PREJUIDCE** the **[**25]** state law claims -- Counts II and III. The Sherman Act claim will proceed.

IT IS SO ORDERED.

DATED JULY 31, 2018.

/s/ *Michael J. Reagan*

MICHAEL J. REAGAN

United States District Judge

Saginaw Cty. v. Stat Emergency Med. Serv.

United States District Court for the Eastern District of Michigan, Southern Division

July 31, 2018, Decided; July 31, 2018, Filed

Case No. 4:17-cv-10275

Reporter

2018 U.S. Dist. LEXIS 127349 *; 2018-2 Trade Cas. (CCH) P80,457; 2018 WL 3631966

SAGINAW COUNTY, a Michigan municipal corporation, Plaintiffs, v. STAT EMERGENCY MEDICAL SERVICE, INC., a Michigan for profit corporation, Defendants.

Subsequent History: Reconsideration denied by *Saginaw Cty. v. STAT Emergency Med. Serv., 2019 U.S. Dist. LEXIS 48947 (E.D. Mich., Mar. 25, 2019)*

Affirmed by *Saginaw Cty. v. STAT Emergency Med. Servs., 2020 U.S. App. LEXIS 804 (6th Cir.) (6th Cir. Mich., Jan. 10, 2020)*

Core Terms

Ordinance, antitrust, Sherman Act, alleges, parties, actual controversy, subject matter jurisdiction, declaratory judgment, declaration, emergency service, violates, ambulance service, ripe, federal question, Plaintiff's Sherman Act, ambulance, lawsuit, hypothetical, confer, courts, concrete, renewed, rights, services contract, adjudicate, meetings, provider, reasons, fails, lack subject matter jurisdiction

Counsel: **[*1]** For Saginaw County, Plaintiff: Lee T. Silver, Michael L. Gutierrez, Silver & Van Essen P.C., Grand Rapids, MI; Douglas W. Van Essen, Silver and Van Essen, Grand Rapids, MI.

For STAT Emergency Medical Service, Inc., Defendant: Derek S. Wilczynski, Orlando L. Blanco, Blanco Wilczynski, Troy, MI.

Judges: Hon. TERRENCE G. BERG, UNITED STATES DISTRICT JUDGE.

Opinion by: TERRENCE G. BERG

Opinion

OPINION AND ORDER GRANTING DEFENDANT'S RENEWED MOTION TO DISMISS (Dkt. 14)

I. Introduction

Saginaw County passed an ordinance in 2016 requiring anyone seeking to provide ambulance services in the county to first obtain the approval of the County Board of Commissioners. One ambulance company—licensed to provide ambulance services by the State of Michigan—went ahead and operated in the county without the Board's approval. Now the County ("Plaintiff" or "Saginaw") is suing that company, STAT Emergency Medical Services ("STAT" or "Defendant"), seeking a declaratory judgment that its ordinance is legal under state law and that enforcing it against Defendant would not violate the federal Sherman Antitrust Act (the "Sherman Act"). Saginaw County is a Michigan county organized as a municipal corporation under Michigan law. STAT is a forprofit **[*2]** corporation that operates ambulance services throughout the state of Michigan, including within Saginaw County. STAT moved to dismiss the County's complaint. The Court heard oral argument on the motion to dismiss on May 2, 2018. For the reasons set out in detail below, that motion will be **GRANTED**.

II. Background

At the heart of this dispute lies the question: through what means can Saginaw County prevent a company from providing emergency services within its borders when that company has obtained authorization from the State of Michigan to provide such services throughout the State as well as medical oversight from the Saginaw County Medical Control Authority?

Plaintiff alleges that as early as 2009, it established a primary ambulance provider system as reflected through contracts with Mobile Medical Response, Inc. ("MMR"), another ambulance company. *See* Dkt. 10, Pg. IDs 216-18. Plaintiff's Emergency Services Communication Ordinance (the "Ordinance"), Dkt. 1, Ex. H, "enforces the macro-ambulance system established by the County through the primary services contract with MMR and the 911 plan." Dkt. 10, Pg. ID 219. Plaintiff maintains that its exclusive ambulance service contract with MMR **[*3]** was most recently renewed for another five-year term in 2013. *Id; see also* Dkt. 1, Ex. C (2013 Renewal). The contract with MMR provides in relevant part that, "The COUNTY hereby designates [MMR] as the sole provider of mobile basic and advanced life support ambulance services for COUNTY during the term of this Agreement." Dkt. 1, Exhibit C, Pg. ID 29. According to Plaintiff, the County held public meetings prior to entering into the primary ambulance provider contract with MMR in 2009, and also before renewing the contract in 2013. Dkt. 10, Pg. ID 218. While STAT did not appear at the public meeting in 2009, Plaintiff alleges that STAT did appear at meetings held in September and October of 2013. *See id.*

According to Plaintiff, at the September 2013 meeting, counsel for STAT contended that the MMR contract would violate the *Sherman Antitrust Act* and the *Due Process clause of the 14th Amendment to the United States Constitution*. *Id.* Counsel for STAT also said it was prepared to initiate legal action against the County if it proceeded with the renewal, according to the Amended Complaint. Dkt. 10, Pg. ID 218. At another meeting in October 2013, Plaintiff claims that STAT's counsel and CEO appeared, "repeat[ing] their threats of Sherman Antitrust and *14th Amendment* Due process **[*4]** claims and resolve to take legal action if the contract were renewed." Dkt. 10, Pg. ID 218. The County ultimately approved the renewal of the MMR contract. *Id.*; *See* Dkt. 1, Ex. C. Plaintiff maintains that STAT is providing ambulatory services in Saginaw County in contravention of Plaintiff's contract with MMR and its Ordinance.

Plaintiff adopted the Ordinance on April 19, 2016, at least in part to protect its primary services contract with MMR. Dkt. 1, Ex. H, Pg. IDs 89-94. Plaintiff alleges that the Ordinance works to enforce the system established by the County through the 911 Plan, yet the record suggests the referenced 911 Plan was adopted by the County on the same day as the Ordinance itself—April 19, 2016. Dkt. 1, Ex. G. This lawsuit primarily concerns Section 5.5 of the Ordinance, which provides that "No Person shall request, operate or provide ambulance service within the County that has not been approved by the Board through contract or resolution." Dkt. 1 Exhibit H, Pg. ID 94.

At the hearing on Defendant's motion to dismiss, both parties acknowledged that STAT is currently providing emergency services within the County in contravention of the Ordinance. STAT maintains that the Ordinance **[*5]** as written requires that it be licensed by a body which has no authority to license and is therefore not authorized or enforceable, as it conflicts with Michigan law. *See, e.g.*, Dkt. 17 Ex. A, Pg. ID 496.

III. Legal Standards

Federal Rule of Civil Procedure 12(b)(6) allows the court to make an assessment as to whether the plaintiff has stated a claim upon which relief may be granted. *See* *Fed. R. Civ. P. 12(b)(6)*. "*Federal Rule of Civil Procedure*

8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief', in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests'." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal citations omitted). While a complaint need not contain "detailed" factual allegations, its "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true." *Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 548 (6th Cir. 2007)* (quoting *Twombly, 550 U.S. at 555*).

Challenges to subject-matter jurisdiction under *Federal Rule of Civil Procedure 12(b)(1)* "come in two varieties: a facial attack or a factual attack." *Gentek Bldg. Prods., Inc. v. Sherwin—Williams Co., 491 F.3d 320, 330 (6th Cir. 2007)*. Under a facial attack, all of the allegations in the complaint must be taken as true, much as with a *Rule 12(b)(6)* motion. *Id.*; *see also* *Lovely v. United States, 570 F.3d 778, 781 (6th Cir. 2009)*, *cert. denied*, *558 U.S. 1111, 130 S. Ct. 1054, 175 L. Ed. 2d 883 (2010)*. A factual attack, on the other hand, is not a challenge to the **[*6]** sufficiency of the pleadings' allegations, but a challenge to the factual existence of subject matter jurisdiction. On such a motion, "no presumptive truthfulness applies to the factual allegations" and "the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *United States v. Ritchie, 15 F.3d 592, 598 (6th Cir. 1994)*; *see also* 2 James Wm. Moore, *Moore's Federal Practice § 12.30[4]* (3d ed. 2000) ("[W]hen a court reviews a complaint under a factual attack, the allegations have no presumptive truthfulness, and the court that must weigh the evidence has discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts.").

IV. Analysis

Federal courts are not courts of general jurisdiction; rather, they have only the power that is authorized by Article III of the United States Constitution and statutes enacted by Congress. A plaintiff must have "constitutional standing" under Article III as well as statutory standing pursuant to a congressional grant in order to avail itself of a federal court's jurisdiction and power to adjudicate a particular case. These two sources together govern a federal court's subject matter jurisdiction. *See, e.g.,* *Bender v. Williamsport Area School Dist., 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986)*.

Article III of the United States Constitution prescribes that federal courts may exercise jurisdiction only where an "actual **[*7]** case or controversy" exists. *See* *U.S. Const. art. III, § 2*. That federal courts are confined by Article III to adjudicate only actual "cases" and "controversies" represents a fundamental limit on the federal judiciary's power. Thus, "the threshold question in every federal case is whether the court has the judicial power to entertain the suit." *Parsons v. U.S. Dep't of Justice, 801 F.3d 701, 709 (6th Cir. 2015)* (quoting *Nat'l Rifle Ass'n of Am. v. Magaw, 132 F.3d 272, 279 (6th Cir.1997))*. Under Article III, courts are required to "avoid issuing advisory opinions based upon hypothetical situations." *Briggs v. Ohio Elections Comm'n, 61 F.3d 487, 493 (6th Cir. 1995)*. The case or controversy requirement works to ensure federal courts do not render advisory opinions or consider hypothetical or abstract questions.

Courts have explained the case or controversy requirement through a series of "justiciability doctrines," such as the standing doctrine. *See* *Nat'l Rifle Ass'n of Am. v. Magaw, 132 F.3d 272, 279 (6th Cir. 1997)*. Standing concerns a plaintiff's ability to sue, requiring that a litigant must have suffered an injury-in-fact that is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*.

Another doctrine which "cluster[s] about Article III" is ripeness. *Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522, 527 (6th Cir. 1998)* (citing *Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79, 226 U.S. App. D.C. 14 (D.C. Cir. 1982)* (Bork, J., concurring.). Where standing concerns a plaintiff's *ability* to sue, ripeness focuses on the *timing* of the action. The ripeness doctrine buttresses **[*8]** Article III's case and controversy requirement by "prevent[ing] the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Nat'l Rifle Ass'n, 132 F.3d at 284* (citing *Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 580, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985))*. Thus, the ripeness doctrine prevents courts from handling cases that have not yet matured into full-blown disputes, thereby ensuring federal courts do not issue opinions advising what the law would be upon a hypothetical set of facts.

In this action, Plaintiff seeks relief pursuant to the *Declaratory Judgment Act (the "Act")*. *See* Dkt. 10. The Act provides in relevant part: "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *28 U.S.C. § 2201(a)*. The Act's "actual controversy" requirement is coextensive with Article III's constitutional limits, and necessarily includes the standing and ripeness doctrines from Article III as well. *See* *Fieger v. Mich. Sup. Ct., 553 F.3d 955, 961 (6th Cir. 2009)*. Thus, the Act's "case of actual controversy" requirement refers to the type of cases and controversies that are justiciable under Article III of the U.S. Constitution. *See* *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)* (citing *Aetna Life Ins. v. Haworth, 300 U.S. 227, 240, 57 S. Ct. 461, 81 L. Ed. 617 (1937))*.

To determine whether parties have an actual case or controversy **[*9]** as required under the Act (and Article III), courts must ask whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *See* *Commodities Export Co. v. Detroit Int'l Bridge Co., 695 F.3d 518, 525 (6th Cir. 2012)*; *MedImmune, 549 U.S. at 127*. Framed another way, the dispute between the parties must be "definite and concrete, touching on the legal relations of parties having adverse legal interests and be real and substantial and admit of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." *See* *Kreinberg v. Dow Chemical Co., 2007 U.S. Dist. LEXIS 70359, 2007 WL 2782060 at *9 (E.D. Mich. Sept. 24, 2007)* (citing *Medimmune, Inc., 549 U.S. at 127*).

Critically, the Act only provides a procedural mechanism; it does not independently confer a federal court with subject matter jurisdiction. *See* *Skelly Oil Co. v. Phillips Petroleum, 339 U.S. 667, 671-72, 70 S. Ct. 876, 94 L. Ed. 1194 (1950)*. Thus, an action can be maintained under the Declaratory Judgment Act only if a plaintiff has an independent basis to invoke a federal court's subject matter jurisdiction. *Michigan Southern R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass'n., Inc., 287 F.3d 568, 575 (6th Cir. 2002)* ("It is well-settled that the Declaratory Judgment Act cannot serve as an independent basis for federal subject matter jurisdiction.") (internal citations omitted). In this action, Plaintiff alleges federal **[*10]** question jurisdiction, federal antitrust jurisdiction, and supplemental jurisdiction under *28 U.S.C. §§ 1331*, *1337*, and *1367*, respectively.

The Court notes that Plaintiff's case presents somewhat of an atypical posture for a declaratory judgment action. Typically, a plaintiff that seeks declaratory relief surrounding the enforceability of a particular law or statute uses the declaratory judgment act as a shield, in an attempt to protect itself from injuries it has or will suffer if the challenged law is enforced against it.[1] In the present case, however, Plaintiff maintains that: 1) it has created a regulatory regime pursuant to the powers given to it by the Michigan legislature regarding the provision of emergency services within its County, 2) Defendant is engaging in activities in violation of that regime, and 3) Plaintiff has been harmed by Defendant's noncompliance. *See generally*, Dkt. 10. Plaintiff's Amended Complaint requests this court to:

1. Declare that the County's 911 Plan and primary services ambulance contract [with MMR] are legal and enforceable against STAT's unauthorized ambulance services originating within the County;

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[1] For instance *Nat'l Rifle Ass'n* involved the pre-enforcement challenge to the constitutionality of ***Title XI of the Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-22, 108 Stat. 1796 (1994)*** (the "Crime Control Act"). *Nat'l Rifle Ass'n, 132 F.3d at 272*. The Crime Control Act prohibited for a period of ten years the manufacture, transfer, or possession of semi-automatic weapons and the transfer or possession of large capacity ammunition feeding devices. *Id. at 277*. One group of Plaintiffs, manufacturers and dealers of firearms, alleged that the passage of the Crime Control Act had a significant impact on the way they conducted their businesses and that compliance with the legislation caused them immediate economic harm. The Sixth Circuit concluded that the declaratory judgment act provided a procedural mechanism for these Plaintiffs to bring their claim because "the federal court is not asked to decide a case involving conjectural or hypothetical injury, but one that creates substantial economic hardship, which is direct and immediate, and will be compounded by a refusal of the court to intervene prior to enforcement of the statute." *Nat'l Rifle Ass'n, 132 F.3d at 287*.

> 2. Declare that the Ordinance is legal and enforceable against STAT's unauthorized **[*11]** ambulance services originating within the County, and that STAT has violated that Ordinance;
>
> 3. Declare that the enforceability of the County's 911 Plan or Ordinance against STAT's unauthorized ambulance services originating within the County does not violate the Sherman Anti-Trust Act or the *Due Process clause of the 14th Amendment*; and
> 4. Enjoin STAT from providing ambulance services originating within the county without the authorization of the County Board of Commissioners through contract or resolution.

See Dkt 10, Pg. IDs 222-23.

Despite the atypical nature of Plaintiff's action, the Act nevertheless provides a mechanism for the pre-enforcement review of a statute; and, while the Act does not on its face differentiate between its use as a "sword" versus a "shield," Plaintiff faces different hurdles in satisfying the necessary Article III and statutory standing requirements to establish subject matter jurisdiction. The Court begins by addressing its power under Article III to hear this case.

A. Plaintiff's Alleged Injuries in Fact

The Court begins its analysis with "[p]erhaps the most important" of the justiciability doctrines: whether Plaintiff has standing to invoke the jurisdiction of the federal Courts. **[*12]** *See Nat'l Rifle Ass'n, 132 F.3d at 279*. Standing concerns a plaintiff's ability to sue, and turns on whether he or she has suffered a concrete injury inflicted by a defendant. The Supreme Court has enumerated the following elements necessary to establish standing:

> First, Plaintiff must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Plaintiff's Amended Complaint alleges that STAT's provision of emergency services in Saginaw County without authorization from the Board of Commissioners has injured Plaintiff because STAT's behavior violates the Plaintiff's 911 Plan and Ordinance, undermines the primary services contract it has with MMR, and "places public safety in jeopardy because the 911 Communications System is unaware **[*13]** of STAT's EMS activities and cannot coordinate other emergency services as well as hospital communications with first responders, including EMS providers." *See* Dkt. 10, Pg. ID 220-21. Plaintiff maintains its emergency services regime was created pursuant to the power conferred on it by Michigan law, and seeks declarations from this Court stating as much. *See id.* at 222-23. However, Plaintiff does not only seek declaratory relief concerning the validity of its emergency services regime under Michigan law. Plaintiff also requests declarations that the enforcement of the County's emergency services regime against STAT's alleged unauthorized ambulance services originating within the County would not violate the Sherman Act or the *Due Process Clause of the 14th Amendment to the United States Constitution*. *See* Dkt. 10, Pg. ID 222. As to this request for declaratory relief, however, Plaintiff does not allege any injuries arising from a failure to declare whether the enforcement of the Ordinance violates the *Due Process Clause of the 14th Amendment* or the Sherman Act.

Courts recognize that declaratory judgments are often sought before a completed injury-in-fact has occurred; this does not prevent a plaintiff from suing under the Declaratory Judgment Act. *Nat'l Rifle Ass'n, 132 F.3d at 279*. However, a federal court's power under Article III—and thus **[*14]** its subject matter jurisdiction to hear a case—is still limited to the resolution of "actual controversies" even when no injury-infact has yet occurred. *See id.* Thus, Plaintiff must show that the parties have an actual controversy as to its Sherman Act and *Due Process Clause* claims to establish that this Court has subject matter jurisdiction over those claims.

The Supreme Court has explained that while the difference between an abstract question and a case or controversy is one of degree, not discernable by any precise test, the basic inquiry is whether "the conflicting contentions of the parties . . . present a real, substantial controversy between the parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297-98, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)*. Furthermore, to determine whether a plaintiff has *standing* to adjudicate an "actual controversy" requisite for relief under the Declaratory Judgment Act, a court must ask whether the parties have "adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment even though the injury-in-fact has not yet been completed." *See, e.g., Nat'l Rifle Ass'n, 132 F.3d at 280* (internal citations omitted). These principles guide this Court's analysis **[*15]** as to whether, with respect to Plaintiff's claims for relief under the Sherman Act and the *Due Process Clause of the 14th Amendment*, Plaintiff has sufficiently alleged an actual controversy.

As will be explained, the Court finds that Plaintiff has failed to satisfy its burden of establishing that the parties have an actual controversy surrounding Plaintiff's Sherman Act Claim, that Plaintiff's alleged Sherman Act claim is ripe for adjudication, and that Plaintiff has standing to pursue its alleged claim for relief under the *Due Process Clause of the 14th Amendment*. Accordingly, the Court cannot exercise jurisdiction over Plaintiff's case because all of Plaintiff's claims that could support this Court's subject matter jurisdiction must be dismissed pursuant to *Fed. R. Civ. P. 12(b)(1)*.

B. Plaintiff's Claim for Relief Pursuant to the Sherman Act

1. Whether An Actual Controversy Exists as to Plaintiff's Sherman Act Claim in the Absence of an Alleged Injury

Plaintiff makes three factual allegations in support of its argument that the parties have an actual controversy under the Sherman Act in this case:

a) at two meetings in 2013, STAT allegedly threatened federal litigation against Plaintiff for violation of antitrust laws;

b) on August 2, 2016, STAT's legal counsel sent a letter to MMR's legal **[*16]** counsel which Plaintiff maintains included an allegation by STAT that the County's primary services contract with MMR violates the Sherman Antitrust Act; and

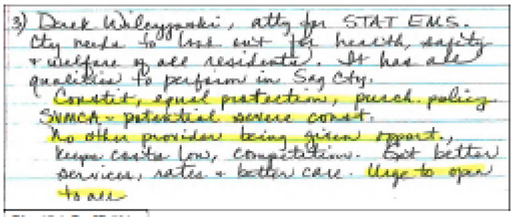
c) during the meet and confer process between counsel for this current lawsuit, STAT's counsel made representations that demonstrate the parties have an actual controversy under the Sherman Act;

See generally, Dkts. 10, 19. The Court will address each argument in turn below, weighing whether Plaintiff's allegations are sufficient to show the parties have an actual controversy surrounding its Sherman Act claim that would confer subject matter jurisdiction. *See, e.g., Ritchie, 15 F.3d at 598* (explaining that the Court may weigh the factual existence of subject matter jurisdiction when faced with a factual attack under *12(b)(1)*).

a) STAT's Alleged Threats at Board Meetings Held in 2013

First, Plaintiff alleges that in September 2013, counsel for STAT attended a Saginaw County Board of Commissioners meeting where the Board addressed whether to renew a "primary ambulance provider macro ambulance system contract" with MMR—essentially, a contract that provided MMR the exclusive right to perform certain emergency services within the county. *See* Dkt. 10, Pg. ID **[*17]** 218. Plaintiff insists that at the September 2013 meeting, STAT representatives asserted that the prospective exclusive contract between the County and MMR would violate the Sherman Antitrust Act and that STAT was prepared to initiate legal action against the County if it were to proceed with the contract. *See id.* According to Plaintiff, STAT's alleged threat amounted to "assert[ing] federal claims" against the County. *See* Dkt. 17, Pg. ID 483. Plaintiff also alleges that one month later, in October 2013, STAT's counsel and CEO appeared at a separate Board of Commissioners meeting and "repeated their threats of Sherman Anti-Trust and *14th Amendment* Due process claims and resolve to take legal action if the contract were renewed." Dkt. 10, Pg. ID 218. Plaintiff claims the aforementioned interactions reflect an actual controversy between the parties, and also one that "arises under" the Sherman Act for purposes of *28 U.S.C. § 1331*. *See* Dkt. 10, Pg. IDs 218-19.

Upon reviewing the factual bases for Plaintiff's claims, the Court finds that the materials submitted by Plaintiff are insufficient to support its allegations that STAT threatened antitrust action at the meetings held in September and October 2013. *See* *Ritchie, 15 F.3d at 598*. The **[*18]** clerical notes filed and cited to by Plaintiff do not record any statements by STAT threatening antitrust litigation at the September 2013 Board of Commissioners meeting. *See* Dkt 17-1, Pg. ID 501. Instead, the notes, partially reproduced below, show that Derek Wilczynski, counsel for STAT, referenced "Constit,[*sic*] equal protection" and "SVMCA [Saginaw Valley Medical Control Authority] — potential severe const." in connection with "no other [ambulance] provider being given [opportunity]" to work in Saginaw county. *See id.*


3) Derek Wilczynski, atty for STAT EMS.
Cty needs to look out for health, safety
+ welfare of all residents. It has all
qualities to perform in Sag Cty.
Constit, equal protection, purch. policy
SVMCA - potential severe const.
No other provider being given opport.,
keeps costs low, competition. Get better
services, rates + better care. Urge to open
to all

Dkt. 17-1, Pg. ID 501.

The official minutes and associated clerical notes from the September 2013 meeting suggest STAT's counsel raised issues expressly relating to potential Constitutional violations by the SVMCA, not Plaintiff Saginaw County. *Id.* Notably absent is evidence that STAT threatened to bring any antitrust claims, or directed any "threats" at the Plaintiff.[2]

The same is true for Plaintiff's allegations surrounding the October 2013 meeting before the Board of Commissioners. While Plaintiff insists that STAT's counsel "repeated" threats to bring a federal antitrust action, the clerical notes only show that counsel for STAT "spoke in opposition to the county entering **[*19]** into an Ambulance Service Agreement with Mobile Medical Response, Inc. (MMR). He appealed to the Board to open this matter to bidding to promote competition and create more access to healthcare. . . ." *See* Dkt. 14-6, Pg. ID 2.

Furthermore, it is significant that Plaintiff is seeking declaratory relief concerning the enforceability of an Ordinance that was adopted on April 19, *2016*—almost three years *after* the Board of Commissioners meetings that took place in September and October of 2013. *See* Dkt. 1 Ex. H, Pg. ID 89. The record also shows that the governing 911 Plan was adopted by the County on the same day as the Ordinance, April 19, 2016. *See* Dkt. 1, Ex. G. The considerable gap in time between the allegedly threatening statements by STAT's counsel at the 2013 meetings (which are not well supported) and the adoption of the 911 Plan and Ordinance in 2016 undermines the strength of any conclusion that: 1) the parties have a "definite and concrete" federal antitrust dispute sufficient to satisfy the actual controversy requirement under the Act, and 2) the parties have an actual controversy that is sufficiently immediate and real to confer Plaintiff with standing to seek relief under **[*20]** the Sherman Act against STAT. *See* *Commodities Exp., 695 F.3d at 525*. Thus, in weighing the above facts, the Court finds that the records of the September and October 2013 meetings (which took place almost 4 years before Plaintiff filed the instant case, no less) fail to demonstrate that the parties have a substantial Sherman Act controversy that is definite and concrete and of sufficient immediacy and reality to warrant the issuance of declaratory relief. *See id.*

[2] The Court notes that since *MedImmune*, a declaratory judgment plaintiff is not required to show that a defendant threatened litigation to establish an actual controversy under the Act. However, proof of such a threat is nevertheless evidence that weighs in favor of proving the existence of an actual controversy under the governing test, which asks whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *See* *MedImmune, 549 U.S. at 127*.

b) STAT's Counsel's Letter to Mr. Van Essen

Second, Plaintiff alleges that STAT communicated to MMR and Saginaw County that their primary services contract violates the Sherman Antitrust Act. *See* Dkt. 10, Pg. ID 219, ¶ 24 (citing Dkt. 1, Ex. I); *see also* Dkt. 17, Pg. ID 485. Plaintiff points to a letter from STAT's counsel to Attorney Douglas Van Essen as proof of an actual controversy between the parties arising under the Sherman Act. *See id.* At the time the letter was sent, this case had not yet been brought, and Van Essen was at that time counsel for MMR.

The record shows that counsel for STAT sent the letter in question in connection with STAT's partial victory in *STAT v. SVMCA, Case No. 13-cv-14960, 2016 U.S. Dist. LEXIS 93591, 2016 WL 3902742 (July 19, 2016, E.D. Mich. 2016)*. *See Dkt.* 1 Ex. I, Pg. ID 96. Moreover, the letter was **[*21]** directed to Mr. Van Essen's then-client, MMR, and discussed issues related to the disposition of that previous case. *See id.* In the letter, STAT's counsel states that the letter serves as a follow-up to an earlier cease-and-desist letter sent to MMR. *Id.* Notably, the letter identifies certain activities undertaken *by MMR*—not the Plaintiff in this case—that STAT's counsel argued might fall within the ambit of the Sherman Act. For example, the letter states, "[MMR's] repeated and ongoing attempts to conspire not only with the SVMCA, but others, for the purpose of limiting competition in the Saginaw and Tuscola County area is precisely what is prohibited by the Sherman Anti-Trust Act." Dkt. 1 Ex. I, Pg. ID 98. But the letter does not state that Plaintiff in this action has violated the Sherman Act. Rather, the letter reflects one private company's perspective that another private company was engaged in anticompetitive conduct regarding the provision of emergency services in Saginaw County. Consequently, the August 2, 2016 letter fails to provide evidence sufficient to support a finding that STAT and Saginaw County have a dispute arising under the Sherman Act that is sufficiently definite **[*22]** and concrete to satisfy the "actual controversy" requirement under Article III and the Declaratory Judgment Act.

c) Meet and Confer Email Communications

Third, Plaintiff points to emails with Defense counsel exchanged as a part of their "meet and confer" obligations. Plaintiff argues that "STAT expressly asserted that if Saginaw County's purpose in enacting the Ordinance and then enforcing it in this lawsuit is to protect MMR's exclusive territorial rights as conferred in [the exclusive contract], then STAT believes the Ordinance violates the Sherman Antitrust Act." Dkt. 17, Pg. ID 475-76 (citing Dkt. 17-1, Pg. ID 495).

In the referenced emails, counsel for Plaintiff informed STAT's counsel that it would "stipulate to a dismissal if you agree in the stipulation that STAT is formally withdrawing its claim that the Ordinance is unenforceable because it interferes with STAT's rights under the Sherman Anti-Trust Act." Dkt. 17 Ex. A, Pg. ID 495. Plaintiff's position on the Sherman Act issue in this case is also reflected in its Amended Complaint, where it alleges that "STAT claims primary services ambulance contracts . . . violate[] the Sherman Anti-Trust Act" and that "[t]he County disputes **[*23]** [these] claims . . . and is resolved to enforce the [Ordinance]. Dkt. 10, Pg. ID 221.

Of course, as of yet STAT has not brought a lawsuit or filed any counterclaims against Plaintiff challenging Plaintiff's emergency services regime under the Sherman Antitrust Act. Nor does the evidence in the record support Plaintiff's allegation that STAT claims primary services ambulance contracts violate the Sherman Act. What the record shows is that STAT has stated that it believes the *enforcement* of the *Ordinance* in a certain way and for particular reasons might give rise to federal antitrust concerns. *See* Dkt. 17-1, Pg. ID 495. In its email exchange during the meet-and-confer process, counsel for STAT explained its position on the Ordinance and this pending lawsuit as follows: "[w]e are not alleging that the Ordinance itself violates the Sherman Antitrust Act. Enforcement of the ordinance, however, if done to protect MMR, to the exclusion of other ambulance providers, would violate the Sherman Antitrust Act . . ." *Id.* At the hearing on Defendant's motion to dismiss, Plaintiff acknowledged that it has not yet taken steps to enforce the Ordinance according to its terms.[3] While the Court acknowledges **[*24]** that the Declaratory Judgment Act serves as an alternative to a party committing arguably-illegal activity, a Plaintiff must still present the Court with a controversy that is definite and concrete—"as distinguished from [seeking] an opinion advising what the law would be upon a hypothetical state of facts." *See MedImmune, 549 U.S. at 127*.

Plaintiff's allegations in its Amended Complaint, its representations through the parties' meet-and-confer email exchanges, and its briefing before this Court show that Plaintiff believes STAT may challenge the County's emergency services regime through a federal antitrust lawsuit at some point in the future.[4] Plaintiff in this action seeks a determination as to whether the federal ***antitrust law*** would be violated *if* Plaintiff "enforced" its Ordinance against STAT and what the result would be if STAT challenged Plaintiff's enforcement on federal antitrust grounds. But neither of these events have occurred. The Court rejects Plaintiff argument that its mere bringing of this lawsuit, given the nature of the parties' relationship, presents an actual Sherman Act controversy because of the position articulated by STAT's counsel during their meet-and-confer communications. Dkt. **[*25]** 17, Pg. ID 476.

In sum, the Court finds that "all of the circumstances" surrounding Plaintiff's Sherman Act claim fail to show an "actual controversy" between the parties regarding this claim. *See MedImmune, 549 U.S. at 127*; *Nat'l Rifle Ass'n, 132 F.3d at 279-81*. Rather, the circumstances show that the parties have mere hypothetical and abstract questions surrounding the applicability of the Sherman Act to potential future conduct. Given this posture, the Court finds that, with respect to Plaintiff's Sherman Act claim, Plaintiff seeks from the Court "an opinion advising what the law would be upon a hypothetical state of facts"—relief that lies outside the scope of this Court's Article III powers.[5] *See id.* For these reasons, the Court finds that it lacks subject matter jurisdiction over Plaintiff's claims surrounding the Sherman Act.

2. Whether Plaintiff's Sherman Act Claim is Ripe for Adjudication

Defendant also argues that Plaintiff's case must be dismissed because the issues presented in the complaint are not ripe for review. *See* Dkt. 14, Pg. IDs 420-22. Courts apply the ripeness doctrine to evaluate whether it may exercise its judicial power over a dispute. The ripeness doctrine is a mixture of Article III concerns about actual cases and controversies and **[*26]** prudential concerns about the appropriate time for a court to adjudicate a matter. The "basic rationale of the ripeness doctrine is 'to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.'" *Nat'l Rifle Ass'n, 132 F.3d at 284* (citing *Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 580, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985))*. While the record is sufficient to conclude that the parties do not have an "actual controversy" surrounding the Sherman Act, application

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[3] Notably, the Ordinance itself contains enforcement provisions that allow the County to issue "appearance ticket[s]" as well as civil and criminal penalties. *See* Dkt. 1 Ex. H, § 4.5.2-4.5.3. While both parties recognize that STAT has and continues to provide emergency services in the County in violation of the Ordinance, no evidence suggests that the County or the County's agents have taken steps to enforce the Ordinance according to its terms. At the hearing on Defendant's motion to dismiss, counsel for Plaintiff acknowledged that the only "enforcement action" purportedly undertaken by Plaintiff involved the sending of a letter on January 18, 2017 to Defendant indicating that "STAT cannot continue to . . . violate the Ordinance and provide either intra-county transport or EMS ambulance services within Saginaw County in defiance of the Ordinance . . . ." *See* Dkt. 1 Ex. 1, Pg. ID 119.

[4] Plaintiff has made several arguments, statements, and references throughout this litigation to this effect. *See, e.g.*, Dkt. 17, Pg. ID 485 ("It is obvious that STAT is simply hoping to clear this case out of the way and initiate its own Sherman Antitrust and *14th Amendment* due process claims against the County with a preferred judge.").

[5] The Court notes that the parties' meet-and-confer emails show that the parties appear to have a definite and concrete controversy surrounding whether the Ordinance is authorized under Michigan law. Counsel for STAT states that "[t]he ambulance ordinance, as currently written, requires STAT to be 'licensed' by a body which has no authority to license," and expressed an opinion that "there is no way that the [Ordinance] is authorized or enforceable." Dkt. 17-1, Pg. ID 496. This issue presents purely questions of Michigan law, however, the answers of which may very well render superfluous the hypothetical antitrust issues that currently dwell on the fringes of obscurity between the parties.

of the ripeness doctrine also requires a finding that this Court lacks subject matter jurisdiction to adjudicate Plaintiff's claim regarding the Sherman Act.

The Sixth Circuit has stated that evaluating whether a suit is ripe requires courts to weigh: 1) the hardship to the parties if judicial relief is denied at the pre-enforcement stage in the proceedings; 2) the likelihood that the harm alleged by plaintiffs will ever come to pass; and 3) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims. *See* *Nat'l Rifle Ass'n, 132 F.3d at 284*. All of these factors support a finding that Plaintiff's Sherman Act claim is not ripe for adjudication: STAT has not filed suit against Saginaw County, nor has it alleged that the Ordinance at issue violates federal antitrust **[*27]** laws. Plaintiff has not fined, ticketed or otherwise taken efforts to sanction STAT for violating the Ordinance, as permitted under the Ordinance. Nothing prevents Plaintiff from enforcing its Ordinance against STAT for its alleged unauthorized activities in the County, and Plaintiff has not sufficiently identified a hardship to the parties if judicial relief is denied at this stage, or that the likelihood of harm alleged by Plaintiffs by denying relief will ever come to pass.[6]

At the hearing on Defendant's motion to dismiss, Plaintiff highlighted the possibility that STAT will bring a federal antitrust case against it in response to its efforts to enforce the Ordinance, which could lead to prolonged federal antitrust litigation. This sentiment is echoed throughout Plaintiff's pleadings and briefing. As an initial matter, it is not clear that Plaintiff's efforts to enforce the Ordinance, whatever they might be, would lead to STAT initiating a federal antitrust lawsuit against Plaintiff. If confronted with sanctions, STAT could very well adapt its behavior; there is no way for the Court to know what might happen. Plaintiff's **[*28]** suit nevertheless seeks a declaration of what the law would be if the County were to undertake enforcement activity against STAT and STAT were to respond by filing an antitrust lawsuit against it. But, even assuming for a moment that such an enforcement action may take place in the future, to be ripe, a suit seeking a declaratory judgment must allege what harm the defendant would suffer from the denial of judicial relief right now. The prospect of protracted federal antitrust litigation is no more diminished if it is pursued in this litigation than through a subsequent action brought based on a ripe and actual controversy. For these reasons, the Court finds that parties will suffer little hardship if judicial relief is denied at this stage and further that, based on the record to date, it is unclear whether the harm alleged by Plaintiffs will ever come to pass.

Moreover, the Court also finds that the factual record is not sufficiently developed to produce a fair adjudication of the merits of Plaintiff's claims. The Court finds significant the fact that this case is one where Plaintiff seeks a judgment that prospective as-yet uncommitted conduct *would not* violate the Sherman Act, as **[*29]** opposed to one where a plaintiff advances an affirmative allegation that certain completed conduct amounts to a Sherman Act violation. The conduct that serves as the foundation for Plaintiff's desired relief under the Sherman Act—the enforcement of the ordinance—*has not yet occurred*. The Court would be required to speculate about the nature of Plaintiff's hypothetical enforcement actions and their impact.

Furthermore, if Plaintiff were able proceed with its suit for a declaratory judgment concerning the Sherman Act, STAT would be forced to either take the role of a putative antitrust plaintiff who filed an affirmative Sherman Act claim (thereby likely requiring STAT to *prove* that certain conduct reflects a Sherman Act violation, when it has not actually advanced such an allegation), or potentially be subject to a *res judicata* finding against it. Additionally, adjudicating Plaintiff's Sherman Act claim would require the Court to speculate on multiple issues of fact in the complex arena of is federal ***antitrust law***. But, given the Court's finding in this Order, this case lacks a definite and concrete dispute over whether an antitrust violation has occurred. The Court finds that "forcing" **[*30]** a defendant

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[6] As noted above, the posture of Plaintiff's case in this action is vastly different from plaintiffs in declaratory judgment cases presenting ripe, actual controversies. *Nat'l Rifle Ass'n* and *MedImmune* are instructive. In *Nat'l Rifle Ass'n*, a set of plaintiffs alleged that the passage of a statute had a significant impact on the way they conducted their businesses and indicated that their compliance with the statute caused them immediate harm. *Nat'l Rifle Ass'n, 132 F.3d at 281*. Similarly, *MedImmune* considered a plaintiff that sought relief under the Act based on its desire to stop making royalty payments pursuant to a licensing agreement. *MedImmune, 549 U.S. at 121*. The plaintiff faced two choices: 1) continue to make the payments, even though plaintiff believed it had the right to stop making the payments, or 2) stop making the payments and face imminent civil litigation. *Id. at 122*. In *MedImmune*, the risk of a civil suit was certain and imminent because the Defendant expressed its intent to sue the plaintiff for violating the agreement if it stopped making the royalty payments. *Id.*

to take the role of a putative plaintiff in a federal antitrust lawsuit when it has not initiated such an action does not represent a "fair adjudication on the merits" of the parties' alleged antitrust disagreement.

Thus, for the reasons explained in detail above, the Court finds that Plaintiff's Sherman Act claim is not ripe for adjudication.

3. Alternatively, Plaintiff's Sherman Act Claim is Subject to Dismissal Pursuant to *Fed. R. Civ. P. 12(b)(6)*

While the record is sufficient to dismiss Plaintiff's Sherman Act claim for lack of subject matter jurisdiction, even if the Court had jurisdiction over Plaintiff's Sherman Act claim, it is subject to dismissal for its failure to sufficiently state a claim upon which relief may be granted. *Fed. R. Civ. P. 12(b)(6)*. Plaintiff in this action seeks, *inter alia*, a declaration that the County's 911 Plan, the Ordinance, and its primary services contract with MMR, if enforced against STAT, do not violate the Sherman Act. But Plaintiff's Amended Complaint alleges no factual content that would allow the Court to plausibly infer that it is entitled to such relief.

Section 1 of the Sherman Act makes unlawful "every contract, combination . . . or conspiracy, in restraint of trade or commerce among **[*31]** the several States." *15 U.S.C. § 1*. *Section 2* of the Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *15 U.S.C. § 2*. Despite several references to its primary services contract with MMR, Plaintiff's Amended Complaint alleges no facts as to why its primary services contract does not reflect an unlawful restraint of trade, and therefore passes muster under *§ 1*. The same issue plagues Plaintiff's pleading vis-à-vis its 911 Plan and the Ordinance. While Plaintiff alleges that the 911 Plan and Ordinance were passed pursuant to state authority, (and that the Ordinance was passed in part to protect Plaintiff's contract with MMR) the Amended Complaint fails to allege any facts to show that the 911 Plan and the Ordinance do not violate the Sherman Act. For instance, Plaintiff alleges no facts to indicate its method of permitting primary emergency service providers does not amount to a contract or conspiracy that unlawfully restrains trade. Plaintiff's Amended Complaint similarly fails to allege any facts to plausibly show it is entitled to a declaration that its 911 Plan, the Ordinance, **[*32]** and the contract with MMR do not violate *Section 2* of the Sherman Act.

For these reasons, the Court finds that Plaintiff's Amended Complaint, Dkt. 10, fails to "contain sufficient factual matter, accepted as true, to state a claim to relief that" plausibly shows it is entitled to relief on its Sherman Act claim. *See* *Ashcroft v. Iqbal, 556 U.S. 662, 678 (2008)*. Thus, even if the Court had subject-matter jurisdiction over Plaintiff's Sherman Act claim, it would be subject to dismissal. *Fed. R. Civ. P. 12(b)(6)*; *Twombly, 550 U.S. at 555*.

C. Plaintiff's Claim for Relief Pursuant to the *Due Process Clause of the 14th Amendment*

Plaintiff also seeks relief pursuant to the *Due Process Clause of the 14th Amendment to the United States Constitution* (the "*Due Process Clause* claim"). Plaintiff requests a declaration that the enforcement of its 911 Plan or Ordinance against STAT's unauthorized ambulance services origination within the County would not violate the *Due Process Clause of the 14th Amendment*. Dkt. 10, Pg. ID 222. Plaintiff provides more clarity on this claim in its response to STAT's motion to dismiss. In its response, Plaintiff states that STAT's motion to dismiss, "demonstrates the existence of a federal case and controversy between the parties; namely whether the County's Ordinance violates STAT's federal constitutional rights." Dkt. 17, Pg. ID 475.

A brief history of the parties' pleadings in this matter provides helpful context to Plaintiff's *Due Process Clause* claim. **[*33]** Plaintiff filed its first Complaint in this case on February 1, 2017. Dkt. 1. Absent from Plaintiff's initial Complaint was a request for a declaration that its 911 Plan and Ordinance did not violate the *Due Process Clause of the Fourteenth Amendment*. *See* Dkt. 1. STAT filed its motion to dismiss Plaintiff's initial complaint on April 3, 2017. Dkt. 9. STAT argued that Plaintiff's case must be dismissed for lacking subject matter jurisdiction and, in the alternative, that the Complaint should be dismissed because the Ordinance violates the *Due Process Clause of the U.S. Constitution*. *See* Dkt. 9, Pg. IDs 175-78. Plaintiff filed its Amended Complaint less than two weeks later on

April 14, 2017 and included for the first time its request for a declaration that the 911 Plan and Ordinance do not violate the *Due Process Clause*. *See* Dkt. 10, Pg. ID 222.

Thus, it appears to the Court that Plaintiff reframed an argument advanced by Defendant in defense to Plaintiff's claims in its original Complaint, and subsequently pled an affirmative claim for relief on the same issue in its Amended Complaint. That is to say, where STAT argued that Plaintiff's ordinance violates its rights under the *Due Process Clause*, Plaintiff's Amended Complaint seeks a declaration that its 911 Plan and Ordinance, if enforced against STAT, would **[*34]** not violate rights guaranteed to STAT by, and protected under, the *Due Process Clause*. As described in further detail below, this Court lacks subject matter jurisdiction to adjudicate Plaintiff's claim on this issue.

1. **Plaintiff Lacks Standing to Bring its *Due Process Clause* Claim**

Plaintiff fails to allege and show the fundamental elements necessary to establish it has standing to bring its *Due Process Clause* claim. Article III standing requires a litigant to have suffered an injury-in-fact, fairly traceable to the defendant's allegedly unlawful conduct, and likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351*. Plaintiff in this action has failed to identify any "injury in fact" to rights that is has which are protected under the *Due Process Clause*; it has not pointed to any behavior that is "fairly traceable" to STAT's conduct that led to the alleged violation of its rights protected under the *Due Process Clause*; and it fails to identify how the injury that it fails to allege vis-à-vis the *Due Process Clause* would be redressed by the requested relief. While Plaintiff is not prohibited from defending itself against a defense, counterclaim, or challenge by STAT that the enforcement of its Ordinance, as applied to STAT, violates STAT's rights as protected under the *Due Process Clause*, Plaintiff has not established **[*35]** that it has standing itself to seek relief as to this issue on an affirmative claim.

2. Alternatively, Plaintiff's *Due Process Clause* Claim Would be Subject to Dismissal Pursuant to *Fed. R. Civ. P. 12(b)(6)*

Even if Plaintiff had standing to raise the *Due Process Clause* claim alleged in its Amended Complaint, the claim would be subject to dismissal for failure to state a claim for relief pursuant to *Fed. R. Civ. P. 12(b)(6)*. While plaintiffs are required to only provide "a short and plain statement of the claim showing that it is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Twombly, 550 U.S. at 555*, Plaintiff fails to allege any facts plausibly showing it is entitled to relief under the *Due Process Clause of the 14th Amendment*. Thus, Plaintiff's Amended complaint fails to allege facts to plausibly show it is entitled to a declaration that the enforcement of its 911 Plan and Ordinance against STAT does not violate STAT's rights as protected under the *Due Process Clause of the U.S. Constitution*, and would therefore be subject to dismissal. *See Twombly, 550 U.S. at 555*.

D. The Court Lacks Subject Matter Jurisdiction Over this Action

As explained in detail above, in order to invoke this Court's subject matter jurisdiction, Plaintiff must establish it has constitutional standing pursuant to Article III as well as statutory **[*36]** standing through a congressional grant. *Bender, 475 U.S. at 541*. Plaintiff alleges federal question jurisdiction, federal antitrust jurisdiction, and supplemental jurisdiction under *28 U.S.C. §§ 1331*, *1337*, and *1367*, respectively.

Because Plaintiff's claim for relief under the Sherman Act must be dismissed for: 1) failing to raise a sufficient "actual controversy" for purposes of Article III and the Declaratory Judgment Act, and 2) lacking sufficient ripeness, the claim must be dismissed and cannot establish the Court's subject matter jurisdiction over this action. *See Loren v. Blue Cross & Blue Shield of Mich., 505 F.3d 598, 606 (6th Cir. 2007)* ("If Plaintiffs cannot establish constitutional standing, their claims must be dismissed for lack of subject matter jurisdiction."). The Court's subject matter jurisdiction, if it exists in this case, must lie elsewhere.

Plaintiff's claim for relief under the *Due Process Clause* similarly fails to establish this Court's subject matter jurisdiction because Plaintiff does not have standing to bring the claim. Plaintiff's *Due Process Clause* claim therefore *also* cannot establish this Court's subject matter jurisdiction pursuant to *28 U.S.C § 1331* because a federal question must be presented on the face of a plaintiff's well-pleaded complaint—not a defense or allegations in the complaint that anticipate a defense. *See* *Caterpillar v. Williams, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)*. **[*37]** Plaintiff's *Due Process Clause* claim represents the only remaining federal question arguably at issue in the Amended Complaint, but it cannot establish this Court's federal question jurisdiction because it "is interjected into this lawsuit solely as a defense to [defendant's] defense to [Plaintiff's] . . . claim." *See* *Michigan Southern R.R. Co. v. Branch & Joseph Counties Rail Users Ass'n., Inc., 287 F.3d 568, 575 (6th Cir. 2002)* (citing *Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S. Ct. 876, 94 L. Ed. 1194*).

Moreover, federal jurisdiction in this action cannot be premised on *STAT's* argument or claim in its motion to dismiss that the Ordinance violates its rights as protected under the *Due Process Clause*. It is well-settled that *counterclaims* and *defenses* that arise under federal law are inadequate to confer federal question jurisdiction; the federal question must appear "on the face" of the plaintiff's well-pleaded complaint. *See, e.g.,* *Merrell Dow, 478 U.S. at 808 (1986)* ("A defense that raises a federal question is inadequate to confer federal [question] jurisdiction."); *Chase Manhattan Mortg. Corp. v. Smith, 507 F.3d 910, 914-15 (6th Cir. 2007)*. Thus, because federal question jurisdiction must exist on the face of Plaintiff's well-pleaded complaint in this action, the Court will not entertain arguments which seek to establish federal question jurisdiction based on Defendant's asserted defenses in this action. *See id.*

Plaintiff also alleges the Court has supplemental jurisdiction over its claims surrounding **[*38]** the validity of the 911 Plan, Ordinance and contract with MMR under Michigan law pursuant to *28 U.S.C. § 1367*. While *Section 1367* provides federal district courts supplemental jurisdiction over a plaintiff's state law claims in certain instances, the statute provides that:

> [the district courts may decline to exercise supplemental jurisdiction over a claim . . . if: [t]he claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). Generally, district courts have "broad discretion in deciding whether to exercise supplemental jurisdiction over state law claims." *Musson Theatrical, Inc. v. Fed. Express Corp., 89 F.3d 1244, 1254 (6th Cir. 1996)*. However, when the court dismisses a plaintiff's federal claims for lack of subject-matter jurisdiction, supplemental jurisdiction can *never* exist. *Id. at 1255*; *Bigelow v. Michigan Dep't of Nat. Resources, 970 F.2d 154, 159 (6th Cir. 1992)* (dismissal for lack of ripeness equivalent to dismissal for lack of subject matter jurisdiction; state law claims cease to be properly supplemental). Moreover, even after a *Fed. R. Civ. P. 12(b)(6)* dismissal, "there is a strong presumption **[*39]** in favor of dismissing supplemental claims." *Musson, 89 F.3d at 1255*. Because the Court lacks subject matter jurisdiction over this action, Plaintiff's state law claim(s) are no longer properly supplemental, and the Court lacks jurisdiction to adjudicate those claims under *28 U.S.C. § 1367*.

E. Court Exercises its Broad Discretion to Decline Jurisdiction Under the Declaratory Judgment Act

In light of the above, the Court exercises its discretion not to grant any declaratory judgment. *Grand Trunk R. Co. v. Consolidated Rail Corp., 746 F.2d 323, 325 (6th Cir. 1984)* (the decision to grant "a declaratory judgment rests in the 'sound discretion' of the court[.]"). Although the Sixth Circuit has outlined a five-factor test for deciding whether to exercise jurisdiction in declaratory judgment cases, *Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 554 (6th Cir. 2008)*, there is no need to conduct this analysis where the Court lacks subject matter jurisdiction, as it does in this case. Such an analysis would not support the exercise of discretion in any event, but regardless, under these facts, the lack of subject matter jurisdiction forecloses the question so that the Court's discretion to make a declaratory judgment should not be exercised.

V. Conclusion

For the foregoing reasons, Defendants' motion to dismiss Plaintiffs' Complaint is **GRANTED**.

SO ORDERED.

Dated: July 31, 2018

/s/ **[*40]** Terrence G. Berg

TERRENCE G. BERG

UNITED STATES DISTRICT JUDGE

Osbourne v. Anschutz Entm't Grp., Inc.

United States District Court for the Central District of California

August 1, 2018, Decided; August 1, 2018, Filed

CV 18-2310 DSF (JEMx)

Reporter

2018 U.S. Dist. LEXIS 152338 *; 2018-2 Trade Cas. (CCH) P80,463

JOHN MICHAEL "OZZY" OSBOURNE, Plaintiff, v. ANSCHUTZ ENTERTAINMENT GROUP, INC., et al., Defendants.

Core Terms

Arena, venue, allegations, promoter, concert, motion to dismiss, anticompetitive, antitrust, coerced, artist, tie, complaint alleges, anti trust law, market power, non-coercive, believes, effects, pleaded, booked, harmed, indoor

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For Anschutz Entertainment Group, Inc., a Colorado corporation, Aeg Presents Llc, a Delaware limited liability company, L.A. Arena Company, Llc, a Delaware limited liability company, Ansco Arena Ltd., a U.K. limited company, Defendants: Paul Benedict Salvaty, LEAD ATTORNEY, David W Skaar, Hogan Lovells LLP, Los Angeles, CA USA; Jordan D Teti, Hogan Lovells US LLP, Los Angeles, CA USA; Joseph G Krauss, PRO HAC VICE, Justin W Bernick, Hogan Lovells LLP, Washington, DC USA.

Judges: Dale S. Fischer, United States District Judge.

Opinion by: Dale S. Fischer

Opinion

Order DENYING Motion to Dismiss (Dkt. No. 32)[1]

This is an antitrust lawsuit by musician Ozzy Osbourne,[2] individually and on behalf of a proposed class of similarly situated performers, against various Anschutz Entertainment Group companies (collectively "AEG").[3] The suit challenges AEG's alleged policy of allowing the O2 Arena in London **[*2]** to be booked by an artist only if the artist agrees to play at least one[4] of the artist's dates in Los Angeles (if any) at the Staples Center. AEG now brings this

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[1] The Court deems this matter appropriate for decision without oral argument. See *Fed. R. Civ. P. 78*; *Local Rule 7-15*. The hearing set for July 30, 2018 is removed from the Court's calendar.

[2] The parties refer to Plaintiff simply as "Ozzy." The Court will do so as well.

[3] The Court notes that for more than a month one of AEG's lawyers has been listed on filings with the note "*pro hac vice* to be filed." Counsel should either file a *pro hac vice* application immediately or not be listed on filings.

motion to dismiss, claiming that Ozzy has not pleaded antitrust standing, that he was coerced, or that the alleged actions cause any anticompetitive effects in any relevant product market.

Several factors are typically used in deciding whether an antitrust plaintiff has standing:

(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall;
(2) the directness of the injury;
(3) the speculative measure of the harm;

(4) the risk of duplicative recovery; and

(5) the complexity in apportioning damages.

Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California, 190 F.3d 1051, 1054 (9th Cir. 1999).

Most of AEG's arguments are various ways of claiming that Ozzy is not the proper plaintiff here because he, personally, was not the target of any purported restraint. AEG claims that Ozzy's concert promoter, Live Nation, was the party required to book Ozzy at the Staples Center if Ozzy was to play the O2 Arena. From this, AEG argues that Ozzy was free to play anywhere he liked in Los Angeles as long as he did not use Live Nation as his promoter **[*3]** to do so. As Ozzy points out, this take on the allegations doesn't necessarily make AEG's actions less anticompetitive. But it is arguably *different* from what is pleaded in the complaint. However, the first amended complaint alleges that, to the degree that Live Nation sought to make agreements with AEG, it was doing so as Ozzy's representative. In any event, it is clear that the complaint alleges that Ozzy personally suffers damage in a fairly direct and non-speculative way by not being able to play in his preferred venues and that the damage stems from the kind of conduct that ***antitrust law*** is intended to prevent.[5] AEG is alleged to be using market power in one market to foreclose competition in another through a tying arrangement. That tie allegedly harms Ozzy by constricting his choices on where to play his concerts regardless of whether Ozzy's or his concert promoter's name is on the contract with the venue.

AEG's argument that the complaint does not adequately allege that Ozzy has been coerced is unpersuasive. The complaint alleges that because Ozzy's only reasonable choice of venue in London is the O2 Arena, he is explicitly coerced by a contract that says he must play the Staples **[*4]** Center in order to play the O2 Arena. FAC ¶¶ 41-48. The argument that the agreement in question might possibly leave open the ability for Ozzy to play a Los Angeles venue that is not the Staples Center if he promotes that show through someone other than Live Nation does not change the analysis. First, this is a motion to dismiss and the parties have a dispute over what the actual, full restraint on Ozzy was. Second, that Ozzy could possibly have dropped his promoter in order to avoid booking the Staples Center doesn't make the Staples Center requirement non-coercive. Presumably, Ozzy chose to promote his concerts through Live Nation for an economically valid reason, just as he has chosen to play London and Los Angeles for a reason. That Ozzy might have another possible way out of the tie besides not playing London or Los Angeles doesn't necessarily make AEG's conduct non-coercive. AEG's citation to *It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676 (4th Cir. 2016)*, does not help it. First, that case was decided on summary judgment where it was found that the plaintiff had no evidence of tying or coercion. See *id. at 685-87*. Second, the plaintiff in It's My Party apparently argued that tying occurs any time a seller with market power over product A merely offers **[*5]** that product for sale along with a product in market B. *Id. at 684-85*. This is very different than *requiring* purchase of the product in the tied market in order to get the monopolized tying product, as is alleged here.

The complaint's market definition allegations are also not defective. AEG claims Ozzy defines the tying market to be the O2 Arena. This is not correct. Ozzy alleges that large indoor arenas in Greater London — venues capable of hosting one of his shows — is the relevant tying market. See FAC ¶¶ 3, 41-43, 52. As it turns out, Ozzy believes

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[4] Ozzy alleges that a requirement to play one show at the Staples Center is akin to requiring all shows to be played there due to high switching costs that typically make splitting dates among venues in the same city impractical. FAC ¶ 34.

[5] The last two factors are irrelevant because Ozzy does not seek monetary damages.

that the O2 Arena is the only venue that currently exists in that market, which is exactly why he believes that AEG can implement a coercive tie.

Finally, a plaintiff does not need to show anticompetitive effects in a *per se* tying case,[6] but Ozzy has nonetheless made numerous plausible allegations of how competition is harmed, most obviously through the restriction of competition in the tied market — indoor arena-sized venues in Los Angeles. FAC ¶¶ 54-59

The motion to dismiss is DENIED.

IT IS SO ORDERED.

Date: August 1, 2018

/s/ Dale S. Fischer

Dale S. Fischer

United States District Judge

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[6] "For a tying claim to suffer per se condemnation, a plaintiff must prove: (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market." ***Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 913 (9th Cir. 2008)**.

Alarm Detection Sys. v. Orland Fire Prot. Dist.

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

August 2, 2018, Decided; August 2, 2018, Filed

No. 14 C 876

Reporter
326 F. Supp. 3d 602 *; 2018 U.S. Dist. LEXIS 135105 **; 2018-2 Trade Cas. (CCH) P80,514

ALARM DETECTION SYSTEMS, INC., Plaintiff, v. ORLAND FIRE PROTECTION DISTRICT and TYCO INTEGRATED SECURITY, LLC, Defendants.

Subsequent History: Affirmed by *Alarm Detection Sys. v. Orland Fire Prot. Dist., 2019 U.S. App. LEXIS 20860 (7th Cir. Ill., July 15, 2019)*

Prior History: *Alarm Detection Sys. v. Bloomingdale Fire Prot. Dist., 2014 U.S. Dist. LEXIS 115470 (N.D. Ill., Aug. 20, 2014)*

Core Terms

Alarm, fire alarm, monitoring, Villages, municipalities, ordinances, immunity, connect, signals, license, Sherman Act, exclusive contract, dispatch center, anticompetitive, transmitters, fire protection district, unilateral, antitrust, retailers, dispatch, entity, prices, contracts, monopoly, effects, concerted action, central station, alarm company, customers, argues

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For Orland Fire Protection District, Defendant: James J. Roche, LEAD ATTORNEY, LeeAnn Marie Crow, Megan Shea Roche, James J. Roche and Associates, Chicago, IL USA; Brittany Erin Hartwig, James J. Roche & Associates, Chicago, Il.

For Tyco Integrated Security, Llc, Defendant: A. Christopher Young, Barbara T. Sicalides, Erica Hall Dressler, Robert L. Hickok, PRO HAC VICE, Pepper Hamilton LLP, Philadelphia, PA USA; Mark Thomas Deming, Polsinelli PC, Chicago, IL USA.

Judges: Honorable Thomas M. Durkin, United States District Judge.

Opinion by: Thomas M. Durkin

Opinion

[*607] **FINDINGS OF FACT & CONCLUSIONS OF LAW**

Alarm Detections Systems, Inc. is a company that provides fire alarm services to commercial and multi-unit residential buildings. It alleges that the Orland Fire Protection District ("Orland FPD") and Tyco Integrated Security, LLC have conspired to restrain or monopolize trade **[**2]** in the market for fire alarm system monitoring in violation of the Sherman and Clayton Acts and the *Equal Protection* and *Due Process Clauses of the Fourteenth Amendments*. The case proceeded to a bench trial on May 22, 2017, and the Court received evidence through May 26, 2017. Initial post-trial briefing was completed on June 26, 2017, and the Court heard closing arguments on August 10, 2017. The parties submitted supplemental post-trial briefs on June 7, 2018, at the Court's request.

This opinion sets forth the Court's findings of fact and conclusions of law pursuant to *Federal Rule of Civil Procedure 52(a)*. These findings are based on the documentary evidence and trial testimony. They are also based on the Court's credibility determinations after observing the witnesses testify. This opinion also addresses Alarm Detection's motion to reconsider the Court's earlier dismissal of part of the *Fourteenth Amendment* claims. R. 488. For the following reasons, the Court finds in favor of Orland FPD and Tyco on the merits and will enter judgment against Alarm Detection.

Findings of Fact

Companies like Alarm Detection and Tyco install fire alarms (meaning the fire sensors and the transmitters that send alarm signals) in commercial and multi-unit residential buildings, and then monitor the transmitted **[**3]** signals for indications of fire or a need for maintenance of the alarms. Various technological systems can be used to monitor fire alarm signals. The systems relevant to this case are (1) central station and (2) direct connect. In a central station system, an alarm company establishes one facility to receive alarm signals indicating the presence of fire from multiple governmental jurisdictions and then relays those signals to the relevant jurisdiction's fire department 911 dispatch center. In a direct connect system, fire alarm transmitters send alarm signals directly to the relevant 911 dispatch center, without passing through a central station.

Some jurisdictions accommodate both direct connect and central station fire alarm **[*608]** monitoring. At issue in this case, however, are jurisdictions that have enacted ordinances requiring buildings to send fire alarm signals directly to the jurisdiction's 911 dispatch center. The Illinois appellate court has held that Illinois municipalities have statutory authority to mandate a direct connect fire alarm monitoring system. *See* *Alarm Detection Sys., Inc. v. Village of Hinsdale, 326 Ill. App. 3d 372, 761 N.E.2d 782, 785, 260 Ill. Dec. 599 (Ill. App. Ct. 2d Dist. 2001)*. Similarly, the Seventh Circuit has held that Illinois fire protection districts have statutory authority to mandate direct **[**4]** connect systems. *See* *ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Protection Dist., 672 F.3d 492, 501-02 (7th Cir. 2012)*.

Fire protection districts are governmental entities created pursuant to the Illinois Fire Protection District Act, *70 ILCS 705*, to "allow two or more local governments to consolidate fire protection and related services." *Lisle-Woodridge, 672 F.3d at 495*. A fire protection district is administered by an elected board of trustees. "The Board of Trustees of any fire protection district . . . may contract with any corporation organized to furnish fire protection service." *70 ILCS 705/11a*. The jurisdictional entities relevant to this case are Defendant Orland FPD and non-parties the Village of Orland Hills and the Village of Orland Park. The Villages of Orland Park and Orland Hills together constitute more than 98% of the geographic territory comprised by Orland FPD. *See* R. 501 at 1 n.1 (citing R. 472 at 278 (635:18-25)).

A governmental entity desiring to implement a "direct connect" system for receipt of fire alarm signals at its 911 dispatch center generally hires an alarm company to provide reception equipment, and sometimes staff, at the 911 dispatch center. Fire alarm companies must obtain a license from the FCC to use a certain signal frequency. *See* R. 472 at 345 (702:7-13). An alarm company's transmission and reception **[**5]** equipment will be calibrated to the frequency the alarm company has licensed. Thus, when a governmental entity hires an alarm company to establish a 911 dispatch center for a direct connect system, the alarm company must also provide the fire alarm transmitters to the commercial buildings, or sub-license other alarm companies to transmit on that frequency.

Fire alarm transmitters and receivers are generally built to transmit or receive only one signal frequency. *See* R. 475 at 147 (1363:12-21).[1] And in a direct connect system, the governmental entity requires that the signal transmit directly from the fire alarm to 911 dispatch. Thus, even if the other alarm companies not hired to provide the equipment for the 911 dispatch center are interested in reaching an agreement to use the transmission frequency of the company maintaining the 911 dispatch **[*609]** center, those companies do not have access to, and cannot monitor, the signals sent by the alarm transmitters, whether indicating the presence of fire in the building or that the alarm transmitters and sensors require maintenance. *See* R. 471 at 93 (93:2-8); R. 475 at 146-47 (1362:22-1363:4).

In 2006, Orland FPD adopted an ordinance **[**6]** requiring direct connection to its 911 dispatch center. *See* Ex. D-140. Orland FPD witnesses testified that they believe that direct connect is safer and more efficient. R. 472 at 218-19 (575:15-576:19); 230 (587:3-24); 253-54 (610:4-611:15).[2] As far back as 1991, Orland FPD hired Tyco's corporate predecessors to provide alarm monitoring services and equipment for Orland FPD's 911 dispatch center and commercial buildings in Orland FPD. *See* R. 472 at 250-52 (607:17-609:2).

In 2012 and 2013, the Seventh Circuit issued decisions questioning the authority of fire protection districts to engage in the business of fire alarm monitoring and transmission in a case against the Lisle-Woodridge Fire Protection District. *See* *Lisle-Woodridge, 672 F.3d 492*; *ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Protection Dist., 724 F.3d 854 (7th Cir. 2013)*. Unlike the defendant Lisle-Woodridge FPD, however, Orland FPD never directly sold or leased alarm transmitters to customers. Nevertheless, apparently in light of the *Lisle-Woodridge* decisions, and at the suggestion of Tyco, Orland FPD rescinded the direct connect requirement provision of its ordinance. *See* Ex. D-115. But because Orland FPD officials continued to prefer direct connect fire alarm monitoring to central station monitoring, they lobbied the Villages to enact ordinances **[**7]** mandating a direct connect system for fire alarms in the Villages. *See* R. 427 at 215-16 (572:14-573:5). Those new ordinances required that Orland FPD's 911 dispatch center be the direct connection reception facility. *See* Ex. D-143; P-053. Orland FPD also renewed its exclusive agreement with Tyco in 2014. *See* Ex. J-006.

Alarm Detection alleges that this arrangement between Orland FPD and Tyco illegally precludes Alarm Detection from competing in the fire alarm monitoring business in Orland FPD. *See* *Lisle-Woodridge, 724 F.3d at 865* (expressing in dicta "serious concerns about the anti-competitive effects" of a direct connect system).[3] Indeed, Tyco provides the transmitters for, and monitors the fire alarm signals from, nearly 100 percent of the customers in Orland FPD. *See* R. 475 at 23 (1239:10-13). Although this arrangement does not directly preclude Alarm Detection from installing and maintaining alarm transmitters, Alarm Detection must purchase the alarms it installs in Orland FPD from Tyco for $1580, *see* R. 472 at 342-43 (699:20-700:3), or the transceiver component of the transmitter for $200, *see* R. 472 at 346-47 (703:15-704:3); R. 473 at 23 (729:3-7), and then contract with Tyco to send signals

[1] The Court notes that the parties have assiduously avoided the question of whether dual-frequency transmitters are a potential solution to this dispute. When the Court specifically posed this question to Alarm Detection's counsel during his opening statement, the answer was long but non-responsive. *See* R. 471 at 30-32 (30:8-32:24). During trial there was testimony that some big-box stores utilize dual-frequency transmitters, *see* R. 474 at 134 (988:11-21), but the issue was not addressed in post-trial briefing. The Court's order requesting supplemental briefing highlighted this testimony and explained how the Court believed the apparent unavailability of dual-frequency transmitters affected the Court's understanding of the factual circumstances of the case. *See* R. 499 at 2. Only Orland FPD's supplemental brief noted its agreement that such technology is not available or economically feasible. *See* R. 501 at 6. Alarm Detection and Tyco did not address the issue. *See* R. 500; R. 502. The Court concludes from this agreement/silence that dual-frequency transmitters are generally unavailable due to some combination of technological and economic circumstances.

[2] This testimony from Orland witnesses is sufficient to prove their motivations. There was insufficient evidence presented at trial for the Court to determine the relative merits of the two systems, but such a finding is unnecessary for the Court to render a verdict in this case.

[3] The *Lisle-Woodridge* case was remanded for various reasons, including potential consideration of any antitrust violations, but the case settled after court decisions based on Illinois law. Although Alarm Detection has consistently argued that the *Lisle-Woodridge* decisions require a finding in its favor, the Seventh Circuit did not engage in an analysis of anticompetitive effect or address any of the legal doctrines on which this Court's verdict is based.

directly to the **[**8]** Orland FPD 911 dispatch center. As discussed, this means that even if Alarm Detection buys transmitters from **[*610]** Tyco and contracts with Tyco for monitoring at the Orland FPD 911 dispatch (as is required by ordinance), Alarm Detection cannot receive maintenance signals directly from the alarms, but is reliant on Tyco or Orland FPD to forward those signals to Alarm Detection. Alarm Detection argues that the cost of buying alarm transmitters from Tyco, and its inability to directly monitor alarm signals, means that its services cannot be competitive in Orland FPD, and that it and other alarm companies are effectively precluded from competing for the business of monitoring fire alarms in individual commercial buildings within the Orland FPD.

Alarm Detection also alleges that Tyco's effective monopoly over fire alarm monitoring in Orland FPD causes customers there to pay more for fire alarm monitoring services. Tyco charges $89 to customers in Orland FPD, *see* R. 472 at 102 (459:10-14), with $23.50 of that fee being remitted to Orland FPD for the right to be the exclusive fire alarm service provider in Orland FPD, *see* R. 473 at 63 (769:4-10). This means that Tyco **[**9]** receives $65.50 from each Orland FPD customer. Tyco charges an average of $68.98 for direct connection services in other jurisdictions in the northern Illinois region. *See* R. 474 at 304 (1158:13-23). The record does not reflect whether Tyco remits a fee to the relevant municipal entity in those jurisdictions. By contrast, Alarm Detection charges $55 or less for central station monitoring service. *See* R. 471 at 160 (160:6-13). It is undisputed that direct connect is typically more expensive because it requires creation of an alarm monitoring "board" for every 911 dispatch jurisdiction, whereas a central station's single board can monitor alarms from multiple jurisdictions. *See* R. 472 at 163-64 (163:22-164:8).

Alarm Detection argues that the exclusionary effects of the Orland FPD arrangement could be remedied by implementing certain technological or systematic adjustments. *See* R. 481 at 6; R. 502 at 10-11. Tyco and Orland FPD argue that none of these options complies with the Villages' ordinances mandating a direct connect system.

Conclusions of Law

Alarm Detection claims that its exclusion from the Orland FPD market violates the Sherman Act, the Clayton Act, and the *Fourteenth Amendment*, and unjustly enriches **[**10]** Defendants in violation of Illinois law. Alarm Detection also brings these claims against Defendants with respect to the services they provide in the Lemont Fire Protection District ("Lemont FPD," a former defendant in this case that settled the claims against it at the pleading stage, *see* R. 211). The Court addresses each claim to the extent necessary to render a verdict.

I. Lemont FPD and the Clayton Act

Before turning to the Orland FPD arrangement that is the primary focus of Alarm Detection's claims, the Court addresses several claims Alarm Detection has made regarding Defendants' conduct in the Lemont FPD. In addition to providing direct connect fire alarm monitoring and 911 dispatch services in Orland FPD, Tyco and Orland FPD provide these services to residents of the Lemont FPD, respectively. Alarm Detection claims that this arrangement with Lemont FPD also precludes Alarm Detection from providing fire alarm services there.

Very little evidence regarding the arrangement in Lemont FPD was presented at trial. But the evidence presented undermines Alarm Detection's claims. Alarm Detection's executive vice president testified that Lemont FPD does not have a direct connect mandate, **[**11]** customers in Lemont FPD may use central station fire **[*611]** alarm monitoring, Alarm Detection has 44 accounts in Lemont FPD, and Alarm Detection uses its own transmitters and does not have to buy or lease them from Tyco. R. 472 at 82-83 (439:5-440:6). Based on this evidence, the Court finds that Alarm Detection is not in fact precluded from competing in Lemont FPD. Therefore, the Court finds for Defendants on Alarm Detection's claims about Lemont FPD.

In addition to its claims about exclusion from Lemont FPD, Alarm Detection continues to claim injury based on Lemont FPD's allegedly illegal assignment of customer contracts to Tyco. R. 481 at 14 n.7; *id.* at 18. This is apparently Alarm Detection's only remaining basis for a Clayton Act claim. *See id.* at 14. n.7. But the Court rejected this claim earlier in the case and sees no basis to reconsider. *See* R. 237 at 19-24 (*Alarm Detection Sys., Inc. v. Orland Fire Protection Dist., 129 F. Supp. 3d 614, 626-28 (N.D. Ill. 2015))*.

Alarm Detection also claims a *Fourteenth Amendment* violation because Orland FPD is monitoring alarms in Lemont FPD, which is allegedly outside its jurisdiction, and beyond its statutory authority. R. 481 at 18. But the agreement between Orland FPD and Lemont FPD (an exhibit admitted at trial, *see* J-011) shows that Orland FPD provides 911 dispatch service to Lemont FPD **[**12]** customers, and Tyco uses the Orland FPD dispatch center to provide direct connect alarm services for customers in Lemont FPD who want that service. *See* R. 473 at 68-71 (774:4-777:11). Moreover, to the extent Orland FPD can be said to be monitoring fire alarms in Lemont FPD in violation of the District Act, this cannot form the basis of a *Fourteenth Amendment* claim because Alarm Detection has failed to show an injury—i.e., it has failed to show that it is excluded from the Lemont FPD market.

II. Sherman Act

A. Statute of Limitations

Turning to Alarm Detection's Sherman Act claims, Defendants argue that they are untimely, because Tyco has had an exclusive contract to service the Orland FPD district since at least 2003, *see* R. 478 at 6, and Alarm Detection did not file this case until 2014. Under the federal antitrust laws, a plaintiff must bring a lawsuit "within four years after the cause of action accrued." *15 U.S.C. § 15b*. An antitrust "cause of action accrues and the statute of limitations begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*; *see also* *In re Copper Antitrust Litig., 436 F.3d 782, 789 (7th Cir. 2006)*. Thus, the "period of limitations for antitrust litigation runs from the most recent injury caused by the defendants' activities rather **[**13]** than from the violation's inception." *Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899, 902 (7th Cir. 2004)*.

The Seventh Circuit has held that "exclusion from a market"—the type of injury Alarm Detection alleges here—"is a conventional form of antitrust injury that . . . [accrues] as soon as the exclusion occurs." *Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 271 (7th Cir. 1984)*. However, "[e]ach discrete act with fresh adverse consequences starts its own period of limitations." *Xechem, 372 F.3d at 902*. "New exclusionary acts" that "extend the period" of exclusion suffice to restart the statute of limitations. *Id.* By contrast, "acts that 'simply reflect or implement a prior refusal to deal or acts that are merely inertial consequences (of a single act) do not restart the statute of limitations.'" *Midwestern Machinery Co., Inc. v. Nw. Airlines, Inc., 392 F.3d 265, 270 (8th Cir. 2004)* **[*612]** (quoting *DXS Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 467-68 (6th Cir. 1996))*; *see also* *In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 229 (E.D.N.Y. 2003)* (Mere "[p]erformance of the alleged anticompetitive contract[] during the limitations period . . . is not sufficient to restart the [limitations] period.").

Alarm Detection argues that the renewal of the contract between Orland FPD and Tyco in 2014, and the passage of the Villages' direct connect ordinances that same year, are new exclusionary acts that extended Alarm Detection's exclusion from the Orland FPD market. The Court agrees that these actions are more than mere inertial consequences of prior agreements and ordinances. **[**14]** Rather, they are evidence of a conscious effort to continue the arrangement that is the basis for Alarm Detection's claims. Therefore, Alarm Detection's antitrust claims are timely.

B. *Section 1*: Contract, Combination, or Conspiracy

Alarm Detection alleges that Defendants' actions violate *Section 1* of the Sherman Act. "The purpose of the Sherman Act is to protect consumers from injury that results from diminished competition." *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 334-35 (7th Cir. 2012)*. To prevail on a *Section 1* claim, a plaintiff must prove: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying injury." *Id. at 335*. Alarm Detection contends that it proved these elements at trial by presenting, respectively, evidence of: (1) the "Orland FPD/Tyco agreements plus Village Ordinances passed at the urging of and for the benefit of Orland FPD"; (2) that Defendants have "virtually 100% control of the Business"; and (3) the "Commercial Accounts have no choice, pay higher prices, and [Alarm Detection] cannot actively compete for the Business." R. 481 at 7.

Although Alarm Detection alleges that the Villages' ordinances are part of the "arrangement" constituting the alleged "contract, combination, or conspiracy" **[**15]** satisfying the first element of its claims, Alarm Detection has not sued the Villages, and Alarm Detection does not argue that the Villages' ordinances are preempted by the Sherman Act. Rather, Alarm Detection's primary goal is to have the agreement between Orland FPD and Tyco invalidated. However, when a state statute or local ordinance is alleged to be an aspect of the defendants' alleged "contract, combination, or conspiracy," as Alarm Detection claims here, an analysis of the federal antitrust implications of such alleged concerted action must begin with the role played by the local law.

In *Fisher v. City of Berkeley*, the Supreme Court explained the standards for such an analysis. *475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)*. "A restraint imposed unilaterally by government does not become concerted-action within the meaning of the [Sherman Act] simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy." *Id. at 267*. Accordingly, legislation that is properly characterized as "unilateral" is "outside the purview of *§ 1 [of the Sherman Act]*." *Id.*

But, this is **[**16]** not true of "all restraints imposed upon private actors by government." *Id.* "Certain restraints may be characterized as 'hybrid,' in that nonmarket mechanisms merely enforce private **[*613]** marketing decisions." *Id. at 267-68*. "Where private actors are thus granted a degree of private regulatory power, the regulatory scheme may be attacked under *§ 1*." *Id. at 268*. At bottom, however, "a government restraint [does not] become concerted action because certain citizens benefit from it, or even have urged it." *Freedom Holdings, Inc. v. Cuomo, 624 F.3d 38, 53 (2d Cir. 2010)* (citing *City of Columbia v. Omni Outdoor Aderv., Inc., 499 U.S. 365, 375, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* ("conspiracy" must "mean . . . more than an agreement to impose [a] regulation").

Fisher concerned an ordinance that kept residential rents artificially low in Berkeley, California. Property owners alleged that the ordinance was preempted by *Section 1* of the Sherman Act. The Supreme Court held that "[w]hile the Ordinance does give tenants—certainly a group of interested private parties—some power to trigger the enforcement of its provisions, it places complete control over maximum rent levels exclusively in the hands of the [city's] Rent Stabilization Board." *Fisher, 475 U.S. at 269*.

The Court distinguished the unilateral action by the City of Berkeley from state and local legislation the Court struck down in prior cases. In *Schwegmann Brothers* ***[**17]*** *v. Calvert Distillers*, a Louisiana statute authorized liquor distributors to enforce price fixing agreements (which were then legal pursuant to a since-repealed exception to the federal antitrust laws) against retailers who were not parties to the agreements. *341 U.S. 384, 387, 71 S. Ct. 745, 95 L. Ed. 1035, 60 Ohio Law Abs. 81 (1951)*. The Court held the state statute was preempted by the Sherman Act because "both the selection of minimum price levels and the exclusive power to enforce those levels were left to the discretion of distributors." *Fisher, 475 U.S. at 268* (citing *Schwegmann, 341 U.S. at 389*). Similarly, in *California Retail Liquor Dealers v. Midcal Aluminum*, a California statute required wine producers to post a retail price schedule, and gave wine wholesalers the power to set prices for a producer that failed to do so. *445 U.S. 97, 99, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. The Court in *Fisher* explained that "the mere existence of legal compulsion" in *Midcal* "did not turn California's scheme into unilateral action by the State." *Fisher, 475 U.S. at 269* (citing *Midcal, 445 U.S. at 103*). Rather, under the statute, the "'State [had] no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.'" *Fisher, 475 U.S. at 269* (quoting *Midcal, 445 U.S. at 100*); *see also* *TFWS Inc. v. Schaefer, 242 F.3d 198, 209 (4th Cir. 2001)* (state statute requiring liquor wholesalers to post and maintain monthly prices, and banning volume sale discounts, was a hybrid **[**18]** restraint because it did not provide for state "review" of the "privately set prices for reasonableness"). Such "hybrid" statutes can be violations of the Sherman Act if the law's other elements are satisfied.

Since *Fisher* was issued more than 30 years ago, courts have had relatively infrequent occasion to apply its standard of unilateral versus hybrid restraint. Four cases are of particular relevance here.

In *Yakima Valley Memorial Hospital v. Washington State Department of Health*, the Washington State Department of Health refused to license a hospital to perform certain elective heart surgery procedures. *654 F.3d 919, 923 (9th Cir. 2011)*. The Department limited licenses for such procedures "to avoid private parties making socially inefficient investments in health-care resources they might make if left unregulated." *Id.* Additionally, **[*614]** the Department would "issue a [license] only if projected demand in an applicant's geographic market exceed[ed] the capacity of incumbent [license] holders by at least 300 procedures." *Id. at 924*. The Ninth Circuit disagreed with the plaintiff hospital's argument that the "regulations grant regulatory power to incumbent licensees by calculating the need for a new [license] based in part on the **[**19]** number of . . . procedures they perform, thereby allowing the incumbent licensees to manipulate the number of [procedures] they perform so as to exclude competing hospitals [from obtaining a license]." *Id. at 928*. The court explained that the plaintiff hospital's argument "mistakes the barrier to entry created by the licensing requirement, and its attendant anticompetitive effects, for a hybrid restraint." *Id. at 929*. The court reasoned that "a licensee meet[ing] the Department's expectation and suppl[ying] all demand is the logical and intended consequence of the . . . regulations, not a delegation of regulatory power to the incumbent. Entry is prohibited by the Department's decision to grant an unlimited license and then withhold additional licenses until the incumbent can no longer meet demand, not the incumbent's natural inclination to capitalize on the market power the licensing requirement creates." *Id.*

Three years before *Yakima*, the Ninth Circuit considered a case challenging the State of Washington's restrictions on sales of beer and wine. *See Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 881 (9th Cir. 2008)*. One of the challenged state restrictions banned alcohol sales by retailers to other retailers, effectively forcing a business to decide whether to operate **[**20]** as a retailer or a wholesaler. *Id. at 889-90*. The court explained that the "ban removes from the market certain firms or persons who might otherwise compete; with fewer, and likely larger, horizontal competitors, prices for the consumer may be higher than they otherwise would be." *Id. at 890*. The court held, however, that "the potential anti-competitive effect is not the result of private pricing or marketing decisions, but the logical and intended result of the statute itself. No further action is necessary by the private parties because the anti-competitive nature of this restraint is complete upon enactment; the conclusion must follow, therefore, that the restraint is unilateral." *Id.*

In holding that the ban on retailer to retailer sales was a unilateral restriction on competition, the Ninth Circuit relied heavily on a decision from the First Circuit. In *Massachusetts Food Association v. Massachusetts Alcoholic Beverages Control Commission*, an association of alcoholic beverage sellers sued a state commission that limited the number of licenses to operate a retail liquor store to three per person or corporate entity. *197 F.3d 560, 562 (1st Cir. 1999)*. Of course, an agreement among retailers not to open more than three locations each would **[**21]** violate the Sherman Act. But the First Circuit held that the state regulation licensed no such agreement among private parties. *See* *id. at 565* ("What is centrally forbidden is state licensing of arrangements between private parties that suppress competition—not state directives that by themselves limit or reduce competition."). The court rejected the plaintiffs' claim because "the state has not ordered or authorized private parties to engage in conduct that, absent immunity, would even arguably violate the antitrust laws; there is no private agreement or arrangement between retailers as to the number of retail outlets and therefore no violation to be shielded. The state simply insists upon licensing retail liquor stores—as it does for many businesses or professions—and limits the number **[*615]** of licenses to three per owner." *Id. at 564*.

Ten years before *Massachusetts Food*, in a case closely analogous to Alarm Detection's claims, the Third Circuit upheld a municipality's choice of an exclusive electrical inspector to certify buildings for occupancy. *See* *Englert v. City of McKeesport, 872 F.2d 1144, 1146-47 (3d Cir. 1989)*. A single company had been providing nearly all the inspections in the municipality "for some time" without having been granted an exclusive right to do so by **[**22]** the city. *Id. at 1146*. When the company began facing competition from a former employee, the city passed a resolution banning such competition and making the company the exclusive provider of electrical inspections for certificates of occupancy. *Id.* The former employee sued for violation of the Sherman Act, but conceded that there was "little evidence which would support an inference that [the company] induced that passage of the . . . resolution." *Id. at*

1150 n.9. The Third Circuit held that the company's "acceptance . . . of the unilateral appointment by [the city]" did "not involve concerted action," and thus there could be no violation of the Sherman Act. Id. at 1151.

What Fisher and its progeny teach is that state and local governments may act as market makers and destroyers without running afoul of the federal antitrust laws. However, state and local government may not delegate that power to private parties. In other words, governments must not enable anticompetitive conduct. The government entity's decision to alter the market must be complete upon enactment of the government's decision, and require no further anticompetitive conduct to create the market conditions envisioned by government authorities.

Here, Alarm **[**23]** Detection has not sued the Villages and does not ask the Court to find that the Villages' ordinances are preempted. But the evidence shows that the Villages' direct connect ordinances require alarm signals to be sent directly from fire alarms to Orland FPD's 911 dispatch center. The parties have also implicitly conceded (*see* footnote 1 above) that dual monitoring technology, i.e., a fire alarm that can send a signal to both Orland FPD's 911 dispatch and a central station, is not available or economically feasible. This combination of municipal regulation and technological/economic limitation eliminates alarm monitoring by any private alarm company other than the company hired to maintain Orland FPD's 911 dispatch center. Granting an exclusive contract for maintenance of the dispatch center is a proper exercise of the Orland FPD's power to contract under the District Act. *See Active Disposal, Inc. v. City of Darien, 635 F.3d 883, 889 (7th Cir. 2011)* (exclusive contracts "are a foreseeable result of [the] authorization for municipalities to make contracts"). Thus, there is a direct causal connection between the Villages' requirement for direct connect alarm monitoring and the allegedly anticompetitive effect in this case—i.e., the need for an exclusive provider **[**24]** of fire alarm monitoring in Orland FPD. Although there are several steps in this causal chain, the Court finds that the causal connections are sufficiently direct that the effect of an exclusive fire alarm monitoring provider in Orland FPD is the "logical and intended result" of the Villages' ordinances.

The Court further finds that this restraint is "complete upon enactment." Orland FPD and Tyco of course have certain discretion to implement the ordinances, which is embodied in their contract. But the anticompetitive effect at issue—i.e., the existence of an exclusive contract (whether with Tyco or another alarm company)— is **[*616]** not within the discretion or control of Orland FPD or Tyco. The Villages require a direct connection to the Orland FPD 911 dispatch center, and an exclusive contract with a fire alarm provider is the only way to accomplish that goal. The Villages' ordinances, therefore, together constitute a "unilateral restraint" that involves no concerted action and therefore cannot be a violation of the Sherman Act. *See Alarm Det. Sys., Inc. v. Village of Schaumburg, 2017 U.S. Dist. LEXIS 141572, 2017 WL 3780279, at *12 (N.D. Ill. Aug. 31, 2017)* (denying a preliminary injunction motion because "[o]nly after the Village passed [a direct connect] [o]rdinance . . . did Tyco allegedly become the exclusive **[**25]** provider of fire alarm monitoring equipment in the Village" through an agreement with the municipal entity responsible for 911 dispatch).

Alarm Detection misses the mark with its argument that "the Supreme Court has classified arrangements that authorize private actors, like Tyco here, to set prices or participate in setting prices, as hybrid restraints." R. 502 at 4. The Sherman Act forbids price fixing *agreements*, not a single company's right to set the prices at which it will do business. In *Schwegmann* and *Midcal,* the Supreme Court found the statutes at issue preempted because they involved government consent for agreements among multiple private actors to set the price they would charge customers. That is not the situation in the fire alarm protection market in Orland FPD. Rather, as discussed, the Villages require direct connect to Orland FPD's dispatch, and Orland FPD has hired Tyco to maintain the dispatch center. Due to current technological and/or economic limitations that prevent the use of dual-frequency transmitters, these governmental decisions have the direct effect of making Tyco the exclusive provider of fire alarm services in Orland FPD. And like the defendants in ***[**26]*** *Yakima* and *Englert,* Tyco has a role in setting the prices it will charge for its services, which it exercises through negotiation with Orland FPD, a governmental entity. This is not the kind of price-fixing agreement among multiple private entities the Supreme Court struck down in *Schwegmann* and *Midcal*.

Alarm Detection attempts to distinguish *Englert* by noting that the ordinance in *Englert* expressly made the defendant company the exclusive electrical inspector, whereas the Villages ordinances do not make Tyco or any other alarm company the exclusive alarm company for Orland FPD. But as discussed, the evidence shows that the only way to comply with a direct connect requirement to a specific dispatch center—an option a village or fire protection district can indisputably mandate—is to enter into an exclusive contract with a single fire alarm company. The lack of an express choice by the Villages does not change the fact that some company must be given an exclusive contract under the circumstances.

Alarm Detection also argues that the exclusive nature of a direct connect mandate could be remedied by use of different technology. But Alarm Detection concedes that the purpose the Villages' **[**27]** ordinances is "to eliminate any intervening call from a central station operator." R. 502 at 9. The two alternatives Alarm Detection describes in its supplemental brief would not satisfy this goal.[4] Alarm Detection first asserts that it "and other alarm companies could use the same radio frequency as Tyco to send [s]ignals from their own transmitters to Orland Central Dispatch." R. 502 at 10. **[*617]** True, but neither Defendants nor the Villages prohibit this. The problem with this "solution," as Alarm Detection has pointed out, *see* R. 471 at 29-30 (29:17-30:7), is that even if it transmitted signals on Tyco's frequency, Alarm Detection would be subject to the costs of replacing or recalibrating its transmitters with Tyco's frequency. Further, if Alarm Detection sends signals directly to Orland FPD 911 dispatch, Alarm Detection cannot monitor those signals (since transmitters with dual transmission ability are apparently not available) and the exclusive monitoring aspect remains.

Alarm Detection's additional suggestion is that it could "automatically retransmit the [s]ignals to eliminate the need to have a central station operator process the [s]ignals before they were sent to Orland Central **[**28]** Dispatch." R. 502 at 10. But this is obviously not a direct connection to Orland FPD's 911 dispatch. Alarm Detection never explains why a midpoint "retransmission" of the signals would comply with ordinances that require "direct connection." Alarm Detection insists that the retransmission would be "instantaneous." *Id.* But the evidence presented at trial on this issue was at best inconclusive. Further, time is not necessarily the only concern. With an additional retransmission point there is additional potential for a breakdown in the system. Clearly, the Villages intended that one alarm company be responsible for the reception of alarm signals in Orland FPD—a decision squarely within the Villages authority. Adding a retransmission point undermines that goal.

For these reasons, the Court finds that Alarm Detection has not met its burden to prove concerted action that implicates *Section 1* of the Sherman Act. Therefore, the Court finds for Defendants on that claim.

C. *Section 2*: Monopoly

Only *Section 1* of the Sherman Act includes an explicit "concerted action" element. However, unilateral state action also undermines a claim for violation of Sherman Act *Section 2*, because that provision requires "the willful acquisition or **[**29]** maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Endsley v. City of Chicago, 230 F.3d 276, 282 (7th Cir. 2000)*. As discussed, Orland FPD's and Tyco's agreement on an exclusive fire alarm monitoring contract was a necessary result of the Villages' requiring direct connect fire alarm monitoring in the context of the current technological environment as it pertains to alarm transmitters. In these circumstances, Tyco cannot be said to have "willfully" acquired a monopoly. It is unnecessary for the Court to decide whether Tyco's business in Orland FPD constitutes a monopoly for purpose of the Sherman Act. But to the extent that it is properly characterized as such, Tyco simply accepted a monopoly that was made available to it by governmental entities. Other courts have found similar conduct insufficient to satisfy the "willful acquisition" element of *Section 2*. *See* *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1132 (9th Cir. 2015)* ("Even if [the defendant private association] competed in any of the relevant markets, *§ 2* liability could only arise if [the defendant] unlawfully acquired or maintained its monopoly. The district court correctly held that [the defendant's] authority was lawfully obtained through a contract **[**30]** with the [Department of Commerce]."); *Englert, 872 F.2d at 1150* ("To prove that [the defendant company] has 'willfuly acquired' monopoly power, [the plaintiff's] burden under *section 2* was

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[4] The Court ordered supplemental briefing to address the *Fisher* line of cases as the parties had not addressed it in their trial briefs.

essentially the same as under *section 1*: he was required to prove that [the defendant **[*618]** municipality] did not unilaterally decide to grant and an exclusive franchise to [the defendant company], but that [the defendant company] contributed to the passage of the resolution, thus willfully obtained a monopoly."). Thus, the Court finds that the unilateral nature of the Villages' ordinances and their effects requires finding for Defendants on Alarm Detection's claim under *Section 2* of the Sherman Act.

D. Immunity

The Court has found that Defendants' conduct was not "concerted" or "willful" in the sense those terms are used by *Sections 1* and *2* of the Sherman Act. Alternatively, the Court finds Defendants are immune from liability for any anticompetitive effects caused by their conduct under the state immunity and *Noerr-Pennington* doctrines, holdings the Court explains presently.

1. Orland FPD: State Immunity

States have immunity for anticompetitive conduct "when acting in their sovereign capacity." *N.C. State Bd. of Dental Examiners v. F.T.C., 135 S. Ct. 1101, 1110, 191 L. Ed. 2d 35 (2015)*. However, when "a State delegates control over a market to a non-sovereign **[**31]** actor," such as a municipality, immunity is not always available. *Id.* For a municipality to have immunity from the federal antitrust laws, the state must have "articulated a clear policy to allow the anticompetitive conduct." *Id. at 1112*. This "requirement is satisfied where the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Id.* In other words, although "a state legislature need not expressly state . . . that [it] intends for the delegated action to have anticompetitive effects," *F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 226, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013)*, "the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Dental Examiners, 135 S. Ct. at 1112*. "All that matters is whether the anti-competitive effects would logically result from the authority to regulate." *Active Disposal, 635 F.3d at 889* (quoting *Campbell v. City of Chicago, 823 F.2d 1182, 1184 (7th Cir. 1987))*.

In addition to demonstrating that the state clearly articulated a policy to allow the anticompetitive conduct at issue, non-sovereign state-actors *other than municipalities* must show that the state "provides active supervision of the anticompetitive conduct." *Dental Examiners, 135 S. Ct. at 1112*. The Supreme Court has held that municipalities need not satisfy this additional requirement because "where the actor is a municipality, **[**32]** there is little or no danger that it is involved in a private price-fixing arrangement." *Id.* This is because "municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market." *Id.* Further, most municipalities "exercise[] a wide range of governmental powers across different economic spheres, substantially reducing the risk that [they] would pursue private interests while regulating any single field." *Id. at 1112-13*.

This case presents unusual circumstances for application of the state immunity doctrine because the actions of two different kinds of governmental entities are involved—the Villages and Orland FPD. Addressing the Villages first, it is likely that they would be immune from any antitrust liability that might arise from their ordinances. Municipalities in Illinois regulate fire alarm protection pursuant to *Article 11* of the municipal code, and the Illinois legislature has stated its "intention . . . that the 'State action exemption' to the **[*619]** application of federal antitrust statutes be fully available to all municipalities, and that agents, officers and employees of each to the extent that are exercising authority . . . **[**33]** [pursuant to] all of Divisions of *Articles 10* and *11* of the Illinois Municipal Code." *65 ILCS 5/1-1-10(b)*. Direct connect fire alarm monitoring has been mandated by some Illinois municipalities at least since 1999 when the ordinance at issue in *Hinsdale* was adopted. *761 N.E.2d at 786*. Although there is no express statutory permission for municipalities to take anticompetitive action in the realm of fire alarm monitoring, the fact that municipalities have been adopting direct connect ordinances for many years has made their effect apparent, not merely foreseeable. This apparent tolerance of such actions by the Illinois legislature, combined with its express intent to permit anticompetitive actions by municipalities generally, is sufficient to show that Illinois has "articulated a clear policy to allow the anticompetitive conduct" at issue here. *See* Village of Schaumburg, 2017 U.S. Dist. LEXIS 141572, 2017 WL 3780279, at *11 (denying preliminary injunction of defendant village's fire alarm ordinance because it was likely that the village was immune (citing Campbell, 823 F.2d at 1185 ("[T]he Illinois General Assembly's passage of [65 ILCS 5/1-1-10] supports the proposition that the state legislature intended reasonably foreseeable anticompetitive acts from its grant of power to municipalities.")).

The fact that the Villages are immune begs the question of whether **[**34]** the Villages' immunity suffices to immunize their sibling governmental entity, Orland FPD. In the *Fisher* analysis, the Villages' unilateral conduct served to demonstrate that further actions by Orland FPD were not part of a conspiracy implicating the Sherman Act. But the state immunity analysis usually applies only in a case were hybrid concerted action *is* present. *See* Fisher, 475 U.S. at 270 ("[U]nder settled principles of ***antitrust law***, the [ordinance] lack[s] the element of concerted action needed . . . [to find] that [it] is facially inconsistent with the federal antitrust laws. We therefore need not address whether, even if the controls were to mandate § 1 violations, they would be exempt under the state-action doctrine from antitrust scrutiny."); *Yakima Valley, 654 F.3d at 926 n.8* (since the court decided the case based on a *Fisher* analysis, the court did "not need to reach the question of state-action immunity"). And unlike unilateral state action, which serves to characterize a regulatory arrangement as a whole, the question of immunity is particular to each entity involved. Thus, in analyzing immunity, the Court must separately address the potential immunity of each party to the arrangement, and any immunity the Villages may have does **[**35]** not trickle down to Orland FPD.

The state statute granting municipalities antitrust immunity under Sections 10 and 11 of the Illinois Municipal Code does not apply to fire protection districts like Orland FPD. Instead, Orland FPD's authority is provided by the District Act. The District Act does not include an express grant of antitrust immunity. But under the District Act, a fire protection district has the authority to adopt an ordinance requiring direct connect fire alarm systems. The District Act also gives the "Board of Trustees of any fire protection district" the power to "contract with any corporation organized to furnish fire protection service." 70 ILCS 705/11a.

In *Active Disposal v. City of Darien* (a case not cited by the parties in their trial briefs), the Seventh Circuit applied the state-action immunity doctrine to a case like this. 635 F.3d at 888-89. In that case, certain Illinois municipalities gave exclusive contracts to certain companies to lease **[*620]** dumpsters to residents within the municipalities. Id. at 885. The court noted that "[w]hile these contracts often have a financial benefit for the municipality, they also impose a cost on consumers who would prefer a different, probably less expensive, trash hauler." *Id.* The court **[**36]** held these "anti-competitive effects are a foreseeable result of [the] authorization for municipalities to make contracts." Id. at 889; *see also id.* ("[W]hen the legislature provides that municipalities may contract for the collection and disposition of trash, those contracts will often be exclusive, a monopoly will be created, and anti-competitive effects will necessarily follow."); LaSalle Nat. Bank of Chi. v. DuPage County, 777 F.2d 377, 381-82 (7th Cir. 1985) (by granting municipalities the power to make contracts the state has granted them the power to make exclusive contracts). The Tenth Circuit followed similar logic in holdings that a municipality was immune under the state-action doctrine. *See* Southern Disposal, Inc. v. Texas Waste Mgmt., 161 F.3d 1259, 1263-64 (10th Cir. 1998) ("Even though the Solid Waste Management Act does not expressly authorize anti-competitive conduct or exclusive contracts, such arrangements are the foreseeable result of allowing municipalities to contract with 'one or more other . . . persons' for waste disposal services. We find the statute permits exactly the type of contract the City entered into with Texas Waste Management, and it clearly articulates and affirmatively expresses a state policy to displace competition with regulation.").

The statute at issue in *Active Disposal* contained a separate section providing that **[**37]** municipalities may adopt ordinances "notwithstanding the fact that competition may be displaced or that such ordinance may have an anti-competitive effect." 65 ILCS 5/11-19-5. But the Seventh Circuit held that the municipalities' authority to enter into the contracts at issue was not derived from the section concerning *ordinances*, but from the section expressly providing the power to *contract*. Nor did the court rely on the general grant of antitrust immunity to Illinois municipalities in 65 ILCS 5/1-1-10 discussed above. The court was clear that the mere authority to make contracts in a certain field (trash hauling in *Active Disposal*; fire protection in this case) is sufficient to establish that the making of exclusive contracts is foreseeable. The Tenth Circuit agreed in *Southern Disposal*. This Court finds this reasoning persuasive, if not (entirely) binding, and holds that Orland FPD's power to contract in the area of fire alarm protection made its exclusive contract with Tyco foreseeable.

Non-sovereign state actors other than municipalities must also show that they "provide active supervision of the anticompetitive conduct." *Dental Examiners, 135 S. Ct. at 1112*. Although Orland FPD is not a municipality per se, it is also not the type of non-sovereign **[**38]** state actor to which the Supreme Court has applied the "active supervision" requirement. That requirement is generally applied to state professional and industry review boards made up of appointed private individuals in the relevant profession or industry. By contrast, fire protection districts are governed by elected officials. That fire protection district officials are responsible to voters removes the basis for the Supreme Court's imposition of the "active supervision" requirement. For these reasons, the Court does not believe that requirement is relevant to whether Orland FPD is immune from antitrust liability.

However, even if that requirement is relevant, it is satisfied here. Tyco's discretion is completely circumscribed by its contract with Orland FPD. This agreement is for a set term and has been periodically adjusted according to Orland FPD's needs. **[*621]** Further, Orland FPD has a role in receiving fire alarm signals at its 911 dispatch center. This is not a case where Tyco has complete discretion over its activities in Orland FPD. Thus, Orland FPD provides active supervision of Tyco's conduct.

Therefore, the Court holds that Orland FPD is immune from any liability arising from **[**39]** its contract with Tyco.

2. Tyco: ***Noerr-Pennington*** Immunity

Tyco argues that it is entitled to immunity under the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine originated as protection for concerted action by private actors in petitioning the government. While "petitioning" is customarily understood as "legislative lobbying," the Supreme Court has interpreted that term to include additional types of interaction with government by private entities. *See* *VIBO Corp., Inc. v. Conway, 669 F.3d 675, 684 (6th Cir. 2012)* ("'petitioning' . . . encompass[es] activities other than legislative lobbying"). Particularly relevant here, the *Noerr-Pennington* doctrine "protects private actors when they . . . enter contracts with the government." *VIBO, 669 F.3d at 684* (citing *Sanders v. Brown, 504 F.3d 903, 912 (9th Cir. 2007)*, and *Greenwood Utils. Comm'n v. Miss. Power Co., 751 F.2d 1484, 1505 (5th Cir. 1985))*; *see also* *Campbell, 823 F.2d at 1186* (explaining that "the antitrust laws do not apply to efforts to persuade the government to organize or support a cartel," and holding that two defendant taxi cab companies were immune from liability for their agreement with Chicago to drop certain lawsuits in return for passage of an ordinance that gave the two taxi cab companies 80% of the taxi licenses in the city); *AmeriCare MedServices, Inc. v. City of Anaheim, 2017 U.S. Dist. LEXIS 220819, 2017 WL 5592892, at *4 (C.D. Cal. Apr. 21, 2017)* ("[A]ny conduct by [the defendant private entity] to petition the City Defendants to grant it an exclusive contract plainly **[**40]** falls within the scope of *Noerr-Pennington* immunity."); *Omega Homes, Inc. v. City of Buffalo, 4 F. Supp. 2d 187, 193-94 (W.D.N.Y. 1998)* (holding that successful lobbying efforts to secure an exclusive contract to build a low-income housing development were protected by *Noerr-Pennington*).

Here, Alarm Detection's claims against Tyco are predicated upon Tyco's actions to secure adoption of the Villages' direct connect ordinances and the exclusive agreement with Orland FPD. The cases cited above show that Tyco's actions are squarely within the realm of activity courts have found is protected by the *Noerr-Pennington* doctrine.

Alarm Detection's primary argument as to why these actions should not receive *Noerr-Pennington* immunity is that Orland FPD acted as a commercial entity. *See* R. 487 at 9 (citing *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp., 573 F. Supp. 833, 838 (N.D. Ill. 1983)* ("*Kurek* stands for the proposition that the *Noerr-Pennington* doctrine does not apply where the governmental body acted as a commercial entity (citing *Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 592 n.10 (7th Cir. 1977))*). But the Seventh Circuit has never denied *Noerr-Pennington* immunity based on a "commercial exception," and the authority for the existence of such an exception is weak, at best. The idea of a "commercial exception" originated with a First Circuit decision from 1970 holding that *Noerr-Pennington* immunity does not extend to **[**41]** efforts by private business to sell products to public officials acting under competitive bidding statutes. *See* *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970)*. But the *Pennington* case itself immunized government coal purchases. *See* *United Mine Workers* of Am. v. Pennington, 381 U.S. 657, 671, **[*622]** 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965). On that basis, many courts have questioned the existence or viability of a "commercial exception." *See* Doron Precision Sys., Inc. v. FAAC, Inc., 423 F. Supp. 2d 173, 191 (S.D.N.Y. 2006) (citing cases); Santana Prods., Inc. v. Bobrick Washroom Equip., Inc., 249 F. Supp. 2d 463, 489-91 (M.D. Penn. Mar. 7, 2003) (citing cases).

Moreover, this case is not about the Villages or Orland FPD making purchases in the fire alarm monitoring market (as was true of the defendant fire protection district in *Lisle-Woodridge*). Rather, the effect of the Villages' ordinances is to define the market for fire alarm monitoring in Orland FPD in the first place. The evidence simply does not support Alarm Detection's contention that Orland FPD is acting as a commercial entity. Thus, to the extent there is a "commercial exception" to the federal antitrust laws, it does not apply in this case.

Alarm Detection also argues that the "sham exception" should apply because "Tyco has promoted outdated technology and supported the District's misunderstanding of response times and denial of alternative means of transmission [s]ignals, even though these positions were inconsistent with its own positions in *Lisle-Woodridge* ***[**42]*** ." R. 487 at 9-10. The Court finds Alarm Detection's contention that Orland FPD's fire safety professionals would or could be fooled by such allegedly false information to be questionable at best. But even if Alarm Detection's contentions were true, and could be characterized as a "sham," they are not the kind of sham that serves as a basis to deny *Noerr-Pennington* immunity. The sham exception to *Noerr-Pennington* prevents the application of immunity where a defendant's act of "petitioning" was "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*. This exception "encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id.* "A 'sham' situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means." *Id.* One "classic" example of sham petitioning is where a defendant files "frivolous objections to the license application of a competitor, with no expectation of achieving **[**43]** denial of the license but simply in order to impose expense and delay." *Id.* For example, denying meaningful access to the "appropriate city administrative and legislative fora" may constitute improper or even unlawful lobbying, but it does not necessarily constitute a "sham." *Id. at 381*.

At most, Alarm Detection contends that Tyco has used false information in an attempt to secure an exclusive contract for the Orland FPD market. The evidence supporting this contention is inconclusive at best. But to the extent Tyco's tactics could be described as "improper," they still do not constitute a basis to deny immunity to Tyco, because there is no evidence that Tyco did not genuinely desire to achieve an exclusive contract for fire alarm monitoring in Orland FPD. And there is no evidence that Tyco sought to abuse the governmental process in order to impede Alarm Detection's business in particular, as opposed to seeking to gain a greater share of the market, no matter the competitor. Absent such evidence, the sham exception does not apply.

For these reasons, even if Tyco could be found to have engaged in concerted action **[*623]** in violation of *Section 1*, or willful acquisition of monopoly power in violation of *Section 2*, Tyco **[**44]** is immune from any such liability.

III. ***Fourteenth Amendment***

Alarm Detection also claims that Tyco's and Orland FPD's actions constitute violations of the *Equal Protection* and *Due Process clauses of the Fourteenth Amendment*. The Court previously held that these claims were time-barred. Alarm Detection has filed a motion to reconsider that holding. R. 488.

A. Statute of Limitations

In its previous decision, the Court held that Alarm Detection's pleadings demonstrated that it had been excluded from the Orland FPD market at least since 2003 when Orland FPD signed an exclusive agreement with Tyco.

Despite the age of this exclusion, Alarm Detection argued then, and argues again, that the 2014 contract constitutes a new and discrete act that is within the statute of limitations. R. 125 at 14. The Court held that "[e]ven if such acts constituted fresh injuries to Alarm Detection's constitutional rights . . . they are insufficient to trigger the application of the continuing violation doctrine, because the doctrine is reserved for only those cases where a plaintiff could not reasonably be expected to have perceived or known about the alleged violation." R. 237 at 50 (*Alarm Detection, 129 F. Supp. 3d at 641*).

The Court's holding would have been correct with respect to an attempt to make old injuries **[**45]** actionable. But the Court was incorrect that the notice provided by earlier conduct made actions for relief based on more recent injuries untimely. As the Court held with respect to the timeliness of Alarm Detection's antitrust claims, the 2014 ordinances and contract renewal are sufficiently overt actions to start a new statute of limitations. Since Alarm Detection brought this action in 2014, the Court reconsiders it earlier decision and finds that Alarm Detection's *Fourteenth Amendment* claims are timely.

B. Merits

Alarm Detection argues that Orland FPD does not have the authority under the District Act to make its agreement with Tyco. And since Orland FPD does not have the authority to make that agreement, Alarm Detection argues it is arbitrary conduct that cannot satisfy the rational basis test of the *Equal Protection Clause*. Specifically, Alarm Detection argues that "Orland FPD is not authorized by the District Act to [1] exclusively engage in fire alarm monitoring; [2] control the decision over transmission equipment; or [3] collect fees from its residents." R. 481 at 17-18.

As to the first two contentions, both the Villages and Orland FPD have statutory authority to require a direct connect fire alarm monitoring. Further, **[**46]** Orland FPD's power to contract under the District Act necessarily implies the authority to enter into exclusive contracts. Moreover, although a governmental entity's decision to enter into an exclusive contract "inherently involves a kind of discrimination," it does not violate the *Equal Protection Clause* when government actors merely exercise their discretion. *See* *Corey Airport Servs., Inc. v. Clear Channel Outdoor, Inc., 682 F.3d 1293, 1298 (11th Cir. 2012)*; *see also* *Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist., 813 F.3d 1124, 1129 (8th Cir. 2016)* ("Furthermore, a class-of-one claim does not extend to cases where the rules are uniformly applicable and a state official exercises his discretionary authority based on subjective, individualized determinations."). Thus, the mere fact that Orland FPD entered into an agreement with one fire alarm services **[*624]** company rather than another does not demonstrate a violation of the *Equal Protection Clause*.

Additionally, to the extent the District Act prohibits Orland FPD itself from engaging in transmission of fire alarm signals and collecting fees from residents, Alarm Detection has not proven that Orland FPD engages in such activities. Rather, the evidence shows that Orland FPD contracts with Tyco to provide fire alarms transmission services to its residents. Alarm Detection also concedes that the $23.50 Tyco remits to Orland FPD for each commercial account is "consideration" **[**47]** for the right to the exclusive contract. *See* R. 481 at 3.

Alarm Detection also claims that Orland FPD "violated [its] due process rights because: (1) [Alarm Detection] is licensed under the Alarm Act and has a protected property interest in engaging in the Business; and (2) [Alarm Detection] was deprived of its property interest due to Defendants' arbitrary conduct." R. 481 at 17. This claim fails. First, Alarm Detection does not claim that it has lost its license under the Alarm Act. Second, Alarm Detection has cited no authority over the course of four years of litigating this case to demonstrate that it has a protected property right in the business of alarm monitoring in Orland FPD. Absent, such a property right, there can be no due process violation.

Therefore, the Court finds for Defendants on Alarm Detection's *Fourteenth Amendment* claims.

IV. Unjust Enrichment

The Court noted earlier in the case that Alarm Detection's claim for unjust enrichment would rise or fall with its other claims. *See* R. 316 at 36 (*Alarm Detection Sys., Inc. v. Orland Fire Prot. Dist., 194 F. Supp. 3d 706, 727 (N.D. Ill. 2016)* (citing *Cleary v. Philip Morris Inc., 656 F.3d 511, 517 (7th Cir. 2011))*). That holding stands, and the Court finds for Defendants on Alarm Detection's unjust enrichment claim.

Conclusion

For the foregoing reasons, the Court finds in favor of Defendants and against **[**48]** Alarm Detection on all counts.[5]

ENTERED:

/s/ Thomas M. Durkin

Honorable Thomas M. Durkin

United States District Judge

Dated: August 2, 2018

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[5] It has taken too long to reach a final judgment in this case. The case would have benefited from clearer thinking earlier in the proceedings about what facts, case law, and legal doctrine would ultimately prove to be dispositive—most notably the *Fisher* line of cases which the parties never addressed until ordered to do so in supplemental post-trial briefing.

In re Namenda Direct Purchaser Antitrust Litig.

United States District Court for the Southern District of New York

August 2, 2018, Decided; August 16, 2018, Filed

No. 15 Civ. 7488 (CM)

Reporter

331 F. Supp. 3d 152 *; 2018 U.S. Dist. LEXIS 140768 **; 107 Fed. R. Evid. Serv. (Callaghan) 215

IN RE NAMENDA DIRECT PURCHASER ANTITRUST LITIGATION

Prior History: *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC, 2016 U.S. Dist. LEXIS 128349 (S.D.N.Y., Sept. 13, 2016)*

Core Terms

generic, switch, patent, Purchaser, Defendants', manufacturers, memantine, Plaintiffs', settlement, forecasts, pharmaceutical, antitrust, damages, launch, branded, conversion, entities, but-for, prices, announcement, Reply, Wholesale, class certification, patients, summary judgment, class member, anticompetitive, predominance, methodology, overcharges

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Admissibility > Expert Witnesses

HN1[] **Summary Judgment, Evidentiary Considerations**

If the expert testimony is excluded as inadmissible, the court must make the summary judgment determination without that evidence.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > Admissibility > Expert Witnesses

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN2[] **Judges, Discretionary Powers**

On a summary judgment motion, the district court properly considers only evidence that would be admissible at trial. Whether expert evidence should be admitted on a motion for summary judgment is a matter committed to the district court's broad discretion.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN3[] **Expert Witnesses, Daubert Standard**

Under *Fed. R. Evid. 702*, which codifies the standard for admissibility set forth, the court's role is to determine whether the expert is qualified to testify as an expert. *Rule 702* provides that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. *Fed. R. Evid. 702*.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Burdens of Proof > Initial Burden of Persuasion

HN4[] **Expert Witnesses, Daubert Standard**

The proponent of the expert testimony has the burden to establish the *Fed. R. Evid. 702* admissibility requirements, with the district court acting as a gatekeeper to ensure that the expert's testimony both rests on a reliable foundation and is relevant to the task at hand.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN5[] **Expert Witnesses, Daubert Standard**

Though *Fed. R. Evid. 702* embodies a liberal standard of admissibility when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, Daubert and *Rule 702* mandate the exclusion of that unreliable opinion testimony. In Daubert, the United States Supreme Court confirmed that trial courts should serve as sentries, preventing juries from being overwhelmed by unsupportable speculation cloaked as expertise.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN6[] **Expert Witnesses, Daubert Standard**

The Second Circuit has held that to warrant admissibility, it is critical that an expert's analysis be reliable at every step. Of course, the district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions. Nevertheless, as the U.S. Supreme Court has recognized, conclusions and methodology are not entirely distinct from one another Nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN7[] Expert Witnesses, Daubert Standard

The standard to evaluate non-scientific expert testimony is whether the expert bases testimony upon professional studies or personal experience and employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN8[] Expert Witnesses, Daubert Standard

An expert's experience is no substitute for scientifically sound analysis.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN9[] Expert Witnesses, Daubert Standard

The Court must exclude unsupported speculation cloaked as expertise.

Evidence > Types of Evidence > Testimony > Credibility of Witnesses

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN10[] Testimony, Credibility of Witnesses

The amended Rules of Evidence require that expert testimony be based on sufficient facts or data and on reliable principles and methods that the expert witness has applied reliably to the facts of the case. *Fed. R. Evid. 702*. Credibility of witnesses is not the province of an expert; indeed, it is an arrogation of the function of the trier of fact.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN11[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The U.S. Supreme Court has specifically declined to hold that reverse payment settlement agreements are presumptively unlawful. It instructed courts reviewing such agreements to proceed by applying a rule of reason analysis to reverse payment agreements. Under this analysis, courts have to assess the payment's size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. Thus, only those reverse payments that are large and unjustified violate the antitrust laws.

Antitrust & Trade Law > Regulated Practices > Private Actions

HN12[] **Regulated Practices, Private Actions**

An antitrust claim has three elements: (1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages. The second element of an antitrust claim - commonly referred to as antitrust injury - requires an antitrust plaintiff to prove that its injury was, in fact, caused by the defendant's violation of the antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions

HN13[] **Sherman Act, Claims**

A plaintiff is only required to show that alleged illegal conduct is a material cause of the antitrust injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury. To prove a causal connection between the defendant's unlawful conduct and the plaintiff's injury, the plaintiff need only demonstrate that the defendant's conduct was a substantial or materially contributing factor in producing that injury. Second Circuit precedent makes clear that in order to prove causation: Plaintiffs do not have to prove that the unlawful activity that the defendants allegedly engaged in was the sole cause of their injuries. The meet their burden if they show that the defendants' unlawful facts substantially contributed to their injuries, even though other facts may have contributed significantly. An antitrust plaintiff is not required to show that the defendants' acts were a greater cause of the injury than other factors. Plaintiffs need only show that their injury to some degree resulted from defendants' violation.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN14[] **Private Actions, Remedies**

The use of defendants' own forecasts to model a but-for world has been held to be a sound economic methodology. Indeed, it is commonly used in courts considering generic delay damages in the context of antitrust actions.

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN15[] **Expert Witnesses, Helpfulness**

While the Second Circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion, expert testimony is viewed as helpful in cases involving complex statutes or issues outside of the general knowledge of the jury.

Evidence > Admissibility > Expert Witnesses > Ultimate Issue

HN16[] **Expert Witnesses, Ultimate Issue**

Unless a patent lawyer is also a qualified technical expert, his testimony on technical issues relating to issues of infringement or validity is improper and thus inadmissible. The federal circuit advises district courts to consider the perspective from which the relevant issue of patent law will be analyzed when the court determines whether an expert is qualified to testify as an expert on that issue.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN17[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

Under the Federal Food, Drug, and Cosmetic Act (FDCA), *21 U.S.C.S. § 301 et seq.*, a pharmaceutical company must submit a New Drug Application (NDA) to the Food and Drug Administration (FDA) before it may bring a new drug to market. *21 U.S.C.S. § 355*. Because the NDA must provide the FDA with sufficient scientific data to demonstrate that the new drug is safe and effective, the testing and approval process is generally long, comprehensive, and costly. Once approved, though, a patented drug enjoys a period of market exclusivity. That period ends when the drug's patent expires and one or more low-cost generic versions of the drug enter the market and compete with the brand-name drug-what is referred to as going off the patent cliff.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN18[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The Drug Price Competition and Patent Term Restoration Act (the Hatch-Waxman Act), Pub. L. No. 98-417, 98 Stat. 1585, makes it easier for manufacturers of generic drugs to compete with brand-name drug producers. The Hatch-Waxman Act provides two methods by which a brand-name drug manufacturer can extend its period of market exclusivity. First, a manufacturer can seek an extension of its patent from the United States Patent and Trademark Office to account for the time the manufacturer spent obtaining approval from the Food and Drug Administration (FDA) for its brand-name drug. *35 U.S.C.S. § 156*. That extension can last no more than five years. *Section 156(g)(6)*. Second, a brand-name drug manufacturer can obtain a six-month period of "pediatric exclusivity" if it conducts certain pediatric studies and the FDA determines that use of the drug in children may produce health benefits. *21 U.S.C.S. § 355a*. A grant of pediatric exclusivity does not extend the length of the underlying patent, but can operate to exclude generic competition by delaying the date by which the FDA may approve generics for sale.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN19[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

Under the Drug Price Competition and Patent Term Restoration Act (the Hatch-Waxman Act), Pub. L. No. 98-417, 98 Stat. 1585, the manufacturer of a generic version of an Food and Drug Administration (FDA)-approved drug may file an Abbreviated New Drug Application (ANDA), which allows the generic manufacturer to rely upon the studies submitted by the brand-name drug manufacturer in connection with the original New Drug Application (NDA) to prove that the generic version of the drug is safe and effective. The ANDA filer must certify that its generic drug, among other things, has the same active ingredient as, and is bioequivalent to, the previously-approved drug. *21 U.S.C.S. § 355(j)(2)(A)(ii)*, *(iv)*. A generic drug is bioequivalent to the brand-name drug if it has the same rate and extent of absorption of the active ingredient as that of the brand-name drug. *21 U.S.C.S. § 355(j)(8)(B)(i)*. In other words, two drugs are bio equivalent if they deliver the same amount of the same active ingredient content into a patient's blood stream over the same amount of time.

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

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

HN20[] **Entitlement as Matter of Law, Appropriateness**

A party is entitled to summary judgment when there is no genuine issue of material fact and the undisputed facts warrant judgment for the moving party as a matter of law. *Fed. R. Civ. P. 56*. In addressing a motion for summary judgment, the court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in its favor. Whether any disputed issue of fact exists is for the court to determine. The moving party has the initial burden of demonstrating the absence of a disputed issue of material fact. Once such a showing has been made, the nonmoving party must present specific facts showing that there is a genuine issue for trial. The party opposing summary judgment may not rely on conclusory allegations or unsubstantiated speculation.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

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

HN21[] **Entitlement as Matter of Law, Materiality of Facts**

Not every disputed factual issue is material in light of the substantive law that governs the case. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > Bad Faith, Fraud & Nonuse

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN22[] **Intellectual Property, Bad Faith, Fraud & Nonuse**

The U.S. Supreme Court has held that a reverse payment settlement-that is, a payment by a patentee to a claimed infringer-is not presumptively either lawful or unlawful, but will be subject to antitrust scrutiny in certain circumstances. Reverse payments are of particular concern when they demonstrate that the patentee sought to induce the infringer to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market. To violate ***antitrust law***, a reverse payment must be both large and unjustified. A payment's size may indicate that the patentee likely possesses the power to bring an unjustified anticompetitive harm about in practice. In other words, a large reverse payment may signal that the patentee possessed the power to charge prices higher than the competitive level and may be using that power to keep others from entering its market. Such a payment may also indicate a patent holder's concern about the validity of its patent, such that the size of the payment may very well correspond with the magnitude of that concern.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > Bad Faith, Fraud & Nonuse

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

Evidence > Burdens of Proof > Burden Shifting

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN23[] Intellectual Property, Bad Faith, Fraud & Nonuse

The U.S. Supreme Court has acknowledged that there also might be legitimate justifications for a reverse payment settlement, including, but not limited to, avoided litigation costs or fair value for services. The Court has directed district courts to apply the traditional rule of reason analysis when evaluating reverse payment settlements. First, the plaintiff bears the initial burden of showing that the defendant's conduct had an actual adverse effect on competition as a whole in the relevant market. If plaintiff satisfies this burden, the burden then shifts to defendant to offer evidence that its conduct had pro-competitive effects. If defendant is able to offer such proof, the burden shifts back to plaintiff, who must prove that any legitimate competitive effects could have been achieved through less restrictive alternatives. To survive summary judgment, the plaintiffs must present a genuinely disputed issue of material fact as to the elements of the rule of reason analysis; only then will the case go to a jury.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions

HN24[] Sherman Act, Claims

Causation in fact is, of course, a necessary element of any claim for relief. An antitrust plaintiff must show that a defendant's anticompetitive act was a material and but-for cause of plaintiffs injury, although not necessarily the sole cause. A plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN25[] Jury Trials, Province of Court & Jury

It is up to the jury to weigh the evidence.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN26[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23 governs class certification. The Second Circuit has emphasized that *Rule 23* should be given liberal rather than restrictive construction, and it seems beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification.

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN27[] Class Actions, Prerequisites for Class Action

A putative class must meet the four prerequisites set forth in *Fed. R. Civ. P. 23(a)* to be certified: numerosity, commonality, typicality, and adequacy of representation. If even one of the *Rule 23(a)* requirements is not met, certification must be denied. The requirements of *Rule 23*, by effectively confining the class claims to those fairly encompassed by the claims of the named plaintiffs, ensure that those plaintiffs are appropriate representatives of the class whose claims they wish to litigate.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN28[] Prerequisites for Class Action, Numerosity

Numerosity requires that the class must be so numerous that joinder of all members is impracticable. *Fed. R. Civ. P. 23(a)(1)*. As certain presumptions attach depending on the sheer size of the class, the number of members in a putative class is the starting point of the *Rule 23(a)(1)* analysis. Classes with forty or more putative members raise a rebuttable presumption that joinder is impracticable. For classes with fewer than twenty members, however, joinder is generally deemed practical. Keeping in mind that the inquiry is not strictly mathematical, the district court must analyze each case separately to determine whether the numerosity requirement has been satisfied, considering the following factors: 1. judicial economy; 2. geographic dispersion of the proposed class members; 3. financial resources of the proposed class members; 4. the ability of proposed class members to file individual suits; 5. requests for relief that could affect future class members; 6. knowledge of the names and existence of potential class members; and 7. whether potential class members have already joined in other actions.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN29[] Prerequisites for Class Action, Commonality

Commonality requires that there exist questions of law or fact that are both common to the class and answerable through a class-wide proceeding. *Fed. R. Civ. P. 23(a)(2)*. The U.S. Supreme Court has clarified that this prong also requires the plaintiff to demonstrate that the class members have suffered the same injury. Where plaintiffs move to certify a class under *Rule 23(b)(3)*, the commonality requirement is subsumed under, or superseded by, the more demanding predominance requirement of *Rule 23(b)(3)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN30[] Prerequisites for Class Action, Typicality

Typicality is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability. Similar considerations animate commonality and typicality such that the analyses under *Fed. R. Civ. P. 23(a)(2)* and *(3)* tend to merge.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN31[] Prerequisites for Class Action, Adequacy of Representation

Adequacy requires that the representative parties fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)(4)*. Class counsel must be qualified, experienced, and generally able to conduct the litigation. *Rule 23(a)(4)* requires that the class representative be aware of the basic facts underlying the lawsuit and not likely to abdicate his obligations to fellow class members. This requirement is a modest one-class representative status may be denied only where the class representatives have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possible competing interests of the attorneys. If certain members of the class are subject to unique defenses, the court must inquire as to whether those defenses threaten to become the focus of the litigation.

Civil Procedure > Special Proceedings > Class Actions > Class Members

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN32[] **Class Actions, Class Members**

In addition to the four factors enumerated in *Fed. R. Civ. P. 23(a)*, there is an implied requirement that the membership of the class is identifiable and ascertainable. A class is ascertainable if it is (1) sufficiently bounded so that it is feasible for the court to determine whether a particular individual is a member, and (2) defined by objective criteria that avoid a mini-hearing on the merits of each case.

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN33[] **Class Actions, Prerequisites for Class Action**

If the class proponent satisfies each of the *Fed. R. Civ. P. 23(a)* prerequisites, he must next demonstrate that at least one of the three requirements listed in subsection 23(b) is met. Subsection 23(b)(3) allows a claim for damages to proceed as a class if it is established that (1) common questions predominate over individual questions (the predominance requirement), and (2) the class action vehicle is superior to other possible methods of fairly and efficiently adjudicating the controversy (the superiority requirement). *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN34[] **Prerequisites for Class Action, Predominance**

The predominance requirement, as a general matter, tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Even where *Fed. R. Civ. P. 23(a)*'s commonality requirement is satisfied, predominance under *Rule 23(b)(3)* is not necessarily met because the latter requires considerably more. More than their mere presence, *Rule 23(b)(3)* requires that questions common to the class predominate over individual ones. Determining whether a question is common or individual depends on the kind of proof that will be needed to resolve that question at trial. An individual question is one for which members of a proposed class will need to present evidence that varies from member to member, while a common question is one for which the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof. Plaintiffs are not, however, required to prove that these questions will be answered in their favor in order to certify a class under this provision. Moreover, individual questions need not be absent in order to certify a class under *Rule 23(b)(3)*; the text of *Rule 23(b)(3)* itself contemplates that such questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN35[] **Prerequisites for Class Action, Superiority**

A district court must determine that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*. While, structurally, the four factors set forth in *Rule 23(b)(3)* govern both predominance and superiority, the Second Circuit has held that they more clearly implicate the latter. Accordingly, in determining whether the class action is a superior method, courts consider: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. *Fed. R. Civ. P. 23(b)(3)*. Manageability is, by far, the most critical factor in the superiority determination.

Civil Procedure > Special Proceedings > Class Actions > Class Members

HN36[] **Class Actions, Class Members**

The United States District Court for the Southern District of New York joins with other courts that have considered the issue and have ruled that where there is distinct and separate injury, a corporate relationship with another class member does not defeat individual member status.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN37[] **Class Actions, Certification of Classes**

It is well-established that a certifying court is not bound by the class definition proposed in the complaint. However, this principle is customarily cited as support for the court's ability to narrow a proposed class. Far fewer cases support the converse proposition that the court may approve the expansion of the class as it was defined in the complaint.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Class Members

HN38[] **Class Actions, Certification of Classes**

A plaintiff's expansion of the class definition beyond that which was proposed in the complaint is not categorically improper. Rather, the court may consider whether the newly proposed class members satisfy the substantive requirements of *Fed. R. Civ. P. 23(a)*.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN39[] **Purchasers, Indirect Purchasers**

Indirect purchasers are those who buy from the customers of a defendant-from people to whom the defendant sold product.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN40[] **Standing, Requirements**

Plaintiffs have standing to bring antitrust claims against defendants if they (1) have suffered an antitrust injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful, and (2) are proper plaintiffs in light of the four efficient enforcer factors.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN41[] **Standing, Requirements**

In the context of the "proper plaintiff prong" to assert an antitrust claim, plaintiffs may have standing if they satisfy the efficient enforcer criteria, which looks to the (1) directness of the asserted injury, or causation; (2) self-interest of the class of persons to vindicate the public interest, or motivation; (3) speculativeness of the alleged injury; and (4) difficulty of identifying and apportioning damages so as to avoid duplicative recoveries.

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN42[] **Class Actions, Prerequisites for Class Action**

The analyses of typicality, commonality, and predominance share a similar focus. They test whether the class is sufficiently cohesive to warrant adjudication by representation.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions

HN43[] **Sherman Act, Claims**

In the context of antitrust claims, plaintiffs must show that three elements are capable of proof at trial through evidence common to the class: (1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN44[] **Private Actions, Remedies**

It is not enough that plaintiffs supply a method to measure and quantify damages on a class-wide basis; the court must be satisfied that the methodology is a just and reasonable inference, and is not speculative.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN45[] **Purchasers, Direct Purchasers**

The court rejects the argument that a class comprising direct purchasers must show that individual payment decisions were the result of the defendant's alleged conduct.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > Types of Evidence > Testimony > Expert Witnesses

HN46[] **Jury Trials, Province of Court & Jury**

It is for the jury to decide whether the an expert's opinions are persuasive.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN47[] Prerequisites for Class Action, Superiority

In the context of superiority, the first consideration under *Fed. R. Civ. P. 23(b)(3)(A)* is whether the class members have an interest in controlling the prosecution of separate actions.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN48[] Class Actions, Certification of Classes

Class treatment is appropriate in such negative value cases, in which each class members' interest in the litigation is less than the cost to maintain an individual action. As the U.S. Supreme Court has said, *Fed. R. Civ. P. 23(b)(3)* class actions can be superior precisely because they facilitate the redress of claims where the costs of bringing individual actions outweigh the expected recovery.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN49[] Judges, Discretionary Powers

As to the most important consideration in the superiority analysis, the manageability of a particular class action is an issue peculiarly within a district court's discretion.

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Judges: Colleen McMahon, Chief United States District Judge.

Opinion by: Colleen McMahon

Opinion

[*167] MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; GRANTING IN SUBSTANTIAL PART AND DENYING IN PART [4] DEFENDANTS' *DAUBERT MOTIONS* TO EXCLUDE OPINIONS AND TESTIMONY OF PLAINTIFFS' EXPERTS; AND GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

McMahon, C.J.:

Plaintiffs J.M. Smith Corporation d/b/a Smith Drug Company ("Smith") and Rochester Drug Co-Operative, Inc. ("RDC") (collectively, "Direct Purchaser Plaintiffs" or "Plaintiffs") commenced this antitrust suit on behalf of themselves and a putative class of similarly situated purchasers of Namenda. Plaintiffs allege that Defendants - Actavis PLC (now known as Allergan PLC), Forest Laboratories, LLC, Forest Laboratories, Inc., and Forest Laboratories Holdings Ltd. (collectively, "Forest" or "Defendants") - schemed to delay entry of generic versions of an Alzheimer's disease treatment by entering into collusive settlements with various generic drug companies and attempting a hard switch in violation of *sections 1* and *2* of the *Sherman Act*, *15 U.S.C. §§ 1*, *2 (2016)*.

Namenda® ("Namenda") is a branded drug used to treat moderate to severe stages of Alzheimer's, a neurodegenerative brain disease that causes memory loss, among other symptoms. Forest had a license to market both Namenda IR (immediate release), a twice-daily drug, and Namenda XR (extended release), a **[**5]** once-daily drug, in the United States under U.S. Patent No. 5,061,703 (the "'703 Patent"). (Am. Compl. ¶ 2, Dkt. No. 29.)

Plaintiffs allege that Forest engaged in a two-part anticompetitive scheme to improperly block generic competition for Namenda IR by: (1) conspiring with manufacturers of generic versions of Namenda IR to drop their legal challenges to the '703 Patent and delay launch of generic versions of Namenda IR until an identical date three months after the expiration of the '703 Patent; and (2) using this improperly obtained period of additional exclusivity to launch the successor branded product, Namenda XR, in order to force the conversion of the market from Namenda IR to the clinically equivalent Namenda XR (hereinafter the "hard switch") before market entry of the generic versions of Namenda IR. (*See id.* at ¶ 5.) Here, Plaintiffs allege that Defendants' illegal hard switch strategy included prematurely removing Namenda IR from the market before its patent expiration such that only Namenda

XR would be available for purchase in the months before Forest faced generic competition for Namenda IR. Plaintiffs allege Defendants knew that, given the nature of Alzheimer's treatment, once a patient was on Namenda XR, there was a decreased **[**6]** likelihood that the patient would "reverse commute" back to a generic version of Namenda IR after cheaper generic versions of the drug became available.

Presently before the Court are two motions: Defendants' motion for summary judgment on all claims in Direct Purchaser Plaintiffs' First Amended Complaint (Dkt. No. 434) and Plaintiffs' motion to certify this as a class action. (Dkt. No. 400.) For the reasons set forth below, Defendants' motion for summary judgment is DENIED, and Plaintiffs' motion for class certification is GRANTED.

[*168] Additionally, Defendants have filed six separate motions to exclude the opinions and proposed testimony of Plaintiffs' experts (*see* Dkt. Nos. 437, 439, 441, 443, 445, 505), each of which is addressed below.

I. *DAUBERT* MOTIONS

Before I recount the facts, I must consider exactly what should and should not be part of the record on Defendants' motion for summary judgment. ***HN1***[] "If the expert testimony is excluded as inadmissible, the court must make the summary judgment determination without that evidence." *Water Pollution Control Auth. of City of Norwalk v. Flowserve US Inc., No. 3:14 Civ. 00549 (VLB), 2018 U.S. Dist. LEXIS 52168, 2018 WL 1525709, at *5 (D. Conn. Mar. 28, 2018)*.

Defendants have moved to exclude the opinions and proposed testimony **[**7]** of: (1) Janet K. DeLeon (Dkt. No. 437); (2) Professor Einer Elhauge (Dkt. No. 439); (3) Dr. Russell Lamb (Dkt. No. 445); (4) Dr. Ernest Berndt and Dr. Russell Lamb regarding their use of forecast averages (Dkt. No. 441); (5) John R. Thomas, Esq. (Dkt. No. 505); and (6) George W. Johnston, Esq. (Dkt. No. 443).

The Daubert Standard

HN2[] "On a summary judgment motion, the district court properly considers only evidence that would be admissible at trial." *Nora Beverages, Inc. v. Perrier Grp. of Am., Inc., 164 F.3d 736, 746 (2d Cir. 1998)* (citing *Raskin v. Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997))*. Whether expert evidence should be admitted on a motion for summary judgment is a matter committed to the district court's "broad discretion." *Yurman Design, Inc. v. PAJ, Inc., 29 F. App'x 46, 48 (2d Cir. 2002)* (internal citation and quotation marks omitted); *see also* *Nora Beverages, Inc., 164 F.3d at 746*.

HN3[] Under *Rule 702 of the Federal Rules of Evidence*, which codifies the standard for admissibility set forth by *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, the court's role is to determine whether the "expert" is qualified to testify as an expert. *Rule 702* provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) **[**8]** the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

HN4[] "The proponent of the expert testimony has the burden to establish the [*Rule 702*] admissibility requirements, with the district court acting as a gatekeeper to ensure that the expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Novick v. AXA Network LLC, 714 F. App'x 22, 25 (2d Cir. 2017)* (citing *In re Pfizer Inc. Sec. Litig., 819 F.3d 642, 658 (2d Cir. 2016))* (internal citation omitted); *see also*

United States v. Apple, Inc., 791 F.3d 290, 335 n.24 (2d Cir. 2015) (citing *United States v. Williams, 506 F.3d 151, 160 (2d Cir. 2007))*.

HN5[] Though the Rule "embodies a liberal standard of admissibility," *Nimely v. City of New York, 414 F.3d 381, 395 (2d Cir. 2005)*, "when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and *Rule 702* mandate the exclusion of that unreliable opinion testimony." *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., 769 F. Supp. 2d 269, 282 (S.D.N.Y. 2011)* (internal citations omitted). "In *Daubert*, the **[*169]** United States Supreme Court confirmed that trial courts should serve as sentries, preventing juries from being overwhelmed by unsupportable speculation cloaked as expertise." *Id. at 281* - 82.

HN6[] Furthermore, the Second Circuit has held that to "warrant admissibility . . . it is critical that an expert's analysis be reliable at every step." *United States v. Morgan, 675 F. App'x 53, 55 (2d Cir. 2017)*, *cert. denied*, *138 S. Ct. 176, 199 L. Ed. 2d 103 (2017)* (internal citation omitted). Of course, "the district court **[**9]** must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions." *Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 266 (2d Cir. 2002)* (internal citation omitted). Nevertheless, as the Supreme Court has recognized,

> conclusions and methodology are not entirely distinct from one another . . . [N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 266 (citing *Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997))*.

HN7[] Moreover, "The standard to evaluate non-scientific expert testimony is whether the expert bases testimony upon professional studies or personal experience and employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Louisiana Wholesale Drug Co. v. Sanofi-Aventis, No. 07 Civ. 7343 (HB), 2008 U.S. Dist. LEXIS 81328, 2008 WL 4580016, at *6 (S.D.N.Y. Oct. 14, 2008)* (citing *Kumho Tire Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999))*.

1. Janet K. DeLeon

Defendants move to exclude the opinions and testimony of Plaintiffs' expert, Janet K. DeLeon. The motion is GRANTED.

Plaintiffs offer Ms. DeLeon as an expert in the process of developing and launching a generic drug. **[**10]** Plaintiffs offer two reports from Ms. DeLeon: (1) an initial report dated September 15, 2017 (Hamburger Decl. Ex. 10, Dkt. No. 438 ("DeLeon Rep.")); and (2) a supplemental report dated October 23, 2017 (*Id.* at Ex. 11 ("DeLeon Supp. Rep.").) Ms. DeLeon was asked to answer the following question: whether there were any supply, equipment or manufacturing challenges that would have prevented five generic competitors - Amneal Pharmaceuticals, Dr. Reddy's Laboratories, Inc., Lupin Pharmaceuticals, Inc., Mylan Pharmaceuticals, Inc. ("Mylan"), and Sun Pharmaceutical Industries, Inc. - or Forest itself from launching a generic version of Namenda IR prior to July 2015. (*See* DeLeon Rep. ¶ 6.) Her answer is that there were none. She rests her opinion on "[her] educational background, [her] professional experience, [her] knowledge and understanding of pharmaceutical industry practices, [U.S. Food and Drug Administration ("FDA")] regulations, guidelines, and enforcement policies, and publicly-available materials such as FDA MAPPs [Manual of Policies and Procedures] and Guidances." (*Id.* at ¶ 6.)

A. Qualifications

Ms. DeLeon's credentials certainly qualify her to offer an opinion on this question.

She **[**11]** has spent 30 years in the pharmaceutical industry, much of which was spent **[*170]** working on new drug launches, including specifically the launching of generics. She has sat on launch teams for 25 years. She has experience at Aventis as a liaison with external manufacturers of drug products and active ingredients, and she managed several applications to the FDA for approved products. At Beckloff, she helped companies develop new and generic drugs and get approval for them to go to market. Moreover, before starting her own pharmaceutical consultancy, Ms. DeLeon was Associate Director and then Director of Product Development at Cypress Pharmaceutical, Inc. and Hawthorn Pharmaceuticals, Inc. (together "Cypress") for seven years where she handled at least 12 separate drug launches. (*Id.* at ¶ 6.)

Her three decades of experience give her familiarity with both the drug launch process and with impediments to launch - including barriers to entry like supply, new technologies, or need for new equipment. In short, her credentials are impeccable.

B. Summary of Ms. DeLeon's Reports

Ms. DeLeon divides her analysis into three sections.

First, she explains, in considerable detail, the process for launching a **[**12]** new generic - a process with which she is intimately familiar - including the relevant regulatory and manufacturing background, and standard pharmaceutical industry practices employed in preparing for the launch of a new drug.

She then evaluates the extensive evidence derived during discovery about each generic's process leading up to the July 2015 launch of its generic Namenda IR. This revealed that each generic had followed precisely the launch process she outlined based on her own experience.

Finally, she opines - "based on her review of the evidence and [her] almost 30 years of pharmaceutical industry experience," - that nothing would have prevented the generic competitors from doing exactly the same thing as early as 2012. (*Id.* at ¶ 3.) She writes: "[I]n my opinion, there would have been no supply, equipment, or manufacturing challenges that would have prevented the Generics from launching their respective generic Namenda IR tablet products during that time period." (*Id.* at ¶ 23.) She continues, "I have seen no evidence in the record suggesting that Defendants could not have followed the same process and launched an authorized generic concurrently with the five Generics, if the **[**13]** Generics had a launch date any time between June 2012 and July 2015." (*Id.* at ¶ 28.)

In reaching her conclusions, Ms. DeLeon stressed that Namenda IR is categorized as a solid oral dose product, which is among the most common pharmaceutical products on the market; that immediate release tablets are among the easiest pharmaceutical products to manufacture; and that the supply of the active ingredient in Namenda IR (memantine hydrochloride) was readily available at all relevant times. (*See id.* at ¶ 3.)

Plaintiffs asked Ms. DeLeon to draft a supplemental report - in light of her review of additional documents and deposition testimony that became available after her initial report - in which her opinions and conclusions about the generics' and Forest's ability to launch generic Namenda IR in 2012 did not change. (*See generally* DeLeon Supp. Rep.)

C. Analysis: Motion to Exclude Ms. DeLeon's Reports

Defendants' principal argument is that Ms. DeLeon's conclusions are highly speculative. The Court agrees that her **[*171]** opinion is little more than expert "*ipse dixit.*" *Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)*. As discussed below, the problem lies in the way Ms. DeLeon derived her opinion. It adds nothing to the direct evidence that cannot be **[**14]** elicited from fact witnesses - nothing other than the use of Ms. DeLeon's impressive credentials to bolster the credibility of those witnesses impermissibly.

Ms. DeLeon did not review in-house documents or deposition testimony from any of the generics or Forest to support her conclusion that the generics and Forest could have launched Namenda IR in 2012. Instead, she relies solely on her review of documents and testimony regarding the actual product launches by these parties in 2015. Defendants cite to several portions of Ms. DeLeon's deposition testimony in which she admitted as much. (*See* Hamburger Decl. Ex. 25, Dkt. No. 438 ("DeLeon Dep. Tr.") at 91:2 - 11; 143:24 - 144:8.)

Of course, Ms. DeLeon has a perfectly sensible and credible explanation for the lack of contemporaneous evidence; she specifically opines that drug companies place a low priority on tasks related to a drug that they cannot manufacture for a few years, so it was no surprise that they did not engage in pre-launch activity three years before they were permitted, by the terms of the settlements, to enter the generic market. (*See id.* at ¶ 36.)

Lacking the kind of evidence she was able to connect to the 2015 launches, **[**15]** Ms. DeLeon relied on three things in order to reach her conclusion about the lack of barriers to entry in 2012: the companies had been able to effectuate a normal launch, without experiencing any disruption or challenge arising from supply, equipment or manufacturing issues, in July 2015; the companies were all major drug manufacturers with the capacity to have done exactly the same thing in earlier years; and a representative of each generic, testifying pursuant to *Fed. R. Civ. P. 30(b)(6)*, had indicated under oath that his/her employer could in fact have undertaken the launch process for Namenda IR much sooner than it did.

According to Plaintiffs, Ms. DeLeon's conclusions are based on an application of her extensive experience in the pharmaceutical industry to the facts presented. However, ***HN8***[] Ms. DeLeon's experience is no substitute for "scientifically sound analysis." *United States v. Apple Inc., 952 F. Supp. 2d 638, 694 (S.D.N.Y. 2013)*, *aff'd*, *791 F.3d 290 (2d Cir. 2015)*.

Ms. DeLeon could have obtained data, from the generics or elsewhere, about matters that might have impacted the generics' ability to enter the market earlier: matters like whether there were any problems with the supply of drug ingredients in earlier years; whether there were equipment failures or manufacturing issues at any of the **[**16]** generics in 2011-12 (issues that apparently did not exist in 2014-15); whether the manufacturing capacity at those companies was already being used to manufacture other drugs such that it could not readily have been converted to Namenda at that time; and about whether Namenda IR would have been prioritized over those other drugs had there been a business reason to consider diverting manufacturing capacity to Namenda during earlier years.

Had Ms. DeLeon reviewed data of the above sort, and concluded, based on her substantial experience, that the generics (or some of them) could have launched as much as three years earlier, it would certainly have been within her expertise to so opine. But simply saying, "They could do it in 2015, so they could have done it in 2012," without any analysis of the market **[*172]** and corporate conditions that might have impacted the generics' ability to launch generic Namenda in 2012, is a conclusion tethered to nothing whatever. ***HN9***[] This Court must exclude "unsupport[ed] speculation cloaked as expertise." *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., 769 F. Supp. 2d 269, 281 - 82 (S.D.N.Y. 2011)*.

To the extent that Plaintiffs point to the testimony of the generics' 30(b)(6) witnesses - all of whom testified that they could have launched generic Namenda as **[**17]** early as 2013 (not 2012) - to undergird Ms. DeLeon's opinion, their reliance exposes another problem with Ms. DeLeon's proposed testimony. Those fact witnesses can be called to testify at trial. They can repeat their testimony that then respective employers could have entered the generic Namenda market earlier but for the settlement of the patent suit. And they can offer an explanation, grounded in the actual circumstances facing each individual generic, about why that was so. Plaintiffs can then argue that the patent settlements were anticompetitive, and the trier of fact can accept or reject that argument after evaluating the credibility of these witnesses.

HN10[] "[T]he amended Rules of Evidence require that expert testimony be based on 'sufficient facts or data' and on 'reliable principles and methods' that the expert 'witness has applied reliably to the facts of the case.'" *United States v. Dukagjini, 326 F.3d 45, 54 (2d Cir. 2003)* (citing *Fed. R. Evid. 702*). Here, the only thing that Ms. DeLeon's "expert" opinion does is bolster the credibility of the 30(b)(6) witnesses - misleading the trier of fact into thinking that, if an "expert" like Ms. DeLeon accepts the testimony of the 30(b)(6) witnesses, so should it. That is not the province of an expert; indeed, **[**18]** it is an arrogation of the function of the trier of fact. *See* *Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 266 (2d Cir. 2002)*. While Ms. DeLeon's experience might make her capable of assessing Defendants' adherence to "standard pharmaceutical industry practice," that experience does not transform her into an oracle. (DeLeon Dep. Tr. at 109:1 - 4.) Her opinions and testimony are inadmissible and will not be considered on the motion for summary judgment.

2. Professor Einer Elhauge

Defendants move to exclude the opinions and testimony of Plaintiffs' expert, Professor Einer Elhauge, who opines in support of Plaintiffs' theory that the reverse payment from Forest to Mylan delayed generic entry. In the professor's opinion, without a reverse payment to generic competitors, the generic competitors would have entered the market on November 2, 2012, approximately 26.3 months earlier than they did.

Plaintiffs offer Revised Expert Report of Professor Einer Elhauge dated September 20, 2017 (Hamburger Decl. Ex. 1, Dkt. No. 438 ("Elhauge Rep.").) Plaintiffs retained Professor Elhauge to address, among other things, what economic analysis reveals about Forest and Mylan's settlement of the Namenda IR patent litigation. He was asked to opine on: (a) whether an alleged **[**19]** reverse payment from Forest to Mylan delayed generic entry into the market; (b) what the settlement entry date would have been in a no-payment settlement; (c) whether a reverse payment was reasonably necessary and the least restrictive means to achieve a settlement between Forest and Mylan; and (d) whether there were any procompetitive justifications for the reverse payment. (*See* Elhauge Rep. ¶ 1.) Professor Elhauge was asked to model a but-for world "with no payment." (Hamburger Decl. Ex. 14, Dkt. No. 438 ("Elhauge Dep. Tr") at 80:11 - 17.)

[*173] A. Qualifications

Professor Elhauge is the Petrie Professor of Law at Harvard Law School, where he teaches and writes about the economic analysis of ***antitrust law***, health policy, and various other subjects. (*See Elhauge Rep.* ¶ 3.) He has authored and co-authored several leading antitrust casebooks, and written articles on monopolization, bundled discounts, loyalty discounts, and reverse-payment settlements. (*See id.*) Professor Elhauge has served as an expert on antitrust economics before Congress, arbitration panels, and foreign competition agencies. He has also testified as an expert witness on antitrust economics in dozens of federal cases. (*See* ***[**20]*** *id.* at ¶ 4.)

B. Summary of Professor Elhauge's Reports

Professor Elhauge begins by summarizing the settlement agreement, signed on July 21, 2010, between Forest and Mylan, which resulted in Mylan dropping its challenge to the Namenda IR patent. (*See* Elhauge Rep. ¶¶ 6 - 11.) He then estimates the parties' actual bargaining strength based on the settlement terms. (*See id.* at ¶¶ 28 - 33.) He uses this estimate - along with other factors, such as the two companies' profit projections and their expectations regarding the pending patent litigation - to predict what the generic entry date would have been in a no-payment settlement. (*See id.*) Finally, Professor Elhauge considers how sensitive his analysis is to changes in the estimates of each parties' strengths (*e.g.*, patent strength, litigation costs, litigation end date, etc.). (*See id.* at ¶¶ 33 - 54.) He concludes that his finding - that the reverse payment caused a significant delay in entry of generic memantine hydrochloride into the market - is robust enough to hold true even given changes to these estimates. Finally, he posits that Defendants' risk aversion could not have justified the reverse payment. (*See id.* at ¶¶ 56 - 58.)

C. Analysis: [**21] Motion to Exclude Professor Elhauge's Reports

Defendants move to exclude the reports and testimony of Professor Elhauge's on three grounds.

First, Defendants argue that Professor Elhauge's opinions are at odds with the Supreme Court's decision in *F.T.C. v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*, because Professor Elhauge presumes that *any* payment from a patentee to a prospective generic, regardless of its size or the reasons for making it, causes anticompetitive delay. That, however, is a mischaracterization of Professor Elhauge's analysis.

HN11[] The Supreme Court in *Actavis* specifically declined to hold that "reverse payment settlement agreements are presumptively unlawful." *Actavis, 570 U.S. at 158*. It instructed courts reviewing such agreements to proceed by applying a "rule of reason" analysis to reverse payment agreements. *Id. at 159*. Under this analysis, courts have to assess the payment's "size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." *Id. at 159*. Thus, only those reverse payments that are "'large and unjustified'" violate the antitrust laws. *Sergeants Benevolent Ass'n Health & Welfare Fund v. Acta Vis, PLC, No. 15 Civ. 6549 (CM), 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at *13 (S.D.N.Y. Sept. 13, 2016)* (quoting *Actavis, 570 U.S. at 158*).

As an initial matter, Professor Elhauge explains in his report **[**22]** that "a reverse payment is large enough to anticompetitively **[*174]** delay entry whenever the payment amount exceeds the litigation costs the patent holder avoided by settling." (Elhauge Rep. ¶ 42.) He determines that the reverse payment from Forest to Mylan, which he estimates to be $30.9 million, was large enough to exceed Forest's avoided litigation costs (an estimated $3.5 million) and was thus potentially anticompetitive. (*Id.* at ¶ 11, 20.) Only after determining that the payment exceeded avoided litigation costs did Professor Elhauge proceed to use economic analysis to assess the degree of delay the reverse payment caused. This approach is fully consistent with *Actavis*.

Next, Defendants argue that Professor Elhauge's opinions are speculative, internally inconsistent, and contradicted by the evidence. The Court will not waste time on this, except to say that this part of their *Daubert* motion, "like so many such motions, is nothing more than a 'we do not agree with his opinion so it is junk science' motion, of the sort that causes this and many judges to view all *Daubert* motions with a certain degree of skepticism." *Bank of New York Mellon Tr. Co., Nat'l Ass'n for Registered Certificate Holders of Morgan Stanley Capital I Inc. v. Morgan Stanley Mortg. Capital, Inc., No. 11 Civ. 505 (CM), 2017 U.S. Dist. LEXIS 20715, 2017 WL 733225, at *1 (S.D.N.Y. Feb. 10, 2017)*. Here, Defendants' disagreements with Plaintiffs' expert are appropriate **[**23]** subjects for cross-examination.

Lastly, Defendants argue that Professor Elhauge's opinions about when entry "would have" occurred improperly attempt to usurp the role of the jury. Defendants cite *to* *United Food and Commercial Workers Local 1776 & Participating Employers Health and Welfare Fund v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 1149 (N.D. Cal. 2017)* (hereinafter "*Lidoderm*"), in support. In that case, which also involved an alleged reverse payment settlement, Professor Elhauge similarly opined in support of plaintiffs' alternate causation theory that in the hypothetical but-for world, even without a reverse payment, the defendants would have agreed to a settlement allowing a competitor into the market a year earlier than they did. The defendants in *Lidoderm* moved to exclude Professor Elhauge's economic model and but-for conclusions as unsound, difficult to understand, and not transparent. The court granted the motion in part, holding that "Elhauge may opine that in his view the parties would have been rationally motivated to agree to settlement allowing [a competitor] early entry by specific dates." *Id. at 1149*. The court then held that Elhauge could not "testify that the parties would have agreed to entry on a date certain, as that impinges on a determination left up to the jury." *Id.* So too here. **[**24]**

Professor Elhauge must qualify his opinions by testifying that "it would have been economically rational for both parties" to enter into a no-payment settlement in a but-for world by specific dates, not that they necessarily *would have*. (Opper Decl. Ex. 2, Dkt. No. 421 ("Elhauge Dep. Tr. II") at 225:18-227:18.) That ultimate issue is for the trier of fact to decide.

With that modification, Defendants' motion is DENIED.

3. Dr. Russell Lamb

Defendants move to exclude the opinions and testimony of Plaintiffs' expert, Dr. Russell Lamb, who opines on class certification and damages caused by Defendants' alleged anticompetitive conduct.

Plaintiffs offer Amended Expert Report of Dr. Russell Lamb dated September 20, 2017 (Hamburger Decl. Ex. 2, Dkt. No. 438 (("Lamb Rep.")); and an Amended Expert Reply Report dated November 9, **[*175]** 2017 (*Id.* at Ex. 3 ("Lamb Reply Rep.")) to correct for an error in his earlier reply report.

Dr. Lamb, an economist, was asked to analyze (1) whether the delay in generic entry impacted prices paid by proposed class members; (2) whether Defendants' allegedly unlawful hard switch impacted prices paid by proposed class members; (3) whether it is possible to establish, using economic **[**25]** analyses and evidence common to the proposed class as a whole, rather than specific to individual members, that proposed class members were injured by Defendants' alleged anticompetitive conduct under two separate but-for worlds (as described below); and (4) the amount of aggregate damages suffered by proposed class members as a result of the alleged misconduct under the two separate but-for worlds. (*See* Lamb Rep. ¶ 5.)

For the purposes of his report, Dr. Lamb conducted economic research on the market and prices paid for memantine hydrochloride by members of the proposed class and reviewed transaction-level data produced by Forest and several generic manufacturers. He also reviewed documents produced by various parties in this matter (including documents, expert reports and testimony from the previous action brought by the New York Attorney General), documents or filings presented before the FDA, as well as a variety of publicly-available documents including trade press and academic literature. (*Id.* at ¶ 12.)

A. Qualifications

Dr. Lamb, an expert in antitrust economics, has testified in U.S. district court on matters concerning antitrust liability, impact, and damages. For more than 20 **[**26]** years, Dr. Lamb has consulted on the economics of markets and prices. (*Id.* at ¶ 2.) Courts have relied upon his economic analyses of the market in certifying classes of direct purchasers and indirect purchasers in litigations involving allegations of anticompetitive conduct. (*Id.* at ¶ 3.) Additionally, he has been hired as an economic consultant to the World Bank and the Government of Peru, and has assisted on various economic consulting projects for private firms, government agencies, and law firms. (*Id.*)

He is the President of an economic consulting firm known as Monument Economics Group, based in Arlington, Virginia. The firm provides economic research and quantitative and statistical analysis to clients in the United States, Canada, and elsewhere internationally. (*Id.* at ¶ 1.) He also currently teaches "Law and Economics" at The George Washington University. (*Id.*)

B. Summary of Dr. Russell Lamb's Reports

Dr. Lamb's reports describe, in part, the relevant pharmaceutical regulatory framework, competitive effects of generic entry, background on the memantine hydrochloride market, and an analysis of the proposed class members. He emphasizes that "By September 2015, three months after **[**27]** generic entry, Forest had lost 89.9 [%] of Namenda IR sales to generic manufacturers" who were selling the drug at about a 95% price discount. (Lamb Rep. ¶ 81 - 82.) He notes that the "rapid substitution of generic memantine hydrochloride for branded Namenda IR, is consistent with the literature describing the effects of generic entry on prices and sales in pharmaceutical markets." (*Id.* at ¶ 83.)

By way of example, Dr. Lamb suggests that, as a result, proposed class members "who purchased Namenda IR at a price of $0.58 per tablet in July 2015, would have purchased the generic at a price below $0.58 in July 2015 had generic competition **[*176]** started in 2012, rather than July 2015, because had generic competition started in 2012, the decline in generic prices that actually occurred after July 2015 would have occurred much earlier." (*Id.* at ¶ 85.)

Dr. Lamb analyzes "two but-for scenarios that Plaintiffs allege would have occurred in a world free of the Defendants' alleged misconduct" - a No Reverse Payment But-For World and a No Hard Switch But-For World. (Lamb Rep. ¶ 7.)

No Reverse Payment But-For World. Under the first scenario, Dr. Lamb considers damages arising from Forest's alleged reverse **[**28]** payment to Mylan (the "No Reverse Payment But-For World"). He assumes that had "Defendants not entered into an allegedly illegal agreement with Mylan, they still would have settled, but without a large reverse payment and with an entry date [in 2012[1]] (rather than in 2015 as provided for in their . . . agreement)." (*Id.* at ¶ 8.) Using an economic model, Dr. Lamb compares the actual price purchasers paid for memantine hydrochloride to the prices that would have prevailed but for Defendants' conduct, and compares the actual volumes of brand Namenda purchased to the volumes of Namenda that would have been purchased but for Defendants' conduct. (*Id.* at ¶ 127 - 42.)

He concludes that "all or nearly all proposed [c]lass members were impacted by Defendants' allegedly anticompetitive agreement with Mylan, assuming that generic entry was delayed and would have occurred earlier otherwise, in that they paid higher prices for brand-name Namenda IR, Namenda XR, and/or generic memantine hydrochloride than they otherwise would have had generic competition started sooner, because they would have purchased (or purchased more) generic memantine hydrochloride at prices below branded Namenda and would have **[**29]** purchased the generic at lower prices." (*Id.* at ¶ 13(a).)

No Hard Switch But-For World. Under the second scenario, Dr. Lamb considers damages suffered by direct purchasers of Namenda products arising solely from Forest's announcement of a hard switch from Namenda IR to Namenda XR (the "No Hard Switch But-For World"). To confirm his hypothesis that Forest's February 2014 discontinuation announcement had an impact on the market, Dr. Lamb conducted a statistical analysis called a "structural break test" to analyze conversion to Namenda XR using market share data from NSP. (*See id.* at ¶ 119.) He concludes that "there is a structural break in the Namenda XR conversion rate at the time the Hard Switch strategy was implemented beginning in February 2014," (*id.*), which illustrates that the hard switch was effective in converting more Namenda IR prescriptions to Namenda XR than otherwise would have been the case. He goes on to analyze the case in which Defendants did not engage in their hard switch strategy (never announced that they would remove Namenda IR from the market) and no generic entry occurred prior to the actual date at which AB-rated generics for Namenda IR became available (*i.e.* ***[**30]*** , July 2015).

[*177] He concludes that "all or nearly all proposed [c]lass members who purchased at least Namenda IR and XR, or XR, were impacted by Defendants' anticompetitive [h]ard [s]witch strategy in that they paid higher prices for Namenda XR than they otherwise would have for generic memantine hydrochloride, and they would have purchased the less expensive generic (or more of it) in place of the more expensive branded Namenda." (*Id.* at ¶ 13(b).)

For purposes of class certification, Dr. Lamb finds that aggregate overcharge damages can be proven through classwide economic models using formulas and methodologies that do not require individualized analysis. (*Id.* at ¶ 121 - 61.) Where available, he uses transaction-level data produced by Forest and some of the generic manufacturers to calculate damages. He calculates the "aggregate, class-wide damages arising from Defendants' alleged misconduct under the two separate but-for worlds." (*Id.* at ¶ 13.) He estimates that "Total damages suffered by Proposed Class members are between $6.09 billion and $6.93 billion under the No-Reverse Payment But-For World, and between $776 million and $814 million under the No Hard Switch But-For World." (*Id.*)

[**31] C. Analysis: Motion to Exclude Dr. Lamb's Reports

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[1] For the purposes of calculating damages under this scenario, Dr. Lamb relies on an analysis conducted by Professor Einer Elhauge in which he determines that a payment-free settlement would have provided for an entry date of November 2, 2012. Dr. Lamb alternatively assumes a June 2012 generic entry date based on George Johnston's alternative theory that absent a settlement agreement, Mylan would have prevailed in the patent litigation brought against it, resulting in generic entry by it in June 2012, and by other generic competitors under the terms of their agreements with Forest.

HN12[] An antitrust claim has three elements: (1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages. *In re Visa Check/Master Money Antitrust Litig.,280 F.3d 124, 136 (2d Cir. 2001)*. This portion of Defendants' motion centers on proof of the second element of an antitrust claim - commonly referred to as "antitrust injury" - which requires "an antitrust plaintiff [to] prove that its injury was, in fact, caused by the defendant's violation of the antitrust laws." *US Airways, Inc. v. Sabre Holdings Corp., No. 11 Civ. 2725 (LGS), 2017 U.S. Dist. LEXIS 40932, 2017 WL 1064709, at *16 (S.D.N.Y. Mar. 21, 2017)* (quoting *U.S. Football League v. NFL, 842 F.2d 1335, 1377 (2d Cir. 1988))*.

Defendants move to exclude the reports and testimony of Dr. Lamb on three grounds.

First, Defendants argue that Dr. Lamb's structural break test does not prove antitrust injury. Defendants claim that Dr. Lamb's test fails because it utilizes market-wide data rather than purchaser-specific information, which approach fails to isolate and measure those patients who switched from Namenda IR to XR *because of the February 2014 announcement* from those patients who switched for other reasons. Stated otherwise, Defendants claim that Dr. Lamb's analysis understates the degree to which Namenda XR could have captured the market even without the hard switch strategy.

This argument is unpersuasive.

Dr. Lamb's conclusion that the hard switch announcement **[**32]** increased conversion to Namenda XR was based on a number of observations that are consistent with Plaintiffs' allegations. Plaintiffs allege "that as a result of Forest's dissatisfaction with the extent of conversion to Namenda XR for several months after its launch, Forest began to consider an option where it would discontinue or dramatically restrict the supply of Namenda IR several months before the availability of generic memantine hydrochloride in order to accomplish a 'forced switch' whereby physicians and patients would have little choice but to switch to Namenda XR." (*Id.* at ¶ 89.) In support of this theory, Dr. Lamb reviewed Forest's internal documents and forecasts confirming the company's formation and implementation of their strategy to reduce the level of competition from generic memantine hydrochloride products. **[*178]** (*See id.* at ¶ 95.) Dr. Lamb relied on forecasts that contained both a "withdrawal" (or "hard switch") scenario and a "conventional" (or "soft switch") scenario, as well as internal high-level discussions of and reliance upon these forecasts to reach conclusions about what the conversion rate of Namenda IR to XR would have been absent initiation of the hard switch **[**33]** strategy. For example, Figure 6 entitled *Forest Namenda Forecasts*, is a copy of Forest's soft switch and hard switch projections which show that Namenda XR's share of the memantine hydrochloride market would be significantly higher under the hard switch strategy versus the soft switch strategy. (*Id.*) Dr. Lamb also notes that:

> In a May 2013 speech concerning the launch of Namenda XR, Mark Devlin of Forest stated: [T]he core of our brand strategy with XR is to convert our existing IR business to Namenda XR as fast as we can and also gain new starts for Namenda XR. We need to transition volume to XR to protect our Namenda revenue from generic penetration in 2015 when we lose IR patent exclusivity.' Mr. Devlin added that the 'better job we do moving business form IR to XR, the more Forest revenue we hopefully shelter from generic threats down the road.'

(*Id.* at ¶ 94.)

Furthermore, the evidence includes sworn statements from doctors stating that they stopped prescribing Namenda IR after the hard switch announcement. (*See id.* at ¶ 104.) Dr. Lamb concludes that the evidence demonstrates that Forest's intention to withdraw Namenda IR was to trigger wide-spread conversion to Namenda XR and that **[**34]** the February announcement was successful in starting to do so.

To confirm his hypothesis, Dr. Lamb conducted a regression analysis called a "structural break test" showing that Forest's implementation of its hard switch strategy would impact the market by increasing conversion to Namenda XR. He used actual sales data from IMS National Sales Perspectives ("NSP"). He concludes that "there is a structural break in the Namenda XR conversion rate at the time the Hard Switch strategy was implemented beginning in February 2014," (*id.* at ¶ 119), which illustrates that the hard switch was effective in converting more Namenda IR prescriptions to Namenda XR than otherwise would have been the case.

Defendants' complain that Dr. Lamb's structural break test fails because it does not isolate the cause of the February 2014 break. However, Dr. Lamb testified that the test was not designed to do so. He testified that "[the test] is not able to tease out where the source of the structural break comes from by itself. One has to implement it because one believes that there is some event which leads to a structural break. . . I had reason to believe that the hard switch strategy which began somewhat before **[**35]** February '14 and which included the announcement . . . would have an effect at that point. And that's why I chose that date." (Hamburger Decl. Ex. 19, Dkt. No. 438 ("Lamb Dep. Tr. I") at 96:2 - 19.)

In other words, Dr. Lamb's test demonstrates that there was a "structural break" in February 2014, which happened to be the date when the hard switch was announced. Correlation does not prove causation, but the coincidence in timing between the announcement and the structural break shown by the data is some evidence of causation in support of Plaintiffs' theory. Perhaps other things were happening in the market in February 2014, and Forest may go into them to undercut Dr. Lamb's data. Taken together with the other evidence analyzed by Dr. Lamb, the **[*179]** regression is designed to confirm a hypothesis that is itself based on other indicia. For the purposes of *Daubert*, Dr. Lamb's analysis passes muster. "At most, [Forest's] arguments concerning the assumptions in [Dr. Lamb's] analysis go to its weight, not admissibility of that testimony." *Dial Corp. v. News Corp., No. 13 Civ. 6802, 2016 U.S. Dist. LEXIS 20427, 2016 WL 690868, at *4 (S.D.N.Y. Feb. 17, 2016)*.

HN13[] Moreover, contrary to Defendants' argument, a plaintiff is only required to show that alleged illegal conduct is "*a* material cause of the [antitrust] injury; **[**36]** a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury." *Id.* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969))* (emphasis added). "[T]o prove a 'causal connection' between the defendant's unlawful conduct and the plaintiff's injury, the plaintiff need only 'demonstrate that [the defendant's] conduct was a substantial or materially contributing factor' in producing that injury." *In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 66 (2d Cir. 2012)* (quoting *Litton Sys., Inc. AT & T Co., 700 F.2d 785, 823 n.49 (2d Cir. 1983))*. Second Circuit precedent makes clear that in order to prove causation:

> [P]laintiffs do not have to prove that the unlawful activity that the defendants allegedly engaged in was the sole cause of their injuries. Plaintiffs meet their burden if they show that the defendants' unlawful facts substantially contributed to their injuries, even though other facts may have contributed significantly. An antitrust plaintiff is not required to show that the defendants' acts were a greater cause of the injury than other factors. Plaintiffs need only show that their injury to *some* degree resulted from defendants' violation.

NFL, 842 F.2d at 1377 (emphasis in original).

Second, Defendants argue that Dr. Lamb improperly expanded the time period of alleged injury to include data from before the February 2014 **[**37]** Namenda IR discontinuation announcement and after the injunction on Namenda XR conversion.

Specifically, Defendants claim that his methodology improperly includes alleged injury from before the February 2014 announcement, in violation of this Court's earlier conclusion about the proper damages period. *See Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC, Nos. 15 Civ. 6549, 15 Civ. 7488, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at *11 (S.D.N.Y. Sept. 13, 2016)* ("According to the Second Circuit: The hard switch began on February 14, 2014 with the announcement of Defendants' intention to withdraw Namenda IR and was suspended in September 2014 when Defendants agreed to a "standstill" during the litigation proceedings.") (internal citation omitted)) In his report, Dr. Lamb cites documents demonstrating that, before the February 2014 announcement, Forest had already begun discussed its hard switch plan outside the company. (*See* Lamb Rep. ¶¶ 89, 102.)

Plaintiffs argue that Dr. Lamb included discussion of pre-February 2014 conduct in order to undercut Forest's theory — that increased conversion to Namenda XR after February 2014 was the result of better formulary placement for XR rather than the hard switch. (Lamb Reply Rep. ¶ 51; *see also* Lamb Rep. **[**38]** ¶¶ 89, 102; Berndt Rep. ¶ 56; Berndt Reply Rep. ¶ 29; PRSoF ¶ 373; PASoF ¶ 67 (collecting evidence of Forest's leveraging of withdrawal plan to achieve better formulary placement).) These opinions are admissible. Defendants' difference of opinion is fair ground for cross examination. Likewise are Dr. Lamb's opinions about any lasting impact **[*180]** the anticompetitive conduct had post-injunction.

Lastly, Defendants argue that the flaws in Dr. Lamb's "No Hard Switch" methodology make his No Reverse Payment methodology unreliable as well. For the reasons discussed above, this argument is without merit.

Defendants' motion is DENIED.

4. Forecast Averages from Dr. Russell Lamb and Dr. Ernst Berndt

Defendants move to exclude the opinions and testimony of Plaintiffs' experts, Dr. Russell Lamb and Dr. Ernst Berndt, regarding their use of forecast averages in their respective analyses. This motion is DENIED.

Dr. Berndt, a Professor in Applied Economics at the Sloan School of Management at the Massachusetts Institute of Technology, submitted: (1) an initial report dated September 15, 2017 (Hamburger Decl. Ex. 7, Dkt. No. 438 ("Berndt Rep.")); (2) a reply expert report dated October 25, 2017 (*Id.* at Ex. 8 **[**39]** ("Berndt Reply Rep.")); and an amended reply expert report dated November 8, 2017 (*Id.* at Ex. 9 ("Berndt Am. Reply. Rep.")).[2] In his initial report, Dr. Berndt opines on (1) "whether it is reasonable as a matter of economics to conduct a damages analysis of the impact of Forest's announcement and conduct of a 'hard switch' marketing campaign . . . based upon use of relevant Forest projections and forecasts" and if so, (2) "what objectively reasonable expected market share Namenda XR would have had if there had been no Hard Switch announcement and marketing campaign (as shown by Forest's reasonable forecasts)." (*See* Berndt Rep. ¶ 6.)

In his report, Dr. Lamb relies on Dr. Berndt's "opinion that these forecasts of the Namenda XR conversion rate are a reliable basis for an analysis of the incremental effect of the Hard Switch on the conversion from branded Namenda IR to branded Namenda XR." (Lamb Rep. ¶ 144.) Thus, Dr. Lamb factored Forest's forecasts into his damages analysis. Specifically, based on Forest's predictions of Namenda XR conversion absent the hard switch, he concluded that the "Namenda XR conversion rate would rate 30 percent in 18 months after Namenda XR entered the market **[**40]** absent the Hard Switch." (*Id.* at ¶ 150.) For purposes of his damages calculation, "The difference between the actual and but for Namenda XR conversion rates, multiplied by total market DOT [days of therapy] times the generic penetration rate, yields the amount of branded XR purchases that would have been generic Namenda IR purchases but for the Hard Switch. This volume multiplied by the difference in price between branded Namenda XR and generic Namenda IR then yields the amount of overcharges to the Hard Switch." (*Id.* at ¶ 13.)

A. Analysis: Motion to Exclude Dr. Berndt's and Dr. Lamb's Forecast Averages

Defendants' principal complaint is that the experts blindly adopt certain of Forest's forecasts without first scrutinizing them. However, a substantial portion of Dr. Lamb's report and the entirety of Dr. Berndt's report are dedicated to analyzing and evaluating Forest's forecasts for reliability. **[*181]** That hardly renders their conclusions inadmissible.

Defendants advance three reasons why this testimony should not be admitted.

First, Defendants argue that Dr. Berndt and Dr. Lamb did not perform any economic analysis to determine what the conversion rate would have been in the but-for world. **[**41]**

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[2] Defendants ask the Court to strike Dr. Berndt's Amended Reply Report as an improper sur-rebuttal based on Dr. Berndt's treatment of issues and documents raised during his deposition about his initial report. The Court will do no such thing. *See* *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem, Co., 769 F. Supp. 2d 269, 277 - 79 (S.D.N.Y. 2011)*. Defendants are not unduly prejudiced by Dr. Berndt's review and informed response to their challenges raised at deposition.

Second, Defendants argue that neither of the doctors applied any expert methodology to average forecasts or to select which forecasts to include in their averages, and that as a result both doctors haphazardly selected forecasts for their averages.

Third, Defendants argue that neither doctor tested the forecasts to determine their reliability.

None of these arguments holds water.

In his report, Dr. Berndt undertook a robust analysis of the process by which Forest came to its forecasts and expectations for the conversion rate between Namenda IR and Namenda XR under a soft switch and a hard switch scenario. He closely studied the inputs into Forest's analysis, analyzed the evolution over time of that analysis, and Forest's internal and external use and reliance upon that analysis. In particular, Dr. Berndt considered that Forest had been in the market for many years, was very familiar with the dynamics between physicians, caregivers, patients, and the various health care entities involved in the treatment of Alzheimer's patients. (Berndt Rep. ¶ 40.)

Dr. Berndt considered that Forest had done a searching analysis of analogous situations in which pharmaceutical manufacturers had brought an **[**42]** extended release product into a market in which that company already had an immediate release product. (*Id.* at ¶ 41.)

Dr. Berndt considered that Forest surveyed physicians, caregivers, pharmacists and health care entities about the Namenda XR launch and conversion. (*Id.* at ¶ 26.)

Dr. Berndt considered that Forest specifically factored in the impact of a cost-conscious and critical segment of the market for Namenda Alzheimer's patients, Long Term Care. (*Id.* at ¶ 28.) Dr. Berndt considered that Forest's analysis evolved over time, including with the assistance of actual sales data after Namenda XR launched. (*Id.* at ¶ 51-55.)

Dr. Berndt also considered that Forest's executives valued these analyses as reliable and accurate as they used them when communicating their expectations about Namenda XR share in the soft switch scenario internally (including to Forest's Board of Directors) and externally to the investing community. (*Id.* at ¶ 32 - 38, 48 - 50.)

Thus, Dr. Berndt did not just assume, as Defendants argue, that Forest's estimates of a 30% conversion in a "soft switch" scenario were reliable (as found by Judge Sweet and adopted for purposes of the motion to dismiss by me). (*See* Dkt. No. **[**43]** 253 at 24 - 25 (citing *New York v. Actavis, PLC (Namenda I), No. 14 Civ. 7473, 2014 U.S. Dist. LEXIS 172918, 2014 WL 7015198, at *80, 109 - 11 (S.D.N.Y. Dec. 11, 2014))*. Instead, Dr. Berndt applied his scholarship, knowledge, and experience from his many decades of studying the pharmaceutical industry. He analyzed the work that Forest put into its forecasting, as well as the extent to which Forest relied upon those forecasts in making business decisions and communicating with the investor community. He endeavored to determine that the forecasting effort was robust and reliable.

Dr. Berndt concludes that "the [internal] forecasts reviewed by Dr. Lamb [were] reliable," as they were based on Forest's own study of the Namenda market and **[*182]** analogous experiences of other drugs. (*Id.* at ¶ 40; *see also* Berndt Reply Rep. ¶¶ 4 - 20.) He further concludes that "[t]he appropriate 'but for' analysis in this case is one in which Forest makes no hard switch announcement of any kind, executes no communications campaign of any kind aimed at alerting patients. . . and others of the impending withdrawal of Namenda IR, and makes no other effort of any kind to implement the hard switch." (Berndt Rep. ¶ 69.)

Likewise, Dr. Lamb independently reviewed and analyzed Forest's internal document and testimony regarding the soft-switch conversion rate. He did **[**44]** not blindly adopt Dr. Berndt's analysis. He factored in the fact that, "Forest used various analogues of drug franchises that had experienced conversion from an immediate release to an extended release product when forecasting the conversion rate from Namenda IR to XR." (*Id.* at ¶ 151.) He noted that Forest updated the Namenda XR conversion forecasts regularly, sometimes creating multiple forecasts in a few weeks. (*See id.*) Using the forecast documents that were created after Namenda XR had entered the market and before the hard switch was implemented, Dr. Lamb averaged the forecasted soft switch Namenda IR to XR conversion rate for November 2014, 18 months after Namenda XR entered the market, and found the but-for conversion rate to be approximately 30 percent. (*Id.* at ¶ 152; *see also id.* at Tbl. 3.) Contrary to Defendants' argument, Dr. Lamb did not "cherry-pick." He averaged multiple iterations of Forest's forecasts and came up with a 30% conversion rate. He then confirmed this number was reasonable based on its specific use in numerous company presentations, statements by company executives on earnings calls, and testimony by these executives. (*See id.* at ¶ 154.)

HN14[] The use of Defendants' **[**45]** own forecasts to model a but-for world has been held to be a sound economic methodology. Indeed, it is commonly used in courts considering generic delay damages. *See, e.g., King Drug Co. of Florence, Inc. v. Cephalon, Inc., 309 F.R.D. 195, 212 (E.D. Pa. 2015)*, *rev'd and remanded on other grounds, In re Modafinil Antitrust Litig., 837 F.3d 238 (3d Cir. 2016)*. Defendants may not hide behind the fact that forecasts are predictions, and by their very nature incorporate some uncertainty — particularly given the controlling legal rule that a defendant may not benefit from any uncertainty concerning damages its own wrongful conduct has caused.

Defendants' complaint that Drs. Berndt and Lamb did not consider all forecasts from the relevant period before the hard switch conduct is of no moment to the admissibility of their testimony. **This** is a matter for cross-examination. If Forest contends that important forecasts were omitted from the experts' analysis, it can introduce them at trial.

The motion is DENIED.

5. Professor John R. Thomas, Esq.

Defendants move to exclude the opinions and testimony of Plaintiffs' expert, Professor John R. Thomas, Esq. Plaintiffs substituted Professor Thomas in place of their proposed expert, Deborah Jaskot, after this Court granted Teva Pharmaceutical USA, Inc.'s nonparty motion to disqualify Ms. Jaskot from **[**46]** serving as Plaintiffs' regulatory expert due to her conflicts as a former Teva executive. (*See* Dkt. No. 355.)

Plaintiffs offer a report from Professor Thomas dated November 14, 2017 (Johnson Decl. Ex. 1, Dkt. No. 506 (Expert Report of Professor John R. Thomas, Esq. ("Thomas Rep.")).) Plaintiffs retained Professor Thomas to (1) provide testimony concerning the *Drug Price Competition and Patent Term Restoration Act (the "Hatch-Waxman Act"), Pub. L. No. 98-417, 98 Stat. 1585*, **[*183]** "and its 'grand bargain' between the competing interests of promoting the innovation of new drugs and promoting competition from generic drugs;" (2) "determine whether there would be any impediments to certain generic drug companies obtaining final approval from [the] FDA to sell their generic versions of Namenda at any point from April 17, 2011 through July 11, 2015;" and (3) "determine whether there would have been any impediments to Forest obtaining approval from [the] FDA to market an authorized generic version of Namenda from April 17, 2011 through July 11, 2015." (Thomas Rep. ¶¶ 3 - 5.)

A. Qualifications

Professor Thomas has taught courses on the Hatch-Waxman Act at Georgetown Law School since 2002, has written a textbook concerning the Hatch-Waxman **[**47]** Act, patent law, and pharmaceutical drugs, and has been qualified to opine on ANDAs in district court before. *See, e.g., Apotex, Inc. v. Cephalon, Inc., 06 Civ. 02768, 2011 U.S. Dist. LEXIS 154863 (E.D. Pa. Mar. 28, 2011)*. He possesses more than two decades of experience with respect to the Hatch-Waxman Act, including authoring and co-authoring numerous Congressional Research Service Reports. He was appointed and served as a Special Master in Hatch-Waxman litigation. (*Id.* at 15.)

He has taught hundreds of patent examiners principles of patent and evidence law as an instructor at the U.S. Patent and Trademark Office Patent Academy, and is admitted to both the patent bar (No. 40,389) and the bar of the state of Maryland. (*Id.* at ¶¶ 11 - 13.) Moreover, he has practiced patent law full-time as an associate attorney at Finnegan, Henderson, Farabow, Garrett & Dunner LLP in Washington, D.C. (*Id.* at ¶ 13.)

B. Summary of Professor John R. Thomas, Esq.'s Report

Professor Thomas divides his analysis into three sections.

First, he discusses the relevant regulatory background regarding drug approval under the Hatch-Waxman Act, including the FDA approval process for brand name and generic drugs generally, the FDA's orange book listing of approved drug products, **[**48]** along with the various marketing exclusivities made available by the Act.

Second, Professor Thomas gives background on the FDA approval of branded and generic Namenda, including the various generic challenges to Forest's Namenda patent, Forest's settlement of these challenges, and the generics' respective approval and launch timelines.

Third, Professor Thomas opines that based on his analysis of the available data, there were no regulatory impediments to the five generics seeking and obtaining final approval for their generic versions of Namenda on or after April 17, 2011.

C. Analysis: Motion to Exclude Professor John R. Thomas, Esq.'s Reports

Defendants move to exclude the reports and testimony of Professor Thomas on three grounds.

First, Defendants call certain portions of Professor Thomas's opinion irrelevant and prejudicial. For example, the professor writes, "When competitors within the pharmaceutical industry. . . choose to bypass or subvert the legislative framework, they potentially engage in strategic behavior that defies the policy goals embodied in the Hatch-Waxman Act." (Thomas Rep. ¶ 30.) They argue that Professor **[*184]** Thomas implies that *all* Hatch-Waxman patent settlements are **[**49]** "suspect" or "inherently 'subvert' Congressional intent to make low-cost generic pharmaceuticals broadly available to the public." (Defs.' Mem. of Law at 1.) This argument lacks even a scintilla of merit. Defendants cannot point to a single instance where Professor Thomas actually offers such an opinion. As for what Defendants believe he "implied," their beliefs are of no moment. This basis for the motion to exclude is DENIED.

Second, Defendants argue that Professor Thomas should not be allowed to explain the Hatch-Waxman statutory scheme, its regulations, and how they relate to the generics and potential authorized generics in this case. According to Defendants, those explanations would constitute improper legal opinions. They are wrong.

HN15[] While, "This circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion," *Hygh v. Jacobs, 961 F.2d 359, 363 (2d Cir. 1992)*, "expert testimony is viewed as helpful in cases, like this one, involving complex statutes or issues outside of the general knowledge of the jury." *United States v. Universal Rehab. Servs., Inc., No. 94 Cr. 147, 1996 U.S. Dist. LEXIS 7912, 1996 WL 297575, at *10 (RD. Pa. May 31, 1996)*, *aff'd sub nom.* *United States v. Universal Rehab. Servs. (PA), Inc., 205 F.3d 657 (3d Cir. 2000)*. In his report, Professor Thomas explains the procedures under the complex law governing approvals of generic drugs, which is subject matter that is foreign **[**50]** to the average person. He does not provide "legal conclusions" or opine on whether Defendants violated the Act, but simply explains the mechanics of drug approval, which provides context that is likely to "assist the trier of fact." *Fed. R. Evid. 702*. I will not preclude this testimony. If Thomas's testimony strays beyond that into matters that are irrelevant or otherwise inadmissible, I will be the first to disallow it.

Finally, Defendants claim that Professor Thomas is not qualified to opine on Abbreviated New Drug Application ("ANDA") approval, since he has neither personally prepared nor filed an ANDA, has never communicated with the FDA regarding an ANDA, and has never worked within the FDA or any pharmaceutical company. That all may be true, but it is of no moment. Professor Thomas has taught courses on the Hatch-Waxman Act at Georgetown Law School since 2002, has written a textbook concerning the Hatch-Waxman Act, patent law, and pharmaceutical drugs, and has been qualified to opine on ANDAs in district court before. *See, e.g.,* *Apotex, 2011 U.S. Dist. LEXIS*

154863. Defendants are free to argue to the jury that Dr. Thomas' lack of practical experience undermines his conclusions; the jury can evaluate that argument for what it is **[**51]** worth. I personally would find it unpersuasive.

6. George W. Johnston

Defendants move to exclude the opinions and testimony of Plaintiffs' expert, George W. Johnston, Esq.

Plaintiffs offer a report from George W. Jolmston, Esq., dated September 15, 2017 (Hamburger Decl. Ex. 12, Dkt. No. 438 ("Jolmston Rep.").) Plaintiffs retained Mr. Jolmston to assess what a reasonable and competent patent attorney would have advised the litigants at the time they settled the Namenda patent litigation in terms of 1) their likelihood of success in the litigation; 2) each of the parties' likely litigation costs; and 3) the likely litigation timing, if the parties had not settled, but rather had continued to litigate through a final, non- **[*185]** appealable judgment. (See Jolmston Rep. ¶ 15.)

A. Qualifications

Mr. Jolmston has spent his entire legal practice as a patent attorney, has over 40 years of experience, and has prosecuted hundreds of patent applications before the United States Patent and Trademark Office ("USPTO"). His experience with patents includes evaluating the patentability of inventions, the scope of patent claims, the validity and enforceability of patents, and the infringement of patents. (*Id.* at **[**52]** ¶ 2.)

He served for 17 years as Chief Patent Counsel for Hoffmarm-La Roche Inc. ("Roche") — a global pharmaceutical, bioteclmology, and diagnostic health care organization. (*Id.* at ¶¶ 3, 6.) During his tenure at Roche, Mr. Jolmston "advise[d] senior management on the likelihood that Roche would prevail in potential and actual patent litigations, the cost of the associated litigations, and the possible timing and duration of the litigations." (*Id.* at ¶ 5.)

Mr. Jolmston retired from Roche in 2013 as a Vice President and Chief Patent Counsel. (*Id.* at 10.) He continues to practice intellectual property law as Counsel at Gibbons P.C. (*Id.* at ¶ 11.)

Mr. Johnston has impressive credentials as a patent attorney and legal adviser to drug companies. He is certainly an expert in that capacity. The question is whether the opinions he offers in his report go beyond his area of expertise. I conclude that they do not.

B. Summary of George W. Johnston, Esq.'s Report

Mr. Johnston's detailed report begins with a brief description of the patenting process — clarifying that a "U.S. patent provides the patent holder with the right to seek to exclude others from making, using, selling, or importing the invention claimed **[**53]** in the patent for the period during which the patent is in force." (*Id.* at ¶ 19.) He also "discuss[es] the process for extending the term of a pharmaceutical patent under the Hatch-Waxman [and] the procedure under the Hatch-Waxman Act by which a generic manufacturer can challenge pharmaceutical patents listed in the Orange Book so it can enter the market before the patents expire." (*Id.* at ¶ 21.)

Then he provides summarized factual information about the Namenda patent ('703 patent) that would be known to a general counsel who was advising his client whether or not to settle a lawsuit — information about the patent's filing, its alleged inventive concept, and Forest's New Drug Application. (*Id.* at ¶ 26 - 35.) He notes that "The '703 patent relates generally to methods for the treatment or prevention of cerebral ischemia using adamantine derivatives, including memantine and amantadine. [It] recognizes that certain adamantine derivatives, including memantine, were already known and described in the art for the treatment of central nervous system disorders." (*Id.* at ¶ 31.) The '703 patent describes an alleged "new mode" of action of certain adamantine derivatives. As named inventor, Dr. Bormann, explained: "[t]he invented **[**54]** concept is that neurodegeneration is caused by calcium overload of the cells and that you can prevent neurodegeneration by memantine or by adamantine derivatives. That's the invention." (*Id.* at ¶ 32.) This summary of background information sets the stage for his opinion.

Mr. Johnston also recounts the prosecution history of the '703 patent, the USPTO's reexamination of the patent in 2004, and Forest's receipt of Paragraph IV challenges from 15 generic companies in 2007 **[*186]** and 2008. "In their Notice Letters, the Generic Companies argued a variety of defenses including noninfringement and invalidity of the '703 patent under *35 U.S.C. §§ 101*, *102*, *103*, *112*, *156*, and *305*." (*Id.* at ¶ 58.) "In response to the. . . Notice Letters, Forest and Merz instituted a number of Hatch-Waxman litigations in the United States District Court for the District of Delaware and elsewhere." (*Id.* at ¶ 59.) "In their Answers and Counterclaims in the Namenda Litigation, the Generic Companies asserted a number of defenses including: noninfringement; invalidity under *35 U.S.C. §§ 101*, *102*, *103*, *112*, *156*, and *305*; failure to state a claim; lack of subject matter jurisdiction; unclean hands; prosecution history estoppel; inequitable conduct; failure to comply with *35 U.S.C. § 156*; patent misuse; equitable intervening **[**55]** rights; as well as counterclaims seeking declaratory judgment of noninfringement and invalidity; an order to de-list the '703 patent from the Orange Book; and a declaratory judgment of invalidity of the patent term extension of the '703 patent." (*Id.* at ¶ 63.) A patent lawyer advising a client about the probability of success in an infringement lawsuit would of course have studied the file wrapper and become familiar with the patent's prosecution.

He then summarizes the history of all 15 of Forest's '703 patent litigations against the generic companies leading up to and including settlements in 2009-2010. That information is, of course, a matter of public record. He notes that "Mylan's case progressed the farthest," not settling until August 26, 2010.

He then examines other information that a reasonable patent counsel who was evaluating whether or not to settle a case would have taken into account. He explained data that showed the statistical likelihood that either a patentee or a challenger would win a Hatch-Waxman lawsuit — the actual track record in real litigations. He then evaluated, in the manner that a reasonable and competent patent attorney would, the information that was available to him about the merits **[**56]** of the Namenda litigation between Forest and Mylan. And as part of that analysis, he discussed in depth the legal claims and defenses raised. For example, he evaluates the strength of Mylan's invalidity defenses, including anticipation, obviousness, enablement and patent term extension. In doing so, he brought to bear his extensive knowledge of patent law and patent litigation. He reviews the evidence and expert opinions that Forest and Mylan planned to offer at trial. He analyzes them, and assesses the likelihood that a trier of fact would accept that evidence and those opinions. (*See id.* at ¶¶ 398 - 401.)

In short, he does exactly what he did time and again during his years as Chief Patent Attorney at Hoffman-LaRoche. And his conclusions are summarized in a table on page 94. (*See Id.* at ¶ 395.)

After conducting this thorough analysis, he offers the opinion on which Plaintiffs rely: "In my opinion, a reasonable and competent patent attorney at the time of the settlement of the Namenda Litigation likely would have concluded that overall Mylan had greater than a 60% chance of prevailing and that Forest Merz had less than [a] 40% chance of prevailing in this litigation through trial and **[**57]** appeal." (*Id.* at ¶ 16.)

Finally, he estimates the expected length and cost of the Namenda litigation, assuming Mylan and Forest had not settled and the case went to trial.

C. Analysis: Motion to Exclude George W. Johnston, Esq.'s Report

Defendants first argue the Mr. Johnston does not have the technical expertise required **[*187]** to opine on patent infringement and validity, because he is not one skilled in the art covered by the patent — he is a lawyer, not a chemist. They urge that allowing Johnston to offer his opinion would run counter to the Federal Circuit's holding in *Sundance, Inc. v. Demonte Fabricating Ltd., 550 F.3d 1356, 1363 (Fed. Cir. 2008)*.

Plaintiffs counter that Mr. Johnston is not offering independent technical expertise about whether the claims of the '703 patent were in fact valid or whether they were infringed by Mylan. They argue that he opines, from the perspective of a reasonable patent attorney with extensive experience in the area of patent law, about the likelihood that Mylan would succeed in its lawsuit against Forest. Plaintiffs note that Johnston relies on the conclusions of the parties' technical experts — persons who are "skilled in the art" — in reaching his own conclusions. (*See* Opper Decl. Ex. 8, Dkt. No. 421 ("Johnston Dep.") at 172:23 - 173:6 ("I **[**58]** had a different role than that of a technical expert. I had a very focused role in terms of what a reasonable patent attorney . . . say, a chief patent counsel, because we did it all the time, would have perceived as the likelihood of success at the time of settlement.").) Plaintiffs thus argue that his testimony does not run afoul of *Sundance*.

Sundance was a patent infringement case. In that case the district court had denied Sundance's motion *in limine* to exclude the testimony of an opposing expert, Bliss. Bliss was "a patent attorney with extensive experience in patent law and procedure." *Sundance, 550 F.3d at 1360*. He opined, on behalf of the alleged infringer, that the patent was invalid, and that if it were valid it was not infringed — even though Mr. Bliss had no technical expertise in the field of the patent. *See id.*

HN16[] The Federal Circuit reversed, concluding that the district court had abused its discretion by admitting Bliss' opinion evidence. The court emphasized that "Mr. Bliss is not qualified to testify as an expert witness on the issues of infringement or validity [as] Whese issues are analyzed in great part from the perspective of a *person of ordinaly skill in the art*" and Mr. Bliss lacked such **[**59]** skill. *Id. at 1361* (emphasis added). In other words, "Unless a patent lawyer is also a qualified technical expert, his testimony *on these kinds of technical issues* is improper and thus inadmissible." *Id. at 1362* (emphasis added).

"*Sundance* actually advises district courts to consider the perspective from which the relevant issue of patent law will be analyzed when the court determines whether an expert is qualified to testify as an expert on that issue." *Network-1 Techs., Inc. v. Alcatel-Lucent USA, Inc., No. 6:11 Civ. 492 (RWS), 2017 U.S. Dist. LEXIS 154434, 2017 WL 4173468, at *3 (ED. Tex. Sept. 21, 2017)* (citing *Aevoe Corp. v. AE Tech Co., No. 2:12 Civ. 0053 (GMN), 2014 U.S. Dist. LEXIS 117197, 2014 WL 4182343, at *2 (D. Nev. Aug. 20, 2014))*.

This case differs from *Sundance* in two important ways.

First and foremost, this is an antitrust case, not a patent infringement case; the Court's concern with the technical issues of patent infringement and validity is indirect.

Second, Mr. Johnston is not opining that the '703 is invalid, or that Mylan did not infringe the patent. Instead, he offers a "reasonable patent attorney's" assessment of the likelihood that Mylan would win its patent case — exactly the sort of assessment he would have offered his client during the nearly two decades when he served as Chief Patent Counsel of Hoffman-LaRoche.

[*188] Nonetheless, it would be naïve to **[**60]** conclude that Mr. Johnston's assessment of Mylan's likelihood of succeeding on its claims in the lawsuit does not include some tangential assessment on his part on the issues of the validity and infringement. True, he does not offer the sort of opinion that one skilled in the art would offer — a black-and-white, yes or no, opinion that the patent was or was not valid or infringed. But Johnson's assessment that Mylan's experts were more likely to be believed that Forest's, and his assignment of statistical likelihoods to those technical opinions necessarily depends on his lawyerly assessment of how the ultimate issues in that patent litigation would play out. His conclusion — that Mylan would more likely than not have managed to prove either invalidity or lack of infringement - had to rest on some assessment of the patent's validity and Mylan's defenses to Forest's charge of infringement.

That said, testimony by experienced lawyers about the likelihood that patent litigations will succeed or not succeed has been admitted in several *post-Actavis* reverse-payment cases. *See In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. CV 14-MD-02503, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *16 (D. Mass. Jan. 25, 2018)*; *In re Wellbutrin XL Antitrust Litig., 133 F. Supp. 3d 734 (E.D. Pa. 2015)*, *aff'd sub nom. In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class, 868 F.3d 132 (3d Cir. 2017)*, *judgment entered* ***[**61]*** *sub nom. In re Wellbutrin XL Antitrust Litig., 868 F.3d 132, 2017 WL 3529114 (3d Cir. 2017)*; *see also United Food & Commer. Workers Local 1776 v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 2017 U.S. Dist. LEXIS 182940, *117 (Nov. 3,* 2017 N.D. Cal.). Unfortunately, in none of those opinions does the court analyze the lawyer's credentials in any detail or so much as mention the issue identified by this Court in the preceding paragraph. But in every such case the issue was litigation risk and lawyers, not chemists, normally assess litigation risk for their clients.

Mr. Johnson unquestionably has the expertise to evaluate the things he assessed — from expert reports to patent file folders — and to draw conclusions about who is more likely to win a patent lawsuit. He has done it dozens of times for his employer; there is no reason why he should not be able to do it for Plaintiffs in this lawsuit. To the extent that his opinions rest on his evaluation of technical material — the opinions of the technical experts — he can be cross-examined about his knowledge of the underlying art, or the lack of the same. And of course Forest is offering the testimony of its own expert (*see* Hamburger Decl. Ex. 13, Dkt. No. 438 (Expert Report of Roderick McKelvie, Esq. ("McKelvie Rep."))) who will be testifying about his assessment of the merit or lack of merit to the Mylan patent case — the assessment that was actually made before **[**62]** the case settled.

As Judge Casper noted when she admitted "Johnston-like" expert testimony in *In re Solodyn*, "To the extent Defendants seek to challenge [an expert's] conclusions as to the likely outcome of the patent challenges, they may do so with their own expert testimony — as they have proposed to do." *2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *16*.

Defendants also argue that Mr. Johnston's opinion is flawed because he opines on the likelihood of succeeding on issues that Forest and Mylan did not intend to raise at trial. Defendants point to a "301-page pretrial order, which includes 187 pages of proposed findings of fact and conclusions of law from both sides" in the '703 patent case that Forest and Mylan were prepared to try. (Defs. Mot. to Exclude at 8.) Defendants complain that many of Mr. Johnston's opinions raise issues and legal arguments that were either **[*189]** undeveloped or completely absent from the parties' pretrial order.

However, Defendants have failed to identify any issue raised by Mr. Johnston that cannot be traced back to documentary evidence related to at least one of the Mylan's defenses identified in its pretrial order. That specific cases or facts were not identified with sufficient granularity in the pretrial order does **[**63]** not justify tying Mr. Johnston's hands. As Defendants do not point to either facts or case law that would justify such a conservative approach, the Court refuses to accept this argument. That said, if Mr. Johnson really did go beyond the issues that were actually in the Mylan-Forest litigation, it should be an interesting cross-examination.

Defendants also protest that Mr. Johnston's opinions constitute impermissible legal opinions and conclusions. However, this is a complex antitrust case involving a secondary body of law — here, patent law — that is not directly at issue. Given the nature of what Mr. Johnston was asked to opine on — the likelihood of success in a patent suit — he necessarily incorporates patent law into his opinion. The Court will not exclude this analysis. As I held with respect to Professor John Thomas's legal testimony, if Mr. Johnston strays beyond into matters that are irrelevant or otherwise inadmissible, I will be the first to disallow it.

Finally, Defendants complain that Mr. Johnston is not allowed to provide opinions that undermine the statutory presumption of patent validity — a presumption, they argue, that can be overturned only by clear and convincing **[**64]** evidence. After a review of the challenged portions of Mr. Johnston's report, it is clear that his opinions do nothing of the sort. (*See* Johnston Rep. ¶ 76 - 86; 87 - 109; 112 - 20.) Again, Defendants are free to cross-examine Mr. Johnston and to argue that he gave insufficient weight to that hard-to-disprove presumption.

Defendants' motion is DENIED.

II. DEFENDANTS' SUMMARY JUDGMENT MOTION AND PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Factual Background

This case's factual background and relevant regulatory scheme have been recounted at length in the Honorable Judge Sweet's opinion granting a preliminary injunction to New York, New York v. Actavis, PLC (Namenda I), No. 14 Civ. 7473, 2014 U.S. Dist. LEXIS 172918, 2014 WL 7015198, at *1 (S.D.N.Y. Dec. 11, 2014), the Second Circuit's decision affirming Judge Sweet's opinion, New York ex rel. Schneiderman v. Actavis PLC (Namenda II), 787 F.3d 638 (2d Cir. 2015), *cert. dismissed*, *136 S. Ct. 581, 193 L. Ed. 2d 421 (2015)*, as well as in two prior decisions of this Court — the first denying Forest's motion to dismiss, Sergeants Benevolent Association Health & Welfare Fund v, Actavis, PLC (Namenda III), Nos. 15 Civ. 6549, 15 Civ. 7488, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at *1-*8 (S.D.N.Y. Sept. 13, 2016)—and another granting in part and denying in part Plaintiff's motion for collateral estoppel and partial summary judgment, In re Namenda Direct Purchaser Antitrust Litigation (Namenda IV), No. 15 Civ. 7488 (CM), 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *1 (S.D.N.Y. May 23, 2017).[3]

In light of these prior rulings, the Court will not recite all of the facts of this case, but instead addresses only the factual and **[*190]** procedural **[**65]** background relevant to the motions addressed herein. The summary of facts in the following pages is drawn from *Namenda I—IV*, as well as from Defendants' Rule 56.1 Corrected Statement of Undisputed Material Facts ("DSoF"), Plaintiffs' Responses and Objections to DSoF ("PRSoF"), Plaintiffs' Affirmative Statement of Material Facts ("PASoF"), and Defendants' Objections and Responses to PASoF ("DRASoF").

Unless otherwise noted, these facts are not in dispute.

Parties

Forest manufactures and sells brand name pharmaceutical products, including the prescription pharmaceutical memantine hydrochloride ("memantine"), which is sold in the United States under the trade names "Namenda" (referred to here as "Namenda IR" to distinguish from Namenda XR) and "Namenda XR. " Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *2. Memantine is a treatment for moderate-to-severe forms of Alzheimer's disease. Forest developed Namenda IR pursuant to an exclusive license and cooperation agreement with Merz GmbH & Co. KGaA, Merz Phauna GmbH & Co. KGaA, and Merz Pharmaceuticals GmbH (collectively, "Merz Entities"), which owned the relevant patent for a memantine-based drug.[4] *Id.*

Named Plaintiff Smith is a South Carolina corporation that purchased Namenda IR directly from **[**66]** Forest. Smith alleges that, during the class period, it paid prices higher than it would have absent Defendants' anticompetitive conduct. *Id.*

Named Plaintiff RDC is a New York corporation that also purchased Namenda IR directly from Forest which it alleges were at supracompetitive prices.[5] *Id.*

Regulatory Background

This case involves the rules set forth in (1) the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 et seq., which governs the manufacture, sale, and marketing of pharmaceuticals in the United States; and (2) the Drug

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[3] Unless otherwise noted, all references to the *Namenda* opinions are to the public, redacted versions where applicable.

[4] The Merz Entities were originally named defendants to some of the counts in, the amended complaint. On April 20, 2017, the parties entered a stipulation naming Forest Laboratories, Inc. and Forest Laboratories Holdings Ltd. as defendants to Counts III, IV, and V, and dismissing the Merz Entities as defendants (*See* Did. No. 207.)

[5] On December 28, 2015, RDC filed an identical complaint against Forest and Merz. All parties stipulated to consolidation of the two duplicative actions, with the Smith Complaint serving as the operative complaint in the consolidated action (*see* Dkt. No. 12, Case No. 15 Civ. 10083), and an amended caption to reflect consolidation: *In Re Namenda Direct Purchaser Antirust Litigation. (See* Dkt. No. 22, Case No. 15 Civ. 10083.)

Price Competition and Patent Term Restoration Act (the "Hatch-Waxman Act"), *Pub. L. No. 98-417, 98 Stat. 1585*; *2017 U.S. Dist. LEXIS 83446, [WL] at *2 - *3*.

HN17[] Under the FDCA, a pharmaceutical company must submit a New Drug Application ("NDA") to the FDA before it may bring a new drug to market. *See generally* *21 U.S.C. § 355*; *Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *2*. Because the NDA must provide the FDA with sufficient scientific data to demonstrate that the new drug is safe and effective, the testing and approval process is generally "long, comprehensive, and costly." *FTC v. Actavis, Inc., 570 U.S. 136, 142, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*; *Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *2*. Once approved, though, a patented drug enjoys a period of market exclusivity. *Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *2*. That period ends when the drug's patent expires and one or more low-cost generic versions of **[**67]** the drug enter the market and compete with the brand-name drug — what **[*191]** is referred to as going off the "patent cliff." *Namenda II, 787 F.3d at 643*.

HN18[] The Hatch-Waxman Act makes it easier for manufacturers of generic drugs to compete with brand-name drug producers. *Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *3*. As relevant here, the Hatch-Waxman Act provides two methods by which a brand-name drug manufacturer can extend its period of market exclusivity. *Id.*

First, a manufacturer can seek an extension of its patent from the USPTO to account for the time the manufacturer spent obtaining approval from the FDA for its brand-name drug. *35 U.S.C. § 156*. That extension can last no more than five years. *Id.* at *§ 156(g)(6)*; *Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *3*.

Second, a brand-name drug manufacturer can obtain a six-month period of "pediatric exclusivity" if it conducts certain pediatric studies and the FDA determines that use of the drug in children may produce health benefits. *21 U.S.C. § 355a*. A grant of pediatric exclusivity does not extend the length of the underlying patent, but can operate to exclude generic competition by delaying the date by which the FDA may approve generics for sale. *Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *3*.

HN19[] Under the Hatch-Waxman Act, the manufacturer of a generic version of an FDA-approved drug may file an Abbreviated New Drug Application ("ANDA"), which **[**68]** allows the generic manufacturer to rely upon the studies submitted by the brand-name drug manufacturer in connection with the original NDA to prove that the generic version of the drug is safe and effective. *Id.* The ANDA filer must certify that its generic drug, among other things, has the same active ingredient as, and is "bioequivalent" to, the previously-approved drug. *21 U.S.C. § 355(j)(2)(A)(ii)*, *(iv)*; *Namenda II, 787 F.3d at 644*. A generic drug is bioequivalent to the brand-name drug if it has the same "rate and extent of absorption" of the active ingredient as that of the brand-name drug. *21 U.S.C. § 355(j)(8)(B)(i)*; *Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *3*. "In other words, two drugs are bio equivalent if they deliver the same amount of the same active ingredient content into a patient's blood stream over the same amount of time." *Namenda II, 787 F.3d at 644*.

Facts of the Case

A. Settlement Agreements

Forest launched Namenda IR in the United States in January 2004, under the '703 Patent, which granted Forest the exclusive right to market a memantine-based drug in the United States. *Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *5*. Forest then applied for and received a five-year extension to the '703 Patent, which was set to expire in April 2010 (an extension permitted under *35 U.S.C. § 156* for the time Forest spent obtaining FDA approval). *Id.* Namenda IR was also approved for six months of pediatric exclusivity **[**69]** in June 2004. *2017 U.S. Dist. LEXIS 83446, [WL] at *6*.

At least 17 generic drug manufacturers filed ANDAs seeking to market generic versions of Namenda IR. *Id.* Defendants timely brought suits for patent infringement, but ultimately reached a number of settlement agreements. *Id* Each agreement contained a virtually identical provision that Plaintiffs assert was anticompetitive, which granted the competitors a license to begin selling a generic version of Namenda IR beginning three months prior to the later of: (1) the expiration of the '703 Patent or (2) the end of any pediatric exclusivity period attached to the '703 Patent. *Id*, With the six-month exclusivity period in place, this meant that the generic competitors could not begin selling generic versions of Namenda IR until July 11, 2015. *Id.*

[*192] B. The "Hard Switch"

Forest obtained FDA approval for Namenda XR in June 2010 and began marketing Namenda XR in July 2013. *2017 U.S. Dist. LEXIS 83446, [WL] at *7*. Namenda IR and Namenda XR contain the same active ingredient and have the same therapeutic effect, but Namenda IR is a tablet taken twice a day that releases directly into the bloodstream while Namenda XR is a capsule that is taken once a day and releases gradually. *Id.* They are not, therefore, "bioequivalents" under the FDA's definition **[**70]** of that term, and so cannot be substituted for one another under any drug substitution law that requires substitutes to be certified by the FDA as bioequivalents. Similarly, generic drugs that are bioequivalents of Namenda IR cannot be substituted for Namenda XR under the same standards.

The key non-pharmacological difference between Namenda IR and Namenda XR relates to their patent protection. Namenda XR's period of patent exclusivity does not expire until 2029, while Namenda IR's expired in 2015. *Namenda II, 787 F.3d at 647*.

When Forest brought Namenda XR to market in 2013, it engaged in a variety of "soft-switch" tactics to encourage patients and physicians to convert from Namenda IR to Namenda XR before Namenda IR lost its patent protection in 2015. *See id. at 647 - 48*. For example, it priced Namenda XR below Namenda IR; it stopped actively marketing Namenda IR; and it heavily promoted the benefits of Namenda XR, including its lower price and once-daily dosage. *Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *7*.

Judge Sweet concluded in *Namenda I* that Forest executives were concerned about the company's ability to convince a sufficient number of patients to convert to Namenda XR prior to generic entry, making a "hard switch" necessary. *Namenda I, 2014 U.S. Dist. LEXIS 172918, 2014 WL 7015198, at *18*. It is undisputed that, on February **[**71]** 14, 2014, Forest announced by press release, notice to the FDA, and letters to physicians and patients, that it was taking Namenda IR off the market on August 15, 2014. *Id.* Four months later, however, Forest announced that it would continue selling Namenda IR through the fall of 2014 due to manufacturing issues with Namenda XR. *2014 U.S. Dist. LEXIS 172918, [WL] at 22*.

C. The Mylan Reverse Payment Agreement

By 2002, Forest had a license to market a drug named Lexapro. (DSoF ¶ 180.) On October 3, 2005, Forest and Alphapharm (later acquired by Mylan), entered into a distribution and supply agreement for authorized generic Lexapro ("the Original Lexapro Agreement.") (*Id.* at ¶ 182.) By the tennis of the Original Lexapro Agreement, Forest would supply Alphapharm's requirements of generic Lexapro for sale and distribution, and Alphapharm would market, but not manufacture, an authorized generic version of Lexapro. (*Id.* at ¶ 184 - 87.)

Alphapharm agreed to pay Forest a 40% share of its "product profit," which the agreement defined as Alphapharm's net sales less Forest's manufacturing costs. (*Id.* at ¶ 189 - 90.)

The '712 Patent was set to expire on March 12, 2012, at which point Teva, the sole first-filing ANDA applicant, was permitted to launch **[**72]** its version of generic Lexapro on March 12, 2012 and was entitled to 180 days of exclusivity under the Hatch-Waxman Act, in that the FDA would not finally approve another ADNA during that time. (DSoF ¶ 194; PRSoF ¶ 194.) Under the Agreement, Alphapharm was allowed to launch its authorized generic two weeks before Teva's date of entry on February 27, 2012. (*Id.* at ¶¶ 188, 193; **[*193]** PRSoF ¶ 193.) The Original Lexapro Agreement had a five year term (starting with Lexapro patent expiry), with a one-year minimum. (PRSoF ¶ 218(e).) Mylan acquired Alphapharm in 2007. (DSoF ¶ 218.)

The Medicaid Drug Rebate Program ("MDRP"), which was established by Congress in 1990, required brand manufacturers to pay a rebate to the government on prescription drugs reimbursed by Medicaid. (DSoF ¶ 197.) The MDRP requires participating drug manufacturers to pay a rebate on those drugs for which a state's Medicaid agency has paid pharmacies to dispense the drug to Medicaid beneficiaries. (*Id.* at ¶ 198.) To determine the rebate amount owed by a manufacturer, the Centers for Medicare & Medicaid Services ("CMS") calculates a per-unit rebate amount ("URA") based on a statutory formula. (*Id.* at ¶ 199.)

The URA for a drug **[**73]** is tied to a product's "Best Price" or, "the lowest price available from the manufacturer during the rebate period to any wholesaler, retailer, provider, health maintenance organization, nonprofit entity, or governmental entity within the United States. . ." (*Id.* at ¶ 200.) The URA is calculated, in part, using a brand manufacturer's commercial sales and discount data. (*Id.* at ¶ 201.)

The *Deficit Reduction Act of 2005 ("DRA")*, in large part, became effective on January 1, 2007. (*Id.* at ¶ 202.) The Final Rule implementing the DRA (the "DRA Final Rule") became effective October 1, 2007. (*Id.* at ¶ 203.) The DRA amended the definition of Best Price to include, for the first time, the lowest price of an authorized generic drug. (*Id.* at ¶ 206.) On January 23, 2008, the CMS clarified that the DRA Final Rule "provides that the primary manufacturer include the best price of an authorized generic drug in its calculation of best price when the drug being sold by the primary manufacturer to the secondary manufacturer. In accordance with this provision, we expect that the primary manufacturer report a BP [best price] which incorporates the transfer price at the time of sale to the secondary manufacturer **[**74]** for the quarter in which the sale occurs, regardless of when the product is launched." (*Id.* at ¶ 207.) The transfer price is generally reflective of the cost to manufacture a drug. (*Id.* at ¶ 209.)

Under the Original Lexapro Agreement, Forest was a primary manufacturer, and Aiphapharm was a secondary manufacturer. (*Id.* at ¶ 208.) Generally, the lower a manufacturer's best price is, the higher its Medicaid Rebate liability will be. (*Id.* at ¶ 212.)

It is undisputed that the DRA exposed Forest to more Medicaid liability than it was exposed to when it entered the agreement in 2005, since under the new rule Forest would now have to include the best price of generic Lexapro in its calculation of best price. (*Id.* at ¶ 208 - 14; PRSoF ¶ 214.) It is also undisputed that the parties negotiated and amended its Lexapro Agreement ("the Lexapro Amendment"), which was executed on July 21, 2010. (DSoF ¶ 255.)

The parties dispute, however, the content and validity of Forest's cost-benefit analysis while it was negotiating the Lexapro Amendment.

According to Defendants, Forest performed three analyses to assess the potential benefits of amending the Original Lexapro Agreement: (1) a comparison of Forest's post-DRA Medicaid Liability under **[**75]** the Original Lexapro Agreement and Forest's liability pursuant to a potential amendment requiring Mylan to manufacture generic Lexapro ("Medicaid Liability Analysis"), (2) a forecast projecting Forest's profit share revenue under the Original **[*194]** Lexapro Agreement and a potential amendment to that agreement ("The Lexapro Sales Forecasts"), and (3) a projection of the potential costs of goods sold savings Mylan could achieve if it manufactured generic Lexapro ("COGS Summary"). (DSoF ¶ 215.)

According to Plaintiffs, the documents underlying Forest's analysis are unreliable. Plaintiffs point out that the final analyses were not created until after Forest and Mylan told the Namenda IR patent court that it had reached a settlement in principle; thus, they could not have been performed to assess the "potential benefits" of the transaction, which had already been agreed to. (PRSoF ¶ 214.)

D. The Other Reverse Payments

The parties do not provide the Court with the same level of detail about the other reverse payment agreements. Here is what we know: Forest settled with approximately eleven generic companies, with each settlement providing for up to a $2 million cash payment, and generic launch dates **[**76]** three months prior to Forest's statutory exclusivity, absent any extension for pediatric exclusivity or the triggering of the accelerated launch provisions if other generics came in early.

Procedural History

There have been two dispositive motions in this case.

On September 13, 2016, this Court denied Defendants' motion to dismiss — finding, in brief, that Plaintiffs stated a claim for product hopping (based on the planned "hard switch"), stated a claim based on the settlement agreements with generic manufacturers, and Plaintiff claims were not time-barred. (Dkt. No. 106.) This Court dismissed Plaintiffs' overarching scheme claim (Count II) as duplicative. (*See id.*)

A few months later, Plaintiffs moved for collateral estoppel and partial summary judgment on Count One (Dkt. No. 134) and for partial summary judgment on Count Five (Dkt. No. 138). Defendants cross-moved for partial summary judgment on Count Five (Dkt. No. 161). On May 23, 2017, this Court denied both motions for partial summary judgment on Count IV. This Court also granted Plaintiffs' motion for collateral estoppel, finding:

> Because all of the elements of collateral estoppel are met, Forest is precluded from relitigating the **[**77]** questions of (1) whether it possessed monopoly power over the U.S. memantine market up until the entry of generic competition; (2) whether its February 2014 announcement of the upcoming discontinuation of Namenda IR was coercive and anticompetitive; and (3) whether Forest had any non-pretextual procompetitive justification for its illegal conduct. Plaintiffs' motion for collateral estoppel on these issues of fact is GRANTED. They will be presented to the jury as already decided.

*Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *16*.

This Court, however, denied Plaintiffs' motion for partial summary judgment on Count One since outstanding questions of material fact remained regarding antitrust injury, which is a necessary element of Plaintiffs' *Section 2* claim.

Defendants now move for summary judgment dismissing all claims in Plaintiffs' First Amended Complaint. (Dkt. No. 434.)

Plaintiffs move to certify a class comprised of 62 direct purchasers of Namenda. (Dkt. No. 400.)

Discussion

Summary Judgment Standard

HN20[] A party is entitled to summary judgment when there is no "genuine issue **[*195]** of material fact" and the undisputed facts warrant judgment for the moving party as a matter of law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *see also* *Fed. R. Civ. P. 56*. In addressing a motion for summary judgment, "[t]he court must **[**78]** view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in [its] favor." *L.B. Foster Co. v. Am. Piles, Inc., 138 F.3d 81, 87 (2d Cir. 1998)*. Whether any disputed issue of fact exists is for the Court to determine. *See* *Balderman v. United States Veterans Admin., 870 F.2d 57, 60 (2d Cir. 1989)*. The moving party has the initial burden of demonstrating the absence of a disputed issue of material fact. *See* *Celotex v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Once such a showing has been made, the nonmoving party must present "specific facts showing that there is a genuine issue for trial." *El-Nahal v. Yassky, 835 F.3d 248, 256 (2d Cir. 2016)*, *cert. denied*, *137 S. Ct. 2187, 198 L. Ed. 2d 255 (2017)* (internal quotation marks and citations omitted). The party opposing summary judgment "may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998)*.

HN21[] Moreover, not every disputed factual issue is material in light of the substantive law that governs the case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson, 477 U.S. at 248*. Finally, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. With these **[**79]** principles in mind, I turn to the claims presented.

Analysis

Defendants move for summary judgment dismissing all claims.

All remaining claims assert that Defendants violated the Sherman Antitrust Act. Count I alleges unlawful maintenance of monopoly power under *Section 2* of the Sherman Act for forcing Namenda IR consumers to switch to Namenda XR. Count III alleges unlawful maintenance of monopoly power under *Section 2* of the Sherman Act for entering into agreements with generic manufacturers to delay generic entry for three months past the expiration of the '703 patent. And Counts IV and V allege restraint of trade under *Section 1* of the Sherman Act for entering into agreements with potential generic manufacturers to delay their entry into the market for three months beyond the expiration of the '703 patent term.

Defendants have moved for summary judgment on the following grounds: (1) there is no evidence in the summary judgment record that Forest's settlements with the generic manufacturers contained an unlawful reverse payment; (2) there is no triable issue of fact related to Plaintiffs' overarching conspiracy claim; (3) Plaintiffs have failed to make the requisite showings of causation; and (4) Plaintiffs have failed to establish **[**80]** that they have suffered antitrust injury as a result of Forest's February 2014 announcement.

A. Plaintiffs' Overarching Conspiracy Claim Was Dismissed

As an initial matter, Forest's motion for summary judgment on Plaintiffs' "overarching conspiracy claim," which was Count II of their complaint is moot. (*See* Am. Compl., Dkt. No. 26 at ¶¶ 244 - 50.) **[*196]** As mentioned above, this Court dismissed this count in its September 13, 2016 decision on Defendants' motions to dismiss. (*See* Dkt. No. 106 at 33.)

Moreover, Plaintiffs have abandoned their inter-generic conspiracy claim (Count IV). (*See* Pls.' Mem. of Law in Opp'n to Defs. Mot. for Summary Judgment at 1.)

There are genuine issues of material fact precluding summary judgment with respect to Forest's two other grounds for summary judgment, which I address in turn below.

B. Defendants' Motion for Summary Judgment on all Claims Arising from Forest's Alleged Reverse Payments to Generic Manufacturers is DENIED

Defendants move for summary judgment on all claims arising from Forest's patent settlement agreements with generics, arguing that Forest made no illegal reverse payments as part of their settling of the various Namenda patent challenges.

The Court **[**81]** concludes that Plaintiffs have offered sufficient evidence such that a reasonable juror could find that Forest's payments to generics did not merely compensate them for avoided litigation costs or fair value for services — and thus were large and unjustified reverse payment in violation of the antitrust laws.

1. Which Settlement Agreements Are at Issue

As an initial matter, Forest argues that discovery eliminated the vast majority of Plaintiffs' reverse payment claims. In their First Amended Class Action Complaint (Dkt. No. 29), Plaintiffs asserted that Forest entered into anticompetitive reverse payment settlement agreements with approximately eleven first filer generic manufacturers. (Am. Compl. at ¶ 113.) Forest contends that, after discovery failed to support their wide-ranging allegations, Plaintiffs functionally abandoned their challenges to all but one of these agreements — the Forest-Mylan Agreement.

The following discussion analyzes the Forest-Mylan Agreement only. The fact remains, however, that the anticompetitive conduct at issue in this case is premised on the alleged barriers to entry put in place by Forest to prevent *all* generic competition, not just Mylan's. Given that **[**82]** the Forest-Mylan settlement was the very last patent settlement agreement Forest entered into, all of the other settlements to keep generic companies from competing that were signed before the Forest-Mylan settlement undergird and compound the anticompetitive effect of the Forest-Mylan deal. This fact is well-illustrated by a February 11, 2010 Forest-Mylan settlement presentation, in which Forest explained that if Mylan would have won the Namenda patent litigation, there would have been "No Financial Upside" because Mylan's profits would have been "miniscule" due to the . . . prior settling Namenda generics having provisions in their agreements that provided for immediate and simultaneous market entry if Mylan won the patent dispute, [thereby] lowering Mylan's potential generic Namenda profits." PASoF ¶ 236 - 37.

Nonetheless, Forest argues that Plaintiffs have abandoned their claims relating to all but Mylan. As a result, in the papers supporting its motion, Forest does not make a particularized showing about why summary judgment should be granted with regard to any of the other agreements that were identified in the complaint as anticompetitive. It simply asserts that Plaintiffs have **[**83]** abandoned those claims, and offers evidence and argument about why the ForestMylan settlement does not violate the antitrust laws.

[*197] Plaintiffs have taken no affirmative steps to indicate that it has abandoned all claims related to its other eleven or so alleged reverse payments — that is simply an assertion by Forest. In its responsive papers, it neither agrees with Forest that those claims have been abandoned nor offers any evidence that would tend to show that the agreements were in fact anti-competitive. Of course, as the party opposing the motion for summary judgment, Plaintiffs had no obligation to discuss agreements that were not addressed on the merits by Forest. But they should have addressed Forest's contention that they were abandoning those claims.

I am going to address the Forest-Mylan agreement, as to which there are myriad genuine issues of material fact that preclude summary judgment. Plaintiffs have ten days from the date of this decision to advise the Court whether they are pursuing claims related to the other reverse payment agreements. If they are, we will simply take those claims to trial.

2. Legal Standards

HN22[] In *F.T.C. v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*, the Supreme Court held that a reverse payment settlement **[**84]** — that is, a payment by a patentee to a claimed infringer — is not presumptively either lawful or unlawful, but will be subject to antitrust scrutiny in certain circumstances. Reverse payments are of particular concern when they demonstrate "that the patentee [sought] to induce the . . . [infringer] to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market." *Id. at 154*. To violate ***antitrust law***, a reverse payment must be both "large and unjustified." *Id. at 158*.

A payment's size may indicate that "the patentee likely possesses the power to bring [an unjustified anticompetitive] harm about in practice." *Id. at 157*. In other words, a large reverse payment may signal that the patentee possessed "the power to charge prices higher than the competitive level" and may be using that power to keep others from entering its market. *Id.* Such a payment may also indicate a patent holder's concern about the validity of its patent, such that "the size of the payment may very well correspond with the magnitude of that concern." *In re Lipitor Antitrust Litig., 868 F.3d 231, 251 (3d Cir. 2017)*, *cert. denied sub nom. Pfizer Inc. v. Rite Aid Corp., 138 S. Ct. 983, 200 L. Ed. 2d 300 (2018)*, and *cert. denied sub nom. Wyeth LLC v. Rite Aid Corp., 138 S. Ct. 984, 200 L. Ed. 2d 300 (2018)*.

HN23[] The Supreme Court in *Actavis*, however, acknowledged that there also might be "legitimate justification[s]" **[**85]** for a reverse payment settlement, including, but not limited to, "avoided litigation costs or fair value for services." *Actavis, 570 U.S. at 156*. The Court directed district courts to apply the traditional rule of reason analysis when evaluating reverse payment settlements. *See id.*

> Rule of reason analysis proceeds in three steps. First, the plaintiff bears the initial burden of showing that the defendant's conduct "had an actual adverse effect on competition as a whole in the relevant market." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)* (emphasis in original). If plaintiff satisfies this burden, the burden then shifts to defendant to offer evidence that its conduct had pro-competitive effects. *Id.* If defendant is able to offer such proof, the burden shifts back to plaintiff, who must prove that any legitimate competitive effects could have been achieved through less restrictive alternatives. *Id.*

[*198] *Arkansas Carpenters Health & Welfare Fund v. Bayer AG, 604 F.3d 98, 104 (2d Cir. 2010)*, as corrected (June 17, 2010).

"To survive summary judgment, the plaintiffs must present a 'genuinely disputed issue of material fact' as to the elements of the rule of reason analysis; only then will the case go to a jury." *In re Wellbutrin XL Antitrust Litig., 133 F. Supp. 3d 734, 754 (E.D. Pa. 2015)*, *aff'd sub nom.* *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class, 868 F.3d 132 (3d Cir. 2017)*, *judgment entered sub nom.* *In re Wellbutrin XL Antitrust Litig., 868 F.3d 132, 2017 WL 3529114 (3d Cir. 2017)*.

3. Reverse [86] Payment Analysis**

This Court predicted in *Namenda IV* that, "Whether the settlement agreements were anticompetitive or procompetitive will depend on several complex factual questions that cannot be decided on summary judgment." *2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *19*. As demonstrated by the host of genuine issues of material fact emanating from the papers filed in connection with this motion, I was correct.

In their briefing on the alleged unlawful reverse payment, the parties analyze several components of the Forest-Mylan agreement, including a cash payment from Forest to Mylan, an agreed early entry date with the possibility of acceleration, and the Lexapro Amendment. Since I am denying the motion, I will use the Lexapro Amendment to illustrate why.[6]

The Court finds that Plaintiffs have offered enough evidence to allow a reasonable finder of fact to conclude that Plaintiffs have established *a prima facie* case for imposing antitrust liability. Although Defendants have offered procompetitive justifications for the Lexapro Amendment — particularly evidence that may indicate that the Lexapro

[6] Because Plaintiffs have raised genuine issues of material fact regarding whether the Lexapro Amendment constituted an unlawful reverse payment, they have likewise raised genuine issues of material fact as to whether the deal, taken as a whole, constituted an unlawful reverse payment. The Court need not discuss each component. All claims related to Forest's settlement agreements with Mylan will go to trial.

Amendment was a fair market value deal — Plaintiffs have offered some evidence that the Amendment was not fair, but instead, constituted overcompensation for agreeing not to compete.

a. Lexapro Amendment

The initial burden of proof lies **[**87]** with Plaintiffs, who must show that Defendants' conduct had an actual adverse effect on competition.

As a threshold issue, the parties disagree about whether the Lexapro Amendment was even a part of the Forest-Mylan patent settlement.

Forest claims that its in-house counsel negotiated the Namenda patent settlement with Mylan and that a "largely separate team" of Forest business people negotiated the Lexapro Amendment with Mylan. Nonetheless, it is undisputed that both the settlement agreement and Lexapro Amendment were executed on the same day, July 21, 2010, and that there were certain personnel of whom were aware of both agreements. (PASoF ¶ 239.)

Plaintiffs, on the other hand, contend that the Lexapro Amendment was linked to the Namenda patent settlement. As evidence, they point to Mylan Deal Concept documents reflecting the "proposed structure" of the Namenda patent settlement, which featured the amendment to the Original Lexapro Agreement. (PASoF ¶ 229.) The January 20 document listed, as "Potential Transaction Benefits to Mylan," **[*199]** "at least $1.5MM in manufacturing cost savings gained through Mylan's control of drug product manufacturing and packaging[.]" (PASoF ¶ 232.) Plaintiffs also point to Forest's in-house and outside counsel repeatedly referring to the Lexapro Amendment as a "side-deal" **[**88]** to the Namenda patent dispute (PASoF ¶ 243), along with a February 11, 2010 Forest-Mylan meeting presentation that explicitly presents the Lexapro Amendment and Namenda patent settlement as a package. (PASoF ¶ 240.)

On this point, Plaintiffs have presented enough evidence to allow a rational juror to conclude that the Lexapro Agreement was a part of the Forest-Mylan patent settlement.

Plaintiffs have also presented sufficient evidence to allow a rational juror to conclude that the Lexapro Amendment had an anticompetitive effect that outweighed its procompetitive effects.

Forest contends that the Lexapro Amendment did not disguise a payment for delayed generic entry, but was instead a fair value business deal between Forest and Mylan, based on arm's length negotiations and reasonable business expectations at the time of agreement. Plaintiffs counter that the Lexapro Amendment was both large and unjustified. They claim that the Lexapro Amendment conferred $32.5 million to Mylan — ten times Forest's saved litigation costs of $3.5 million. (PRSoF ¶ 280.) Plaintiffs point again to Forest's 2011 settlement presentation, in which Forest points out that "the money it was proposing to pay to Mylan — including 'millions of dollars' from modifying the 'LEXAPRO authorized generic deal' — 'provides **[**89]** *more* value than Mylan's forecasted profits for generic memantine[.]" (PASoF ¶ 235-38 (emphasis added).)

This admission is enough to create a genuine issue of material fact. "A reasonable jury could find that a reverse payment to a generic manufacturer that comes close to or exceeds the expected profits to be earned by prevailing in the patent litigation could induce a generic manufacturer to forfeit its claim." *King Drug Co. of Florence v. Cephalon, Inc., 88 F. Supp. 3d 402, 417 (E.D. Pa. 2015)*.

Part of Forest's explanation for the $32.5 million reverse payment is that it compensated Mylan for accepting manufacturing responsibility for authorized generic Lexapro, thereby allowing Forest to avoid $26.5 million in Medicaid rebate liability.

Plaintiffs argue that this claimed reduction was both inflated and pretextual. Plaintiffs point out that the final analyses were not created until after Forest and Mylan told the Namenda IR patent court that it had reached a settlement in principle. (PRSoF ¶ 214.) Plaintiffs claim that Forest employees manipulated the rebate liability analyses to inflate the forecasted rebate savings to just about equal the reverse payment to Mylan. They point to convenientlt-timed changes to the royalty rate rates made in March 2010, which inflated **[**90]** the purported rebate savings. (PASoF at ¶¶ 265-67.)

Plaintiffs have presented enough evidence that rebuts Defendants' procompetitive justifications to get to trial.

Defendants' motion for summary judgment dismissing Plaintiffs' claims related to Forest's settlement agreements with generics is DENIED.

C. Defendants Are Not Entitled to Summary Judgment Because Plaintiffs Carry Their Burden on Causation

Defendants argue that they are entitled to summary judgment because Plaintiffs **[*200]** have not raised a genuine issue of material fact on the issue of causation.

HN24[] "Causation in fact is, of course, a necessary element of any claim for relief." *In re Actos End-Payor Antitrust Litig., 848 F.3d 89, 97 (2d Cir. 2017)* (quoting *Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 41 (2d Cir. 1986)*. "An antitrust plaintiff must show that a defendant's anticompetitive act was a "material" and "but-for" cause of plaintiffs injury, although not necessarily the sole cause." *In re Actos, 848 F.3d at 98* (quoting *In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 65 - 66 (2d Cir. 2012))*. A plaintiff "need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; *see also In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 695 (2d Cir. 2009)*.

Here, Plaintiffs offer two alternative causation theories: (1) but for Forest's reverse payment, Forest and Mylan would have entered a no-payment settlement with an earlier entry date based on the bargaining strength of the parties; **[**91]** and (2) absent a settlement Mylan would have prevailed in the patent litigation and entered earlier than the agreed-to entry date.

Defendants argue that both theories are based on insufficient evidence and are speculative. Against, the Court disagrees.

1. Early Entry Date But for Reverse Payment

Plaintiffs' first causation theory is that the parties would have agreed to an earlier generic entry date but for the alleged reverse payment. Plaintiffs rely primarily on expert opinions to support this causation theory.

As discussed in section 1.2, *supra*, Plaintiffs rely on a report from Professor Einer Elhauge addressing what economic analysis reveals about Forest and Mylan's settlement of the Namenda IR patent litigation, including whether an alleged reverse payment from Forest to Mylan delayed generic entry into the market and what the settlement entry date would have been in a no-payment settlement. (*See* Elhauge Rep. ¶ 1.) Professor Elhauge's report was admitted with the caveat that he cannot offer an opinion about when entry "would have" occurred, so as not to usurp the role of the factfinder. Professor Elhauge is, however, allowed to testify that by specific dates "it would have been economically **[**92]** rational for both parties" to enter into a no-payment settlement in a "but for" world (*e.g.*, November 2012). (Elhauge Dep. Tr. at 225:18 - 227:18.)

Forest attacks Professor Elhauge's assertions as speculative and largely repeats the arguments made in its motion to exclude. This Court has already held that it will not prevent Professor Elhauge from offering his opinion on this but-for scenario as a general matter. (*See* section 1.2., *supra*.)

Forest argues that the evidence suggests that it would not have agreed to a settlement allowing generic Namenda entry in November 2012. In support of this argument, Forest cites to *post hoc* testimony of its own employees. For example, Forest points to testimony from its Chief Intellectual Property Counsel, who was responsible for overseeing the Namenda patent litigation at the time of the settlement. He testified that a settlement agreement with Mylan allowing generic entry in 2012 would have been neither feasible nor acceptable to Forest. (*See* Hamburger

Decl. Ex. 18, Did. No. 438 ("Ryan Dep. Tr.") at 394:21 - 395:4.) "At most defendants criticize plaintiffs' experts for failing to consider or adequately consider certain points they believe are significant . **[**93]** . . disagreements **[*201]** of which] are the subject for cross-examination." *Teikoku Pharma USA, 296 F. Supp. 3d at 1164*. ***HN25***[] It is up to the jury to weigh the evidence.

The evidence raises a "genuine dispute of material fact on this causation theory." *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. CV 14-MD-02503, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *16 (D. Mass. Jan. 25, 2018)*.

2. Early Entry Date After Mylan Won '703 Patent Litigation

Plaintiffs' second causation theory is that if Forest and Mylan had not settled, Mylan would have likely prevailed in the patent litigation through trial and appeal and entered the market earlier than it did.

While Defendants argue that Plaintiffs may not establish causation and antitrust injury by reference to a hypothetical patent trial between Forest and Mylan, this Court has already held that it could. *See* *Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *19* (The viability of Plaintiffs' *Section 1* claim "will depend on the presence of 'evidence suggesting that the settlement agreements did, in fact, delay generic entry,' which will presumably require proof that the '703 Patent would likely have been found invalid or not infringed by the Generic Competitors.")

Defendants point to the patent court's favorable *Markman* ruling and the subsequent settlements by Forest and the generics of the patent challenges as evidence that Forest's patent **[**94]** was unlikely to fail. Plaintiffs counter that the subsequent settlements had nothing to do with the patent merits, but are instead evidence — as Forest explained to Mylan during settlement discussions — that the generics recognized that there was "no financial upside to litigating." (PASoF ¶¶ 56 - 57.) In other words, they argue that the settlements were recognition that there were fourteen first filers who would share the 180-day exclusivity window and that sales and profits for generic memantine would be miniscule as a result. However, the Court need not resolve this issue for purposes of summary judgment.

As discussed in section I.6.C., *supra*, the court admits the opinions of Plaintiffs' expert George W. Johnson, Esq. Given this testimony, Plaintiffs have proffered evidence sufficient to raise a genuine dispute of material fact on this causation theory.

Defendants' summary judgment motion is DENIED.

D. Defendants are Not Entitled to Summary Judgment on Plaintiffs' Hard Switch Claims

Defendants move for summary judgment on Forest's hard switch claims arguing that Defendants cannot establish that the proposed class members suffered antitrust injury as a result of Forest's February 2014 announcement. **[**95]** In support of this motion, Defendants rely on the same arguments made in their motion to exclude the testimony of Plaintiffs' expert, Dr. Lamb, addressed in section 1.3., *supra*. (*See* Did. No. 445.)

For the reasons discussed therein, Defendants' motion is DENIED.

Plaintiffs' Motion for Class Certification is GRANTED

Class Certification Standard

HN26[] *Rule 23 of the Federal Rules of Civil Procedure* governs class certification. "The Second Circuit has emphasized that *Rule 23* should be given liberal rather than restrictive construction, and it seems beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification." Espinoza v. 953 Assocs. LLC, 280 F.R.D. 113, 2011 WL 5574895, at *6 (S.D.N.Y. 2011) (quoting Gortat v. **[*202]** Capala Bros., Inc., 257 F.R.D. 353, 361 (E.D.N.Y. 2009), *aff'd*, 568 F. App'x 78 (2d Cir. 2014)).

A. Rule 23(a)

HN27[] A putative class must meet the four prerequisites set forth in Rule 23(a) to be certified: numerosity, commonality, typicality, and adequacy of representation. Brown v. Kelly, 609 F.3d 467, 475 (2d Cir. 2010).

If even one of the Rule 23(a) requirements is not met, certification must be denied. Gomez v. Lace Entm't, Inc., No. 15 Civ. 3326 (CM), 2017 U.S. Dist. LEXIS 5770, 2017 WL 129130, at *4 (S.D.N.Y. Jan. 6, 2017). As the Supreme Court observed in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011), the requirements of Rule 23, by effectively confining the class claims to those "fairly encompassed" by the claims of the named plaintiffs, ensure that those plaintiffs are "appropriate representatives of the class whose claims they wish to litigate."

1. Numerosity — Rule 23(a)(1)

HN28[] Numerosity requires that the class must be "so numerous **[**96]** that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). As certain presumptions attach depending on the sheer size of the class, the number of members in a putative class is the starting point of the Rule 23(a)(1) analysis. Classes with forty or more putative members raise a rebuttable presumption that joinder is impracticable. *See* Sanchez v. New York Kimchi Catering, Corp., 320 F.R.D. 366, 375 (S.D.N.Y. 2017); Shayler v. Midtown Investigations, Ltd., No. 12 Civ. 4685 (KBF), 2013 U.S. Dist. LEXIS 29540, 2013 WL 772818, at *4 (S.D.N.Y. Feb. 27, 2013). For classes with fewer than twenty members, however, joinder is generally deemed practical. *See, e.g.,* Ansari v. New York Univ., 179 F.R.D. 112, 114 (S.D.N.Y. 1998) (twenty-one or fewer members suggests no class); *CL—*Alexanders Laing & Cruickshank v. Goldfeld, 127 F.R.D. 454, 455 (S.D.N.Y. 1985) (twenty-one members insufficient to certify class); *see also* Wilson v. Corelogic SafeRent, LLC, No. 14 Civ. 2477 (JPO), 2017 U.S. Dist. LEXIS 162928, 2017 WL 4357568, at *6 (S.D.N.Y. Sept. 29, 2017) (quoting William B. Rubenstein, *Newberg on Class Actions* § 3:11 (5th ed. 2017)).

Keeping in mind that the inquiry is not strictly mathematical, Pa. Pub. Sch. Empls. Pet Sys. v. Morgan Stanley & Co., Inc., 772 F.3d 111, 120 (2d Cir. 2014), the district court must analyze each case separately to determine whether the numerosity requirement has been satisfied, considering the following factors:

1. judicial economy;
2. geographic dispersion of the proposed class members;
3. financial resources of the proposed class members;
4. the ability of proposed class members to file individual suits;
5. requests for relief that could affect future class members;
6. knowledge of the names and existence of potential class members; and
7. whether potential class members have already **[**97]** joined in other actions.

See Robidoux, 987 F.2d at 935.

2. Commonality — Rule 23(a)(2)

HN29[] Commonality requires that there exist questions of law or fact that are both common to the class and answerable through a class-wide proceeding. Fed. R. Civ. P. 23(a)(2); Dial Corp. v. News Corp., 314 F.R.D. 108, 113 (S.D.N.Y. 2015). The Supreme Court has clarified that this prong also requires the plaintiff to "demonstrate that the class members have suffered the same injury.'" Wal—Mart, 564 U.S. at 350 (quoting Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157, **[*203]** 102 S. Ct. 2364, 72 L. Ed. 2d 740 (2011)). Where, as here, plaintiffs move to certify a class under Rule 23(b)(3), the commonality requirement is subsumed under, or superseded by, the more demanding predominance requirement of Rule 23(b)(3), discussed *infra. See* Dial, 314 F.R.D. at 113.

3. Typicality — Rule 23(a)(3)

HN30[] Typicality "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997) (internal quotation marks omitted) (quoting In re Drexel Burnham Lambert, 960 F.2d 285, 291 (2d Cir. 1992)). Similar considerations animate commonality and typicality such that the analyses under Rules 23(a)(2) and (3) tend to merge. *See* Marisol A., 126 F.3d at 376.

4. Adequacy — Rule 23(a)(4)

HN31[] Adequacy requires that "the representative parties fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *see also* Brown, 609 F.3d at 475. Class counsel must be "qualified, experienced, and generally able to conduct the litigation." Marisol A, 126 F.3d at 378 (internal quotation marks omitted) (quoting In re Drexel Burnham Lambert Grp, Inc., 960 F.2d at 291).

Rule 23(a)(4) also requires **[**98]** that the class representative "be aware of the basic facts underlying the lawsuit and not likely to abdicate his obligations to fellow class members." Gordon v. Sonar Capital Mgmt. LLC, 92 F. Supp. 3d 193, 200 (S.D.N.Y. 2015) (internal quotation marks omitted) (quoting In re Monster Worldwide, Inc. Sec. Litig., 251 F.R.D. 132, 135 (S.D.N.Y. 2008)). This requirement is a modest one — "class representative status may be denied only 'where the class representatives have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possible competing interests of the attorneys.'" *Id.* (quoting In re Monster Worldwide, 251 F.R.D. at 135).

Finally, if certain members of the class are subject to unique defenses, the court must inquire as to whether those defenses "threaten to become the focus of the litigation." Gordon v. Sonar Capital Mgmt. LLC, 92 F. Supp. 3d 193, 205 (S.D.N.Y. 2015) (internal quotation marks omitted) (quoting Romero v. Flaum Appetizing Corp., No. 07 Civ. 7222, 2011 U.S. Dist. LEXIS 23782, 2011 WL 812157, at *3 (S.D.NY. Mar. 1, 2011)).

5. Ascertainability

HN32[] In addition to the four factors enumerated in Rule 23(a), there is an "implied requirement that the membership of the class is identifiable and ascertainable." Jankowski v. Castaldi, No. 1 Civ. 0164 (SJF), 2006 U.S. Dist. LEXIS 4237, 2006 WL 118973, at *5 (E.D.N.Y. Jan. 13, 2006) (quoting In re Methyl Tertiary Butyl Ether Prods. Liab. Litig. (In re MTBE), 209 F.R.D. 323, 337 (S.D.N.Y. 2002)); Noble v. 93 Univ. Place Corp., 224 F.R.D. 330, 337 (S.D.N.Y. 2004). A class is ascertainable if it is (1) sufficiently bounded so that it is feasible for the court to determine whether a particular individual is a member, and (2) defined by objective criteria that avoid a "mini-hearing on the merits of each case." In re Petrobras Sec., 862 F.3d 250, 266 (2d Cir. 2017).

B. Rule 23(b)

HN33[] If the class **[**99]** proponent satisfies each of the Rule 23(a) prerequisites, he must next demonstrate that at least one of the three requirements listed in subsection 23(b) is met. Wal—Mart, 564 U.S. at 345. **[*204]** Here, Plaintiffs seek certification under subsection 23(b)(3), which allows a claim for damages to proceed as a class if it is established that (1) common questions predominate over individual questions (the predominance requirement), and (2) the class action vehicle is superior to other possible methods of "fairly and efficiently adjudicating the controversy" (the superiority requirement). *Fed. R. Civ. P. 23(b)(3)*.

1. Predominance

HN34[] The predominance requirement, as a general matter, "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re Nassau Cty. Strip Search Cases, 461 F.3d 219, 225 (2d Cir. 2006)* (internal quotation marks and citation omitted). Even where *Rule 23(a)*'s commonality requirement is satisfied, predominance under *Rule 23(b)(3)* is not necessarily met because the latter requires considerably more. *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*. More than their mere presence, *Rule 23(b)(3)* requires that questions common to the class predominate over individual ones.

Determining whether a question is common or individual depends on the kind of proof that will be needed to resolve that question at trial. An individual question is one for which **[**100]** "members of a proposed class will need to present evidence that varies from member to member," while a common question is one for which "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo, 136 S.Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016)*. Plaintiffs are not, however, required to prove that these questions will be answered in their favor in order to certify a class under this provision. *See* *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 468, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)*.

Moreover, "individual questions need not be absent" in order to certify a class under *Rule 23(b)(3)*; the text of *Rule 23(b)(3)* itself contemplates that such questions will be present. *Sykes, 780 F.3d at 81*. "The rule requires only that those questions not predominate over the common questions affecting the class as a whole." *Id.* (internal quotation marks omitted) (quoting *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cit. 2012))*. For example, if liability can be determined on a class-wide basis, common issues may predominate even in the face of some individualized damages issues. *Sykes, 780 F.3d at 81* (quoting *In re Visa Check, 280 F.3d at 139*).

2. Superiority

HN35[] Finally, the district court must determine that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. While, structurally, the four factors set forth in *Rule 23(b)(3)* govern both predominance and superiority, **[**101]** the Second Circuit has held that "they more clearly implicate" the latter. *Sykes, 780 F.3d at 82*. Accordingly, in determining whether the class action is a superior method, courts consider:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> **[*205]** (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). Manageability is, by far, the most critical factor in the superiority determination. *Id.*

Analysis

Plaintiffs seek to certify a class comprising "All persons or entities in the United States and its territories who purchased branded Namenda IR 5 or 10 mg tablets, and/or generic Namenda IR 5 or 10 mg tablets (including an authorized generic), and/or branded Namenda XR capsules, directly from Forest or its successors in interest, Actavis and Allergan, and/or from any generic manufacturer at any time during the period from June 2012 until September 30, 2015." (Pls.' Mot. for Class Certification, Ex. 1, Dkt. No. 400 ("Class Cert. Mot.").)

The proposed class **[**102]** consists of 62 members. (Pls.' Reply Mem. of Law in Supp. of Direct Purchaser Class Pls.' Mot. for Class Certification at 2, Dkt. No. 421 ("Pls.' Reply")). All are major pharmacy retailers (like CVS or Walgreens) or wholesalers who sell to major pharmacy retailers. They purchase Namenda or Namenda-generics for resale to pharmacies and/or consumer patients. (Lamb Rep. ¶ 42.)

At the outset, I reject Defendants' argument that Smith and RDC are inadequate class representatives because they lack sufficient knowledge and involvement in the case, and have abdicated all control to counsel. (Defs.' Opp'n to Direct Purchaser Pls.' Mot. for Class Certification at 20, Dkt. No. 412 ("Defs.' Opp'n").) Both RDC and Smith have indicated their knowledge of and interest in pursuing the claims of the class. (Hamburger Decl. Ex. 14, Dkt. No. 410 ("Doud Dep. Tr.") at 10:25 - 11:21, 14:6 - 24, 155:20 - 23, 180:1 - 3; Hamburger Decl. Ex. 15, Dkt. No. 410 ("Benton Dep. Tr.") at 25:8 - 23, 46:15 - 17, 283:14 284:7, 295:9 - 24.)

Defendants' remaining inadequacy arguments pertaining to specific conflicts will be addressed in the discussions of the relevant subgroup.

The proposed class can be broken down into 5 **[**103]** subgroups: (1) Forest Direct Customers; (2) Generic Purchasers (with a sub-subgroup of Non-Forest Generic Purchasers); (3) Corporate Subsidiaries; and (4) allegedly uninjured entities. As Plaintiffs have removed DIK Drug, First Veterinary Supply, and H.D. Smith Wholesale from the revised list of proposed members, they are not included in the following discussion.

Forest Direct Customers. 19 entities (including named Plaintiffs Smith and RDC) are direct customers of Defendants ("Forest Direct Customers"). These entities purchased branded Namenda IR and XR from Defendants, and all also purchased the generic. (Did. No. 552.) The members of this subgroup assert both "reverse payment" and "hard switch" claims. They are Arnerisource Bergen; Anda; Capital Wholesale; Cardinal Health; Dakota Drag; Drogueria Betances; Drogueria Cesar Castillo; Frank W. Kerr Inc.; HD Smith LLC; Louisiana Wholesale Drug; McKesson; Miami Luken; Morris & Dickson; North Carolina Mutual Wholesale Drug; PBA Health; Prescription Supply Inc.; RDC; Smith; and Value Drug.

With respect to this subgroup, Defendants argue that Smith and RDC are inadequate representatives because 3 members are subject to a unique defense that **[**104]** other members have no interest in defending against. (Defs.' Opp'n at 21.) They argue that Amerisource Bergen, Cardinal, and McKesson ("the Big Three"), are subject to a "generic bypass" defense insofar as "they may have benefitted from Forest's conduct because of the tendency for generic **[*206]** companies to bypass wholesalers and sell directly to retailers." (*Id.* at 21.) The question here is whether the generic-bypass defense "threaten[s] to become the focus of the litigation." *Gordon, 92 F. Supp. 3d at 205* (internal quotation marks omitted) (quoting *Romero, 2011 U.S. Dist. LEXIS 23782, 2011 WL 812157, at *3)*.

These arguments aside, Defendants concede that these 19 entities would be properly included in any class that might be certified. They urge, however, that a class of 19 members is not sufficiently numerous to warrant certification.

As to the other 43 members of the proposed class, Forest objects, on multiple grounds, to their inclusion in a certified class.

Generic Purchaser Group. 31 entities purchased only generic memantine ("the Generic Purchaser Group"). They are Albertsons LLC, American Health Packaging, Associated Pharmacies, Auburn Pharmaceutical; Bloodworth Wholesale Drugs; Blupax Pharmaceuticals, LLC; CVS Caremark; Drugs Unlimited, Inc.; Express Scripts Inc.; Genetco Inc.; **[**105]** Hannaford Brothers; HC Pharmacy Central Inc.; Healthsource Distributors, LLC; Humana Inc.; Independent Pharmacy Cooperative; Kaiser Permanente; Keysource Medical, Inc.; Major Pharmaceuticals/Rugby Laboratories; Masters Pharmaceutical Inc.; Medco Health Solutions Inc.; Meijer, Inc; OptumRx Inc.; Peytons; Quest Pharmaceuticals, Inc.; Richie Pharmaceutical Company; Rx Outreach; Supervalu Inc.; Tel Drug of PA LLC; TopRx LLC; Walmart; and Winn Dixie Logistics Inc.

Defendants argue that the Generic Purchaser Group was not comprehended within the original class definition proposed in the complaint and that should not be added into the mix now. As to all thirty-one members, Defendants argue that these members' claims are not typical of the named Plaintiffs' claims (or of the claims of the Forest Direct Customers) and either lack common questions with the hard switch claims asserted by the Forest Direct Customers or any common claims do not meet the predominance standard of *Rule 23(b)(3)*; and that the named Plaintiffs have no incentive to represent the interests of this group as a result. (Defs.' Opp'n at 10 - 12.)

In addition to the objections described above, Defendants also argue that 30 members of the **[**106]** Generic Purchaser Group lack antitrust standing under *Illinois Brick, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, because only one entity — Meijer, Inc. — purchased generic memantine directly from Forest. (Dk-t. No. 552.) All other entities purchased generics from entities other than Forest and Mylan during the last two and one half months of the class period. I will call them the "Non-Forest Generic Purchaser Group."

Corporate Subsidiaries. Defendants object to the inclusion of 4 entities on the basis that class membership should be limited to the common parent of corporate family members — Bellco, Burlington Drug, The Harvard Group, and Valley Wholesale. (Defs.' Opp'n at 13 - 14.)

Allegedly Uninjured Members. Defendants argue that 9 entities (including The Harvard Group from the previous list) must be excluded because they were not injured.

Publix, HE Butt, Kerr Drug, and Bartell allegedly suffered no injury from the purported scheme because they never bought Namenda IR and stopped buying Namenda XR before the hard switch announcement. (*Id.* at 12.)

DMS allegedly suffered no injury from the purported scheme because it purchased neither Namenda IR nor Namenda XR until after generic entry. (*Id.* at 12 - 13.)

[*207] Discount Drug Mart, Drogueria Central, and The Harvard **[**107]** Drug Group allegedly suffered no injury from the hard switch because they never purchased Namenda XR at all. (*Id.* at 13.)

Finally, Bartell, Drogueria Central, Kerr Drug, and Kroger allegedly were not injured by the scheme because they purchased only branded Namenda, even following generic entry. (*Id.* at 13.) (Bartell, Kerr Drug, and Drogueria Central were already included in the previous lists.)

I will deal with Forest's objections group by group.

A. Corporate Subsidiaries

Defendants argue that class membership should be limited to the common parent of corporate family members and object to the inclusion of four entities they claim are owned by other members in the class. They are Bellco, Burlington Drug, The Harvard Group, and Valley Wholesale. Defendants assert that Belleo is owned by Amerisource Bergen; that Burlington Drug is owned by JM Smith Corporation; that The Harvard Group is owned by Cardinal; and that Valley Wholesale is owned by H.D. Smith LLC. (*Id.* at 13 - 14.)

Plaintiffs' Exhibit 9 addresses the corporate status of these entities. (Pls.' Ex. 9, Corporate Status of Certain Entities Listed in Manufacturer Transactional Data.)

The record indicates that Bellco is the wholly owned subsidiary of Arnerisource **[**108]** Bergen Drug Corporation and has been incorporated in New York State since May 1960. (Pls.' Ex. 9-B.) Burlington Drug is a subsidiary of JM Smith Corporation, formed under the laws of Vermont in January 1998. (Pls.' Ex. 9-C.) The Harvard Group is a majority-owned subsidiary of Cardinal, incorporated under the laws of Michigan in June 1997. (Pls.' Ex. 9-D.) And Valley Wholesale is a wholly-owned subsidiary of H.D. Smith, formed under the laws of Delaware in October 2012. (Pls.' Ex. 9-E.)

Plaintiffs argue that these subsidiaries are each entitled to a presumption of separateness from their parent corporations because the companies are separately incorporated, separately listed in the manufacturers' transactional data, and, most importantly, separately purchased (and were overcharged for) the product. (Pls.' Reply at 6.) In other words, related or not, each Class member that bought Namenda "suffered independent injury." (*Id.*)

I agree. Defendants do not dispute the fact that these entities each independently purchased Namenda products. ***HN36***[] I join with other courts that have considered this issue and have ruled that where there is distinct and separate injury, a corporate relationship with another **[**109]** class member does not defeat individual member status. *See, e.g., In re Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *4* (considering and rejecting this argument with respect to Valley Wholesale and H.D. Smith); *see also Am. Sales Co., LLC v. Pfizer, Inc., No. 14 Civ. 361, 2017 U.S. Dist. LEXIS 137222, at *25, 2017 WL 3669604, at *8 (ED. Va. July 28, 2017)* (allowing subsidiaries to vindicate their own antitrust injuries).

Plaintiffs provide sufficient evidence of separateness between these subsidiaries and their parent corporations. Any overcharges they paid for their own purchases of memantine are separately and distinctly applicable to them.

13. Miscellaneous Uninjured Members

Defendants' objections to the following entities are variations on a theme. At bottom, their arguments pertaining to Publix, HE Butt, Kerr Drug, Bartell, DMS, Drogueria **[*208]** Central, Kroger, Discount Drug Mart, and The Harvard Group come down to the claim that, for one reason or another, these entities were not injured by Forest's alleged misconduct.

To frame the following discussion, it is instructive to review the proposed class members' alleged injuries. All members of the class claim that they were overcharged for their memantine requirements due to Forest's allegedly anticompetitive conduct.

With respect to the reverse payment claim, Plaintiffs allege that "all or nearly all" members of the class were **[**110]** overcharged. (Lamb Rep. ¶ 13-a.) They allege that any member who purchased Namenda IR, Namenda XR, and/or generic memantine hydrochloride paid higher prices than they otherwise would have had generic competition started earlier, "because they would have purchased (or purchased more) generic memantine at prices below branded Namenda and would have purchased the generic at lower prices." (*Id.*) In other words, Plaintiffs claim that the reverse payment injured any member who purchased Namenda IR, any member who purchased Namenda XR, and any member who purchased a generic alternative once it became available (from Forest or from a generic competitor).

With respect to the hard switch claim, Plaintiffs allege that "all or nearly all proposed Class members who purchased at least Namenda IR and XR, or XR" were overcharged. (Lamb Rep. ¶ 13-b.) In other words, Plaintiffs allege that any entity that purchased Namenda XR paid a higher price than they otherwise would have for the generic memantine they would have purchased in place of the more expensive brand name drug, and that they would have purchased more of that generic. (*Id.*)

Plaintiffs allege that the aggregate overcharges break down into two **[**111]** categories: "Brand-Generic" and "Generic-Generic." (*Id.* at ¶ 125.) The former relates to Forest's alleged foreclosure of class members' switching to generic memantine via both the reverse payment and the hard switch strategy. Absent the reverse payment, Plaintiffs allege, a large volume of branded Namenda IR and Namenda XR purchases would have been replaced by generic memantine at a significantly reduced price. (*Id.*) "Brand-Generic" injuries thus include the higher prices paid by class members for the branded Namenda IR and XR they actually bought instead of the lower-priced generic alternative they would have bought absent the reverse payment and the hard switch strategy. (*Id.*)

"Generic-Generic" overcharges relate to the higher prices that class members paid for the generic alternatives they actually bought. (*Id.* at ¶ 126.) The reverse payment led to such overcharges because it delayed generic entry and "prices for generic drugs tend to decline over time as generic manufacturers compete against each other." (*Id.*) The hard switch strategy led to Generic-Generic overcharges because it shifted the Namenda IR prescription base to Namenda XR before generics had the chance to compete for **[**112]** Namenda IR business. (*Id.* at ¶ 65.) In light of the 89.9% substitution rate of generic memantine for brand Namenda IR over the three months following generic entry, Dr. Lamb concludes that generic entry would have affected a larger base of IR prescriptions absent the hard switch. (*Id.* at ¶ 81.) Plaintiffs submit that generic memantine purchasers paid higher prices because this suppressed generic sales and their attendant savings. (*Id.* at ¶ 65.) The Generic-Generic category would apply to any member who purchased generic memantine, whether they previously purchased branded Namenda products or not.

Moving to Defendants' specific objections, they first argue that Publix, HE **[*209]** Butt, Kerr Drug, and Bartell were not injured because they never bought Namenda IR and stopped buying Namenda XR before the hard switch announcement. (Defs.' Opp'n at 12.) These entities were injured under the Brand-Generic theory described above insofar as Plaintiffs allege that Namenda XR purchases would have been replaced by generic memantine at a significantly reduced price.

Publix and HE Butt were also injured to the extent they purchased generic memantine. The record indicates that Kerr Drug and Bartell never purchased **[**113]** generic memantine. (*See* Hamburger Decl. Ex. 13, Dkt. No. 410 (Expert Report of Pierre-Yves Cremieux ("Cremieux Rep.")), at ¶ 63 (Ex. 1.2, Summary of Findings: Reverse Payment))

Defendants argue that DMS could not have been injured by the alleged scheme because it did not make any purchases of Namenda IR or Namenda XR until after generic entry." (Defs.' Opp'n at 13.) To the extent Plaintiffs allege that DMS purchased generic memantine during the class period, DMS suffered injury in the form of Generic-Generic overcharges.

Defendants argue that Bartell, Drogueria Central, Kerr Drug, and Kroger should be excluded because they did not buy generic memantine, even after it became available following generic entry. They submit that there is no basis to assume that such brand-only purchasers "would have purchased generic Namenda IR in the but-for world." (*Id.* at 13.)

I understand Defendants' argument that the decision to continue buying branded Namenda products, even after generics entered the market, casts doubt on the fact that these entities would have purchased the generic earlier had it been available to them. But Defendants are not entitled to the benefit of that doubt when the very reason we cannot **[**114]** know the answer to that question is because of their alleged wrongdoing. *See* *In re DDAVP, 585 F.3d at 689*.

Defendants argue that Discount Drug Mart, Drogueria Central, and The Harvard Group "could not have been injured by the hard switch" because they never purchased Namenda XR or stopped purchasing Namenda XR before the February 2014 announcement, and should therefore be excluded with respect to the hard switch claim. (Defs.' Opp'n at 13.)

That these entities never purchased Namenda XR does not establish that they were uninjured by the hard switch. If the jury finds Forest liable on Plaintiffs' theory of liability, these members were injured insofar as the hard switch strategy shifted the Namenda IR prescription base, thereby suppressing generic sales and their attendant savings. In the case of Discount Drug Mart, the question of whether its purchases were "due to" the hard switch strategy is a question for the trier of fact, given the evidence of Defendants' pre-announcement communications with key stakeholders and customers regarding the launch of Namenda XR and withdrawal of Namenda IR.

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That brings Plaintiffs to a total proposed class of 31 members, which is still below the commonly accepted threshold of **[**115]** 40 members needed to warrant class certification.

And so we turn to the largest and most complicated group of potential class members — the one as to which Forest levels the most objections. If they can be included in the class, it will easily exceed the 40 member threshold. If they cannot, certification becomes more problematic.

[*210] C. Generic Purchaser Group

This category includes members who purchased generic memantine hydrochloride. They are Albertsons LLC; American Health Packaging; Associated Pharmacies; Auburn Pharmaceutical; Bloodworth Wholesale Drugs; Blupax Pharmaceuticals, LLC; CVS Caremark; Drugs Unlimited, Inc.; Express Scripts Inc.; Genetco Inc.; Hannaford Brothers; HC Pharmacy Central Inc.; Healthsource Distributors, LLC; Humana, Inc.; Independent Pharmacy Cooperative; Kaiser Permanente; Keysource Medical, Inc.; Major Pharmaceuticals/Rugby Lab; Masters Pharmaceutical Inc.; Medco Health Solutions Inc.; Meijer Inc.; Optumrx Inc.; Peytons; Quest Pharmaceuticals, Inc.; Richie Pharmaceutical Company; RX Outreach; Supervalu Inc.; Tel Drug of PA LLC Joann Christens; Top RX LLC; Walmart; and Winn Dixie Logistics Inc.

Forest objects to the inclusion of the entire Generic Purchaser Group **[**116]** because generic purchasers were not included in the original class definition proposed in the complaint. It also argues that their claims are not typical of Forest Direct Customers, and that their claims either lack common questions with the Forest Direct Customers' hard switch claim, or any common issues do not predominate. Forest argues that named Plaintiffs' interests are not aligned with the Generic Purchaser Group as a result. (*Id.* at 10 - 11.)

Finally, because all but one Generic Purchaser — Meijer, Inc. — purchased memantine from Forest's generic competitors, not from Forest itself, Forest objects to the Non-Forest Generic Purchasers on the further ground that they lack antitrust standing under *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. (Defs.' Opp'n at 11 - 12.)

1. Expanded Class Definition

Defendants are correct that the inclusion of the Generic Purchaser Group expands upon the definition found in Plaintiffs' complaint, which proposed a class consisting only of members who purchased Namenda IR or XR *directly* from Forest. (*See* Am. Compl. ¶ 193.) They are wrong, however, when they argue Plaintiffs "were obligated to seek leave to amend the Complaint well before fact discovery closed." (Defs.' Opp'n at 11.)

HN37[] It is well-established **[**117]** that a certifying court "is not bound by the class definition proposed in the complaint." *Robidoux v. Celani, 987 F.2d 931, 937 (2d Cir. 1993)*. However, this principle is customarily cited as support for the court's ability to narrow a proposed class. *See, e.g., Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F.2d 11, 14 (2d Cir. 1993)*; *Madden v. Midland Funding, LLC, 237 F. Supp. 3d 130, 153 (S.D.N.Y. 2017)*; *Flores v. Anjost Corp., 284 F.R.D. 112, 125 (S.D.N.Y. 2012)*; *Poddar v. State Bank of India, 235 F.R.D. 592, 595 (S.D.N.Y. 2006)*. Far fewer cases support the converse proposition that the court may approve the expansion of the class as it was defined in the complaint. Plaintiffs cite three cases to this end, two of which are instructive here — *Menking ex rel. Menking v. Daines, 287 F.R.D. 174 (S.D.N.Y. 2012)* and *McCarthy v. Paine Webber Grp., Inc., 164 F.R.D. 309 (D. Conn. 1995)*.

In *Menking, 287 F.R.D. at 181*, even though the plaintiff originally sought certification of a *citywide* class in her complaint, the court approved a "new and expanded *statewide* definition for the proposed class," as requested by the plaintiff in her motion for class certification "based on evidence obtained in discovery." In *McCarthy, 164 F.R.D. at 311*, the plaintiff's motion for class certification proposed a class comprising all persons **[*211]** who owned limited partnership interests in a particular entity. This was broader than the definition found in the complaint, which confined the class to persons who owned a limited partnership interest *during a particular time period. Id.* The court certified the broader class proposed in the motion for certification, noting that it was "not bound by the class definition **[**118]** proposed in the complaint." *Id.* (citing *Robidoux, 987 F.2d at 937*).

Menking and *McCarthy* demonstrate that*HN38*[] a plaintiff's expansion of the class definition beyond that which was proposed in the complaint is not categorically improper. Rather, in both cases, the court went on to consider whether the newly proposed class members satisfied the substantive requirements of *Rule 23(a)*.

Forest argues that, under *In re Aluminum Warehousing Antitrust Litig., No. 13-md-2481 (KBF), 2016 U.S. Dist. LEXIS 54643, at *32-33 (S.D.N.Y. Apr. 25, 2016)*, Plaintiffs must establish that there is good cause for expanding the class at this juncture because the time to add new members "has long passed." (Defs.' Opp'n at 11.) I disagree. Defendants' reliance on the good cause standard discussed in *Aluminum Warehousing* is misplaced; there, the court was considering the plaintiffs' motion for leave to file a fifth amended complaint. *Aluminum Warehousing, 2016 U.S. Dist. LEXIS 54643, at *21*. This is a timely motion for class certification, not a belated motion for leave to file an amended complaint.

Moreover, Plaintiffs' proposed class definition does not raise the same notice and discovery issues present in *Aluminum Warehousing*. There, the proposed amendments would have added two new foreign defendants, "with respect to whom service would not be completed under the Hague Convention **[**119]** for at least several months," *id. at *13*; changed the plaintiffs' claims and proposed class definition "in the midst of class certification briefing in ways that could necessitate substantial new fact and expert discovery — including significant non-party and overseas discovery — that defendants could not have anticipated," *id. at * 13* - 14; and substantially broadened the scope of the proposed class and relevant transactions by including markets that the defendants had no "reason to address during the discovery period," *id. at * 14*.

Plaintiffs here are not attempting to add any new defendants, let alone foreign parties. Nor are they attempting to broaden the class definition "in the midst of class certification briefing — they included the expanded definition at the outset, in their initial motion for certification. (Class Cert. Mot., Ex. 1.)

Furthermore, Defendants had reason to anticipate during discovery any novel issues that the Generic Purchaser Group might introduce. While the Amended Complaint did not include the Generic Purchaser Group as members of the class, it specifically alleged that but for Defendants' anticompetitive conduct, members of the class would have paid less for memantine by "purchasing generic **[**120]** Namenda IR at lower prices sooner." (Am. Compl. ¶ 229.) It further alleged,

> Defendants' anticompetitive conduct, which delayed introduction into the United States marketplace of generic versions of Namenda IR, has caused plaintiff and the Class to pay more than they would have for memantine hydrochloride absent defendants' illegal conduct. . . . As more generic manufacturers enter the market, prices for generic versions of a drug predictably plunge **[*212]** even further due to competition among the generic manufacturers.

(*Id.* ¶¶ 226 - 27.) And indeed, Defendants' expert, Dr. Cremieux, addresses the claims of the Generic Purchaser Group throughout his report. (*See, e.g.*, Cremieux Rep. 163.)

Ultimately, consistent with the certifying court's broad discretion over class definition and obligation to reassess class rulings as the case develops, *Boucher v. Syracuse Univ., 164 F.3d 113, 118 (2d Cir. 1999)* (quoting *Barnes v. Am. Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998))*, I see no reason to disregard the class definition that Plaintiffs propose in their motion for class certification simply because it expands upon the definition found in the Amended Complaint.

2. Antitrust Standing

Defendants object to the inclusion of the Non-Forest Generic Purchasers in the class on the ground that they lack antitrust standing. Defendants **[**121]** rely on a line of cases beginning with *Illinois Brick*, to support their argument that "any purchases from a generic manufacturer (other than Mylan or Forest itself) could not form the basis of an antitrust claim." (Defs.' Opp'n at 12.)

However, these "direct-purchaser" cases are irrelevant because the Non-Forest Generic Purchasers are not *Illinois Brick* "indirect purchasers." ***HN39***[] Indirect purchasers are those who buy from the customers of a defendant — from people to whom the defendant sold product. *See* *Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 492-94, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*; *see also* *California v. ARC Am. Corp., 490 U.S. 93, 97, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*; *Illinois Brick, 431 U.S. at 724, 741*; *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 550, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. The Non-Forest Generic Purchasers bought from Forest's competitors. Vis-à-vis Forest, they are neither direct nor indirect; vis-à-vis the generic manufacturers from whom they bought their memantine, they are direct purchasers.

HN40[] The Non-Forest Generic Purchasers have standing to bring antitrust claims against Forest if they (1) have suffered an antitrust injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," and (2) are proper plaintiffs in light of the four "efficient enforcer" factors. *In re DDAVP, 585 F.3d at 688* (internal citations and quotation marks omitted) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 66 (2d Cir. 1988))*.

As to the first prong, the Non-Forest Generic Purchasers **[**122]** claim that they were overcharged for their purchases of generic memantine as a result of Forest's "two-part, allegedly anticompetitive and 'unlawful scheme to maintain a monopoly and to allocate the United States market for branded and generic versions of memantine hydrochloride." (Lamb Rep. ¶ 5.) Monopolist overcharges are "the classic antitrust injury." *Savory Pie Guy, LLC v. Comtec Indus., Ltd., No. 14 Civ. 7527 (VB), 2016 U.S. Dist. LEXIS 179317, 2016 WL 7471340, at *12 (S.D.N.Y. Dec. 28, 2016)*; *see also* *Freeland v. AT&T Corp., 238 F.R.D. 130, 143 (S.D.N.Y. 2006)*. Paying higher prices for generic memantine is "inextricably intertwined" with the anticompetitive effects of Defendants' alleged conduct and thus "flows from that which makes [their] acts unlawful." *In re DDAVP, 585 F.3d at 688* (quoting *Blue Shield of Va. V. McCready, 457 U.S. 465, 484,* ***[*213]*** *102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982))*.

HN41[] As to the proper plaintiff prong, the Non-Forest Generic Purchasers satisfy the efficient enforcer criteria, which look to the (1) directness of the asserted injury, or causation; (2) self-interest of the class of persons to vindicate the public interest, or motivation; (3) speculativeness of the alleged injury; and (4) difficulty of identifying and apportioning damages so as to avoid duplicative recoveries. *Id. at 688*.

The Non-Forest Generic Purchasers' purported injuries are the direct result of the asserted antitrust violation — they allege they paid higher prices for generic memantine because Defendants intentionally restricted **[**123]** and manipulated generic competition.

They are also sufficiently motivated and well-positioned to vindicate the antitrust interests at play in this case. *See* *id. at 689* (describing competitors as the most motivated antitrust plaintiffs); *see also* *In re Zinc Antitrust Litig., 155 F. Supp. 3d 337, 361 (S.D.N.Y. 2016)* (describing competitors as the traditional plaintiff in antitrust cases).

Their claims support non-speculative damages, as they define damages by the difference between the prices they paid for generic memantine in the actual world and "those they would have paid in a world free of the alleged misconduct." *In re Zinc, 155 F. Supp. 3d at 362* (finding injury sufficiently non-speculative for antitrust standing purposes where plaintiffs defined damages by the amount by which the price at issue was inflated). While it "may be difficult to account precisely for the likely effects of generic competition," the Court has "little doubt that those effects can be sufficiently estimated and measured here." *In re DDAVP, 585 F.3d at 689*. Plaintiffs have submitted expert reports and analysis that speak precisely and extensively to this issue.

For example, Dr. Lamb uses the nearly 95% discount of generic memantine and corresponding 89.9% adoption rate in the three months following generic entry to estimate the price a generic purchaser **[**124]** would have paid if generics had entered the market earlier. (Lamb Rep. at Fig. 3 (Brand and Generic Market Sales); Fig. 4 (Brand and Generic Namenda IR Average Price); Fig. 5 (Generic Namenda IR Average Price).)

Defendants' reliance on *In re Skelaxin (Metaxalone) Antitrust Litig., 2014 U.S. Dist. LEXIS 66707, at *29 - 41 (E.D. Tenn. May 15, 2014)*, is unpersuasive. While the alleged antitrust conspiracy in that case largely tracks the facts of the scheme alleged here, I disagree with the court's conclusion that the relationship between fewer generic manufacturers and higher generic prices is "too speculative" to estimate the alleged overcharge. *Id. at *36*.

And finally, the circumstances of this case do not raise the same concerns of duplicative recovery as was true in *Illinois Brick* and the other "direct-purchaser" rule cases.

3. Adequacy of Named Plaintiffs

Defendants claim that RDC and Smith (both Forest Direct Customers) are inadequate representatives of a class including the Generic Purchaser Group because the majority of that group faces a unique standing hurdle, and no member of that group has an interest in the product-hopping claim. (Defs.' Opp'n at 21.)

I have already addressed and rejected Defendants' argument regarding the Non-Forest Generic Purchasers' antitrust standing.

[*214] I disagree with Defendants **[**125]** that the Generic Purchaser Group has no interest in the "hard switch" claim. Plaintiffs allege that the Generic Purchaser Group was impacted by the hard switch strategy because it led to higher generic prices. Dr. Lamb concluded that absent the hard switch strategy, and given the 89.9% substitution of generic memantine for brand Namenda in the three months following generic entry, generic entry would have affected a larger base of IR prescriptions and led to increased generic memantine purchases and savings. (Lamb Rep. ¶ 81.)

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With the Generic Purchaser Group included, the class comprises 62 members and the numerosity requirement is presumptively satisfied. *Ramirez v. Riverbay Corp., 39 F. Supp. 3d 354, 362 (S.D.N.Y. 2014)* (citing *Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995))*.

The various other factors in the numerosity analysis also weigh in favor of certification. The class members in this case are spread across the country; a fair number are located on the East Coast, others on the West, and still others in Puerto Rico. (Lamb Reply Rep. at Fig. 2.) Their disparate locations constitutes both a significant and practical difficulty to joinder. Individual suits filed in each of these locations would also impose an unnecessary and substantial burden on the judicial system.

There is also evidence **[**126]** that a number of the potential class members are small wholesalers that lack the financial resources to bring individual actions. (Lamb Rep. ¶ 42.) While all members might have the same incentive to bring individual actions, they do not have the same ability to do so.

D. Typicality, Commonality, and Predominance

Defendants' objections to the various subgroups addressed above are, in reality, arguments about typicality, commonality, and predominance. ***HN42***[] These analyses share a similar focus — they test whether the class is "sufficiently cohesive to warrant adjudication by representation," *In re Nassau Cty. Strip Search Cases, 461 F.3d 219, 225 (2d Cir. 2006)* (internal quotation marks and citation omitted) (quoting *In re Visa Check, 280 F.3d at 136*).

Defendants argue that RDC and Smith's claims are not typical of a class that includes (1) three national wholesalers, AmerisourceBergen, McKesson, and Cardinal Health, or (2) the Generic Purchaser Group. (Defs.' Opp'n at 19 - 20.) As to the inclusion of AmerisourceBergen, McKesson, and Cardinal Health, Defendants argue that because "the Big Three" are large national wholesalers, they are in a fundamentally different position than RDC and Smith and enjoy significantly more negotiating power and leverage with suppliers like Forest. (*Id.* at 19.) The size of **[**127]** these entities, however, does not change the fact that their claims arise from the same course of conduct alleged by all class members — the reverse payment and the hard switch strategy. As members who purchased both branded Namenda products and the generic alternative, these entities advance legal arguments identical to members in the Forest Direct Customer subgroup.

It is a more complicated question whether common questions can be said to exist, and indeed, to predominate, when the class includes all subgroups. As commonality is subsumed under the more demanding predominance requirement, *Dial, 314 F.R.D. at 113*, I proceed directly to the *Rule 23(b)(3)* analysis, which imposes upon the **[*215]** court the "duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast, 569 U.S. at 34*. That discussion also addresses the typicality argument Defendants raise with respect to the Generic Purchaser Group.

HN43[] The parties agree that Plaintiffs must show that three elements are capable of proof at trial through evidence common to the class: (1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages. *See* *Fleischman v. Albany Med. Ctr., 639 F.3d 28, 29-30 (2d Cir. 2011)*.

Liability. Plaintiffs claim that "the proof necessary to establish Defendants' wrongdoing will not vary Class **[**128]** member-by-Class member." (Mem. in Support of Direct Purchaser Class Pls.' Mot. for Class Certification at 17.) They argue that the reverse payment with Mylan presents "solely" common issues, and that the product-hop theory presents "predominantly" common issues. (*Id.* at 17.)

As to liability, I agree that common questions predominate over the class, including the generic-only purchasers. If each Class members were to pursue this theory individually, "each would have to prove the same course of conduct, using the same documents and witnesses." (*Id.* at 17.) To establish the reverse payment claim, for example, all members will need to present evidence of the agreement and its terms. Similarly, to establish the hard switch claim, members have indicated that they will offer evidence of pre-announcement communications with key stakeholders and customers regarding the forthcoming launch of Namenda XR and withdrawal of Namenda IR; evidence of the announcement itself; evidence pertaining to Judge Sweet's December 15, 2014 order; and evidence related to the aftermath of that order, including Forest's communications regarding its intention to challenge Judge Sweet's order in the Court of Appeals.

Injury. Plaintiffs **[**129]** allege that 58 of the 62 members in the proposed class were impacted by the Brand-Generic and/or the Generic-Generic overcharge because they either switched from branded Namenda to the generic alternative once it became available, or just bought the generic. (PLs.' Reply at 2.) (Only 4 purchasers — Bartell, Drogueria Central, Kerr Drug, and Kroger — continued to buy branded Namenda following generic entry.) They claim that the brand-to-generic purchasers suffered Brand-Generic overcharges during the time they were purchasing branded Namenda products and also suffered Generic-Generic overcharges once they switched to the generic alternative. (Lamb Rep. ¶ 126.)

Common questions predominate as to injury. First and foremost, at trial, all but 4 members of the class would need to prove they were injured by the Generic-Generic overcharge — that, but for Defendants' conduct, "generic prices by July 2015 would have been lower." (Pls.' Reply at 4.) This is but one aspect of the injury suffered by the 27 customers who allege they also paid higher prices for the branded Namenda they actually purchased. For the remaining 31 members, the Generic Purchaser Group, this is the ultimate question with **[**130]** respect to injury. Therefore, 58 of the 62 members (just about 94% of the class) allege they were injured by paying higher prices for the generic memantine they actually purchased.

This issue is susceptible to generalized, class-wide proof. As Defendants point out, Plaintiffs' proof of injury will necessarily be intertwined with proof of damages. (Defs.' Opp'n at 23.) In other words, proving that they were injured will be bound up with proving the extent to which Plaintiffs were injured. *McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 227 (2d Cir. 2008)*.

[*216] The 58 members claiming Generic-Generic damages all need to establish that the less expensive generics would have entered the market earlier; that generic prices would have continued to fall over time as more generic manufacturers competed; and that they would have paid less for their actual generic purchases. They will also need to show that the hard switch strategy further suppressed generic competition (and therefore savings) by shifting the Namenda IR prescription base to Namenda XR before generic entry.

All class members indicate that they plan to rely on Dr. Lamb's analysis of antitrust injury and damages, which, in turn, is based on three categories of proof that he states is "common to the proposed **[**131]** Class as a whole rather than specific to individual members." (Lamb Rep. 167.) His conclusions are based on: (1) peer-reviewed economic and government research showing that generics typically enter the market at lower prices than their brand name counterparts and capture a significant share of the total unit sales for that drug; (2) Forest's internal forecasts of the impact that generic competition would have on the memantine market; and (3) data on the actual sales volumes and prices of Namenda IR, Namenda XR, and generic memantine (which shows a 95% price discount for the generic and an 89.9% substitution rate by September 2015), derived from IMS Health's NSP database. (*Id.* at ¶¶ 68 - 85.)

They also intend to rely on his analysis of the impact that the hard switch had on generic competition. (*Id.* at ¶ 119.) For example, while Forest lost 96.5% of Namenda IR sales within six months of generic entry, it retained significant sales of branded Namenda because over 50% of existing Namenda patients had already switched to Namenda XR — "far more than the approximately 30 percent that [Forest's] own planning indicated would be possible in the absence of a hard switch." (*Id.* at ¶ 87; *see also* ***[**132]*** Pls.' Reply at 16.) This analysis again relies in part on internal forecasts, including Forest's comparison of its loss of exclusivity over Namenda IR with the Hard Switch strategy and without it. Other common evidence includes communications from Forest to various stakeholders (physicians, caregivers, pharmacies) and customers regarding Forest's "Namenda IR to XR Conversion Project" and informing them of the withdrawal of Namenda IR "immediately and for the next six months." (Pls.' Reply at 11; Lamb Rep. ¶ 98.) All members indicate they will rely on this evidence at trial to prove that, while Namenda IR was never fully removed from the market, due to Judge Sweet's December 15, 2014 order, "this communications strategy was successful for Forest in triggering widespread conversion to Namenda XR." (Lamb Rep. ¶ 63.)

While the Generic Purchaser Group will not (and could not) prove that they were injured by any Brand-Generic overcharges, determining Brand-Generic damages does not overwhelm the predominantly common issues that govern the class. To determine Brand-Generic damages, Plaintiffs indicate that they will rely on some of the same evidence discussed in connection with the Generic-Generic **[**133]** damages. To determine Brand-Generic damages, Dr. Lamb used the NSP database to calculate both "the price differential between the actual average Namenda IR and Namenda XR prices and *but-for average monthly generic memantine hydrochloride prices*" and "the price differential between the actual average Namenda XR monthly prices and *but-for average monthly generic memantine hydrochloride prices." (Id.* at ¶ 125 (emphasis added).) For both Brand-Generic and Generic-Generic damages, class members will need to establish the price of **[*217]** average monthly generic memantine but for Defendant's alleged misconduct. The additional factor in the Brand-Generic computation is the actual average monthly price of Namenda IR and Namenda XR, which is a far less complicated question. It does not overwhelm the predominating issues in this case.

Damages. Defendants argue that Dr. Lamb's models do not provide a sufficient method of measuring class-wide damages. ***HN44***[] It is not enough that Plaintiffs supply a method to measure and quantify damages on a class-wide basis; the court must be satisfied that "the methodology [is] a just and reasonable inference," and is not speculative. *Comcast Corp., 569 U.S. at 35*. Defendants argue that Plaintiffs cannot **[**134]** meet this burden.

Plaintiffs must demonstrate that Dr. Lamb's methodology identifies only damages that result from Defendants' wrong — *i. e.*, it must isolate damages that inhere from a valid theory of antitrust impact from those that do not. In *Comcast, 569 U.S. at 36*, the Supreme Court held that the plaintiffs' proposed methodology failed to do so where their expert's model assumed the validity of all four alleged theories of antitrust impact, but the district court credited only one of those theories. The expert's testimony confirmed that his model "calculated damages resulting from 'the alleged anticompetitive as a whole' and did not attribute damages to any one particular theory." *Id.*

Dr. Lamb's methodology in this case does not suffer from the same infirmity identified in *Comcast, 569 U.S. at 37*. Dr. Lamb's methodology would in fact be able "to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable" to each step of the alleged two-part maneuver that Plaintiffs allege in this case. *Comcast, 569 U.S. at 38*. In *Comcast*, the plaintiffs' expert established a single "'but-for' baseline — a figure that would show what the competitive prices would have been if there had been *no* antitrust violations." **[**135]** *Id.* By contrast, Dr. Lamb has provided multiple models that account for different "but-for" scenarios. (Lamb Rep. ¶ 21 ("I have applied benchmark methodologies to measure damages associated with each of the two components of the alleged misconduct.").)

In his report, Dr. Lamb discusses the measurement of class-wide damages in both the "No Reverse-Payment But-For World," *id* at ¶¶ 139 - 42, and the "No Hard Switch But-For World." (*Id.* at ¶¶ 158 - 60.) These various models allowed Dr. Lamb to isolate and analyze damages arising from each aspect of Forest's alleged anticompetitive conduct. (*Id.* at ¶¶ 141, 158.); *see also In re Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *10* (approving the plaintiffs' expert's model which provided for twelve but-for scenarios, "contemplating the different possible points of sustained generic entry absent the [alleged conduct] and the varying competitive conditions that would have followed").

Defendants challenge the ability of Dr. Lamb's hard switch and reverse payment models to measure classwide damages. Their overarching objection is that Dr. Lamb's models assume the injury that they purport to prove. To the extent I have addressed these objections in connection with Defendants' motion to exclude Dr. Lamb **[**136]** as an expert, I will not readdress them here.

1. Hard Switch Methodology

To calculate hard switch damages, Dr. Lamb started with actual Namenda XR sales volume over the class period. (Lamb Rep. ¶ 146.) He subtracted from that number the estimated sales volume of Namenda XR that Forest predicted would occur if **[*218]** it did not commence the hard switch (lawful conversion). (*Id.*) The difference between those figures, Dr. Lamb concludes, is attributable to the hard switch. (Pls.' Reply at 11; Lamb Rep. ¶ 146.) He performed a structural break / statistical significance test to confirm this conclusion. He then used this figure (the difference between actual and but-for Namenda XR sales) to calculate the price that class members who purchased Namenda XR would have paid for generic memantine instead of purchasing Namenda XR. (Lamb Rep. ¶ 147.)

Defendants argue that Dr. Lamb's hard switch model, including the structural break test that purports to confirm his conclusion, fail to prove causation. (Defs.' Opp'n at 31.) Without proving that proposed class members' Namenda XR purchases were made because of the hard switch, Defendants claim that Dr. Lamb's models fail to show that members were injured. This **[**137]** is more or less the same argument made in Defendants' motion to exclude Dr. Lamb's expert testimony. Defendants again argue that Dr. Lamb's hard switch methodology fails to show causation because it includes market-wide, rather than purchaser-specific information, and imposes a 30% threshold of lawful Namenda XR adoption. I remain unpersuaded.

In the class certification context, Defendants emphasize that market-wide data cannot establish causation because it does not account for patient and physician prescribing preferences, which would require individualized proof. I reiterate what I said in my discussion of Defendants' motion to exclude Dr. Lamb's expert testimony — Plaintiffs' allegation is that Forest worked to ensure a "'forced switch' whereby physicians and patients would have little choice but to switch to Namenda XR." (Lamb Rep. ¶ 89.) They allege that limiting patient and physician preferences was precisely the point of "discontinu[ing] or dramatically restrict[ing] the supply of Namenda IR several months before the availability of generic memantine." (*Id.*)

In this case, the idiosyncrasies of patient preferences do not require a degree of individualized proof that makes class **[**138]** certification inappropriate. Defendants' reliance on *McLaughlin* is undermined by the fact that the proposed members were not individual consumers — a fact of fundamental importance to the court's decision in that case. *See, e.g., McLaughlin, 522 F.3d at 224*; *id. at 229*; *id. at 225 n.7*. Here, proposed members are not patients; they are "wholesalers and other direct purchasers." (Pls.' Reply at 14.) Forest does not contest the fact that it "deals with wholesalers, not patients." (*Id.*) ***HN45***[] I agree with those courts that have rejected the argument that a class comprising direct purchasers must show that individual patient decisions were the result of the defendant's alleged conduct. *See In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528-29 (3d Cir. 2004)* (plaintiffs' allegation of overpayment for drug was "purely an economic injury" supporting a finding of commonality and predominance); *In re Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *10*; *Teva Pharms. USA, Inc. v. Abbott Labs., 252 F.R.D. 213, 229 (D. Del. 2008)*.

As to the 30% lawful adoption rate imposed in Dr. Lamb's model, I have already addressed the propriety of this figure in response to Defendants' motion to exclude Dr. Lamb and Dr. Berndt's use of forecast averages in their respective analyses. This threshold was derived from Forest's own documents and forecasts, which compared hard switch and soft switch scenarios, as well as internal high-level analysis of how these forecasts **[**139]** impacted potential Namenda XR conversion rates. These forecasts were not, as Defendants state, "cherry-picked." Dr. Lamb relied on forecasts that **[*219]** were (1) "closest in time to Forest's decision to enact the hard switch, after Forest had market experience with Namenda XR and predicted generic entry in July 2015 (when it actually occurred), and thus incorporated the best analysis Forest had at the time"; and (2) "consistent with Forest's actual conversion rate through January 2014, before the switch announcement." (Pls.' Reply at 18.)

In any event, disputes over which forecasts are the appropriate forecasts do not discredit Dr. Lamb's methodology at the class certification stage. ***HN46***[] It is for the jury to decide whether the his opinions are persuasive. *See In re Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *10*.

It is also worth noting that, when estimating the adoption rate of Namenda XR absent the hard switch, it stands to reason that Forest took factors such as patient and physician prescribing preferences into account. As Dr. Lamb indicates, Forest's Namenda XR conversion rates were both thorough and kept up to date, with multiple forecasts being created in the space of a few weeks. (Lamb Rep. ¶ 151.)

Defendants raise the additional argument **[**140]** that Dr. Lamb dismisses the impact of Judge Sweet's injunction and Forest's "campaign to comply with it." (Defs.' Opp'n at 30.) Dr. Lamb considered this possibility at length. He concluded, however, that the injunction "was unlikely to have eliminated the anticompetitive effects of Forest's Hard Switch strategy." (Pls.' Reply at 12; Lamb Reply Rep. ¶ 69 - 75.) He reached this conclusion based on two categories of evidence.

First, when Forest informed customers of the injunction, it indicated that it was "appealing" the order and intended to "convince the higher court that, in fact, the lower court's decision was in error." (Opper Decl. Ex. 13, Dkt. No. 421 ("Cremieux Dep. Tr.") at 13:18 - 21.) After the Second Circuit upheld the injunction, Forest continued to challenge it through November 2015, and communicated this to its customers. (Pls.' Reply at 12; Lamb Rep. ¶ 114.) Plaintiffs' argue that the effects of the hard switch continued because, contrary to Forest's alleged campaign to comply with the injunction, Forest "intentionally sowed doubt" as to whether it would stand. (Pls.' Reply at 12.) This is supported by evidence cited in Dr. Lamb's report that "physicians were often hesitant **[**141]** to prescribe Namenda IR following the Court's injunction." (Lamb Rep. ¶ 116.)

Second, Dr. Lamb reviewed evidence indicating the difficulty of transitioning patients back to Namenda IR once they had switched to Namenda XR. This includes evidence that physicians were hesitant to prescribe, and pharmacies and health plans no longer covered, Namenda IR following the injunction. (*Id.* at ¶ 118.) Plaintiffs thus argue that, regardless of the injunction, "the marketplace, once shifted, would be slow to revert back to IR." (Pls.' Reply at 12.)

2. Reverse Payment Methodology

Because Dr. Lamb's reverse payment model incorporates hard switch damages, Defendants argue that it suffers from the same flaws described above. That discussion applies with respect to those objections.

Defendants claim that the reverse payment model suffers from additional flaws. They argue both that it is "premised on assumptions regarding generic pricing and penetration that are untethered from the actual world and sound economic theory," and that it allocates damages on the assumption that each member was injured by the reverse payment and the hard switch strategy. (Defs.' Opp'n at 31.)

The first objection is without merit. **[**142]** I disagree that Dr. Lamb's methodology in **[*220]** connection with the reverse payment model is divorced from sound economic theory. Dr. Lamb explains that he used a "benchmark analysis" to measure the overcharge resulting from the reverse payment, which "has been widely used for many years in calculating damages that arise from anticompetitive conduct of the sort alleged in this case." (Lamb Rep. ¶ 131.) I have reviewed Dr. Lamb's qualifications and the soundness of his expert testimony in the motion to exclude that testimony. To the extent that Forest disagrees with the generic entry date and number of generics that Dr. Lamb uses in his calculations, they are free to explore those issues on cross-examination.

The second part of Defendants' challenge to the reverse payment model speaks to their previous objections about which members were and were not injured. For example, they state, "Dr. Lamb's allocation awards damages for the hard switch to entities that never even purchased Namenda XR," and "allocates damages and assumes injury to entities that never purchased generic IR and thus could not have been injured by any of Forest's conduct." (Defs.' Opp'n at 32.) These are arguments about Plaintiffs' **[**143]** theory of injury, not about Dr. Lamb's methodology. I have already addressed these arguments in the discussion of which members could and could not be included in the class.

E. Superiority

Finally, a class action is superior to other available methods for fairly and efficiently adjudicating this controversy, as required under *Rule 23(b)(3)*.

HN47[] The first consideration under *Rule 23(b)(3)(A)* is whether the class members have an interest in controlling the prosecution of separate actions. There is no evidence that any of the direct purchasers would prefer to control the prosecution of their claims through separate lawsuits. On the contrary, Plaintiffs submit that many members of the class would forego their claims altogether rather than pursue them individually because, as small wholesalers, they "lack the resources to bring complex, expert-intensive antitrust suits on their own." (Class Cert. Mot. at 9.) The Court is not aware of any other litigation concerning this controversy by or against the direct purchaser class members. *See Fed. R. Civ. P. 23(b)(3)(B)*.

HN48[] Class treatment is appropriate in such "negative value cases," in which each class members' interest in the litigation is less than the cost to maintain an individual action. **[**144]** *Royal Park Invs. SA/NV v. Wells Fargo Bank, N.A., No. 14 Civ. 9764 (KPF), 2018 U.S. Dist. LEXIS 9087, 2018 WL 739580, *16 (S.D.N.Y. Jan. 10, 2018)* (citing *Noble, 224 F.R.D. at 346*). "As the Supreme Court has said, *Rule 23(b)(3)* class actions can be superior precisely because they facilitate the redress of claims where the costs of bringing individual actions outweigh the expected recovery." *In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 130 (2d Cir. 2013)* (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*.

Turning to *Rule 23(b)(3)(C)*, several considerations weigh in favor of concentrating the litigation in this particular forum. First, the current litigation has been before this Court for nearly three years, since September 2015. In that time, I have made a number of dispositive rulings that govern the claims of all direct purchasers. The parties have thus already litigated several issues that would surely arise in any new case. I also have before me the claims of the indirect purchasers in this case, which I have stayed pending the outcome of this litigation. (Dkt. No. 106.) **[*221]** These considerations make concentrating this litigation here particularly desirable.

HN49[] Turning to the fourth and most important consideration in the superiority analysis, the manageability of a particular class action is "an issue peculiarly within a district court's discretion." *Adkins v. Morgan Stanley, 307 F.R.D. 119, 147 (S.D.N.Y. 2015)*, *aff'd*, *656 F. App'x 555 (2d Cir. 2016)* (internal quotation marks omitted) (quoting *Seijas v. Repub. of Argentina, 606 F.3d 53, 58 (2d Cir. 2010))*. This class does not present any unique manageability issues that would preclude **[**145]** certification. As far as classes go, this class is relatively small.

Moreover, certification would promote uniformity of decision as to all direct purchasers, without sacrificing procedural fairness. *Id. at 141*.

For the reasons described above, Plaintiffs' motion for class certification is GRANTED.

I am certifying a direct purchaser plaintiff class including the 62 members proposed in Plaintiffs' revised list. These include Albertsons LLC; American Health Packaging; Amerisource Bergen; Anda; Associated Pharmacies; Auburn Pharmaceutical; Bellco; Bartell; Bloodworth Wholesale Drugs; Blupax Pharmaceuticals, LLC; Burlington Drug; Capital Wholesale; Cardinal Health; CVS Caremark; Dakota Drug; Discount Drug Mart; DMS; Drogueria Betances; Drogueria Central; Drogueria Cesar Castillo; Drugs Unlimited, Inc.; Express Scripts Inc.; Frank W. Kerr Inc.; Genetco Inc.; Hannaford Brothers; HC Pharmacy Central Inc.; Healthsource Distributors, LLC; HE Butt; HD Smith LLC; Humana, Inc.; Independent Pharmacy Cooperative; Kaiser Permanente; Kerr Drug; Keysource Medical, Inc.; Kroger; Louisiana Wholesale Drug; Major Pharmaceuticals/Rugby Lab; Masters Pharmaceutical Inc.; McKesson; Medco Health Solutions Inc.; Meijer **[**146]** Inc.; Miami Luken; Morris & Dickson; North Carolina Mutual Wholesale Drug; Optumrx Inc.; PBA Health; Peytons; Prescription Supply Inc.; Quest Pharmaceuticals, Inc.; Publix; Richie Pharmaceutical Company; RDC; RX Outreach; Smith; Supervalu Inc.; Tel Drug of PA LLC Joann Christens; The Harvard Group; Top RX LLC; Valley Wholesale; Value Drug; Walmart; Winn Dixie Logistics Inc.

CONCLUSION

This constitutes the decision and order of the Court.

Forest's motion for leave to file a letter of supplemental authority (Dkt. No. 561) is DENIED. The Clerk of the Court is directed to remove the motions at Dkt. Nos. 400, 434, 437, 439, 441, 443, 445, 505, and 561 from the Court's list of pending motions.

Dated: August 2, 2018

/s/ Colleen McMahon

Chief Judge

State v. Fournier Industrie et Sante & Labs. Fournier, S.A.

Court of Appeal of Louisiana, First Circuit

August 3, 2018, Judgment Rendered

NO. 2017 CA 1552, NO. 2017 CW 1218

Reporter

256 So. 3d 295 *; 2018 La. App. LEXIS 1495 **; 2018-2 Trade Cas. (CCH) P80,469; 2017 1552 (La.App. 1 Cir. 08/03/18);; 2018 WL 3685997

STATE OF LOUISIANA, BY AND THROUGH ITS ATTORNEY GENERAL JAMES CALDWELL VERSUS FOURNIER INDUSTRIE ET SANTE AND LABORATORIES FOURNIER, S.A., ABBOTT LABORATORIES, ABBVIE, INC.

Subsequent History: Rehearing denied by *State v. Fournier Indus. Et Sante, 2018 La. App. Unpub. LEXIS 348 (La.App. 1 Cir., Nov. 15, 2018)*

Writ denied by *State v. Fournier Industrie et Sante, 2019 La. LEXIS 941 (La., Apr. 8, 2019)*

Prior History: **[**1]** Appealed from the 19th Judicial District Court. In and for the Parish of East Baton Rouge. State of Louisiana Case No. C637571. The Honorable Donald R. Johnson, Judge Presiding.

State v. Fournier Industrie, 2017 La. App. LEXIS 2538 (La.App. 1 Cir., Dec. 28, 2017)

Disposition: WRIT DENIED; REVERSED AND RENDERED.

Core Terms

cause of action, Monopolies, no cause of action, no right, trial court, purchaser, indirect, interlocutory judgment, unjust enrichment, antitrust, right of action, restitution, overruling, application for a writ, assigned error, civil penalty, commerce, damages, anti trust law, violations, argues, retroactive, peremptory

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

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

HN1[] **Standards of Review, De Novo Review**

The standard of review of a ruling on an exception of no right of action, which presents a question of law, is de novo. Further, appellate review of a peremptory exception of no cause of action is de novo because an exception of no cause of action presents a question of law and the trial court's decision is based only on the sufficiency of the petition. Appellate review regarding questions of law is simply a review of whether the trial court was legally correct or legally incorrect.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN2[] Appellate Jurisdiction, Final Judgment Rule

A judgment that determines the merits in whole or in part is a final judgment. *La. Code Civ. Proc. Ann. art. 1841*. A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment. *Art. 1841*. An interlocutory judgment is appealable only when expressly provided by law. *La. Code Civ. Proc. Ann. art. 2083*.

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

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN3[] Motions to Dismiss, Failure to State Claim

The overruling of a peremptory exception of no right of action is an interlocutory judgment. Further, a trial court's decision overruling the peremptory exception raising the objection of no cause of action is an interlocutory judgment. Such an interlocutory judgment is only appealable if expressly provided by law. *La. Code Civ. Proc. Ann. art. 2083*.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN4[] Private Actions, State Regulation

Although interlocutory judgments are generally not appealable, *La. Rev. Stat. Ann. §§ 51:134* and *51:135* provide for an immediate appeal of interlocutory judgments related to antitrust claims.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN5[] Private Actions, State Regulation

La. Rev. Stat. Ann. §§ 51:134 and *51:135* provide for an immediate appeal of an interlocutory judgment related to antitrust claims.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN6[] **Private Actions, State Regulation**

An appeal may be taken as a matter of right from an interlocutory order or judgment relating to an antitrust claim. La. Rev. Stat. Ann. §§ 51:134 and 51:135. Furthermore, in the case of a restricted appeal, an appellant may also challenge interlocutory rulings involving the same or related issues.

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

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN7[] **Motions to Dismiss, Failure to State Claim**

The function of an exception of no right of action is a determination of whether plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the petition. La. Code Civ. Proc. Ann. art. 927(A)(6). In examining an exception of no right of action, a court should focus on whether the particular plaintiff has a right to bring the suit, but assume that the petition states a valid cause of action for some person.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Governments > State & Territorial Governments > Claims By & Against

HN8[] **State Regulation, Claims**

The State itself has a right of action under the Louisiana Unfair Trade Practices Act (LUTPA), La. Rev. Stat. Ann. § 51:1401 et seq., including a specific right to seek civil penalties and restitution. La. Rev. Stat. Ann. §§ 51:1407(B) and 51:1408(A)(5).

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Governments > Legislation > Effect & Operation > Prospective Operation

HN9[] **State Regulation, Claims**

In 2006, several amendments were made to the Louisiana Unfair Trade Practices Act (LUTPA), La. Rev. Stat. Ann. § 51:1401 et seq., including provisions allowing for civil penalties and restitution against any person found to have committed a LUTPA violation. La. Rev. Stat. Ann. § 51:1407(B)-(E) and La. Rev. Stat. Ann. § 51:1408(A)(5). There are no provisions which expressly state that any of the 2006 amendments are retroactive. La. Rev. Stat. Ann. § 1:2. The Louisiana Supreme Court has found no clear expression of legislative intent as to the retroactive application of LUPTA. As such, the 2006 amendment to LUTPA, which allows for civil penalties and restitution, cannot be applied retroactively. Thus, only injunctive relief is available for LUTPA violations occurring prior to the 2006 amendment.

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

HN10[] **Motions to Dismiss, Failure to State Claim**

An exception of no cause of action questions whether the law extends a remedy against the defendant to anyone under the factual allegations of the petition and is triable on the face of the petition. To determine the issues raised by the exception of no cause of action, each well-pleaded fact in the petition must be accepted as true. An exception of no cause of action should be granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim that would entitle him to relief. Every reasonable interpretation must be accorded the language used in the petition in favor of maintaining its sufficiency and affording the plaintiff the opportunity of presenting evidence at trial. If the petition states a cause of action on any ground or portion of the demand, the exception should generally be overruled.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN11[] **Regulated Practices, Monopolies & Monopolization**

The Louisiana Monopolies Act defines commerce as trade or commerce within the geographic boundaries of "this state." *La. Rev. Stat. Ann. § 51:121*. Further, the Louisiana Monopolies Act states that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in "this state" is illegal. *La. Rev. Stat. Ann. § 51:122(A)*.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN12[] **Types of Contracts, Quasi Contracts**

The root principle of unjust enrichment is that the plaintiff suffers an economic detriment for which he should not be responsible, while the defendant receives an economic benefit for which he has not paid. An action for unjust enrichment is allowed only when the plaintiff has no other remedy at law. However, where there is a rule of law directed to the issue, an action must not be allowed to defeat the purpose of said rule. Stated differently, unjust enrichment principles are only applicable to fill a gap in the law where no express remedy is provided.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN13[] **Clayton Act, Claims**

The Louisiana Monopolies Act states that no person shall monopolize, or attempt to monopolize, or combine, or conspire with any person to monopolize any part of the trade or commerce within this state. *La. Rev. Stat. Ann. § 51:123*. Only a direct purchaser may bring an action under § 4 of the Clayton Act, or the federal antitrust provision (akin to the Louisiana Monopolies Act). Indirect purchasers are not entitled to recover under the Clayton Act, based on the unique nature of antitrust litigation, issues of multiple recovery, and the problem of allocating damages if indirect purchasers were allowed to bring suit. Federal antitrust laws do not, however, preempt states from enacting statutes that allow indirect purchasers to recover damages for their injuries.

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Judges: BEFORE: McCLENDON, WELCH, AND THERIOT, JJ. Welch J. concurs in result only. McClendon, J., concurs and assigns reasons.

Opinion by: THERIOT

Opinion

[*297] [Pg 3] **THERIOT, J.**

Abbott Laboratories and AbbVie Inc. appeal the judgment of the Nineteenth Judicial District Court overruling their peremptory exceptions of no right of action and no cause of action. Abbott Laboratories and AbbVie Inc. have also filed a supervisory writ **[**2]** application seeking review of the same judgment.[1] For the following reasons, we deny the supervisory writ application, reverse the trial court's judgment, and render judgment dismissing the State's petition for failure to state a cause of action.

FACTS AND PROCEDURAL HISTORY

On March 4, 2015, the State of Louisiana, by and through its Attorney General James D. "Buddy" Caldwell[2] ("the State"), **[*298]** filed suit against Fournier Industrie Et Sante and Laboratories Fournier, S.A., Abbott Laboratories, and AbbVie Inc. (collectively "Defendants"), all of whom allegedly marketed and sold the pharmaceutical product Tricor in and to the state of Louisiana.[3] In its petition, the State alleged that Defendants had employed an unlawful scheme to prevent or delay a less expensive generic version of Tricor from entering the market. According to the State, this scheme included conduct such as filing fraudulent patent applications with the United States Patent and Trademark Office, unlawfully listing unenforceable patents in the FDA's Orange Book, "product hopping," and filing sham litigation against would-be competitors. **[**3]** The State claimed that, through this scheme, Defendants illegally maintained monopoly power in the market for fenofibrate in the United States for at least a decade, [Pg 4] maintained the price of Tricor at *supra*-competitive levels, and overcharged the State millions of dollars by depriving it of the benefits of unrestricted competition and access to less expensive generic versions of fenofibrate. With regard to the overpayments, the State claimed that Defendants' alleged unlawful conduct caused the State, through the Louisiana Medicaid Program ("Medicaid"), to pay more for fenofibrate products than they otherwise would have paid. As a result, the State brought claims under the *Louisiana Monopolies Act, La. R.S. 51:121, et seq*, and *Louisiana's Unfair Trade Practices Act ("LUTPA"), La. R.S. 51:1401, et seq.* Alternatively, the State asserted that it had a claim for unjust enrichment. The State sought restitution, reimbursement for the overpayments, damages as permitted by law, reasonable attorney fees, and costs.

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[1] The supervisory writ application filed by Abbott Laboratories and AbbVie Inc. was referred to this panel. See *State of Louisiana by and through its Attorney General, James Caldwell v. Fournier Industrie et Sante and Laboratories S.A., Abbott Laboratories, AbbVie, Inc., 2017-1218, 2017 La. App. LEXIS 2538 (La. App. 1 Cir. 12/28/17)* (unpublished writ action).

[2] On January 11, 2016, James D. "Buddy" Caldwell was succeeded in office as the Attorney General of Louisiana by Jeffrey "Jeff" Landry.

[3] Tricor is a drug used to treat high cholesterol and high triglyceride levels. The generic equivalent of Tricor is fenofibrate.

On May 8, 2015, AbbVie, Inc. and Abbott Laboratories (collectively "AbbVie") filed exceptions raising objections of prescription and peremption, no right of action, and no cause of action. On August 11, 2015, the trial court **[**4]** sustained AbbVie's objections of prescription and peremption and dismissed the State's claims for relief. In doing so, the trial court did not take up AbbVie's exceptions of no right of action or no cause of action, but held both exceptions in abeyance pending further proceedings.

The state subsequently appealed the trial court's judgment on AbbVie's exceptions. On December 22, 2016, this court found that the trial court erred in sustaining AbbVie's exception of prescription and peremption. *State by and Through Caldwell v. Fournier Industrie et Sante and Laboratories Fournier, S.A., 2015-1353 (La. App. 1 Cir. 12/22/16); 208 So.3d 1081, 1085-86*. Specifically, this court found that the trial court should have first considered whether the State was the proper party to bring its claims against AbbVie. *Id.* Thus, this court vacated the trial court's [Pg 5] judgment and remanded the case to the trial court for further proceedings. *Id. at 1086*.

Following this court's ruling, the trial court considered AbbVie's objections of no right of action and no cause of action. In a supplemental brief, Abb Vie argued that the only party vested with a right of action to recover for damages to Medicaid was the Louisiana Department of Health ("LDH"), meaning the Attorney General acting on behalf of the State did **[**5]** not have a right to recover Medicaid damages through litigation.[4] AbbVie also contended **[*299]** that the LUTPA claim was not viable because the State had not sought injunctive relief. As to whether the State had a cause of action, AbbVie argued that the State only asserted "indirect purchaser" claims and that Louisiana ***antitrust law*** did not provide a cause of action for indirect purchasers, nor did Louisiana ***antitrust law*** provide a cause of action for alleged antitrust violations that occurred entirely outside of Louisiana. Finally, AbbVie argued that the State had no right or cause of action to bring an unjust enrichment claim, in part because the State's damages were addressed by existing laws.

On July 17, 2017, the trial court held a hearing on these objections. On July 31, 2017, the trial court overruled AbbVie's objections of no right of action and no cause of action. AbbVie subsequently filed this appeal and a writ application, raising the same arguments as the appeal.

ASSIGNMENTS OF ERROR

Appellants assign the following as error:

(1) The trial court erred when it overruled Defendants-Appellants' exception of no right of action as to all of the Petition's claims, because the real party in **[**6]** interest to assert the claims in the Petition is not the State of Louisiana, but rather the Louisiana Department of Health.
[Pg 6] (2) The trial court erred when it denied Defendants-Appellants' exception of no cause of action as to the Petition's Monopolies Act claim, because the Monopolies Act does not reach the conduct alleged in the Petition.
(3) The trial court erred when it denied Defendants-Appellants' exceptions of no right or cause of action as to the Petition's unjust enrichment claim, because the Louisiana Department of Health is the only party in interest with the right of action to recover damages to Louisiana Medicaid on an unjust enrichment theory, and because an action for unjust enrichment cannot lie where express laws exist that address the complained-of conduct.
(4) The trial court erred when it overruled Defendants-Appellants' exception of no cause of action as to all of the Petition's claims, because Louisiana law does not provide a cause of action for indirect purchasers of a product.

STANDARD OF REVIEW

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[4] The Louisiana Department of Health was formerly known as the Department of Health and Hospitals.

HN1[] The standard of review of a ruling on an exception of no right of action, which presents a question of law, is *de novo. LeCompte v. Continental Casualty Co., 2016-1359 (La. App. 1 Cir. 7/12/17); 224 So.3d 1005, 1009*, *writ denied*, *2017-1525 (La. App. 1 Cir. 12/15/17); 231 So.3d 635*. Further, appellate review **[**7]** of a peremptory exception of no cause of action is *de novo* because an exception of no cause of action presents a question of law and the trial court's decision is based only on the sufficiency of the petition. *CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc., 2015-1260 (La. App. 1 Cir. 9/23/15); 182 So.3d 1009, 1016*. Appellate review regarding questions of law is "simply a review of whether the trial court was legally correct or legally incorrect." *Id.*

DISCUSSION

We first address a pending rule to show cause regarding whether this court has appellate jurisdiction over this appeal and an existing writ application.

[Pg 7] Rule to Show Cause and Writ Application

This court, *ex proprio motu*, issued a rule to show cause on November 8, 2017, on the basis that the judgment appeared to be a non-appealable ruling. On December 28, 2017, a panel of this court referred the order to the appeal panel. Subsequently, **[*300]** the State argued in a show cause brief that the trial court's judgment overruling AbbVie's exceptions of no right of action and no cause of action was not appealable because it was an interlocutory judgment.

HN2[] A judgment that determines the merits in whole or in part is a final judgment. *La. Code Civ. P. art. 1841*. A judgment that does not determine the merits but only preliminary matters in the course of the action is **[**8]** an interlocutory judgment. *La. Code Civ. P. art. 1841*. An interlocutory judgment is appealable only when expressly provided by law. *La. Code Civ. P. art. 2083*.

HN3[] The overruling of a peremptory exception of no right of action is an interlocutory judgment. *Bennett v. Arkansas Blue Cross Blue Shield, 2005-1714 (La. App. 1 Cir. 9/15/06); 943 So.2d 1124, 1126*. Further, the trial court's decision overruling the peremptory exception raising the objection of no cause of action is an interlocutory judgment. *Reid v. Reid, 2010-2000 (La. App. 1 Cir. 2/11/11); 57 So. 3d 609, 2011 WL 2120057, at *1* (unreported). Accordingly, the trial court's judgment in the present case is an interlocutory judgment and is only appealable if expressly provided by law. *La. Code Civ. P. art. 2083*.

HN4[] Although interlocutory judgments are generally not appealable, *La. R.S. 51:134* and *51:135* provide for an immediate appeal of interlocutory judgments related to antitrust claims. *[Pg 8] HPC Biologicals, Inc. v. UnitedHealthcare of Louisiana, Inc., 2016-0585 (La. App. 1 Cir. 5/26/16); 194 So.3d 784, 792*.

Louisiana Revised Statutes 51:135 states:

> All interlocutory judgments in the cases affected by this Part, and not otherwise provided for, shall be appealable within five days and shall be heard and determined within twenty days after appeal is lodged, and any interlocutory judgments not appealed, except those rendered during the progress of the trial, shall be final, and shall not be reopened on final appeal. Such appeals shall be on the original papers, on the order of the district judge, if a transcript cannot be prepared **[**9]** in time.

Because the State asserts claims under the Louisiana Monopolies Act, which is contained in *La. R.S. 51:121, et seq.*, *La. R.S. 51:135* is applicable. This court's jurisprudence has consistently stated that *HN5*[] *La. R.S. 51:134* and *51:135* provide for an immediate appeal of such an interlocutory judgment related to antitrust claims. See *HPC Biologicals, Inc., 194 So.3d at 792*; see also *CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc., 2015-0881 (La. App. 1 Cir. 7/14/15); 180 So.3d 382, 383*; *Van Hoose v. Gravois, 2011-0976 (La. App. 1 Cir. 7/7/11); 70 So. 3d 1017, 1021-22*; *Plaquemine Marine, Inc. v. Mercury Marine, 2003-1036 (La. App. 1 Cir. 7/25/03); 859 So.2d 110, 114, n. 3*. Accordingly, as long as AbbVie appealed the interlocutory judgment within five days, AbbVie's appeal is proper under *La. R.S. 51:135*. The parties were notified of the judgment overruling AbbVie's exceptions of no right of action and no cause of action on Thursday, August 3, 2017. AbbVie submitted their motion for appeal on Thursday, August 10, 2017. Because legal holidays are not to be included in the computation of a period of time allowed or prescribed when that time period is less than seven days, AbbVie timely filed its appeal on the fifth day of the applicable time period. See La. Code Civ. P. art. 5059.

[Pg 9] As previously stated, AbbVie filed both an appeal and a writ application after the trial court's overruling of its objections. While there is no specific statutory provision providing for an immediate appeal **[*301]** of an interlocutory judgment related to LUTPA claims, some courts have addressed LUTPA claims along with **[**10]** antitrust claims on appeals authorized by R.S. 51:134 and 51:135. See Southern Tool & Supply, Inc. v. Beerman Precision, Inc., 2003-0960 (La. App. 4 Cir. 11/26/03); 862 So.2d 271, *writs denied*, *2003-3481, 2003-3518, & 2003-3536 (La. 3/12/04); 869 So.2d 821*, 825, & 826; see also Jefferson v. Chevron U.S.A. Inc., 97-2436, 98-0254 (La. App. 4 Cir. 5/20/98); 713 So.2d 785, *writ denied*, 98-1681 (La. 10/16/98); 727 So.2d 441.[5] Accordingly, because we find that this appeal is proper under the Louisiana Monopolies Act, we deny the writ application.

Assignment of Error #1

In its first assignment of error, AbbVie argues that the trial court erred in overruling AbbVie's exception of no right of action as to all of the petition's claims, because the real party in interest to assert the claims is LDH, not the State. As such, AbbVie argues that LDH is the only party that can seek reimbursement of the Medicaid funds at issue.

HN7[] The function of an exception of no right of action is a determination of whether plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the petition. La. Code Civ. P. art. 927(A)(6); Badeaux v. Southwest Computer Bureau, Inc., 2005-0612 (La. 3/17/06); 929 So.2d 1211, 1217. In examining an exception of no right of action, a court [Pg 10] should focus on whether the particular plaintiff has a right to bring the suit, but assume that the petition states a valid cause of action for some person. Turner v. Busby, 2003-3444 (La. 9/9/04); 883 So.2d 412, 415.

This court addressed the issue of whether the State has a right of action under LUTPA in State, by and through Caldwell v. AstraZeneca AB, 2016-1073 (La. App. 1 Cir. 4/11/18); ___ So.3d ___, 249 So. 3d 38, 2018 La. App. LEXIS 693, 2018 WL 1755535. Therein, this court **[**11]** found that***HN8***[] the State itself had a right of action under LUTPA, including a specific right to seek civil penalties and restitution. 2018 La. App. LEXIS 693, [WL] at *4-6 (citing State v. Abbott Laboratories, Inc., 2015-1626, 2015-1854 (La. App. 1 Cir. 10/21/16); 208 So.3d 384, 389, *writs denied*, *2017-0125, 2017-0149 (La. 3/13/17); 216 So.3d 802, 808*); see also La. R.S. 51:1407(B) and La. R.S. 51:1408(A)(5). Accordingly, the State has a right of action under LUTPA to bring claims against AbbVie. However, we must also decide whether the State has a cause of action under LUTPA.

In *Astra Zeneca AB*, this court noted that "LUTPA, by its terms, gives the State a cause of action, as well as a right of action[.]" AstraZeneca AB, 2018 La. App. LEXIS 693, [WL] *12-13. However, this court declined to address the issue of whether the State could seek the remedies available under La. R.S. 51:1407(B) without having sought injunctive relief pursuant to La. R.S. 51:1407(A). Astra Zeneca AB, 2018 La. App. LEXIS 693, [WL] *5 n.3. AbbVie also raises another issue not addressed **[*302]** in Astra Zeneca AB; namely, whether the State can seek civil penalties or restitution when the conduct alleged in the petition occurred prior to the 2006 amendment that added civil penalties and restitution as potential relief in LUTPA cases. AbbVie raised this issue with the trial court and with this court on appeal. As such, we must address this issue.

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[5] ***HN6***[] An appeal may be taken as a matter of right from an interlocutory order or judgment relating to an antitrust claim. See La. R.S. 51:134 and 51:135. Furthermore, in the case of a restricted appeal, such as this, an appellant may also challenge interlocutory rulings involving the same or related issues. Roba, Inc. v. Courtney, 2009-0509 (La. App. 1 Cir. 8/10/10), 47 So.3d 509, 514 n.12; State ex rel. Div. of Admin., Office of Risk Management v. National Union Fire Ins. Co. of Louisiana, 2010-0689 (La. App. 1 Cir. 2/11/11); 56 So.3d 1236, 1242, *writ denied*, ***2011-0849 (La. 6/3/11); 63 So.3d 1023***. In this case, the issues relating to the antitrust claims are integral to the issues relating to the LUTPA claims. As such, the issues relating to the LUTPA claims are properly before us in this restricted appeal of a judgment relating to the antitrust claims.

HN9[] In 2006, several amendments were made to **[**12]** LUTPA, including provisions allowing for civil penalties and restitution against any person [Pg 11] found to have committed a LUTPA violation. *La. R.S. 51:1407(B)-(E)* and *La. R.S. 51:1408(A)(5)*. There are no provisions which expressly state that any of the 2006 amendments are retroactive. See *La. R.S. 1:2*. However, the retroactivity of the 2006 amendment was specifically addressed by the Louisiana Supreme Court in *State v. Foret, 2015-1298 (La. 1/27/16); 188 So.3d 154*. Therein, the Louisiana Attorney General filed a civil suit in 2013 against Dr. Foret under the Sledge Jeansonne *Louisiana Insurance Fraud Prevention Act* ("the Sledge Jeansonne Act"). *Foret, 188 So.3d at 155*. The Attorney General also sought civil monetary penalties under LUTPA for violations of *La. R.S. 51:1405*. *Id. at 156*. The Louisiana Supreme Court subsequently conducted a review of the legislative history of the Sledge Jeansonne Act and LUTPA, and found no clear expression of legislative intent as to the retroactive application of these laws. *Id. at 159-60*. The Louisiana Supreme Court concluded that it could not apply the provisions of LUTPA to Dr. Foret's acts of criminal misconduct that preceded the effective date of the relevant LUTPA amendment, which allowed the State Attorney General to seek penalties for unlawful, unfair methods of competition and unfair or deceptive acts **[**13]** or practices in the conduct of trade or commerce. *Id. at 162-63*. As such, the 2006 amendment to LUTPA, which allows for civil penalties and restitution, cannot be applied retroactively. Thus, only injunctive relief is available for LUTPA violations occurring prior to the 2006 amendment.

Herein, the State's petition alleges various acts of misconduct, all occurring between 2000 and 2005. Because we cannot retroactively apply the 2006 amendment to alleged violations occurring prior to the effective date of that amendment, we find that the State cannot state a cause of action for civil penalties or restitution under LUTPA. In deciding this issue, we do [Pg 12] not address whether the State could seek civil penalties or restitution without having sought injunctive relief pursuant to *La. R.S. 1407(A)*.

Assignment of Error #2

In its second assignment of error, AbbVie argues that the trial court erred in denying its exception of no cause of action as to the Monopolies Act claim because the alleged acts did not occur in Louisiana or have the purpose of affecting trade in Louisiana. ***HN10***[] An exception of no cause of action questions whether the law extends a remedy against the defendant to anyone under the factual allegations of **[**14]** the petition and is triable on the face of the petition. *Badeaux, 929 So.2d at 1217*. To determine the issues raised by the exception of no cause of action, each well-pleaded fact in the petition must be accepted as true. *Id.* An exception of no cause of action should be granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim that would entitle him to relief. *Id.* Every reasonable interpretation must be accorded the language used in the petition in favor of maintaining its sufficiency and affording the plaintiff the opportunity of presenting evidence at trial. *Id.* If the petition states a cause of action on any ground or portion of **[*303]** the demand, the exception should generally be overruled. *Id.*

The State cannot state a cause of action for violations of the Louisiana Monopolies Act based on the operative facts (*i.e.* AbbVie's activities) that occurred outside of the geographic boundaries of Louisiana. ***HN11***[] The Louisiana Monopolies Act defines commerce as "trade or commerce within the geographic boundaries of this state." *La. R.S. 51:121* (emphasis added). Further, the Louisiana Monopolies Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, **[**15]** in restraint of trade or commerce in this state is illegal." *La. R.S. 51:122(A)* (emphasis [Pg 13] added). The alleged illegal acts in the State's petition include patent infringement actions filed in Illinois and Delaware. Although the State alleges that AbbVie's acts affected commerce within Louisiana and that AbbVie sold TriCor within Louisiana, the alleged wrongful acts occurred outside of the geographic boundaries of Louisiana. Accordingly, the State failed to state a cause of action under the Louisiana Monopolies Act.

Assignment of Error #3

In its third assignment of error, AbbVie argues that the trial court erred in denying its exceptions of no right and no cause of action as to the State's unjust enrichment claim. In its petition, the State alleges that AbbVie's acts resulted in financial benefit, *i.e.* profits resulting from unlawful overcharges and monopoly profits. The State argues that it is inequitable to allow AbbVie to retain those overcharges and profits and that AbbVie should be compelled to repay those profits.

HN12[] The root principle of unjust enrichment is that the plaintiff suffers an economic detriment for which he should not be responsible, while the defendant receives an economic benefit **[**16]** for which he has not paid. *Coastal Environmental Specialists, Inc. v. Chem-Lig Intern., Inc., 2000-1936 (La. App. 1 Cir. 11/9/01); 818 So.2d 12, 19*. An action for unjust enrichment is allowed only when the plaintiff has no other remedy at law. *Id.* However, where there is a rule of law directed to the issue, an action must not be allowed to defeat the purpose of said rule. *Id.* Stated differently, unjust enrichment principles are only applicable to fill a gap in the law where no express remedy is provided. *Id.* Because the State has no cause of action under LUTPA or the Louisiana Monopolies Act, it cannot employ a subsidiary unjust enrichment claim to circumvent this rule. *AstraZeneca AB, 2018 La. App. LEXIS 693, [WL] at *8* (Welch, J., dissenting); *[Pg 14]* see also *Coastal Environmental Specialists, Inc. v. Chem-Lig Intern., Inc., 2000-1936 (La. App. 1 Cir. 11/9/01); 818 So. 2d 12, 19*. Accordingly, the State failed to state a cause of action for unjust enrichment.

Assignment of Error #4

In its fourth assignment of error, AbbVie argues that the trial court erred in overruling AbbVie's exception of no cause of action as to the State's Louisiana Monopolies Act claim, because Louisiana law does not provide a cause of action to indirect purchasers of a product. AbbVie bases this argument on *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977)*, in which the United States Supreme Court held that only a direct purchaser may bring an action under the federal antitrust provision.

HN13[] The Louisiana Monopolies Act states **[**17]** that "[n]o person shall monopolize, or attempt to monopolize, or combine, or conspire with any person to monopolize any part of the trade or commerce within this state." *La. R.S. 51:123*. In *Illinois Brick Co. v. Illinois, 431 U.S. 720, 728-29, 97 S.Ct. 2061, 2066, 52 L.Ed.2d 707 (1977)*, the United States Supreme Court held **[*304]** that only a direct purchaser may bring an action under *§ 4 of the Clayton Act*, or the federal antitrust provision (akin to the Louisiana Monopolies Act). The United States Supreme Court further held that indirect purchasers were not entitled to recover, citing the unique nature of antitrust litigation, issues of multiple recovery, and the problem of allocating damages if indirect purchasers were allowed to bring suit. *Illinois Brick Co., 431 U.S. at 730-35, 737-38*. In a later case, the United States Supreme Court held that federal antitrust laws do not, however, preempt states from enacting statutes that allow indirect purchasers to recover damages for their injuries. [Pg 15] See *California v. ARC America Corp., 490 U.S. 93, 101-02, 109 S.Ct. 1661, 1665-66, 104 L.Ed.2d 86 (1989)* (rejecting the argument that California's ***antitrust law***, which specifically allows indirect purchaser actions, was preempted by federal law).

AbbVie's argument regarding indirect purchasers is identical to AstraZeneca's argument in *Astra Zeneca AB*. This court previously discussed this argument, stating:

> AstraZeneca **[**18]** further contends that even if the State has a right of action, it cannot maintain a cause of action as an indirect purchaser of the prescription drug at issue. Although AstraZeneca couches this argument in terms of "no cause," the argument in essence is one of no right. In other words, AstraZeneca asserts that because the State is an indirect purchaser, it has no right to assert claims under LUTPA or the Monopolies Act. [. . .]
>
> Regardless of whether the State is an indirect purchaser . . . the State itself has a right of action under LUTPA, including a specific right of action to seek civil penalties and restitution. On this limited record based solely on the exceptions, we make no determination of whether Louisiana would follow *Illinois Brick* with regard to the indirect purchaser rule, as we need not decide this issue to determine whether the State has any right of action.

*Astra Zeneca AB, 2018 La. App. LEXIS 693, [WL] at *6*. Accordingly, this court declined to address whether Louisiana would follow *Illinois Brick*.

Like AstraZeneca's argument in *Astra Zeneca AB*, AbbVie's argument that indirect purchasers lack standing to assert claims and pursue damages for alleged antitrust violations is an argument of no right of action. However, because **[**19]** we find that the State fails to state a cause of action under both LUTPA and the Monopolies Act, and we find the State does not have a cause of action as to its unjust enrichment claim, we need not determine whether Louisiana would follow *Illinois Brick*. We must dismiss the State's petition for failure to state a cause of action. Therefore, we pretermit any discussion as to whether the State has a right of action.

DECREE

For the above and foregoing reasons, we deny Abbott Laboratories and AbbVie Inc.'s writ application. We reverse the judgment of the Nineteenth Judicial District Court overruling Abbott Laboratories and AbbVie Inc.'s peremptory exceptions of no cause of action as to the State's Louisiana Unfair Trade Practices Act claim, its Louisiana Monopolies Act claim, and its unjust enrichment claim. We render judgment dismissing the State's petition for failure to state a cause of action. Costs of this appeal in the amount of $4,020.00 are assessed to Appellee, the State of Louisiana, by and through its Attorney General James D. "Buddy" Caldwell.

[*305] WRIT DENIED; REVERSED AND RENDERED.

Concur by: McClendon

Concur

McClendon, J., concurring.

Given that the State fails to state a cause of action under the Louisiana **[**20]** Monopolies Act, I concur. The State has not alleged any violations occurring in intrastate commerce. Rather, all alleged antitrust acts occurred outside of the State of Louisiana even though the acts allegedly affected Louisiana interests. The policy decision of whether to expand Louisiana's ***antitrust law*** is reserved to our legislature.

I note that Louisiana's Monopolies Act utilizes language similar to Alabama's Monopolies Act. In reviewing its act, the Alabama Supreme Court stated: "Thus, [Alabama's antitrust statutes] regulate monopolistic activities that occur 'within this state—within the geographic boundaries of this state—even if such activities fall within the scope of the *Commerce Clause of the Constitution of the United States.* We leave to the Legislature the policy decision of whether to expand the reach of Alabama's antitrust statutes to activities that cross state boundaries." ***Abbott Laboratories v. Durrett****, 746 So.2d 316, 339 (Ala. 1999)*.

I recognize that some other states have amended their antitrust laws to also apply to interstate commerce in circumstances when antitrust acts occur solely outside of the state, but substantially affect the people of a state. See ***Olstad v. Microsoft Corp.****, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139, 156 & 157 (Wis. 2005)* ("The Legislature deleted references to 'in this state' in the Little Sherman Act portion of the chapter. ... In Wisconsin, **[**21]** the interpretation of our statute has changed not only because of evolution in constitutional theory, but also because the legislature acted to repeal and recreate Chapter 133 in 1980, with altered language.")[1]

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[1] For a detailed discussion of the history of federal ***antitrust law*** and its interplay with state ***antitrust law*** see **Olstad**. The **Olstad** court also recognized that while states can regulate interstate commerce in some circumstances, "[s]tate law is precluded from regulating interstate commerce only if it 'unduly burden[s]' interstate commerce." *700 N.W.2d at 143* (citing Von Kalinowski, Antitrust Laws & Trade Regulation § 100.03 (2d ed.2004)).

Because the Louisiana Legislature has not broadened the scope of Louisiana's antitrust laws, I concur with the result reached.

AngioDynamics, Inc. v. C.R. Bard, Inc.

United States District Court for the Northern District of New York

August 6, 2018, Decided; August 6, 2018, Filed

1:17-cv-00598 (BKS/CFH)

Reporter
2018 U.S. Dist. LEXIS 131206 *; 2018 WL 3730165

ANGIODYNAMICS, INC., Plaintiff, v. C.R. BARD, INC. and BARD ACCESS SYSTEMS, INC., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Without prejudice *AngioDynamics, Inc. v. C.R. Bard, Inc., 2021 U.S. Dist. LEXIS 37234, 2021 WL 776701 (N.D.N.Y., Mar. 1, 2021)*

Partial summary judgment denied by, Summary judgment denied by, Motion granted by *AngioDynamics, Inc. v. C.R. Bard, Inc., 537 F. Supp. 3d 273, 2021 U.S. Dist. LEXIS 85578, 2021 WL 1792394 (N.D.N.Y., May 5, 2021)*

Motion granted by, in part, Motion granted by *AngioDynamics, Inc. v. C.R. Bard, Inc., 2021 U.S. Dist. LEXIS 109621, 2021 WL 2403107 (N.D.N.Y., June 11, 2021)*

Motion granted by, in part, Motion denied by, in part, Motion denied by, in part, As moot *AngioDynamics, Inc. v. C.R. Bard, Inc., 2022 U.S. Dist. LEXIS 120384, 2022 WL 2643583 (N.D.N.Y., July 8, 2022)*

Later proceeding at *Angiodynamics, Inc. v. C.R. Bard, Inc., 2022 U.S. Dist. LEXIS 164560, 2022 WL 4225170 (N.D.N.Y., Sept. 13, 2022)*

Later proceeding at *AngioDynamics, Inc. v. C.R. Bard, Inc., 2022 U.S. Dist. LEXIS 168146 (N.D.N.Y., Sept. 19, 2022)*

Core Terms

tip, stylets, sells, technology, products, allegations, catheter, coercion, buyer, tied product, competitors, purchasers, sterile, patients, blood, cable, seller, tying product, bundling, effects, vein, anticompetitive, customers, buy, manufactures, peripheral, confirm, motion to dismiss, consumer demand, market share

Counsel: **[*1]** For Plaintiff: Philip J. Iovieno, Adam R. Shaw, Anne M. Nardacci, Jenna C. Smith, Boies Schiller Flexner LLP, Albany, NY; Nicholas A. Gravante, Jr., New York, NY.

For Defendants: Andrew J. Frackman, Edward N. Moss, O'Melveny & Myers LLP, New York, NY; James P. Nonkes, Philip G. Spellane, Harris Beach PLLC, Pittsford, NY.

Judges: Hon. Brenda K. Sannes, United States District Judge.

Opinion by: Brenda K. Sannes

Opinion

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff AngioDynamics, Inc. ("AngioDynamics") brings this antitrust action against Defendants C.R. Bard, Inc. and Bard Access Systems, Inc. (collectively, "Bard"), asserting a claim of illegal tying in violation of *section 1 of the Sherman Act* (codified at *15 U.S.C. § 1*) under "per se" and "rule of reason" theories of liability. (*See generally* Dkt. No. 1). AngioDynamics seeks treble damages, a permanent injunction, and declaratory relief. (*See id.* at 29). Bard now moves to dismiss the Complaint for failure to state a claim under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. (Dkt. No. 14). For the reasons set forth below, Bard's motion is denied.

II. FACTS[1]

A. Peripherally Inserted Central Catheters

AngioDynamics manufactures medical devices used for minimally invasive treatment of medical conditions requiring vascular access, peripheral **[*2]** vascular, oncology, or surgical interventions. (Dkt. No. ¶ 24). Similarly, Bard manufactures vascular access, oncological, urological, and surgical medical devices. (*Id.* ¶¶ 25, 26). More specifically, both AngioDynamics and Bard manufacture, market, and sell peripherally inserted central catheters ("PICCs"). (*Id.* ¶ 30). PICCs are long, thin catheters inserted into the body through a vein, most commonly the basilic vein in the upper arm, and passed to the distal superior vena cava, the large vein leading to the right atrium of the heart. (*Id.* ¶¶ 2, 31-32). PICCs are generally suited for patients requiring long-term intravenous medical treatment; clinicians use PICCs to deliver medications, fluids, and nutrients into the body, sample blood, and power-inject contrast media. (*Id.* ¶¶ 2, 31).

Nevertheless, PICC have associated risks, including infection, blood clotting, and catheter occlusion. (*Id.* ¶ 34). Blood clotting is a "serious, but common, complication arising from any PICC use." (*Id.*). It may cause life-threatening thromboembolic events, such as deep vein thrombosis ("DVT")—when a blood clot blocks a large, essential vein—or pulmonary embolism ("PE")—when a blood clot travels to and **[*3]** obstructs vessels in the lungs. (*Id.* ¶ 35). There is a strong association between PICC use and upper extremity deep vein thrombosis, as "PICCs are placed in the upper extremities and can occupy much of the cross-sectional diameter of peripheral veins of the arm." (*Id.* ¶ 37). A recent study indicated that "23% of patients who received a PICC during hospitalization experienced a thromboembolic event."[2] (*Id.* ¶ 38). Another common problem is "intra-luminal catheter occlusion, which is most often caused by the reflux of blood into the catheter shaft and the subsequent clotting of that blood." (*Id.* ¶ 4). A tissue plasminogen activator ("tPA") is commonly used to clear catheter occlusions, but a dose of tPA can cost approximately $124, and the administration of the drug has been tied to an "increase in the development of central line associated blood stream infections." (*Id.* ¶ 5).

AngioDynamics markets and sells PICCs that address both the problems of blood clots and catheter occlusions. (*Id.* ¶¶ 3, 4). In 2012, the company obtained FDA approval for its BioFlo PICC, which is made of a material containing Endexo Technology, "a permanent and non-eluting integral polymer." (*Id.* ¶¶ 3, 45-46, **[*4]** 48). Because the polymer is "blended with Carbothane thermoplastic polyurethane" as part of the manufacturing process, it is "present throughout the catheter material, including the outer surface, inner surface and even the cut catheter tip."

[1] The allegations are taken from the Complaint and assumed to be true for purposes of this motion. *Faber v. Metro. Life Ins. Co., 648 F.3d 98, 104 (2d Cir. 2011)*.

[2] According to the Complaint, reducing the incidence of DVT and PE cases has been a priority for national health authorities in recent years. (*See id.* ¶¶ 40-44).

(*Id.* ¶ 48). The combined material protects against blood clot formation "by creating passive surfaces" and thereby reduces the risk of life-threatening DVT and PE. (*Id.* ¶¶ 3, 48, 49). According to in-vitro tests, on average, BioFlo PICCs using Endexo Technology decrease blood clot accumulation by 87%, as measured by platelet count, compared to commonly used PICCs. (*Id.* ¶¶ 3, 50). BioFlo PICCs are "also available with [Pressure Activated Safety Valve ("PASV")] Technology, which is AngioDynamics' patented valve designed to automatically resist backflow and reduce blood reflux on the inside of the catheter." (*Id.* ¶ 52). PASV-equipped BioFlo PICCs can therefore lower the usage of tPA, with its attendant risks, to treat catheter occlusion. (*See id.* ¶ 5).

By contrast, Bard sells standard polyurethane PICCS that "do not contain any thrombo-resistant material," as "Bard has been unable to develop a thrombo-resistant material similar to the Endexo Technology **[*5]** . . . despite its efforts to do so."[3] (*Id.* ¶ 55; *see also id.* ¶¶ 57-61). Further, Bard's catheters have longer taper length, which increases the risk of complications from additional obstruction of blood flow. (*Id.* ¶ 55).

The market for PICCs in the United States amounts to approximately $400 million per year in annual sales, with Bard accounting for "the vast majority of sales in the PICC market." (*Id.* ¶ 115). Despite differing "in certain important respects," PICCs "all serve the same basic function"—they "administer fluids, medications and nutrients, sample blood, and power inject contrast media." (*Id.* ¶ 91). Other types of catheters or vascular access devices are generally not good substitutes for PICCs, except "in limited circumstances." (*Id.* ¶ 92). One distinguishing consideration is the treatment's duration; PICCs are for medium-term treatments (more than six days), whereas short peripheral intravenous venous catheters are for short-term treatments and implantable ports are for long-term treatments. (*Id.*).

B. Tip Location Systems

As catheter misplacement can cause serious complications, clinicians must ascertain a PICC's location within the patient's body. (*See id.* ¶ 7). Traditionally, **[*6]** medical personnel used a chest x-ray or fluoroscopy to confirm a PICC's final location, but clinicians now often rely on technologies known as tip location systems, which are less expensive, less time consuming, and more accurate. (*Id.* ¶¶ 7-8, 62-63). Many such technologies use a patient's electrocardiographic ("ECG") waveform to determine the final location of the PICC's tip in relation to the heart. (*Id.* ¶ 8). ECG technology, however, cannot convey information about the tip's location as it travels through the venous system before entering the superior vena cava. (*Id.* ¶ 64). Therefore, some tip location systems also provide navigation assistance, using magnetic tracking or Doppler technology, to help clinicians steer the PICC through the venous system. (*Id.* ¶¶ 7, 9, 65, 85).

Bard sells tip location systems under the brand names Sherlock 3CG Tip Confirmation System ("Sherlock 3CG") and Sherlock II Tip Location System ("Sherlock II"). (*Id.* ¶ 11). It was the first company to provide navigation technology, and its Sherlock 3CG system is the first and only tip location system to combine three technologies, (*id.* ¶ 11): (i) ultrasound technology to identify a suitable vein for inserting **[*7]** the PICC, (*id.* ¶¶ 32, 68); (ii) magnetic tracking navigation technology to monitor and guide the PICC through the venous system, using an external sensor and display device paired with a "proprietary stylet," (*id.* ¶¶ 68-70); and (iii) ECG technology to confirm the final location of the PICC's tip in the superior vena cava, (*id.* ¶ 64, 68). Thanks to these combined technologies, "Bard's Sherlock 3CG system is widely regarded as superior to other tip location systems," (*id.* ¶ 68), and "indisputably provides the highest quality in PICC placement, thus providing the greatest ease of use for clinicians," (*id.* ¶ 87). According to a recent survey, "approximately 75% of tip location purchasers would not buy a tip location system that lacked navigation." (*Id.* ¶ 87). Given its technological edge, Bard sells more than 70% of tip location systems in the United States. (*Id.* ¶¶ 28, 83, 88).

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[3] The Complaint states that in January 2015 Bard announced its plan to launch "coated PICCs" but that Bard later dropped "any further reference to its efforts to develop a thrombo-resistant PICC family of products." (*Id.* ¶¶ 59, 61). Further, "thrombo-resistant coating" is allegedly inferior to AngioDynamics' integrated Endexo Technology in terms of "reduced thrombus results" and "protecting cut surfaces"; AngioDynamics also asserts that coatings "elute into the blood stream, exposing patients to chemicals unnecessarily." (*Id.* ¶¶ 59, 60).

AngioDynamics also sells a tip location system, marketed under the brand name Celerity and manufactured by Nostix, LLC. (*Id.* ¶¶ 78, 82). This system uses ECG technology to confirm PICC placement but does not include navigation or ultrasound technology. (*Id.* ¶ 78-79). Following Nostix's acquisition by another medical **[*8]** device company in 2016, AngioDynamics announced that it would stop selling the Celerity tip location system. (*Id.* ¶¶ 12, 82).

Although "tip location systems on the market differ in certain respects," they can "all be used reasonably interchangeably." (*Id.* ¶ 85). On the other hand, x-rays and fluoroscopy, which are comparatively more time consuming, more expensive, and less accurate, are "not good substitutes for tip location system." (*Id.* ¶ 86). Industry organizations have recommended using tip location systems over traditional methods of confirming PICC placement, thus making tip location systems "the industry standard of care in PICC placement." (*Id.* ¶¶ 86-87). The use of tip location systems has continued to grow and has now largely displaced the use of x-rays and fluoroscopy to confirm PICC placement. (*Id.* ¶ 86). According to the Complaint, "very few players have entered the tip location system market" because of high regulatory and technological barriers to entry, including the "significant research and development" effort required, the high level of investment needed, and the lengthy time to market. (*Id.* ¶ 89).

C. Bard's Selling Practices

Bard's Sherlock 3CG and Sherlock II tip **[*9]** location systems require Bard's proprietary stylets to operate, but Bard only sells the stylets preloaded in its own PICCs, despite having approval from the U.S. Food and Drug Administration (the "FDA") to sell its stylets separately from its PICCs—i.e., "single sterile." (*Id.* ¶¶ 16, 71, 74). In approving the sale of Bard's stylets single sterile, the FDA stated that Bard's stylets "may now be used with specific Bard catheters as well as any open-ended, non-valved, polyurethane peripherally inserted central catheter that meets the dimensional specifications of the stylet (0.020 in minimum lumen diameter)." (*Id.* ¶ 74). Bard's stylet is compatible with AngioDynamics' BioFlo PICC. (*Id.* ¶ 77). Bard has sold its stylets single sterile only once—to Cleveland Clinic, "one of the leading medical centers in the United States," which has "significant purchasing leverage." (*Id.* ¶¶ 16, 75). Having seen a significant reduction in upper-extremity DVT in patients using AngioDynamics' BioFlo PICCs, Cleveland Clinic "requested to purchase Bard's stylets single sterile specifically so that it could use AngioDynamics' BioFlo PICCs with the Bard Sherlock 3CG tip location system."[4] (*Id.* ¶ 75).

With the exception of Cleveland Clinic, however, "Bard refuses to sell the stylets separately from its PICCs." (*Id.* ¶ 97). "Other institutions have requested that Bard sell its stylets single sterile to them and Bard has refused their requests." (*Id.* ¶ 76). In contrast to Bard, AngioDynamics sells its Celerity-branded tip location system with the clip necessary to operate it separately from its BioFlo PICCs. (*Id.* ¶ 80). All sellers of tip location systems, except for Bard, allow their tip location systems to be sold separately from their PICCs.[5] (*Id.* ¶ 81).

D. Alleged Effects

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[4] Bard notes in their motion that "Bard originally obtained FDA approval to sell its stylets preloaded in its PICCs and applied for FDA approval to sell the stylets separately *only in response* ***[*10]*** *to, and in order to accommodate, Cleveland Clinic's request*." (Dkt. No. 14-1, at 16 n.6). Bard also states that "Cleveland Clinic ultimately switched to purchasing [the stylets] together with PICCs as an integrated product." (*Id.* at 16 n.5). These factual assertions, however, are outside the pleadings and thus not properly considered on a *Rule 12(b)(6)* motion. *See* *Nakahata v. New York-Presbyterian Healthcare Sys., 723 F.3d 192, 202 (2d Cir. 2013)*.

[5] In their moving papers, Bard asserts that another seller of tip location systems, Teleflex, preloads its stylets in its PICCs. (Dkt. No. 14-1, at 10 n.2; *see also* Dkt. Nos. 14-2, 14-3). AngioDynamics responds that Teleflex also sells its stylets separately. (Dkt. No. 18, at 19 & n.5). The Court has not considered either party's factual assertions on this issue because they are outside of the pleadings. (*See supra* note 4). As AngioDynamics correctly notes, on a motion to dismiss, the Court cannot consider the contents of documents filed with the Securities and Exchange Commission for the truth asserted therein; instead, the Court must confine itself to the four corners of the Complaint. *See* *Staehr v. Hartford Fin. Serv. Grp., 547 F.3d 406, 425 (2d Cir. 2008)*.

By refusing to sell its tip location system stylet single sterile, Bard has "foreclosed purchasers who prefer AngioDynamics BioFlo PICCs from pairing Bard's tip location system with BioFlo PICCs," and instead Bard has forced purchasers who want a Bard tip location system to purchase Bard PICCs. (*Id.* ¶ 112). That conduct has caused three types of harm: (i) harm to competition, including price competition, (*id.* ¶ 119 (alleging that Bard "substantially lessened competition in the PICC market [by] financially coercing hospitals and other **[*11]** purchasers into buying all or nearly all of their PICCs from Bard and reducing price competition in the market for PICCs"); *see also id.* ¶¶ 112-113); (ii) harm to consumers and patients, (*id.* (alleging that Bard's conduct "stifles innovation and harms patient welfare, as well, preventing a large segment of the population from obtaining access to BioFlo PICCs")); and (iii) harm to AngioDynamics (*id.* (stating that Bard's selling practice "harms AngioDynamics' business, preventing it from selling BioFlo PICCs to a substantial portion of the PICC market")). As a result, Bard has been able to "capture and maintain a dominant position in the PICC market, exceeding 70% market share." (*Id.* ¶ 15). AngioDynamics, on the other hand, has lost "market share in the PICC market," (*id.*), and suffered a "substantial loss of sales," (*id.* ¶ 18), despite BioFlo PICCs being "a truly disruptive product offering," (*id.* ¶ 53). Although AngioDynamics "anticipated rapid adoption of the BioFlo technology," "actual adoption of BioFlo PICCs has been limited" due to Bard's practices. (*Id.* ¶ 54).

The Complaint asserts that there is no procompetitive reason (technological, business, or otherwise) for Bard's selling **[*12]** of its tip location systems exclusively with its PICCs. (*Id.* ¶¶ 16, 72, 101, 117). Bard has "acknowledged" as much, according to the Complaint, because it sought FDA approval for selling its stylets single sterile. (*Id.* ¶ 73). Even if there were a reason for selling tip location systems together with PICCs, the Complaint adds, "any justification Bard has for tying its tip location systems and PICCs together is far outweighed by the anti-competitive effects in the market for PICCs." (*Id.* ¶ 72).

III. STANDARD OF REVIEW

To survive a pre-answer motion to dismiss for failure to state a claim, "a complaint must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Mayor & City Council of Balt. v. Citigroup, Inc., 709 F.3d 129, 135 (2d Cir. 2013)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "Although a complaint need not contain detailed factual allegations, it may not rest on mere labels, conclusions, or a formulaic recitation of the elements of the cause of action, and the factual allegations 'must be enough to raise a right to relief above the speculative level.'" *Lawtone-Bowles v. City of New York, No. 16-cv-4240, 2017 U.S. Dist. LEXIS 155140, at *5, 2017 WL 4250513, at *2 (S.D.N.Y. Sept. 22, 2017)* (quoting *Twombly, 550 U.S. at 555*). The Court must accept as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *See EEOC v. Port Auth., 768 F.3d 247, 253 (2d Cir. 2014)* (citing *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007))*.

When **[*13]** deciding a motion to dismiss, the Court's review is ordinarily limited to "the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *See McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007)*. The Court may also consider "any document not incorporated but that is, nevertheless, 'integral' to the complaint because the complaint 'relies heavily upon its terms and effect.'" *See Yung v. Lee, 432 F.3d 142, 146 (2d Cir. 2005)* (quoting *Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002))*. As is well established, "there is no heightened pleading standard in antitrust cases, and the facts alleged are subject to *Federal Rule of Civil Procedure 8(a)*'s general requirement of a 'short plain statement' of facts supporting a plausible claim." *Concord Assocs., L.P. v. Entm't Props. Tr., 817 F.3d 46, 52 (2d Cir. 2016)*.

IV. DISCUSSION

"A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" *Smugglers Notch Homeowners' Ass'n, Inc. v. Smugglers' Notch Mgmt. Co., Ltd., 414 F. App'x 372, 374*

(2d Cir. 2011) (quoting Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 464, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)). To state a tying claim under the Sherman Act, a plaintiff must allege facts plausibly showing that: (1) "the sale of one product (the tying product) is conditioned on the purchase of a separate product (the tied product)"; (2) "the seller uses actual coercion **[*14]** to force buyers to purchase the tied product"; (3) "the seller has sufficient economic power in the tying product market to coerce purchasers into buying the tied product"; (4) "the tie-in has anticompetitive effects in the tied market"; and (5) "a not insubstantial amount of interstate commerce is involved in the tied market." Kaufman v. Time Warner, 836 F.3d 137, 141 (2d Cir. 2016) (citing E&L Consulting, Ltd. v. Doman Indus. Ltd., 472 F.3d 23, 31 (2d Cir. 2006)).[6]

AngioDynamics alleges that Bard has violated section 1 of the Sherman Act by unlawfully tying the purchase of Bard tip location system stylets to the purchase of Bard PICCs. (Dkt. No. 1, ¶ 95). The "tying products"—the products over which Bard allegedly has market power—are Bard's tip location systems, and the "tied products"—the products that Bard allegedly coerces buyers to purchase—are Bard's PICCs. (*See id.* ¶¶ 96-96, 104). Bard moves to dismiss the Complaint under Rule 12(b)(6) on the grounds that AngioDynamics failed to sufficiently allege the elements of coercion, separate products, and anticompetitive effects. (*See generally* Dkt. No. 14-1). The Court considers **[*15]** the parties' arguments with regard to each of these three issues below.

A. Coercion

"Actual coercion by the seller that in fact forces the buyer to purchase the tied product is an indispensable element of a tying violation." Unijax, Inc. v. Champion Int'l, Inc., 683 F.2d 678, 685 (2d Cir. 1982). Indeed, "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984), *abrogated on other grounds by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006). "When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Id.* A seller's "use of strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce [a buyer] to buy its full line of products does not . . . amount to actual coercion," which is present only if the seller "goes beyond persuasion and condition its [buyer's] purchase of one product on the purchase of another product." Unijax, 683 F.2d at 685 (internal quotation marks omitted).

Bard argues that AngioDynamics fails to sufficiently allege coercion because the Complaint merely describes permissible **[*16]** bundling of PICCs with tip location systems. (*See* Dkt. No. 14-1, at 12 ("AngioDynamics' *sole* basis for pleading 'coercion' is its allegation that Bard preloads its stylets in its PICCs . . . . That is insufficient, because neither the Supreme Court nor Second Circuit has ever held that mere bundling in and of itself constitutes 'coercion.'")). AngioDynamics objects to the characterization of Bard's conduct as mere "bundling," explaining that

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[6] Citing *Kaufman* and *E&L Consulting*, Bard argues that "pleading anticompetitive effects is a requirement even when a plaintiff purports to allege a *per se* tying claim." (Dkt. No. 14-1, at 17 & n.8). AngioDynamics demurs, noting that the court in these two cases did "not state whether it [was] analyzing a *per se* or Rule of Reason claim." (Dkt. No. 18, at 21 n.6). Further, as AngioDynamics points out, (*id.* at 20-21), the Second Circuit in *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.* (*In re Visa Check/MasterMoney Antitrust Litigation*) did not include a required showing of anticompetitive effects when listing out the four "substantive elements of [an] illegal per se tying claim," as opposed to "tying claims under a rule of reason theory," which require proof that "the challenged action had an adverse effect on competition as a whole in the relevant market and, if the defendant shows a pro-competitive redeeming virtue of the action, that the same pro-competitive effect could be achieved though [sic] an alternative means that is less restrictive of competition." 280 F.3d 124, 134 n.5 (2d Cir. 2001), *overruled on other grounds by* Miles v. Merrill Lynch & Co., Inc. (In re Initial Pub. Offerings Sec. Litig.), 471 F.3d 24 (2d Cir. 2006), *and superseded by statute on other grounds as stated in* Attenborough v. Constr. & Gen. Bldg. Laborers' Local 79, 238 F.R.D. 82, 100 (S.D.N.Y. 2006). Here, AngioDynamics advances a single tying claim under both per se and rule-of-reason theories. Since Bard moves to dismiss the Complaint for failure to allege anticompetitive effects, the Court must review the anticompetitive effects allegations to determine, at the very least, whether AngioDynamics has stated a rule-of-reason tying claim.

"[u]nlike a tying arrangement, a bundling arrangement offers discounted prices or rebates for the purchase of multiple products, but the buyer is under no obligation to purchase more than one item," and the products "are also available for purchase separately." (Dkt. No. 18, at 12-13).

The distinction between tying and bundling is well established. *See* *Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256, 270 (2d Cir. 2001)* ("An invalid tying arrangement conditions the purchase of one product to the purchase of a second product that the buyer either does not want or would have preferred to purchase elsewhere. In contrast, a bundling arrangement offers discounted prices or rebates for the purchase of multiple products, although the buyer is under no obligation to purchase more than one item." (citation omitted)). Taking **[*17]** the allegations in the Complaint as true and drawing all reasonable inferences in AngioDynamics' favor, the Court reads the pleading as describing a tying, not a bundling, arrangement. AngioDynamics alleges that Bard only sells its tip location systems preloaded in its own PICCs, (Dkt. No. 1, ¶ 71), and that Bard made a one-time exception for Cleveland Clinic, given that institution's "significant purchasing leverage," (*id.* ¶ 75). The Complaint further states that Bard has refused to sell the stylets single sterile despite other institutions' requests. (*Id.* ¶ 76). Despite Bard's contention that it "sells the allegedly tied products separately as well as bundled," (Dkt. No. 14-1, at 13), these allegations instead make out a policy of selling the products together.

The cases on which Bard relies are factually distinguishable. In *In re Time Warner Inc. Set-Top Cable Television Box Antitrust Litigation*, cable television subscribers alleged that the cable company tied premium cable services to the rental of its cable box, but the subscribers acknowledged that premium cable services were also available through the use of a "CableCARD" sold or rented by a third party. *See* *No. 08-cv-7616, 2010 U.S. Dist. LEXIS 22369, at *6-7, 2010 WL 882989, at *1 (S.D.N.Y. Mar. 5, 2010)* **[*18]** . Because customers could choose not to lease the cable box and still receive premium cable services, even though the cable company's "promotion of cable boxes . . . may have persuaded most customers to choose to lease a cable box," the court determined that customers "were not actually coerced." *2010 U.S. Dist. LEXIS 22369, at *20, 2010 WL 882989, at *5-6*. In *Synergetics USA, Inc. v. Alcon Labs., Inc.*, a manufacturer of light sources and light pipes for eye surgery alleged that its competitor, Alcon, tied the sale of light pipes to the sale of cassettes used in Alcon's market-leading vitrectomy machines (which only Alcon could make). *See* *No. 08-cv-3669, 2009 U.S. Dist. LEXIS 13868, at *1-3, 2009 WL 435299, at *1 (S.D.N.Y. Feb. 23, 2009)*. Alcon sold the cassettes with the light pipes in one of the packages it marketed, but the plaintiff acknowledged that Alcon also sold the cassettes separately from the light pipes. *2009 U.S. Dist. LEXIS 13868, at *10, 2009 WL 435299, at *4*. The court concluded that the plaintiff had "fail[ed] to allege coercion." *Id.* Here, by contrast, AngioDynamics has alleged that Bard does not sell its tip location systems separately from its PICCs, and Bard has refused requests from purchasers, other than Cleveland Clinic, to do so. An "unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restrain competition in the market for the tied product constitutes the requisite coercion . . . given foreclosure of a not insubstantial volume of interstate commerce." *Hill v. A-T-O, Inc., 535 F.2d 1349, 1355 (2d Cir. 1976)*.

Bard also contends that the coercion allegations are insufficiently specific because AngioDynamics has not identified which purchasers requested to buy the tip location system stylets single sterile. (Dkt. No. 14-1, at 14-15; Dkt. No. 22, at 8). Plausibility generally requires that a plaintiff provide "some specificity" as to "the customers who would have purchased a product elsewhere but for the coercion." *E&L Consulting, 472 F.3d at 32*; *Synergetics, 2009 U.S. Dist. LEXIS 13868, at *10, 2009 WL 435299, at *4* ("Where the pleading recognizes that the defendant also sells the allegedly tied items separately, general claims that [the seller] has refused to sell two supposedly tied products individually do not allege actual coercion of the buyer."). But when the seller has "a policy of never offering the [tying product] separately from the [tied product]," *Hill, 535 F.2d at 1355*, allegations of individual coercion are unnecessary. **[*19]** *See* *Park v. Thomson Corp., No. 05-cv-2931, 2007 U.S. Dist. LEXIS 2001, at *11-12, 2007 WL 119461, at *4 (S.D.N.Y. Jan. 11, 2007)* ("When a policy of conditioned sales is demonstrated, proof of coercion on an individual basis is unnecessary."); *cf.* *Reisner v. Gen. Motors Corp., 511 F. Supp. 1167, 1177 n.21 (S.D.N.Y. 1981)* ("The 'unremitting policy of tie-in,' which under some circumstances can substitute for coercion, is appropriate only in a situation . . . where the policy was applied to all buyers." (citation omitted)), *aff'd*, *671 F.2d 91 (2d Cir. 1982)*. Here, AngioDynamics has alleged that all purchasers currently have to buy Bard PICCs and stylets together because Bard only sells these two items as a package. Given Bard's policy of selling the PICCs and stylets together—and since Bard does not challenge the allegations' sufficiency with regard to its market power or the amount of commerce affected—AngioDynamics need not identify customers who would have purchased a product elsewhere but for the coercion for coercion to be plausible under these circumstances. *See* Hill, 535 F.2d at 1355. Thus, the Court concludes that AngioDynamics has adequately alleged coercion.

B. Separate Products

Bard seeks dismissal on the ground that the Complaint fails to sufficiently allege that PICCs and tip location systems are two separate products. (Dkt. No. 14-1, at 15). "The 'separate product' element requires that the alleged tying product and tied **[*20]** product be separate, *i.e.*, they must exist in separate and distinct product markets." Kaufman, 836 F.3d at 141. "This is because if there is no separate market for the allegedly tied product, there can be no fear of leveraging a monopoly in one market to harm competition in a second market." Id. at 142. Courts apply a "consumer demand test" to determine whether two products are separate for ***antitrust law*** purposes. *Id.* Two products are separate only if "there is a sufficient demand for the purchase of [the tied product] separate from [the tying product] to identify a distinct product market in which it is efficient to offer [the former] separately from [the latter]." Jefferson Parish, 466 U.S. at 21-22. Separateness "turns not on the functional relation between [the products], but rather on the character of the demand for the two items." Id. at 19. Factors relevant to whether there is "separate and distinct consumer demand" for the two products include, among others, "the history of the products being, or not being, sold separately" and "the sale of the products separately in similar markets." Kaufman, 836 F.3d at 142.

According to Bard, the Complaint "alleges next to nothing" concerning the character of the demand for PICCs and tip location systems. (Dkt. No. 14-1, at 15). Bard characterizes **[*21]** the allegation that Cleveland Clinic requested to purchase the stylets separately as an "isolated example of one hospital . . . out of thousands in this country," and faults AngioDynamics for not including "any facts to support that customers *in general* actually wish to purchase PICCs and tip location systems separately." (*Id.* at 15-16). Further, Bard contends that the allegation that it applied for FDA approval to sell stylets single sterile is irrelevant because it goes to "supply-side considerations rather than the character of consumer demand." (*Id.* at 16 (quoting Kaufman, 836 F.3d at 144)). Lastly, Bard asserts that the allegation that other suppliers sell tip location systems separately is "not sufficiently specific" because the Complaint does not detail how many competitors there are and whether their products are similar to Bard's. (*Id.* at 16-17).

Bard, however, overlooks a number of allegations that, if assumed to be true and read together with the rest of the Complaint, make it plausible that PICCs and tip location systems are separate products. The Complaint describes the distinct characteristics of the market for PICCs and the market for tip location systems. (*Compare* Dkt. No. 1, ¶¶ 84-89, *with id.* ¶¶ 90-93). Additionally, AngioDynamics **[*22]** alleges that Cleveland Clinic and other institutions have asked to purchase Bard's stylets separately from its PICCs, and that customers can purchase its competitors' tip location systems single sterile. (Dkt. No. 1, ¶¶ 75, 76). Drawing all reasonable inferences in AngioDynamics' favor, the Court reads the Complaint as indicating that PICCs were historically sold on a standalone basis. (*Id.* ¶¶ 7, 62-63, 86). These allegations plausibly show that there is separate consumer demand for PICCs and tip location systems.

Likewise, the Complaint sufficiently describes Bard's competitors and their products. The Complaint provides a great deal of detail about the tip location systems offered by Bard and its competitors. (*Id.* ¶¶ 62-82). Although the Complaint describes Bard's Sherlock systems as superior to others on the market, it also states that all tip locations systems serve to locate a PICC's tip in relation to the heart—obviating the need for less accurate and more expensive x-rays or fluoroscopy. (*Id.* ¶¶ 63-64, 69). At this stage, these allegations suffice to show that other tip location systems compete on the same market as Bard's, and since Bard's competitors sell their tip location **[*23]** systems separately, "the sale of the [competing tip location systems] separately" plausibly suggests a "separate and distinct consumer demand" for tip location systems and PICCs. Kaufman, 836 F.3d at 142. Therefore, AngioDynamics has sufficiently pled the element of separate products.

C. Anticompetitive Effects

The third basis for dismissal asserted by Bard is that "AngioDynamics fails to plead 'some specificity' as to 'the anticompetitive effects in a specified market." (Dkt. No. 14-1, at 17 (quoting *E&L Consulting, 472 F.3d at 32*)). To plead anticompetitive effects, a plaintiff must allege that "competitors were foreclosed from selling to [buyers] because of [the defendant's] policies." *Yentsch v. Texaco, Inc., 630 F.2d 46, 57 (2d Cir. 1980)*. Bard argues that: (i) the Complaint's allegations of diminished competition, harm to patients, and harm to Plaintiffs are "generalized and conclusory"; (2) AngioDynamics' allegations that competitors lost market share to Bard are insufficient because ***antitrust law*** protects competition, not competitors; and (3) the Complaint merely alleges harm to AngioDynamics, not harm to competition or the competitive process. (Dkt. No. 14-1, at 18-19).

Bard's arguments do not stand up to scrutiny.[7] The Complaint alleges that, as a result of its selling practices, Bard **[*24]** has been able to "capture and maintain a dominant position in the PICC market, exceeding 70% market share," causing competitors to lose PICC sales and market share, despite the technological superiority of AngioDynamics' BioFlo PICCs (which allegedly reduces blood clotting and catheter obstruction), and reducing price competition. (Dkt. No. 1, ¶¶ 15, 18, 94, 100). These circumstances, if true, plausibly suggest substantial foreclosure of a specified market (the PICC product market) and resulting restraints on innovation by a dominant market player—i.e., not just harm to competitors but harm to the competitive environment itself. Furthermore, the Complaint states that Cleveland Clinic was able to buy Bard's stylets separately in order to combine them with AngioDynamics' BioFlo PICCs, but that Bard denied similar requests from other institutions. (*See id.* ¶ 77). If, as alleged, BioFlo PICCs are superior to Bard's PICCs, and BioFlo PICCs are unavailable to patients because of Bard's practices, then Bard's conduct will have harmed patients. In sum, AngioDynamics has stated enough factual allegations rendering its claim of anticompetitive effects plausible at this early stage of the case. **[*25]** Therefore, Bard's motion to dismiss must be denied.

V. CONCLUSION

For these reasons, it is hereby

ORDERED that Defendants' motion to dismiss (Dkt. No. 14) is **DENIED** in its entirety.

IT IS SO ORDERED.

Dated: August 6, 2018

Syracuse, New York

/s/ Brenda K. Sannes

Brenda K. Sannes

U.S. District Judge

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[7] As AngioDynamics correctly points out, (*see* Dkt. No. 18, at 24), the cases cited by Bard are distinguishable, involving conclusory allegations of anticompetitive effects, in sharp contrast to the details alleged here.

Arandell Corp. v. Cantera Res., Inc. (In re Western States Wholesale Nat. Gas Antitrust Litig.)

United States Court of Appeals for the Ninth Circuit

July 12, 2018, Argued and Submitted, San Francisco, California; August 6, 2018, Filed

No. 17-16227

Reporter

743 Fed. Appx. 825 *; 2018 U.S. App. LEXIS 21718 **; 2018 WL 3720027

In re: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION, ARANDELL CORP.; et al., Plaintiffs-Appellants, v. CANTERA RESOURCES, INC.; et al., Defendants-Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [1]** Appeal from the United States District Court for the District of Nevada. D.C. No. 2:03-cv-01431-RCJ-PAL. Robert Clive Jones, District Judge, Presiding.

Arandell Corp. v. CenterPoint Energy Servs., 900 F.3d 623, 2018 U.S. App. LEXIS 21699 (9th Cir. Nev., Aug. 6, 2018)

Disposition: VACATED and REMANDED.

Core Terms

district court, class certification, cases, predominance, transferor

LexisNexis® Headnotes

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

Civil Procedure > Appeals > Record on Appeal

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

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

It is not enough for a district court to "paraphrase" the requirements of *Fed. R. Civ. P. 23* and simply indicate the court's conclusion that those provisions were not satisfied. Although the appellate court reviews district court orders denying class certification for abuse of discretion, that court cannot perform even that deferential review without determinations keyed to the particular facts and issues in these cases.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN2[] **Purchasers, Direct Purchasers**

Under Wisconsin ***antitrust law***, both direct and indirect purchasers may seek remedies for antitrust injury, *Wis. Stat. § 133.18(1)(a)*, and direct purchasers may seek full disgorgement, *Wis. Stat. § 133.14*.

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

HN3[] **Venue, Multidistrict Litigation**

If determination of a motion rests on application of the transferor court's conflicts-of-law and substantive law rules, the transferor judge may be able to decide the motions most efficiently. The authority to order remand to the transferor court lies with the Judicial Panel on Multidistrict Litigation, not with a court of appeals or the district court. *28 U.S.C.S. § 1407(a)*. The Panel's rules permit the parties to make a request for remand either to the transferee court (whose recommendation the Panel can then consider) or directly to the Panel. J.P.M.L.R.P. 10.1(b). No direction or permission from an appellate court is required for such motions.

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For CMS ENERGY CORP., CANTERA GAS COMPANY, CMS ENERGY RESOURCES MANAGEMENT CO., Defendants - Appellees: Nitin Reddy, Sidley Austin LLP, Los Angeles, CA.

For E PRIME, INC., Defendant - Appellee: Brett DeArmond Bissett, Michael John Miguel, Attorney, McKool Smith Hennigan, P.C., Los Angeles, CA.

For E PRIME ENERGY MARKETING, INC., Defendant - Appellee: Brett DeArmond Bissett, Michael John Miguel, Attorney, McKool Smith Hennigan, P.C., Los Angeles, CA; Joseph A. Fischer, III, Attorney, Jackson Walker L.L.P., Houston, TX; Craig A. Fitzgerald, Esquire, Attorney, GABLE & GOTWALS, Tulsa, OK; Michael John Miguel, Attorney, McKool Smith Hennigan, P.C., Los Angeles, CA; Nitin Reddy, Sidley Austin LLP, Los Angeles, CA; Mark Russell Robeck, KELLEY DRYE & WARREN LLP, Washington, DC; Bradley C. Weber, Trial Attorney, Locke Lord LLP, Dallas, TX.

For EL PASO LLC, El Paso Corporation, EL PASO MARKETING COMPANY, L.L.C., El Paso Marketing, L.P., EL PASO MERCHANT ENERGY, L.P., Defendants - Appellees: Scarlett Collings, Attorney, Locke Lord LLP, Houston, TX; Joshua D. Lichtman, Attorney, Fulbright & **[**6]** Jaworski LLP, Los Angeles, CA; Roxanna A. Manuel, Kupferstein Manuel and Quinto, Los Angeles, CA; Mark Russell Robeck, KELLEY DRYE & WARREN LLP, Washington, DC; Bradley C. Weber, Trial Attorney, Locke Lord LLP, Dallas, TX; Michael John Miguel, Attorney, McKool Smith Hennigan, P.C., Los Angeles, CA; Bradley C. Weber, Trial Attorney, Locke Lord LLP, Dallas, TX.

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For WILLIAMS MERCHANT **[**7]** SERVICES COMPANY, LLC, WILLIAMS GAS MARKETING, INC., Defendants - Appellees: Tristan L. Duncan, Esquire, Shook, Hardy & Bacon LLP, Kansas City, MO; Joshua D. Lichtman, Attorney, Fulbright & Jaworski LLP, Los Angeles, CA; Nitin Reddy, Sidley Austin LLP, Los Angeles, CA; Mark Russell Robeck, KELLEY DRYE & WARREN LLP, Washington, DC; Steven D. Soden, Shook, Hardy & Bacon LLP, Kansas City, MO.

Judges: Before: GRABER and HURWITZ, Circuit Judges, and LEMELLE,[**] District Judge.

Opinion

[*828] MEMORANDUM and ORDER[*]

The plaintiffs in each of these actions are commercial and industrial purchasers of natural gas, who allege that the defendant natural gas traders conspired between 2000 and 2002 to manipulate prices. The original complaints were filed in various state courts between 2007 and 2010. The defendants removed each case to federal court, invoking diversity jurisdiction under the *Class Action Fairness Act*, *28 U.S.C. § 1332(d)(2)*. The cases were consolidated as Multidistrict Litigation (MDL) No. 1566 and transferred to the District of Nevada.

In 2007, this court reversed dismissals premised on the filed rate doctrine in various actions arising out of MDL No. 1566. *Sinclair Oil Corp. v. OneOK Energy Servs. Co., L.P., 377 F. App'x 622, 623 (9th Cir. 2010)* (unpublished). In 2013, we reversed summary judgment orders in several MDL **[**8]** No. 1566 actions, holding that the *Natural Gas Act, 15 U.S.C. § 717 et seq.*, did not preempt the plaintiffs' state law claims. *See In re W. States Wholesale Nat. Gas Antitr. Litig., 715 F.3d 716 (9th Cir. 2013)*, *aff'd sub nom. Oneok, Inc. v.* ***[*829]*** *Learjet, Inc., 135 S. Ct. 1591, 191 L. Ed. 2d 511 (2015)*. This third appeal is from the district court's order denying motions for class certification in four actions. We have appellate jurisdiction under *28 U.S.C. § 1292(e)*; we vacate and remand to the district court.

1. After citing and quoting caselaw, the district court's order denying class certification devoted only a few sentences to its analysis of why the predominance requirement of *Rule 23(b)(3)* was not satisfied in the Kansas *Learjet* action. The court then simply incorporated that discussion by reference—without more—into the portions of its order denying class certification in the other three actions. The centerpiece of the district court's brief rationale was that the "class members in these cases are not small consumers whose damages constitute a straightforward calculation" but rather are "sophisticated industrial and commercial consumers who used varying and complex strategies for purchasing natural gas such that it is difficult to calculate their damages in most cases." However, "the

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[**] The Honorable Ivan L.R. Lemelle, United States District Judge for the Eastern District of Louisiana, sitting by designation.

[*] This disposition is not appropriate for publication and is not precedent except as provided by *Ninth Circuit Rule 36-3*.

amount of damages is invariably an individual question and does not defeat class action treatment." **[**9]** *Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010)* (quoting *Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975))*.

To the extent that the district court's order can be read as finding that common questions of law or fact did not predominate with respect to antitrust injury, it was similarly sparse. The court simply noted, without citation to the record or further explanation, that "Plaintiffs' own experts have used different methods to calculate injury resulting in disparate estimations of what percentage of class members were even harmed." The court then concluded by stating that "[a]lthough there are some common questions of law and fact, they simply do not predominate over individual issues," without clearly identifying either the common or the individual issues.

The court's terse order with respect to *Rule 23(b)(3)* predominance does not provide a sufficient analysis to permit us to engage in "[m]eaningful appellate review." *Narouz v. Charter Commc'ns, LLC, 591 F.3d 1261, 1266 (9th Cir. 2010)*. ***HN1***[] It is not enough for a district court to "paraphrase" the requirements of *Rule 23* and simply "indicate the court's conclusion that those provisions were not satisfied." *Loc. Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1161 (9th Cir. 2001)*. Although we review district court orders denying class certification for abuse of discretion, we cannot perform even that deferential review without determinations keyed to the particular facts and issues in these **[**10]** cases. *See id*. (vacating and remanding the district court's denial of class certification because the district court failed, in the "four operative sentences" of its order, to "explain why the court concluded that the provisions were not satisfied on the facts of this case").

The deficiencies in the district court's order concerning predominance are exacerbated by the failure to acknowledge, let alone discuss, the differences in the governing state laws in the four actions. Those differences are particularly acute with respect to the Wisconsin *Arandell* and *NewPage* actions. ***HN2***[] Under Wisconsin ***antitrust law***, both direct and indirect purchasers may seek remedies for antitrust injury, *Wis. Stat. § 133.18(1)(a)*, and direct purchasers may seek full disgorgement, *id*. *§ 133.14*. The district court, however, simply incorporated its brief discussion from the portion of its order dealing with the Kansas *Learjet* action when finding an absence of predominance in the Wisconsin action. The district court also failed to discuss differences in the number and nature **[*830]** of the plaintiffs and the defendants in each action, foregoing any analysis, for instance, of how classwide resolution of the issues in the *Breckenridge* action, in which only **[**11]** two defendants remained at the time of this appeal, would differ from the cases involving more defendants.[1]

The plaintiffs ask us to order class certification. We decline to do so. These cases are decades old, with extensive records, and the issue is better analyzed by the district court in the first instance. We therefore vacate the orders denying class certification and remand to the district court to conduct an appropriate analysis of the *Rule 23(b)(3)* issue in the first instance, with particular focus on the potential differences between each of the four actions.

2. At oral argument, the plaintiffs suggested that, because of differences in state antitrust laws in each of the four actions, the issue of class certification would be considered most appropriately by the transferor courts. The plaintiffs asked that we instruct the district court to request that the Judicial Panel on Multidistrict Litigation ("the Panel") remand the cases to their transferor courts.

There is some facial merit to the plaintiffs' suggestions. ***HN3***[] If determination of a motion "rests on application of the transferor court's conflicts-of-law and substantive law rules, the transferor judge may be able to decide the motions **[**12]** most efficiently." Manual for Complex Litig., Fourth § 22.36 at 372. We decline, however, to instruct the district judge to request a remand. The authority to order remand to the transferor court lies with the Panel, not with this court or the district court. *28 U.S.C. § 1407(a)*. The Panel's rules permit the parties to make a request for remand either to the transferee court (whose recommendation the Panel can then consider) or directly to the Panel. Rules of Procedure of the Judicial Panel on Multidist. Litig. 10.1(b). No direction or permission from this court is

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[1] The district court's order is also inconsistent with respect to the typicality requirement of *Rule 23(a)*. The court initially concluded that the claims of the named plaintiffs in the *Learjet* action are "typical of the class members' claims," but later suggested that the typicality requirement was not met.

required for such motions. Indeed, the plaintiffs have previously filed several requests to recommend remand with the district court. *See* Order Denying Remand, *In re W. States Wholesale Nat. Gas Antitr. Litig (MDL 1566), No. 2:03-cv-01431-RCJ (PAL), 2015 U.S. Dist. LEXIS 164421 (D. Nev. Aug. 5, 2015)*, ECF No. 2142; Motion for Suggestion of Remand, *In re W. States Wholesale Nat. Gas Antitr. Litig (MDL 1566)*, No. 2:03-cv-01431-RCJ (PAL) (D. Nev. Jan. 13, 2017), ECF No. 2765; Motion for Suggestion of Remand, *In re W. States Wholesale Nat. Gas Antitr. Litig (MDL 1566)*, No. 2:03-cv-01431-RCJ (PAL) (D. Nev. Sept. 8, 2017), ECF No. 2961. In denying the most recent request, the district court expressly suggested renewal after the mandate issued in this **[**13]** appeal. *See* Order Denying Motion for Suggestion of Remand, *In re W. States Wholesale Nat. Gas Antitr. Litig (MDL 1566), No. 2:03-cv-01431-RCJ (PAL), 2017 U.S. Dist. LEXIS 191228 (D. Nev. Nov. 20, 2017)*, ECF No. 2987. We therefore remand without prejudice to the plaintiffs' pursuing, either before the district court or the Panel, their requests for remand to the transferor courts to decide the class certification motions.

VACATED and REMANDED. Costs on appeal awarded to Plaintiffs-Appellants.[2]

End of Document

[2] Appellee Dynegy's motion for judicial notice, **Dkt. 86**, is **GRANTED**. Appellants' opposed motion to correct the record, **Dkt. 29**, is **DENIED**.

Arandell Corp. v. CenterPoint Energy Servs.

United States Court of Appeals for the Ninth Circuit

February 16, 2018, Argued and Submitted, San Francisco, California; August 6, 2018, Filed

No. 16-17099

Reporter
900 F.3d 623 *; 2018 U.S. App. LEXIS 21699 **; 2018-2 Trade Cas. (CCH) P80,462; 2018 WL 3716026

ARANDELL CORP.; BRIGGS AND STRATTON CORPORATION; CARTHAGE COLLEGE; LADISH CO., INC.; MERRICK'S INC.; SARGENTO FOODS, INC., Plaintiffs-Appellants, v. CENTERPOINT ENERGY SERVICES, INC., Defendant-Appellee.

Subsequent History: Decision reached on appeal by, Motion granted by, Motion denied by, Remanded by *Arandell Corp. v. Cantera Res., Inc. (In re Western States Wholesale Nat. Gas Antitrust Litig.), 743 Fed. Appx. 825, 2018 U.S. App. LEXIS 21718 (9th Cir. Nev., Aug. 6, 2018)*

Motion granted by, Motion denied by, Stay granted by *Arandell Corp. v. Centerpoint Energy Servs., 2018 U.S. App. LEXIS 33297 (9th Cir. Nev., Nov. 27, 2018)*

Remanded by *Arandell Corp. v. Centerpoint Energy Servs., 2019 U.S. App. LEXIS 13967 (9th Cir. Nev., May 8, 2019)*

Motion denied by, Motion granted by *Arandell Corp. v. CenterPoint Energy Servs., 2019 U.S. App. LEXIS 30552 (9th Cir. Nev., Oct. 11, 2019)*

Prior History: [1]** Appeal from the United States District Court for the District of Nevada. D.C. No. 2:03-cv-01431-RCJ-PAL. Robert Clive Jones, Senior District Judge, Presiding.

Reorganized FLI, Inc. v. Oneok, Inc. (In re W. States Wholesale Nat. Gas Antitrust Litig.), 725 Fed. Appx. 560, 2018 U.S. App. LEXIS 7644 (9th Cir. Nev., Mar. 27, 2018)

Core Terms

conspiracy, natural gas, prices, manipulative, wholly owned subsidiary, conspirators, price-fixing, enterprise, subsidiary, anticompetitive, coordinated, purposes, antitrust, Plaintiffs', summary judgment, Sherman Act, affiliates, trading, submit evidence, participated, consumers, inflated, sales, unity, district court, single entity, triable issue, knowingly, rigged, FERC

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope

HN1[] **Antitrust & Trade Law, Sherman Act**

A parent and a wholly owned subsidiary always have a unity of purpose and thus act as a single enterprise whenever they engage in coordinated activity, for purposes of *§ 1 of the Sherman Act*., *15 U.S.C.S. § 1*.

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

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

***HN2*[]** **Burdens of Proof, Nonmovant Persuasion & Proof**

Appellate courts review the district court's grant of summary judgment de novo. The court's ultimate inquiry is to determine whether the specific facts set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence.

Antitrust & Trade Law > Sherman Act > Scope

***HN3*[]** **Antitrust & Trade Law, Sherman Act**

Wisconsin courts' interpretation of *Wis. Stat. § 133.03* is controlled by federal court decisions under the *Sherman Act*. *Section 1 of the Sherman Act* provides that every contract, combination, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*. A defendant may be held liable under *§ 1 of the Sherman Act* if that person acted either with the knowledge that the action would have unreasonable anticompetitive effects or with the purpose of producing those effects.

Antitrust & Trade Law > Sherman Act > Scope

***HN4*[]** **Antitrust & Trade Law, Sherman Act**

The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *15 U.S.C.S. § 1* because a parent and its wholly owned subsidiary have a complete unity of interest. Therefore, a parent company and its wholly owned subsidiary are incapable of conspiring with each other for purposes of *§ 1 of the Sherman Act*., *15 U.S.C.S. § 1*. The Copperweld doctrine establishes that where there is substantial common ownership, individual firms function as an economic unit and are generally treated as a single entity.

Governments > Courts > Judicial Precedent

***HN5*[]** **Courts, Judicial Precedent**

As a general rule, the principle of stare decisis directs courts to adhere not only to the holdings of prior cases, but also to their explications of the governing rules of law.

Antitrust & Trade Law > Sherman Act > Scope

***HN6*[]** **Antitrust & Trade Law, Sherman Act**

A wholly owned subsidiary that engages in coordinated activity in furtherance of the anticompetitive scheme of its parent and/or commonly owned affiliates is deemed to engage in such coordinated activity with the purposes of the single "economic unit" of which it is a part.

Business & Corporate Compliance > ... > Corporations > Corporate Governance > Directors & Officers

HN7[] **Corporations, Directors & Officers**

The general rule is well established that a corporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of his employment within the scope of his authority, even though the officer or agent does not in fact communicate his knowledge to the corporation.

Antitrust & Trade Law > Sherman Act > Claims

HN8[] **Sherman Act, Claims**

To be liable on a *§ 1 of the Sherman Act*., *15 U.S.C.S. § 1*, claim, a defendant must have conspired (or agreed or combined, etc.) to restrain trade. It is not necessary to find an express agreement, either oral or written, in order to find a conspiracy, but it is sufficient that a concert of action be contemplated and that defendants conform to the arrangement. Any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy.

Summary:

SUMMARY**

Antitrust Law

The panel reversed the district court's summary judgment in favor of CenterPoint Energy Services, Inc. ("CES"), a natural gas company, in a class action alleging that ten large natural gas companies colluded to fix retail natural gas prices in Wisconsin.

CES was a wholly owned subsidiary of Reliant Energy, Inc. The plaintiff class alleged that certain Reliant entities — including CES — conspired with other natural gas conglomerates to fix retail natural gas prices.

The panel held that *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, supported the following rule: a wholly-owned subsidiary that engaged in coordinated activity in furtherance of the anticompetitive scheme of its parent and/or commonly owned affiliates is deemed to engage in such coordinated activity with the purposes of the single "economic unit" of which it was a part.

The panel held that plaintiffs raised a triable issue of CES's anticompetitive intent. Specifically, the panel held that: plaintiffs submitted evidence that Reliant's "economic unit" had an anticompetitive purpose during the class **[**2]** period; such anticompetitive "purpose" could sustain liability under the federal Sherman Act with or without an additional finding of knowledge; and Reliant's alleged illegal purposes are imputed to CES's coordinated activities.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that plaintiffs' evidence was sufficient to raise a triable issue of whether CES knowingly acted to further the alleged price-fixing scheme. The panel further held that any knowledge of the alleged price-fixing scheme that CES's directors and officers acquired while concurrently acting as directors or officers of the other Reliant companies was imputable to CES as a matter of Wisconsin law.

The panel held that plaintiffs submitted sufficient evidence to raise a genuine issue under the *Sherman Act* — and *Wisconsin Statute § 133.03(1)* — as to whether CES participated in coordinated activity in furtherance of the alleged inter-enterprise price-fixing conspiracy.

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Mark Russell Robeck (argued) and Travis G. Cushman, Kelley Drye & Warren LLP, Washington, D.C. for Defendants-Appellees.

Judges: Before: Carlos T. Bea and N. Randy Smith, **[**3]** Circuit Judges, and Robert S. Lasnik,* District Judge. Opinion by Judge Bea.

Opinion by: Carlos T. Bea

Opinion

[*625] BEA, Circuit Judge:

Here we have a wholly owned subsidiary company which sold natural gas to Plaintiffs. It asserts that it acted innocently and without knowledge of its parent company's price-fixing scheme, which had pumped up the price of that gas. Yes, the subsidiary company sold the gas at prices previously rigged by the parent, and yes, the subsidiary sent the profits back to the parent. But the subsidiary asserts there is no evidence that *it* knew the prices were inflated or that *it* had the purpose to carry out the price-fixing scheme. Under Wisconsin ***antitrust law***, can the subsidiary be liable to Plaintiffs? Because Supreme Court precedent establishes that ***HN1***[] "a parent and a wholly owned subsidiary *always* have a 'unity of purpose'" and thus act as a "single enterprise" whenever they engage in "coordinated activity," *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (emphasis added), we conclude that it can.

I. BACKGROUND

Most consumers of natural gas in North America are individuals or small businesses **[*626]** who buy their gas from local utility companies. However, some larger and more sophisticated businesses bypass their local utility and purchase **[**4]** gas directly from the companies that sell gas to the local utilities. These large commercial customers enter contracts to buy agreed-upon quantities of gas and take delivery via high-volume gas pipelines. While these contracts typically specify the quantity to be delivered, the price is typically left to be determined by reference to the market price at the time of delivery, as reported in the latest price index published by a designated trade publication. For example, a contract might provide that the price of a delivery of natural gas would be "the *Inside FERC* index plus $*x*." Such contracts to purchase gas on the cash market and take physical delivery of natural gas are referred to as "physical" contracts (as opposed to financial or "futures" contracts).[1]

* The Honorable Robert S. Lasnik, Senior District Judge for the Western District of Washington, sitting by designation.

[1] To protect against the risk that the price of natural gas will increase before the delivery date, many sophisticated gas purchasers seek to "hedge" by purchasing natural gas futures contracts—standardized contracts for the sale and purchase of natural gas at a specific price in the future—which are resolved financially (*i.e.*, by selling the contractual interest for cash or

In the early 2000s, natural gas prices rose dramatically, due in part to manipulative trading practices of some of the nation's largest natural gas conglomerates. In March 2003, the Federal Energy Regulatory Commission (FERC) published a report on "whether and, if so, the extent to which California and Western energy markets were manipulated during 2000 and 2001." *See* FERC, **[**5]** *Final Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, at ES-1 (Mar. 2003), available at https://www.ferc.gov/legal/maj-ord-reg/land-docs/PART-I-3-26-03.pdf ("FERC Final Report"). The report "found significant market manipulation" by gas marketing companies such as Enron, for example. *Id.* at ES-1—ES-2. In particular, FERC discovered widespread "efforts to manipulate price indices compiled by trade publications" primarily through "[r]eporting of false data" to the trade publications, "wash trading,"[2] and a trading activity known as "churning."[3] *Id.* at ES-1—ES-5. The report determined that energy trading companies had few, if any, internal controls in place to ensure the accuracy of the data reported **[*627]** to trade publications. *FERC Final Report* at III-3. Ultimately, the report found that price manipulation was a substantial cause of "[d]ysfunctions in the natural gas market" which led to "extraordinary" increases in gas prices in 2000 and 2001. *Id.* at ES-1.

Various plaintiff groups filed class-action lawsuits around the country, in both state and federal courts, and alleged that natural gas traders manipulated **[**6]** the price of natural gas by reporting false information to price indices published by trade publications and engaging in wash sales. *See* *In re W. States Wholesale Nat. Gas Antitrust Litig., 715 F.3d 716, 727 (9th Cir. 2013)*, *aff'd sub nom.* *Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 191 L. Ed. 2d 511 (2015)*. These actions were eventually consolidated into a multi-district litigation proceeding in the District of Nevada, *In re W. States Wholesale Nat. Gas Antitrust Litig.*, MDL No. 1566 (the "MDL"); *see also* *In re W. States, 715 F.3d at 727*. The MDL includes the instant action.

Plaintiffs (collectively known in the MDL below as the "Arandell Plaintiffs") filed this action in Wisconsin state court on December 15, 2006, on behalf of a proposed class of "all industrial and commercial purchasers of natural gas" who purchased natural gas "for their own use or consumption . . . in Wisconsin" between January 1, 2000, and October 31, 2002 (the "Class Period"). The defendants are ten large natural gas companies, including certain of their subsidiaries and affiliates, who allegedly colluded to fix retail natural gas prices in Wisconsin. The action was removed on the basis of diversity jurisdiction to the Western District of Wisconsin on February 9, 2007. On June 29, 2007, the case was transferred to the MDL in the District of Nevada.

This appeal is from the district court's grant **[**7]** of summary judgment to one defendant in the Arandell case, CenterPoint Energy Services, Inc. ("CES").[4] CES sold natural gas and related services to commercial and industrial customers in Wisconsin during the Class Period. From January 1, 2000, to August 31, 2002 (33 of the 34 months in the Class Period), CES was a wholly owned subsidiary of Reliant Energy, Inc. ("Old Reliant").[5] Within the Reliant

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otherwise liquidating the gas interest) rather than by taking delivery of gas. A properly executed hedging strategy negates any loss or gain on the physical purchase due to changes in the price of gas, as the physical gas customer stands in the position of a natural gas *seller* for purposes of the futures contract. Ideally, the "buy" position on the physical contract and the "sell" position on the futures contract counterbalance each other so that the physical gas purchaser is left with a net cost for natural gas equal to the price of natural gas *at the time it entered the physical gas contract*.

[2] A "wash trade" is "a prearranged pair of trades of the same good between the same parties, involving no economic risk and no net change in beneficial ownership. These trades expose the parties to no monetary risk and serve no legitimate business purpose." Such trades were alleged to have "exaggerated market demand for natural gas and thus manipulate[d] natural gas prices."

[3] "Churning" is "a pattern of natural gas purchases and sales" wherein (a) the gas marketing companies "both bought and sold during the trading interval, so that the trades largely offset each other," (b) "gross trading volume greatly exceeded net trading volume," and (c) the companies "made a relatively large number of consecutive purchases and/or sales in a short amount of time, often being the only buyer and/or seller during the burst of transactions." "Churning" allegedly enabled the companies to "artificially manipulate the day's average price by initially buying (which raised the prices), and then selling (which brought prices back down)."

[4] Like the parties' briefs, we refer to CenterPoint Energy Services by its current name. However, CES was known as Retail Energy Retail, Inc. during the Class Period.

family of companies, CES dealt primarily with Reliant Energy Services, Inc. ("RES" and together with Old Reliant and the other Reliant co-defendants collectively "Reliant"), a commonly owned affiliate during most of the Class Period.[6] Reliant has admitted to engaging in wash trades during the Class Period and has reached settlements with several government agencies **[*628]** regarding its manipulative trading practices during that time.

In this action, Plaintiffs alleged that certain Reliant entities—including CES, Old Reliant, and RES—conspired with other natural gas conglomerates to fix retail natural gas prices in Wisconsin. Plaintiffs further alleged that CES in particular sold natural gas in Wisconsin at prices that were artificially inflated as a result of the price-fixing conspiracy between Reliant **[**8]** and other, non-Reliant co-conspirators. Plaintiffs alleged two causes of action under Wisconsin's antitrust statutes, seeking (1) a declaratory judgment that certain natural gas contracts made during the Class period are void under *Wisconsin Statute § 133.14*, and (2) treble damages for violations of *Wisconsin Statute § 133.03*, which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal."

In the MDL, the district court granted CES's motion for summary judgment against the Plaintiffs' Third Amended Complaint ("TAC"). CES argued that it was entitled to summary judgment because it was "not alleged to have engaged in any anticompetitive activity or other wrongdoing in or directed to Wisconsin," but rather it was alleged only to have been affiliated with RES and to have sold gas to Wisconsin consumers. The district court agreed that Plaintiffs had not raised a genuine issue of material fact sufficient to support a verdict or judgment under *Wisconsin Statute § 133.03(1)* because there was "no evidence" that CES knowingly "participated in a conspiracy or direct acts in restraint of trade." In particular, the court ruled that there was no evidence that CES "knowingly" engaged in swaps "in conspiracy **[**9]** with RES" for "the purpose of increasing the price of natural gas," or that CES "knew that RES or others were engaged in such behavior."

On appeal, Plaintiffs summarized their case against CES as follows:

> CES (formerly a Reliant company) made an essential contribution to the Reliant companies' coordinated price-fixing efforts. Each Reliant company played a necessary role. The Reliant trading company (RES) inflated retail natural gas prices through manipulative trading and false reporting of sales data to publishers of benchmark price indices. RES then sold gas at inflated prices to CES, the Reliant sales subsidiary. CES resold the overpriced gas to Wisconsin businesses, collected millions of dollars in overcharges at the expense of the class members, and funneled the revenues from these sales to the Reliant parent. The officers and directors of the Reliant parent orchestrated this scheme, directing RES to manipulate retail prices and instructing CES to send its illegal profits to the Reliant parent.

Plaintiffs argue the district court erred in: (1) determining that Plaintiffs needed to produce evidence that CES intentionally conspired with RES to inflate gas prices in order to raise a **[**10]** triable issue, (2) failing to consider record evidence that CES purposely or knowingly furthered the alleged inter-enterprise conspiracy by selling gas at rigged prices and channeling the proceeds to Old Reliant, and (3) granting summary judgment without considering the Plaintiffs' *Rule 56(d)* motion for additional discovery.

II. DISCUSSION

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[5] From January 1, 2000, to August 31, 2002, CES was a wholly owned subsidiary of Reliant Energy Resources Corp., which, in turn, was a wholly owned subsidiary of Old Reliant.

[6] During the Class Period, Old Reliant was in the process of restructuring its business pursuant to a plan filed with the Texas Public Utility Commission as required by Texas law. From January 1, 2000, to January 1, 2001 (the first year of the Class Period), CES and RES were both wholly owned subsidiaries of RERC, which was itself wholly owned by Old Reliant. The first phase of the restructuring was completed on January 1, 2001 (one year into the Class Period). After January 1, 2001, Old Reliant owned 83% of RES (through a new company, Reliant Resources Inc.), while CES remained wholly owned (through RERC). Reliant completed the restructuring one month before the end of the Class Period. As of September 30, 2002, the restructuring of Old Reliant resulted in two independent, publicly traded companies: Reliant Resources, Inc. ("New Reliant"), which owned RES, and CenterPoint Energy, Inc., which owned CES.

HN2[] We review the district court's grant of summary judgment *de novo.* *Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103 (9th Cir. 1986)*. "[T]he court's ultimate inquiry is to determine whether the 'specific facts' set forth **[*629]** by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987)*. For purposes of summary judgment, CES does not contest the substance of Plaintiffs' evidence that one or more of the other Reliant entities successfully conspired with non-Reliant entities to manipulate gas prices during the Class Period, or that CES bought gas from RES and sold it to consumers in Wisconsin during the Class Period. Therefore, the question before the court is whether Plaintiffs submitted sufficient evidence to raise triable issues as to (1) whether CES had the requisite intent and purpose to restrain trade, **[**11]** and (2) whether CES did in fact act to further the alleged conspiracy. We address each in turn.

A. Anticompetitive Intent

HN3[] Wisconsin courts' interpretation of *Wisconsin Statute § 133.03* "is controlled by federal court decisions under the Sherman Act." *Ford Motor Co. v. Lyons, 137 Wis. 2d 397, 405 N.W.2d 354, 367 (Wis. Ct. App. 1987)*. *Section 1 of the Sherman Act* provides that "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. A defendant may be held "liable under *§ 1 of the Sherman Act* if that person . . . [acted] either with the knowledge that the . . . [action] would have unreasonable anticompetitive effects or with the purpose of producing those effects." *United States v. Bailey, 444 U.S. 394, 404-05, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980)*. Plaintiffs argue that the evidence submitted below established that CES *purposely* participated in the price-fixing scheme because, as a wholly owned subsidiary of Reliant during the Class Period, CES is deemed to have shared the intent of the commonly owned Reliant conspirators. Plaintiffs also argue that they submitted evidence showing overlap among the directors and managers of CES, on one hand, and the alleged Reliant conspirators, on the other—creating a genuine issue of material fact as to whether CES *knowingly* participated in **[**12]** the price-fixing scheme.

1. Purpose

Plaintiffs argue that, contrary to the district court's decision, Wisconsin ***antitrust law*** did not require them to prove "that CES knowingly engaged 'in [a] conspiracy with RES . . . with the purpose of increasing the price of natural gas" to create a triable issue as to CES's liability. According to Plaintiffs, the "*Copperweld* doctrine"—named for the U.S. Supreme Court case *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*—establishes that "the Reliant Defendants that participated in price-fixing (CES, RES, and REI) acted as a *single* enterprise, with a shared intent." *Copperweld*—like all federal antitrust precedents—is applicable to claims under *Wisconsin Statute § 133.03*. *Lyons, 405 N.W.2d at 367* (adopting and following *Copperweld* as a matter of Wisconsin law).

In *Copperweld*, the plaintiff alleged that Copperweld and its wholly owned subsidiary, Regal Tube Co. ("Regal"), conspired to prevent a former Regal employee from competing with Regal by threatening to sue prospective customers and financers of the former employee's new business. *Id. at 755-58*. A jury found that Copperweld and Regal violated *Section 1* of the Sherman Act, and the Seventh Circuit affirmed. *Id. at 758*. The Supreme Court reversed. *Id. at 777*. Rejecting "the so-called 'intra-enterprise conspiracy' **[*630]** doctrine," which permitted **[**13]** *Section 1* liability between commonly owned companies, *id. at 759*, the Court held that *HN4*[] "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1*" because "[a] parent and its wholly owned subsidiary have a complete unity of interest," *id. at 771*. Therefore, a parent company and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act." *Id. at 777*. As relevant here, the *Copperweld* doctrine establishes that "[w]here there is substantial common ownership, . . . individual firms function as an economic unit and are generally treated as a single entity." *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1147-48 (9th Cir. 2003)*.

The district court was correct that, for antitrust purposes, CES did not conspire with RES; under *Copperweld*, it was incapable of doing so as a matter of law. But Plaintiffs' theory of the case is that CES was part of a "single entity"—including both RES (a commonly owned company) and Old Reliant (its parent)—which "intentionally colluded with other, *non-Reliant* conspirators to manipulate natural gas prices and profit from this manipulation."[7] Therefore, they argue, the district court should have found that *as a matter of law* it was "not possible for CES **[**14]** to have a different reason than [Old Reliant] and RES for participating in these efforts."

Although the Plaintiffs' application of the principles laid out in *Copperweld* is novel, we must agree. The Supreme Court stated in *Copperweld* that a parent and its wholly owned subsidiary "*always* have a 'unity of purpose or a common design.' They share a common purpose *whether or not the parent keeps a tight rein over the subsidiary*." Copperweld, 467 U.S. at 771 (emphasis added); *see also* Freeman, 322 F.3d at 1147-48 ("Where there is substantial common ownership, . . . individual firms function as an economic unit and are generally treated as a single entity."). The Supreme Court could have hardly made this point more explicit:

> The coordinated activity of a parent and its wholly owned subsidiary *must* be viewed as that of a *single enterprise* for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a *complete unity of interest*. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary **[**15]** acts for the benefit of the parent, its sole shareholder.
>
> . . . [I]n reality a parent and a wholly owned subsidiary *always* have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.

Copperweld, 467 U.S. at 771-72 (emphases added). This premise led the Supreme Court to conclude that a parent cannot conspire with its subsidiary, but it also leads inescapably to the corollary conclusion that, for antitrust purposes, it is legally impossible for firms within a single **[*631]** "economic unit" to act together in furtherance of the same price-fixing scheme for independent and distinct purposes. True, *Copperweld* decided only that a parent and its wholly owned subsidiary could not conspire with each other for purposes of Section 1 of the Sherman Act, but ***HN5***[] "[a]s a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (quoting Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 668, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (Kennedy, J., concurring in part and dissenting in part)). From the Supreme Court's "explications" in *Copperweld* ***[**16]*** , the corollary proposed by Plaintiffs necessarily follows: If "a parent and a wholly owned subsidiary *always* have a 'unity of purpose'" and act as a "single enterprise" whenever they engage in "coordinated activity," then a subsidiary such as CES as a matter of law *cannot* innocently advance an anticompetitive scheme (here, by selling gas at prices rigged by Reliant and distributing the profits to Reliant) for a legitimate business purpose, while its parent and sister companies purposely advance the very same scheme (here, by rigging the prices upstream) for an illegal, anticompetitive purpose.

The Tenth Circuit, so far the only Court of Appeals squarely to consider such an application of *Copperweld*, recently reached the same conclusion in Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221 (10th Cir. 2017). There, the district court had granted summary judgment to the defendant on claims under Section 2 of the Sherman Act.[8] Id. at 1229-30. The plaintiff in *Lenox* argued that "its burden of establishing any individual defendant's liability

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[7] For purposes of summary judgment, CES does not contest the substance of the evidence that Reliant successfully conspired with the other (non-Reliant) defendants and co-conspirators to manipulate retail gas prices.

[8] *Lenox* dealt with a claim under Section 2 of the Sherman Act. 847 F.3d at 1229. Section 2 provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2.

required showing only that the defendant's conduct played a 'role' in the overall anticompetitive scheme perpetrated by the enterprise as a whole." *Id. at 1230*. The Tenth Circuit panel agreed. It held that, under *Copperweld*, the plaintiff did not need to prove that **[**17]** "'*specific* Defendants' independently satisfied each necessary element of the claims," because "in a single-enterprise situation, it is the affiliated corporations' collective conduct—*i.e.*, the conduct of the *enterprise* they jointly compose—that matters; it is the *enterprise* which must be shown to satisfy the elements of a *[Section 2*] claim." *Id. at 1236* (emphasis in original). Therefore, the Tenth Circuit panel concluded that the plaintiff "advanced a viable, if somewhat unusual, antitrust theory." *Id. at 1230*. Ultimately, the court granted summary judgment to the defendants on the basis of claim preclusion. *Id. at 1239*. One of the companies in the "single entity" identified by the court had previously won a final judgment on the merits on claims based on the same underlying events. *See id. at 1239-40*. Applying the plaintiffs' *Copperweld* theory, claims against other defendants in the "single entity" were thus precluded. *Id. at 1239*.

Defendants cannot have the *Copperweld* doctrine both ways. It would be inconsistent to insist both (1) that two affiliates are incapable of conspiring with each other for purposes of *Section 1* of the Sherman Act because they "always" share **[*632]** a "unity of purpose," and (2) that one affiliate may escape liability for its **[**18]** own conduct—conduct necessary to accomplish the illegal goals of the scheme—by disavowing the anticompetitive intent of the other, even where the two acted together. *See id. at 1236* (finding that *Copperweld* "forecloses" a result that would allow sophisticated companies to evade *Section 2* liability by spreading anticompetitive schemes over multiple affiliates). In sum, *Copperweld* supports the following rule: ***HN6***[] A wholly owned subsidiary that engages in coordinated activity in furtherance of the anticompetitive scheme of its parent and/or commonly owned affiliates is deemed to engage in such coordinated activity with the purposes of the single "economic unit" of which it is a part.

Here, Plaintiffs submitted evidence that the Reliant "economic unit" had an anticompetitive purpose during the Class Period. Such anticompetitive "purpose" can sustain liability under the Sherman Act with or without an additional finding of "knowledge," *Bailey, 444 U.S. at 404-05*; *United States v. U.S. Gypsum Co., 438 U.S. 422, 446, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)* (stating that requiring proof of both knowledge and purpose for liability under *Section 1* of the Sherman Act would be "unnecessarily cumulative"). Therefore, because the Reliant enterprise's alleged illegal purposes are imputed to CES's coordinated activities, the district court erred in **[**19]** granting summary judgment on the basis that Plaintiffs failed to raise a triable issue of CES's intent.

2. Knowledge

Furthermore, Plaintiffs' evidence was sufficient to raise a triable issue of whether CES knowingly acted to further the alleged price-fixing scheme. Plaintiffs submitted evidence of substantial overlap, during the Class Period, between the directors and officers of CES, on one hand, and the directors and officers of Old Reliant, RES, and other commonly owned Reliant entities. For example, it is undisputed that (1) Marc Kilbride was the Treasurer for CES from 2000 to 2002, and also the Treasurer for RES in 2000 and for RERC from 2000 to 2003, (2) David M. McClanahan served as the Chairman of CES's board of directors in 2002, after having served as the President and sole director of RERC from 2001 to 2002, and (3) Hugh Rice Kelly was the Corporate Secretary for CES in 2000, General Counsel and Corporate Secretary to Old Reliant from 2000 to 2001, and then the Corporate Secretary for RES in 2002. Plaintiffs' evidence shows a network of fast-revolving doors connecting the boardrooms and executive offices of CES and the other Reliant companies.

Any knowledge of the alleged price-fixing **[**20]** scheme that CES's directors and officers acquired while concurrently acting as directors or officers of the other Reliant companies is imputable to CES as a matter of Wisconsin law. *Suburban Motors of Grafton, Inc. v. Forester, 134 Wis. 2d 183, 396 N.W.2d 351, 355 (Wis. Ct. App. 1986)* (***HN7***[]) "The general rule is well established that a corporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer or agent receives notice or acquires

However, the Tenth Circuit panel based its holding on *Copperweld*, a *Section 1* case, which it held to apply equally to *Section 2* cases. *Id. at 1234*.

knowledge while acting in the course of his employment within the scope of his authority, even though the officer or agent does not in fact communicate his knowledge to the corporation." (quoting 3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 790 (rev. perm. ed. 1975) (footnotes omitted and alteration in original))). Plaintiffs submitted evidence that Reliant traders engaged in manipulative trade practices at the direction of Reliant management. **[*633]** Plaintiffs also submitted evidence that such manipulative practices were a matter of common knowledge within Reliant. Drawing all rational inferences in favor of Plaintiffs, these facts permit a reasonable finding that CES's directors or officers acquired knowledge of Reliant's manipulative trading practices while concurrently serving as directors **[**21]** or officers of other Reliant companies. *T.W. Elec., 809 F.2d at 631* (holding that "[i]nferences must . . . be drawn in the light most favorable to the nonmoving party" so long as "it is 'rational' or 'reasonable' and otherwise permissible under the governing substantive law"). Because such knowledge would be imputed to CES as a matter of Wisconsin law, Plaintiffs raised a genuine issue of material fact as to CES's knowledge of the alleged price-fixing scheme.

B. Anticompetitive Acts

We next consider whether there was a genuine issue of material fact as to whether CES acted to further the alleged price-fixing conspiracy. As Plaintiffs admit, *Copperweld* speaks only of a "unity of *purpose*," *467 U.S. at 771* (emphasis added). It does not supply a theory of unbounded vicarious liability for the *acts* of legally distinct entities. Rather, *Copperweld* states that commonly-owned-but-legally-distinct entities are considered a "single entity" for antitrust purposes where they engage in "coordinated activity."[9] *See 467 U.S. at 771* ("The *coordinated activity* of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the Sherman Act." (emphasis added)). Thus, a subsidiary shares the purposes and intentions **[**22]** of the parent when it acts in coordination with the parent, but *Copperweld* does not support holding a subsidiary liable for the parent's independent conduct. *See Lenox, 847 F.3d at 1237* ("[A]lthough we agree that [the plaintiff] was entitled to pursue its *§ 2* claims against Defendants as a single enterprise, and to prove those claims based on the actions of the enterprise as a whole, [the plaintiff] was still required to come forward with evidence that each defendant independently participated in the enterprise's scheme, to justify holding that defendant liable as part of the enterprise."). As with any antitrust defendant, Plaintiffs must put forth evidence that CES engaged in anticompetitive conduct.[10]

[*634] ***HN8***[] To be liable on a *Section 1* claim, a defendant must have conspired (or agreed or combined, etc.) to restrain trade. "It is not necessary to find an express agreement, either oral or written, in order to find a conspiracy, but it is sufficient that a concert of action be contemplated and that defendants conform to the arrangement." *Esco Corp. v. United States, 340 F.2d 1000, 1008 (9th Cir. 1965)*. "[A]ny conformance **[**23]** to an

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[9] This distinction provides a bright-line limit on an antitrust plaintiff's recovery from a particular defendant. While a "veil-piercing, alter ego, or *respondeat superior* theory" might render a defendant separately and individually liable for any conduct of its corporate affiliates, Plaintiffs' theory seeks to hold CES liable only for its own alleged anticompetitive acts. *See Lenox, 847 F.3d at 1237*. Therefore, any recovery from an affiliate under Plaintiffs' *Copperweld* corollary would be limited to damages caused by anticompetitive conduct attributable to that affiliate.

[10] The cases cited by CES merely apply this distinction, and thus they are not contrary to Plaintiffs' "single entity" theory. *See In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 341 n.44 (3d Cir. 2010)* (noting the defendant subsidiaries were not alleged to have actually participated in the alleged bid-rigging scheme); *Mitchael v. Intracorp, Inc., 179 F.3d 847, 857 (10th Cir. 1999)* (rejecting "single enterprise" theory "[i]n the absence of any specific evidence of coordinated activity" and distinguished on this basis in *Lenox, 847 F.3d at 1234*); *Acuity Optical Labs., LLC v. Davis Vision, Inc., No. 14-cv-03231, 2016 U.S. Dist. LEXIS 112423, 2016 WL 4467883, at *9 (C.D. Ill. Aug. 23, 2016)* (finding no "actual evidence" of "coordinated activity"); *Vollrath Co. v. Sammi Corp., No. CV 85-820 MRP, 1989 U.S. Dist. LEXIS 16902, 1989 WL 201632, at *20-21 (C.D. Cal. Dec. 20, 1989)* (finding no evidence of an *inter*-enterprise conspiracy and thus no actionable conspiracy under *Copperweld*); *cf. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195-96, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (holding that *separately owned* NFL teams were not a "single entity" under *Copperweld*). Cases addressing veil-piercing, alter-ego, and *respondeat-superior* theories are likewise inapposite.

agreed or contemplated pattern of conduct will warrant an inference of conspiracy." *Id.* Therefore, CES's alleged contributions to the conspiracy (selling gas to Wisconsin consumers at the inflated prices and disbursing the profits to Reliant), would be adequate circumstantial evidence of conspiracy, if proved, to permit a finding of liability.

This conclusion comports with ordinary conspiracy principles. "While particularly true of price-fixing conspiracies, it is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged." *Id. at 1007*. Thus, even in the criminal context, the government "need show neither direct contact nor explicit agreement among all of the alleged conspirators." *United States v. Reese, 775 F.2d 1066, 1071 (9th Cir. 1985)*. Nor must the government show "that each defendant or all defendants must have participated in each act or transaction." *Esco, 340 F.2d at 1006*. Involvement "in but two of ten allegedly conspirational [sic] situations does not absolve [a defendant] from participation in the entire conspiracy if its involvement in the two was unlawful and knowingly and purposely performed." *Id. at 1008*. Nor can a single defendant **[**24]** "join a continuing conspiracy long after others have commenced it, or partially carried it out, and thereby claim immunity either for his actions, or for those of others taking place before or after his active participation, *as long as he remains an active participant*." *Id. at 1006* (emphasis added and citation omitted). In sum, CES may be held liable for its own acts in purposeful and knowing furtherance of the alleged inter-enterprise price-fixing conspiracy, if proven.

The remaining question is whether Plaintiffs submitted sufficient evidence to raise a genuine issue as to whether CES in fact participated in coordinated activity in furtherance of the alleged inter-enterprise price-fixing conspiracy.[11] Plaintiffs submitted evidence that, during the Class Period, CES sold gas at rigged prices and then distributed the proceeds up to its parent's coffers. CES does not deny that it sold gas it purchased from RES to consumers in Wisconsin.[12] Plaintiffs also submitted evidence that the profits from CES's natural gas sales "rolled up" to Reliant and its shareholders, and that Reliant would report those distributions as revenues in its consolidated financial reports.

This evidence suffices to create a triable issue of liability under the Sherman Act, and thus it suffices under *Wisconsin Statute § 133.03(1)* as well. Crediting Plaintiffs' evidence, CES's role was essential to **[*635]** securing the benefit of the other Reliant defendants' price-fixing (at least in Wisconsin), and CES's acts were the immediate cause of Plaintiffs' injuries. *T.W. Elec., 809 F.2d at 631* ("If the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by the moving party."). In selling gas at rigged prices and distributing the inflated profits to its parent, CES helped to carry out the inter-enterprise conspiracy with the other gas companies (just as Reliant allegedly carried out the conspiracy by reporting sham sales to the trade publications). CES's role was not only helpful to the conspirators, it was crucial: Until CES sold the gas to consumers, the rigged and inflated prices were not passed on to buyers *outside* of the Reliant economic unit and there was no gain to the Reliant enterprise. *Cf.* *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* (noting that an alleged antitrust conspiracy "would fail" if the conspirators could not charge higher prices to **[**26]** the "jobbers and consumers"). "[T]he conspiracy contemplated and embraced, at least by clear implication, sales to . . . consumers . . . at the enhanced prices. The making of those sales supplied part of the 'continuous cooperation' necessary to keep the conspiracy alive." *Id.*

CES argues that "sales to Wisconsin customers were unnecessary for RES to profit from the alleged conspiracy" because "RES would accrue any purported benefit of increased prices once RES's sale occurred—whether to CES or any other customer." But this argument ignores *Copperweld*'s instruction to treat RES and CES as part of a "single entity." CES's and RES's respective balance sheets may have changed when CES bought gas from RES,

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[11] Again, for purposes of summary judgment, CES does not contest the substance of Plaintiffs' evidence that one or more Reliant companies successfully conspired with non-Reliant defendants and co-conspirators to manipulate the prices of gas sold by CES during the Class Period. *See FERC Final Report* at ES-5 (describing churning by Reliant in 2000 and 2001).

[12] The parties dispute *how much* gas CES sold in Wisconsin, *how much* money CES received for that gas, and ***[**25]*** *how much* of that gas came from RES. These are issues for the trier of fact.

but the Reliant enterprise did not benefit until Reliant gas was sold to someone outside the enterprise. Reliant could not profit by moving cash from its right pocket to its left.

CES's critical contributions to the conspiracy, if proved, would permit a rational factfinder to find that CES joined the conspiracy. Because CES is deemed to have engaged in this coordinated activity with the alleged illegal purpose of its affiliates, Plaintiffs have raised a triable issue of CES's liability **[**27]** under Wisconsin ***antitrust law***. Accordingly, the district court's grant of summary judgment is reversed. Because we reverse the district court's grant of summary judgment, we need not and do not reach Plaintiffs' challenge to that order based on *Rule 56(d)*. *See* *Longoria v. Pinal Cty., 873 F.3d 699, 711 (9th Cir. 2017)*.

REVERSED and **REMANDED**. Appellee's motion to supplement the record on appeal, filed April 24, 2017, is **DENIED**.

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Gold Medal LLC v. USA Track & Field

United States Court of Appeals for the Ninth Circuit

May 8, 2018, Argued and Submitted, Portland, Oregon; August 7, 2018, Filed

No. 16-35488

Reporter
899 F.3d 712 *; 2018 U.S. App. LEXIS 21928 **; 2018-2 Trade Cas. (CCH) P80,474; 2018 WL 3732856

GOLD MEDAL LLC, DBA Run Gum, Plaintiff-Appellant, v. USA TRACK & FIELD; UNITED STATES OLYMPIC COMMITTEE, Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the District of Oregon. D.C. No. 6:16-cv-00092-MC. Michael J. McShane, District Judge, Presiding.

Gold Medal LLC v. USA Track & Field, 187 F. Supp. 3d 1219, 2016 U.S. Dist. LEXIS 62703 (D. Or., May 11, 2016)

Disposition: AFFIRMED.

Core Terms

Gum, governing body, Games, advertising, athletes, antitrust immunity, anti trust law, restrictions, amateur, district court, sport, antitrust, sponsors, logo, Equestrian, brand, manufacturer, sponsorship, apparel, mission, soccer, intent of congress, competitions, exemption, finance, marks, promulgated, regulation, repugnancy, quotation

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Sports

Civil Procedure > Appeals > Standards of Review > De Novo Review

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

HN1[] **Regulated Industries, Sports**

The appellate court reviews de novo the district court's grant of a motion to dismiss. The appellate court also reviews de novo the district court's determinations of immunity from antitrust liability.

Antitrust & Trade Law > Regulated Industries > Sports

HN2[] **Regulated Industries, Sports**

Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.

Antitrust & Trade Law > Regulated Industries > Sports

HN3[] **Regulated Industries, Sports**

Under the *Amateur Sports Act* (ASA), the respective national governing body is authorized to organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games, the Paralympic Games, and the Pan-American Games, and obtain, directly or by delegation to the appropriate national governing body, amateur representation for those games, *36 U.S.C.S. § 220505(c)(3)*. The ASA broadly grants national governing bodies exclusive rights in the name United States Olympic Committee, the symbol of the International Olympic Committee, the emblem of the corporation, as well as the words Olympic, Olympiad, Citius Altius Fortius, Paralympic, Paralympiad, Pan-American, America Espirito Sport Fraternite, or any combination of those words, *36 U.S.C.S. § 220506(a)*. In light of the broad authority bestowed upon national governing bodies to fund the Olympic Mission, the challenged advertising and logo restrictions precluding advertisers from impinging on this delegated authority falls within the mission to protect the value of corporate sponsorships and maximize sanctioned fundraising. To compel the Olympic Committee and USATF under the antitrust laws to permit any would-be advertiser to sponsor individual athletes without national governing body approval would unduly interfere with the operation of the ASA.

Antitrust & Trade Law > Regulated Industries > Sports

HN4[] **Regulated Industries, Sports**

Although *36 U.S.C.S. § 220505(c)(3)* does not explicitly bestow antitrust immunity, the *Amateur Sports Act* establishes funding for the Olympic mission as a central responsibility of the Olympic Committee and its national governing bodies.

Antitrust & Trade Law > Regulated Industries > Sports

HN5[] **Regulated Industries, Sports**

The *Amateur Sports Act* was enacted to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States. It was the intent of Congress that the Olympic Committee be provided with the means to raise money to support the Olympics, including the commercial and promotional value derived from the panache associated with the Olympics.

Summary:

SUMMARY[**]

Antitrust

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel affirmed the district court's dismissal of a complaint alleging that USA Track & Field and the United States Olympics Committee engaged in an anticompetitive conspiracy in violation of ***antitrust law*** by imposing advertising restrictions during the Olympic Trials for track and field athletes.

Following the analysis of the Tenth and Eleventh Circuits, and distinguishing a decision of the Fifth Circuit, the panel held that the Olympics Committee and USATF were entitled to implied antitrust immunity on the basis that their advertising restrictions were integral to performance of their duties under the *Ted Stevens Olympic and Amateur Sports Act*.

Concurring in the result, Judge Nguyen disagreed with the majority's conclusion that the defendants were immune from the antitrust claim alleged in the complaint. Judge Nguyen wrote that the complaint nevertheless failed to state a claim under *§ 1* of the *Sherman Act* because, even if the plaintiff could allege a plausible conspiracy and a viable product market, it did not allege **[**2]** that the defendants received any economic benefit.

Counsel: Sathya S. Gosselin (argued), Swathi Bojedla, and Michael D. Hausfeld, Hausfeld LLP, Washington, D.C.; Timothy P. Landis, Timothy Landis P.C., Portland, Oregon; for Plaintiff-Appellant.

Derek Ludwin (argued) and Philip J. Levitz, Covington & Burling LLP, Washington, D.C.; Bruce L. Campbell, Miller Nash Graham & Dunn LLP, Portland, Oregon; Douglas N. Masters and Emily Stone, Loeb & Loeb LLP, Chicago, Illinois; Nathan J. Muyskens, Loeb & Loeb LLP, Washington, D.C.; Robert E. Sabido, Cosgrave Vergeer Kester LLP, Portland, Oregon; for Defendants-Appellees.

Judges: Before: Kim McLane Wardlaw[*], Johnnie B. Rawlinson, and Jacqueline H. Nguyen, Circuit Judges. Opinion by Judge Rawlinson; Concurrence by Judge Nguyen.

Opinion by: RAWLINSON

Opinion

[*713] RAWLINSON, Circuit Judge:

Appellant Gold Medal LLC d/b/a Run Gum (Run Gum) appeals the district court's order dismissing its complaint. Run Gum alleged that Appellees USA Track & Field (USATF) and the United States Olympic Committee (Olympic Committee) engaged in an anticompetitive conspiracy in violation of ***antitrust law*** by imposing advertising restrictions during the Olympic Trials for track and field athletes. According to Run Gum, **[**3]** the district court erroneously determined that the Olympic Committee and USATF should be afforded implied antitrust immunity on the basis that their advertising restrictions were integral to performance of their duties under the *Ted Stevens Olympic and Amateur Sports Act* (ASA). *See* *JES Props., Inc. v. USA Equestrian, Inc., 458 F.3d 1224, 1226* (describing the ASA) (Alarcon, C.J., authoring judge). Reviewing *de novo*, we affirm the judgment of the district court.

I. BACKGROUND

This appeal involves the statutory framework devised by Congress in support of the mission of national sports governing bodies to promote and finance the participation of American athletes in "international amateur athletic competition." *36 U.S.C. § 220503*. Under the auspices of the ASA, the Olympic Committee exercises exclusive jurisdiction over "all matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games, including representation of the United States in the games," and "the organization of

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[*] Judge Kim McLane Wardlaw was drawn to replace Judge Marvin Garbis, who retired after oral argument but before this opinion was published. Judge Wardlaw has read the briefs, reviewed the record, and listened to oral argument.

the Olympic Games, the Paralympic Games, and the Pan-American Games when held in the United States." *Id.* at *§ 220503(3)*. With respect to amateur athletics, the Olympic Committee may "organize, finance, and control the representation of the United States **[**4]** in the competitions and events of the Olympic Games, the Paralympic Games, and the Pan-American Games." *Id.* at *§ 220505(c)(3)*. The Olympic Committee may also "obtain, directly or by delegation to the appropriate national governing body, amateur representation for those games." *Id.*

In its complaint, Run Gum, a manufacturer of "compressed functional chewing gum" containing "a proprietary mix of caffeine, taurine, and b vitamins," averred that USATF, as the national governing body for the sport of track and field, "organizes and hosts the Olympic Trials, where the greatest track [and] field athletes in the United States compete to earn a position on the U.S. Olympic team." Run Gum asserted that "[g]iven the unique nature and infrequency of the Olympic Trials, the public interest is overwhelming," with "[i]n-person attendance typically exceed[ing] 20,000."

Run Gum alleged that, despite its interest in sponsoring athletes during the Olympic Trials, it was precluded from doing so due to logo and sponsorship restrictions imposed by the Olympic Committee **[*714]** and enforced by USATF. According to Run Gum, USATF "severely restrict[s] the type of *individual* sponsors that track [and] field athletes can display on their **[**5]** athletic apparel at the Olympic Trials, including their competition kit, which greatly diminishes sponsorship opportunities for the athletes and excludes various would-be sponsors." (internal quotation marks omitted) (emphasis in the original). Run Gum complained that USATF's advertising restrictions provide that "with the exception of standard manufacturers' equipment identification . . . the equipment, uniforms, and the bibs/numbers of the competitors and officials at the Trials may not bear any commercial identification or promotional material of any kind (whether commercial or noncommercial)." (alteration and footnote reference omitted). Run Gum asserted that the USATF regulation nonetheless allows athletes to wear apparel containing the logo and names of certain preapproved manufacturers, such as Nike.

Run Gum maintained that use of pre-approved manufacturers "exclude[d] scores of sponsors from the marketplace" in violation of *Section 1* of the Sherman Act. Run Gum posed a single cause of action premised on violations of the antitrust laws stemming from the challenged advertising restrictions. Run Gum contended that the regulation limiting sponsorships of athletes during the Olympic Trials **[**6]** was "an anticompetitive horizontal and vertical agreement among competitors to fix artificially—and unlawfully—the number of individual sponsors and the price paid to athletes for individual sponsorship." Run Gum further alleged that the advertising and logo restriction was "an unlawful group boycott of individual sponsors that do not manufacturer [sic] apparel or equipment, which are categorically excluded from sponsoring athletes at the Olympic Trials." In addition to damages, Run Gum sought to enjoin the Olympic Committee and USATF from "preventing Run Gum from sponsoring individual athletes at the 2016 Olympic Trials in exchange for sponsor identification on clothing at the Olympic Trials."

In a published opinion, the district court dismissed Run Gum's action based on implied antitrust immunity under the ASA. *See* *Gold Medal LLC v. USA Track & Field, 187 F. Supp. 3d 1219, 1222 (D. Or. 2016)*. While acknowledging that grants of implied antitrust immunity are generally disfavored, the district court nevertheless concluded that the advertising restrictions enabled the Olympic Committee and USATF to perform their statutory obligations under the ASA. *See* *id. at 1228-30*. The district court emphasized that "[a]s the only nation that does not provide its Olympic team with federal **[**7]** funding or subsidies, the United States instead relies on the [Olympic Committee] to raise the financial resources necessary to organize Team USA and to compete in the Olympic Games." *Id. at 1228* (citation omitted). According to the district court, the advertising restrictions "prevent a dilution of the Olympic brand," and "permit the [Olympic Committee] and USATF to play a gatekeeping function which preserves the exclusivity-and thus value-of the Olympic symbols and name." *Id. at 1230*. Due to the importance of the advertising restrictions in advancing the Olympic mission, the district court held that the Olympic Committee and USATF should be afforded implied antitrust immunity in enforcing the restrictions that were necessary to fulfillment of their statutory duties under the ASA. *See* *id. at 1230-31*.

Run Gum filed a timely notice of appeal.

II. STANDARDS OF REVIEW

HN1[] "We review de novo the district court's grant of a motion to dismiss." *Elmakhzoumi* ***[*715]*** *v. Sessions, 883 F.3d 1170, 1172 (9th Cir. 2018)* (citation omitted).

"We [also] review *de novo* . . . the district court's determinations of immunity from antitrust liability." *United Nat'l Maintenance, Inc. v. San Diego Convention Ctr., Inc., 766 F.3d 1002, 1006 (9th Cir. 2014)* (citation omitted).

III. DISCUSSION

HN2[] We have recognized that "implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy **[**8]** between the antitrust laws and the regulatory system." *Total TV v. Palmer Commc'ns, Inc., 69 F.3d 298, 302 n.6 (9th Cir. 1995)* (citation and alteration omitted). Although we have not directly addressed implied antitrust immunity under the ASA, other circuit courts have found the requisite "clear repugnancy" between the ASA and antitrust laws. *Id.*

In *JES Props., Inc. v. USA Equestrian, Inc., 458 F.3d 1224 (11th Cir. 2006)*, the Eleventh Circuit addressed a rule developed by the United States Equestrian Foundation (Equestrian Foundation) that imposed a mileage distance for equestrian competitions. *See id. at 1226-27*. The mileage rule generally required that any A-rated equestrian competitions on the same date be held a minimum of 250 miles apart. The Eleventh Circuit discerned the following two purposes for the rule: 1) "to concentrate elite riders into fewer competitions in order to yield the most competitive international equestrian team possible," and 2) "to promote equestrianism nationwide by forcing promoters to hold recognized competitions in more diverse locations." *Id. at 1227*. The Eleventh Circuit reasoned that, due to "the monolithic control" exercised by national governing bodies, "the question . . . is whether the application of the antitrust laws to the facts of this case would unduly interfere with the operation of the ASA." *Id. at 1231-32* (citation and internal **[**9]** quotation marks omitted). The Eleventh Circuit explained that it would "not substitute its own judgment for that of the [Equestrian Foundation] regarding the optimum way to fulfill its obligations," and concluded that "implied immunity [was] called for in [the] case." *Id. at 1232*. In reaching this conclusion, the Eleventh Circuit emphasized that, contrary to the plaintiffs' assertions, it was not required to "focus on whether the rule is an effective or wise way of implementing [the Equestrian Foundation's] powers," *id. at 1231*, or to "consider whether the *particular* eligibility rule was necessary or otherwise examine the wisdom of the rule." *Id. at 1232* (emphasis in the original).

The Eleventh Circuit held that "[b]ecause the ASA requires [a national governing body] to promulgate rules to minimize conflicts in schedules, the imposition of antitrust liability for the promulgation of such a rule is plainly repugnant to the ASA." *Id.* (alteration and internal quotation marks omitted). The Eleventh Circuit relied heavily on the Tenth Circuit's approach in *Behagen v. Amateur Basketball Ass'n of the United States, 884 F.2d 524 (10th Cir. 1989)*. *See JES Props., 458 F.3d at 1231-32*. In *Behagen*, the Tenth Circuit reversed a jury verdict in favor of a basketball player who challenged under the antitrust laws an eligibility rule developed by **[**10]** the national governing body for amateur basketball that prohibited a player from participating in amateur events if the player had participated in professional games. *See Behagen, 884 F.2d at 526-27*. The Tenth Circuit held that the antitrust issue should not have gone to the jury because the eligibility rule was exempt from the antitrust laws under the ASA. *See id. at 527*. The Tenth Circuit emphasized that "Behagen complains of exactly that action which the [ASA] directs— **[*716]** the monolithic control of an amateur sport by the [national governing body] for that sport." *Id. at 529*. The Tenth Circuit clarified that "the [Amateur Basketball Association of the United States of America] could not be authorized under the [ASA] unless it maintained exactly that degree of control over its sport that Behagen here alleges as an antitrust violation." *Id.* The Tenth Circuit emphasized that "[a]lthough [a national governing body] is a private actor, the monolithic control exerted by [a national governing body] over its amateur sport is a direct result of the congressional intent expressed in the *Amateur Sports Act*." *Id. at 528* (footnote reference omitted).

We are persuaded that we should follow the analysis reflected in the decisions of our sister circuits applying **[**11]** implied antitrust immunity under the ASA. We are not persuaded that the Fifth Circuit's decision in *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198 (5th Cir. 2000)*, mandates a reversal in this case. In *Eleven Line*, the Fifth Circuit held that the exclusionary activities of nonprofit, volunteer-run soccer organizations should not be afforded implied antitrust immunity. *See id. at 199, 204-05*. The non-profit organization in that case promulgated and implemented a rule requiring soccer players, coaches, and referees to conduct soccer games only at "sanctioned" facilities, which did not include Eleven Line's for-profit soccer facility. *Id. at 199*. Notably, the national governing body for youth soccer did not issue the challenged rule or explicitly approve it. *See id. at 204* & n.1. For these reasons, *Eleven Line* is distinguishable from the present appeal, as well as from *JES Properties* and *Behagen*, because it involved a rule that was not sanctioned or approved by a national governing body, and the organization imposing the rule was the "only national state association to have such a rule." *Id.*

The Fifth Circuit recognized the propriety of applying implied antitrust immunity under the ASA when the rule, like the advertising and logo restriction before us in this case, is either developed **[**12]** or approved by a national governing body:

> Although the facts of this case do not support an implied exemption from the antitrust laws, an implied exemption would be appropriate in many other situations. For example, if national state associations all over the country had a similar rule, one could infer that the rule was necessary to the management of the sport. . . . If [the national governing body] had promulgated the rule or expressly approved [the] rule in such a way as to indicate an awareness of its consequences, it would be a player eligibility rule exempted under *Behagen*. . . . Any of these circumstances, and no doubt others not described here, would merit an implied exemption.

Id. at 204-05.

The Fifth Circuit expressed its belief that "*Behagen* was correctly decided," but recognized that *Behagen* did not cover the facts of *Eleven Line. Id. at 204*. Ultimately, in *Eleven Line*, the Fifth Circuit concluded that implied antitrust immunity was unavailable because the non-profit soccer organization "promulgated a rule that could be found nowhere else in the country, that was not explicitly approved by the [the national governing body], and for which it was unable to articulate a convincing rationale related to its management **[**13]** of amateur soccer in the area." *Id. at 205*.

We conclude that the decisions of the Tenth and Eleventh Circuits provide a sound basis for affirming the district court's application of implied antitrust immunity to the advertising and logo restrictions enforced by the USATF. ***HN3***[] Under the ASA, the respective national governing **[*717]** body is authorized to "organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games, the Paralympic Games, and the Pan-American Games, and obtain, directly or by delegation to the appropriate national governing body, amateur representation for those games." *36 U.S.C. § 220505(c)(3)*. The ASA broadly grants national governing bodies exclusive rights in "the name United States Olympic Committee," "the symbol of the International Olympic Committee," "the emblem of the corporation," as well as "the words Olympic, Olympiad, Citius Altius Fortius, Paralympic, Paralympiad, Pan-American, America Espirito Sport Fraternite, or any combination of those words." *36 U.S.C. § 220506(a)* (internal quotation marks omitted). In light of the broad authority bestowed upon national governing bodies to fund the Olympic Mission, the challenged advertising and logo restrictions precluding **[**14]** advertisers from impinging on this delegated authority falls within the mission to protect the value of corporate sponsorships and maximize sanctioned fundraising. To compel the Olympic Committee and USATF under the antitrust laws to permit any would-be advertiser to sponsor individual athletes without national governing body approval "would unduly interfere with the operation of the ASA." *JES Props., 458 F.3d at 1231-32* (citation and internal quotation marks omitted). ***HN4***[] Although the statute does not explicitly bestow antitrust immunity, the ASA establishes funding for the Olympic mission as a central responsibility of the Olympic Committee and its national governing bodies. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 538-39, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987)* (recognizing that exclusive rights in the term "Olympics" "directly advances . . . governmental interests by supplying the [Olympic Committee] with the means to raise money to support the Olympics and encourages the [Olympic Committee's] activities by ensuring that it will receive the benefits of its efforts"); *see also Behagen, 884 F.2d at 529* ("Although the *Amateur Sports Act* does not contain an explicit statement exempting action taken under its direction from the federal antitrust laws, we find that the directives of the Act make the intent of Congress sufficiently **[**15]** clear. . . .") (citation and footnote reference omitted).

The analysis of our sister circuits that we now adopt is consistent with the express purpose of the ASA. As noted by the United States Supreme Court, ***HN5***[] the ASA was "enacted to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States." *San Francisco Arts & Athletics, 483 U.S. at 544* (quoting H.R. Rep. No. 95-1627, p. 9, U.S. Code Cong. & Admin. News 1978 p. 7482). As discussed, the Supreme Court has clarified that it was the intent of Congress that the Olympic Committee be provided "with the means to raise money to support the Olympics," including the "commercial and promotional value derived from the panache associated with the Olympics." *Id. at 532-33*. Similarly to the plaintiff in *Behagen*, Run Gum "complains of exactly that action which the [ASA] directs—the monolithic control of an amateur sport by the [national governing body] for that sport," *Behagen, 884 F.2d at 529*, as a "direct result of the congressional intent expressed in the [ASA]." *Id. at 528* (footnote reference omitted).

Finally, Run Gum contends that the district court engaged in improper fact-finding that the advertising and logo restrictions prevented dilution of the Olympic brand. Run Gum specifically **[**16]** maintains that the district court's factual findings contradicted its allegations that must be **[*718]** taken as true at the dismissal stage. However, the district court's analysis was not premised on any improper factual findings, as the district court merely made the obvious and common-sense observation that elimination of the advertising restrictions would dilute the Olympic brand. *See San Francisco Arts & Athletics, 483 U.S. at 532-33*; *see also Gold Medal, 187 F. Supp. 3d at 1230* (noting that Run Gum sought "to capitalize on the unique nature of the Olympic Brand" and that the national governing body sought to "prevent a dilution of the Olympic Brand").[1]

IV. CONCLUSION

Consistent with the purpose of the ASA, and the analytical framework reflected in *Behagen* and *JES Properties*, we conclude that the advertising and logo restrictions applied by the Olympic Committee and USATF to sponsorship of individual athletes during the Olympic Trials should be afforded implied antitrust immunity under the ASA. The district court properly applied implied antitrust immunity under the ASA in dismissing Run Gum's complaint based on the "convincing showing of clear repugnancy between the antitrust laws" and the provisions of the ASA to advance the Olympic Committee's mission to fund and administer **[**17]** Olympic events. *Total TV, 69 F.3d at 302 n.6* (citation omitted). As the district court observed, an injunction preventing enforcement of the advertisement regulation "would open the floodgates" to potential advertisers, some of which might enhance the Olympic brand and some of which might devalue the Olympic brand. *See Gold Medal LLC, 187 F. Supp. 3d at 1230*. The regulation avoids placing the Olympic Committee in the unenviable position of having to face this conundrum in fulfilling its mission to finance American Olympic athletes. We thus view the regulation as protected from antitrust challenge. *See Behagen, 884 F.2d at 529* (connecting implied antitrust immunity with Congressional intent for the ASA). As made evident by the *Eleven Line* decision, application of implied antitrust immunity is not limitless. However, we are persuaded that the facts of this case fall comfortably within the framework contemplated by Congress when it enacted the ASA. *See San Francisco Arts & Athletics, 483 U.S. at 538-39* (discussing Congressional intent to supply the Olympic Committee with "the means to raise money to support the Olympics" and "ensuring that the [Olympic Committee] will receive the benefit of its efforts").

AFFIRMED.

Concur by: Jacqueline H. Nguyen

Concur

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[1] Because we conclude that the Olympic Committee and USATF should be afforded implied antitrust immunity, we do not reach the alternative argument raised by the Olympic Committee and USATF that Run Gum failed to sufficiently allege the requisite relevant market for antitrust injury.

NGUYEN, Circuit Judge, concurring in the result:

Respectfully, I disagree with the majority's **[**18]** conclusion that defendants are immune from the antitrust claim alleged in the complaint. As the majority correctly recognizes, "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 719, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975)*. We therefore don't analyze conflict between antitrust and other laws at a high level of generality. *See Silver v. N.Y. Stock Exch., 373 U.S. 341, 357, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)* (rejecting approach in which an organization's "general power to **[*719]** adopt rules" renders "particular applications of such rules . . . outside the purview of the antitrust laws."). "[T]he proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Id. at 357*.

The antitrust claim here involves a narrow exception allowing athletes to wear apparel with the manufacturer's logo notwithstanding a general rule prohibiting sponsorship and advertising on their clothes. The purpose of this exception, according to defendants, is "to permit athletes to purchase and wear store-bought apparel they preferred and could afford." It has nothing to do with defendants' statutory right "to exercise exclusive jurisdiction" over **[**19]** "all matters pertaining to United States participation in the Olympic Games," *36 U.S.C. § 220503(3)(A)*, to "authorize contributors and suppliers of goods or services to use" Olympic marks, *id. § 220506(b)*, or to otherwise "finance . . . the Olympic Games," *id. § 220505(c)(3)*.

While the rule banning advertising on athletic apparel may serve a revenue-raising purpose by protecting the value of the Olympic brand, it is the exception—not the rule—at issue here. Run Gum's allegations don't suggest that defendants profit from the exception.[1] But neither do they establish a viable product market. *See Hicks v. PGA Tour, Inc., No. 16-15370, 897 F.3d 1109, 2018 U.S. App. LEXIS 20905, [slip op.] at 25-30 (9th Cir. July 27, 2018)*. Therefore, while implied antitrust immunity does not apply, Run Gum nevertheless has failed to allege an antitrust claim.

Run Gum normally would be entitled to amend its pleadings, *see 2018 U.S. App. LEXIS 20905, [silip op.] at 31-32*, but here any amendment would be futile. Even if Run Gum can allege a plausible conspiracy and a viable product market, its antitrust claim is still untenable. Either defendants received no economic benefit, in which case the apparel manufacturer exception is nonactionable, *see O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1065-66 (9th Cir. 2015)*, or they are exercising their statutory right to finance the Olympic Games with implied immunity from suit.

Therefore, I concur in the result **[**20]** affirming the district court's dismissal of Run Gum's complaint with prejudice.

End of Document

[1] The only entities alleged to profit from the exception are the apparel manufacturers, who compete for advertising space on athletes' apparel with fewer potential rivals, thus suppressing their advertising costs. While it is possible that defendants indirectly profit from the exception by conspiring with the apparel manufacturers, Run Gum's conclusory allegations do not plausibly show this or any other conspiracy. *See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

Dehoog v. Anheuser-Busch InBev SA/NV

United States Court of Appeals for the Ninth Circuit

May 15, 2018, Argued and Submitted, Portland, Oregon; August 8, 2018, Filed

No. 16-35912

Reporter
899 F.3d 758 *; 2018 U.S. App. LEXIS 22035 **; 2018-2 Trade Cas. (CCH) P80,465; 2018 WL 3747591

JAMES DEHOOG; BRIAN BOUTELLER; SHONNA BOUTELLER; CARLY BOWEN; TOM BUTTERBAUGH; ERICA I. CORONA; MARIA G. CORONA; CHRIS DENNETT; JOHN DESBIENS; MATTHEW JOHNSON; CYNTHIA A. KREITZBERG; EDWARD LAWRENCE; JERUSHA MALAER; ROBERT MALAER; MICHAEL MARTIN; MICHAEL MCATEE; DAVID MILLIGAN; JEFF REEDER; RALPH REEDER; WADE SCAGLIONE; BETH H. SILVERS; BRADLEY O. SILVERS; PATRICE WADE, Plaintiffs-Appellants, v. ANHEUSER-BUSCH INBEV SA/NV; SABMILLER, PLC, Defendants-Appellees.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *Dehoog v. Anheuser-Busch Inbev SA/NV, 2018 U.S. App. LEXIS 26496 (9th Cir. Or., Sept. 18, 2018)*

US Supreme Court certiorari denied by *Dehoog v. Inbev, 2019 U.S. LEXIS 1393 (U.S., Feb. 25, 2019)*

Prior History: [1]** Appeal from the United States District Court for the District of Oregon. D.C. No. 1:15-cv-02250-CL. Ann L. Aiken, District Judge, Presiding.

DeHoog v. Anheuser-Busch InBev, SA/NV, 2016 U.S. Dist. LEXIS 137407 (D. Or., Oct. 3, 2016)

Disposition: AFFIRMED.

Core Terms

Consumers, acquisition, beer, competitor, concentration, settlement, allegations, district court, acquire, speculative, joint venture, market share, anticompetitive, antitrust, factual allegations, Clayton Act, divestiture, percent, divest, merger

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN1[] **Clayton Act, Claims**

Section 7 of the Clayton Act generally prohibits business acquisitions whose effect may be substantially to lessen competition, or tend to create a monopoly in a relevant market. 15 U.S.C.S. § 18. In addition, any person may sue for and have injunctive relief against threatened loss or damage by a violation of Section 7, as long as the standard equitable principles for injunctive relief are met. 15 U.S.C.S. § 26.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

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

HN2[] Standards of Review, De Novo Review

An appellate court's de novo review of a dismissal under Fed. R. Civ. P. 12(b)(6) is limited to the complaint, materials incorporated into the complaint by reference, and matters of which the court has taken judicial notice. See *Metzler Inv. GMBH v. Corinthian Coll., Inc., 540 F.3d 1049, 1061 (9th Cir. 2008)*. An appellate court benchmarks claims against the now-familiar standard of Twombly and Iqbal: a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Those factual allegations must be enough to raise a right to relief above the speculative level.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN3[] Clayton Act, Claims

Section 7 of the Clayton Act requires claimants to first establish a prima facie case that a merger is anticompetitive. In practical terms, this means adequately alleging facts that an acquisition creates an appreciable danger or a reasonable probability of anticompetitive effects in the relevant market.

Summary:

SUMMARY**

Antitrust

The panel affirmed the dismissal of an action brought under § 7 of the Clayton Act by consumers and purchasers of beer, seeking to enjoin Anheuser-Busch InBev, SA/NV, from acquiring SABMiller, plc.

As a condition of approving the transaction, the U.S. Department of Justice required SABMiller to divest entirely its domestic beer business. Because the divestiture left SABMiller without a presence in the U.S. beer market, the consumers did not and could not plausibly allege that ABI's acquisition of SABMiller would substantially lessen competition in that market. The panel held that the consumers therefore failed to state a claim under the Clayton Act.

Counsel: Joseph M. Alioto (argued) and Jamie L. Miller, Alioto Law Firm, San Francisco, California; Rachele R. Selvig and Christopher L. Cauble, Cauble and Cauble LLP, Grants Pass, Oregon; Gil D. Messina, Messina Law

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Firm P.C., Holmdel, New Jersey; Jeffery K. Perkins, Law Offices of Jeffery K. Perkins, Tiburon, California; for Plaintiffs-Appellants.

Yonatan Even (argued), Cravath Swaine & Moore **[**2]** LLP, New York, New York, for Defendants-Appellees.

Judges: Before: M. Margaret McKeown and Richard A. Paez, Circuit Judges, and Cynthia A. Bashant,[*] District Judge.

Opinion by: M. Margaret McKeown

Opinion

[*760] McKEOWN, Circuit Judge:

This case features a bevy of beer aficionados trying to undo the acquisition of one brewing behemoth by another. James DeHoog and other consumers and purchasers of beer ("Consumers") appeal the district court's dismissal of their private antitrust action to enjoin Anheuser-Busch InBev, SA/NV ("ABI") from acquiring SABMiller, plc ("SAB"). Although the merger closed in October 2016 with the blessing of antitrust authorities, Consumers' private suit persists.

Like the district court, we conclude that Consumers failed to state a claim under *Section 7* of the Clayton Act, *15 U.S.C. § 18*. As a condition of approving the transaction, the U.S. Department of Justice ("DOJ") required SAB to divest entirely its domestic beer business. Because the divestiture left SAB without a presence in the U.S. beer market, Consumers did not and could not plausibly allege that ABI's acquisition of SAB would substantially lessen competition in that market.

[*761] Background

ABI, whose brands include Budweiser, Stella Artois, and Michelob Ultra, is **[**3]** the largest producer and seller of beer in the United States, comprising roughly 46 percent of the U.S. market share. At the time of this suit, SAB was a multinational brewing company that operated in the United States exclusively through a joint venture with Molson Coors Brewing Company ("Molson").[1] The SAB/Molson joint venture, MillerCoors, LLC ("MillerCoors"), was the second-largest producer and seller of beer in the United States, controlling roughly 25 percent of the U.S. market share.[2]

In November 2015, ABI and SAB announced the terms of a $107 billion acquisition of SAB by ABI. As part of the transaction, ABI also announced a contingent agreement with Molson: upon completion of ABI's acquisition of SAB, SAB would completely divest its interest in MillerCoors. Per the terms of the agreement, Molson would acquire SAB's 50 percent voting interest and 58 percent economic interest in MillerCoors, making MillerCoors a wholly-owned subsidiary of Molson. Molson would maintain full control of the business operations and resulting economic benefits of MillerCoors. In short, ABI would acquire SAB but not before spinning off SAB's ownership in MillerCoors (i.e., SAB's U.S. interests) to Molson. **[**4]**

After reviewing the proposed transaction for its effect on competition, on July 20, 2016, the DOJ reached a settlement with ABI to allow the acquisition to move forward. ABI was required to divest SAB's entire U.S.

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[*] The Honorable Cynthia A. Bashant, United States District Judge for the Southern District of California, sitting by designation.

[1] Molson, the world's third largest brewer, is not a defendant.

[2] SAB and Molson each held 50 percent of the governance rights in MillerCoors. The DOJ approved the MillerCoors joint venture in 2008. MillerCoors brands include Miller Lite, Coors Light, Blue Moon, and Zima.

business—including SAB's ownership in MillerCoors—such that the settlement would "prevent any increase in the concentration in the U.S. beer industry." The settlement also prohibited ABI from acquiring beer distributors or brewers without allowing for DOJ review of the acquisition's likely competitive effects and prevented ABI from engaging in certain anti-competitive practices. According to the DOJ, the settlement would "help preserve and promote competition" in the U.S. beer industry.

That same day, the DOJ Antitrust Division filed a civil lawsuit against ABI in the U.S. District Court for the District of Columbia to block the transaction, on the ground that the acquisition violated *Section 7* of the Clayton Act, along with the proposed settlement, which—if approved by the court—"would resolve the competitive harm alleged in the lawsuit."[3] The filings complied with the requirements of the *Antitrust Procedures and Penalties Act ("the Tunney Act")*, a part of the federal government's **[**5]** review of certain mergers and acquisitions. *15 U.S.C. § 16*. Pursuant to the *Tunney Act*, the DOJ published the terms of the settlement and a competitive impact statement in the Federal Register and gave the public 60 days to submit comments. *Id.* *§ 16(d)*.

After consideration of the public comments, the DOJ and several international competition authorities cleared the transaction, which closed on October 10, 2016. Molson then promptly announced that it had completed its acquisition of SAB's interest in MillerCoors. At the time of this opinion, one *Tunney Act* procedure remains outstanding: the U.S. District Court **[*762]** for the District of Columbia must determine whether entry of the settlement "is in the public interest." *Id.* *§ 16(e)*. In making that determination, the court may "take such other action in the public interest as the court may deem appropriate." *Id.* *§ 16(f)*.

Parallel to the government's antitrust enforcement efforts, on December 1, 2015, Consumers filed a private antitrust action against ABI and SAB in the District of Oregon, seeking to enjoin the acquisition.[4] Consumers likewise alleged that the proposed acquisition violated *Section 7* of the Clayton Act, "in that the effect of the proposed acquisition may be substantially **[**6]** to lessen competition, or to tend to create a monopoly in the production and sale of beer in the United States." More specifically, Consumers alleged that the acquisition threatened to cause them "loss and damage in the forms of higher prices, fewer services, fewer competitive choices, diminished product quality and product diversity, [and] suppression and destruction of smaller competitors through exclusive distribution arrangements . . ." Consumers further claimed that the acquisition would "increase ABI's buying power" globally. Although Molson was not a named defendant, Consumers made a corollary allegation regarding Molson's acquisition of SAB's interest in MillerCoors: "Given the resulting change in management and Molson's new increased size and scope in the United States market following the ABI-SAB acquisition, Molson's management is likely to have incentives to change its practices to match ABI's."

The district court dismissed the complaint for failure to state a claim. The court found that Consumers failed to allege that the acquisition would increase ABI's market power in the U.S. beer market; allegations regarding Molson's future conduct in the ownership of MillerCoors were **[**7]** too speculative to state a claim for relief against ABI; and allegations concerning ABI's buying power were too vague to state a plausible claim. In dismissing with prejudice, the court concluded that any amendment to the complaint would be futile because Consumers "cannot plausibly allege that the challenged transaction will increase either ABI's market share or the concentration of firms in the U.S. beer market." By securing the complete divestiture of MillerCoors, the DOJ had reached a settlement to prevent increased concentration in the U.S. beer industry.

ANALYSIS

This appeal centers on a longstanding ***antitrust law*** that empowers the public to sue to block allegedly anticompetitive mergers. ***HN1***[] *Section 7* of the Clayton Act generally prohibits business acquisitions whose

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[3] See United States v. Anheuser-Busch InBev SA/NV, No. 1:16-cv-01483 (D.D.C.).

[4] Consumers are "twenty-three consumers and purchasers of beer in the United States" who reside in Oregon, California, and Washington.

effect "may be substantially to lessen competition, or tend to create a monopoly" in a relevant market. *15 U.S.C. § 18*. In addition, "[a]ny person" may "sue for and have injunctive relief . . . against threatened loss or damage by a violation of" *Section 7*, as long as the standard equitable principles for injunctive relief are met. *Id. § 26*.

I. CONSUMERS FAILED TO STATE A CLAIM UNDER THE *CLAYTON ACT*

HN2[] Our de novo review of a dismissal under *Federal Rule of Civil Procedure 12(b)(6)* is limited to the **[**8]** complaint, materials incorporated into the complaint by reference, and matters of which the court has taken judicial notice. *See Metzler Inv. GMBH v. Corinthian Coll., Inc., 540 F.3d 1049, 1061* ***[*763]*** *(9th Cir. 2008)*.[5] We benchmark Consumers' claims against the now-familiar standard of *Twombly* and *Iqbal*: "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Those factual allegations "must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*.

HN3[] *Section 7* of the Clayton Act requires Consumers to "first establish a prima facie case that a merger is anticompetitive." *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 783 (9th Cir. 2015)*. In practical terms, this means adequately alleging facts that an acquisition creates "an appreciable danger" or "a reasonable probability" of anticompetitive effects in the relevant market. *Id. at 788*; *FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1160 (9th Cir. 1984)*.[6] Consumers' allegations do not belly up to this bar.

A. BECAUSE OF THE DIVESTITURE, ABI DID NOT ACQUIRE AN ACTUAL COMPETITOR IN THE U.S. BEER MARKET

Consumers' frontline allegations are that the acquisition eliminated SAB as an "actual . . . competitor in the United States." But as the district court correctly found, ABI's acquisition of SAB did not create a reasonable probability of anticompetitive effects in the U.S. beer market **[**9]** because ABI did not acquire any business interests in the U.S. beer market. Pre-transaction, SAB operated in the United States exclusively through its joint venture MillerCoors. As a condition of closing the acquisition, SAB divested completely its interests in MillerCoors to Molson. By requiring full divestiture of SAB's U.S. interests, the DOJ ensured that the acquisition will not create "any increase in the concentration in the U.S. beer industry."

Faced with a similar ABI acquisition, we recently affirmed dismissal of a *Section 7* suit for failure to state a claim, albeit in an unpublished disposition. *See Edstrom v. Anheuser-Busch InBev SA/NV, 647 F. App'x 733 (9th Cir. 2016)*, *cert. denied*, *137 S. Ct. 258, 196 L. Ed. 2d 136 (2016)*.[7] In that case, beer purchasers sought to enjoin ABI and Constellation Brands, Inc. ("Constellation") from acquiring Grupo Modelo S.A.B. de C.V. ("Modelo"). Under the terms of that agreement, "ABI would purchase Modelo but grant Constellation an irrevocable, exclusive license to import Modelo brands into the United States." *Id. at 735*. ABI retained no right to sell Modelo beer in the United States. *Id.* Because "the challenged transaction d[id] not increase ABI's market share or the concentration of the U.S. beer market," we concluded that "Plaintiffs failed to plausibly allege a prima **[**10]** facie case that the challenged transaction is anticompetitive." *Id.* So too, here. The challenged transaction did not increase ABI's market share because ABI acquired no interests in the United States. The concentration of **[*764]** the U.S. beer market stayed precisely the same because MillerCoors remained in the market as a competitor (with SAB's share transferred fully to Molson).

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[5] Consumers' motion to take judicial notice of government documents, court filings, press releases, and undisputed matters of public record concerning the ABI-SAB transaction (Dkt. No. 17) is granted.

[6] The parties agree that the relevant product market is the production and sale of beer, and the relevant geographic market is the United States.

[7] Although our decision in *Edstrom* is not precedential and we do not rely on it here, it is instructive as to the reality of a transaction where ABI acquired no interests in the U.S. market. *See Ninth Circuit Rule 36-3*.

Since SAB did not compete in the market before the transaction except *as* MillerCoors, and MillerCoors still competes in the market, Clayton Act cases addressing the elimination of an actual competitor in a relevant market—and a concomitant increase in market concentration—are inapposite.[8] Consumers argue that these cases "establish the illegality of any nontrivial acquisition of a competitor, whether or not the acquisition was likely either to bring about or shore up collusive or oligopoly pricing" in a highly concentrated market like the U.S. beer market. *See* Hospital Corp of America v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986). Yet with the exception of the potential competitor cases, discussed below, Consumers' cited cases involve the removal of an actual competitor *from the relevant market*. MillerCoors remains as a competitor in the market.

B. ABI DID NOT ACQUIRE [**11] A POTENTIAL COMPETITOR "POSITIONED AT THE EDGE OF THE MARKET, CONTINUALLY THREATENING TO ENTER"

Recognizing the reality that ABI did not acquire an actual competitor, Consumers claimed in summary fashion that the acquisition would eliminate SAB as a "*potential* competitor." (Emphasis added). The claim is doomed from the start because the potential competitor theory lacks factual allegations in the complaint. Indeed, by alleging that ABI and SAB were actual competitors, Consumers undermine their assertion that the brewers were potential competitors. Taking Consumers' factual allegations as true, as we must at this stage, SAB was not a potential competitor with ABI. *See* In re Tracht Gut, LLC, 836 F.3d 1146, 1150 (9th Cir. 2016) (we accept as true all factual allegations in the complaint, but "do[] not have to accept as true conclusory allegations in a complaint"). Instead, before the transaction and divestiture, SAB was an actual competitor through its joint venture MillerCoors.

Consumers' effort on appeal to recast SAB as a "potential competitor . . . so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in the market" fails. United States v. Falstaff Brewing Corp., 410 U.S. 526, 532-33, 93 S. Ct. 1096, 35 L. Ed. 2d 475 (1973). SAB was not poised on the edge of the market "continually threatening **[**12]** to enter." United States v. Penn-Olin Chem. Co., 378 U.S. 158, 173, 84 S. Ct. 1710, 12 L. Ed. 2d 775 (1964). Nor was SAB "eager[] to enter that market." United States v. El Paso Nat. Gas Co., 376 U.S. 651, 660, 84 S. Ct. 1044, 12 L. Ed. 2d 12 (1964). SAB had already entered the market, through the MillerCoors joint venture. SAB's beneficial influence on competitive conditions in the market thus was *through* MillerCoors, an entity still competing in the market today.

Consumers did not allege in their complaint that SAB was a potential competitor because of "the ever-looming threat of the possible end of the [SAB-Molson] joint venture [MillerCoors] and the resulting re-entry of the parents." But such a claim also would be futile because allegations regarding the potential dissolution of MillerCoors **[*765]** and its competitive effects would be entirely speculative. *See* Twombly, 550 U.S. at 555.

C. ALLEGATIONS CONCERNING THE NEW MILLERCOORS' DISTRIBUTION PRACTICES ARE TOO SPECULATIVE TO STATE A CLAIM

Consumers make one last speculative argument: Post-transaction, MillerCoors—now a wholly-owned subsidiary of Molson—will adopt the distribution practices of ABI. Consumers provide no support for that assertion.[9] Merely

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[8] *See, e.g.,* United States v. Pabst Brewing Co., 384 U.S. 546, 550, 86 S. Ct. 1665, 16 L. Ed. 2d 765 (1966) (merger of "two very large brewers competing against each other in 40 States"); United States v. Von's Grocery Co., 384 U.S. 270, 277, 86 S. Ct. 1478, 16 L. Ed. 2d 555 (1966) (merger of "two of the most successful and largest [grocery stores] in the area" to create the second largest grocery store in Los Angeles); United States v. Aluminum Co. of Am., 377 U.S. 271, 281, 84 S. Ct. 1283, 12 L. Ed. 2d 314 (1964) (acquisition of "an aggressive competitor" in the same market).

[9] After briefing on the motion to dismiss, Consumers filed a supplemental declaration with an attached letter written by the American Antitrust Institute regarding potential post-merger coordination in the U.S. beer market. That letter was not incorporated into the complaint. Regardless, the letter was addressed to the DOJ Antitrust Division to encourage the agency to order pro-competitive remedies if it approved the merger, some of which the DOJ adopted in its settlement agreement with ABI.

stating that "it is likely that a 100 percent Molson Coors-owned MillerCoors will follow ABI's lead in its dealings with distributors," without more, is insufficient. *See* Iqbal, 556 U.S. at 678 (emphasizing that "labels **[**13]** and conclusions" are not enough to survive a motion to dismiss). This allegation is a classic speculative conclusion. General allegations regarding past acquisitions in the market, which prompted distinct DOJ remedies, do not alter the equation. The bottom line is that the complaint offers only speculation as to how a MillerCoors operated solely by Molson, as opposed to by Molson and SAB, will do business.[10] Such speculation "stops short of the line between possibility and plausibility of entitlement to relief." Twombly, 550 U.S. at 557 (alteration and internal quotation marks omitted).[11]

In view of our conclusion that Consumers do not have a viable Clayton Act claim, we need not reach Consumers' claim for injunctive relief.

II. The District Court Did Not Abuse Its Discretion in Dismissing the Complaint with Prejudice

The only remaining question is whether Consumers' complaint could be "saved by amendment." Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1051 (9th Cir. 2008). Ultimately, the district court did not abuse its discretion in concluding that Consumers could not plead around the elephant in the room. *See* Missouri ex rel. Koster v. Harris, 847 F.3d 646, 655-56 (9th Cir. 2017). Since SAB divested its interests in the U.S. beer market, the transaction could not increase ABI's market share or the concentration of that market. **[**14]** As the district court aptly observed, the DOJ reached a settlement to "prevent increased concentration" in the market. While Consumers contend that the settlement only partially remedies their alleged injuries, they curiously did not submit public comments opposing the settlement, as they were entitled to do. *See* 15 U.S.C. § 16(d).

Consumers' new arguments on appeal underscore that any amendment to their complaint would be futile. Consumers argue that they would add factual allegations regarding SAB's role in the relevant market **[*766]** managing MillerCoors as a joint venture, or (perhaps contradicting themselves), on the "edge of the market." Given the legal deficiencies in applying the "actual competitor" and "potential competitor" theories to the present facts, further allegations would not salvage the complaint.

Consumers also assert that they would add allegations regarding the closing of a MillerCoors brewery in Eden, North Carolina in September 2015. According to Consumers, the shuttered brewery once brewed on a contract basis for competitor Pabst and its closure "increased market concentration to presumptively illegal levels." However, Consumers do not explain why a brewery closed by MillerCoors months **[**15]** *before* ABI announced its proposed acquisition of SAB has anything to do with the merger, as opposed to being merely the product of MillerCoors' independent business judgment. The weakness of these proposed amendments underscores that the district court was within its discretion to dismiss the complaint with prejudice.

AFFIRMED.

End of Document

See Press Release, U.S. Dep't of Justice, Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition (July 20, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer.

[10] Molson is not a defendant in this action. But if Molson conducts its MillerCoors business in the U.S. beer market in violation of the antitrust laws, it does so at the risk of private and public antitrust enforcement suits.

[11] Consumers do not appeal the district court's decision that allegations about ABI's buying power are too speculative.

Pfizer Inc. v. Johnson & Johnson

United States District Court for the Eastern District of Pennsylvania

August 8, 2018, Decided; August 10, 2018, Filed

CIVIL ACTION No. 17-cv-4180

Reporter

333 F. Supp. 3d 494 *; 2018 U.S. Dist. LEXIS 135261 **; 2018-2 Trade Cas. (CCH) P80,464; 2018 WL 3818918

PFIZER INC., Plaintiff, v. JOHNSON & JOHNSON and JANSSEN BIOTECH, INC., Defendants.

Prior History: *Pfizer Inc. v. Johnson & Johnson, 2018 U.S. Dist. LEXIS 31690 (E.D. Pa., Feb. 26, 2018)*

Core Terms

antitrust, patients, bundling, rebates, biosimilars, allegations, infliximab, insurers, motion to dismiss, products, providers, biologic, compete, foreclose, pricing, anticompetitive conduct, anticompetitive, multi-product, incontestable, anti trust law, Defendants', purchasing, argues, competitor, continues, contracts, percent, exclusionary, contestable, medications

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Judges: J. CURTIS JOYNER, J.

Opinion by: J. CURTIS JOYNER

Opinion

[*496] **MEMORANDUM**

Joyner, J.

Before the Court are Defendants' Motion to Dismiss (Doc. No. 27) and Corrected Memorandum in Support thereof (Doc. No. 31), Plaintiff's Response in Opposition thereto (Doc. No. 42), Defendants' Reply in Support thereof (Doc. No. 48), and Plaintiff's Notice of Supplemental Authority (Doc. No. 54). We deny Defendants' Motion for the following reasons. **[**2]**

I. BACKGROUND

This case arises from an antitrust action brought by Pfizer, Inc. ("Pfizer") against Johnson & Johnson, along with its wholly **[*497]** owned subsidiary, Janssen Biotech, Inc. (collectively, "J&J"), for allegedly anticompetitive practices in the pharmaceutical market for infliximab products. The practices at issue are embodied by exclusive agreements and bundled rebates. Pfizer's principal claim is that J&J violated federal antitrust laws by engaging in anticompetitive behavior to shield Remicade from competition posed by Pfizer's biosimilar, Inflectra.

Under consideration is J&J's Motion to Dismiss Pfizer's Complaint for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. This Motion is fully briefed and ripe for the Court's adjudication. The Court has considered the parties' submissions and decides this matter without oral argument. *Fed. R. Civ. P. 78*; *Loc. R. Civ. P. 7.1(f)*.

I. ALLEGED FACTS[1]

The subject medications in this litigation are J&J's Remicade and Pfizer's Inflectra. Both are branded forms of infliximab, which is a biologic drug used to treat a range of immune-mediated diseases. Compl. ¶35. Biologics are relatively new medications to the pharmaceutical market, and their unique qualities are relevant to our decision.

Biologic **[**3]** medications, such as infliximab, are complex mixtures derived from living systems. Id. ¶28. Biologics stand in contrast to more common drugs that are chemically synthesized and whose structure is known. Id. Therefore, the composition of biologics are not easily identified or characterized. Id. This makes biologic medications difficult to replicate and produce in generic form. Id.

The emergence of biologics prompted Congress to enact the Biologic Price Competition and Innovation Act ("BPCIA"). Id. ¶31. The BPCIA provides an abbreviated regulatory approval pathway for the introduction of drugs that are biosimilar to a biologic, similar to the abbreviated approval process for generic drugs under the Hatch-Waxman Act. Id. ¶33. To prove that an applicant drug is biosimilar to an originator product, the applicant must show that it is "highly similar to the [originator] notwithstanding minor differences in clinically inactive components" and that "there are no clinically meaningful differences between the [proposed biosimilar] and the [originator] in terms of safety, purity, and potency." Id. (quoting *42 U.S.C. §262(i)(2)*).

One important difference between biosimilars approved under the BPCIA and generic medications **[**4]** approved under the Hatch-Waxman Act is that biosimilars are not automatically substitutable with the originator biologic. Id. ¶34. While it appears there is a process in which a biosimilar can become automatically substitutable once achieves interchangeability status with the FDA, Pfizer claims that whether the biosimilar can be automatically substituted would ultimately depend on state law. Id. A key aspect to this distinction, according to Pfizer, is that "it enables biologic originator firms to leverage their monopolies over existing patients to extract anticompetitive commitments from insurers and providers." Id.

With this in mind, we turn to the competing products in this case. J&J introduced the first infliximab product under the brand name Remicade in the United States in 1999. Id. ¶38. The FDA has approved Remicade's indications for rheumatoid arthritis, psoriatic arthritis, ankylosing **[*498]** spondylitis, ulcerative colitis, Chron's disease, and plaque psoriasis. Id. ¶¶45, 83. Pfizer estimates that 475,000 patients in the United States receive at least one dose of Remicade annually. Id. ¶39. Because of its patients, J&J enjoyed a monopoly over the infliximab market in the United States **[**5]** until 2016. Id. ¶3.

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[1] Unless otherwise noted, the following facts are taken from Pfizer's Complaint. On consideration of a *Rule 12(b)(6)* motion to dismiss, the allegations in the plaintiff's complaint are generally taken as true and all reasonable inferences are drawn in favor of the claimant. See *Phillips v. Cty. of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008)*.

Pfizer brought Inflectra to market in 2016 after it received FDA approval as the first biosimilar to Remicade. Id. ¶5. The FDA approved Inflectra for the same indications as Remicade, except for pediatric ulcerative colitis, which accounts for a minimal amount of Remicade's sales. Id. ¶45.

Remicade and Inflectra are administered intravenously at an institutional setting, such as a clinic or hospital. Id. ¶49. They are "medical benefit" products, in contrast to "pharmacy benefit" products. Id. ¶¶49-50. As medical benefit products, Remicade and Inflectra are first purchased by the providers, who later seek reimbursement after administering it on patients. Id. Because the provider bears financial risk posed by the patient or patient's insurer not reimbursing them for the cost of medical benefit products, providers have an interest in utilizing drugs that are widely covered by insurers. Id. ¶50.

Within weeks of Inflectra's launch in 2016, J&J began to deploy its "Biosimilar Readiness Plan." Id. ¶6. Pfizer claims that the "core features of the plan are exclusionary contracts that foreclose Pfizer's access to an overwhelming share of consumers, coupled with anticompetitive **[**6]** bundling and coercive rebate policies designed to block both insurers from reimbursing, and hospitals and clinics from purchasing, Inflectra or other biosimilars of Remicade despite their lower pricing." Id. Pfizer alleges that J&J's anticompetitive scheme targeted both insurers and providers and involved exclusive contracts for Remicade, multi-product bundled rebates, rebates based on the bundling of existing (incontestable) and new (contestable) infliximab patients, and creating a "rebate trap" that prevented Pfizer and other competitors from competing with Remicade. Pfz. Resp. at 6 (citing Compl. ¶¶ 8, 9, 11, 55-79, 98) (Doc. No. 42).

Exclusive Contracts. A key component of J&J's scheme was to secure contractual commitments from commercial insurance companies to exclude biosimilars from coverage under their plans, thereby making Remicade the exclusive infliximab available to patients covered under those plans. Id. ¶58. A portion of these agreements contained express terms that would exclude biosimilars from their medical policies and drug formularies. Id. The remaining portion of these agreements contained a "fail first" provision, which would require a patient to first try and fail **[**7]** on Remicade before the insurance company would reimburse Inflectra or another biosimilar. Id. However, if a patient first fails on Remicade, it would "defy sound medical judgment" for a physician to switch to a therapeutic equivalent biosimilar, such as Inflectra, rather than try another therapy. Id. At least 70 percent of commercially insured patients in the United States fall under plans that have adopted these express or de facto agreements to exclude Inflectra and other biosimilars. Id. ¶59.

Bundled Rebates and Multi-Product Bundling. Pfizer also alleges that J&J has forced insurers into accepting exclusive contracts by introducing a rebate program that would provide savings off Remicade's increasing list price for all existing Remicade patients. Id. ¶¶9, 66. The threat of not qualifying for the rebate would result in significant costs for insurance companies because it would apply to both new and existing Remicade patients. Id.

Pfizer posits that the force of J&J's "all-or-nothing" rebate program is effective **[*499]** because it bundles the base of existing Remicade patients with new patients entering the infliximab market. Id. ¶¶9, 65. Pfizer asserts that the exiting Remicade patients represent **[**8]** inelastic demand, or incontestable patients, who are "highly unlikely" to stitch to a biosimilar regardless of price. Id. By premising rebates on this incontestable population, J&J is able to force insurance companies to exclude Inflectra from competing for new patients entering the infliximab market. Id. ¶¶9, 66. Pfizer refers to this as the "rebate trap." Id. ¶66.

Beyond bundling contestable and incontestable patients, J&J has also bundled rebates across multiple products. Id. ¶¶9, 67. In essence, if an insurer refuses to grant exclusivity to Remicade, the insurer would be forced to pay a higher price on other J&J products in addition to Remicade. Id. Pfizer identifies Simponi, Simponi Aria, and Stelara as other J&J products included in its multi-product bundled rebate program. Id. Pfizer also claims it could offer no competing drugs to these products. Id.

Pfizer claims that Inflectra's exclusion from coverage by most insurers results in an even greater foreclosure than just the patients covered by those insurers. Id. ¶¶10, 69, 70, 71. As an infusion product, infliximab is administered at a provider's facility. The provider therefore purchases and stocks infliximab products. According **[**9]** to Pfizer, the risk that Inflectra will not be reimbursed by a significant portion of patients' insurers causes physicians to only purchase, stock, and proscribe Remicade for nearly all of their infliximab patients. Id. ¶¶10, 69-71.

Pfizer claims that J&J's multi-faceted approach to control the infliximab market has foreclosed it from competing. Pfizer alleges that it continues to offer "a significantly lower price for Inflectra unit-for-unit." Id. ¶66. Despite a lower unit cost, insurance companies continue to enter into exclusive agreements with J&J to cover Remicade for all infliximab patients to avoid losing rebates on the substantial base of existing Remicade patients who are not likely to switch to Inflectra. Id. To overcome the "rebate trap," Pfizer claims that it would have to follow J&J's lead and price Inflectra below its own average variable cost. Id. ¶¶66, 77, 78. Pfizer states that it continues to negotiate with providers to make Inflectra the lower-priced infliximab option on a per-unit basis, even in the form of offering guarantees. Id. ¶77. Again, according to Pfizer, its efforts to compete on price have failed because of J&J's efforts to foreclose it from the market. **[**10]** Id.

As a result of J&J's exclusionary contracting scheme, and despite Pfizer's efforts to compete, Remicade's price continues to rise. Id. ¶¶8, 12, 47, 80-82, 100, 102; Pfizer's Not. of Supp. Auth. (Doc. No. 74). Pfizer alleges that both Pfizer's Wholesale Acquisition Price ("WAP") and "Average Sales Price" ("ASP"), which is a net price accounting for rebates and other discounts, continues to rise despite insurers and providers now having a lower-cost alternative that, according to Pfizer, differs in no meaningful way. Id. ¶¶13, 42, 45-47, 104; Pfz. Not. of Supp. Auth. at 2. According to Pfizer, J&J's ability to increase the price of Remicade quarter after quarter since Pfizer brought Inflectra to market "underscores the plausibility of [Pfizer's] allegations" that J&J's scheme has unlawfully restrained--and continues to unlawfully restrain--biosimilar competition to Remicade. Pfz. Not. of Supp. Auth. at 2.

As a result of J&J's anticompetitive conduct, Pfizer claims that it has been foreclosed from competing for at least 70 percent of all commercially insured patients in the United States. Compl. ¶8. The spillover effect that J&J's scheme **[*500]** causes on providers' purchasing decisions has led 90 percent of provider account stocking no Inflectra at all. Id. **[**11]** ¶12. As of September 2017, J&J maintained an over 96 percent marketshare of infliximab unit sales in the United States. Id. ¶102.

Pfizer points out that it is not the only one harmed as a result of J&J's exclusionary conduct. Id. ¶104. Since the FDA approved Inflectra, J&J has increased the price of Remicade by nearly 10 percent, which in turn increases the cost to private insurance companies, government payers, and consumers. Id. ¶¶13, 104.

II. LEGAL STANDARD

Fed. R. Civ. P. 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiffs are not required to provide detailed factual allegations in their complaint, though they must do more than merely state legal conclusions and formulaic recitations of the elements of the cause of action. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

A party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. When considering a motion to dismiss under *Rule 12(b)(6)*, a district court must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." *Krantz v. Prudential Invs. Fund Mgmt. LLC, 305 F.3d 140, 142 (3d Cir. 2002)* (quoting *Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996))*. While a court generally cannot consider matters outside the pleadings, "a document integral to **[**12]** or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment." *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)* (internal quotation marks and alteration omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citation omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id. at 678* (quoting *Twombly, 550 U.S. at 556*). A plaintiff is entitled to all reasonable inferences from the facts alleged, but a plaintiff's legal conclusions are not entitled to deference, and the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*.

The Court's analysis, below, applies this governing standard to J&J's *Rule 12(b)(6)* arguments for dismissal.

IV. DISCUSSION

Pfizer has asserted claims under *Section 1* and *Section 2 of the Sherman Act* and *Section 3 of the Clayton Act*. Compl. ¶¶110, 117, 125, **[**13]** 136. The law applicable to each claim is effectively the same as it applies to J&J's Motion to Dismiss. *Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 402 n.11 (3d Cir. 2016)*. Specifically, to sufficiently plead an actionable antitrust violation, Pfizer must plead facts showing that J&J engaged in anticompetitive conduct and that Pfizer suffered antitrust injury as a result. Id.

[*501] J&J raises three lines of attack against J&J's Complaint. First, J&J generally targets Pfizer's alleged pleadings, arguing that Pfizer has failed to plead facts that constitute an antitrust injury. Second, J&J argues that Pfizer has failed to plead specific allegations establishing antitrust injury with respect to the particular conduct that is the subject of Pfizer's Complaint. Lastly, J&J argues that the facts that Pfizer did plead lack sufficient basis to support its antitrust injury. We address each below.

A. General Antitrust Injury

"Competition is at the heart of the antitrust laws." *Philadelphia Taxi Ass'n, Inc. v. Uber Techs., Inc., 886 F.3d 332, 338 (3d Cir. 2018)* (internal quotation omitted). Antitrust laws are only aimed at curtailing anticompetitive conduct, "or a competition-reducing aspect or effect of the defendant's behavior." Id. In other words, the underlying principle of our antitrust laws is to protect competition, not competitors. Id.

The law **[**14]** therefore establishes antitrust injury as a common pleading requirement for antitrust plaintiffs. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; see also *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 101 (3d Cir. 2010)*; *Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 875-76 (3d Cir. 1995)*. An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick, 429 U.S. at 489*.

Under this requirement, Pfizer "must allege harm to competition, not just harm to its own business" to adequately plead antitrust injury. *In re EpePen (Epinephrine Injection, USP) Mktg., Sales Practices and Antitrust Litig., 2017 U.S. Dist. LEXIS 209710, at *64 (D. Kan. Dec. 21, 2017)*; see also *Philadelphia Taxi Ass'n, 886 F.3d at 338*. "This standard, on a motion to dismiss, requires an antitrust plaintiff to allege facts capable of supporting a finding or inference that the purported anticompetitive conduct produced increased prices, reduced output, or otherwise affected the quantity or quality of the product." *In re EpePen, 2017 U.S. Dist. LEXIS 209710, at *64-65* (citing *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 113, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*; *Cohlmia v. St. John Medical Center, 693 F.3d 1269, 1281 (10th Cir. 2012)*; *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996))*.

While an antitrust plaintiff must present plausible allegations establishing antitrust injury, "the adequacy of a [plaintiff's] contentions regarding the effect on competition is typically resolved after discovery, either on summary judgment or after trial." *Brader, 64 F.3d at 869*. Accordingly, "the existence of the antitrust injury is not typically resolved through motions to dismiss." *Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 417-18 (3d Cir. 1997)* (citing *Brader, 64 F.3d at 876*). The distinction between these propositions is that a plaintiff must assert allegations making plausible **[**15]** the claim that it, and the competitive market, suffered as a result of defendant's anticompetitive conduct; however, on a motion to dismiss, we liberally analyze the adequacy of those allegations, and of course, we do not judge the validity of those claims.

For example, in Brader, the Third Circuit reversed the district court's dismissal of antitrust claims based on the antitrust injury pleading requirement. *64 F.3d at 875-76*. The Third Circuit noted that the plaintiff did in fact plead that the defendant **[*502]** hospital "prevented him and others from engaging in the practice of general vascular trauma surgery in the relevant market, and prevented other hospitals in the relevant market from employing or granting medical staff privileges to the [p]laintiff for the purpose of competing with defendants." *Id. at 876*. These allegations alone were sufficient to state a claim for antitrust injury. Id.

Pfizer's Complaint sufficiently alleges that it has suffered an antitrust injury as the result of J&J's anticompetitive conduct. J&J's efforts to foreclose Pfizer from the market, as Pfizer has alleged, have led to increased prices for consumers and limited competitive options for end payors, providers, and patients. Pfizer provides **[**16]** detailed allegations regarding J&J's exclusionary terms with many of the nation's largest insurers, the incentive structure that forces end payors and providers into accepting those terms, Pfizer's efforts to compete, including its guarantees that Inflectra would cost less than Remicade, and showed how market participants on many levels are injured from J&J's ability to sell Remicade without having to compete with Inflectra and other biosimilars.

Along a similar line of attack, J&J also takes aim at Pfizer's alleged antitrust injury by arguing that Pfizer's inability to gain market share is caused by reasons other than J&J's alleged anticompetitive conduct. For example, J&J argues that Inflectra's lack of competition is the result of providers' lack of comfort and awareness of biosimilars, Inflectra's lack of "interchangeability" status with Remicade, and Remicade's substantial rebates. J&J Corrected Mem. at 1, 14-15 (Doc. No. 31).

While these arguments may prove true after discovery, they are not grounds for dismissing Pfizer's Complaint. The existence of possible alternative causes of an antitrust injury is not a valid ground for dismissal. *In re EpePen, 2017 U.S. Dist. LEXIS 209710, at *76 (D. Kan. Dec. 21, 2017)*. In other words, an antitrust plaintiff **[**17]** is not required to disprove all other possible alterative causes to survive a motion dismiss.

This reasoning is illustrated in *In re EpePen*, in which Sanofi asserted antitrust claims against Mylan on the basis that Mylan prevented Sanofi's pharmaceutical from competing. *2017 U.S. Dist. LEXIS 209710, at *19-21*. On a motion to dismiss, Mylan argued that Sanofi's inability to compete was instead a result of its poor marketing decisions. *Id. at *76*. Mylan also argued Sanofi's lack of success was more likely attributable to Sanofi's product recall than Mylan's conduct. *Id. at *77*. Rejecting Mylan's arguments, the district court noted that "[t]hese arguments merely foreshadow factual disputes that the court cannot resolve on a motion to dismiss." Id. The court therefore "refuse[d] to dismiss Sanofi's claims at the pleading stage based on Mylan's arguments that alterative reasons caused the alleged injuries." *Id. at *76*.

While J&J may ultimately be correct that Inflectra's lack of success is the result of something other than J&J's conduct, its argument is misplaced at this stage in the litigation. In considering the sufficiency of Pfizer's alleged antitrust injury, "dispositive weight should not be given to lists of possible alternatives, which virtually any **[**18]** defendant can generate." Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶338 (4th Ed., 2018 Cum. Supp. 2010-2017). We therefore reject J&J's invitation to dismiss Pfizer's Complaint on the basis that Pfizer's own **[*503]** actions caused Inflectra's lack of success to date.

B. Conduct Specific Antitrust Injury

J&J next asks us to dismiss Pfizer's Complaint on the basis that Pfizer has failed to allege facts establishing antitrust injury resulting from J&J's particular conduct that is the subject to Pfizer's Complaint.

As noted above, Pfizer claims that J&J has engaged in a multifaceted scheme to prevent Inflectra and other biosimilars from competing with Remicade. Pfz. Resp. at 19. This scheme includes "secur[ing] contractual commitments from commercial insurance companies to exclude biosimilars from coverage under their plans."

Compl. ¶58. Such commitments, as Pfizer alleges, cause Remicade to be the exclusive infliximab available to new and current infliximab patients. Id. The alleged scheme also includes bundling, in the form of multi-product bundles and a theory based on bundling Remicade's existing and new patients. Id. ¶¶65-68. **[**19]**

Exclusive dealing arrangements arise when a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time. These agreements can be in the form of express or *de facto* terms--terms that naturally result in the buyer purchasing exclusively from the seller. *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012)*. In ZF Meritor, the Third Circuit noted there was sufficient evidence of a *de facto* exclusive dealing arrangement where no risk adverse purchaser would refuse the agreement out of caution for jeopardizing its relationship with the largest seller. *Id. at 283*.

On one hand, such agreements may benefit consumers because they can assure supply and price stability. On the other hand, such agreements can also deprive competitors access to a certain market. We therefore consider exclusive dealing arrangements under a rule of reason framework, in which we analyze "the likely or actual anticompetitive effects of the exclusive dealing arrangement, including whether there was reduced output, increased price, or reduced quality in goods or services." *Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 403 (3d. Cir. 2016)*.

Another form of potentially anticompetitive conduct is bundled rebates. Bundled rebates pose antitrust concern when a defendant forecloses competition from its **[**20]** product in a competitive market by linking it to a product on which it faces no competition. LePage's Inc. v. 3M, *324 F.3d 141, 156 (3d Cir. 2003)*; *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1065 (3d Cir. 1978)*. In SmithKline, the Third Circuit affirmed as an antitrust violation the defendant's rebates based on the purchase of multiple products because the bundle, in effect, "insulated its product from true price competition." *575 F.2d at 1065*. The same was true in LePages's, where the defendant "used its monopoly in transparent tape, backed by its considerable catalog of products, to squeeze" its competitor from the market. *324 F.3d at 157*. Similar to exclusive dealing agreements, bundled rebate claims are analyzed under a rule of reason framework.

Focusing on Pfizer's alleged antitrust injury, J&J makes several arguments specific to each aspect of its alleged anticompetitive conduct.

First, J&J argues that Pfizer's alleged antitrust injury based on J&J's multi-product bundling should be dismissed because Pfizer failed to allege that it offered its own multi-product bundles. According to J&J, Pfizer was either required to plead facts establishing that it offered its own competing bundle or that it **[*504]** was incapable of doing so. J&J Resp. at 13.

J&J relies heavily on Eisai, where the Third Circuit stated it previously **[**21]** "limited the reasoning in LePage's to cases in which a single-product producer is excluded through a bundled rebate program offered by a producer of multiple products, which conditions the rebates on purchases across multiple different product lines." *821 F.3d at 405*. In Eisai, the Third Circuit reviewed the circuit's prior decisions in bundling cases and noted that bundling can be anticompetitive when it "forecloses portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer." Id.

Pfizer, of course, is not a single-product producer. It admits as much in its Complaint. Compl. ¶18. Moreover, Pfizer has not alleged any facts suggesting that J&J is hindering its ability to compete with J&J's multi-product bundles by offering their own multi-product bundles. J&J's multi-product bundles, on their own, therefore do not present antitrust concern.

Second, J&J cites Eisai for the proposition that bundling contestable and incontestable demand, for the same product, cannot constitute an antitrust violation. However, the Third Circuit did not completely shut the door on such a theory, as J&J argues. *Id. at 406*. Rather, it **[**22]** affirmed summary judgment with the factual support that "nothing in the record indicates that an equally efficient competitor was unable to compete." Id.

Bundling Remicade's incontestable demand could create anticompetitive consequences by foreclosing competition for new infliximab patients--thereby posing antitrust concern that was lacking in *Eisai*. Taking Pfizer's allegations as true, new infliximab patients are contestable because they have not yet been anchored to a specific infliximab product. If incontestable demand is truly inelastic, then this could fall into a traditional bundling case where J&J has bundled its power over existing Remicade patients to break the competitive mechanism and deprive new infliximab patients (and their insurers) of the ability to make a meaningful choice between Remicade and its biosimilars. See *Eisai, 821 F.3d at 404*. We therefore refuse to dismiss Pfizer's bundling claim as it relates to contestable and incontestable demand.

C. Allegations Supporting Pfizer's Efforts to Compete

Lastly, J&J argues that Pfizer's alleged antitrust injury based on J&J's exclusive contracts should be dismissed because Pfizer failed to plead adequate facts establishing that it attempted to compete. **[**23]** J&J supports this argument by claiming Pfizer's allegations regarding the price of Inflectra and Remicade lack sufficient accuracy to make plausible Pfizer's efforts to compete.

J&J mainly takes issue with Pfizer's reliance on Average Sales Price ("ASP") and Wholesale Acquisition Cost ("WAC"). According to J&J, Pfizer cannot rely on ASP and WAC to support its efforts to compete with J&J by offering lower prices because both metrics lack sufficient specificity. J&J Corrected Mem. at 17.

As noted above, WAC is essentially a metric reflecting list price, whereas ASP is based on an annual average that does account for rebates and discounts off list price. J&J argues that because WAC does not reflect the net price after discounts and rebates, it provides no indication about the price competition between Remicade and Inflectra. The problem with ASP, according to J&J, is that because Remicade's current ASP reflects a yearly net average, and because Inflectra has been on the market for less than a year at **[*505]** the time Pfizer filed its Complaint, Remicade's ASP reflects pricing data from months where Inflectra was not yet on the market. J&J Corrected Mem. at 3-4, 16-18.

At this stage, we find that **[**24]** Pfizer's allegations containing ASP data do support the plausibility of its claims. According to Pfizer, it has priced Inflectra lower than J&J's Remicade even accounting for incentives such as bundled discounts and rebates. Pfizer also alleges that Remicade's ASP continues to increase despite Inflectra's entrance to the market at a 24 percent lower per unit cost. Supp. Auth. at 2. These allegations lend plausibility to Pfizer's theory that J&J is engaging in anticompetitive behavior, which is foreclosing biosimilars from competing.

We agree with J&J that the WAC provides minimal support for the proposition that Inflectra costs less on a unit-for-unit basis than Remicade. Nevertheless, Pfizer's allegations regarding Remicade's increasing WAC does support Pfizer's theory that J&J's bundled rebate force purchasers into excluding Remicade's biosimilars from the market. Increasing Remicade's WAC in turn increases the penalties for not excluding Inflectra and other biosimilars in the form of lost incentives. Accepting as true Pfizer's allegations that existing Remicade patients will not switch to a biosimilar despite price competition, the increasing penalties that payors may face for exiting patients may **[**25]** effectively force payors into accepting J&J's exclusionary terms for all patients.

J&J's arguments against Pfizer's support for its pricing allegations are misplaced--or rather, mistimed. Discovery will reveal whether Pfizer has offered more competitive pricing for Inflectra, as alleged in its Complaint. If Pfizer's claims about pricing prove true, then the pricing data may indicate that J&J's conduct has prevented Pfizer from competing in violation of the antitrust laws. Ultimately, the legality of J&J's conduct will depend on whether it foreclosed a substantial share of the market such that competition has been harmed. *ZF Meritor, 696 F.3d at 283* (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 326-28, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*.

V. CONCLUSION

For the foregoing reasons, J&J's Motion to Dismiss is denied. An appropriate Order will follow.

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

[*none] **ORDER**

AND NOW, this 8th day of August, 2018, upon consideration of Defendants' Motion to Dismiss (Doc. No. 27) and Corrected Memorandum in Support thereof (Doc. No. 31), Plaintiff's Response in Opposition thereto (Doc. No. 42), Defendants' Reply in Support thereof (Doc. No. 48), and Plaintiff's Notice of Supplemental Authority (Doc. No. 54), it is hereby ORDERED that Defendants' Motion to Dismiss is DENIED.

It is further ORDERED that the Court's prior **[**26]** Order Staying Discovery (Doc. No. 50) is hereby LIFTED.

BY THE COURT:

/s/ J. CURTIS JOYNER

J. CURTIS JOYNER, J.

Wortman v. Air New Zealand

United States District Court for the Northern District of California

August 8, 2018, Decided; August 8, 2018, Filed

Case No. 07-cv-05634-CRB

Reporter

326 F.R.D. 549 *; 2018 U.S. Dist. LEXIS 133883 **; 101 Fed. R. Serv. 3d (Callaghan) 935; 2018-2 Trade Cas. (CCH) P80,466; 2018 WL 3753226

DONALD WORTMAN, ET AL., Plaintiffs, v. AIR NEW ZEALAND, et al., Defendants.

Subsequent History: Motion granted by, Costs and fees proceeding at *In re Transpacific Passenger Air Transp. Antitrust Litig., 2018 U.S. Dist. LEXIS 224208 (N.D. Cal., Sept. 24, 2018)*

Prior History: *Wortman v. Yang (In re Transpacific Passenger Air Transp. Antitrust Litig.), 701 Fed. Appx. 554, 2017 U.S. App. LEXIS 11321 (9th Cir. Cal., June 26, 2017)*

Core Terms

class member, Satogaeri, damages, proposed class, antitrust, tickets, predominance, class certification, surcharge, fares, conspiracy, purchasers, fuel, estimate, itineraries, named plaintiff, ascertainability, questions, commonality, airline, travel, price-fixing, class-wide, numerosity, passenger, absent class members, certification, aggregate, merits, cases

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For Amy Yang, Objector: Aaron M Dawson, Dawson & **[**12]** Rosenthal, Sedona, AZ; Anna St. John, Theodore Harold Frank, Competitive Enterprise Institute Center for Class Action Fairness, Washington, DC.

Judges: CHARLES R. BREYER, United States District Judge.

Opinion by: CHARLES R. BREYER

Opinion

[*553] ORDER GRANTING MOTION FOR CLASS CERTIFICATION

This is an antitrust suit alleging that price-fixing harmed two *Rule 23(b)(3)* classes of transpacific airline passengers. The Court hereby GRANTS Plaintiffs' motion to certify both classes. See Mot. Class Cert. (dkt. 1118-5).

I. BACKGROUND

Plaintiffs filed this action in 2007, alleging that multiple international airlines fixed the prices of transpacific air travel in violation of the Sherman Antitrust Act. See generally Compl. (dkt. 1); First Am. Compl. (dkt. 493); Second Am. Compl. (dkt. 741). Since then, nearly all of the twenty-six defendants settled or were dismissed. Only All Nippon Airways ("ANA" or "Defendant") remains.

On November 22, 2013, Plaintiffs filed a Second Amended Complaint ("SAC"), alleging that ANA, JAL,[1] and other airlines conspired to "artificially fix, raise, maintain, and/or stabilize the prices of passenger air transportation, including surcharges, for flights between the United States and Asia . . . in violation of *Section 1* of the **[**13]** Sherman Act, *15 U.S.C. § 1*." SAC ¶ 405. This Court **[*554]** recently denied Defendant's motion for summary judgment. Order Den. Mot. Summ. J. (dkt. 1194).[2]

In the present motion, Plaintiffs propose two classes focusing on purported damages caused by price-fixing activities in two specific areas: (1) fuel surcharges and (2) special types of discounted tickets known as "satogaeri" fares. Compare Mot. Class Cert. at i with SAC ¶ 395.

II. LEGAL STANDARD

Plaintiffs bear the burden of proving, by a preponderance of the evidence, that class certification is appropriate. See *Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1238 (9th Cir. 2001)*. Certification is a three-step process.

First, plaintiffs must "demonstrate that an identifiable and ascertainable class exists." *Mazur v. eBay Inc., 257 F.R.D. 563, 567 (N.D. Cal. 2009)*.[3]

Second, plaintiffs must meet the four explicit requirements of *Rule 23(a)*: numerosity, commonality, typicality, and adequacy. *Fed. R. Civ. P. 23(a)*. "Class certification is proper only if the trial court has concluded, after a 'rigorous analysis,' that *Rule 23(a)* has been satisfied." *Wang v. Chinese Daily News, Inc., 737 F.3d 538, 542-43 (9th Cir. 2013)* (quoting *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011))*.

Third, plaintiffs must show their proposed classes fulfill one of *Rule 23(b)*'s three requirements. In the present case, Plaintiffs seek to certify both of their proposed classes under *Rule 23(b)(3)*. A court may certify **[**14]** a class under

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[1] JAL was originally a defendant in this suit, but settled in July, 2014. See Am. Settlement Agreement (dkt. 999-2). JAL remains relevant in this motion because a clause of its settlement reserved the right to hold other Defendants jointly and severally liable for JAL sales of passenger air transportation, "to the extent permitted and/or authorized by U.S. law." Id. ¶ 9.

[2] Plaintiffs also recently filed a motion to strike certain materials that ANA "submitted in connection with its memorandum in opposition to Plaintiffs' motion for class certification." Pls.' Mot. to Strike (dkt. 1188). It is not necessary to rely on any of the allegedly objectionable materials to answer the dispositive questions in the present motion. Therefore, the Court DENIES this motion as moot.

[3] This ascertainability requirement is not explicitly required by the Federal Rules of Civil Procedure, but courts in this district routinely require plaintiffs to demonstrate it as part of *Rule 23* class certification motions. See, e.g., *Astiana v. Ben & Jerry's Homemade, Inc., No. C 10-4387 PJH, 2014 U.S. Dist. LEXIS 1640, at *4 (N.D. Cal. Jan. 7, 2014)* ("[A]part from the explicit requirements of *Rule 23*, the party seeking class certification must also demonstrate that an identifiable and ascertainable class exists."); *Viet. Veterans of Am. v. C.I.A., 288 F.R.D. 192, 211 (N.D. Cal. 2012))* ("While it is not an enumerated requirement of *Rule 23*, courts have recognized that . . . 'to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable.'" (quoting *DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970)))*.

In a recent opinion, the Ninth Circuit rejected instituting a "separate administrative feasibility prerequisite" for class certification. *Briseno v. Conagra Foods Inc., 844 F3d 1121, 1123-24 (9th Cir. 2017)*. However, this is distinct from requiring that classes be clearly or objectively defined. See *id. at 1124 n.3*.

Rule 23(b)(3) when (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. These two requirements are often referred to as "predominance" and "superiority."

In analyzing a class certification motion, a court may consider merits questions "to the extent—but only to the extent—that they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)*. Although this certification inquiry may involve substantive analysis, "[t]he court may not go so far . . . as to judge the validity" of a plaintiff's claims. *Staton v. Boeing Co., 327 F.3d 938, 954 (9th Cir. 2003)*.

III. DISCUSSION

This order first reviews the certified class definitions, and then explains the Court's reasoning on whether Plaintiffs' proposed classes meet the ascertainability requirement, *Rule 23(a)*'s four requirements, and *Rule 23(b)(3)*'s two requirements in turn.

A. Class Definitions

At a hearing before this Court on August 3, 2018, the parties discussed and agreed to **[*555]** several modifications to the class definitions as proposed in Plaintiffs' motion. The class definitions below reflect **[**15]** these modifications.

> **Japan Class**. Adjusted definition as follows:
> All persons and entities that directly purchased tickets for passenger air transportation from Japan Airlines International Company, Ltd. ("JAL") or All Nippon Airways Corporation, Ltd. ("ANA"), or any predecessor, subsidiary or affiliate thereof, that originated in the United States and included at least one flight segment from the United States to Japan between the period beginning February 1, 2005 and ending December 31, 2007. Excluded from the class are any tickets that did not include a fuel surcharge. Excluded from the class are any antitrust immunized fares agreed upon at IATA 'Tariff Coordinating Conferences.' Excluded from the class are tickets exclusively acquired through award or reward travel or any tickets acquired for infant travel with a 90% discount. Also excluded from the class are purchases by government entities, Defendants, any parent subsidiary or affiliate thereof, and Defendants' or any other commercial airline's officers, directors, employees, agents, and immediate families ("Japan Class").
>
> **Satogaeri Class**. Adjusted definition as follows:
>
> All persons and entities that directly purchased satogaeri **[**16]** fares from JAL or ANA or any predecessor, subsidiary or affiliate thereof that originated in the United States and included at least one flight segment to Japan and does not include travel to countries other than the United States and Japan between the period beginning January 1, 2000 and ending April 1, 2006. Excluded from the class are purchases by government entities, Defendants, any parent subsidiary or affiliate thereof, and Defendants' officers, directors, employees and immediate families. Also excluded are purchases of "Satogaeri Special" and maerui satogaeri fares ("Satogaeri Class," and collectively with the Japan Class, the "Classes").

Concurrent Classes. These two classes are not mutually exclusive. Between February 2005 and March 2006, all satogaeri fares sold would have also included a fuel surcharge. Tr. Proceedings (dkt. 1192) at 9. Therefore all Satogaeri Class members purchasing a ticket during this period are also members of the proposed Japan Class, barring unusual circumstances in individual cases.

B. Ascertainability

A class is not ascertainable unless membership can be established by means of objective, verifiable criteria. *Xavier v. Philip Morris USA, Inc., 787 F. Supp. 2d 1075, 1088-90 (N.D. Cal. 2011)*. "Without an objective, reliable way to ascertain class membership, **[**17]** the class quickly would become unmanageable, and the preclusive effect of final judgment would be easy to evade." *Id. at 1089*. Nonetheless, "not all class members need to be ascertained prior to class certification." *Mauto v. Gen. Motors Corp., No. 07-892, 2008 U.S. Dist. LEXIS 93897, 2008 WL 2775004, at *4 (E.D. Cal. July 15, 2008)* (citation omitted).

In this case, Plaintiffs can fulfill the ascertainability requirement for both of their proposed classes.

Japan Class. The proposed class is defined by objective, verifiable criteria: people who directly bought price-fixed tickets, and suffered as a result. Plaintiffs' expert showed that class members can be verified with the transaction data that ANA and JAL have already produced. See Mangum Rpt. (dkt. 1119-2) ¶ 19.

Defendant argues that the Japan Class is not ascertainable because Plaintiffs have not offered a method for separating class members who are direct purchasers from those who are indirect purchasers under Illinois Brick.[4] This Court's recent order forecloses this argument. See Order Den. Mot. Summ. J.

[*556] **Satogaeri Class**. Similarly, Plaintiffs' expert demonstrated that Satogaeri Class members can be verified with the transaction data that ANA and JAL have already produced. See Mangum Rpt. ¶ 19.

Defendant does not dispute the ascertainability of the Satogaeri **[**18]** Class.

C. *Rule 23(a)* Factors

1. Numerosity

The class must be "so numerous that joinder of all members is impracticable." See *Fed. R. Civ. P. 23(a)(1)*. "Although there is no exact number, some courts have held that numerosity may be presumed when the class comprises forty or more members." *Krzesniak v.Cendant Corp., No. C 05-05156 MEJ, 2007 U.S. Dist. LEXIS 47518, at *19 (N.D. Cal. June 20, 2007)*. The plaintiff does not need to allege a precise number of class members, but may make a reasonable estimate. See *Whiteway v. FedEx Kinko's Office & Print Servs., No. C 05-2320 SBA, 2006 U.S. Dist. LEXIS 69193, at *11 (N.D. Cal. Sept. 13, 2006)*.

Plaintiffs' proposed classes have well over the required number of members, and they make reasonable estimates based on the transactional data produced by JAL and ANA. See Mot. Class Cert. at 14. Plaintiffs' proposed classes both satisfy the numerosity requirement.

Japan Class. Plaintiffs demonstrate that there are approximately 1.1 million itineraries in the transactional data that meet the definition of the Japan Class. See id.; Mangum Rpt. ¶ 8. Defendant does not dispute the numerosity of the Japan Class.

Satogaeri Class. Plaintiffs assert there are more than 147,000 itineraries in the transactional data that meet the definition of the Satogaeri class. See **[**19]** Mot. Class Cert. at 14; Mangum Rpt. ¶ 8.

Defendant maintains that all purchasers in the Satogaeri Class are "indirect purchasers" under Illinois Brick, and therefore Plaintiffs have "defined a class that has zero members." Opp'n (dkt. 1157) at 16. This argument is foreclosed by this Court's recent order. See Order Den. Mot. Summ. J.

Accordingly, Plaintiffs' proposed classes meet the numerosity requirement.

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[4] *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* (barring indirect purchasers from recovering treble damages for overcharges resulting from a price-fixing conspiracy).

2. Commonality

The commonality requirement demands that there be "questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. Commonality is satisfied where "claims . . . depend upon a common contention . . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes, 564 U.S. at 350*.

Both of Plaintiffs' proposed classes easily satisfy this requirement. "Where an antitrust conspiracy has been alleged, courts have consistently held that 'the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.'" *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., No. M 02-1486 PJH, 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166, at *3 (N.D. Cal. June 5, 2006)* **[**20]** (quoting *In re Rubber Chem. Antitrust Litig., 232 F.R.D. 346, 351 (N.D. Cal. 2005))*. That is the case here: both of the proposed classes allege harm resulting from an antitrust price-fixing conspiracy. Additionally, Defendant does not dispute the commonality of either proposed class. The commonality requirement is met.

3. Typicality

The typicality requirement is met if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. Representative claims need only be "reasonably co-extensive with those of absent class members; they need not be substantially identical." See *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998)*.

Like commonality, "there is substantial legal authority holding in favor of a finding of typicality in price fixing conspiracy cases, even where differences exist between plaintiffs and absent class members with respect to pricing, products, and/or methods of purchasing products." See *DRAM, 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166, at *5*.

[*557] In this case, Defendant's price-fixing conspiracy is the underlying course of conduct allegedly causing damages to both of Plaintiffs' proposed classes. Because the named Plaintiffs and all absent class members share these claims and this liability theory, these classes satisfy the typicality requirement.

Japan Class. The record expressly states that **[**21]** three of the four named Plaintiffs paid the fuel surcharge. See Mangum Rpt. ¶ 19. The record does not indicate if the remaining named Plaintiff (Della Ewing Chow) paid the surcharge,[5] but even if this Plaintiff is omitted, the class would survive. See id.

Defendant disputes typicality on the grounds that the named Plaintiffs purchased their tickets through travel agents, and are therefore not representative of "direct purchasers." Opp'n at vii. This argument is no longer valid after this Court's recent order. See Order Den. Mot. Summ. J.

Satogaeri Class. The record explicitly shows that the three named Satogaeri Class Plaintiffs purchased satogaeri fares during the class period. See Mangum Rpt. ¶ 19.

Defendant does not dispute the typicality of Satogaeri Class representatives. Accordingly, the typicality requirement is met for both classes.

4. Adequacy

[5] Even without express evidence, it is likely that Della Chow did pay the surcharge: Plaintiffs note that that "ANA and JAL's fuel surcharge was applied to all passengers, in all booking classes, for all routes originating in the United States" during the proposed class period. Mot. Class Cert. at 3.

The adequacy requirement asks whether the class representatives "will fairly and adequately protect the interests of the class." See *Fed. R. Civ. P. 23(a)(4)*. Courts determine whether the named plaintiffs and counsel will (1) have any conflicts of interest with other class members and (2) prosecute the action vigorously on behalf of the class. See *Hanlon, 150 F.3d at 1020*.

Plaintiffs' proposed **[**22]** classes satisfy this requirement. The named Plaintiffs and counsel have no discernable conflicts of interest with absent class members, as they seek the same relief and share an identical interest in proving Defendant's liability. See Mot. Class Cert. at 15. Each named Plaintiff has actively participated in the litigation, and Plaintiffs' counsel has vigorously pursued this litigation since 2007. See id. at 15-16; Compl. (filed Nov. 6, 2007).

Japan Class. Defendant argues that the named Plaintiffs for the Japan Class are inadequate, again based on their indirect-purchaser theory. Opp'n at 20-22. Defendant asserts that since all the named Plaintiffs for the Japan Class purchased their tickets through travel agents, none of them are adequate representatives of class members who "directly purchased" their tickets. Mot. Class Cert. at i (emphasis added). This argument also fails in light of this Court's recent order. See Order Den. Mot. Summ. J.

Satogaeri Class. Defendant does not dispute the adequacy of the proposed Satogaeri Class representatives.

Accordingly, the adequacy requirement is met for both classes.

C. *Rule 23(b)(3)*

Plaintiffs seek to certify both of their proposed classes under *Rule 23(b)(3)*. To do so, Plaintiffs must **[**23]** satisfy *Rule 23(b)(3)*'s predominance and superiority requirements by showing that "[c]ommon questions . . . predominate over any questions only individual members; and class resolution is superior to other available methods for the fair the efficient adjudication of the controversy." See *Amchem Prods. v. Windsor, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*.

1. Predominance

Rule 23(b)(3)'s first test, predominance, itself consists of two parts. First, a plaintiff must show that common questions of law and fact predominate over individual questions. Second, a plaintiff must present a model of damages that (1) identifies damages that stem from the defendant's alleged wrongdoing and (2) is "susceptible of measurement across the entire class." **[*558]** *Comcast Corp. v. Behrend, 569 U.S. 27, 133 S. Ct. 1426, 1433-34, 185 L. Ed. 2d 515 (2013)*.

a. Individual Determinations

Rule 23(b)(3)'s predominance requirement is more stringent than *Rule 23(a)(2)*'s commonality requirement, and "tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchen, 521 U.S. at 623*.

Plaintiffs satisfy this part of the predominance inquiry due to the nature of Defendant's alleged antitrust violation. See, e.g., *Amchen, 521 U.S. at 625* (showing this part of the predominance test is "readily met in certain cases alleging . . . violations of the antitrust laws."); *DRAM, 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166, at *3* ("Where an antitrust conspiracy has been alleged, courts have consistently **[**24]** held that 'the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.'" (quoting *Rubber Chem., 232 F.R.D. at 351*)); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc., 209 F.R.D. 159, 167 (C.D. Cal. 2002)* ("In price-fixing cases, 'courts repeatedly have held that the existence of the conspiracy is the predominant issue and warrants certification even where significant individual issues are present.'" (quoting *In* re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 518 (S.D.N.Y. 1996))). Plaintiffs' proposed classes will "prevail or fail in unison" based on the common question of the Defendant's guilt. See Amgen, 568 U.S. at 460.

Plaintiffs present extensive evidence of Defendant's participation in collusive behavior, but even if they had not, certification would still be proper. Proof is not a prerequisite for class certification. See id. at 459 ("Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.").

b. Damages

To satisfy the second part of the predominance inquiry, a plaintiff must present a damages model that identifies damages that stem from the defendant's alleged wrongdoing and that is "susceptible of measurement across the entire class." Comcast, 133 S. Ct. at 1433-34. In antitrust cases, this requirement will be met "if the plaintiffs can prove . . . that there has been an antitrust **[**25]** violation and that each class member has suffered an antitrust injury." 6 Newberg on Class Actions § 20:52 (5th ed. 2018). "At class certification, plaintiff must present 'a likely method for determining class damages,' though it is not necessary to show that his method will work with certainty at this time." Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365, 379 (2010) (quoting In re Tableware Antitrust Litig., 241 F.R.D. 644, 652 (N.D. Cal. 2007)). The need for individualized damage calculations alone cannot defeat class certification. See Leyva v. Medline Indus., Inc., 716 F.3d 510, 513 (9th Cir. 2013) (citing *Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010))*.

This Order will first summarize Plaintiffs' proposed damage model for each class, and then briefly address Defendant's objections.

(1) Plaintiffs' Proposed Damage Models

Japan Class. Plaintiffs' expert created an econometric model using data produced by JAL and ANA demonstrating the class-wide impact of the Defendant's alleged conspiracy. Mot. Class Cert. at 19. This model aggregates the ticket pricing information during the alleged conspiracy period, and compares it with ticket pricing information from before the alleged conspiracy began. See id.; Mangum Rpt. ¶¶ 157-59. By comparing this information, Plaintiffs assert that their model can determine a "but for" price—i.e., the price that Japan Class members would have paid for their tickets "but for" the alleged conspiracy. **[**26]** Mot. Class Cert. at 20. Their expert uses the model to estimate an average overcharge of 8.33% for itineraries purchased by the Japan Class. See id. This calculation applies to the total cost of the itinerary, not solely the fuel surcharge component of the itinerary. When applied class-wide, the model estimates that Japan Class members paid an aggregate of $94 million in overcharges. See id. at 21.

[*559] Plaintiffs calculate individual damages by comparing economic damages with the fuel surcharge paid by the passenger. The passenger would be eligible to recover either the amount of the fuel surcharge or the economic damages, whichever is lower. See Mangum Rpt. ¶ 183.

Satogaeri Class. Plaintiffs use a different methodology to estimate Satogaeri Class damages: instead of comparing pricing information to a different time period, they compare pricing information with the "closest alternative to Satogaeri fares."[6] Plaintiffs' expert uses this method to estimate that class members paid between 7.1% and 9.1% more for their base fares as a result of Defendant's collusion. Mangum Rpt. ¶¶ 207-09. This estimate applies to the

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[6] Plaintiffs' expert selects two alternatives: a "Super Value Fare" and a maerui satogaeri fare. See Mangum Rpt. ¶¶ 203-11. Plaintiffs chose this method due to a lack of data, which prevented the use of same type of benchmark model used in the Japan Class analysis. See id. ¶ 203 ("The econometric methodology that I implement above to measure the overcharge for Japan class members cannot be used for the Satogaeri Class because the misconduct started as early as 1997 and I have no information based on the prices that were being charged for Satogaeri fares prior to the start of the alleged cartel behavior.").

base fare, not the total cost of the ticket. When applied class-wide, this model estimates **[**27]** that Satogaeri class members suffered aggregate damages of $22.5 million to $28.9 million in overcharges. Id. ¶ 211.

Individual damages would be calculated by multiplying the overcharge estimate (i.e., 7.1%-9.1%) to the base fare component of the overall ticket price.

(2) Defendant's Challenges to "Predominance" Requirement

Arguing that Plaintiffs cannot demonstrate predominance, Defendant submits various theories, which fall into two overlapping categories: (1) challenges to Plaintiffs' method of calculating aggregate damages, and (2) challenges to Plaintiffs' ability to prove that individual class members suffered damages.

(a) Challenges to Plaintiffs' Aggregate Damages Model

Defendants assert that there are various deficiencies with Plaintiffs' expert's damages model, including: (1) failure to account for "yield-management" software systems; (2) exclusion of certain Japan Class itineraries; (3) the presence of "false positives;" (4) failure to account for individual consumer preferences, which may induce customers to make purchasing decisions based on factors other than price; and (5) the use of averages to mask variability among the proposed class members, **[**28]** "many of which . . . did not suffer harm." Opp'n at v, 3, 10.[7]

Some of these asserted deficiencies may be valid. However, "the issue at class certification is not which expert is the most credible, or the most accurate modeler, but rather have the plaintiffs demonstrated that there is a way to prove a class-wide measure of [impact] through generalized proof." *In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 604 (N.D. Cal. 2010)*, amended in part, *No. M 07-1827 SI, 2011 U.S. Dist. LEXIS 84476, 2011 WL 3268649 (N.D. Cal. July 28, 2011)*; see also *In re Optical Disk Drive Antitrust Litig., No. 3:10-MD-2143 RS, 2016 U.S. Dist. LEXIS 15899, 2016 WL 467444, at *7 (N.D. Cal. Feb. 8, 2016)* (certifying antitrust class even though "Defendants and their expert advance a litany of supposed defects in [the plaintiff's expert's] analysis" of antitrust impact). Merits questions can be resolved at trial. See *Comcast, 133 S. Ct. at 1433* (noting that "any model supporting a plaintiff's damages case must be consistent with its liability case," but "[c]alculations need not be exact" at the class certification stage); **[*560]** *Amgen, 568 U.S. at 460* (noting that forcing plaintiffs to prove the merits of their case at the class certification stages would be "put[ting] the cart before the horse.").

Plaintiffs' proposed aggregate damages models are plausible **[**29]** and consistent with their theory of liability. Accordingly, they are sufficient to pass the class certification stage. Plaintiffs will have to prove the merits of their models at trial, when this Court will scrutinize them closely with the benefit of additional evidence and testimony.

(b) Challenges to Proof of Individual Impact

Defendant next asserts that Plaintiffs fail to demonstrate that each proposed class member has suffered an antitrust injury. Defendant relies on three lines of argument. First, Defendant argues that Plaintiffs present no proof that class members who purchased their tickets from travel agents[8] suffered damages. Second, Defendant asserts that

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[7] Defendant also moves to strike the testimony of Plaintiffs' expert as inadmissible under *Federal Rule of Evidence 702* and *Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. Def.'s Mot. to Strike (dkt. 1206). Defendant's motion is based on objections to the expert's methodology similar to those made in its Opposition brief. See Opp'n at v, 3, 10. Daubert requires courts to "ensure the reliability and relevancy of expert testimony." *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 151-52, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. This requirement is met here: Plaintiffs' expert employs widely-recognized and reliable methodologies. See 2A Phillip E. Areeda et al., ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶¶ 398-99 (4th ed. 2014). Accordingly, this Court DENIES Defendant's motion to strike.

Plaintiffs have not shown that higher fuel surcharges would necessarily result in higher ticket prices for Japan Class members. Third, Defendant argues that large segments of the Japan Class members paid lower prices as a result of the price-fixing conspiracy, and therefore did not suffer an antitrust injury.

Defendant's first line of argument is foreclosed by this Court's earlier order. See Order Den. Mot. Summ. J. Plaintiffs are not indirect purchasers under *Illinois Brick*, and therefore they suffered direct antitrust **[**30]** injury.

Defendant's second and third lines of argument both assert that large percentages of particular subsets of the Japan Class did not suffer an antitrust injury. Therefore, Defendant argues, the class should not be certified due to Plaintiffs' "failure to demonstrate that 'all or virtually all' class members were injured." Opp'n at 5 (quoting *In re Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14, 2017 WL 5311533, at *87 (D.D.C. Nov. 13, 2018))*.

Plaintiffs assert that fuel surcharge increases represent price increases to passengers. See Mangum Rpt. ¶ 37. This is partially based on a common-sense theory that "there would be no reason to collude on fuel surcharges if [ANA and JAL] were going to continue to compete on base fares." Id. ¶ 182. Plaintiffs also rebut Defendant's theoretical assertion with a practical examination of the data. Plaintiffs' expert purportedly found "no decline in base fares when fuel surcharges were implemented, indicating that there was no base fare offset for fuel surcharges." Mot. Class Cert. at 3; see also Mangum Rpt. ¶ 95. He ultimately determined that "95.7% of the Japan Class itineraries were impacted by ANA's allegedly anticompetitive conduct." Reply (dkt. 1190) at 5.

Plaintiffs proposed **[**31]** classes meet the predominance requirements. Even if a small number of customers of Japan Class members received discounted fares, it is not an obstacle to class certification. See *Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1043, 194 L. Ed. 2d 124 (2016)* (affirming district court certification of a class of 3,344 members even though it was "undisputed that hundreds of class members suffered no injury in the case."); *Ruiz Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1137 (9th Cir. 2016)* (concluding that in cases where the defendant asserts "the potential for unlawful conduct in the absence of harm," the "fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class."); *In re Rail Freight, 292 F. Supp. 3d 14, 2017 WL 5311533, at *87* (suggesting that if more than 5% or 6% of class members are uninjured, the class is un-certifiable).

Defendant will have the opportunity to present evidence on the merits of Plaintiffs' approach during the trial. And the Court reserves the right, upon presentation of further evidence and testimony subject to cross-examination, to de-certify either or both classes. But for now, Plaintiffs have adequately demonstrated that "all or virtually all" of their proposed classes suffered an injury. See *In re Rail Freight, 292 F. Supp. 3d 14, 2017 WL 5311533, at *87*. Accordingly, Plaintiffs' proposed **[*561]** classes satisfy the predominance requirement.

2. Superiority

To fulfill *Rule 23(b)(3)*'s superiority **[**32]** requirement, Plaintiffs must show "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." A court must consider *Rule 23(b)(3)*'s four factors.[9] See *Zinser v. Accufix Research Institute, Inc., 253 F3d 1180, 1190 (9th Cir. 2001)*.

Plaintiffs' proposed classes meet the superiority requirement. It would be inefficient and cost prohibitive to litigate hundreds of thousands of individual proceedings, rather than on a class-wide basis. Plaintiffs also correctly point

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[8] This includes all Satogaeri Class members, and some subset of Japan Class members who purchased their transpacific airfare from travel agents. Defendant estimates this subset to be at least 37.5% of the Japan Class. See Opp'n at 10.

[9] These factors are: "(a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action." *Fed. R. Civ. P. 23(b)(3)(A-D)*.

out that "[t]he prosecution of separate actions by individual class members would . . . create the risk of inconsistent rulings, and could result in prejudice to the Plaintiffs and absent class members." See Mot. Class Cert. at 22.

It is administratively feasible to identify class members. See *Briseno, 844 F.3d at 1128*. Though the airline transaction data JAL and ANA have already produced in discovery does not allow one to match passenger names to the itineraries, Reply at 6, Plaintiffs demonstrate they are able to use this information to verify proposed class members' claims, Mangum Rpt. ¶ 19. Moreover, it should not be hard for class members to self-identify. International airline travel is a major expense, and potential class members would likely recall their purchase.[10] Many class **[**33]** members may have a record of their purchases, particularly if they paid by credit card. See Stone Decl. ¶ 38 (showing that since 2000, over 98% of airline ticket sales are paid by credit card). In the event that class members do not produce sufficient proof of their purchase, Defendant will have an opportunity to "individually challenge the claims of absent class members if and when they file claims for damages." *Briseno, 844 F.3d at 1131*; see also *Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 (3rd Cir. 2012)* (stating that forcing the defendants to "accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications.").

Defendant does not dispute the superiority requirement of either proposed class.

Japan Class. As stated in the 'numerosity' discussion, Plaintiffs assert that there are already 1.1 million itineraries within the transaction data produced by ANA and JAL. Mot. Class Cert. at 14. Under Plaintiffs' expert's proposed damages model, no single member of the Japan Class would be awarded more than $113. See Mangum Rpt. at ¶¶ 52, 183. This is clearly not a large enough sum to sustain individual proceedings, nor is the federal court system equipped to adjudicate **[**34]** hundreds of thousands of separate actions.

Satogaeri Class. Plaintiffs estimate that there are more than 147,000 itineraries that meet the definition of the Satogaeri Class. Mot. Class Cert. at 14. Plaintiffs' expert estimates that class-wide damages range between $22.5 and $28.9 million. Id. at 21. Even assuming the highest damages proposed by Plaintiffs' model, class members would still receive less than $200 on average. Again, this is clearly not a large enough sum to sustain individual proceedings, nor could the court system efficiently adjudicate 147,000 individual claims.

IV. CONCLUSION

Plaintiffs' proposed classes meet the requirements for class certification. Merit **[*562]** questions will be resolved at the upcoming trial.

The Court hereby GRANTS Plaintiffs' class certification motion.

IT IS SO ORDERED.

Dated: August 8, 2018

/s/ Charles R. Breyer

CHARLES R. BREYER

United States District Judge

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[10] Although some courts have recognized difficulties in cases of low-cost consumer purchases that customers would have no reliable way of remembering, those concerns are not implicated here. See, e.g., *Sethavanish v. ZonePerfect Nutrition Co., No. 12-2907, 2014 U.S. Dist. LEXIS 18600, 2014 WL 580696, at *6 (N.D. Cal. Feb. 13, 2014)*; *In re POM Wonderful LLC, No. 10-2199, 2014 U.S. Dist. LEXIS 40415, 2014 WL 1225184, at *6 (C.D. Cal. Mar. 25, 2014)* ("Few, if any, consumers are likely to have retained receipts during the class period" and "there is no way to reliably determine who purchased Defendant's [juice] products or when they did so.").

In re Liquid Aluminum Sulfate Antitrust Litig.

United States District Court for the District of New Jersey

August 14, 2018, Decided; August 16, 2018, Filed

Civil Action No.: 16-md-2687 (JLL); Civ. Action Nos. 17-11416; 17-4656; 17-4659

Reporter
2018 U.S. Dist. LEXIS 138719 *; 2018 WL 3928771

IN RE LIQUID ALUMINUM SULFATE ANTITRUST LITIGATION

Notice: NOT FOR PUBLICATION

Prior History: *In re Liquid Aluminum Sulfate Antitrust Litig., 159 F. Supp. 3d 1382, 2016 U.S. Dist. LEXIS 13293 (J.P.M.L., Feb. 4, 2016)*

Core Terms

Chemical, bids, conspiracy, allegations, per ton, motion to dismiss, Antitrust, prices, contracts, Sherman Act, restraint of trade, survive, raw material, winning bid, combined, winning, breach of contract, increased price, sulfuric acid, misrepresentation, immaterial, customers, solicited, colluded, bidder, throw

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For CITY OF ALEXANDRIA, Plaintiff in 16-856, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): **[*10]** Charles E Johnson, Jr, LEAD ATTORNEY, Alexandria City Atty's Office, Alexandria, LA.

For EAST VALLEY WATER DISTRICT, Plaintiff in 16-869, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): LEE ALBERT, LEAD ATTORNEY, Glancy Prongay & Murray LLP, NEW YORK, NY; THOMAS J. KENNEDY, LEAD ATTORNEY, PRO HAC VICE, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GLANCY PRONGAY & MURRAY LLP, NEW YORK, NY; GEORGE CARLOS AGUILAR, COUNSEL NOT ADMITTED TO USDC-NJ BAR, ROBBINS ARROYO LLP, SAN DIEGO, CA.

For CITY OF MATTOON, Plaintiff in 16-870, CITY OF EAST MOLINE, Plaintiff in 16-897, Plaintiffs (2:16-md-02687-JLL-JAD-JLL-JAD): CARL VINCENT MALMSTROM, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP, CHICAGO, IL; JEFFREY L KODROFF, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC NJ BAR, SPECTOR, ROSEMAN & KODROFF, PC, PHILADELPHIA, PA; THOMAS HAMILTON BURT, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP, NEW YORK, NY.

For CITY OF TACOMA, Plaintiff in 16-871, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): DEREK W LOESER, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER ROHRBACK, SEATTLE, WA; Daniel P Mensher, Raymond J Farrow, **[*11]** LEAD ATTORNEYS, KELLER ROHRBACK, SEATTLE, WA; LYNN L. SARKO, MARK A. GRIFFIN, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER ROHRBACK LLP, SEATTLE, WA.

For SUEZ WATER MANAGEMENT & SERVICES INC., Plaintiff in 15-8697, SUEZ WATER ENVIORNMENTAL SERVICES INC., Plaintiff in 15-8697, SUEZ WATER NEW JERSEY INC., Plaintiff in 15-8697, Plaintiffs (2:16-md-02687-JLL-JAD-JLL-JAD): CHRISTOPHER A. SEEGER, LEAD ATTORNEY, PARVIN KRISTY AMINOLROAYA, SEEGER WEISS LLP, RIDGEFIELD PARK, NJ; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; SAMI HUSAYN RASHID, STEPHEN RANDALL NEUWIRTH, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, QUINN EMANUEL URQUHART & SULLIVAN LLP, NEW YORK, NY; TERRIANNE BENEDETTO, LEAD ATTORNEY, SEEGER WEISS LLP, PHILADELPHIA, PA; SCOTT A. GEORGE, SEEGER WEISS, LLP, NEWARK, NJ.

For SUEZ WATER NEW YORK INC., Plaintiff in 15-8697, SUEZ WATER PENNSYLVANIA INC., Plaintiff in 15-8697, SUEZ WATER PRINCETON MEADOWS, INC., Plaintiff in 15-8697, Plaintiffs (2:16-md-02687-JLL-JAD-JLL-JAD): CHRISTOPHER A. SEEGER, LEAD ATTORNEY, PARVIN KRISTY AMINOLROAYA, SEEGER WEISS LLP, RIDGEFIELD PARK, NJ; JAMES E. CECCHI, LEAD ATTORNEY, **[*12]** CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; SAMI HUSAYN RASHID, STEPHEN RANDALL NEUWIRTH, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, QUINN EMANUEL URQUHART & SULLIVAN LLP, NEW YORK, NY; TERRIANNE BENEDETTO, LEAD ATTORNEY, SEEGER WEISS LLP, PHILADELPHIA, PA; SCOTT A. GEORGE, SEEGER WEISS, LLP, NEWARK, NJ.

For TOWN OF TONAWANDA, NEW YORK, Plaintiff in 15-8739, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): BRUCE DANIEL GREENBERG, LEAD ATTORNEY, LITE DEPALMA GREENBERG, LLC, NEWARK, NJ.

For THE CITY OF CHARLOTTE, Plaintiff in 15-8755, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI, OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For BEAVER WATER DISTRICT, Plaintiff in 15-8887, CITY OF SILOAM SPRINGS, ARKANSAS, Plaintiff in 15-8888, CITY OF SPRINGDALE, ARKANSAS, Plaintiff in 15-8889, Plaintiffs (2:16-md-02687-JLL-JAD-JLL-JAD): LISA J. RODRIGUEZ, LEAD ATTORNEY, Schnader Harrison Segal & Lewis LLP, Cherry Hill, NJ. MICHAEL L. ROBERTS, LEAD ATTORNEY, ROBERTS LAW FIRM, LITTLE ROCK, AR.

For INTERSTATE CHEMICAL CO., INC., Plaintiff in 16-0009, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): JOSEPH J. DEPALMA, LITE, LEAD ATTORNEY, **[*13]** DEPALMA, GREENBERG, LLC, NEWARK, NJ.

For OTTAWA COUNTY, OHIO, Plaintiff in 16-303, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): BRUCE DANIEL GREENBERG, LEAD ATTORNEY, LITE DEPALMA GREENBERG, LLC, NEWARK, NJ; MINDEE J. REUBEN, LEAD ATTORNEY, Lite DePalma Greenberg LLC, PHILADELPHIA, PA.

For CITY OF LORAIN, Plaintiff in 16-453, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): BRENT WILLIAM JOHNSON, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, WASHINGTON, DC; MANUEL JUAN DOMINGUEZ, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL, PALM BEACH GARDENS, FL; RICHARD A. KOFFMAN, LEAD ATTORNEY, COHEN MILLSTEIN SELLERS & TOLL PLLC, WASHINGTON, DC; THOMAS ROBERT THEADO, GARY NAEGELE & THEADO LLC, LORAIN, OH.

For CITY OF FRESNO, CALIFORNIA, Plaintiff in 16-527, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): BRENDAN P. GLACKIN, LEAD ATTORNEY, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, SAN FRANCISCO, CA; ERIC B. FASTIFF, KATHERINE LUBIN, LEAD ATTORNEYS, LIEFF, CABRASER, HEIMAN & BERNSTEIN, LLP, SAN FRANCISCO, CA; JASON LOUIS LICHTMAN, LEAD ATTORNEY, ADAM HERBERT WEINTRAUB, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NEW YORK, NY; DANIEL EDWARD SELTZ, LIEFF CABRASER HEIMANN & BERNSTEIN, NEW YORK, NY.

For CITY OF COLUMBIA, **[*14]** SOUTH CAROLINA, Plaintiff in 15-8429, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): ELIZABETH ANNE FEGAN, JASON ALLEN ZWEIG, LEAD ATTORNEYS, HAGENS BERMAN SOBOL SHAPIRO LLP, CHICAGO, IL; JOSEPH J. DEPALMA, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG, LLC, NEWARK, NJ; MICHAEL D. CRITCHLEY, LEAD ATTORNEY, Critchley, Kinum & DeNoia, LLC, Roseland, NJ; STEVE W. BERMAN, LEAD ATTORNEY, HAGENS BERMAN SOBOL SHAPIRO LLP, SEATTLE, WA.

For BOROUGH OF PHOENIXVILLE, Plantiff in 16-582, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): JOSHUA DAVID SNYDER, LEAD ATTORNEY, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; MATTHEW ADAM GREEN, LEAD ATTORNEY, OBERMAYER REBMANN MAXWELL & HIPPELL LLP, CHERRY HILL, NJ.

For City of Rochester, Minnesota, Plaintiff in 16-733, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): BRIAN D. CLARK, W. JOSEPH BRUCKNER, LEAD ATTORNEYS, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; DANIEL E. GUSTAFSON, DANIEL C. HEDLUND, LEAD ATTORNEYS, GUSTAFSON GLUEK PLLC, MINNEAPOLIS, MN; HEIDI M. SILTON, LEAD ATTORNEY, LOCKEIDGE FRINDAL NAUEN PLLP, MINNEAPOLIS, MN; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For HACKETTSTOWN MUNICIPAL UTILITIES AUTHORITY, Plaintiff **[*15]** in 16-1022, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): MICHAEL D FITZGERALD, LEAD ATTORNEY, BRIELLE, NJ.

For BAY COUNTY FLORIDA, Plaintiff in 16-648, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI, OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ. LINDA P. NUSSBAUM, LEAD ATTORNEY, NUSSBAUM LAW GROUP PC, NEW YORK, NY.

For CITY OF CHARLOTTE, NORTH CAROLINA, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; PAUL F NOVAK, LEAD ATTORNEY, PRO HAC VICE, COUNSEL NOT ADMITTED TO USDC-NJ BAR, Weitz &

Luxenberg, P.C., DETROIT, MI; SANFORD P. DUMAIN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, MILBERG LLP, NEW YORK, NY.

For City of Everett, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): LYNN L. SARKO, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER ROHRBACK LLP, SEATTLE, WA; MARK A. GRIFFIN, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER ROHRBACK LLP, SEATTLE, WA.

For City of Everett, Plaintiff in 16-1198, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): LYNN L. SARKO, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER ROHRBACK LLP, SEATTLE, WA.

For KEY **[*16]** LARGO WASTEWATER, TREATMENT DISTRICT, On behalf of itself and all others, similarly situated, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For City of Milwaukee, Plaintiff in 16-1386, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): BRIAN D. CLARK, CHARLES N. NAUEN, ELIZABETH R. ODETTE, W. JOSEPH BRUCKNER, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOCKRIDGE GRINDAL NAUEN, PLLP, MINNEAPOLIS, MN; HEIDI M. SILTON, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOCKEIDGE FRINDAL NAUEN, PLLP, MINNEAPOLIS, MN; Rachel Kitze Collins, LEAD ATTORNEY, Lockridge Grindal Nauen PLLP, Minneapolis, MN.

For AQUA PENNSYLVANIA, INC., Plaintiff in 16-1331, AQUA OHIO, INC., Plaintiff in 16-1331, Plaintiffs (2:16-md-02687-JLL-JAD-JLL-JAD): JOSHUA DAVID SNYDER, LEAD ATTORNEY, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; MATTHEW ADAM GREEN, OBERMAYER REBMANN, LEAD ATTORNEY, MAXWELL & HIPPELL LLP, CHERRY HILL, NJ.

For City of Scottsdale, City of Mesa, Plaintiffs (2:16-md-02687-JLL-JAD-JLL-JAD): LYNN L. SARKO, LEAD ATTORNEY, MARK A. **[*17]** GRIFFIN, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER ROHRBACK LLP, SEATTLE, WA.

For CITY OF BLOOMINGTON, INDIANA, Plaintiff in 16-1503, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): DAVID M. CIALKOWSKI, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, ZIMMERMAN REED PLLP, MINNEAPOLIS, MN; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI, OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For Lake Restoration, Inc., Plainitff in 16-1581, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): BRIAN D. CLARK, CHARLES N. NAUEN, ELIZABETH R. ODETTE, W. JOSEPH BRUCKNER, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOCKRIDGE GRINDAL NAUEN, PLLP, MINNEAPOLIS, MN; Diana Young Morrissey, LEAD ATTORNEY, Wallen-Friedman & Floyd, P.A., Mpls, MN; HEIDI M. SILTON, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOCKEIDGE FRINDAL NAUEN, PLLP, MINNEAPOLIS, MN; Rachel Kitze Collins, LEAD ATTORNEY, Lockridge Grindal Nauen PLLP, Minneapolis, MN.

For City of Scottsdale, Plainitff in 16-1579, City of Mesa, Plaitiff in 16-1712, Plaintiffs (2:16-md-02687-JLL-JAD-JLL-JAD): DEREK W LOESER, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER ROHRBACK, SEATTLE, WA; Daniel P Mensher, Raymond J Farrow, LEAD ATTORNEYS, **[*18]** KELLER ROHRBACK, SEATTLE, WA; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback LLP, Seattle, WA; MARK A. GRIFFIN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER ROHRBACK LLP, SEATTLE, WA; RON KILGARD, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, DALTON, GOTTO, SAMSON & KILGARD, PLC, NATIONAL BANK PLAZA, PHOENIX, AZ.

For CITY OF HOMESTEAD, FLORIDA, Plaintiff in 16-2873, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): RICHARD MARVIN KERGER, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KERGER & HARTMAN LLC, TOLEDO, OH; WILLIAM L. MENTLIK, LEAD ATTORNEY, ROY HENRY WEPNER, LERNER, DAVID, LITTENBERG, KRUMHOLZ & MENTLIK, LLP, WESTFIELD, NJ; AARON SCOTT ECKENTHAL, LERNER DAVID LITTENBERG, KRUMHOLZ & MENTLIK LLP, WESTFIELD, NJ; ABIGAIL G. CORBETT, COUNSEL NOT ADMITTED, USDC-NJ BAR, STEARNS WEAVER MILLER, MIAMI, FL; ANDREW SZOT, COUNSEL NOT ADMITTED TO USDC-NJ BAR, MILLER LLC, CHICAGO, IL; JASON PETER HERNANDEZ, JAY B. SHAPIRO, MARIA A. FEHRETDINOV, COUNSEL NOT ADMITTED TO USDC-NJ BAR, STEARNS WEAVER MILLER, MIAMI,

FL; KATHLEEN ELLEN, BOYCHUCK, MATTHEW ERIC VAN TINE, COUNSEL NOT ADMITTED TO USDC-NJ BAR, MILLER LAW LLC, CHICAGO, IL; MARVIN A. MILLER, COUNSEL **[*19]** NOT ADMITTED TO USDC-NJ BAR, CHICAGO, IL; SAMUEL OLDS PATMORE, COUNSEL NOT ADMITTED TO USDC-NJ BAR, STEARNS WEAVER MILLER, MIAMI, FL.

For Jefferson County, Alabama, Plaintiff in 16-3228, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): Craig L Lowell, LEAD ATTORNEY, WIGGINS CHILDS PANTAZIS, FISHER & GOLDFARB, Birmingham, AL; Dennis G Pantazis, LEAD ATTORNEY, WIGGINS CHILDS PANTAZIS, FISHER & GOLDFARB LLC, Birmingham, AL.

For City of Moulton, Alabama, Plaintiff in 16-3379, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): Craig L Lowell, WIGGINS CHILDS PANTAZIS, LEAD ATTORNEY, FISHER & GOLDFARB, Birmingham, AL; Dennis G Pantazis, WIGGINS CHILDS PANTAZIS, LEAD ATTORNEY, FISHER & GOLDFARB LLC, Birmingham, AL; Robert V Goldsmith, III, LEAD ATTORNEY, Caine Goldsmith, Moulton, AL.

For CITY OF CRESTON WATER, WORKS DEPARTMENT, Plaintiff in 16-4037, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): ALEC BLAINE FINLEY JR., LEAD ATTORNEY, CUNEO GILBERT & LASUCA LLP, WASHINGTON, DC.

For Phoenix, City of, Plaintiff in 16-4257, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): DEREK W LOESER, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER ROHRBACK, SEATTLE, WA; Daniel P Mensher, Raymond J Farrow, LEAD ATTORNEYS, KELLER **[*20]** ROHRBACK, SEATTLE, WA; LYNN L. SARKO, MARK A. GRIFFIN, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER ROHRBACK LLP, SEATTLE, WA.

For City of Shreveport, Plaintiff in 16-4679, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): CURTIS RAY JOSEPH JR, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, WINCHELL & JOSEPH LLC, SHREVEPORT, LA; DANIEL R. LAPINSKI, LEAD ATTORNEY, WILENTZ, GOLDMAN & SPITZER, PC, WOODBRIDGE, NJ.

For STATE OF FLORIDA, OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LEGAL AFFAIRS, Plaintiff in 17-384, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): GREGORY SCOTT SLEMP, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, FLORIDA ATTORNEY GENERAL'S OFFICE, TALLAHASSEE, FL; COLIN GRAHAM FRASER, COUNSEL NOT ADMITTED TO USDC-NJ BAR, FLORIDA OFFICE OF THE ATTORNEY GENERAL THE CAPITOL, TALLAHASSEE, FL; LEE ISTRAIL, COUNSEL NOT ADMITTED TO USDC-NJ BAR, OFFICE OF THE ATTORNEY GENERAL OF FLORIDA THE CAPITOL, TALLAHASSEE, FL; ROBERT SCOTT PALMER, COUNSEL NOT ADMITTED TO USDC-NJ BAR, FLORIDA ATTORNEY GENERALv TALLAHASSEE.

For ILLINOIS-AMERICAN WATER COMPANY, Plaintiff in 17-2752, INDIANA-AMERICAN WATER, COMPANY, Plaintiff in 17-2752, IOWA-AMERICAN WATER COMPANY, Plaintiff in 17-2752, **[*21]** MISSOURI-AMERICAN WATER COMPANY, Plaintiff in 17-2752, NEW JERSEY-AMERICAN WATER COMPANY, Plaintiff in 17-2752, PENNSYLVANIA-AMERICAN WATER COMPANY, Plaintiff in 17-2752, VIRGINIA-AMERICAN WATER COMPANY, Plaintiff in 17-2752, Plaintiffs (2:16-md-02687-JLL-JAD-JLL-JAD): HAE SUNG NAM, JASON A. URIS, ROBERT N. KAPLAN, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY; IRMA ESPINO, SCOTT SUMMY, ZACHARY DAVID SANDMAN, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BARON & BUDD PC, DALLAS, TX; WILLIAM J. PINILIS, LEAD ATTORNEY, PINILIS HALPERN, MORRISTOWN, NJ.

For City of Richmond, Plaintiff in 17-4656, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): ALEXANDER PETER KOMMATAS, LEAD ATTORNEY, BALLARD SPAHR LLP, NEW YORK, NY; Constantinos George Panagopoulos, LEAD ATTORNEY, Ballard Spahr LLP (DC), Washington, DC; EDWARD D. ROGERS, JASON ALLEN LECKERMAN, LEAD ATTORNEYS, BALLARD SPAHR LLP, PHILADELPHIA, PA.

For City of Richmond, Plaintiff in 17-4656, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): JAY N. FASTOW, LEAD ATTORNEY, JUSTIN WARD LAMSON, THOMAS JOSEPH, BALLARD SPAHR LLP, NEW YORK, NY.

For MAYOR AND CITY COUNCIL OF BALTIMORE, Plaintiff in 17-4659, **[*22]** Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): ALEXANDER PETER KOMMATAS, LEAD ATTORNEY, BALLARD SPAHR LLP, NEW YORK, NY; David E Ralph, LEAD ATTORNEY, Baltimore City Department of Law, Baltimore, MD; EDWARD D. ROGERS,

JASON ALLEN LECKERMAN, JAY N. FASTOW, THOMAS JOSEPH GALLAGHER, LEAD ATTORNEYS, BALLARD SPAHR LLP, PHILADELPHIA, PA; Suzanne Sangree, LEAD ATTORNEY, City of Baltimore Law Department, Senior Public Safety Counsel, Baltimore, MD; William Alden McDaniel Jr, LEAD ATTORNEY, Ballard Spahr, LLP, Baltimore, MD; JUSTIN WARD LAMSON, BALLARD SPAHR LLP, NEW YORK, NY.

For CENTRAL ARKANSAS WATER, plaintiff in 17-5974, CITY OF CHARLOTTE, NORTH CAROLINA, plaintiff in 17-5974, CITY AND COUNTY OF DENVER, COLORADO, plaintiff in 17-5974, FLAMBEAU RIVER PAPERS, LLC, plaintiff in 17-5974, CITY OF GREENSBORO, NORTH CAROLINA, plaintiff in 17-5974, MOBILE AREA WATER AND SEWER SYSTEM, plaintiff in 17-5974, CITY OF SACRAMENTO, CALIFORNIA, plaintiff in 17-5974, SUEZ WATER ENVIRONMENTAL SERVICES INC., plaintiff in 17-5974, SUEZ WATER NEW JERSEY INC., plaintiff in 17-5974, SUEZ WATER PRINCETON MEADOWS INC., plaintiff in 17-5974, SUEZ WATER NEW YORK INC., plaintiff in 17-5974, SUEZ WAER PENNSYLVANIA INC., **[*23]** plaintiff in 17-5974, CITY OF TEXARKANA, ARKANSAS, plaintiff in 17-5974, CITY OF TEXARKANA, TEXAS D/B/A TEXARKANA WATER UTILITIES, plaintiff in 17-5974, CITY OF GREENSBORO, NORTH CAROLINA, Plaintiff in 17-6674, Plaintiffs (2:16-md-02687-JLL-JAD-JLL-JAD): JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For CITY OF ROCHESTER, MINNESOTA, plaintiff in 17-5974, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; W. JOSEPH BRUCKNER LEAD ATTORNEY LOCKRIDGE GRINDAL NAUEN PLLP MINNEAPOLIS, MN.

For City of Stockton, Plaintiff in 17-6956, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): FRANCIS ONOFREI SCARPULLA, LEAD ATTORNEY, LAW OFFICES OF FRANCIS O. SCARPULLA, SAN FRANCISCO, CA; PATRICK BRADFORD CLAYTON, LEAD ATTORNEY, THE LAW OFFICES OF FRANCIS O. SCARPULLA, SAN FRANCISCO, CA; WILLIAM H. PARISH, LEAD ATTORNEY, PARISH & SMALL A PROFESSIONAL LAW CORPORATION, STOCKTON, CA.

For Washington Suburban Sanitary Commission, 14501 Sweitzer Lane, Laurel, MD 20707, Plaintiff in 17-11416, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): William Alden McDaniel Jr, LEAD ATTORNEY, Ballard **[*24]** Spahr, LLP, Baltimore, MD; JUSTIN WARD LAMSON, BALLARD SPAHR LLP, NEW YORK, NY.

For Fairfax County Water Authority, Plaintiff in 18-8163, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): Constantinos George Panagopoulos, LEAD ATTORNEY, Ballard Spahr LLP (DC), Washington, DC.

For Appomattox River Water Authority, Plaintiff in 18-8159, City of Norfolk, County of Chesterfield, South Central Wastewater Authority, City of Newport News, Plaintiffs (2:16-md-02687-JLL-JAD-JLL-JAD): CHRISTOPHER DONALD POMEROY, FRANK PAUL CALAMITA III, PAUL THOMAS NYFFELER, LEAD ATTORNEYS, AQUALAW PLC, RICHMOND, VA; JUSTIN WARD LAMSON, BALLARD SPAHR LLP, NEW YORK, NY.

For Commissioners of Public Works of the City of Charleston, Grand Strand Water & Sewer Authority, Plaintiffs (2:16-md-02687-JLL-JAD-JLL-JAD): CHRISTOPHER DONALD POMEROY, FRANK PAUL CALAMITA III, PAUL THOMAS NYFFELER, LEAD ATTORNEYS, AQUALAW PLC, RICHMOND, VA.

For CITY OF AKRON, Plaintiff in 18-9781, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): Brian D. Bremer, LEAD ATTORNEY, City of Akron - Civil Division Department of Law, Akron, OH; HAE SUNG NAM, JASON A. URIS, ROBERT N. KAPLAN, LEAD ATTORNEYS, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY.

For County Of Henrico, **[*25]** Rivanna Water & Sewer Authority, City of Lynchburg, City of Springfield, Plaintiffs (2:16-md-02687-JLL-JAD-JLL-JAD): CHRISTOPHER DONALD POMEROY, FRANK PAUL CALAMITA, III, PAUL THOMAS NYFFELER, LEAD ATTORNEYS, AQUALAW PLC, RICHMOND, VA; JUSTIN WARD LAMSON, BALLARD SPAHR LLP, NEW YORK, NY.

For Commission of Public Works of the City of Greenville SC, Plaintiff in 18-11027, Plaintiff (2:16-md-02687-JLL-JAD-JLL-JAD): FRANK PAUL CALAMITA, III, LEAD ATTORNEY, AQUALAW PLC, RICHMOND, VA.

For FRANK A REICHL, Defendant (2:16-md-02687-JLL-JAD-JLL-JAD): MICHAEL B. HIMMEL, MICHAEL ANDREW KAPLAN, LEAD ATTORNEYS, LOWENSTEIN SANDLER LLP, ROSELAND, NJ.

For GENERAL CHEMICAL CORPORATION, GENERAL CHEMICAL PERFORMANCE PRODUCTS, LLC, GENTEK, INC., CHEMTRADE LOGISTICS, INC, Defendant in 15-7827, CHEMTRADE LOGISTICS INCOME FUND, CHEMTRADE LOGISTICS INC., CHEMTRADE CHEMICALS CORPORATION, CHEMTRADE CHEMICALS US, LLC, CHEMTRADE US, LLC, CHEMTRADE SOLUTIONS LLC, Defendants (2:16-md-02687-JLL-JAD-JLL-JAD): RICHARD H. EPSTEIN, LEAD ATTORNEY, LAURA ELLEN SEDLAK, NEWARK, NJ.

For GEO SPECIALTY CHEMICALS, INC., Defendant (2:16-md-02687-JLL-JAD-JLL-JAD): JAMES HOWARD MUTCHNIK, LEAD ATTORNEY, SYDNEY L. SCHNEIDER, KIRKLAND **[*26]** & ELLIS LLP, CHICAGO, IL; MARK R. BUTSCHA, JR., ROBERT F. WARE, THOMPSON HINE LLP, CLEVELAND, OH; TERRY W. POSEY, JR., THOMPSON HINE LLP, MIAMISBURG, OH.

For KEMIRA CHEMICALS, INC., Defendant (2:16-md-02687-JLL-JAD-JLL-JAD): DANIELLE CHATTIN, EMILY SHOEMAKER NEWTON, JEFFREY S. CASHDAN, LEAD ATTORNEYS, KING & SPALDING LLP, ATLANTA, GA.

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For USALCO, LLC., Defendant (2:16-md-02687-JLL-JAD-JLL-JAD): AARON LOUIS CASAGRANDE, WILLIAM FITTS RYAN, JR., LEAD ATTORNEYS, AARON ANDREW NICHOLS, EDWARD MARK BUXBAUM, WHITEFORD TAYLOR & PRESTON LLP, BALTIMORE, MD.

For SOUTHERN IONICS, INC., Defendant (2:16-md-02687-JLL-JAD-JLL-JAD): JOHN S. MAIRO, ROBERT FERRI, LEAD ATTORNEYS, PORZIO BROMBERG & NEWMAN PC, NEW YORK, NY; KELLY D. CURTIN, WILLIAM J. HUGHES, JR., PORZIO BROMBERG & NEWMAN PC, MORRISTOWN, NJ.

For C&S CHEMICALS, INC, RGM Chemical, LLC, RGM OF GEORGIA, LTD, C&S CHEMICALS (OF GEORGIA) INC., Defendants (2:16-md-02687-JLL-JAD-JLL-JAD): JOHN DURAND DALBEY, LEAD ATTORNEY, CHILIVIS COCHRAN LARKINS & BEVER LLP, ATLANTA, GA.

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For BRIAN C. STEPPIG, Defendant (2:16-md-02687-JLL-JAD-JLL-JAD): J. BRUCE MAFFEO, LEAD ATTORNEY, Cozen O'Connor, NEW YORK, NY; MEGAN SUSAN SCHEIB, LEAD ATTORNEY, COZEN O'CONNOR, PHILADELPHIA, PA; NICOLE H. SPRINZEN, LEAD ATTORNEY, COZEN O'CONNOR, WASHINGTON, DC; EMILY MCLOGAN GURSKIS, COZEN O'CONNOR PC, WASHINGTON, DC.

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For ALEX AVRAAMIDES, Defendant (2:16-md-02687-JLL-JAD-JLL-JAD): DENNIS T. SMITH, LEAD ATTORNEY, PASHMAN STEIN, PC, HACKENSACK, NJ.

For AMITA GUPTA, Defendant (2:16-md-02687-JLL-JAD-JLL-JAD): MICHAEL SVETKEY FELDBERG, LEAD ATTORNEY, ALLEN & OVERY LLP, NEW YORK, NY.

For Milton Sundbeck, Defendant (2:16-md-02687-JLL-JAD-JLL-JAD): **[*28]** JOHN S. MAIRO, LEAD ATTORNEY, PORZIO BROMBERG & NEWMAN PC, MORRISTOWN, NJ.

For Kenneth A. Ghazey, Defendant (2:16-md-02687-JLL-JAD-JLL-JAD): NICHOLAS CHRISTOS THEODOROU, LEAD ATTORNEY, MARK DAVID FINSTERWALD, THERESA MARIE ROOSEVELT, FOLEY HOAG LLP, BOSTON, MA.

For Delta Chemical Corporation, Defendant (2:16-md-02687-JLL-JAD-JLL-JAD): CHARLES OWEN MONK, II, LEAD ATTORNEY, SAUL EWING LLP, BALTIMORE, MD; DOUGLAS ALAN SAMPSON, GEOFFREY MAURICE GAMBLE, SAUL EWING ARNSTEIN & LEHR LLP, BALTIMORE, MD.

For AMERICAN SECURITIES LLC, MATTHEW LEBARON, SCOTT WOLFF, Defendants (2:16-md-02687-JLL-JAD-JLL-JAD): AARON RUBINSTEIN, C. SCOTT LENT, PAUL Q. ANDREWS, LEAD ATTORNEYS, ARNOLD & PORTER KAYE SCHOLER, NEW YORK, NY.

For BRENNTAG MID-SOUTH, INC., BRENNTAG SOUTHEAST, INC., BRENNTAG NORTH AMERICA, INC., Defendants (2:16-md-02687-JLL-JAD-JLL-JAD): DAVID G. MURPHY, LEAD ATTORNEY, REED SMITH LLP, PRINCETON, NJ.

For US Department of Justice, Intervenor (2:16-md-02687-JLL-JAD-JLL-JAD): PATRICIA LYNN JANNACO, LEAD ATTORNEY, U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, NEW YORK, NY. FRANCIS ADAM CAVANAGH, OFFICE OF THE U.S. ATTORNEY, DISTRICT OF NEW JERSEY, NEWARK, NJ; MARY ANNE FLORENTINA CARNIVAL, DEPARTMENT **[*29]** OF JUSTICE, ANTITRUST DIVISION, NEW YORK, NY.

For Washington Suburban Sanitary Commission, Plaintiff (2:17-cv-11416-JLL-JAD): William Alden McDaniel, Jr, Ballard Spahr, LLP, Baltimore, MD.

For AMITA GUPTA (2:17-cv-11416-JLL-JAD, 2:17-cv-04659-JLL-JAD), Defendant: MICHAEL SVETKEY FELDBERG, LEAD ATTORNEY, ALLEN & OVERY LLP, NEW YORK, NY.

For USALCO LLC (2:17-cv-11416-JLL-JAD, 2:17-cv-04659-JLL-JAD), Defendant: AARON LOUIS CASAGRANDE, WILLIAM FITTS RYAN, JR., LEAD ATTORNEYS, AARON ANDREW NICHOLS, WHITEFORD TAYLOR & PRESTON LLP, BALTIMORE, MD.

For MAYOR AND CITY COUNCIL OF BALTIMORE, A Municipal Corporation, Plaintiff (2:17-cv-04659-JLL-JAD): David E Ralph, LEAD ATTORNEY, Baltimore City Department of Law, Baltimore, MD; Suzanne Sangree, LEAD ATTORNEY, City of Baltimore Law Department, Senior Public Safety Counsel, Baltimore, MD; William Alden McDaniel, Jr, LEAD ATTORNEY, Ballard Spahr, LLP, Baltimore, MD.

Judges: JOSE L. LINARES, Chief United States District Judge.

Opinion by: JOSE L. LINARES

Opinion

LINARES, Chief District Judge.

This matter comes before the Court by way of Defendants Delta Chemical Corporation ("Delta Chemical"), John D. Besson, and Rebecca L. Besson's Motion to Dismiss Plaintiffs Washington Suburban Sanitary **[*30]** Commission ("WSSC"), Mayor and City Council of Baltimore ("Baltimore City"), and City of Richmond ("Richmond")'s Amended Complaints (ECF Nos. 555, 652, and 653) pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* and Strike Certain Allegations pursuant to *Rule 12(f) of the Federal Rules of Civil Procedure*. (ECF No. 901). Plaintiffs have submitted Opposition (ECF No. 902),[1] to which the Defendants have replied. (ECF No. 904). The Court decides this matter without oral argument pursuant to *Rule 78 of the Federal Rules of Civil Procedure*. For the reasons set forth below, the Court denies Defendants' Motion to Dismiss and Strike Certain Allegations.

I. BACKGROUND[2]

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[1] An additional copy of Plaintiffs' Opposition was filed at a later time. (ECF No. 1002). Said Opposition is identical to the originally filed brief. Accordingly, the Court will rely on the arguments set forth by Plaintiff in their original Opposition. (ECF No. 902).

[2] For purposes of brevity, the Court will only cite to the WSSC Amended Complaint whenever the WSSC, Baltimore City, and/or Richmond Amended Complaints allege similar facts. Hence, this background is generally derived from Plaintiff WSSC's Amended Complaint ("Compl."), which was originally docketed in Civ. Action No. 17-11416. (ECF No. 1). The Court must accept

The Court has set forth, at length, the factual and procedural background as it pertains to this Multidistrict Litigation in its Opinion dated July 20, 2017. (ECF No. 405 at 1-24). Accordingly, the Court need not restate, and hereby incorporates, same herein. Thus, the Court will only set forth the relevant factual and procedural background as it pertains to these specific Defendants and their motions.

Plaintiffs brought this action seeking to recover monetary damages and injunctive relief against Delta Defendants for conspiring to suppress and eliminate competition in the sale and marketing of aluminum sulfate ("Alum"), pursuant to the Sherman Antitrust Act, **[*31]** *15 U.S.C. § 1, et seq.*, the Clayton Antitrust Act, *15 U.S.C. §§ 12-17* & *29 U.S.C. §§ 52-53*, and the laws of the State of Maryland. (Compl. ¶ 1). Plaintiffs contend that Delta Defendants agreed to "rig bids and allocate customers for, and to fix, stabilize, inflate, and maintain the price of, Alum sold to companies, municipal authorities, and governmental subdivisions in the United States from January 1, 1997 through at least February 2011 . . . ." (Id. ¶ 1). Specifically, Plaintiffs allege that Delta Defendants met to "discuss their respective Alum businesses," agreed to "'stay away' from each other's historical customers," submitted "intentionally high," or "throw away" bids, and withdrew winning bids "in cases where a bid was inadvertently submitted." (Id. ¶ 4).

Defendant John D. Besson is presently a resident of Miami Beach, Florida. (Id. ¶ 20). He was the president of Delta Chemical and "oversaw its sale and marketing of water treatment chemicals, including Alum," in addition to "effectuating attempts" to sell or merge Delta Chemical with another company. (Id. ¶ 20). Plaintiffs allege that Defendant John Besson "joined, participated in, and benefitted from the unlawful [Alum] conspiracy." (Id. ¶ 20). Defendant Rebecca L. Besson is presently **[*32]** a resident of Miami Beach, Florida and was the chairperson of Delta Chemical's board of directors. (Id. ¶ 21). Plaintiffs aver that Defendant Rebecca Besson "knew or should have known about the unlawful [Alum] conspiracy ..., but allowed it continue and profited substantially from it." (Id. ¶ 21). After Delta Chemical combined with USALCO in November 2011, Defendants John and Rebecca Besson became USALCO consultants. (Id. 1121).

Defendant Delta Chemical is a Maryland corporation which sold Alum throughout the United States with a principal place of business in Baltimore. (Id. ¶ 51). Plaintiffs allege that "[f]rom the beginning of the Conspiracy Period to the date USALCO combined with Delta Chemical on November 17, 2011, Delta Chemical was an active participant in, and benefitted from, the conspiracy." (Id. ¶ 51). Moreover, "[a]s a result of [Defendant] Delta Chemical's combination with USALCO, [Defendant] Delta Chemical ceased to be a potential competitor in the sale and marketing of Alum." (Id. ¶ 51). Plaintiffs contend that the combination "was made in furtherance of, and intended to reinforce, the Defendant's unlawful conspiracy .. . by increasing USALCO's market power and eliminating the **[*33]** possibility of competition emerging . . . ." (Id. ¶ 52). Plaintiffs also argue that Defendants John and Rebecca Besson "profited handsomely" from the combination. (Id. ¶ 53).

Prior to the combination, Defendant Delta Chemical sold Alum to Plaintiffs WSSC and Baltimore directly as well as indirectly through C&E Services, Inc. ("C&E Services"), located in Washington, D.C. (Id. ¶ 54). Plaintiffs assert that, Defendant Delta Chemical, C&E Services, or USALCO would always be the "winning" bidder despite solicitation of bids from outside Alum providers. (Id. ¶ 54). Additionally, Plaintiffs allege that Defendant Delta Chemical's contracts for polyaluminum chloride ("PAC") "raise similar concerns [of conspiratorial conduct]." (Id. 131). Specifically, Delta Chemical submitted the winning bid in a 2004 PAC contract with Plaintiff WSSC at a rate of $1,376.00 per ton. (Id. 1-131). In 2009, Defendant Delta Chemical again submitted a winning bid for a PAC with Plaintiff WSSC at a price of $2,380.00 per ton, a ***more than 72% increase***. (Id. ¶ 131) (emphasis in original). The next lowest bid was submitted for $7,250.00 per ton (three times Defendant Delta Chemical's winning bid) by Intercoastal Trading, Inc. (Id. ¶ **[*34]** 131).[3]

the allegations therein as true at this stage of the proceedings. *See* *Alston v. Countrywide Fin. Corp., 585 F.3d 753, 758 (3d Cir. 2009)*.

[3] Plaintiffs' contention that Delta Defendants' use of PAC contracts in furtherance of the conspiracy alleged herein is found solely in the WSSC Amended Complaint. (ECF No. 555 at ¶ 131).

Plaintiff's WSSC and Baltimore City purchased Alum from Defendant Delta Chemical via "requirement contracts" at an as-needed basis from 1997 through early-2005. (Id. ¶ 246). "For example, WSSC solicited bids for new Alum contracts to begin in 2003 and 2004." (Id. ¶ 246). In both instances, Plaintiff WSSC received bids from Defendant Delta Chemical and General Chemical Corporation. (Id. ¶ 246). In 2004, Plaintiff WSSC "solicited bids for a new Alum contract" and C&E Services was the only bidder. (Id. ¶ 247). Plaintiff WSSC alleges that, "as part of and in furtherance of the conspiracy," C&E Services consistently raised the price it charged Plaintiff WSSC for Alum via the 2005 contract and, "[a]s a result, the price per ton of Alum increased by approximately 60%" from "$185.85 per ton to $314.00 per ton." (Id. ¶ 248). On December 23, 2008, C&E Services submitted a notification from Defendant Delta Chemical justifying an increase in Alum prices because of the "sulfuric acid market," a necessary component for making Alum. (Id. ¶ 249). However, Plaintiff WSSC contends that this justification stood in contrast to a decline in the price of sulfuric acid "***by more than a third***" from its **[*35]** October 2008 index price by December 2008. (Id. ¶ 249) (emphasis in original). In 2009, Plaintiff WSSC solicited bids for a new Alum contract through "BidBridge, an online solicitation and bidding platform," but only received three bids. (Id. ¶ 251). Defendant Delta Chemical submitted the winning bid at $304.00 per ton and C & S Chemicals, Inc. allegedly submitted a "throw away" bid of $537.00 per ton. (Id. ¶ 251).

After USALCO combined with Defendant Delta Chemical, USALCO raised the price it charged Plaintiff WSSC for Alum through the 2009 contract from $304.00 per ton to $311.50 per ton. (Id. ¶ 252). Plaintiff WSSC argues that the prices which USALCO charged for Alum were substantially similar to those charged by Defendant Delta Chemical prior to the combination and further demonstrate that "both [Defendant] Delta Chemical and USALCO were members of the conspiracy." (Id. ¶ 253). In April 2014, Plaintiff WSSC received a bid for a new Alum contract from USALCO for $314.19 per ton and a bid from Chemtrade, General Chemical's "successor-in-interest," for $422.00 per ton. (Id. ¶ 254). Plaintiff WSSC contends that "Chemtrade's bid, which was $107.81 (34.3%) more than USALCO's bid, was **[*36]** a 'throw away' bid made in furtherance of the conspiracy." (Id. ¶ 254).

Plaintiff Baltimore City makes similar allegations against Delta Defendants regarding Alum contract bidding. In 2006, Plaintiff Baltimore City received two bids and Defendant Delta Chemical submitted the winning bid. (ECF No. 652 at ¶ 153). In 2008, Defendant Delta Chemical submitted "***the only bid***" for a new Alum contract with Plaintiff Baltimore City and provided a price of $280.97 per ton. (Id. ¶ 155-156) (emphasis in original). In 2009, Defendant Delta Chemical attempted to raise the price of Alum for Plaintiff Baltimore City by 29.7% due to an "increase in price of the raw materials used to make Alum." (Id. ¶ 157-158). After negotiation, Defendant Delta Chemical agreed to increase the price by 23.1% and charge $345.97 per ton of Alum for 2009. (Id. ¶ 159-160). In 2012, Plaintiff Baltimore City received bids from USALCO and General Chemical Corporation for a contract and USALCO was the winning bidder. (Id. ¶ 164).

Plaintiffs contend that, "[i]n addition to the lack of competition and resultant inflated prices demonstrated above," Delta Defendants' "bidding history over the Conspiracy Period" with respect to Alum **[*37]** contracts was not "freight-logical." (Compl. ¶ 255). Specifically, Plaintiffs allege that GEO Specialty Chemicals, Inc. had a water treatment chemical plant located in Baltimore, Maryland but never submitted a bid to supply Alum to Plaintiff WSSC. (Id. ¶ 255). Similarly, USALCO was headquartered in Maryland but never submitted a bid to Plaintiff WSSC prior to combining with Defendant Delta Chemical. (Id. ¶ 256). Additionally, Southern Ionics had a water treatment chemical plant in Williamsport, Maryland and also never submitted a bid to Plaintiff Baltimore City. (ECF No. 652 at ¶ 168).

"As a result of the conspiracy among [Delta] Defendants," Plaintiffs were allegedly "forced to pay supra-competitive prices for Alum" which they purchased from Defendant Delta Chemical and USALCO. (Compl. ¶ 257, 260). Plaintiff WSSC saw its cost for Alum "quadruple over a decade, rising from $82.10 per ton in 2000 to $314.00 per ton by 2010 . . . ." (Id. 260). Plaintiffs argue that Delta Defendants "used non-public means of communication . . . to eliminate competition by, *inter alia*, fixing prices, rigging bids, and allocating customers for Alum in the United States." (Id. ¶ 262). Plaintiffs further allege that **[*38]** Defendant John Besson made false representations regarding price increases in Alum due to increases in prices of raw materials. (Id. 271-276). Moreover, Delta Defendants allegedly "took additional affirmative acts of concealment, including ensuring that there were few written communications regarding their conspiracy and agreement." (Id. ¶ 279).

Accordingly, Plaintiffs assert the following claims: Count I — Conspiracy in Restraint of Trade in violation of the Sherman Act against all Defendants except Defendant Rebecca Besson; Count II — Conspiracy in Restraint of Trade in violation of the Maryland Antitrust Act against all Defendants except Defendant Rebecca Besson; Count III — Common Law Fraud against all Defendants except Defendant Rebecca Besson; Count IV — Breach of Contract against Defendant Delta Chemical; Count V — Breach of Contract against Defendant Delta Chemical; and, Count VI — Restitution, Disgorgement, and Unjust Enrichment against Delta Defendants.[4] Defendants seek to dismiss Plaintiffs' Amended Complaints for failure to state a claim upon which relief can be granted under *Federal Rules of Civil Procedure 12(b)(6)* ad/or to strike certain allegations from Plaintiffs' Amended Complaints under *Federal Rules of Civil Procedure 12(f)*. (ECF No. 901).

II. LEGAL STANDARD [*39]

A. *Rule 12(b)(6)* Failure to State a Claim

To withstand a motion to dismiss for failure to state a claim, a "complaint must contain sufficient factual matter, accepted as true, to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id., 556 U.S. at 678* (citing *Twombly, 550 U.S. at 556*). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly, 550 U.S. at 556*).

To determine the sufficiency of a complaint under *Twombly* and *Iqbal* in the Third Circuit, the Court must take three steps. "First, it must 'tak[e] note of the elements a plaintiff must plead to state a claim.' Second, it should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' Finally, '[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *See* *Connelly v. Lane Constr. Corp., 809 F.3d 780, 787 (3d Cir. 2016)* (quoting *Iqbal, 556 U.S. at 675, 679)* (citations omitted). "In deciding a *Rule 12(b)(6)* motion, a court **[*40]** must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick, 605 F.3d 223, 230 (3d Cir. 2010)*. The Third Circuit has held that the Court can review the record of prior actions between the parties and take judicial notice of the same in considering a motion to dismiss. *See* *Toscano v. Conn. Gen. Life Ins. Co., 288 F. App'x 36, 38 (3d Cir. 2008)*.

B. 12(1) Motion to Strike Certain Allegations

Under *Rule 12(f) of the Federal Rules of Civil Procedure*, "[t]he Court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. The Court may act

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[4] Plaintiff Baltimore City asserts the following claims in its complaint against Delta Defendants: Claim I — Conspiracy in Restraint of Trade in violation of the Sherman Act against all Defendants; Claim II — Conspiracy in Restraint of Trade in violation of the Maryland Antitrust Act against all Defendants; Claim III — Common Law Fraud against Defendant Delta Chemical; Claim IV — Breach of Contract against Defendant Delta Chemical; Claim V — Breach of Contract against Defendant Delta Chemical; and, Claim VI — Restitution, Disgorgement, and Unjust Enrichment against Defendant Delta Chemical. (ECF No. 652). Additionally, Plaintiff Richmond asserts the following claims in its complaint against Delta Defendants: Count I — Conspiracy in Restraint of Trade in violation of the Sherman Act against all Defendants except Defendant Rebecca Besson; Count II — Conspiracy in Restraint of Trade in violation of the Virginia Antitrust Act, *Va. Code Ann. § 59.1-9.5* against all Defendants except Defendant Rebecca Besson; and, Count V — Restitution, Disgorgement, and Unjust Enrichment against all Defendants. (ECF No. 653). As will be further explained herein, the analysis for all these claims is nearly identical. Thus, the Court will analyze all claims jointly unless there is a substantive reason for a separate analysis.

either "on its own" or on a motion by a party. *Id.* at *12(f)(1)-(2)*. "The purpose of a motion to strike is to simplify the pleadings and save time and expense by excising from a plaintiffs complaint any redundant, immaterial, impertinent, or scandalous matter which will not have any possible bearing on the outcome of the litigation." *Corradetti v. Sanitary Landfill, Inc., 912 F. Supp. 2d 156 (D.N.J 2012)* (quoting *Garlanger v. Verbeke, 223 F. Supp. 2d 596, 609 (D.N.J. 2002))*. "[M]otions to strike are usually 'viewed with disfavor' and will generally 'be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues.'" *Gray v. Bayer Corp., 2010 U.S. Dist. LEXIS 33040, 2010 WL 1375329, at *2 (D.N.J. Mar. 31, 2010)* (citing *Garlanger, 223 F. Supp. 2d at 609*). In fact, "*Rule 12(f)* should be **[*41]** construed strictly against striking portions of the pleading on grounds of immateriality and if the motion is granted at all, the complaint should be pruned with care." *Morgan Home Fashions, Inc. v. UTI, U.S. Inc., 2004 U.S. Dist. LEXIS 13412, 2004 WL 1950370, at *8 (D.N.J. Feb. 9, 2004)*.

III. ANALYSIS

A. Motion to Dismiss

For the following reasons, Delta Defendants' Motion to Dismiss Plaintiffs' Consolidated Complaint is denied.

a. Conspiracy in Restraint of Trade in Violation of the Sherman Act

To survive a motion to dismiss, Plaintiffs must prove two essential elements for a claim of conspiracy in restraint of trade in violation of the Sherman Act. Plaintiffs must show that (1) a "contract, combination, or conspiracy" existed and that (2) such contract, combination, or conspiracy "imposed an unreasonable restraint of trade." *Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002)*.

Preliminarily, this Court has already found that, at least at the pleading stage, a conspiracy existed. (ECF No. 405 at 45-65). Additionally, in their Amended Complaints, Plaintiffs allege that Delta Defendants conspired to suppress and eliminate competition in the sale and marketing of Alum. (Compl. ¶ 1). Specifically, Plaintiffs allege that Delta Defendants agreed to "rig bids and allocate customers for, and to fix, stabilize, inflate, and maintain the price of Alum sold to companies, **[*42]** municipal authorities, and governmental subdivisions in the United States from January 1, 1997 through at least February 2011 . . . ." (Id. ¶ 1). Furthermore, Plaintiffs allege Delta Defendants met to "discuss their respective Alum businesses," agreed to "'stay away' from each other's historical customers," submitted "intentionally high," or "throw away" bids, and withdrew winning bids "in cases where a bid was inadvertently submitted." (Id. ¶ 4). These allegations are sufficient to support a *prima facie* claim Delta Defendants engaged in a conspiracy which imposed an unreasonable restraint on the trade of Alum in violation of the Sherman Act. Hence, the claim must survive Delta Defendants' Motion to Dismiss.

b. Conspiracy in Restraint of Trade in Violation of the Maryland Antitrust Act and the Virginia Antitrust Act

"*Section 11-204(a)(1)* of the Maryland Antitrust Act is the state law analogue of *Section 1* of the Sherman Act." *Merck-Medco Managed Care, Inc. v. Rite Aid Corp. 22 F. Supp. 2d 447, 450 n.4 (D. Md. 1998)*. The purpose of the Maryland Antitrust Act is "to complement the body of the federal law governing restraints of trade." *Nat. Design, Inc. v. Rouse Co., 302 Md. 47, 485 A.2d 663 (1983)* (quoting *Md. Code Ann. § 11-202(a)* (2005)). In construing the Act, "the courts [are to] be guided by the interpretation given by the federal courts to the various federal statutes **[*43]** dealing with the same or similar matters." *Nat. Design, Inc., 485 A.2d at 666*; *see also* *Berlyn Inc v. The Gazette Newspapers, 73 F. App'x 576, 582 (4th Cir. 2003)*.

Similarly, "[t]he Virginia Antitrust Act, with the exception of an interstate commerce component, shares common elements with sections one and two of the Sherman Act." *Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 710 (4th

Cir. 1991). The Virginia Antitrust Act prohibits "[e]very contract, combination or conspiracy in restraint of trade or commerce," *Va. Code Ann. § 59.1-9.5* (1998), and "[e]very conspiracy combination, or attempt to monopolize, or monopolization of, trade or commerce." *Id.* at *§ 59.1-9.6*. In fact, the Virginia Act specifically provides that it is to be "interpreted and applied in harmony with federal ***antitrust law***." *Oksanen, 945 F.2d at 710*. Therefore, Plaintiffs' claims under the Virginia Antitrust Act are "governed by the same standard as their claims under the Sherman Antitrust Act." *Va. Vermiculite, Ltd. v. W.R. Grace & Co.-Conn., 108 F. Supp. 2d 549, 605 (W.D. Va. 2000)* (citing *Satellite Television & Associated Res., Inc. v. Cont'l Cablevision of Va., Inc., 714 F.2d 351, 358 n.13 (4th Cir. 1983))*. Consistent with the above guidance provided by the Fourth Circuit, this Court's analysis for Plaintiffs' claims under the Sherman Act must be applied to Plaintiffs' antitrust claims under both Maryland and Virginia law. Because Plaintiff's claims pursuant to the Sherman Act are sufficient to survive Delta Defendants' Motion to Dismiss, Plaintiffs' claims under Maryland and Virginia state antitrust claims must also survive.

c. Common Law Fraud [*44]

Maryland's Court of Appeals has summarized the elements of a cause of action for fraud or deceit, "[i]n order to recover damages in an action for fraud or deceit, a plaintiff must prove (1) that the defendant made a false representation to the plaintiff, (2) that its falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth, (3) that the misrepresentation was made for the purpose of defrauding the plaintiff, (4) that the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) that the plaintiff suffered compensable injury resulting from the misrepresentation." *Nails v. S & R, Inc., 334 Md. 398, 639 A.2d 660, 668 (Md. 1994)* (internal citations omitted). Similarly, to establish a claim of actual fraud under Virginia law, a plaintiff must prove that: (1) the defendant "falsely represented or deliberately did not disclose (when it had a duty to disclose); (2) a material fact; (3) intentionally and knowingly; (4) with intent to mislead; (5) on which the [Plaintiff] reasonably relied; and (6) which caused damage to party misled." *Arnlund v. Deloitte & Touche LLP, 199 F. Supp. 2d 461, 486 (E.D. Va. 2002)* (citing *Evaluation Research Corp. v. Alequin, 247 Va. 143, 439 S.E.2d 387, 10 Va. Law Rep. 779 (Va. 1994))*.

Plaintiffs allege in their Amended Complaints that Delta Defendants "used deception," "made a misrepresentation," and "concealed, **[*45]** suppressed or omitted material facts in connection with the sale" of Alum. (Compl. ¶ 317). Specifically, Defendants allegedly "represented" that Alum prices were offered based on a "competitive market" while participating in an unlawful conspiracy to "inflict monetary harm" on Plaintiffs. (Id. ¶ 318, 322). For example, on December 23, 2008, "[Defendant] John Besson, then-President of [Defendant] Delta Chemical represented that [it] would need to raise the price of Alum by $36.33 per ton" due to the "sulfuric acid market." (Id. ¶ 249, 272). Similarly, on December 29, 2008, [Defendant] John Besson emailed the Engineer Supervisor of Plaintiff Baltimore City and "represented that [Defendant] Delta Chemical would need to raise the price of Alum due to 'a substantial increase in one of the raw materials that are used to make the aluminum sulfate.'" (Id. ¶ 273). However, Plaintiffs contends that these changes were misrepresentations which stood in contrast to a decline in the price of sulfuric acid "***by more than a third***" from its October 2008 index price by December 2008. (Id. ¶ 249) (emphasis in original).

Plaintiffs' allegations, when taken as true, support the claims that Delta Defendants **[*46]** knowingly misrepresented the price of Alum to Plaintiffs with the purpose of defrauding Plaintiffs and Plaintiffs reasonably relied upon Delta Defendants' representation and suffered a resulting compensable injury. *Nails, 639 A.2d at 668* (internal citations omitted). Similarly, Plaintiffs' allegations support Plaintiffs' claims that Delta Defendants falsely and knowingly represented a material fact regarding price increases of Alum with intent to mislead Plaintiffs from the ongoing conspiracy and Plaintiffs reasonably relied on the representation which caused damages to Plaintiffs. Therefore, at this juncture, Plaintiffs' claims of common law fraud must survive Delta Defendants' Motion to Dismiss.

d. Breach of Contract against Defendant Delta Chemical

Under Maryland law, the elements of a claim for breach of contract are "contractual obligation, breach, and damages." *Tucker v. Specialized Loan Servicing, LLC, 83 F. Supp. 3d 635, 655 (D. Md. 2015)* (quoting *Kumar v. Dhanda, 198 Md. App. 337, 17 A.3d 744, 749 (Md. Ct. Spec. App. 2011))*. "In order to survive a motion to dismiss, a complaint for breach of contract [in Maryland] must allege facts showing a contractual obligation owed by the defendant to the plaintiff and a breach of that obligation by the defendant." *Swedish Civil Aviation Admin. v. Project Mgmt. Enters., Inc., 190 F. Supp. 2d 785, 791 (D. Md. 2002)* (citing *Cont'l Masonry Co., Inc. v. Verdel Constr. Co., Inc., 279 Md. 476, 369 A.2d 566 (1977))*. Likewise, "[f]or a breach of contract to be actionable [in Virginia], a party must establish **[*47]** a material breach." *Vienna Metro LLC v. Pulte Home Corp., 786 F. Supp. 2d 1076, 1081 (E.D. Va. 2011)* (citing *Horton v. Horton, 254 Va. 111, 487 S.E.2d 200, (Va. 1997))*.

The central dispute in this case with respect to the first breach of contract claim is whether Delta Chemical breached its contractual obligation to "only submit price increases that were based on changes in the contractor's cost of services and materials." (Compl. ¶ 328). Plaintiffs allege that Delta Defendants falsely represented increases in market prices of raw materials used to make aluminum sulfate as a justification for increasing contract prices for Alum. (Id. ¶ 272 -273). These price increases allegedly stood in stark contrast to a "crash" in the market for sulfuric acid, a raw material used to create Alum. (Id. ¶ 275). Moreover, prices for other raw materials used to make Alum had allegedly declined at the time of the price increase. (Id. ¶ 276). Plaintiffs assert that Delta Defendants made affirmative representations to prevent Plaintiffs from "discovering the actual reason for the artificially-inflated prices." (Id. ¶ 277). Thus, at this juncture in the proceedings, the Court finds that Plaintiffs have alleged sufficient facts to sustain their first set breach of contract claims under both Maryland and Virginia law.

With respect to the second **[*48]** breach of contract claim, the major point of contention is whether Defendant Delta Chemical "breached their contractual agreements that they had not agreed, connived, or colluded to produce a deceptive show of competition and had not colluded with any other person, firm or corporation in the bid on the Alum contracts." (Id. ¶ 333). "Beginning at least as early as 2010, Plaintiff WSSC's Alum supply contracts incorporated terms specifying that the Bidder/Offeror[, *i.e.*, Delta Defendants,] had not agreed, connived or colluded to produce a deceptive show of competition, and had not colluded with any other person, firm or corporation in the bid on the Alum contracts." (Id. ¶ 332). Plaintiffs assert that "[a]fter USALCO and [Defendant] Delta Chemical combined in November 2011, USALCO was always the 'winning' bidder, having either combined or colluded with all viable competitors." (Id. ¶ 244). Additional examples provided by Plaintiffs of the alleged collusion include substantial similarity between Defendant Delta Chemical and USALCO's bid prices for Alum after their combination and alleged "throw away" bids by Chemtrade. (Id. ¶ 252, 254). Plaintiffs also cite a lack of bids from "freight-logical" **[*49]** chemical plants such as GEO and Southern Ionics. (ECF No. 652 at ¶ 168). Hence, Plaintiffs have sufficiently alleged that there was a non-collusion component to their contract with Delta Defendants which was breached, such that their second set of breach of contract claims, under both Maryland and Virginia law, may proceed.

e. Restitution, Disgorgement, and Unjust Enrichment

In Maryland, to support a claim for unjust enrichment, "a plaintiff must establish: (1) a benefit [was] conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value." *Swedish Civil Aviation Admin., 190 F. Supp. 2d at 792-93*. In Virginia, "[The] elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation.'" *Navar, Inc. v. Fed. Bus. Council, 291 Va. 338, 784 S.E.2d 296, 299 (Va. 2016)* (quoting *Ulloa v. QSP, Inc., 271 Va. 72, 624 S.E.2d 43, 48 (Va. 2006))*.

Plaintiffs assert that it would be "inequitable" for Delta Defendants "to be allowed to retain the benefits" they "obtained from **[*50]** their illegal agreements, manipulative acts, and other unlawful conduct" at the expense of Plaintiffs. (Compl. ¶ 337). Moreover, Plaintiffs aver that it would be equally inequitable for Defendants John Besson and Rebecca Besson to be "allowed to retain the millions of dollars that each personally received . . . in connection with [Defendant] Delta Chemical's combination with USALCO" because of its alleged connection to the aforementioned conspiracy. (Id. ¶ 338). As discussed above, Plaintiffs have sufficiently alleged facts pertaining to the contracts which they had made with Delta Defendants regarding agreed terms on non-collusion. (Id. ¶ 332). Moreover, Plaintiffs have set forth sufficient allegations and examples of Delta Defendants' breach of these non-collusion contracts to show a violation. (Id. ¶ 333). Finally, Plaintiffs have shown that Delta Defendants' alleged breach of these contracts, if true, would cause Plaintiffs significant economic injury. (Id. ¶ 341d). Therefore, the Court concludes that Plaintiffs' claims for unjust enrichment must survive Delta Defendants' Motion to Dismiss.

B. Motion to Strike Certain Allegations

Delta Defendants ask the Court to strike the allegations **[*51]** contained in paragraph 131 of Plaintiff WSSC's Amended Complaint regarding its purchase of PAC, on the basis that such allegations are "irrelevant to an Alum price fixing conspiracy" and "unsupported by the requisite factual allegations." (ECF No. 901-1, at 27). Delta Defendants maintain that because "PAC is not the subject of this litigation, and no prior price fixing scheme has been pled regarding PAC." (Id. at 27). In sum, Delta Defendants argue that there is no basis of allegations of conspiracy regarding PAC and, "in any event," these allegations are "not probative to the issues in this case relating to liquid Alum." (ECF No. 904, at 11).

On the other hand, Plaintiffs allege in their Amended Complaints that bids received for PAC raise "similar concerns" to the conspiracy regarding liquid Alum. (Compl. ¶ 131). Plaintiffs provide examples of Delta Chemical "winning" PAC contracts in 2004 and 2009 at prices which increased by seventy-two percent over five years and explain that the next-lowest bid submitted on the 2009 contract was "***more than three times***" Defendant Delta Chemical's winning bid. (Id. ¶ 131) (emphasis in original). Plaintiffs further argue that their allegations regarding PAC **[*52]** are "relevant to the [Defendants'] ability to conspire, and the history of conspiracy, in the water treatment chemical industry." (ECF No. 902, at 28). Plaintiffs note that USALCO "explicitly linked non-competition agreements with [Defendant] Delta on Alum and PAC." (Id. at 28).

"[M]otions to strike are usually 'viewed with disfavor' and will generally 'be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues.'" *Gray, 2010 U.S. Dist. LEXIS 33040, 2010 WL 1375329, at *2*. In fact, "*Rule 12(f)* should be construed strictly against striking portions of the pleading on grounds of immateriality and if the motion is granted at all, the complaint should be pruned with care." *Morgan Home Fashions, Inc., 2004 U.S. Dist. LEXIS 13412, 2004 WL 1950370, at *8*. When accepting Plaintiffs' allegations as true, a possible relation can be drawn between USALCO's use of non-competition agreements with Defendant Delta Chemical on PAC in negotiations leading up to their combination and Delta Chemical's participation in the general liquid Alum conspiracy. (ECF No. 902 at 28).

Moreover, even if the allegations "may ultimately prove to be immaterial," they are not "so wholly impertinent or scandalous as to presently warrant the 'drastic remedy' authorized **[*53]** by *Rule 12(f)*. Once discovery is complete and the record more fully developed, [Delta] Defendants will have the opportunity to renew any challenges they may have to the Plaintiff[s] allegations and/or evidence by way of an appropriate *Rule 12(b)(6)* motion, motion for summary judgment, or motion in *Limine*." *Adams v. County of Erie, Pa., 2009 U.S. Dist. LEXIS 108090, 2009 WL 4016636, at *1 (W.D. Pa. 2009)*. Thus, at this stage in the litigation, the Court must deny Delta Defendants' Motion to Strike Certain Allegations.

IV. <u>CONCLUSION</u>

For the aforementioned reasons, Delta Defendants' Motion to Dismiss and Strike Certain allegations is denied. An appropriate Order accompanies this Opinion.

Date: August 14, 2018

/s/ Jose L. Linares

JOSE L. LINARES

Chief Judge, United States District Court

ORDER

This matter comes before the Court by way of Defendants Delta Chemical Corporation, John D. Besson, and Rebecca L. Besson's (collectively "Delta Defendants") Motion to Dismiss Plaintiffs Washington Suburban Sanitary Commission, Mayor and City Council of Baltimore, and City of Richmond's Amended Complaints pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* and Strike Certain Allegations pursuant to *Rule 12(f) of the Federal Rules of Civil Procedure*. (ECF No. 901). For the reasons set forth in the Court's corresponding Opinion.

IT IS on this 14th day of August, 2018,

ORDERED that Delta Defendants' Motion to Dismiss **[*54]** and Strike Certain Allegations (ECF No. 901) is hereby DENIED.

SO ORDERED.

/s/ Jose L. Linares

JOSE L. LINARES

Chief Judge, United States District Court

Int'l Equip. Trading, Ltd. v. Illumina, Inc.

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

August 14, 2018, Decided; August 14, 2018, Filed

No. 17 C 5010

Reporter

2018 U.S. Dist. LEXIS 136718 *; 2018-2 Trade Cas. (CCH) P80,478; 2018 WL 3861575

INTERNATIONAL EQUIPMENT TRADING, LTD., Plaintiff, v. ILLUMINA, INC., Defendant.

Prior History: *Int'l Equip. Trading, Ltd. v. Illumina, Inc., 312 F. Supp. 3d 725, 2018 U.S. Dist. LEXIS 32239 (N.D. Ill., Feb. 28, 2018)*

Core Terms

sequencing, customers, alleges, license fee, argues, software, relevant market, motion to dismiss, antitrust, monopolization, site, monopoly, products, second amended complaint, resellers, markets, market share, third-party, consumers, Counts, pled, enforcement mechanism, anti trust law, monopoly power, Sherman Act, manufactured, probability, purchasers, deceptive, predatory

Counsel: **[*1]** For International Equipment Trading Ltd., an Illinois Corporation, Plaintiff, Counter Defendant: Howard L. Teplinsky, LEAD ATTORNEY, Katherine A. Grosh, Levin Ginsburg, Chicago, IL.

For Illumina, Inc., Defendant: Jacob D Koering, LEAD ATTORNEY, Miller, Canfield, Paddock and Stone, P.L.C., Chicago, IL; Anita F. Stork, Ashley M. Simonsen, PRO HAC VICE, Covington & Burling LLP, San Francisco, CA.

For Illumina, Inc., Counter Claimant: Anita F. Stork, Ashley M. Simonsen, Covington & Burling LLP, San Francisco, CA.

Judges: Hon. Marvin E. Aspen, United States District Judge.

Opinion by: Marvin E. Aspen

Opinion

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Plaintiff International Equipment Trading, Ltd. ("IET") alleges Defendant Illumina, Inc. ("Illumina") engaged in predatory and anticompetitive behavior that violated federal antitrust and Illinois law. (2d Am. Compl. (Dkt. No. 54) ¶ 1.) We previously dismissed Counts I-V of IET's first amended complaint without prejudice. (Order (Dkt. No. 44) at 17.) Presently before us is Illumina's motion to dismiss Counts I-V of IET's second amended complaint with prejudice. (Mot. (Dkt. No. 55).) For the following reasons, we deny Illumina's motion.

In addition, Illumina **[*2]** shall file its answer to IET's second amended complaint on or before September 12, 2018. The principal attorneys for Illumina and IET shall appear before the Court with an agreed written discovery plan at the Court's status call on October 18, 2018 at 10:30 a.m.

BACKGROUND

For the purposes of a motion to dismiss, "we accept the well-pleaded facts in the complaint as true." *McCauley v. City of Chi., 671 F.3d 611, 616 (7th Cir. 2011)*. IET, an Illinois corporation with its principal place of business in Mundelein, Illinois, sells, rents, trades, and leases laboratory equipment to laboratories, hospitals, universities, and research institutions across the United States and internationally. (2d Am. Compl. ¶¶ 2, 13.) As part of its business, IET sources various models of used or refurbished genome sequencing unit systems ("sequencing units") and required accessory instruments manufactured by Illumina. (*Id.* ¶¶ 2.) Illumina, a Delaware corporation with its principal place of business in San Diego, California, manufactures and markets "integrated systems" that "serve the sequencing, genotyping and gene expression markets" and sells its used sequencing units[1] in competition with IET. (*Id.* ¶¶ 3-4.) While IET "regularly brokers service contracts between **[*3]** Illumina and IET's customers," Illumina is the only company that services its equipment. (*Id.* ¶ 4.)

IET alleges that since around 2007, once Illumina learns of a possible sale or lease by IET and other third-party resellers of a refurbished Illumina sequencing unit, Illumina engages in "scare tactics" that are "intended to kill the sale or lease between the customer and IET." (*Id.* ¶¶ 5, 7, 9.) Specifically, IET alleges Illumina has a practice of informing IET's potential customers that unless they buy or lease a new or used Illumina sequencing unit from Illumina, they must pay a significant "site licensing fee" for operation and data collection software needed to operate a used Illumina sequencing unit. (*Id.* ¶¶ 5-6.) IET alleges this fee ranges from $6,000.00 to $90,000.00 depending on the model. (*Id.*) IET claims Illumina's sales representatives and servicing engineers have discretion in charging the fee, and only threaten the fee to interfere with sales from third-party resellers like IET. (*Id.* ¶¶ 7-9.) IET further alleges Illumina sometimes charges the fee for machines exempt from site licensing fees based on a preexisting contract between Illumina and De Lage Landen Financial **[*4]** Services, Inc. ("DLL").[2]. (*Id.* ¶ 21-22.)

IET further alleges that when the purchasers do not pay Illumina the site licensing fee, Illumina sometimes refuses to service sequencing units purchased from IET, deeming these customers as unauthorized users. (*Id.* ¶ 8.) Illumina also allegedly either refuses to provide needed services, parts, and software for preowned Illumina systems they did not sell, or charges "exorbitant markups" to do so. (*Id.* ¶¶ 8, 10, 22, 32.) IET claims customers who need replacement parts "have no choice but to give in to Illumina's threats" because only Illumina's replacement parts are compatible with Illumina machines, and only Illumina services Illumina units. (*Id.* ¶¶ 4, 8.) Specifically, IET states that Illumina announced in March 2018 that it will no longer support any HiSeq X sequencing units resold by third-parties to customers in the United States, including servicing, repairing, or selling "related consumables" to customers with these preowned systems. (*Id.* ¶ 10.) IET claims that if enforced, Illumina's policy will "eliminat[e] the secondary market" for HiSeq X units completely. (*Id.*)

Based on these allegedly anticompetitive tactics, IET alleges Illumina "has **[*5]** unlawfully attempted to create a monopoly within the secondary sequencing unit market, or alternatively, within the sub-market consisting of [Illumina] sequencing units." (*Id.* ¶ 11.) As a result, IET claims it has lost sales, including the sale of sequencing units to: (1) the University of Central Florida, (2) the University of Chicago, (3) Tempus, (4) Argon National Laboratory, and (4) ACGT Inc. (*Id.* ¶¶ 23, 45.)

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[1] Based on IET's complaint, it appears Illumina sells used sequencing units that are made by Illumina in addition to used units made by other manufacturers. (*See* 2d Am. Compl. ¶ 20 (alleging Illumina's market share is higher in the market of Illumina used sequencing units as compared to its market share in the refurbished sequencing unit market generally).)

[2] DLL allegedly leases and finances Illumina equipment, and often Illumina sells the instruments and systems to DLL directly. (2d Am. Compl. ¶ 21.)

IET's second amended complaint mirrors the seven counts of its first amended complaint. IET alleges Illumina violated various antitrust laws, and asserts attempted monopolization claims under *§ 2 of the Sherman Act*, *15 U.S.C. § 2* (Count I); *§§ 4* and *16 of the Clayton Act*, *15 U.S.C. §§ 15(a)*, *26* (Count II); and the *Illinois Antitrust Act ("IAA"), 740 ILCS 10/1 et seq.* (Count V). (*Id.* ¶¶ 25-35, 36-39, 50-52.) IET claims Illumina's "predatory and anticompetitive conduct" in charging site licensing fees has been an attempt to "drive IET and other third-party resellers from the . . . sequencing unit markets and thereby strengthen its dominant position within these markets." (*Id.* ¶ 32.)

IET's second amended complaint also includes claims under the *Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq.* ("ICFA") (Count III) and Illinois **[*6]** *Uniform Deceptive Trade Practices Act, 815 ILCS 510/1 et seq.* ("UDTPA") (Count IV) based on Illumina's alleged willful engagement in "deceptive and unfair conduct." (*Id.* ¶¶ 40-49.) Finally, IET alleges Illumina intentionally interfered with a prospective economic advantage (Count VI) and seeks a declaratory judgment pursuant to the *Declaratory Judgment Act, 28 U.S.C. § 2201(a)* deciding whether Illumina "may charge or threaten to charge" a site licensing fee to customers purchasing Illumina sequencing units from IET (Count VII). On February 28, 2018, we dismissed without prejudice the same Counts I through V of IET's first amended complaint and denied Illumina's motion to dismiss Counts VI and VII pursuant to *Federal Rule of Civil Procedure 12(b)(6)*.

On April 16, 2018, Illumina filed a motion to dismiss Counts I through V of IET's second amended complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (Mot. at 1.) Illumina argues "IET's attempt to resuscitate these claims in the Second Amended Complaint . . . falls short." (Def.'s Mem. in Support of Mot. To Dismiss ("Mem.") (Dkt. No. 56) at 1.) Illumina contends IET's attempted monopolization claims should be dismissed because Illumina has failed to adequately plead any of the requisite elements. (*Id.* at 3-12.) Furthermore, Illumina argues IET failed to state **[*7]** a claim under the ICFA and UDTPA "because (1) IET still does not allege that it lost a sale to any Illinois customers and (2) none of the alleged misrepresentations falls within the purview of the UDTPA." (*Id.* at 13.)

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) governs Illumina's motion to dismiss. "The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits." *Gibson v. City of Chi., 910 F.2d 1510, 1520 (7th Cir. 1990)* (internal citation omitted). When considering a motion to dismiss under *Rule 12(b)(6)*, we accept as true all well-pleaded facts alleged in the complaint and view them in the light most favorable to the plaintiff. *Santiago v. Walls, 599 F.3d 749, 756 (7th Cir. 2010)*. While "detailed factual allegations" are not required to survive a motion to dismiss, the complaint must "state a claim [for] relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)* (internal quotation marks omitted) (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007))*. The plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft, 556 U.S. at 678, 129 S. Ct. at 1949* (quoting *Twombly, 550 U.S. at 556, 127 S. Ct. at 1965*). While the plaintiff need not plead "detailed factual allegations," the complaint must allege facts sufficient "to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555, 127 S. Ct. at 1964-65*. However, to protect defendants from expensive discovery in antitrust cases, **[*8]** a plaintiff's claim must have a "reasonably founded hope that the [discovery] process will reveal relevant evidence" to support a claim. *Twombly, 550 U.S. at 558-59, 127 S. Ct. at 1966-67*.

ANALYSIS

I. ATTEMPTED MONOPOLIZATION CLAIMS (COUNTS I, II, & V)

We first consider whether IET sufficiently pled its antitrust claims to survive a *Rule 12(b)(6)* motion to dismiss. Our analysis focuses on the requirements of *§ 2* of the Sherman Act, as IET's Clayton Act and IAA claims "stand or fall with the *Sherman Act* Claim."[3] *Int'l Equip. Trading, Ltd. v. AB SCIEX LLC, No. 13 C 1129, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *3 n.3 (N.D. Ill. Aug. 29, 2013)*; *Hon Hai Precision Indus. Co. v. Molex, Inc., No. 08 C 5582, 2009 U.S. Dist. LEXIS 9165, 2009 WL 310890, at *3 (N.D. Ill. Feb. 9, 2009)*. At the pleading stage of an attempted monopolization claim under *Section 2* of the Sherman Act, the plaintiff must preliminarily establish the "relevant market that the defendant has purportedly attempted to monopolize." *Attempted Monopolization*, William Holmes & Melissa Mangiaracina, ***Antitrust Law*** Handbook § 3:6; *see* *Nucap Indus., Inc. v. Robert Bosch LLC, 273 F. Supp. 3d 986, 1011 (N.D. Ill. 2017)* ("[F]ailure to offer a plausible relevant market is a proper ground for dismissing an antitrust claim at the *Rule 12(b)(6)* stage.") (internal citation omitted). The plaintiff must also adequately plead that a defendant (1) engaged in predatory or anticompetitive conduct, (2) specifically intended to acquire monopoly power, and (3) reached a stage based on defendant's actions and market position where there is a dangerous probability defendant will achieve **[*9]** an actual monopoly. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 890-91, 122 L. Ed. 2d 247 (1993)*; *Lektro-Vend Corp. v. Vendo, Co., 660 F.2d 255, 270 (7th Cir. 1981)*; *Hon Hai Precision Indus., 2009 U.S. Dist. LEXIS 9165, 2009 WL 310890, at *2*. Illumina argues that IET has failed to sufficiently plead any of these elements, which we consider in turn. (Mem. at 3.)

A. Market Definition

Illumina first argues that IET's antitrust claims should be dismissed because IET has failed to plead a "legally cognizable" market. (*Id.* at 3.) To successfully prove an attempted monopolization claim, the plaintiff must define the relevant market in terms of relevant geographic area and product. *Spectrum Sports, Inc, 506 U.S. at 456, 113 S. Ct. at 890-91* (finding the issue generally necessary to plead the monopoly power element); *Right Field Rooftops, LLC v. Chi. Baseball Holdings, LLC, 87 F. Supp. 3d 874, 886 (N.D. Ill. 2015)*. Accordingly, "failure to offer a plausible relevant market is a proper ground for dismissing an antitrust claim." *Right Field Rooftops, 87 F. Supp. 3d at 886*; *see also* *Ploss v. Kraft Foods Grp., Inc., 197 F. Supp. 3d 1037, 1070 (N.D. Ill. 2016)* (considering the identification of a relevant market on a motion to dismiss a *§ 2* claim). Market definition, however, is very fact-intensive and we hesitate to grant motions to dismiss for failure to plead a relevant market, unless "the alleged relevant market clearly does not encompass all interchangeable substitute products or when a plaintiff fail[s] even to attempt a plausible explanation as to why a market should be limited in a particular way." *Ploss, 197 F. Supp. 3d at 1071-72* (citing *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., 767 F. Supp. 2d 880, 901 (N.D. Ill. 2011))*.

Under "*§ 2* of the Sherman Act, a market is defined by reasonable interchangeability **[*10]** of products and the cross-elasticity of demand for those products. In other words, the products in a market must have unique attributes that allow them to be substituted for one another, but make them difficult to replace with substitute products from outside the market." *In re Dairy Farmers, 767 F. Supp. 2d at 901* (citing *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394-95, 76 S. Ct. 994, 1007, 100 L. Ed. 1264 (1956))*. IET proposes two alternative markets: (1) the market for used genome sequencing units ("used unit market"), and (2) the market for used Illumina genome sequencing units ("used Illumina unit market"). (2d Am. Compl. ¶¶ 28-29.) Illumina argues neither market is legally cognizable.

Illumina first challenges both markets for "improperly exclude[ing] *new* genome sequencing systems," and argues new units are substitutes to used units. (Mem. at 4.) IET alleges used sequencing units are not substitutes for new units because of a substantial price differential, up to $500,000.00 between new and used units.[4] (2d Am. Compl.

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[3] IET's *Clayton Act* claim depends on the survival of its Sherman Act claim because *Sections 4* and *16 of the Clayton Act* merely establish a private right of action for any person injured by a violation of the Sherman Act. *15 U.S.C. § 15*.

[4] Illumina also alleges IET concedes new and used sequencing units are substitutes in use based on language in the Second Amended Complaint. (Mem. at 4 (citing 2d Am. Compl. ¶ 5).) We agree with IET that this interpretation of IET's second amended complaint misconstrues its language. (Resp. at 6.) Instead of conceding a customer seeking a used unit "may instead purchase a 'new or used sequencing unit' directly from Illumina" (Mem. at 4), this paragraph merely describes Illumina's alleged sales behavior, including threatening the imposition of a site licensing fee "unless the customer buys or leases a new or used sequencing unit directly from Illumina" (2d Am. Compl. ¶ 5).

¶¶ 16, 28-29.) Considering the difference in price, IET describes new units to be so expensive they are cost-prohibitive for many customers. (*Id.*) Illumina asserts that mere price differential does not mean new and used units are not in the same markets. (Mem. at 4.) Considering the highly factual **[*11]** nature of market definition, making inferences in IET's favor, we find IET has sufficiently pled that used units could constitute a separate sub-market from new units, especially considering the significant price differential IET alleges exists between the two types of units. *See* Beatrice Foods Co. v. F.T.C., 540 F.2d 303, 309 (7th Cir. 1976) (finding price distinctions can lead to separate market definitions when the products "are sold in clearly separate price groupings"); Avnet, Inc. v. F.T.C., 511 F.2d 70, 77 (7th Cir. 1975) (finding variance in price between new and used products sufficiently varied to support finding that new and used products constitute different submarkets).

Illumina also challenges the used Illumina unit market specifically, arguing the proposed single-brand market fails as a matter of law. (Mem. at 5-6.) In "rare circumstances," a single brand of a product can constitute its own market. In re Dealer Mgmt. Sys. Antitrust Litig., No. 18 C 864, 313 F. Supp. 3d 931, 2018 U.S. Dist. LEXIS 80937, 2018 WL 2193236, at *21 (N.D. Ill. May 14, 2018) (slip op.); *see also* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481-82, 112 S. Ct. 2072, 2090, 119 L. Ed. 2d 265 (1992) (establishing possibility of single-brand markets). A market composed of a single brand can be viable if a plaintiff can prove the product cannot be substituted by any other brand's products. AB SCIEX LLC, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *4.

Here, IET offers multiple reasons why used Illumina sequencing units are not interchangeable with another brand. For example, preexisting Illumina sequencing unit customers allegedly **[*12]** cannot easily switch to a different manufacturer because the processes of "platform validation and development of methodology involve steep learning curves," especially when the customer has other Illumina sequencing units or has developed protocols on Illumina platforms. (2d Am. Compl. ¶ 18.) IET also avers some research institutions can only use Illumina sequencing units "due in large part to their sensitivity." (*Id.*) Based on these specific allegations, we find IET has pled conceivable explanations why Illumina units are not replaceable with other brands for some customers. *Cf.* AB SCIEX LLC, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *4 (dismissing proposed single-brand market where plaintiff failed to plead any facts demonstrating the product is "unique and cannot be substituted with other manufacturer's [products]"). Furthermore, whether used sequencing unit customers are truly locked in to Illumina's brand is a question of fact not properly determined at this stage. Eastman Kodak, 504 U.S. at 482, 112 S. Ct. at 2090 ("The proper market definition in this case can be determined only after a factual inquiry into the commercial realities faced by consumers.") (internal citation omitted). We accordingly find that IET has sufficiently pled both proposed markets.

A. Predatory or Anticompetitive [*13] Conduct

Next, Illumina argues IET has failed to plead it engaged in any predatory or anticompetitive conduct. (Mem. at 10.) "Predatory conduct may be broadly defined as conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition." Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 541 (7th Cir. 1986); *see also* Endsley v. City of Chi., 230 F.3d 276, 283 (7th Cir. 2000) ("Under § 2, intent to obtain a monopoly is unlawful only where an entity seeks to maintain or achieve monopoly power by anticompetitive means.").

IET alleges Illumina engaged in a number of anticompetitive behaviors, primarily threatening to charge customers who do not purchase used Illumina sequencing units from Illumina directly a site licensing fee; selectively imposing the site licensing fee to interfere with sales from third-party resellers; and refusing, or charging "exorbitant markups," to service or sell replacement parts for sequencing units sold by third-parties. (2d Am. Compl. ¶¶ 5-7, 32, 34 (alleging the total cost of the software transfer fee, health check, installation, and service contracts of used Illumina sequencing units totals between $180,000.00 and $210,000.00).)

We first consider IET's allegations regarding Illumina's statements **[*14]** about its ability to impose site licensing fees. IET claims that since 2007, once Illumina learns of a potential sale or lease by IET of a used Illumina sequencing unit, with the intent to "kill" the sale or lease with IET, Illumina would contact the potential customer and threaten to impose a site licensing fee for the used unit's operation and data collection software needed to operate the unit. (2d Am. Compl. ¶ 5.) Among other complaints about these threats, IET argues Illumina does not have the ability to charge site licensing fees for purchasers of used Illumina sequencing units, and that these statements constitute misrepresentations. (Resp. at 10-11.)

Generally, false statements accompanied with an "enforcement mechanism" can constitute predative conduct under ***antitrust law***. *See* *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 851 (7th Cir. 2011)* (noting that an anticompetitive threat is not actionable anticompetitive action without "some sort of 'enforcement mechanism' designed somehow to coerce or compel the competitor to head the admonition") (internal citation omitted); *AB SCIEX LLC, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *8* ("For a misrepresentation to be actionable under the Sherman Act it must be combined with a coercive enforcement mechanism."). We first consider whether IET has pled Illumina **[*15]** made false statements, then consider whether IET alleges Illumina had enforcement mechanisms to restrain trade as a result of the misstatements.

IET argues Illumina did not have the right to impose any licensing fees for operating software on its used sequencing units, as the first sale doctrine dictates that "Illumina does not actually own the license that it threatens to charge a fee for." (Resp. at 10.) The first sale doctrine allows the purchaser of copyrighted material to transfer the work without the copyright owner's permission. *17 U.S.C. § 109(a)* ("[T]he owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy . . . ."). The first sale doctrine, however, does not apply when the copyright holder merely licenses instead of sells copyrighted software. *Id.* ¶ *109(d)*; *see* *AB SCIEX LLC, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *6* (finding first sale doctrine did not apply because plaintiff admitted defendant only licensed the operating software of its machines to purchasers) (citing *Apple Inc. v. Psystar Corp., 658 F.3d 1150, 1155 (9th Cir. 2011)* ("[T]he first sale doctrine does not apply to a licensee.")).

Accordingly, at the heart of whether Illumina could legally charge licensing fees at **[*16]** all is whether Illumina licensed or sold the operating software for its sequencing units: if Illumina sold the software, the first sale doctrine applies, and any representations Illumina made about the right to impose a site licensing fee for purchasers of used Illumina sequencing units would be necessarily false and misleading. Whether a software user is a licensee instead of an owner of a copy of the software requires a fact-intensive inquiry into the terms of the original transfer from the copyright owner to the first user, including whether the transfer specified that the user was only granted a license, whether the transfer had significant use restrictions, and whether the transfer restricted the user's ability to transfer the software in the future. *See* *Vernor v. Autodesk, Inc., 621 F.3d 1102, 1111-12 (9th Cir. 2010)*. Viewing the pleadings in IET's favor, we find Illumina could have sold the software subject to the first use doctrine to purchasers of new Illumina sequencing units, and that any threats to charge a licensing fees to purchasers of used units could constitute misrepresentations.

Furthermore, IET sufficiently pled that Illumina made false statements about its ability to charge licensing fees for specific units that were allegedly **[*17]** subject to a licensing fee waiver. Specifically, IET alleges Illumina previously entered into an agreement with DLL that any Illumina equipment owned or leased by DLL would not be subject to a relicensing fee from Illumina if a DLL unit is resold to a new customer. (*Id.* ¶ 21.) IET claims that Illumina has "repeatedly" threatened IET's customers with the site licensing fee (and will threaten to withhold service equipment if the fee is unpaid) even though the used Illumina sequencing units at issue were subject to the DLL agreement. (*Id.* ¶¶ 21-22; 32 (calling Illumina's threats "false" in these instances).)

Having established that Illumina's statements about the ability to charge licensing fees could be false, we also find IET has alleged sufficient "enforcement mechanisms" to make these falsehoods actionable in ***antitrust law***. *Sanderson v. Culligan Int'l Co., 415 F.3d 620, 623 (7th Cir. 2005)*. IET avers Illumina refuses to service, sell related consumables, or sell replacement parts for its used sequencing units if they were sold or leased by IET or another third-party. (*Id.* ¶¶ 8, 10.) Specifically, IET claims Illumina deems these customers to be unauthorized users without a "'proper' software license." (*Id.*) In the instances Illumina is willing to **[*18]** service or sell needed parts or equipment to unauthorized users, IET avers Illumina charges "exorbitant markups." (*Id.* ¶ 32.) According to IET, Illumina's refusals are particularly powerful considering no other manufacturer's replacement parts are compatible with used Illumina sequencing units, and "Illumina is the only company that services Illumina equipment." (*Id.* ¶¶ 4, 8.) Finally, IET claims that since March 2018, Illumina has adopted a policy that it will not support or in some cases relicense software for used Illumina equipment sold by IET or other third-parties, which "is making sales of those units by resellers impossible." (*Id.* ¶ 10.)

Considering these allegations, we find IET has pled Illumina possesses sufficient enforcement mechanisms to harm competition in the relevant markets. *See* *Nexstar Broad., Inc. v. Granite Broad. Corp., No. 1:11 C 249 RM, 2012 U.S. Dist. LEXIS 95024, 2012 WL 2838547, at *7 (N.D. Ind. July 9, 2012)* ("Whether [defendant]'s alleged derogatory or disparaging statements are actionable in antitrust depends on the nature of the speech (who it made the statements to and what it said), and whether there was an 'enforcement mechanism' in place—whether [defendant]'s statements were backed **[*19]** by any sort of coercive conduct or threat (*i.e.*, the ability to boycott, to enter into agreements not to advertise certain products, or an inherent authority that it could leverage to compel advertisers to deal exclusively with [defendant]."); *cf.* *Sanderson, 415 F.3d at 623* (finding no unfair tactics under the Sherman Act for defendant's false statements made about plaintiff, noting the lack of an "enforcement mechanism" paired with the alleged falsehoods). Specifically, Illumina can threaten to never service a used Illumina sequencing unit purchased from IET or another reseller if the customer does not pay the threatened licensing fee, or refuse to sell the consumer sequencing unit consumables or replacement parts needed to keep the machine operational. These threats combined with the alleged misrepresentations about Illumina's ability to charge site licensing fees could drive all customers to Illumina and result in IET's exclusion from the marketplace of used sequencing units. (Resp. at 12 (noting Illumina's statements about licensing will ultimately limit the available resellers of used sequencing units and allow Illumina to increase prices).) *Cf.* *Briggs & Stratton Corp. v. Kohler Co., 405 F. Supp. 2d 986, 990 (W.D. Wis. 2005)* (finding misstatements alone without further mechanisms that **[*20]** did not "otherwise exclude [the party] from the market" and were thus insufficient to establish predatory conduct under the Sherman Act). We find IET's pleadings about Illumina's allegedly false statements are sufficient to survive a motion to dismiss, and need not consider IET's other claims about Illumina's allegedly predatory behavior.

B. Specific Intent to Monopolize

Next, Illumina argues IET has failed to allege an intent to achieve a monopoly. (Mem. at 9-10.) In attempted monopolization claims, "[s]pecific intent may be inferred from predatory conduct." *Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 541 (7th Cir. 1986)* (analyzing appeal of an order granting defendants summary judgment); *see also* *Viamedia, Inc. v. Comcast Corp., 218 F. Supp. 3d 674, 687 n.6 (N.D. Ill. 2016)* (noting that courts often infer intent from predatory behavior for purposes of a *Rule 12(b)(6)* motion to dismiss monopolization and attempted monopolization claims); *DSM Desotech Inc. v. 3D Sys. Corp., No. 08 C 1531, 2009 U.S. Dist. LEXIS 5980, 2009 WL 174989, at *10 (N.D. Ill. Jan. 26, 2009)* ("Although the specific intent requirement is consistently listed in the Seventh Circuit as a separate inquiry from the predatory conduct element, the same evidence that is used to prove predatory conduct often establishes specific intent as well."). As established above, IET has sufficiently alleged anticompetitive conduct; accordingly, we infer specific intent from the same **[*21]** allegations for the purposes of this motion.

C. Dangerous Probability of Achieving Monopoly Power

Next, Illumina argues IET has not alleged a dangerous probability of achieving a monopoly in the two alleged markets. A dangerous probability of establishing a monopoly in a market requires more than allegations of mere "unfair or predatory conduct"; instead, "the antitrust plaintiff must also prove the defendant has market power in a relevant market" and that the "market power will tend to approach monopoly power if the alleged unlawful conduct remains unchecked." *Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc., 669 F. Supp. 2d 895, 900-01 (N.D. Ill. 2009)* (citing *Spectrum Sports, 506 U.S. at 457, 113 S. Ct. at 891*; *DSM Desotech Inc. v. 3D Sys. Corp., No. 08 C 1531, 2009 U.S. Dist. LEXIS 5980, 2009 WL 174989, at *7 (N.D. Ill. Jan. 26, 2009))*. Courts regularly find pleading the defendant's share of the relevant market sufficient to allege this element at the pleading stage. *Walter Kidde, 669 F. Supp. 2d at 901*; *see also* *Avnet, Inc. v. Motio, Inc., No. 12 C 2100, 2015 U.S. Dist.*

*LEXIS 10799, 2015 WL 425442, at *6 (N.D. Ill. Jan. 30, 2015)* (finding an allegation that defendant controlled ninety-five percent of a market sufficient to survive a motion to dismiss); *Hon Hai Precision Indus., 2009 U.S. Dist. LEXIS 9165, 2009 WL 310890, at *3* (dismissing attempted monopolization claim under the Sherman Act for failure to plead dangerous probability of achieving a monopoly, noting that "the extent of [defendant]'s worldwide share in the relevant market . . . would allow the Court to infer that [defendant] threatens or even has the capacity to obtain monopoly power"). **[*22]** Lack of "competition in the relevant market" also suggests a dangerous probability of establishing a monopoly. *Hon Hai Precision Indus, 2009 U.S. Dist. LEXIS 9165, 2009 WL 310890, at *3*.

We previously dismissed IET's attempted monopolization claims after finding IET had failed to identify any non-conclusory facts demonstrating Illumina's market power in the relevant markets. (Order at 6.) Illumina presently argues the new statistics IET included in its second amended complaint still fail to establish Illumina's power in the relevant markets. (Mem. at 7.) IET states that based on figures from 2016, Illumina maintains a market share between sixty-three and sixty-seven percent in the secondary resale market of refurbished sequencing units. (2d Am. Compl. ¶¶ 20, 33.) IET alleges Illumina has an even higher market share in the used Illumina unit market, and that fewer than five companies in the United States and Canada sell used Illumina units. (*Id.* ¶ 11.) Specifically, IET claims Illumina's market share in the used Illumina unit market is higher because Thermo Fisher Scientific, which has a twenty-four percent market share in the used unit market generally, does not resell Illumina sequencing units. (*Id.* ¶ 20.) We find the pleading of specific percentage of market **[*23]** share of sixty-three and sixty-seven percent, which is allegedly even higher for the used Illumina sequencing unit market, sufficiently establishes probability of achieving monopoly power at this stage. (*Id.* ¶ 20.) *See, e.g., Walter Kidde, 669 F. Supp. 2d at 902* (finding plaintiff's allegations defendant controlled sixty-five percent of the market to be "sufficient" at pleading stage to establish market share); *Am. Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 1133, 90 L. Ed. 1575 (1945)* (describing a company's control of over two-thirds of the cigarette market to constitute a substantial monopoly); *see also Endsley v. City of Chi., 230 F.3d 276, 282 (7th Cir. 2000)* (explaining that "frequently, questions of whether the defendant possessed the requisite market power to establish a monopoly are addressed on a motion for summary judgment or [at] trial").

Illumina seemingly misconstrues IET's statistics, arguing "IET does not allege that Illumina *sold* 63% of the genome sequencing systems in this putative relevant market," but "[i]nstead, this alleged 63% figure apparently reflects the share of resold genome sequencing systems *manufactured* by Illumina." (Mem. at 7.) While we agree this would be an important distinction, the relevant language of the second amended complaint discusses percentages of revenue from the sale of used sequencing units, not unit **[*24]** manufacturers. For example, IET pulls the sixty-three to sixty-seven percent figures from the "2016 total global" and "U.S. market share" of "market revenue for refurbished genome sequencing systems." (2d Am. Compl. ¶ 20.) IET clearly is referring to each company's percentage of total revenue from the sale of refurbished sequencing units, not the manufacturer of the units themselves.

Finally, Illumina argues that IET's acknowledgment of the existence of competitors in the used sequencing unit market "suggests Illumina does not have a dangerous proximity of monopoly power." (Mem. at 8 (citing Order at 7).) As mentioned above, IET states that other third parties resell Illumina's used sequencing units, including Certified Gene Tool, Carmet Scientific, and some sellers on E-Bay. (2d Am. Compl. ¶ 33.) However, especially when paired with Illumina's alleged market share, the mere existence of a small number of competitors in the relevant markets is not "fatal" to IET on this element. (Mem. at 8.) *See Walter Kidde, 669 F. Supp. 2d at 902* (finding the existence of three "main competitors" in the relevant market combined with defendant's alleged sixty-five percent market share to be sufficient to state a claim at the pleading **[*25]** stage).

Accordingly, based on the pleadings, IET has sufficiently alleged that Illumina "had sufficient market power to have been able to create a monopoly." *Endsley, 230 F.3d at 282* (citing *Hennessy Indus. Inc. v. FMC Corp., 779 F.2d 402, 405 (7th Cir. 1985))*.

D. Antitrust Injury

Finally, Illumina argues IET's antitrust claims must be dismissed because IET has failed to plead an alleged antitrust injury. (Mem. at 9; Reply (Dkt. No. 61) at 7-8.) Antitrust injury is a threshold requirement for private antitrust plaintiffs; the parties do not dispute that IET must plead an antitrust injury. (Reply at 7-8; Resp. at 13-14.) *See* *United States ex rel. Blaum v. Triad Isotopes, Inc., 104 F. Supp. 3d 901, 925 (N.D. Ill. 2015)* (discussing the "amorphous presence" of antitrust injury in "antitrust jurisprudence"). Antitrust injury is also a requisite element of a claim pursuant to *§§ 4* and *16 of the Clayton Act*. *15 U.S.C. § 15(a)* ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ."); *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 1889, 109 L. Ed. 2d 333 (1990)*. To prove an antitrust injury, plaintiff must show the injury is "the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atl. Richfield Co., 495 U.S. at 334, 110 S. Ct. at 1889* (internal citation omitted). In other words, "a private plaintiff must show antitrust injury—which is to say, injury by reason of those things that **[*26]** make the practice unlawful, such as reduced output and higher price." *U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 626-27 (7th Cir. 2003)*.

IET alleges it has suffered a number of injuries as the result of Illumina's alleged anticompetitive behavior, namely lost "actual and potential" sales of used sequencing units. (2d Am. Compl. ¶¶ 9, 11, 23-24, 45.) We agree with IET that its losses could "stem from the 'competition-reducing aspect' of Illumina's behavior." (Resp. at 14 (citing *Atl. Richfield Co., 495 U.S. at 344, 110 S. Ct. at 1894*) (emphasis removed).) This is because IET is not merely complaining about lost sales due to competition. Instead, IET alleges that Illumina's alleged predatory behavior is driving all third-party sequencing unit resellers out of the relevant markets, and as competition is eliminated, Illumina will raise prices, which will harm the consumer. (Resp. at 13-14.) *Cf.* *Ehredt Underground, Inc. v. Commonwealth Edison Co., 90 F.3d 238, 240 (7th Cir. 1996)* ("[W]e stress that antitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business."); *Stamatakis Indus., Inc. v. King, 965 F.2d 469, 471 (7th Cir. 1992)* ("[T]he plaintiff's complaint is too much competition (injuring producers) rather than too little (injuring consumers). Entertaining claims of excessive competition would undermine the functions of the antitrust laws."). Accordingly, IET has **[*27]** sufficiently pled an antitrust injury as it claims its lost sales are due to Illumina's attempt to establish market power.

* * *

As IET has sufficiently plead the required elements to support an attempted monopolization claim under the Sherman Act, we deny Illumina's motion to dismiss IET's attempted monopolization claims (Counts I, II, and V).

II. ICFA AND UDTPA CLAIMS (COUNTS III & IV)

Finally, we consider IET's state law fraud claims. Illumina argues we must dismiss these claims because (1) IET did not allege it lost sales to Illinois customers and (2) none of Illumina's alleged misrepresentations "fall[] within the purview of the UDTPA." (Mem. at 13.)

A. Geographic Nexus to Illinois

As established in our previous order, both the ICFA and UDTPA have a limited reach outside of Illinois. (Order at 9.) *See* *Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill. 2d 100, 185, 835 N.E.2d 801, 853, 296 Ill. Dec. 448 (Ill. 2005)* (holding the ICFA does not "apply to fraudulent transactions which take place outside of Illinois"); *see also* *LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 809 F. Supp. 2d 857, 859 (N.D. Ill. 2011)* ("The Court concludes that the rule in *Avery* applies to the []UDTPA.").

To qualify as sufficiently "within Illinois" to bring a claim under the ICFA or UDTPA, a plaintiff must allege "circumstances that relate to the disputed transaction occur primarily and substantially in Illinois." **[*28]** *Avery, 216 Ill. 2d at 187, 835 N.E.2d at 853*. "[T]here is no single formula or bright-line test for determining whether a transaction occurs within [Illinois]"; instead, "each case must be decided on its own facts." *Id.* Relevant factors include "(1) the claimant's residence; (2) the defendant's place of business; (3) the location of the relevant item that is the subject of the disputed transaction; (4) the location of the claimant's contacts with the defendant; (5) where the contracts at issue were executed; (6) the contract's choice of law provisions . . . ; (7) where the allegedly deceptive statements were made; (8) where payments for services were to be sent; and (9) where complaints about the goods or services were to be directed." *Haught v. Motorola Mobility, Inc., No. 12 C 2515, 2012 U.S. Dist. LEXIS 119575, 2012 WL 3643831, at *3 (N.D. Ill. Aug. 23, 2012)*.

We previously dismissed IET's state fraud claims because we found IET failed to plead facts sufficiently connecting Illumina's actions to the state of Illinois. (Order at 10 (finding IET maintaining its principal place of business in Illinois to be an insufficient connection to Illinois).) In its second amended complaint, IET adds a list of four potential customers in Illinois that IET allegedly lost because of Illumina's conduct.[5] (2d Am. Compl. ¶ 45.) Illumina argues we should again find IET **[*29]** failed to sufficiently allege the requisite nexus to Illinois to proceed under the ICFA or UDTPA. (Mem. at 13.)

IET pleads two essential factors that create a connection to Illinois: IET being an Illinois corporation with its principal place of business in Mundelein, Illinois, and five sales IET alleges it lost from four potential customers in Illinois. (2d Am. Compl. ¶¶ 13, 45.) A plaintiff's injury in Illinois combined with specifically-identified lost sales to customers in the state sufficiently establishes a nexus to Illinois at the pleading stage. *AB SCIEX, LLC, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *11* (finding plaintiff sufficiently pled a nexus to Illinois on ICFA and UDTPA claims based on plaintiff's incorporation and primary place of business in Illinois combined with lost sales to three customers in Illinois); *cf.* *Walker v. S.W.I.F.T. SCRL, 491 F. Supp. 2d 781, 795 (N.D. Ill. 2007)* (finding no substantial connection to Illinois when only tie is plaintiff's residence in Illinois, noting specifically that none of the parties' interactions or transactions occurred in Illinois).

B. Scope of the UDTPA

Finally, Illumina argues IET's UDTPA claim should be dismissed because none of Illumina's alleged actions fall under the scope of the Illinois statute. (Mem. at 14-15.) To succeed on a UDTPA claim, IET **[*30]** must show Illumina "engaged in one of the types of deceptive conduct enumerated in the statute." *Patel v. Zillow, Inc., No. 17 C 4008, 2018 U.S. Dist. LEXIS 76245, 2018 WL 2096453, at *4 (N.D. Ill. May 7, 2018)* (slip op.), *appeal filed*, No. 18-21330 (7th Cir. May 21, 2018). IET claims Illumina's alleged behavior falls under two categories of prohibited activities listed in *§ 2 of the UDTPA*. (2d Am. Compl. ¶¶ 40-46.) *Section 2* defines "deceptive trade practice[s]" to include a person who "in the course of his or her business, vocation, or occupation . . . (11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; [or] (12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding." *815 ILCS 510/2(a)(11)-(12)*. Illumina argues that its alleged behavior falls outside the scope of these subsections.

Illumina argues none of IET's allegations could fall under *subsection 12* because none of its alleged behaviors involve confusion related to the use of a "deceptive trade name, trademark, or other distinctive symbol." (Mem. at 14-15 (citing *ATC Healthcare Servs., Inc. v. RCM Techs., Inc., 192 F. Supp. 3d 943, 953 (N.D. Ill. 2016)*.) IET correctly observes in response that *subsection 12* is given broad interpretation. *Chi.'s Pizza, Inc. v. Chi.'s Pizza Franchise Ltd. USA, 384 Ill. App. 3d 849, 868, 893 N.E.2d 981, 998, 323 Ill. Dec. 507 (1st. Dist. 2008)*. However, The Seventh Circuit has clarified that "likelihood of confusion" under the UDTPA has the same meaning as in "traditional **[*31]** infringement cases." *McGraw-Edison Co. v. Walt Disney Prods., 787 F.2d 1163, 1174 (7th Cir. 1986)*. In trademark infringement law, "'likelihood of confusion' exists when the defendant's use of a deceptive trade name, trademark, or other distinctive symbol is likely to confuse or mislead consumers as to the source or origin of the product or service." *ATC Healthcare Servs., 192 F. Supp. 3d at 953*.

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[5] IET alleges "Illumina's conduct has resulted in lost sales of preowned Illumina equipment to the following Illinois customers dating back to 2010": (1) the University of Chicago in Chicago, Illinois; (2) Tempus in Chicago, Illinois; (3) Argon National Laboratory in Argon, Illinois; and (4) ACGT Inc. in Wheeling, Illinois. (2d Am. Compl. ¶ 45.) IET alleges it lost two separate sales of Illumina GA2X systems to the University of Chicago. (*Id.*)

Here, IET has not alleged any behavior by Illumina that suggests Illumina used any sort of trademark or trade symbol of IET, and IET does not claim Illumina ever misled customers about the source of relevant sequencing units. We thus agree that IET has failed to meet the requirement of *subsection 12*. *Id.* (dismissing claim under *UDTPA subsection 12* because plaintiff did not allege defendant "tried to pass of its services as those of [plaintiff]," and because there was no confusion which company was contacting customers); *Lorillard Tobacco Co. v. Elston Self Serv. Wholesale Groceries, Inc., No. 03 C 4753, 2009 U.S. Dist. LEXIS 48615, 2009 WL 1635735, at *5 (N.D. Ill. June 9, 2009)* ("The concern over 'a likelihood of confusion or misunderstanding' in the Deceptive Practices Act is the same as that in trademark infringement cases. The focus is whether there is a likelihood of confusion over the *origin* of the product.") (internal citation omitted).

We do find, however, that IET's allegations could fit *subsection 11*. There is scant case law interpreting "price reduction" under **[*32]** the UDTPA; however, Illinois courts have directed the UDTPA is to be given broad interpretation. *Duhl v. Nash Realty Inc., 102 Ill. App. 3d 483, 495, 429 N.E.2d 1267, 1277, 57 Ill. Dec. 904 (1st Dist. 1981)* ("There is a clear mandate from the Illinois legislature that the courts of this State utilize the Act to the utmost degree in eradicating all forms of deceptive and unfair business practices and grant appropriate remedies to injured parties."). Illumina argues that IET does not plead any behavior of Illumina that falls under *subsection 11* because IET claims Illumina made false statements regarding "Illumina's ability to charge software relicensing fees," statements Illumina claims are not related to "price reductions." (Mem. at 14.)

However, we agree with IET that Illumina's alleged behaviors could fall within the scope of *subsection 11* if we consider the total price of a used Illumina unit to include both its price and the cost of its operating software. IET argues Illumina made false or misleading statements about Illumina's ability to charge software licensing fees for used Illumina sequencing units, and that a customer would not be subject to this fee should they purchase a used Illumina unit directly from Illumina. (2d Am. Compl. ¶¶ 5-6.) When considering the total price of a unit, **[*33]** the result of Illumina's threatened licensing fee is a lower total cost of a used Illumina sequencing unit if purchased from Illumina instead of IET. If Illumina did not have the right to charge this software licensing fee, this could constitute a false or misleading statement about its ability to offer a reduced price for the same equipment. Accordingly, making all inferences in IET's favor, we find IET's allegations could state a violation of *subsection 11*, and accordingly deny Illumina's motion to dismiss Count IV.

CONCLUSION

For the aforementioned reasons, we hereby deny Illumina's motion to dismiss. Illumina shall file its answer to IET's second amended complaint on or before September 12, 2018. The principal attorneys for Illumina and IET shall appear before the Court with an agreed written discovery plan at the Court's status call on October 18, 2018 at 10:30 a.m. It is so ordered.

/s/ Marvin E. Aspen

Marvin E. Aspen

United States District Judge

Dated: August 14, 2018

Chicago, Illinois 24

Viamedia, Inc. v. Comcast Corp.

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

August 16, 2018, Decided; August 16, 2018, Filed

Case No. 1:16-cv-05486

Reporter

335 F. Supp. 3d 1036 *; 2018 U.S. Dist. LEXIS 138661 **; 2018-2 Trade Cas. (CCH) P80,500; 2018 WL 3921741

VIAMEDIA, INC., Plaintiff, v. COMCAST CORPORATION and COMCAST SPOTLIGHT, LP, Defendants.

Subsequent History: Reversed by, Remanded by *Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 2020 U.S. App. LEXIS 5469, 2020 WL 879396 (7th Cir. Ill., Feb. 24, 2020)*

Prior History: *Viamedia, Inc. v. Comcast Corp., 218 F. Supp. 3d 674, 2016 U.S. Dist. LEXIS 152990 (N.D. Ill., Nov. 4, 2016)*

Core Terms

interconnects, avails, antitrust, full-turnkey, damages, anticompetitive conduct, customers, terms, competitor, anticompetitive, rival, expert testimony, summary judgment, interconnect-only, advertising, monopolist, selling, contracts, Cable, tying product, products, sales, compete, monopolization, bundle, firms, tie, diagnostic tool, anti trust law, tied product

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Judges: Hon. Amy J. St. Eve, United States Circuit Judge.

Opinion by: Amy J. St. Eve

Opinion

[*1042] **MEMORANDUM OPINION AND ORDER**

AMY J. ST. EVE, Circuit Judge*:

This antitrust suit was born when a monopolist in one market decided not to do business with a competitor from a related market. The monopolist, Comcast Corporation, denied its competitor, Viamedia, Inc., access (or access on terms Viamedia considered reasonable) to much-needed sales platforms called interconnects. Hurting as it lost

* Sitting by designation (R. 346).

revenue and customers turned to Comcast, Viamedia sued under Section 2 of the Sherman Act and various state antitrust laws. *See* Compl., R. 1; Am. Compl., R. 40.

At the motion-to-dismiss stage, the Court ruled that Comcast had no **[**2]** antitrust duty to deal with Viamedia and thus its refusal to deal was not cognizably anticompetitive under Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004), and its progeny. Viamedia, Inc. v. Comcast Corp., 218 F. Supp. 3d 674, 698-99 (N.D. Ill. 2016); Viamedia, Inc. v. Comcast Corp., No. 16-CV-5486, 2017 U.S. Dist. LEXIS 24213, 2017 WL 698681, at *3-6 (N.D. Ill. Feb. 22, 2017). Now, at the summary-judgment stage, the question is whether Comcast's conduct can be characterized as something more—tying, exclusive dealing, or another form of anticompetitive conduct. It cannot. Undisputed facts reveal that Viamedia's alternative theories are lacking as a matter of law. Undisputed facts demonstrate that Comcast's refusal to deal with Viamedia—not coercive conduct directed at their mutual customers—is what caused Viamedia's injuries and damages.

Before the Court are Comcast's motion for summary judgment (R. 264), motion to exclude opinions proffered by Viamedia, Inc.'s damages expert, Thomas Lys, Ph.D. (R. 212), and motion to exclude certain opinions proffered by Viamedia's liability expert, Harold Furchtgott-Roth (R. 208). For the reasons explained below, the Court grants Comcast's motion for summary judgment, grants in part Comcast's motion to exclude Dr. Furchtgott-Roth's opinions and denies the remainder as moot, grants Comcast's motion to exclude Dr. Lys's opinions, and enters judgment in Comcast's favor.

[*1043] BACKGROUND

I. Factual Background [**3]

Northern District of Illinois Local Rule 56.1 frames how district courts receive facts at the summary-judgment stage. *See* Delapaz v. Richardson, 634 F.3d 895, 899 (7th Cir. 2011). Local Rule 56.1(a)(3) requires the movant to provide "a statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law." L.R. 56.1(a)(3); Curtis v. Costco Wholesale Corp., 807 F.3d 215, 219 (7th Cir. 2015). The nonmovant must then file "a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon." L.R. 56.1(b)(3)(B); Petty v. Chicago, 754 F.3d 416, 420 (7th Cir. 2014). The nonmovant may also submit a separate statement of additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other materials relied upon to support those facts. L.R. 56.1 (b)(3)(C); *see also* Ciomber v. Coop. Plus, Inc., 527 F.3d 635, 643-44 (7th Cir. 2008).

The purpose of Local Rule 56.1 statements and responses is to identify the relevant admissible evidence supporting the material facts, not to make factual or legal arguments. Cady v. Sheahan, 467 F.3d 1057, 1060 (7th Cir. 2006); *see also* United States v. 5443 Suffield Terrace, Skokie, Ill., 607 F.3d 504, 510 (7th Cir. 2010) ("[S]ummary judgment may only be defeated by pointing to admissible evidence in the summary judgment record that creates a genuine issue of material fact, and it was not the district court's job to sift through the record **[**4]** and make [a claimant's] case for him"). Unresponsive, argumentative, evasive, and unsupported denials are improper, *e.g.,* Morrill v. Nielsen, 2018 U.S. Dist. LEXIS 106950, Phillips v. Quality Terminal Servs., LLC, 855 F. Supp. 2d 764, 771 (N.D. Ill. 2012), and district courts may disregard improper denials and deem the opponent's facts admitted, *e.g.,* Aberman v. Bd. of Educ. of Chi., 242 F. Supp. 3d 672, 677 (N.D. Ill. 2017). *See also* Boss v. Castro, 816 F.3d 910, 914 (7th Cir. 2016) ("The district court's discretion to require strict compliance with Local Rule 56.1 has been upheld time and again."). Moreover, "[w]hen reviewing a summary judgment motion, courts may only consider admissible evidence." FED. R. CIV. P. 56(c); McGreal v. Vill. of Orland Park, 850 F.3d 308, 312-14 (7th Cir. 2017). "To be considered on summary judgment, evidence must be admissible at trial, though 'the form produced at summary judgment need not be admissible.'" Cairel v. Alderden, 821 F.3d 823, 830 (7th Cir. 2016) (quoting Wragg v. Village of Thornton, 604 F.3d 464, 466 (7th Cir. 2010)). With those principles and the Rule 56 standard in mind, the parties' respective Local Rule 56.1 statements and responses describe the following backdrop to this lawsuit.[1]

A. The Spot Cable Business and Interconnects

Cable networks, like ESPN or CNN, typically allocate small windows of air **[*1044]** time—two to three minutes per hour—to the multichannel video programming distributors ("MVPDs") that show their programming. CSF ¶ 7.[2] These windows, according to industry parlance, are called "availabilities," "avails," or "spot cable ads." *Id.* ¶¶ 7, 9. About a quarter of the time, MVPDs retain those avails to advertise **[**5]** their or their affiliates' services. VSF ¶ 5. MVPDs sell the remainder to outside advertisers—and how they choose to do so is the focus of this case. *See* CSF ¶ 9.

There are many MVPDs nationwide, including Comcast, RCN Corporation, Wide Open West ("WOW!"), Charter Communications, Inc., Atlantic Broadband, and Verizon Communications. MVPDs come in different forms—cable operators, like Comcast or Charter; telecom providers, like Verizon and AT&T; overbuilders, like WOW! and RCN; and satellite providers, like DISH or DirectTV. *Id.* ¶ 8. Most MVPDs offer their services in one or more metropolitan regions, called designated market areas ("DMAs"). *Id.* ¶ 5. There are typically four or more MVPDs in a DMA. Comcast Ex. 2, Furchtgott-Roth Report ¶ 17 (R. 273-5).

In any given DMA, there are different ways in which MVPDs sell avails to advertisers. Some MVPDs sell directly through their own sales force. CSF ¶ 10. Others hire advertising-representation firms that specialize in spot cable advertising ("Ad Reps"). *Id.* ¶ 11. Viamedia is such an Ad Rep, and it has no corporate affiliation with any MVPD. *Id.* ¶ 13. Viamedia, in fact, is the only independent Ad Rep with significant market presence. VSF ¶ **[**6]** 9.[3] Comcast, under the trade name Comcast Spotlight, also does business as an Ad Rep, both on its own behalf and on behalf of other MVPDs.[4] CSF ¶ 5.

When an MVPD hires an Ad Rep, the two typically enter into an "advertising purchase and sale" agreement. *Id.* ¶ 11. Under these agreements, an Ad Rep is responsible for managing and selling an MVPDs' avail inventory (or some portion of it) to advertisers. *Id.* ¶¶ 11-12; VSF ¶ 1. Ad Reps can represent their MVPD customers: (1) locally, selling only a part of an MVPD's avails in a DMA to local advertisers; (2) regionally, selling all of the MVPD's avails in a DMA; or (3) nationally. Furchtgott-Roth Report ¶ 21. In any event, Ad Reps' sales responsibilities entail ancillary responsibilities, too, including: marketing and pricing the avails; maintaining the software and hardware needed to run, insert, traffic, monitor and advertise spot cable ads; organizing inventory into schedules and ensuring each ad runs correctly during those schedules; and performing financial services, like accounting, billing, and collection. VSF

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[1] Comcast argues that Viamedia's Statement of Additional Facts exceeds the court-ordered limit of 75 facts (*see* R. 315) by compounding multiple facts into single paragraphs, and asks the Court to strike the stated facts exceeding that limit. R. 339 at 25. Although Comcast has a point—Viamedia's fact-packing borders on gamesmanship—the Court, in its discretion, will not strike any of Viamedia's stated facts. *See* Benuzzi v. Bd. of Educ. of Chi., 647 F.3d 652, 655 (7th Cir. 2011) (courts have "broad discretion" in enforcing local rules). Comcast is (though less so) guilty of the same tactic, and the additional facts Viamedia offers do not impact the Court's analysis.

[2] The Court will refer to Comcast's Rule 56.1 Statement of Undisputed Facts with Viamedia's responses (R. 327) as "CSF," and Viamedia's Rule 56.1 Statement of Additional Facts with Comcast's responses (R. 341) as "VSF." Unless otherwise noted—specifically, with a "Resp. to ¶"—a citation to a paragraph refers to the paragraph itself and not to the opposing party's response.

[3] Comcast challenges this fact, proffered by Viamedia's expert Dr. Furchtgott-Roth, as unsupported because Dr. Furchtgott-Roth's opinions are inadmissible. *See* Furchtgott-Roth Report ¶ 44. Comcast, however, did not move to exclude this opinion from Dr. Furchtgott-Roth's report. *See* R. 211.

[4] Comcast Cable Communications Management, LLC is a successor to Comcast Spotlight, and it is a wholly owned subsidiary of Comcast Corporation. CSF ¶ 5. Both parties nevertheless refer to Comcast's spot cable ad rep business as Spotlight, and so will the Court.

¶ 1. Ad Reps are also responsible for working with interconnects to sell avails. *Id.* These services make up "Ad Rep Services," **[**7]** according **[*1045]** to Viamedia. *Id.; see also* Furchtgott-Roth Report ¶¶ 22-29.

An interconnect is a "one stop shop" where advertisers can purchase spot cable ads on a DMA-wide basis. CSF ¶ 16. Developed by MVPDs in the 1990s, interconnects solve a market inefficiency. Before interconnects, an advertiser wanting to reach television audiences with commercials running at the same time on the same channel across the DMA had to either rely on over-the-air broadcast stations exclusively or negotiate separately with each MVPD. CSF ¶¶ 14-15, Resp. to ¶ 14. An interconnect—of which there is one per DMA—fixes that problem by pooling together avails among the DMAs' MVPDs, scheduling allocations, selling and coordinating the sale of those avails, and billing the parties. *Id.* ¶ 17, Resp. to ¶ 17. These collective services make up "Interconnect Services," according to Viamedia. *Id.; see also* Furchtgott-Roth Report ¶¶ 30-42.

Over the last decade or so, the largest MVPD in a DMA has come to operate that DMA's interconnect. *Id.* ¶ 18; *see also* Am. Compl. ¶¶ 13, 44. In operating the interconnect, the controlling MVPD makes investments to support and maintain the platform. The degree and nature of those investments **[**8]** are disputed, but, at a minimum, MVPDs invest in and maintain a sales infrastructure for the interconnects. CSF ¶ 20, Resp. to ¶ 20; *see also* Comcast Ex. 14 at 147:11-14 (David Solomon, Viamedia's Chief Revenue Officer, testifying that, "I'm sure [Comcast] ha[s] over the past 18 years . . . spent significant [sic] to establish support, build and maintain their infrastructure" over the interconnects").

Ad Reps, pursuant to the purchase and sale agreements, profit from the sale of MVPDs' avails based on an agreed revenue share, or split, with the MVPD. CSF ¶ 38. The split is the percentage division of the revenue generated from the avails' sales, with a share going to the Ad Rep and the remainder to the MVPD. *Id.* A higher split share for the Ad Rep means a worse price for the Ad Rep's services to the MVPD, and vice versa. *Id.* ¶ 39. Also important, of course, is the amount of revenue generated—an MVPD could concede a less favorable split if it thought that the Ad Rep would be able to generate more revenue. *Id.*, Resp. to ¶¶ 38, 39. Ad Reps also sometimes provide MVPDs with minimum-revenue guarantees. *Id.* ¶ 40. Revenue splits and guarantees are "critical points of competition" between Ad **[**9]** Rep firms vying for MVPD business. *Id.* ¶ 41.

As to other terms of Ad Rep-MVPD agreements, the industry standard is exclusive, region-wide, full-turnkey representation. CSF ¶¶ 25-27. In a full-turnkey representation, the MVPD sells all of its avails in one or more DMA (absent the portion it wants to retain for self-advertising) to a single Ad Rep. *Id.* The Ad Rep then enjoys the "exclusive right to manage and sell" the avails. *Id.* ¶ 27; VSF ¶ 2. This arrangement offers "one stop shopping" for both MVDPs and Ad Reps. CSF ¶ 28. Full-turnkey representation comes with other services, too; Viamedia, for example, assists MVPDs with their branding efforts, product promotions, and technical problems. VSF ¶ 6.

Though the most prominent, full-turnkey is not the only form of Ad Rep Services. Some MVPD customers hire Ad Reps to represent them locally, and sign over only a portion of their avails in a DMA. *E.g.*, Furchtgott-Roth Report ¶¶ 24-25; *see also id.* ¶ 53 ("Spot Cable Ad Rep Services and Interconnect Services are separate products regardless of whether Spot Cable Ad Rep Services are provided on a full turnkey basis"). Other MVPDs may self-provide Ad Rep Services. Furchtgott-Roth Report ¶¶ 24-25. **[**10]**

[*1046] Interconnect operators can also work directly with an MVPD customer to sell a portion of the MVPD's avails without a third-party Ad Rep. *See id.* ¶ 53; CSF ¶ 29. This arrangement is called an "interconnect-only" agreement. CSF ¶ 30. In such an agreement, the MVPD sells a portion of its avails to the interconnect operator for sale on a DMA-wide basis. *Id.* ¶ 29. Interconnect-only agreements allow interconnect operators to provide Interconnect Services directly to MVPDs. VSF ¶ 67. To sell the remaining avails on a local (*i.e.*, not regional or DMA-wide) basis, MVPDs with an interconnect-only agreement may sell their own avails or hire an Ad Rep for "local-only" agreements. CSF ¶¶ 29, 31, 33, 126; *see also* VSF ¶ 67. Verizon and Frontier, Verizon's successor in certain DMAs, have previously opted for this arrangement in some DMAs. CSF ¶¶ 32-37. For its part, Comcast has been willing to enter into interconnect-only agreements; since December 2011, 14 percent of Comcast's agreements with MVPDs have been interconnect-only. *Id.* ¶ 129. Comcast entered into its most recent interconnect-only deal in September 2016. *Id.* ¶ 125; Comcast Ex. 58.

B. Comcast's Competition with Viamedia and Control of the [11] Interconnects**

Viamedia and Comcast compete as Ad Reps for business from MVPD clients in many DMAs. VSF ¶ 9. The record reflects that both have respective advantages. Comcast, as a large MVPD, and in some DMAs the largest (and therefore the operator of the interconnect), requires less incremental operation expenses to represent fellow MVPDs. CSF ¶ 115; Comcast Ex. 96 at 16 (internal Viamedia presentation stating "Viamedia can not [sic] compete economically within the footprint of a major cable company"); *see also* Comcast Ex. 18 at 93:5-19. Particularly relevant here, Comcast operates the interconnects in Chicago, Detroit, and Hartford, Connecticut. *Id.* ¶ 10. At the same time, some MVPDs have expressed that "all things being equal" they would prefer that a competitor, like Comcast, not represent them. VSF ¶ 7; Viamedia Ex. 69 at 8 ("RCN is not comfortable having its largest and most formidable rival as its representative in the spot cable market"). This benefits an unaffiliated Ad Rep, like Viamedia. *Id.* Viamedia's former Chief Financial Officer, Christopher Black, has also testified that Viamedia had "[l]ong term relationships with . . . certain MVPDs" and provided strong customer service. **[**12]** *Id.* ¶¶ 6, 8; Viamedia Ex. 8. Both Viamedia and Comcast pursue full-turnkey relationships with their MVPD clients, *Id.* ¶ 55; VSF ¶ 7, although, as noted, Comcast has entered into interconnect-only agreements with some frequency.

Ad Reps require interconnect "access" to compete effectively for MVPDs' business because of the substantial amount of advertising revenue interconnects generate. Am. Compl. ¶ 73; CSF ¶ 111; VSF ¶ 20. The parties engage in a semantic debate about whether Ad Reps access interconnects "on behalf" of their MVPD clients, and whether the MVPD clients "feel" as though they participate in the interconnects, but the economic facts of the transaction are straightforward. For an Ad Rep to obtain access, the interconnect operator contracts with the Ad Rep to acquire a portion of ad inventory from the Ad Rep, which the Ad Rep has already acquired responsibility for selling from its MVPD-client. *See* CSF ¶ 42; Comcast Ex. 34. The interconnect operator then arranges for the sale of those avails on the interconnect, and distributes proceeds to the Ad Rep accordingly. *Id.*

This was the agreement Comcast and Viamedia entered into in 2003. *Id.* ¶¶ 42- **[*1047]** 43. Pursuant to that agreement, **[**13]** Comcast had the exclusive right to sell through its Chicago and Detroit interconnects a portion of an ad inventory for which Viamedia had acquired responsibility from two of its clients, RCN and WOW!. *Id.* ¶ 43. Viamedia's representations of RCN and WOW! were, as is typical, exclusive and full-turnkey, meaning that RCN and WOW! could not resell their avails through another third party in the Chicago and Detroit DMAs. *Id.* ¶¶ 44, 49. Viamedia's exclusive relationship with RCN was to expire at the end of 2015, and its exclusive relationship with WOW! was to expire at the end of 2014. CSF ¶¶ 88, 96; VSF ¶¶ 26, 32. Further, the 2003 agreement contained a non-solicitation clause, which prohibited Comcast from contacting RCN or WOW! for certain periods. CSF ¶ 45. The 2003 agreement between Comcast and Viamedia contemplated an expiration date of May 31, 2012. *Id.* ¶ 46.

Months before that expiration date, in December 2011, Comcast notified Viamedia that it would not be renewing the agreement. VSF ¶ 15; CSF ¶ 47. As a result, from June 2012 until the expiration of Viamedia's exclusive contracts with RCN and WOW!, Viamedia, RCN, and WOW! lost out on revenue they may have made if Viamedia could **[**14]** have continued to use Comcast's interconnects. *See* VSF ¶ 17.

Comcast did not renew its contract with Viamedia so that it could pursue full-turnkey relationships with RCN and WOW!. *Id.* ¶ 15. According to Comcast, it "prefers to do direct deals with MVPDs rather than intermediaries like Viamedia." CSF ¶ 48. Put another way, Comcast's strategy, starting in 2011, was "to get" MVPDs to employ Comcast on a full-turnkey basis. VSF ¶ 15; Viamedia Ex. 57; *see also, e.g.*, Viamedia Ex. 53 (citing Comcast's "[r]ealigned business strategy for 2012 and beyond with non-renewal of Viamedia contract for allowing for full turnkey opportunities into the future."). To that end, Comcast stopped contracting "with 'middlemen' media firms, such a Viamedia." Viamedia Ex. 69 at 9. One Comcast executive explained: "Working through a middleman, intermediary, like Viamedia really brought no value to the table other than their contract with their respective MVPDs," and so the company looked to deal directly with the MVPDs. Viamedia Ex. 21 at 167.

Whatever Comcast's motivations, its strategy and Viamedia's resultant inability to access the interconnects in Chicago and Detroit cost Viamedia, RCN, and WOW! "millions **[**15]** of dollars in revenue" between June 2012 and 2015. VSF ¶ 23. This came as no surprise to Comcast. In 2011, it knew that Viamedia had the exclusive right to sell all of WOW! and RCN's avails in Chicago and Detroit "for several years into the future," VSF ¶ 14, and it conducted an internal analysis that projected that its decision to not renew with Viamedia would negatively impact Comcast Spotlight, Viamedia, RCN, and WOW! in 2012, *id.* ¶ 16. In addition to Chicago and Detroit, Comcast has denied Viamedia's request to enter into an interconnect agreement with it in the Hartford DMA, where Viamedia represents Frontier. *Id.* ¶ 18.

In 2014, however, Comcast and Viamedia began negotiating a contract to permit Viamedia access to the Chicago, Detroit, and Hartford interconnects. *Id.*, Resp. to ¶ 18. WOW! even got involved, and directly requested that Comcast allow its avails (still contracted to Viamedia) to be sold on the interconnects "immediately." *See* VSF ¶ 19.[5] Yet Comcast and Viamedia failed to **[*1048]** reach terms. Viamedia's Chief Executive Officer, Mark Lieberman, called Comcast's offer "neither fair nor reasonable." Comcast Ex. 116.

C. Viamedia's Subsequent Lost Business

From 2011, when **[**16]** Comcast notified Viamedia that it would not renew their interconnect agreement in Chicago and Detroit, until 2016, when Viamedia filed this lawsuit, Viamedia operated in 90 DMAs representing at least nine MVPDs. CSF ¶¶ 54, 57. In that period, Viamedia bid for and lost several MVPD clients—and it attributes many of those losses, and others, to Comcast's conduct in Chicago, Detroit, and Hartford.

1. RCN

Up until 2015, Viamedia was RCN's only Ad Rep nationwide. VSF ¶ 32. In 2014, RCN and Viamedia began to negotiate renewing their full-turnkey agreements. CSF ¶ 96. During negotiations, Viamedia "stepped back its guarantees" and gave a "less favorable" offer in November of that year, which caused RCN to react negatively. CSF ¶ 97. RCN then, and for apparently the first time in its relationship with Viamedia, requested Viamedia's financials, which showed that the company was suffering. VSF ¶ 33. According to Viamedia, without interconnect access in Chicago and Detroit, it was "unable to make a competitive financial offer." *Id.* ¶ 33. RCN requested a bid for exclusive, full-turnkey services from Comcast in 2015. CSF ¶ 99. It never sought from Comcast an interconnect-only agreement. *See id.* Comcast **[**17]** ultimately offered superior terms, which, as a former RCN executive testified, made the offers "nowhere near equal" and a "not [ ] very difficult decision" for RCN to make. *Id.* ¶ 100. It selected Comcast as its full-turnkey Ad Rep, knowing that its decision could result in Viamedia exiting the Chicago DMA market. *Id.* ¶ 103.

RCN understood that it could not have its avails sold on Comcast-operated interconnects if it sought to do so through a third-party Ad Rep, like Viamedia. *Id.*, Resp. to ¶ 104; *see also* VSF ¶ 19. RCN wrote to the Federal Communications Commission during Comcast's proposed merger with Times Warner Cable ("TWC"), and explained that Comcast "limit[s] access to the interconnects to those firms [*i.e.*, MVPDs] that eschew the use of Viamedia and other third party representatives." Viamedia Ex. 69. It cited Comcast's policy, that it "does not typically contract with 'middlemen' media firms, such as Viamedia." *Id.*

2. WOW!

WOW! and Viamedia's relationship began in 2001. VSF ¶ 26. As of 2015, and after several contract renewals, Viamedia represented WOW! in 12 DMAs. *Id.* Expecting its contract with WOW! to expire at the end of 2014, WOW!

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[5] Viamedia paints these requests by WOW! as "directly solicited proposals." VSF ¶ 19. To the extent Viamedia means that WOW! sought a direct, interconnect-only deal with Comcast, it is mistaken. The record makes clear that WOW! in 2014 was still under contract with Viamedia (and so could not "directly" engage Comcast for anything, even an interconnect-only deal), and that WOW!'s 2014 request sought "to get *Viamedia* back into the Chicago and Detroit interconnects." Viamedia Ex. 14 at 108:25-109:4; *id.* at 105:16-19 (emphasis added).

solicited bids from Viamedia and Comcast **[**18]** in October 2013. CSF ¶ 88. WOW! selected Viamedia, but only for a year—to the end of 2015. *Id.* ¶ 89. In 2015, WOW! issued another bid to Comcast and Viamedia seeking proposals for exclusive, full-turnkey representation in eight DMAs, including Chicago and Detroit. *Id.* ¶ 90. WOW!, like RCN, never requested an interconnect-only deal from Comcast. *See id.* By the 2015 request for **[*1049]** bids, WOW! was "very unhappy" that Viamedia had not been able to sell its avails on the Chicago and Detroit interconnects. VSF ¶ 27. Comcast again offered better financial terms to represent WOW! in the Chicago and Detroit DMAs, and WOW! selected Comcast in those regions. CSF ¶¶ 91, 92. In so doing, WOW! recognized that its decision could force Viamedia out of the Chicago and Detroit regions. *Id.* ¶ 94. WOW!, however, selected Viamedia to represent it in other DMAs, like Columbus, Cleveland, and Tampa. VSF ¶ 29.

WOW! valued having its avails sold on the interconnects and the resulting substantial revenue. *Id.* ¶ 28. WOW!, like RCN, understood that if it wanted its avails sold on the Comcast-operated interconnects in Chicago and Detroit, it would need to directly contract with Comcast—it could not do so through Viamedia. **[**19]** *Id.* In weighing Viamedia and Comcast, for example, WOW! listed Comcast's interconnect access as a "pro" and Viamedia's lack thereof as a "con." Viamedia Ex. 68. Internal WOW! emails similarly reflect that the company believed it needed to have a "rep agreement" with Comcast to have its avails sold on the interconnects. CSF ¶ 95, Resp. to ¶ 95.

3. Verizon

In 2006, Viamedia and Verizon entered into a full-turnkey representation agreement for nine DMAs. CSF ¶ 58. In 2009, the parties extended the agreement through December 2013, but contracted to allow for Verizon to "negotiate for the sale of regional and/or national Commercial Advertising in any Other Market by means of an 'interconnect' in such DMA," including Dallas, Los Angeles, and New York. *Id.* ¶ 59. In May 2010, Verizon and TWC entered into an agreement, pursuant to which TWC purchased 40 percent of Verizon's avails in Dallas, Los Angeles, and New York—where TWC operated the interconnects—for sale on TWC's interconnects. *Id.* ¶ 60. That agreement contained a "Local Business Option." If TWC met certain performance metrics in 2011 and 2012, it could "elect to present Verizon's local advertising sales business" beginning in 2014. *Id.* ***[**20]*** ¶ 61.

In January 2013, pursuant to the Verizon-TWC contract, TWC notified Verizon that it was contemplating exercising the Local Business Option and attached its performance-metric calculations. *Id.* ¶ 62. Verizon responded on February 15, 2015, with a metrics report. Under the original TWC-Verizon contract, TWC had until March 15, 2013, or 30 days after receipt of the metrics report to exercise its Local Business Option. VSF ¶ 50. On March 15, 2013, however, the parties amended the agreement and extended the date by which TWC could exercise the Local Business Option to April 5, 2013. VSF ¶ 50, Resp. to ¶ 50. TWC exercised the Local Business Option on that day. *Id.* ¶ 50. Verizon then replaced Viamedia with TWC in those DMAs. *See* CSF ¶ 65. Further, and also in 2013, Verizon informed Viamedia that it had selected other Ad Reps—including Bright House, Cox, and Comcast—to represent it in several respective DMAs. VSF ¶ 47, Resp. to ¶ 47.

Before then, Verizon and Viamedia had started to negotiate for Viamedia's continued representation after 2013. *Id.* ¶ 50. During those negotiations, Verizon expressed concerns about Viamedia's fiscal health. *Id.* ¶ 50. In each DMA that Viamedia lost Verizon's **[**21]** business, it failed to match the terms offered by the competing Ad Reps. CSF ¶ 69.

4. Frontier

Viamedia has been an Ad Rep for Frontier since 2010. VSF ¶ 37. In 2014, Frontier acquired AT&T's MVPD system in Hartford. CSF ¶ 71. Comcast, which operates the Hartford interconnect, had previously **[*1050]** represented AT&T on a full-turnkey basis, and, under that agreement, any successor (like Frontier) had the right to assume Comcast's Ad Rep agreement. *Id.* ¶ 72. Frontier instead entered into an exclusive, full-turnkey agreement with Viamedia for the Hartford DMA, set to expire at the end of 2018. *Id.* ¶ 73; VSF ¶ 37. Comcast, however, has refused to enter into an agreement with Viamedia to allow for the sale of Frontier's avails on the Hartford interconnect. *Id.* ¶ 39. As a result, Viamedia and Frontier have not benefited from those potential sales, and Frontier's revenues fell below the baselines guaranteed by Viamedia in 2015 and 2016. *Id.* ¶ 41.

Outside of Hartford, Viamedia bid for Frontier's business in Los Angeles and Dallas (where Comcast does not run the interconnects). CSF ¶ 77. Frontier rejected Viamedia's offer because it fell "significantly below market value." *Id.* ¶ 78. Viamedia also lost **[**22]** Frontier's business in Tampa (where Comcast also does not control the interconnects) to Bright House. *Id.* ¶ 79.

5. Atlantic Broadband

In 2014, Atlantic Broadband sought bids from Comcast and Viamedia for exclusive, fullturnkey representation in seven DMAs (none of which was Chicago, Detroit, or Hartford). *Id.* ¶ 82. At the time, Comcast already represented Atlantic Broadband in each DMA; Viamedia had never represented Broadband. *Id.* ¶¶ 84?85. Comcast offered Atlantic Broadband terms "superior" to Viamedia. *Id.* ¶ 86. Atlantic Broadband chose Comcast. *Id.* ¶ 87. Viamedia, however, believes that it was "well positioned" to compete for Atlantic Broadband's business, and could have offered better terms and a more substantial guarantee if it had been allowed access to Comcast-controlled interconnects. VSF ¶¶ 51, 53.

6. Other Claimed Losses

Viamedia also claims that Comcast's refusal to allow its acquired avails to be sold on the Chicago, Detroit, and Hartford interconnects has harmed it in a bevy of ways. The refusal, according to Viamedia, has forced it to negotiate debt amendments, and incur bank and legal fees. *Id.* ¶ 54. In addition, it has had to pay certain personnel expenses, like "retention **[**23]** bonuses and severance payments," as well as wasteful fixed expenses, like "rent on unused office space in Chicago." *Id.* In 2012, Viamedia generated $212 million in revenue and had $23.5 million in EBITA annually, plus 460 employees who worked for 32 MVPD partners covering 4.7 million subscribers in 57 DMAs. *Id.* ¶ 56. Since 2012, however, Viamedia claims to have lost millions of investment dollars, its good reputation, talented employees, and the ability to renew or obtain new contracts with MVPD partners. *Id.* ¶ 57.

II. Procedural Background

Out of that factual backdrop, Viamedia filed this lawsuit on May 23, 2016. Viamedia brings claims of monopolization and attempted monopolization by Comcast in markets where it operates the interconnects in violation of *Section 2 of the Sherman Ac*t, *15 U.S.C. § 2*. Viamedia additionally raises state-law antitrust claims under the *Illinois Antitrust Act, 740 ILCS 10/3*, *Michigan Antitrust Reform Act, Mich. Comp. Laws § 445.771*, and *Connecticut Antitrust Act, Title 35, § 35-27*.[6] (Viamedia also brought a claim for tortious interference **[*1051]** with business expectancy, which it has since abandoned. *See* R. 326 at 14 n.2.) For Comcast's supposed antitrust wrongs, Viamedia seeks damages and asks the Court to "[e]njoin[ ] Comcast from **[**24]** engaging in the anticompetitive . . . conduct alleged, including any effort to exclude Viamedia or its MVPD clients from participating on a fair and open basis in the Interconnects." Compl. at 46; Am Compl. at 50.

A. The Motion-to-Dismiss Decisions

Comcast moved to dismiss the first complaint. R. 22, 23. As every claim of monopolization or attempted monopolization requires anticompetitive conduct, Viamedia proffered three in response to Comcast's motion to

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[6] Comcast and Viamedia agree that there is no material difference between the federal antitrust claims and their state-law claims. R. 271 at 11 n.3; R. 23 at 15; R. 28 at 15. For the same reasons why Viamedia's federal ***antitrust law*** claims fail (as explained below), so too does its state-law claims.

dismiss: tying, of Comcast's Interconnect Services to its Ad Rep Services; exclusive dealing, in that Comcast's contracts with MVPDs were exclusive; and a refusal to deal, by denying interconnect agreements with Viamedia or offering commercially unacceptable terms.[7] Viamedia, via a surreply, made clear that it was pursuing only "straightforward tying and exclusive dealing theories," plus refusal to deal or essential facilities claims; it was not pursuing a "free-standing" monopolization claim. R. 32. The Court held that Viamedia sufficiently pled tying and exclusive dealing so as to permit discovery on those claims, but dismissed the refusal to deal claim without prejudice because it did not meet the high bar set by *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*, and *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*.[8] Namely, **[**25]** Viamedia did not plead that Comcast's exclusion of it from the interconnects was irrational but for an anticompetitive purpose. *See* *Viamedia, Inc. v. Comcast Corp., 218 F. Supp. 3d 674, 698-99 (N.D. Ill. 2016) (Viamedia I)*.

Viamedia amended its complaint, realleging its refusal to deal claim. Comcast moved to dismiss this part of the amended complaint, R. 45, 46, which the Court granted. Again, the Court ruled, Viamedia did not plead that Comcast's decision to exclude it from the interconnects was an independently anticompetitive act. *Viamedia, Inc. v. Comcast Corp., No. 16-CV-5486, 2017 U.S. Dist. LEXIS 24213, 2017 WL 698681, at *4-6 (N.D. Ill. Feb. 22, 2017) (Viamedia II)*. As such, this case proceeded to discovery on Viamedia's tying and exclusive dealing claims.

B. Comcast's Liability and Damages Experts

During discovery, and in support of its case, Viamedia identified and proffered two expert witnesses: Dr. Furchtgott-Roth, to opine on Comcast's liability; and Dr. Lys, to opine on damages.

1. Dr. Furchtgott-Roth's Opinions

Dr. Furchtgott-Roth's opinions touch on "the nature and extent of Comcast's monopoly power," the distinction between Ad Rep Services and Interconnect Services, and the "exclusionary nature" of Comcast's actions and their impact on the Ad Rep Services market. According to Dr. Furchtgott-Roth, Ad Rep Services and Interconnect **[*1052]** Services are "separate products" **[**26]** because there is a "sufficient demand to purchase" those services separately. Furchtgott-Roth Report ¶ 47. He cites "substantial evidence" in support, including Viamedia's own "business model" and the MVPDs that receive "unbundled" Ad Rep and Interconnect Services. By a "conservative" estimate, he submits, 21.5% of cable subscribers use an MVPD that relies on unbundled services, once subscribers to MVPDs that self-provide Ad Rep Services are removed from the mix. *Id.* ¶ 50. He includes in that group MVPDs that enter into fullturnkey agreements with third-party Ad Reps, which in turn contract with the interconnect operator to have a portion of the avails sold on the interconnects. *Id.* Dr. Furchtgott-Roth further notes that, although Interconnect Services also entail the selling of avails to advertisers, Ad Rep Services include additional "back office" services, unlike Interconnect Services, which entail "creating and maintaining schedules of advertising, inserting advertising, negotiating with and monitoring Interconnect operators, and allocating advertising inventory among multiple sales channels." *Id.* ¶ 51. In further support of his separate-products opinion, Dr. Furchtgott-Roth states **[**27]** that "some MVPDs unbundle" services by entering into interconnect-only agreements and "self-providing" Ad Rep Services. *Id.* ¶ 53.

Having defined separate products, Dr. Furchtgott-Roth explains his tying opinion. Interconnect Services are the tying product, and Ad Rep Services are the tied product. *Id.* ¶ 63. Evidence of Comcast's tying policy, according to

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[7] Viamedia also raised a monopoly-leveraging theory, but that claim is predicated on underlying anticompetitive activity. *See* *Schor v. Abbott Labs., 457 F.3d 608, 611-13 (7th Cir. 2006)*.

[8] At the pleading stage, Viamedia also complained that Comcast had threatened to "shut Viamedia and its MVPD clients out" of using National Cable Communications LLC ("NCC"), a multi-DMA exchange. *See* Compl. ¶ 59. Viamedia appears to no longer pursue that theory, as "NCC" is mentioned in neither its response brief nor its Statement of Additional Facts.

Dr. Furchtgott-Roth, is found in testimony in which a Comcast executive—who worked in the Chicago and Detroit DMAs—agreed with the proposition that "if an MVPD wants to get access to Comcast [Spotlight] controlled Interconnect, it has to hire Comcast [Spotlight] as its ad sales representative." *Id.* ¶ 64. Dr. Furchtgott-Roth also cites testimony and documents suggesting that WOW! and RCN "understood" that they had to purchase Ad Rep Services from Comcast Spotlight to obtain access to the interconnects in 2014 and 2015. *Id.* Dr. Furchtgott-Roth reasons further that Comcast had to "exclude" Viamedia from Comcast-controlled interconnects as a "necessary" part of this tying policy, as it ostensibly made clear in 2011 when it "announced" that it was not going to renew its Interconnect agreement with Viamedia as a "continuation of a strategy **[**28]** to have full turnkey direct relationships with the MVPDs." *Id.* ¶ 65. Similarly, Comcast Spotlight's chief operating officer testified that non-renewal with Viamedia "freed [Comcast Spotlight] up" to "have the opportunity to present and have a direct relationship with WOW and RCN." *Id.* That tying practice has "manifested" in at least ten other DMAs as well, according to Dr. Furchtgott-Roth, as Comcast has also declined Viamedia interconnect access in those DMAs. *Id.* ¶ 69. Dr. Furchtgott-Roth opines further that the same conduct "that amounts to tying also amounts to exclusive dealing." *Id.* ¶ 72.

These practices lead Dr. Furchtgott-Roth to conclude that Comcast has foreclosed competition in the market for Ad Rep Services. *Id.* ¶ 90. That is, "by tying Spot Cable Ad Rep Services to Interconnect Services and entering into multi-year, exclusive contracts to provide both services as a bundle, Comcast Spotlight has created a formidable competitive advantage for itself over Viamedia." *Id.* ¶ 87. There is additional market foreclosure, Dr. Furchtgott-Roth opines, because MVPDs recognize that interconnect access is necessary to maximize their profits on avails, and Comcast has cut off Viamedia's **[**29]** access to Comcast-controlled interconnects. *Id.* ¶ 89-90.

[*1053] 2. Dr. Lys's Opinions

Dr. Lys's Amended Report calculates the damages Viamedia has purportedly suffered as a result of Comcast's conduct. He opines, ultimately, that Comcast has caused Viamedia $158 million in damages. Comcast Ex. 6, Lys Am. Report ¶ 37 (R. 273-9). Dr. Lys's opinions assume Comcast's liability for committing anticompetitive conduct. *Id.* ¶ 16. His opinions make the additional assumptions—albeit phrased as "understanding[s]" in his Amended Report—that Comcast's anticompetitive behavior resulted in the loss of several MVPD contracts. *Id.* ¶¶ 57-59. Specifically, Dr. Lys predicates his opinions on the "understanding" that "Comcast's anticompetitive conduct" caused Viamedia to lose the RCN and WOW! agreements in 2015, had a "material adverse effect on" Viamedia's retention of an agreement with Verizon in 2013, and caused Viamedia to fail to obtain an agreement with Atlantic Broadband in 2014. *Id.* His opinions also assume that Comcast's exclusion of Viamedia from the interconnects in Chicago, Detroit, and Hartford caused Viamedia to lose interconnect-related revenues, *id.* ¶ 56, and that Viamedia lost "out of pocket expenses" **[**30]** from Comcast's conduct. *Id.* ¶ 60. Dr. Lys divides his damages opinions into seven categories. His ultimate conclusion analyzes Viamedia's damages relating to: (1) interconnect-revenue losses in Chicago and Detroit; (2) interconnect-revenue losses in Hartford; (3) lost future agreements with WOW! for two DMAs; (4) lost agreements with RCN for five DMAs; (5) lost agreements with Verizon for nine DMAs; (6) lost agreements with Atlantic Broadband for six DMAs; and (7) out-of-pocket expenses.

On April 4, 2018, the Court held an evidentiary hearing regarding Dr. Lys's opinions pursuant to *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, and *Federal Rule of Evidence 702*. At the hearing, Dr. Lys explained his Amended Report in greater detail. In addition, he confirmed that his Amended Report assumed causation. The facts supporting his causation assumptions had been provided by Viamedia's management, although Dr. Lys noted that he "poked" their assertions to ensure that they had some sound basis. Dr. Lys elaborated that he did not think causation in this case could be demonstrated with economic analysis, because the market is one for services, not commodities. At the hearing, Viamedia's counsel, too, confirmed that Dr. Lys was not offered as an expert on causation. **[**31]** [9]

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[9] Belatedly, and despite not designating Dr. Lys as causation expert, Viamedia submitted additional opinions from Dr. Lys, including opinions regarding causation. The Court granted Comcast's motion to strike those opinions. R. 283.

LEGAL STANDARDS

I. Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A genuine dispute as to any material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. In deciding summary-judgment motions, "facts must be viewed in the light most favorable to the nonmoving party"—but "only if there is a 'genuine' dispute as to those facts." *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*.

The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact. **[*1054]** *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. After "a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson, 477 U.S. at 255* (quotations omitted). That is, the nonmovant "must point to specific facts showing that there is a genuine issue for trial, and inferences relying on mere speculation or conjecture will not suffice." *DiPerna v. Chicago Sch. of Prof'l Psychology, 893 F.3d 1001, 1006 (7th Cir. 2018)* (citation omitted); *see also Bunch v. United States, 880 F.3d 938, 941 (7th Cir. 2018)* ("The party that bears the burden of proof for an issue at trial must 'cite the facts which it believes [would] satisf[y]' that burden and **[**32]** 'demonstrate why the record is so one-sided as to rule out the prospect of a finding in favor of the non-movant.'") (quoting *Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund, 778 F.3d 593, 601 (7th Cir. 2015))*. If the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, summary judgment must be granted." *Blow v. Bijora, Inc., 855 F.3d 793, 797-98 (7th Cir. 2017)* (citation and quotations omitted). "When ruling on a motion for summary judgment, '[t]he court should neither look the other way to ignore genuine issues of material fact, nor strain to find material fact issues where there are none.'" *Simpkins v. DuPage Hous. Auth., 893 F.3d 962, 964 (7th Cir. 2018)* (quoting *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987))*.

"In the field of ***antitrust law***, summary judgment serves a vital function—it avoids wasteful trials and prevents lengthy litigation that may have a chilling effect on pro-competitive market forces." *Anderson News, L.L.C. v. Am. Media, Inc., 899 F.3d. 87 , 2018 U.S. App. LEXIS 21735, 2018 WL 3716083, at *7 (2d Cir. July 19, 2018)* (citation, modifications, and quotations omitted); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Indeed, "the very nature of antitrust litigation encourages summary disposition of such cases when permissible." *Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 476 (7th Cir. 1988)*. That is not to say that there is heightened summary-judgment standard in antitrust cases—there is not. Nevertheless, at summary judgment, an antitrust claimant must "present evidence that tends to exclude the possibility that **[**33]** the [defendant's] conduct was as consistent with competition as with illegal conduct." *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 856 (7th Cir. 2011)* (quoting *Nelson v. Monroe Reg'l Med. Center, 925 F.2d 1555, 1578 (7th Cir. 1991))*; *see also Matsushita, 475 U.S. at 594*; *It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 685 (4th Cir. 2016)*; *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1412 (7th Cir. 1989)*.

II. *Rule 702* and *Daubert* Standard

Courts may decide the admissibility of an expert witness's testimony in the context of a summary-judgment motion and when deciding whether the case presents a genuine issue of material fact warranting trial. *See, e.g., Manpower, Inc. v. Ins. Co. of Pa., 732 F.3d 796, 806 (7th Cir. 2013)*; *Lewis v. CITGO Petroleum Corp., 561 F.3d 698, 704 (7th Cir. 2009)*; *see also Porter v. Whitehall Labs., Inc., 9 F.3d 607, 612 (7th Cir. 1993)* (expert testimony must be admissible to be considered in a motion for summary judgment). "Any assessment of the admissibility of expert witness testimony begins with *Federal Rule of Evidence 702* and the Supreme Court's opinion in *Daubert*, as together they govern **[*1055]** the admissibility of expert witness testimony." *Krik v. Exxon Mobil Corp., 870 F.3d 669, 673 (7th Cir. 2017)*; *see also* *Owens v. Auxilium Pharms., Inc., 895 F.3d 971, 972 (7th Cir. 2018)*. *Rule 702* states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. **[**34]** In *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, "the Supreme Court interpreted *Rule 702* to require the district court to act as an evidentiary gatekeeper, ensuring that an expert's testimony rests on a reliable foundation and is relevant to the task at hand." *Gopalratnam v. Hewlett-Packard Co., 877 F.3d 771, 778, 732 Fed. Appx. 484 (7th Cir. 2017)*.

In deciding whether to admit expert testimony under *Rule 702* and *Daubert*, "the district court must evaluate: (1) the proffered expert's *qualifications*; (2) the *reliability* of the expert's methodology; and (3) the *relevance* of the expert's testimony." *Gopalratnam, 877 F.3d at 779* (emphases in original). A district court's evaluation of expert testimony under *Daubert* does not "take the place of the jury to decide ultimate issues of credibility and accuracy." *Lapsley v. Xtek, Inc., 689 F.3d 802, 805 (7th Cir. 2012)*; *see also* *Ortiz v. City of Chicago, 656 F.3d 523, 536 (7th Cir. 2011)* ("The admissibility determination is not intended to supplant the adversarial process, and so even 'shaky' testimony may be admissible."). Once a court determines that "the proposed expert testimony meets the *Daubert* threshold of relevance and reliability, the accuracy of the actual evidence is to be tested before the jury with the familiar tools of 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *Lapsley, 689 F.3d at 805* (quoting *Daubert, 509 U.S. at 596*); *see also* *Manpower, 732 F.3d at 806*. The "proponent of the expert bears the burden of demonstrating **[**35]** that the expert's testimony would satisfy the *Daubert* standard" by a preponderance of the evidence. *Lewis, 561 F.3d at 705*; *see also* *United States v. Saunders, 826 F.3d 363, 368 (7th Cir. 2016)* ("[F]or expert testimony to be admissible, the proponent of the evidence must establish that the expert's testimony is reliable (and relevant) by a preponderance of the evidence").

ANALYSIS

Comcast argues that summary judgment is appropriate for numerous reasons: Viamedia cannot establish anticompetitive conduct; Viamedia cannot establish causation, in the antitrust sense or for damages purposes; and Viamedia cannot otherwise establish harm to competition. The first two matters are dispositive, and so the Court will address only them. Along the way, the Court will address Comcast's motions to exclude Viamedia's expert opinions where relevant to the analysis.

I. Viamedia Cannot Establish Anticompetitive Conduct

Under *Section 2* of the Sherman Act, "[e]very person who shall monopolize, or attempt to monopolize" is subject to antitrust liability. *15 U.S.C. § 2*; **[*1056]** *see also* *15 U.S.C. § 15* (providing individual right of action). But like its fraternal twin, *Section 1*, *Section 2* bans less than its literal reading suggests. "Simply possessing monopoly power and charging monopoly prices does not violate" *Section 2*. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 447-48, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. Instead, liability under **[**36]** *Section 2*, whether for monopolization or the attempt at it, requires "anticompetitive conduct." *Mercatus Grp., 641 F.3d at 854*; *Endsley v. City of Chicago, 230 F.3d 276, 282 (7th Cir. 2000)* ("The offense of monopoly under *§ 2*" requires "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"); *American Acad. Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317,* 1320 (7th Cir. 1991) ("The offense of monopolization is the acquisition of monopoly by improper methods or, more commonly . . . the abuse of monopoly"); State of Ill. ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1481 (7th Cir. 1991) ("Section 2 forbids not the intentional pursuit of monopoly power but the employment of unjustifiable means to gain that power."). Such conduct, or "exclusionary practices," comes in many forms—"tie-in sales . . ., group boycotts, exclusive dealing . . ., or predatory pricing." Schor, 457 F.3d at 610.

Not usually counted among the traditional anticompetitive practices is a refusal to deal. Under well-rooted antitrust principles, firms generally have the right to determine with whom they will do business. United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919). That right extends to monopolists, as "***antitrust law*** does not require monopolists to cooperate with rivals by selling them products that would help the rivals to compete." Schor, 457 F.3d at 610; *see also* Authenticom, Inc. v. CDK Glob., LLC, 874 F.3d 1019, 1025 (7th Cir. 2017) ("Even monopolists are almost never required to assist their competitors"); Goldwasser v. Ameritech Corp., 222 F.3d 390, 400 (7th Cir. 2000); Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986).

In the flagship **[**37]** case of *Trinko*, the Supreme Court held that a telecommunications monopolist had no antitrust duty to deal with a rival, let alone a duty to deal on favorable terms. 540 U.S. 409-10. *Trinko* teaches:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.

Id. at 407-08. A few years later, the Supreme Court echoed these principles. In *Linkline*, it held that another telecommunications monopolist had no duty to deal, let alone a duty to deal on favorable terms, in selling services to its competitors in the retail market. 555 U.S. at 450. *Linkline* confirmed that a monopolist can generally wield its "upstream" power "to prevent **[**38]** rival firms from competing effectively" in a downstream market. *Id.*; *see also* Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th **[*1057]** Cir. 2013) ("Even a monopolist generally has no duty to share (or continue to share) its intellectual or physical property with a rival.").

Indisputably, Comcast refused to deal with Viamedia by disallowing it access (or refusing it "reasonable" access) to the Chicago, Detroit, and Hartford interconnects. *See, e.g.*, CSF ¶ 48, VSF ¶ 15. That was its right under Trinko and the law of this case. *See* Viamedia I, 218 F. Supp. 3d at 697-99; Viamedia II, 2017 U.S. Dist. LEXIS 24213, 2017 WL 698681 at *4-6. As *Linkline* explains, the fact that Comcast may have refused to deal (or refused to deal on certain terms) to "prevent" Viamedia from "competing effectively" is largely irrelevant in the absence of a duty to deal. 555 U.S. at 450; *cf*. Furchtgott-Roth Report ¶¶ 97-120 (opining on whether Comcast's "proposed justifications" for "excluding Viamedia from the Chicago and Detroit Interconnects" are "persuasive"); Comcast Ex. 1.1, Report of Dennis W. Carlton (R. 273-2) (opining of the economic efficiencies of Comcast's conduct).

Viamedia, however, submits that Comcast's conduct constitutes more than a "mere" refusal to deal. R. 326 at 26. It argues that Comcast, in excluding Viamedia (and by extension, Viamedia's customers) from the interconnects **[**39]** and later taking RCN's and WOW!'s business, has engaged in the "distinct" practices of tying, exclusive dealing, or general exclusionary conduct. *See* Viamedia I, 218 F. Supp. 3d at 699. Yet discovery has demonstrated otherwise. The record leaves no genuine issue of material fact regarding the viability of Viamedia's alternative theories.

A. There Is Insufficient Evidence that Comcast Engaged in Anticompetitive Tying

Viamedia claims that Comcast tied access to the interconnects, or Interconnect Services (the tying product), to Comcast's Ad Rep Services (the tied product). "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461-62, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)). The Supreme Court has emphasized that the "essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984); *see also* Sheridan v. Marathon Petroleum Co. LLC, 530 F.3d 590, 592 (7th Cir. 2008) ("The traditional antitrust concern with such an agreement **[**40]** is that if the seller of the tying product is a monopolist, the tie-in will force anyone who wants the monopolized product to buy the tied product from him as well, and the result will be a second monopoly."). Accordingly, a tie, whether expressly instituted or effectively applied, exists only where "the defendant improperly imposes conditions that explicitly or practically require buyers to take the second product if they want the first one." Phillip E. Areeda and Herbert Hovenkamp, ***ANTITRUST LAW***: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1752b (3d ed. 2018).

1. No Evidence Tends to Exclude the Likelihood That Comcast, Rather Than Tying Services, Simply Refused to Deal with Viamedia

Viamedia has not identified a genuine issue of fact as to whether Comcast tied **[*1058]** the sale of Interconnect Services and Ad Rep services.[10] A fundamental element of a tying claim—conditioning—is absent from Viamedia's construct. *See* Sheridan v. Marathon Petroleum Co. LLC, 530 F.3d 590, 592 (7th Cir. 2008); Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co., 758 F.2d 203, 207 (7th Cir. 1985).

No evidence shows that Comcast told MVPDs, expressly or impliedly, that they could only purchase Interconnect Services on the condition that they also purchase Ad Rep Services. *See* Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 722 (7th Cir. 1979) ("we are reluctant to find a tying arrangement without some evidence that **[**41]** [the defendant]" created applied a "de facto tying clause"); Areeda & Hovenkamp, ***Antitrust Law*** ¶ 1700i ("products are not tied unless the supplier refuses to accommodate those who prefer one without the other"). To the contrary, it is undisputed that 14 percent of Comcast's agreements with MVPDs are interconnect-only. CSF ¶¶ 123-24. With an interconnect-only agreement, an MVPD is free to: forego employing any Ad Rep Services; hire another Ad Rep to sell a portion of their remaining avails on a non-full-turnkey basis[11]; and/or self-provide Ad Rep Services by selling its own avails. *See* CSF ¶¶ 29, 32-36, 126. In antitrust terms, the customer (an MVPD) can purchase the tying product (Interconnect Services) without purchasing the tied product (Ad Rep Services). *Accord* Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1427 (9th Cir. 1995) ("The harm from tying arrangements is the forced sale of the *tied* product, not the withholding of the tying product.") (emphasis in original). That Comcast has so often entered into such standalone sales of the tying product belies any inference that Comcast tied its services. *See* Live Nation, 811 F.3d at 685 (14 percent of non-tied sales "exceed [ ] sufficiently" whatever baseline is required "to cast doubt on any allegation of tying"); Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 1756b2 **[**42]** (suggesting that "10 percent unbundling" rebuts "an otherwise established or presumed inference of a tying condition").

Viamedia tries to do away with this inconvenient fact in two ways. First, it argues that Comcast did not sell interconnect-only deals in Chicago, Detroit, and Hartford, where Comcast denied Viamedia use of the interconnects. This case, however, is not limited to those markets—Viamedia challenges Comcast's conduct in the markets in which it operates the interconnects generally. Am. Compl. ¶¶ 1, 180; *see also* Furchtgott-Roth Report ¶¶ 63-73. Second, Viamedia contends that substantial evidence of unbundled sales does little to defeat a tying claim in cases where there is an "announced condition," "rebuffed request for separate provision," or "publicized policy" of

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[10] The Court assumes that Interconnect Services and Ad Rep services are distinct services for tying purposes, and that MVPDs "consider" themselves as receiving Interconnect Services from interconnect operators (like Comcast) even when they have hired a unaffiliated Ad Rep (like Viamedia) on a full-turnkey basis. *See, e.g.*, R. 326 at 27.

[11] As noted, Viamedia does not define Ad Rep Services as exclusive, full-turnkey representation. *See, e.g.*, Furchtgott-Roth Report ¶¶ 24-25; R. 326 at 7. Doing so would necessarily defeat its tying claim, for reasons discussed below.

tying. *See* Areeda & Hovenkamp, ***Antitrust Law*** ¶¶ 1756a, 1756b. True enough, but this is no such case. The record lacks evidence showing that Comcast told customers that they could not receive an interconnect-only deal—that is, Interconnect Services—standing alone.[12]

[*1059] Even focusing exclusively on Chicago, Detroit, and Hartford, there is insufficient evidence **[**43]** of conditioning. "A high percentage, even 100 percent, of unbundled sales does not itself indicate that two products may have been tied together" because "buyers may have all bought the products bundled because they preferred them together." *Id.* ¶ 1756b2. Viewing the record in the light most favorable to Viamedia, this is precisely what it reflects. It is undisputed that both RCN and WOW! *wanted* full-turnkey representation, and whichever company they hired had to have the ability to make available to them both Interconnect Services and Ad Rep Services. CSF ¶¶ 90, 99. When "a consumer wants to purchase a bundle of the alleged tying and tied products, the seller is simply satisfying consumer demand and monopolization concerns are irrelevant." *Kaufman v. Time Warner, 836 F.3d 137, 142 (2d Cir. 2016)*.

Viamedia responds by pointing out that Comcast never *offered* RCN or WOW! an interconnect-only deal. VSF ¶ 19. But why would it-Firms soliciting business have no reason to offer potential customers a less substantial (and presumably less profitable and less efficient) deal than the one those customers seek. Areeda & Hovenkamp, ***Antitrust Law*** ¶ 1700i ("[F]inding two products does not mean that they are tied together. The franchisee may have preferred **[**44]** a 'turnkey' franchise and never asked for the" tying product "separately"); *see also Kaufman, 836 F.3d at 142*. RCN and WOW! sought both Interconnect Services and Ad Rep Services made available through a single full-turnkey relationship, and the "voluntary purchase of two products together" is "not a tie at all." *Will v. Comprehensive Accounting Corp., 776 F.2d 665, 669 (7th Cir. 1985)*.

Viamedia thus cannot show that Comcast ever withheld the tying product *from customers* unless they also purchase the tied product. *Live Nation, 811 F.3d at 684* (if "the buyer is free to decline the tied product or to purchase the two products separately, then by definition there is no unlawful tying"). The real rub of Viamedia's tying claim is, instead, that Comcast withheld the tying product *from its rival Viamedia*. The consequence: customers that contracted with Viamedia could not obtain Comcast's Interconnect Services through their Viamedia representation, and customers wanting a full-turnkey deal that made available to them both Interconnect Services and Ad Rep Services could not get such a deal through Viamedia. In Viamedia's words, Comcast withholds Interconnect Services from "*Viamedia's MVPD partners*"—not MVPDs, period—and therefore "constrains improperly [MVPDs'] choice" by "excluding Viamedia" as a competitor. R. 326 **[**45]** at 19.

Viamedia's theory extends tying beyond the law's recognition. The constraining of consumer choice is of course a feature of a tying arrangement, Areeda & Hovenkamp, ***Antitrust Law*** ¶ 1756b2, but there must still be an actual "tie" of products or services, *Reifert v. S. Cent. Wisconsin MLS Corp., 450 F.3d 312, 317 (7th* **[*1060]** *Cir. 2006)*; *Photovest, 606 F.2d at 722*. Viewing the record in Viamedia's favor, it shows none.

Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171 (9th Cir. 2016), illustrates the point. In *Aerotec*, a manufacturer, Honeywell, operated in two related markets. *Id. at 1175*. It was a monopolist in the replacement parts market, and a competitor in the repair services market. *Id. at 1175-76*. Honeywell had long dealt on prioritized and better terms with itself and its affiliated servicers than with independent ones, like Aerotec. *Id. at 1176-77*. But when a parts shortage hit, Honeywell's supply of parts to Aerotec came to a halt. This was ruinous for Aerotec; it could not live up to certain contracts and lost future work, including work that went to Honeywell. *Id. at 1177*. Aerotec

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[12] Viamedia does not claim a "negative tie." *See In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d 931, 2018 U.S. Dist. LEXIS 80937, 2018 WL 2193236, at *20 (N.D. Ill. May 14, 2018)*. Even if it did, the record would not support it. There is no evidence suggesting that Comcast conditioned the sale of Interconnect Services *to MVPDs* on them agreeing not to purchase Viamedia's Ad Rep Services. *Cf. Eastman Kodak, 504 U.S. 463 n. 8* ("Assuming, *arguendo*, that Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not."). As discussed further below, RCN and WOW! wanted full-turnkey representation and at least a portion of their avails sold on the Interconnects; because of Comcast's refusal to deal with Viamedia, a full-turnkey agreement with Viamedia could not offer that bundle.

sued alleging, among other things, anticompetitive tying of replacement parts to repair services (it called the parts shortage pretextual). The district court granted Honeywell summary judgment, and the Ninth Circuit affirmed. Regarding the tying claim, the Ninth Circuit reasoned that there was no evidence that **[**46]** Honeywell "explicitly or implicitly ties or conditions the *sale* of APU parts *to APU owners* on a requirement that the owners" use Honeywell services. *Id. at 1179* (emphases in original). It did not matter if Honeywell had refused to deal fairly with Aerotec, which made it more difficult for Aerotec to compete and owners to receive Honeywell parts without Honeywell repair services. *Id. at 1179-80*. The Ninth Circuit "decline[d] to stretch the tying construct to accommodate the claim that . . . conduct toward third party servicers . . . acts as an effective, or 'de facto,'" tying condition. *Id. at 1178*.[13]

A similar story unfolded in *Serv. & Training, Inc. v. Data Gen. Corp., 963 F.2d 680 (4th Cir. 1992)*. In that case, Data General manufactured computer systems and offered a diagnostic tool that was critical to servicing those systems. Data General used the diagnostic tool in servicing its systems for customers, but it refused to license the diagnostic tool to competing third-party maintenance servicers. *Data Gen., 963 F.2d at 682-83*. One servicer sued, alleging that Data General effectively tied the provision of its diagnostic tool to the sale of its services. *Id. at 683*. The district court granted Data General summary judgment and the Fourth **[**47]** Circuit affirmed. The Fourth Circuit held that, even if the diagnostic tool and maintenance services could be tied together, the plaintiff-servicer had not produced sufficient evidence of such a tie. *Id. at 687-88*. Evidence showed that customers demanded that their servicers be able to use the diagnostic tool, and, as the result of Data General's refusal to license, third-party servicers simply could not compete for that **[*1061]** business. *See id. at 687*. This was not a tying condition, according to the court. *See id. at 687-688*; *see also id. at 686* ("The fact that Data General has selectively licensed [the diagnostic tool] is not evidence of an illegal tying arrangement. Data General may lawfully license [the tool] to whomever it chooses.").

Like the third-party competitors in *Aerotec* and *Data General*, Viamedia has shown "no direct condition" of a tie. *Aerotec, 836 F.3d at 1179*; *see Data Gen., 963 F.2d at 687-88*. It admits that Comcast has been willing to deal with MVPDs on an interconnect-only basis, and no evidence shows that a sales condition—as opposed to prevailing MVPD preference combined with Comcast's refusal to deal—is what kept RCN and WOW! from purchasing Viamedia's Ad Rep Services. *See Data Gen., 963 F.2d at 687-88*. Rather than show a direct tying condition on MVPD customers, Viamedia takes issue with how **[**48]** Comcast has chosen (not) to deal with *it* and the consequences that choice has had on *its* ability to compete. But "tactics imposed on a third-party competitor" are insufficient "to create a tie with respect to a separate buyer simply because they make it less desirable to purchase from the third party." *Aerotec, 836 F.3d at 1180*; *accord Linkline, 555 U.S. at 450* (a monopolist can generally wield its "upstream" power "to prevent rival firms from competing effectively" in a downstream market).[14]

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[13] Viamedia's attempt to distinguish *Aerotec* is meritless. It argues that, "unlike the plaintiff in *Aerotec*, Viamedia does not purchase Interconnect Services for its own account, but rather purchases them on behalf of MVPDs." R. 326 at 28. How one could read *Aerotec* and conclude that the plaintiff (a repair servicer) purchased replacement airplane parts "for its own account"—as opposed to "on behalf of" its airplane-owning customers—is questionable. Like Viamedia, it was precisely because the plaintiff could not make available the supposedly tying product (replacement parts) to its customers that its business suffered. *Aerotec, 836 F.3d at 1177*; *see also Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 4 F. Supp. 3d 1123, 1133 (D. Ariz. 2014)* ("Aerotec asserts that Honeywell's practices amount to per se illegal tying, claiming that Honeywell uses its dominant position in the market for Honeywell APU parts to coerce APU owners, *who need Honeywell APU component parts for APU repairs*, to purchase MRO services from Honeywell.") (emphasis added). Whatever Viamedia means by "on its own account," it is an economically meaningless distinction in comparing *Aerotec* to this case.

[14] The Court recognizes that commentators and courts have remarked on the fact that a refusal to deal with related-market competitors—and vertical integration generally—can appear to have a tying effect in certain markets. *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1144 & n. 96 (7th Cir. 1983)* (noting the similarity in the plaintiffs' claims but not "imply[ing] that a tying violation will always flow from any denial of an essential facility by a dominant firm"); *Live Nation, 811 F.3d at 689* ("it is no surprise that vertical integration has generally been permitted despite its apparent similarity to tying"); Glen O. Robinson, *On Refusing to Deal with Rivals*, *87 Cornell L. Rev. 1177, 1178 (2002)*. Professor Hovenkamp, for example, has noted that "in dominated, path-dependent networks," refusals to deal with competitors can resemble "tying arrangements." *See* Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, *90 B.U. L. Rev. 1611, 1642-43 (2010)*; Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 772. Here, however, there is no tying effect, as no evidence shows that MVPDs cannot obtain (from Comcast at least) the tying product alone—they just cannot obtain it through Viamedia's representation. That

Viamedia's insistence that comments made by RCN, WOW!, and Comcast create a genuine issue of fact as to whether there was tying is misplaced. RCN and WOW! stated that they understood that they could not have their avails sold on Comcast-operated interconnects without hiring Comcast as their "representative." VSF ¶ 18. A Comcast executive, moreover, answered "yes" when asked by the Department of Justice whether it was Comcast's "business practice" that if "an MVPD wants to get access to a Comcast controlled Interconnect, it has to hire Comcast as its ad sales representative." *See id.* ¶¶ 13, 18, 19. None of these statements, however, "tend[ ] to exclude **[**49]** the possibility" that Comcast's conduct "was as consistent" with a legal refusal to deal as an illegal tying of its services. *Mercatus Grp., 641 F.3d at 856*; *see also* *Authenticom, 874 F.3d 1019* (after a preliminary-injunction hearing, expressing "dubious[ness] in the extreme" that a dealers' supposed tying of two related products "amounts to tying, rather than simply participation at two levels of the market, as in *Linkline*").

The undisputed context of those statements matters. *See* *Matsushita, 475 U.S. **[*1062]** at 586*. Only two companies competed for RCN's and WOW!'s Chicago and Detroit business in 2015, Viamedia and Comcast. They did so, at RCN's and WOW!'s invitations, on a full-turnkey basis. CSF ¶¶ 90, 99. RCN and WOW! knew that they could not have their avails sold on the interconnects if they contracted with Viamedia; Comcast, as interconnect operator, had made clear that it did not want to do business with Viamedia. Thus, to have their avails sold on the interconnects, RCN and WOW! had to deal directly with Comcast, the only source who made could make both services available in a single full-turnkey deal. This does not mean that the MVPDs could not have received an interconnect-only deal if they had requested one—that is, that they could have received the tying product **[**50]** without the tied product—but the record indisputably shows they did not want that service alone, instead opting for the full-turnkey bundle. *See* *Will, 776 F.2d at 669*.

Data General is again instructive. There, the plaintiff-servicer presented evidence that in pitching its maintenance service Data General had "stated to potential customers that *only* Data General" could use the diagnostic tool—the implication being, of course, that customers had to hire Data General services to receive the benefit of the diagnostic tool. *Data Gen., 963 F.2d at 687* (emphasis added). But this evidence did not tend to exclude legal conduct. *Id.* Other servicers had no right to use the diagnostic tool, and so Data General's statements were "entirely consistent" with it "lawfully extolling the superiority of its repair services." *Id.* Similarly, in *Data General* the "customers as a matter of fact have demanded that any" servicers "be able" to use the diagnostic tool, and thus the evidence that they choose Data General over other servicers suggested simply that customers "preferred Data General services using [the diagnostic tool] over [third-party servicers] that do not." *Id. at 687*. The same is true here. Viewing the record in Viamedia's favor, Comcast said that its **[**51]** "practice"—in an industry dominated by full-turnkey business, where MVPDs generally prefer not to do interconnect-only deals—is that an MVPD must employ Comcast to have its avails sold on the interconnects. *See* VSF ¶ 13. Likewise, RCN and WOW! did not complain that were unable to receive Interconnect Services from Comcast on a standalone basis. The record shows they complained, at most, that they could not receive Interconnect Services *through* Viamedia, and had to work with Comcast directly because they wanted full-turnkey representation that could make available Interconnect Services. *See, e.g.*, VSF ¶ 18. This evidence is, at a minimum, equally consistent with Comcast's refusal to deal with Viamedia as it is a tying arrangement.

None of this is to say that, as a matter of law, for a tying condition to be cognizably anticompetitive it must be applied directly and only to the end user, not its representative. *Cf.* *COPECA, Inc. v. Western Aviation Servs. Corp., 653 F. Supp. 2d 141, 147 (D.P.R. 2009)* (not seeing "the relevance" that a defendant applied an alleged tie "via an intermediary" because the defendant could still "impose its condition"). It is to say, however, that at summary judgment the claimant must present evidence tending to exclude the possibility that the **[**52]** defendant engaged in legitimate conduct. Viamedia lacks any evidence that Comcast withheld Interconnect Services from customers (as opposed to Viamedia) unless they also purchased Ad Rep Services, and it has not otherwise pointed to evidence suggesting that Comcast's conduct was anything more than a refusal to deal with Viamedia.

MVPDs typically choose not to obtain the tying product alone underscores the fact that this dispute should be resolved by the market, not the courts.

[*1063] Another wrinkle of Viamedia's claim is worth addressing. Although Viamedia does not define Ad Rep Services as only full-turnkey services, *see* Furchtgott-Roth Report ¶¶ 22-29, it occasionally refers to Comcast's tie as one of Interconnect Services to full-turnkey Ad Rep Services, *see* VSF ¶ 18, CSF, Resp. to ¶ 48. That changes little. For one, the record is devoid of evidence that customers could not receive Comcast's Interconnect Services standing alone (only that they could not receive those services through Viamedia's representation). Equally important, in a full-turnkey relationship with a third-party Ad Rep the MVPD does not directly contract for Interconnect Services. It relies on its Ad Rep—to which it has assigned all of its avails in a DMA—to make sure that a portion of those avails are sold on the interconnects. *See, e.g.*, VSF ¶¶ 1-3. Focusing on that **[**53]** scenario, there can be no anticompetitive tie.

Professors Areeda and Hovenkamp explain why. Suppose an ingot manufacturer "refuses to sell separately but rather fabricates into products like building wall sections, which it sells directly to builders." Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 1748a. A rival fabricator demands ingot separately "so that it too can bundle it with fabrication services in order to make and sell walls. When the defendant refuses, [the rival] claims the defendant is tying ingot to fabrication services." *Id.* The claim fails as a matter of law:

> [T]he gravamen of the complaint is not that the defendant's bundled sales have foreclosed rivals from selling unbundled fabrication to the defendant's customers. Rather, the gravamen is that the defendant's refusal to sell unbundled ingot to the defendant's rival has prevented the rival from selling the very same ingot/fabrication bundle sold by the defendant. . . . For example, the plaintiff does not want the defendant to offer ingot separately to builders; nor would doing so eliminate any relevant "foreclosure" when builders do not want "un-tied" ingot in order to arrange separately for its fabrication. Rather, the plaintiff **[**54]** seeks to hold the defendant liable for not selling the plaintiff ingot so that it can fabricate ingot into wall sections too.

Id. ¶ 1748b. The antitrust laws do not favor such attacks on vertical integration, which are resolvable only by enforcing a duty to deal with a rival. *Id.*; *see also id.* ¶ 1700j1.

Viamedia submits that this principle applies only "to situations where the only separate demand for the tying product comes from the defendant's rivals." R. 326 at 31; *see also* R. 235 at 10. Not so. "Even if the separate provision of ingot [the tying product] and fabrication [the tied product] is common in competitive analogues," there is no liability for tying "when the plaintiff's theory of injury is not that customers of the defendant's bundle would buy the items unbundled if they could, but rather that a rival could sell the *same bundle* if only the defendant would sell it a particular input." Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 1748b; *see also id.* ¶ 1748b n.2 (a finished-product exists even where the claimant meets the "threshold requirement of showing buyer interest because we can find some buyers desiring the items unbundled").

This is the "gravamen" of Viamedia's tying claim—that **[**55]** Comcast's refusal to provide it interconnect access prevents it from selling the kind of full-turnkey Ad Rep Services that WOW! and RCN desire. Although MVPDs in a full-turnkey relationship with a third-party Ad Rep may consider themselves to receive Interconnect Services from the interconnect operator, *see* VSF ¶ 3, it is undisputed that those MVPDs have one agreement with one Ad Rep that makes those Interconnect Services available to them without having to **[*1064]** have a direct relationship with the interconnect operator. (That is, of course, Viamedia's business model.) *See, e.g., id.* ¶¶ 1, 3; *see also* Furchtgott-Roth Report ¶ 53 (describing arrangements, unlike Viamedia's practice, in which MVPDs contract separately for Ad Rep Services and Interconnect Services as "unbundle[d]" transactions). Viamedia has no antitrust right to force Comcast to help it sell such a bundle to their mutual customers. *See* Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶¶ 1748a, 1748b; *accord* *Linkline, 555 U.S. at 450*.

Viamedia further argues that deciding Comcast did not tie services would "conflict[ ] with sound antitrust policy." R. 326 at 29. It provides no authority for its perspective on what antitrust policy should be, and understandably. Viamedia's **[**56]** view "demand[s] that holders of market power cooperate with rivals"—a view that "bit the dust" with *Trinko*. Frank H. Easterbrook, *The Chicago School & Exclusionary Conduct*, *31 HARV. J.L. & PUB. POL'Y 439, 441-42 (2008)*. Courts routinely tout the procompetitive benefits of integration, even if middlemen suffer. *See, e.g., It's My Party, 811 F.3d at 689* ("A single firm incorporating separate but closely related production processes can often be far more efficient than various independent entities transacting to produce the same good or bundle of goods."). Viamedia's contrary claim "echoes a plea for relief on behalf of a competitor, not for the sake of competition itself." *Aerotec, 836 F.3d at 1180*.[15]

2. Dr. Furchtgott-Roth's Opinions Regarding Comcast's Supposed Tying Are Inadmissible

Dr. Furchtgott-Roth also opines that Comcast had an effective tying policy. He asserts that Comcast's own admissions and MVPDs' statements demonstrate that Comcast had a practice of tying, and that excluding Viamedia from the interconnects was a "necessary aspect" of that tying strategy. Furchtgott-Roth Report ¶ 3.e.; *see also id.* ¶¶ 63-71. These opinions, however, are inadmissible. They would not assist the trier of fact and are contrary to the law.

Rule 702(a) and *Daubert* provide that "[a]n expert's opinion is **[**57]** helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate that opinion"—in other words, "the opinion must be an *expert* opinion." *United States v. Benson, 941 F.2d 598, 604 (7th Cir. 1991)*, *amended on other grounds* *957 F.2d 301 (7th Cir. 1992)*; *see also* *FED. R. EVID. 702(a)*; *Owens, 895 F.3d at 972* (the expert's testimony must "assist the trier of fact"). "Expert testimony does not assist the trier of fact when the jury is able to evaluate the same evidence and is capable of drawing its own conclusions without the introduction of a proffered expert's testimony." *Matter of the Complaint of Ingram Barge Co., No. 13 C 3453, 2016 U.S. Dist. LEXIS 91408, 2016 WL 3763450, at *10 (N.D. Ill. July 14, 2016)*; *see also* *Dhillon v. Crown Controls Corp., 269 F.3d 865, 871 (7th Cir. 2001)* ("An expert must testify to something more than what is 'obvious to the layperson' in order to be of any particular assistance to the jury."); *Taylor v. Ill. Cent. R.R. Co., 8 F.3d 584, 585-86 (7th Cir. 1993)* (affirming the exclusion of expert testimony where "any lay juror could understand th[e] issue without the assistance of expert testimony"). As such, expert testimony **[*1065]** "cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence." *Newman ex rel. Newman v. McNeil Consumer Healthcare, No. 10 C 1541, 2013 U.S. Dist. LEXIS 113438, 2013 WL 9936293, at *6 (N.D. Ill. Mar. 29, 2013)*; *United States v. Hall, 93 F.3d 1337, 1343 (7th Cir. 1996)* ("Unless the expertise adds something, the expert is at best offering a gratuitous opinion, and at worst is exerting undue influence on the jury."). Expert testimony, further, must be consistent with the law; otherwise it is necessarily unhelpful and risks confusing **[**58]** and misleading the jury. *Loeffel Steel Prods. v. Delta Brands, Inc., 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005)* ("Expert opinions that are contrary to law are inadmissible. They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact.") (citations omitted).

Dr. Furchtgott-Roth's tying opinions fail these requirements. Furchtgott-Roth Report ¶¶ 63-71. His opinion that Comcast had a tying policy rests exclusively on a lay interpretation of evidence that this Opinion has already discussed. *Id.* ¶¶ 64-66. Quoting the Comcast testimony provided to the DOJ cited above, *supra at 34-35*, for example, he matter-of-factly asserts that "Comcast has admitted that it ties Spot Cable Ad Rep Services to Interconnect Services." *Id.* ¶ 64. He also relies on the MVPDs' statements to conclude that the MVPDs "understood" that they had to deal with Comcast to obtain Interconnect Services. *Id.* ¶ 64. Although Dr. Furchtgott-Roth later adopts his interpretation of those documents "[a]s a matter of economics," *id.* ¶ 68, he does not undertake any expert assessment in arriving at that conclusion. *Elorac, Inc. v. Sanofi-Aventis Canada Inc., No. 14 C 1859, 2017 U.S. Dist. LEXIS 133449, 2017 WL 3592775, at *27 (N.D. Ill. Aug. 21, 2017)* (excluding expert because "[n]o expert economic analysis is necessary on [a] basic point, nor, in truth, did [the expert] perform any; his opinion appears to be based simply on his review **[**59]** of [evidence], not a scientific analysis"); *In re Live Concert Antitrust Litig., 863 F. Supp. 2d 966, 993 (C.D. Cal. 2012)* (excluding expert opinions because a "key ingredient missing" was "*economic analysis* (be it quantitative or qualitative) tying these statements by [witnesses and observers] to" the "ultimate conclusion") (emphasis in original). All he cites is the undisputed and unremarkable fact that Comcast and Viamedia were the only two full-turnkey Ad Reps in certain DMAs, like Chicago and Detroit. *Id.* ¶ 67.

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[15] Viamedia makes no argument that Comcast effectively and anticompetitively ties Interconnect Services to Ad Rep Services through discounted bundling. Nor could it, as no evidence shows that Comcast ever predatorily priced—or even sold below cost—its services. *See* *Midwest Gas Servs., Inc. v. Indiana Gas Co., 317 F.3d 703, 713 (7th Cir. 2003)*.

So unhelpful are Dr. Furchtgott-Roth's tying opinions that Viamedia, in arguing that there is an issue of fact as to whether Comcast engaged in tying, does not rely on them (either directly or via its Statement of Additional Facts). *See* R. 326 at 18-22, 26-30. Viamedia, instead, simply cites directly to many of the same pieces of evidence that Dr. Furchtgott-Roth does. Indeed, no expertise is needed to interpret, contextualize, or synthesize that evidence. *See* *Davis v. Duran, 276 F.R.D. 227, 231 (N.D. Ill. 2011)* ("expert testimony is helpful to the jury if it concerns a matter beyond the understanding of the average person"). But this betrays that Viamedia simply seeks to use Dr. Furchtgott-Roth's tying opinion to give an expert mouthpiece to its preferred (and unreasonable) narrative of the evidence. **[**60]** *See, e.g.,* *McNeil Consumer, 2013 U.S. Dist. LEXIS 113438, 2013 WL 9936293, at *6*; *Sullivan v. Alcatel-Lucent USA Inc., No. 12 C 07528, 2014 U.S. Dist. LEXIS 97011, 2014 WL 3558690, at *5 (N.D. Ill. July 17, 2014)* (excluding expert who "simply reads and interprets documents" without drawing "on any expert qualifications or experience").

Dr. Furchtgott-Roth's narrative, moreover, is contrary to the law for reasons already explained. His opinions seek to **[*1066]** hold Comcast liable for the mere withholding of the tying product, not the forced sale of a tied product, and not even to a customer, but to a competitor. *See* Furchtgott-Roth Report ¶¶ 67, 69-71; *see* *Aerotec, 836 F.3d at 1178-80*. Those opinions are "inconsistent with the definitions of tying and coercion in the context of tying claims," and thus inadmissible. *Gumwood HP Shopping Ptrs., L.P. v. Simon Prop. Grp., Inc., No. 3:11-CV-268 JD, 2016 U.S. Dist. LEXIS 144712, 2016 WL 6091244, at *4 (N.D. Ind. Oct. 19, 2016)*; *accord* *Norwest Bank v. KMart Corp., No. 3:94-CV-78RM, 1997 U.S. Dist. LEXIS 3426, 1997 WL 33479072, at *3 (N.D. Ind. Jan. 29, 1997)* (excluding opinions "close enough to this case's legal issues" so as to "create a risk of jury confusion"). The Court, accordingly, excludes Dr. Furchtgott-Roth's opinions on whether Comcast had a tying practice. *See* Report ¶¶ 3.e. 64-71.

B. There Is Insufficient Evidence that Comcast Engaged in Anticompetitive Exclusive Dealing

Viamedia next contends that Comcast engaged in exclusive dealing. Generally, "[a]n exclusive dealing **[**61]** contract obliges a firm to obtain its inputs from a single source." *Paddock Publ'ns, Inc. v. Chicago Tribune Co., 103 F.3d 42, 46 (7th Cir. 1996)*; *see also* Areeda & Hovenkamp, ***Antitrust Law*** ¶ 1800a; *Methodist Health Servs. Corp. v. OSF Healthcare Sys., 859 F.3d 408, 410 (7th Cir. 2017)*. "The objection to exclusive-dealing agreements is that they deny outlets to a competitor during the term of the agreement." *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 393 (7th Cir. 1984)*; *see also, e.g.,* *Methodist Health Servs. Corp. v. OSF Healthcare Sys., No. 13-CV-01054, 2016 U.S. Dist. LEXIS 136478, 2016 WL 5817176, at *8 (C.D. Ill. Sept. 30, 2016)* ("Exclusive dealing claims brought under *§ 2* are analyzed in much the same way as *§ 1* claims"). As the Court has recognized, however, the law "'often approve[s]' of exclusive dealing because of its 'procompetitive benefits.'" *Viamedia I, 218 F. Supp. 3d at 696 (N.D. Ill. 2016)* (quoting *Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 736 (7th Cir. 2004))*. These benefits include "increasing allocative efficiency, reducing adverse selection and moral hazard barriers to deals, and preventing free-riding." *VBR Tours, LLC v. Nat'l R.R. Passenger Corp., No. 14-CV-00804, 2015 U.S. Dist. LEXIS 130455, 2015 WL 5693735, at *12 (N.D. Ill. Sept. 28, 2015)* (citing *Republic Tobacco, 381 F.3d at 736*).

Viamedia does not explain its exclusive dealing claim.[16] It is not clear if Viamedia takes issue with the exclusive and full-turnkey representations that are the undisputed industry norm, the fact that Comcast deals exclusively with MVPDs that work directly with it, or some combination of the two. In any event, Viamedia's claim fails.

"The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself." *Roland Mach., 749 F.2d at 394*. "Hence" a plaintiff must be able to "prove that the probable (not certain) **[**62]** effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition." *Id.* Viamedia has not produced any such evidence. It does not meaningfully argue that Comcast's exclusive dealings have harmed *competition*; it cites only is exclusion as a

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[16] Viamedia's defense of its exclusive dealing claim is near perfunctory. It devotes just a page and a half to this claim in its 46-page brief, and in the course of that page and a half neither cites a single fact nor raises a single case save for *Viamedia I*.

competitor. *See* R. 326 at 22-23. Indeed, the record lacks any evidence showing that Comcast has **[*1067]** raised, plans to raise, or even has the ability to raise prices. *Accord* Schor, 457 F.3d at 612 ("The monopolist can take its profit just once; an effort to do more makes it worse off and is self-deterring."); *see also, e.g.,* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2288, 201 L. Ed. 2d 678 (2018) (claim of anticompetitive conduct failed, in part, because it "did not offer any evidence that the [defendant's] price . . . was higher than the price one would expect to find in a competitive market"). Nor does the record contain any evidence showing that Comcast has reduced or plans to reduce output. *See* Methodist Health, 859 F.3d at 410 (affirming summary judgment because plaintiff had not shown evidence of the "dire consequences" required to deem exclusive contracting illegal).

To the contrary, Viamedia's own expert, Dr. Furchtgott-Roth, explains the procompetitive benefits of Comcast's deals. By bundling **[**63]** Interconnect Services and Ad Rep Services and selling them on an exclusive basis, Comcast is "able to offer financial terms to MVPDs that are much more generous than any terms Viamedia could feasibly (much less profitably) offer." Furchtgott-Roth Report ¶ 87.[17] Elsewhere in its brief, Viamedia cites the fact that MVPDs "consider" Viamedia's lack of MVPD-affiliation in weighing Ad Rep Services. But Viamedia provides no support for the notion that the fact that MVPDs deal with a fellow MVPD for the terms of their Ad Rep Services contracts constitutes a cognizable harm to competition. MVPDs themselves made clear that such a concern matters only when "all else [is] equal"—meaning they, like any rational consumer, value price and quality foremost. *See* R. 326 at 42; VSF ¶ 7; *see also* CSF ¶ 100 (RCN representative saying that Comcast's and Viamedia's offers were "nowhere near equal" and it was "not [ ] very difficult decision" for RCN to choose Comcast). Viamedia, further, has presented no expert evidence showing that it could have offered terms "equal" to Comcast's. *See id.* ¶¶ 116-122 (Comcast, on average, offered better revenue shares to MVPDs than Viamedia).

That Comcast's exclusive deals **[**64]** do not harm competition is further established by the fact that they are the very deals that MVPD-consumers seek. To be sure, the law can prohibit monopolists from engaging in conduct generally permitted to those without market power. Eastman Kodak, 504 U.S. at 488 (Scalia, J., dissenting); E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 441 (4th Cir. 2011); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005). But here it is undisputed that both RCN and WOW! *requested* "exclusive, full turnkey representation," CSF ¶¶ 90, 99, and only for a fixed period in limited geographic markets. *See* Methodist Health, 859 F.3d at 410; Areeda & Hovenkamp, ***ANTITRUST LAW*** 1802g2. Frontier wanted the same in Hartford, a deal which Viamedia won and assented to. *Id.* ¶ 73. MVPDs' desire for exclusive, full-turnkey deals is, moreover, economically sound. It is undisputed that such Ad Rep Services provide both MVPDs and advertisers a "one stop shop" for the sale and purchase of avails. CSF ¶ 28. Thus, doing as Viamedia requests—requiring a monopolist to rebuff **[*1068]** customers' requested, and mutually beneficial, terms in order to assist competitors—would itself "impair[ ] the health of the competitive process." Roland Mach., 749 F.2d at 394.

Viamedia does not dispute these facts. It admits that "full turnkey Spot Cable Ad Rep Services agreements have benefits." R. 326 at 23. It complains, instead, that it lacks "a fair **[**65]** playing field" on which to compete for such agreements, because of "Comcast's use of its conceded monopoly power over the Interconnects." *Id.* That is not a complaint about exclusive dealing, *see, e.g.,* Roland Mach., 749 F.2d at 394, but about Comcast's refusal to deal with Viamedia. As such, Viamedia has presented evidence neither showing exclusive dealing that harms competition nor evidence tending to exclude Comcast's legal conduct.[18]

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[17] To the extent Dr. Furchtgott-Roth opines that Comcast has foreclosed Viamedia from the market as a result of its tying or exclusive dealing practices, *see* Furchtgott-Roth Report ¶ 90, those opinions are inadmissible because, for the reasons discussed in the text, his predicate opinions regarding the alleged tying and exclusive dealing are inadmissible as they are unhelpful to the jury and contrary to the law. In any event, Viamedia's response does not rely on Dr. Furchtgott-Roth's foreclosure opinions.

[18] Viamedia's response does not rely on Dr. Furchtgott-Roth's opinion about exclusive dealing. This opinion, in any event, is inadmissible. *See* Furchtgott-Roth Report ¶¶ 72-73. Constituting just two paragraphs, Dr. Furchtgott-Roth's opinion conflates tying and exclusive dealing. He asserts, "the same conduct by Comcast Spotlight that amounts to tying also amounts to exclusive dealing." *Id.* ¶ 72. Dr. Furchtgott-Roth, again, applies no expertise, analysis, or study in reaching that conclusion. *See*

C. Viamedia's Claim for Otherwise Anticompetitive Conduct is Procedurally Barred and Meritless

Viamedia also invokes a catchall exclusionary conduct claim, arguing that "however" Comcast's conduct is described it is anticompetitive. As Viamedia notes, the law precludes exclusionary conduct for *Section 2*'s purposes even if that conduct does not neatly fall into one of the traditional forms of anticompetitive conduct under *Section 1*. *See, e.g.*, Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 777a ("While the standard for a *§ 2* violation is significantly stricter in its power assessment, it is broader and less categorial in its definition of proscribed conduct.").

Viamedia, however, is procedurally barred from raising this claim. Despite extensive motion to dismiss briefing and numerous hearings in court, **[**66]** Viamedia has never raised this claim before. "It is well settled that a plaintiff may not advance a new argument in response to a summary judgment motion." *Abuelyaman v. Illinois State Univ., 667 F.3d 800, 814 (7th Cir. 2011)*; *see also, e.g., Anderson v. Donahoe, 699 F.3d 989, 998 (7th Cir. 2012)*; *Midco Int'l, Inc. v. Metro. Life Ins. Co., No. 14 CV 9470, 2017 U.S. Dist. LEXIS 103296, 2017 WL 2868949, at *4 n.1 (N.D. Ill. July 5, 2017)* ("a new theory" of liability "raised for the first time in response to the motion for summary judgment" that "was not plaintiff's theory at the motion-to-dismiss stage" is "waived"). Viamedia, in fact, was not just silent in failing to advance this theory earlier. It affirmatively disavowed any "free-standing" monopolization claim "unaccompanied by . . . 'any of the normal exclusionary practices.'" R. 32 at 7 (quoting *Schor, 457 F.3d at 610-11*).

The Court relied on that assertion in *Viamedia I*, concluding that Viamedia's claim was not "'free standing' because it alleges particular types of anticompetitive conduct." *Viamedia I, 218 F. Supp. 3d at 695*; *see also id.* ("Viamedia's success turns on whether it states a claim based on those three classes of anticompetitive conduct [tying, exclusive dealing, and a refusal to deal], not whether a free-standing leveraging theory is independently viable."). Now accepting Viamedia's claim—about which **[*1069]** Viamedia's liability expert did not clearly opine—would add a new dimension to this two-year-old litigation after the close of all **[**67]** fact and expert discovery and allow Viamedia to circumvent motion to dismiss procedures. *See, e.g., Shuffle Tech Int'l LLC v. Sci. Games Corp., No. 15 CV 3702, 2017 U.S. Dist. LEXIS 141445, 2017 WL 3838096, at *8 (N.D. Ill. Sept. 1, 2017)* (judicial estoppel "requires that the court accepted the earlier position such that its acceptance of the new position would lead to inconsistent determinations"). It would, moreover, prejudice Comcast by forcing it to defend a claim that Viamedia indicated at the motion to dismiss stage that it was not pursuing. *See The Medicines Co. v. Mylan Inc., No. 11-CV-1285, 2014 U.S. Dist. LEXIS 66601, 2014 WL 1979261, at *3-4 (N.D. Ill. May 15, 2014)*.

Setting waiver and estoppel aside, Viamedia's claim fails.[19] It hits the same roadblock Viamedia's tying claim did: viewing the record in light most favorable to Viamedia, no evidence tends to exclude the fact that Comcast's conduct was merely a refusal to deal, rather than anticompetitive conduct. *See Mercatus Grp., 641 F.3d at 856*. The claim is just a "recast" of the refusal to deal, complaining, again, about Comcast's refusal to allow Viamedia to resell MVPDs' avails on the Interconnects and the impact that conduct has had on its ability to compete. *Novell, 731 F.3d at 1079*; *see* R. 326 at 25 (complaining that "Comcast has used its control over the Interconnects to squeeze its only competitor"). The "refusal to deal doctrine is not so easily evaded." *Novell, 731 F.3d at 1079*. Viamedia may have been rendered unable to "compete effectively," *Linkline, 555 U.S. at 450*, *see* ***[**68]*** *also* Furchtgott-Roth Report ¶¶ 86-92, but even *Section 2* does not concern itself with the welfare of a competitor; it asks whether the monopolist's actions were cognizably anticompetitive. *Id. at 448-450*; *Trinko, 540 U.S. at 407-08*; *see also Schor, 457 F.3d at 611-14* (rejecting monopoly claims not tied to "normal exclusionary practices"); *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986)* ("Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition, and to deter aggressive conduct is to deter

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Fed. R. Evid. 702. He merely posits the broad assertion. Further, because his predicate tying opinions are inadmissible, so too is his one-in-the-same exclusive dealing opinion. The Court therefore excludes it. *Id.* ¶¶ 71-72.

[19] Viamedia appears to use its catchall theory as protection in case the Court found that Interconnect Services and Ad Rep Services are not separate products for tying purposes. *See* R. 326 at 25 ("In particular, unlike *Section 1* tying claims, *Section 2* doctrine does not require Viamedia to establish the existence of separate products"). As noted earlier, the Court has assumed that the products are separate.

competition. Thus the plaintiff faces a stiff burden in any *§ 2* litigation."). For reasons explained above, and in *Viamedia I* and *Viamedia II*, Comcast's refusal to permit Viamedia to participate in the interconnects does not violate the Sherman Act.

II. Even If Comcast Had Engaged in Anticompetitive Conduct, Viamedia Cannot Show that It Caused Viamedia's Antitrust Injury or Damages

Even if Viamedia had presented a question of fact as to whether Comcast engaged in tying, exclusive dealing, or other anticompetitive conduct, its case still fails. At summary judgment, a plaintiff must demonstrate an issue of fact with respect to each element of its claim—including causation. *See* *Dalton v. Teva N. Am., 891 F.3d 687, 691 (7th Cir. 2018)*; *O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc., 36 F.3d 565, 573 (7th Cir. 1994)*. Viewing the record in the light most favorable to Viamedia, there is no issue of fact **[**69]** for the jury to decide regarding whether Comcast's anticompetitive conduct caused: (1) Viamedia's antitrust injury, or (2) its damages.

[*1070] A. Viamedia Cannot Show Antitrust Injury

To establish an antitrust injury, a plaintiff must show that the anticompetitive conduct complained of was "the cause-in-fact of the injury"—that is, "'but for' the violation, the injury would not have occurred." *Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 718 (7th Cir. 2006)* (antitrust injury must "reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation"); *see also* *O.K. Sand & Gravel, 36 F.3d at 573* (holding that antitrust injury requires "not only that the injury is of the type intended to be protected by the antitrust laws, but that the violation was 'the cause-in-fact of the injury: that but for the violation, the injury would not have occurred'") (citing *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993))*; *see also, e.g.,* *In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 66 (2d Cir. 2012)* ("to prevail on an antitrust claim, a plaintiff must establish that 'the injuries alleged would not have occurred *but for* [the defendant's] antitrust violation' . . . adding necessity to the materiality requirement of our antitrust causation analysis.") (emphasis in original, internal citation omitted). A plaintiff, thus, must be able to distinguish between "financial loss **[**70]** from the *lawful* activities of a competitor" from loss "caused by the *unlawful* acts of the defendant." *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1161 (7th Cir. 1983)* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. In other words, if lawful competition "fully accounts for" a plaintiff's "claimed injury," the law will "deny any injury" because "the plaintiff's situation would be the same with or without the challenged restraint." Areeda & Hovenkamp, ***Antitrust Law*** ¶ 338b-c.

In assessing whether a defendant's anticompetitive conduct caused a plaintiff's antitrust injury, courts assume that the defendant acted anticompetitively. *Id.* ¶ 338. Here, that means assuming that Comcast engaged in tying, exclusive dealing, or other exclusionary and cognizably anticompetitive conduct. So doing, Viamedia is nevertheless unable to present an issue of fact as to whether its alleged antitrust injuries resulted from that anticompetitive conduct as opposed to Comcast's undisputed and legal refusal to deal.

Without exception, each injury Viamedia identifies—the lost revenue from the Chicago and Detroit interconnects after Comcast refused to renew the 2003 agreement in 2012; lost contracts with MVPDs; the lost revenue from the Hartford interconnect; and the attendant business expenses and talent loss—is fully **[**71]** attributable to Comcast's decision to deny Viamedia interconnect access. Dr. Furchtgott-Roth, for example, asserts that Viamedia's foreclosure from the market "flows *directly* from Viamedia's inability to access" the interconnects. Furchtgott-Roth Report ¶ 90 (emphasis added). Dr. Lys, likewise, premises all of his damages opinions on the assumption that absent Comcast's anticompetitive conduct Viamedia would have had reasonable access to the interconnects. *E.g.*, Lys Report ¶ 34(1)-(7). He even testified that his "entire damages estimate is based directly or indirectly on Viamedia's lack of access to Comcast Spotlight's interconnect in Chicago, Detroit, and Hartford." Comcast Ex. 7 at 235:18-236:20. Mark Lieberman, Viamedia's CEO, similarly complains that "Viamedia lost business and revenues as a consequence of being excluded from Comcast-operated Interconnects." Viamedia Ex.

5 at 5. By all accounts, Viamedia's refusal to deal with Comcast explains entirely Viamedia's injuries. **[*1071]** *See* MCI Commc'ns Corp., 708 F.2d at 1161.

Novell is on point. In that case, a software-providing competitor of Microsoft's, Novell, filed suit under Section 2. Novell, 731 F.3d at 1065 (Gorsuch, J.). In rolling out Windows 95, Microsoft had initially decided to share certain intellectual property—like **[**72]** namespace extensions, which allow users to search for and open documents outside of a particular application—with independent software providers. Id. at 1067-68. It later changed course, after concluding that not sharing the intellectual property would maximize its profits. Id. at 1068. This conduct impeded Novell's ability to build (and sell) software around the extensions, and its "business suffered" because it was delayed in launching its new software. Id. at 1069. Unable to sustain a refusal to deal case under *Aspen Skiing* and *Trinko*, Novell argued at summary judgment that Microsoft's conduct was not merely a refusal to deal but an act of business deception that sufficed independently for Section 2 purposes. Id. at 1079-1080. The Tenth Circuit disagreed, concluding that Novell lacked antitrust injury to bring such a claim. Id. at 1080. It reasoned that even if Microsoft had been upfront about its competitive decisions, and engaged in nothing nearing a business tort, "Novell and consumers *still* would have suffered the same alleged harm"—the delayed release of products caused by Microsoft's refusal to deal. *Id.* (emphasis in original). So too here. Viamedia's own evidence decisively establishes that Comcast's refusal to deal was sufficient unto itself **[**73]** to cause Viamedia's injuries.

Viamedia offers no meaningful rejoinder to this plain fact. At most, Viamedia submits that as long as it has established the type of injuries with which the antitrust laws are concerned, the Court should "presume that such an injury . . . was caused by" an anticompetitive act. R. 326 at 35 (citing Publ'n Paper, 690 F.3d at 66). Even if that were true, Viamedia's own evidence shows that tying and exclusive dealing were not "but for" causes of Viamedia's injuries. Publ'n Paper, 690 F.3d at 67 (the presumption is rebuttable). Those injuries, which Viamedia concedes stem from Comcast's decision to deny Viamedia interconnect access in Chicago, Detroit, and Hartford, would have occurred with or without attendant tying and exclusive dealing. *Supra* at 50; *infra* at 53-55; Furchtgott-Roth Report ¶ 91; *see generally* Lys Am. Report. No evidence suggests otherwise. Apart from that argument, Viamedia offers little to explain how it can demonstrate that anticompetitive conduct, not an independent and already-deemed legal refusal to deal, caused its antitrust injury.[20]

It is black-letter law that Viamedia must show that it would have suffered antitrust injury but for Viamedia's anticompetitive conduct. *E.g.,* Kochert, 463 F.3d at 718; MCI Commc'ns Corp., 708 F.2d at 1161. Critically, Viamedia does not argue or **[**74]** present any evidence showing that absent tying or exclusive dealing practices, Comcast would have felt any differently about excluding Viamedia from the interconnects. To the contrary, the record presents ample evidence of Comcast's decision to stop dealing with middlemen and go after full-turnkey relationships with more MVPDs. As such, in the but-for world, Comcast still would have refused to deal with Viamedia; it just could not further condition services or engage in anticompetitive exclusive dealing. Viamedia makes no effort to account for that but-for world, and that is the fundamental flaw in its case.

[*1072] B. Viamedia Cannot Show Damages Resulting from Supposedly Anticompetitive Conduct

Viamedia's asserted damages suffer the same problem. Despite the complicated nature of proving damages causation in an antitrust case, *see* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981), Viamedia elected not to employ an expert to opine on causation. Instead, Viamedia submits affidavits signed by three executives: CEO Lieberman (Viamedia Ex. 5), co-founder and former president Jeff Carter (Viamedia Ex. 3), and co-founder and former CEO Todd Donnelly (Viamedia Ex. 4). Viamedia rests primarily on these affidavits (most often, Lieberman's), "Viamedia **[**75]** management project[ions]," and its "track record with its partners" to support its notion of what profits Viamedia would have made but for Comcast's anticompetitive conduct. R. 326 at 36.

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[20] In fact, Viamedia's short shrift of the issue prompts Comcast to argue that Viamedia has waived any argument about causation and antitrust injury. R. 339 at 4 n.3.

1. Viamedia's Evidence of Causation Does Not Distinguish Between Damages Caused by Competitive and Anticompetitive Conduct and Thus Fails

"When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors"—like lawful competition—"the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage." *MCI Commc'ns Corp., 708 F.2d at 1162*; Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 675b; *see also* *Comcast Corp. v. Behrend, 569 U.S. 27, 35, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (it is an "unremarkable premise" that a claimant is "entitled only to damages resulting from" to the claimed anticompetitive conduct).

That it is precisely what Viamedia has done. Its evidence fails to disaggregate the damages caused by Comcast's lawful refusal to deal from Comcast's supposed tying, exclusive dealing, and other exclusionary conduct. Lieberman's affidavit is exemplary. He attests that "Viamedia's exclusion from" the Chicago and Detroit "Interconnects has caused Viamedia and its MVPD partners to lose revenues they otherwise would have earned **[**76]** from Interconnect sales, which has, in turn, reduced Viamedia's cash flows and financial stability," causing in turn "MVPD partners to switch to other ad representation firms." Viamedia Ex. 5 at 6. It repeats similar claims for pages. *See id.* at 7 ("Due to loss of access to the Chicago and Detroit Interconnects, Viamedia was ultimately unable to make a competitive financial offer" to RCN), 11 (complaining of the purported results of Comcast's decision to "deny[ ] Viamedia the ability to continue purchasing Interconnect Services on behalf of [its] MVPD clients), 13 ("If Viamedia had never been excluded from the Interconnects Chicago, Detroit, and Hartford, I am confident that the momentum Viamedia had in the marketplace prior to 2012 . . ."). Dr. Lys's damages opinion likewise conflates the financial consequences of Comcast's refusal to deal with the results of Comcast's supposedly anticompetitive conduct. *See generally* Lys Am. Report. He, again, admitted that his "entire damages estimate is based directly or indirectly on Viamedia's lack of access" to the interconnects in Chicago, Detroit, and Hartford. Comcast Ex. 7 at 236:10-20. All of this evidence (to the extent it is admissible) attributes **[**77]** Viamedia's damages to Comcast's decision not to permit Viamedia interconnect access—its refusal to deal.

Under the law, Viamedia must be able to segregate the damages (to a reasonable degree, at least) caused by lawful competition from those caused by anticompetitive acts. *See* *MCI Commc'ns Corp., 708 F.2d at 1162*; *see also* ABA Section of **[*1073]** ***Antitrust Law***, *Proving Antitrust Damages: Legal and Economic Issues* 13-14 (3d ed. 2017) ("courts require that the antitrust violation be the sole cause of the plaintiff's damages, by insisting on a but-for world that eliminates only the defendant's unlawful conduct separately from all other sources that may also have caused the plaintiff's damages"). Considering them to be one in the same, Viamedia fails to do so.[21] It therefore seeks to "force" Comcast "to pay treble damages for conduct that was determined to be entirely lawful." *MCI Comm'ns, 708 F.2d at 1162-63*.

[21] Even assuming *arguendo* that the but-for world is a place where Comcast decides to permit Viamedia on the interconnects on friendly terms, the Court is dubious that Viamedia's lay evidence of causation regarding the loss of future business (the largest part of its damages claim) would suffice. Despite Viamedia's pronouncements about its management team's work (*e.g.*, R. 326 at 40), "Viamedia's projections" are not based on any economic price or terms analyses (at least as far as the record is concerned). Viamedia's refrain that it need not examine prices because the Ad Rep market is a "relationship business" is convenient; there is in fact no specific evidence showing that Viamedia could have competed with Comcast on price. *See* CSF ¶¶ 116-122 (Comcast, on average, offered better revenue shares to MVPDs than Viamedia). Further, not a single MVPD testified that it would have selected Viamedia but for its lack of interconnect access. Viamedia did not hire an expert to opine on causation, and lay persons are generally forbidden from doing precisely as Viamedia's management does here—testify regarding "hypotheticals or assumptions" about what might have happened in the future. *Gumwood HP Shopping Ptrs. L.P. v. Simon Prop. Grp., Inc., 2017 U.S. Dist. LEXIS 110070, 2017 WL 3016385, at *4 (N.D. Ind. July 17, 2017)*. In short, this multimillion-dollar antitrust case is "far removed from situations in which a causation issue is so obvious that a plaintiff may forgo expert testimony." *Dalton, 891 F.3d at 691*. The Court, however, need not ultimately decide whether Comcast has presented sufficient evidence with respect to this part of its damages case because Viamedia has failed to meet its threshold burden to show an issue of fact as to whether the any of the damages it seeks stem from unlawful conduct.

2. Dr. Lys's Damages Opinions Are Inadmissible

As Dr. Lys's Report and testimony, plus Viamedia's representations at the *Daubert* hearing, make clear, the entirety of his opinion assumes that but for Comcast's supposed anticompetitive practices, Viamedia would have been able to access the interconnects and compete as it had before 2011. *See, e.g.,* ***[**78]*** *Daubert* Hr'g Tr., R. 354, at 153:24-154:5 (Viamedia's counsel indicating that Dr. Ly's "assume[d] causation" and that the question of whether those assumptions are permissible is "a question about summary judgment"). An expert's testimony is inadmissible, however, if it does not fit "the facts of the case." *Owens, 895 F.3d at 971*.

Dr. Lys's opinions are inadmissible, as they rest on the unfounded assumption that Viamedia could have accessed the interconnects but for Comcast's anticompetitive conduct. *See, e.g., Buscaglia v. United States, 25 F.3d 530, 533 (7th Cir. 1994)* (expert testimony may not be based on "unsupported assumptions"); *see also, e.g., Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 777 (8th Cir. 2004)*; *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1055-1057 (8th Cir. 2000)*; *Rickman v. Deere & Co., 36 F.3d 1093 (4th Cir. 1994)*; *accord Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."); Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 657b ("If the **[*1074]** plaintiff's expert's damages study cannot segregate lawful from unlawful practices, then no damages may be awarded on the basis of that study.").

3. Viamedia's Claim for Injunctive Relief Fails

On a final note, Viamedia also requests injunctive relief from Comcast's conduct. R. 40 at 50. As an initial and obvious matter, Viamedia **[**79]** is not entitled to this relief because it has not shown an issue of fact as to whether Comcast engaged in anticompetitive conduct or that any such conduct caused it injury or damages. But the Court addresses Viamedia's request—that it enjoin Comcast from "any effort to exclude Viamedia or its MVPD clients from participating on a fair and open basis in the Interconnects"—because it, too, betrays the fundamental flaw in its case.

Antitrust law does not allow the injunctive relief Viamedia seeks. *See* Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 774c. *Trinko* and *Linkline* prohibit enforced sharing absent a duty to deal, and for good reason. Forced sharing "lessen[s] the incentive for the monopolist, the rival, or both to invest," it requires courts to act as "central planners" over the proper terms of such sharing, and it can compel the "supreme evil of antitrust: collusion." *Trinko, 540 U.S. at 407-08*; *see also* Easterbrook, *The Chicago School & Exclusionary Conduct, at 441-42*; Richard A. Posner, ***ANTITRUST LAW*** 242 (2d ed. 2001) ("Where the refusal to deal is unilateral, the only effective remedy is an order that defendant do business with the victim of the refusal to deal. The antitrust court becomes charged with the supervision of an ongoing commercial relationship, a function **[**80]** that courts are not equipped to perform effectively."). Indeed, while examining claims similar to the ones Viamedia brings, the Seventh Circuit recently warned about "fail[ing] to adhere to the lessons of" *Trinko* and *Linkline. Authenticom, 874 F.3d at 1021*. In doing so, it vacated a preliminary injunction that forced two firms that dominated upstream markets to allow their downstream competitors access to their systems. The Seventh Circuit noted that if there is a tie, "the proper remedy would be to enjoin the tie"—not, as Viamedia requests, "to create a duty to deal." *Id. at 1026*.

Viamedia brought this case in an attempt to force—under Court order—Comcast to provide it access to the interconnects on favorable terms. ***Antitrust law*** does not oblige.

CONCLUSION

For the foregoing reasons, the Court grants Comcast's motion for summary judgment, grants in part Comcast's motion to exclude Dr. Furchtgott-Roth's opinions and denies the remainder as moot, grants Comcast's motion to exclude Dr. Lys's opinions, and enters judgment in Comcast's favor.

Dated: August 16, 2018

ENTERED

/s/ Amy J. St. Eve

AMY J. ST. EVE

United States Circuit Court Judge

Sitting by Designation

Veritext Corp. v. Bonin

United States Court of Appeals for the Fifth Circuit

August 17, 2018, Filed

No. 17-30691

Reporter

901 F.3d 287 *; 2018 U.S. App. LEXIS 23010 **; 2018-2 Trade Cas. (CCH) P80,484

VERITEXT CORPORATION, Plaintiff - Appellant v. PAUL A. BONIN, in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; VINCENT P. BORRELLO, JR., individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; MILTON DONEGAN, JR., individually and in their official capacity as Member of the Louisiana Board of Examiners of Certified Court Reporters; SUZETTE MAGEE, individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; KIMYA M. HOLMES, in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; JOHN H. ANDERSSEN, individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; MAY F. DUNN, individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; ELIZABETH C. METHVIN, individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; LAURA PUTNAM, in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, Defendants - Appellees

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of Louisiana.

Veritext Corp. v. Bonin, 2017 U.S. Dist. LEXIS 121488 (E.D. La., July 28, 2017)
Veritext Corp. v. Bonin, 259 F. Supp. 3d 484, 2017 U.S. Dist. LEXIS 54336 (E.D. La., Apr. 10, 2017)

Core Terms

supervision, court reporting, court reporter, district court, constitutional claim, party litigant

LexisNexis® Headnotes

Civil Procedure > ... > Methods of Discovery > Depositions > Oral Depositions

Governments > Courts > Court Personnel

Governments > State & Territorial Governments > Employees & Officials

HN1[ ] **Depositions, Oral Depositions**

The Louisiana Board of Examiners of Certified Shorthand Reporters enforces Louisiana law regarding the relationship of court reporters to litigants. This law provides, in part, that depositions shall be taken before an officer authorized to administer oaths, who is not an employee or attorney of any of the parties or otherwise interested in the outcome of the case. La. Code Civ. Proc. Ann. art. 1434(A)(1). The law further provides that an employee includes a person who has a contractual relationship with a party litigant to provide shorthand reporting or other court reporting services and also includes a person employed part or full time under contract or otherwise by a person who has a contractual relationship with a party litigant to provide shorthand reporting or other court reporting services. La. Code Civ. Proc. Ann. art. 1434(A)(2).

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN2[] **Judicial Review, Standards of Review**

A statutory classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. This is an expansive standard.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Governments > Legislation > Interpretation

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN3[] **Case or Controversy, Constitutionality of Legislation**

When a statute has only indirect effects on interstate commerce and regulates evenhandedly, courts consider whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Antitrust & Trade Law > Sherman Act > Claims

HN4[] **Sherman Act, Claims**

To prevail under the Sherman Act, a plaintiff must show a contract, combination, or conspiracy that imposed an unreasonable restraint on trade.

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN5[] **Appellate Review, Standards of Review**

When reviewing a summary judgment, an appellate court construes all facts and inferences in favor of the nonmoving party.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > State & Territorial Governments > Claims By & Against

HN6[] **Sherman Act, Defenses**

Anti-competitive conduct by a state is generally immune from federal ***antitrust law***. The *Sherman Act* makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. However, this immunity is not absolute. For a state agency to enjoy Parker immunity under the *Sherman Act*, it must satisfy two requirements: first that the challenged restraint be one clearly articulated and affirmatively expressed as state policy, and second that policy be actively supervised by the State.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > State & Territorial Governments > Claims By & Against

HN7[] **Sherman Act, Defenses**

The active state supervision requirement for state immunity from a suit under the *Sherman Act* is necessary to prevent a State from circumventing the *Sherman Act's* proscriptions by casting a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. Active supervision might include establishing prices and reviewing the reasonableness of the price schedules, regulating the terms of fair trade contracts, monitoring market conditions, and engaging in pointed reexamination of the program. And while any such inquiry will necessarily turn on the circumstances of a particular case, active supervision must entail review of the substance of the anticompetitive decision, not merely the procedures followed to produce it, and the power to veto or modify particular decisions to ensure they accord with state policy.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > State & Territorial Governments > Claims By & Against

Governments > State & Territorial Governments > Legislatures

HN8[] **Sherman Act, Defenses**

State legislatures always possess the power to change the law. "Active supervision" for purposes of Parker immunity under the *Sherman Act* requires more than the bare possibility that controlling law might be changed—the mere potential for state supervision is insufficient.

Governments > State & Territorial Governments > Employees & Officials

Governments > State & Territorial Governments > Licenses

HN9[] **State & Territorial Governments, Employees & Officials**

Louisiana law requires that six of the nine members of the Louisiana Board of Examiners of Certified Shorthand Reporters be certified shorthand reporters. *La. Rev. Stat. Ann. § 37:2551(B)(1)*.

Counsel: For VERITEXT CORPORATION, Plaintiff - Appellant: Mark Aaron Cunningham, Alexander N. Breckinridge, Jones Walker, L.L.P., New Orleans, LA.

For PAUL A. BONIN, in thier official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, VINCENT P. BORRELLO, JR., individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, MILTON DONEGAN, JR., individually and in their official capacity as Member of the Louisiana Board of Examiners of Certified Court Reporters, SUZETTE MAGEE, individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, KIMYA M.

HOLMES, in their official capacity as a Member of the Louisiana Board of Examiners of Certified court Reporters, JOHN H. ANDERSSEN, individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, MAY F. DUNN, Individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, ELIZABETH C. METHVIN, individually **[**2]** and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, LAURA PUTNAM, in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, Defendants - Appellees: James M. Garner, Joshua Simon Force, Brandon Keay, Esq., David A. Marcello, Sher Garner Cahill Richter Klein & Hilbert, L.L.C., New Orleans, LA; John Elliott Baker, Covington, LA.

Judges: Before KING, SOUTHWICK, and HO, Circuit Judges.

Opinion by: JAMES C. HO

Opinion

[*290] JAMES C. HO, Circuit Judge:

HN1[] The Louisiana Board of Examiners of Certified Shorthand Reporters enforces Louisiana law regarding the relationship of court reporters to litigants. This law provides, in relevant part, that "deposition[s] shall be taken before an officer authorized to administer oaths, who is not an employee or attorney of any of the parties or otherwise interested in the outcome of the case." *La. Code Civ. Proc. Ann. art. 1434(A)(1)*. The law further provides that "an employee includes a person who has a contractual relationship with a party litigant to provide shorthand reporting or other court reporting services and also includes a person employed part or full time under contract or otherwise by a person who has a contractual relationship **[**3]** with a party litigant to provide shorthand reporting or other court reporting services." *La. Code Civ. Proc. Ann. art. 1434(A)(2)*.

In 2012, the Board began enforcing *Article 1434* more aggressively, declaring that the law prohibits all contracts between court reporters and party litigants, including volume-based discounts and concessions to frequent customers. Veritext, a national private court reporting service regulated by the Board and doing business in Louisiana, filed suit.

Veritext alleges, in sum, that these regulatory efforts reflect nothing more than rent-seeking. As Veritext sees it, local providers are simply harnessing the regulatory power of the state to prevent competition from national and regional court reporting firms, and thereby increase business opportunities and raise prices for freelance court reporters.

To vindicate its concerns, Veritext brought a variety of constitutional claims—substantive due process, equal protection, and the Dormant *Commerce Clause*—as well as a claim under the *Sherman Act*. **[*291]** The district court dismissed the constitutional claims, and subsequently dismissed the *Sherman Act* claim on reconsideration. *Veritext Corp. v. Bonin, 259 F. Supp. 3d 484, 488 (E.D. La. 2017)*, *on reconsideration*, *2017 U.S. Dist. LEXIS 121488, 2017 WL 3279464 (E.D. La. Aug. 2, 2017)*. Veritext appeals on all these grounds.

We conclude that none of the constitutional **[**4]** claims presented by Veritext have merit, but that the *Sherman Act* claim should proceed on remand.

I.

The district court was correct to dismiss all of the constitutional claims brought by Veritext as a matter of Supreme Court precedent.

Veritext argues that the Board's 2012 decision to ban volume-based discounts and concessions to frequent customers lacks a rational basis, and thereby violates both substantive due process and equal protection under established precedent. The Board responds that these regulatory efforts further the State's legitimate government interest in ensuring and protecting the integrity of legal proceedings. As the Board explains, "[c]ommon sense dictates that court reporters might be more inclined to alter a deposition transcript in favor of party litigants that provide them with long-term financial benefits."

This rationale may find a skeptical audience in certain quarters. But it is legally sufficient to support the Board's action under rational basis review. As the Supreme Court has long recognized, ***HN2***[] "[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe by Doe, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)* (citation **[**5]** and quotations omitted). This is an expansive standard, and the Board's stated goal of protecting against "any appearance of impropriety or bias on the court reporter's behalf" meets it. *Veritext Corp., 259 F. Supp. 3d at 490*.

A similar analysis applies to Veritext's Dormant *Commerce Clause* argument. ***HN3***[] "When . . . a statute has only indirect effects on interstate commerce and regulates evenhandedly," we consider "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)*. Here, as previously stated, Louisiana's interest in the integrity of its court reporting system is legally sufficient. And Veritext has failed to clearly identify a burden on interstate commerce imposed by the Board's enforcement of *Article 1434* that exceeds its local benefits. Veritext's Dormant *Commerce Clause* claim therefore fails as well.

II.

Although we agree that the constitutional claims lack merit, we remand this case so that Veritext can proceed on its *Sherman Act* claim.

HN4[] To prevail under the *Sherman Act*, Veritext must show a contract, combination, or conspiracy that imposed an unreasonable restraint on trade. *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 189, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*. ***HN5***[] "When reviewing a summary judgment, we construe all facts and inferences in favor of the nonmoving party." **[**6]** *Deshotel v. Wal-Mart Louisiana, LLC, 850 F.3d 742, 745 (5th Cir. 2017)*.

[*292] Veritext pled facts sufficient to support a finding that the Board's conduct does indeed restrain trade. Among other allegations, Veritext argued that the Board is composed of active market participants who "are highly engaged in setting the agenda of the Board and its committees and in directing the Board's business," who actively sought to "discourage a perceived trend of freelance court reporters leaving the profession," and who took regulatory actions calculated to "deter[] and delay[] entry by national and regional court reporting firms." On the record before us, we agree with the district court that Veritext has alleged facts sufficient to make out a prima facie *Sherman Act* claim.

This raises the question of immunity. As the district court noted, ***HN6***[] "anti-competitive conduct by a state is generally immune from federal ***antitrust law***." *Veritext Corp., 259 F. Supp. 3d at 492*. *See also* *Parker v. Brown, 317 U.S. 341, 351, 63 S. Ct. 307, 87 L. Ed. 315 (1943)* ("The *Sherman Act* makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.").

However, this immunity is not absolute. For the Board to enjoy *Parker* immunity under the *Sherman Act*, it must satisfy "two requirements: first that 'the challenged restraint . **[**7]** . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" *N. Carolina State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101, 1110, 191 L. Ed. 2d 35 (2015)* (citation omitted).

The Board satisfies the first requirement: Its ban on private court reporting arrangements is clearly articulated, as *Article 1434* does indeed bar contracts between private court reporting services and party litigants. But the Board fails under the second requirement of active state supervision.

HN7[] "[T]he active state supervision requirement [is] necessary to prevent a State from circumventing the *Sherman Act's* proscriptions 'by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.'" *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46-47, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)* (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106, 100 S. Ct. 937,* *63 L. Ed. 2d 233 (1980))*. Active supervision might include "establish[ing] prices [and] review[ing] the reasonableness of the price schedules," "regulat[ing] the terms of fair trade contracts," "monitor[ing] market conditions," and "engag[ing] in 'pointed reexamination' of the program." *Midcal, 445 U.S. at 105-06* (citation omitted). And while any such inquiry will necessarily turn on the circumstances of a particular case, *Dental Examiners* made clear that "active supervision" must entail "review [of] the substance of the anticompetitive **[**8]** decision, not merely the procedures followed to produce it," and "the power to veto or modify particular decisions to ensure they accord with state policy." *135 S. Ct. at 1116*.

We find that Veritext has pled facts sufficient to support a finding that the active supervision requirement is not met in this case. Nothing in the record indicates that elected or appointed officials oversaw or reviewed the Board's decisions or modified the Board's enforcement priorities. And the Board's argument on this point—that the legislature can amend the law in this area or veto proposed rules under *Louisiana's Administrative Procedure Act*—is unconvincing. ***HN8***[] State legislatures *always* possess the power to change the law. Active supervision requires more **[*293]** than the bare possibility that controlling law might be changed—the "mere potential for state supervision" that *Dental Examiners* expressly identified as insufficient. *135 S. Ct. at 1116*. Adoption of the Board's logic would effectively nullify the requirement of active state supervision under *Dental Examiners*.

The Board alternatively contends that the active supervision requirement does not apply here for two reasons: first, because Veritext has not pled sufficient facts to show that the Board's **[**9]** members are active market participants; and second, because the Board does not advance private interests by enforcing the terms of state law.

These arguments are unavailing. To begin with, ***HN9***[] Louisiana law requires that six of the Board's nine members be "certified shorthand reporter[s]"—the very individuals most likely to be impacted by Veritext's involvement in the market. *La. Rev. Stat. § 37:2551(B)(1)*. The Board attempts to differentiate "freelance" and "official" court reporters, but the boundary between these categories is porous: an individual serving as an official court reporter may readily go freelance if he so chooses. It is sufficiently clear from the record that the members of the Board qualify as active market participants. And it strains credulity to regard the Board's conduct as strictly public-minded, in light of its decision to convene a meeting that included "How to increase rates?" as one of its agenda items. *Veritext Corp., 259 F. Supp. 3d at 492*.

In sum, the district court was correct the first time when it observed that Veritext alleged sufficient facts that "the board's actions do not resemble a municipality under active supervision but instead represent an unbridled regulatory environment." *Veritext Corp., 259 F. Supp. 3d at 493*. Because Veritext has pled facts sufficient **[**10]** to support a finding that the active supervision requirement of *Midcal* and *Dental Examiners* is not satisfied here, the district court erred in granting summary judgment to the Board on Veritext's *Sherman Act* claim.

III.

We affirm the district court's dismissal of Veritext's constitutional claims. We reverse the district court's dismissal of Veritext's *Sherman Act* claim and remand for further proceedings.

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Bray v. Bank of Am. Corp.

United States District Court for the Middle District of Florida, Tampa Division

August 20, 2018, Decided; August 20, 2018, Filed

Case No: 8:15-cv-2532-T-35CPT

Reporter
2018 U.S. Dist. LEXIS 187674 *; 2018-2 Trade Cas. (CCH) P80,530

PATRICK RYAN BRAY, Plaintiff, v. BANK OF AMERICA CORP. and BANK OF AMERICA, N.A., Defendants.

Subsequent History: Affirmed by *Bray v. Bank of Am. Corp., 784 Fed. Appx. 738, 2019 U.S. App. LEXIS 27231, 2019 WL 4271914 (11th Cir. Fla., Sept. 10, 2019)*

Prior History: *Bray v. Bank of Am. Corp., 2015 U.S. Dist. LEXIS 194907, 2015 WL 13826464 (M.D. Fla., Dec. 21, 2015)*

Core Terms

res judicata, summary judgment motion, allegations, statute of limitations, summary judgment, antitrust, parties, alleged violation, overt act

Counsel: **[*1]** Patrick Ryan Bray, Plaintiff, Pro se, Bradenton, FL.

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For Bank of America, N.A., Defendant: Mahlon Herbert Barlow, III, LEAD ATTORNEY, Sivyer Barlow & Watson PA, Tampa, FL; Michael B. Miller, LEAD ATTORNEY, Morrison & Foerster, LLP-New York, New York, NY.

For Peter J. Grilli, Mediator: Peter John Grilli, LEAD ATTORNEY, Peter J. Grilli, PA, Tampa, FL.

Judges: MARY S. SCRIVEN, UNITED STATES DISTRICT JUDGE.

Opinion by: MARY S. SCRIVEN

Opinion

ORDER

THIS CAUSE comes before the Court for consideration of the Plaintiff's Motion for Summary Judgment, (Dkt. 114); Defendants' Response in opposition thereto, (Dkt. 126); Plaintiff's Reply, (Dkt. 134); Defendants' Motion for Summary Judgment, (Dkt. 116); Plaintiff's Response in opposition thereto, (Dkt. 121); Defendants' Reply, (Dkt. 127); and Defendants' Motion to Exclude Expert Testimony of Professor Cornelius K. Hurley.[1] (Dkt. 115) Upon

[1] Plaintiff filed no response to Defendants' Motion to Exclude Expert Testimony of Professor Cornelius K. Hurley.

consideration **[*2]** of all relevant filings, case law, and being otherwise fully advised, the Court **DENIES** Plaintiff's Motion for Summary Judgment, (Dkt. 114), **GRANTS** Defendants' Motion for Summary Judgment, (Dkt. 116), and **DENIES AS MOOT** Defendants' Motion to Exclude Expert Testimony of Professor Cornelius K. Hurley. (Dkt. 115)

I. BACKGROUND

Plaintiff Patrick Ryan Bray ("Bray") initiated this action against Defendants Bank of America Corp. ("BAC") and Bank of America, N.A. ("BANA") on October 27, 2015. (Dkt. 1) On February 26, 2016, Bray filed an Amended Complaint. (Dkt. 26) In the Amended Complaint, Bray alleges that BANA committed violations of the Sherman Act, *15 U.S.C. § 1, et seq.*, the Clayton Act, *15 U.S.C. § 12, et seq.*, and the Florida Antitrust Act, *Fla. Stat. § 542.15, et seq.* (Id.) Bray's antitrust claims are expressly premised on BANA's alleged violation of the Bank Holding Company Act ("BHCA"), *12 U.S.C. § 1972*, which prohibits banks from engaging in the "tying" of certain bank services. (Id.) Bray alleges that he was damaged by BANA's purported unlawful "tying" arrangement that required Maritz Holdings, Inc. ("Maritz")—which had secured a syndicated loan from BANA and five other lenders—to move its assets, called the General Public Account ("GPA"), to Merrill Lynch. (Id. at ¶ **[*3]** 59) Bray had previously managed the GPA through bonds and bond mutual funds; however, he was no longer able to do so after resigning from Merrill Lynch in October 2011 because the GPA remained at Merrill Lynch, an affiliate of BANA, as required by the loan agreement. (Id. at ¶¶ 20, 30-31, 59, 68) Thus, Bray contends, the tying arrangement prohibited him from being able to independently manage the GPA. (Id. at ¶ 59)

This is Bray's third of four legal actions based on the same operative facts in the Complaint. The Court reincorporates the factual and procedural background in Bray v. Bank of Am., N.A., (Case No. 8:17-cv-75-MSS-AAS ("Bray IV"), Docket No. 38).

Bray moves for summary judgment, arguing that no genuine issue of material facts exists related to BANA's alleged violations, and that BAC, as the parent company of BANA, sets "all policies and procedures for its subsidiaries to follow." (Dkt. 114 at 26) Bray contends that he is entitled to judgment as a matter of law. Defendants move for summary judgment, contending that Bray's claims are barred by *res judicata* and time-barred by the statute of limitations. (Dkt. 116 at 2) Additionally, Defendants argue that Bray lacks standing to **[*4]** bring his claims, and that, in any case, the claims fail because Bray cannot demonstrate the essential elements of the antitrust tying claims. (Id. at 2-3)

II. STANDARD OF REVIEW

Summary judgment is appropriate when the movant can show there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Fennell v. Gilstrap, 559 F.3d 1212, 1216 (11th Cir. 2009)* (citing *Welding Servs., Inc. v. Forman, 509 F.3d 1351, 1356 (11th Cir. 2007))*. Which facts are material depends on the substantive law applicable to the case. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The moving party bears the burden of showing that no genuine issue of material fact exists. *Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991)*.

Evidence is reviewed in the light most favorable to the non-moving party. *Fennell, 559 F.3d at 1216* (citing *Welding Servs., Inc., 509 F.3d at 1356*). A moving party discharges its burden on a motion for summary judgment by showing or pointing out to the Court that there is an absence of evidence to support the non-moving party's case. *Denney v. City of Albany, 247 F.3d 1172, 1181 (11th Cir. 2001)* (citation omitted).

When a moving party has discharged its burden, the non-moving party must then designate specific facts (by its own affidavits, depositions, answers to interrogatories, or admissions on file) that demonstrate there is a genuine issue for trial. *Porter v. Ray, 461 F.3d 1315, 1320-1321 (11th Cir. 2006)* (citation omitted). The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. **[*5]** *Evers v. Gen. Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985)* ("[C]onclusory allegations without specific supporting facts have no probative value."). "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . the court may grant summary judgment if the motion and supporting materials . . . show that the movant is entitled to it." *Fed. R. Civ. P. 56(e)*.

"The standard of review for cross-motions for summary judgment does not differ from the standard applied when only one party files a motion, but simply requires a determination of whether either of the parties deserves judgment as a matter of law on the facts that are not disputed." *S. Pilot Ins. Co. v. CECS, Inc., 52 F. Supp. 3d 1240, 1242-43 (N.D. Ga. 2014)* (citing *Am. Bankers Ins. Group v. United States, 408 F.3d 1328, 1331 (11th Cir. 2005))*. "Cross-motions may, however, be probative of the absence of a factual dispute where they reflect general agreement by the parties as to the controlling legal theories and material facts." *Id. at 1243* (citing *United States v. Oakley, 744 F.2d 1553, 1555-56 (11th Cir. 1984))*.

III. DISCUSSION

A. Bray's claims are barred by *res judicata*

Defendants argue that Bray's claims are barred by *res judicata*, as they are based on the same set of facts as those in *Bray v. Bank of Am., N.A., 2014 U.S. Dist. LEXIS 157339, 2014 WL 5783039 (E.D. Mo. Nov. 6, 2014)*, ("Bray II"). (Dkt. 116)

"The doctrine of *res judicata*, or claim preclusion, bars the parties to an action from litigating claims that were or could have been litigated in a prior action between **[*6]** the same parties." *Lobo v. Celebrity Cruises, Inc., 704 F.3d 882, 892 (11th Cir. 2013)*. To invoke *res judicata*, a party must establish that: "(1) the prior judgment was rendered by a court of competent jurisdiction; (2) the judgment was final and on the merits; (3) both cases involve the same parties or those in privity with them; and (4) 'both cases . . . involve the same causes of action.'" *Borrero v. United Healthcare of N.Y., Inc., 610 F.3d 1296,1306 (11th Cir. 2010)* (quoting *In re Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001))*.

The Court finds that Bray's claims are barred by *res judicata*. First, this Court is a court of competent jurisdiction that rendered a prior judgment of Bray's claims. Second, the Court ruled, in relevant part in Bray IV, that Bray's BHCA claim was barred by the statute of limitations and dismissed the claim with prejudice. (Bray IV, Dkt. 38 at 10, 14) Thus, the judgment was final and on the merits. Third, there is no dispute that Bray and BANA are the same parties that were involved in Bray IV. (Id.; Dkt. 22) Although Bray added BAC as a defendant in the instant litigation, there is no dispute that BAC is in privity with BANA, as BAC is a parent corporation of BANA. (Dkt. 54 at 9; Dkt. 26 at ¶¶ 23-24) See *United States v. Avatar Holdings, Inc., 93-281-CIV-FTM-21, 1995 U.S. Dist. LEXIS 20450, 1995 WL 871260, at *21 (M.D. Fla. Nov. 22, 1995)* (finding that claims against parent company were barred by *res judicata* and noting that **[*7]** the plaintiff cannot argue that a parent company is liable for its subsidiary's actions "under a theory of parent control of its subsidiary and, at the same time, assert that although it is a parent corporation, it is not in privity with the subsidiary for the purpose of res judicata.").

Last, Bray's antitrust claims in the instant litigation are expressly premised on BANA's alleged violation of the BHCA, which was asserted in Bray IV. In the Complaint, Bray states that he "brings this action for violations of the Sherman Act, Clayton Act, [and] Florida's ***Antitrust Law***, pursuant to *Section 542.15 et seq.*, of the Florida Statutes, via violations of 106 of the Bank Holding Company Act *§ 1972*." (Dkt. 26 at 1) Bray's new antitrust claims are predicated on the same cause of action that was previously dismissed. The presence of a new legal theory will not preclude the applicability of *res judicata* because the claims in the "new" litigation are based on the same operative facts as Bray IV. Any claims based on the same "nucleus of operative facts," even when different legal theories are asserted, "are barred by *res judicata* because they are considered the same claim or cause of action."

De Souza v. JPMorgan Chase Home Lending Div., 608 F. App'x 776, 781 (11th Cir. 2015)[2] (citing *Griswold v. Cnty. of Hillsborough, 598 F.3d 1289, 1293 (11th Cir. 2010))*.

Moreover, Plaintiff's **[*8]** argument that the subsequent filing of Bray IV bars *res judicata* is unavailing. The filing date of the actions is not determinative of *res judicata*. Rather, when two actions are proceeding simultaneously, the "final judgment in one action preclude[s] further litigation" in another action. *Shurick v. Boeing Co., 623 F.3d 1114, 1118 (11th Cir. 2010)*[3]

B. Bray's claims are time-barred

Defendants also argue that Bray's claims are time-barred. The statute of limitations of Bray's claims under the Sherman Act, the Clayton Act, and Florida's antitrust statute is four years. *15 U.S.C. § 15(b)*; *Fla. Stat. § 542.26*. Bray filed this action on October 27, 2015. To be timely, the alleged violations must have occurred on or after October 27, 2011. The statute of limitations began to run for the alleged violations either in November 2009, when the *third amendment* to the loan agreement was signed, or at the latest, in March 2010, when the assets were moved to Merrill Lynch. Bray does not dispute that the limitations period initially began to run either in 2009 or in 2010. (Dkt. 34 at 12)

Instead, he claims that the limitations period began anew when he resigned from Merrill Lynch on October 28, 2011. On that same day, Bray alleges that BANA threatened Maritz that it would place the syndicated loan **[*9]** into immediate default if Maritz moved the GPA with Bray. (Dkt. 26 at ¶ 68) Bray alleges that but for the illegal tying of the syndicated loan and the alleged threat, Maritz would have authorized that the GPA move with Bray. (Id.) However, the evidence in the record shows that BANA merely affirmed the provisions of the terms of the loan agreement.[4] (Dkt. 117 at ¶ 43) In an email dated October 28, 2011, BANA employee Stephen Bode ("Bode") wrote to his colleagues that "[t]hese assets cannot move or they will be immediately in default." (Dkt. 116-17 at 2; Dkt. 116-18 at 2) Bode then notified Maritz officials of Bray's departure. (Dkt. 116-19 at 2) Bode also told Maritz officials that he had assured his colleagues that the assets would not move so there would be no default under the credit agreement. (Dkt. 116-19 at 2) There is no evidence in the record that demonstrates, or even suggests, that BANA reconsidered whether it should continue to enforce the loan provision or whether it might grant a modification of the loan agreement such that any purported violation continued or a new overt act occurred. The mere affirmation of an existing agreement is insufficient to constitute an overt act. **[*10]** See *Z. Techs Corp. v. Lubrizol Corp., 753 F.3d 594, 604 (6th Cir. 2014)* (affirming the dismissal of a Sherman Act claim based on a statute of limitations violation, noting that "the implementation of the [contractual] clause, which was originally entered into at the time of the [contract], does not constitute a 'new and independent' act" and that reaffirmations of existing policy are not overt acts).

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[2] The Court notes that "[a]lthough an unpublished opinion is not binding on this court, it is persuasive authority. See *11th Cir. R. 36-2*." *United States v. Futrell, 209 F.3d 1286, 1289 (11th Cir. 2000)*.

[3] Because the Court finds that Bray's claims are barred by Bray IV, it need not address Defendants' contention that the claims are barred by Bray II.

[4] Maritz was the majority shareholder of American Express Incentive Solutions ("AEIS") and had requested that the lenders permit it to acquire the minority shares of AEIS. (Dkt. 116 at 4) The lenders required additional collateral for the purchase of the AEIS shares, and in 2009, the loan agreement was amended. (Id.; Dkt. 26 at ¶ 30). Provision 7.16 of the loan agreement states:

> Within forty-five (45) days after the date AEIS becomes a Subsidiary, AEIS shall open, maintain and otherwise have all investment accounts that contain bond mutual funds at Bank of America (or its Affiliates) and shall have entered into a control agreement with, or have agreed to other arrangements granting "control" (within the meaning of Article 9 of the applicable Uniform Commercial Code) to, the Administrative Agent, in each case, in form and substance reasonably satisfactory to the Administrative Agent.

(Dkt. 129 at ¶ 10)

Moreover, Bray makes a conclusory allegation that "[c]ertainly if the terms imposed by Defendants through Section 7.16 of the Loan [were] illegal in 2009, Section 7.16 would still be illegal on October 28, 2011," when Bray resigned from Merrill Lynch. (Dkt. 121 at 17; Dkt. 26 at ¶ 68) As stated above, the party opposing a motion for summary judgment must rely on more than **[*11]** conclusory statements or allegations unsupported by facts. *Evers, 770 F.2d at 986* ("[C]onclusory allegations without specific supporting facts have no probative value."). Again, mere reaffirmations of existing policy are not overt acts sufficient to trigger a new limitations period.

Bray does not assert any facts to support an exception to the statute of limitations, such as a continuing violation or an overt act that occurred on or after October 27, 2011. Therefore, Bray's claims, which were brought on October 27, 2015, were not filed within four years of the alleged injury. As such, even if the claims were not barred by *res judicata*, they would be time-barred. Defendants are also entitled to summary judgment on this basis.

Because the Court GRANTS Defendants' motion for summary judgment finding that Bray's claims are barred by *res judicata*, Bray's motion for summary judgment is **DENIED AS MOOT**.

IV. CONCLUSION

Upon consideration of the foregoing, it is hereby **ORDERED** as follows:

1. Defendants' Motion for Summary Judgment, (Dkt. 116), is **GRANTED**.

2. Plaintiff's Motion for Summary Judgment, (Dkt. 114), is **DENIED AS MOOT**.

3. Defendants' Motion to Exclude Expert Testimony of Professor Cornelius K. Hurley, (Dkt. 115), **[*12]** is **DENIED AS MOOT**.

4. The Clerk is directed to enter **FINAL JUDGMENT** in favor of Defendants.

5. After entry of final judgment, the Clerk shall terminate any pending motions and **CLOSE** this case.

DONE and **ORDERED** in Tampa, Florida, this 20th day of August, 2018.

/s/ Mary S. Scriven

MARY S. SCRIVEN

UNITED STATES DISTRICT JUDGE

In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.

United States District Court for the District of Kansas

August 20, 2018, Decided; August 20, 2018, Filed

Case No. 17-md-2785-DDC-TJJ; MDL No: 2785

Reporter

336 F. Supp. 3d 1256 *; 2018 U.S. Dist. LEXIS 140323 **; 2018-2 Trade Cas. (CCH) P80,485; 2018 WL 3973153

IN RE: EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation. (This Document Applies to Consumer Class Cases)

Prior History: *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., 2017 U.S. Dist. LEXIS 169541 (D. Kan., Oct. 13, 2017)*

Core Terms

allegations, class plaintiff, settlement, plaintiffs', generic, defendants', consumer protection, consumers, patent, antitrust claim, asserts, motion to dismiss, competitors, pricing, class action, conspiracy, rebates, enterprise, purchasers, citizen's petition, cases, parties, deceptive, inflated price, antitrust, patients, infer, anti trust law, courts, Conspirators

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Special Proceedings, Class Actions**

In the context of a motion to dismiss, the court accepts the facts asserted in a Class Complaint as true and views them in the light most favorable to the class plaintiffs.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 8(a)(2) provides that a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Although this Rule does not require detailed factual allegations, it demands more than a pleading that offers labels and conclusions' or a formulaic recitation of the elements of a cause of action which, will the Supreme Court explained, will not do. When considering a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the court must assume that the factual allegations in the complaint are true. But the court is not bound to accept as true a legal conclusion couched as a factual allegation. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice to state a claim for relief. Also, the complaint's factual allegations must be enough to raise a right to relief above the speculative level.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

For a complaint to survive a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the pleading must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. The question is whether, if the allegations are true, it is plausible and not merely possible that the plaintiff is entitled to relief under the relevant law.

Antitrust & Trade Law > Procedural Matters

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

HN4[] **Antitrust & Trade Law, Procedural Matters**

In the antitrust context, the U.S. Supreme Court has observed that proceeding to antitrust discovery can be expensive. So, courts must insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. But still, antitrust cases are not subject to a standard requiring heightened fact pleading of specifics. Instead, an antitrust complaint must allege only enough facts to state a claim to relief that is plausible on its face sufficient to nudge the claims across the line from conceivable to plausible. On a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss antitrust claims, the court must ensure that plaintiffs have alleged facts to support those elements sufficient to provide the heft to show an entitlement to relief and to nudge plaintiffs' claims over the line from mere possibility or speculation to plausibility.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Tying Arrangements

HN5[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Tying is an arrangement involving the sale of two distinct products or services as a package. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. But a tying arrangement cannot exist unless two separate product markets have been linked. And the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items. To be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide one separately from the other.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Tying Arrangements

HN6[] Price Fixing & Restraints of Trade, Tying Arrangements

In the context of a tying relationship claim, the Tenth Circuit has defined the relevant product market in any given case as one composed of products that have reasonable interchangeability for the purposes for which they are produced-price, use and qualities considered.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN7[] Scope, Exemptions

The Noerr-Pennington doctrine exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition. The scope of the Noerr-Pennington doctrine depends on the source, context, and nature of the anticompetitive restraint at issue. Noerr-Pennington immunity does not apply if the purported effort to influence or obtain government action is in fact only an attempt to interfere with the business relationships of a competitor. This is the so-called sham exception to the Noerr-Pennington doctrine. The sham exception applies when persons use the governmental process-as opposed to the outcome of that process-as an anticompetitive weapon. The exception thus involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, such as a defendant who files frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN8[] Scope, Exemptions

In the context of the Noerr-Pennington doctrine, not every fraudulent misrepresentation during an adjudicative or administrative proceeding can give rise to antitrust liability. A misrepresentation renders an adjudicative proceeding a sham only if the misrepresentation (1) was intentionally made, with knowledge of its falsity; and (2) was material, in the sense that it actually altered the outcome of the proceeding.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN9[] Clayton Act, Claims

To assert a plausible exclusive dealing claim, a plaintiff must plead facts capable of supporting a finding or inference that the probable effect of performance of the contract will foreclose competition in a substantial share of the line of commerce affected.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN10[] Clayton Act, Claims

In the context of an exclusive dealing claim, the U.S. Supreme Court has instructed lower courts to determine substantiality in a given case by weighing the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. When considering whether a contract at issue tends to foreclose a substantial volume of competition, the Supreme Court has considered several things. They include the relative dominance of a seller's position in the market, whether the market has myriad outlets with substantial sales volume, the prevalence in the industry of exclusive contracts, the duration of the contract, and the existence of any pro-competitive justifications for the contract.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN11[] **Standing, Requirements**

To establish antitrust standing, a plaintiff must allege (1) an antitrust injury; and (2) a direct causal connection between that injury and a defendant's violation of the antitrust laws.

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN12[] **Noerr-Pennington Doctrine, Sham Exception**

In the context of an antitrust claim based on a reverse payment settlement, the United States Supreme Court has explained that it is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham) because an unexplained large reverse payment itself would normally suggest that the patentee has some serious doubts about the patent's survival. Also, the court recognized as a general matter, it is well established that the burden of proving infringement generally rests upon the patentee. On summary judgment, the standard requiring Plaintiffs to produce some evidence of invalidity or noninfringement does not require Plaintiffs to prove that the generic defendant would have won, only that it could have.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN13[] **Sherman Act, Claims**

To state a claim under Sherman Act § 1, a complaint must allege enough factual matter (taken as true) to suggest that an agreement was made. To state a claim for a violation of § 1, the plaintiff must allege facts which show: the defendant entered a contract, combination or conspiracy that unreasonably restrains trade in the relevant market. An agreement or conspiracy under federal antitrust laws is said to exist when there is a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme. A plaintiff may plead an agreement by alleging direct or circumstantial evidence, or a combination of the two, but allegations of direct evidence, that are adequately detailed, are sufficient alone. However, bare bones accusations of a conspiracy without any supporting facts are insufficient to state an antitrust claim.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN14[] **Sherman Act, Claims**

When allegations of parallel conduct are set out in order to make a claim under § 1 of the Sherman Act, they must be placed in a context that raises a suggestion of preceding agreement, not merely parallel conduct that could just as well be independent action. This is so because lawful parallel conduct fails to bespeak unlawful agreement. While consciously parallel behavior may contribute to a finding of antitrust conspiracy, it is insufficient, standing alone, to prove conspiracy. Conscious parallel business behavior, standing alone, is insufficient to prove conspiracy. Thus, an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Instead, a plaintiff must allege conspiracy evidence that tends to rule out the possibility that the defendants were acting independently.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN15[] **Sherman Act, Claims**

The Tenth Circuit has held that parallel behavior may, however, support the existence of an illegal agreement when augmented by additional evidence from which an understanding among the parties may be inferred. Such evidence may include a showing that the parties are acting against their own individual business interests, or that there is motivation to enter into an agreement requiring parallel behavior. Some courts have denominated these additional facts, the presence of which may indicate the existence of an actionable agreement, as plus factors and identified at least three such plus factors: (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > Conspiracy to Monopolize

HN16[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The U.S. Supreme Court has not held that a patent holder and licensee never can conspire to violate the antitrust laws. Indeed, as other courts have recognized, a patent holder and its licensee can conspire in violation of the antitrust laws only if the conspiracy deprives the marketplace of independent actors.

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

HN17[] **Noerr-Pennington Doctrine, Sham Exception**

The U.S. Supreme Court has held that reverse payment settlements can sometimes violate the antitrust laws. A reverse payment settlement refers to an agreement by a brand-name manufacturer and patent holder to compensate a generic manufacturer and alleged patent infringer in exchange for settling patent infringement litigation, thus delaying the generic's market entry. When a brand-name manufacturer pays to delay the first filer's generic launch, that reverse payment postpones not only the first filer's product but also those of all other generic manufacturers, who must wait out the 180-day exclusivity period before going to market. Because a reverse payment settlement effectively delays generic competition in the market, the U.S. Supreme Court has recognized that a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN18[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

To determine whether a reverse payment settlement has anticompetitive effects, the United States Supreme Court has instructed that a detailed exploration of the validity of the patent itself is not necessary. Instead, the anticompetitive effects of a reverse payment depend on its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The Supreme Court also recognized that the existence and degree of any anticompetitive consequence may also vary as among industries. Because of these complexities, the Supreme Court has held that courts must analyze alleged unlawful reverse payment settlements under the rule of reason.

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

HN19[] **Motions to Dismiss, Failure to State Claim**

Consideration of disputed factual allegations is not proper on a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss.

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

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

The Noerr-Pennington doctrine exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition. But Noerr-Pennington immunity does not apply to sham activities. Petitioning the government is a sham activity if: (1) it is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and (2) it uses the governmental process-as opposed to the outcome of that process-as an anticompetitive weapon.

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

HN21[] **Noerr-Pennington Doctrine, Sham Exception**

Some courts have found that the question whether petitioning activity is a sham is generally one for the jury. But a court may decide probable cause as a matter of law where there is no dispute over the predicate facts of the underlying proceeding.

Antitrust & Trade Law > Sherman Act > Claims

Torts > Intentional Torts > Defamation > Procedural Matters

HN22[] Sherman Act, Claims

Deceptive speech can support Sherman Act claims because in some cases, such defamation, which plainly is not competition on the merits, can give rise to antitrust liability, especially when it is combined with other anticompetitive acts.

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

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Antitrust & Trade Law > Consumer Protection > False Advertising

HN23[] Actual Monopolization, Claims

The Tenth Circuit presumes that allegedly false speech bears only a de minimis effect on competition. A plaintiff asserting a monopolization claim based on misleading advertising must overcome a presumption that the effect on competition of such a practice was de minimis. An antitrust plaintiff may rebut this presumption by satisfying a six-factor test, showing that the disparagement was: (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible to neutralization or other offset by rivals. The Tenth Circuit has not decided whether a plaintiff must satisfy all six factors to overcome the de minimis presumption.

Civil Procedure > Special Proceedings > Class Actions > Class Members

HN24[] Class Actions, Class Members

Several courts, including other district courts in the Tenth Circuit, have determined that the plaintiffs in a putative class action may only assert a state law claim if a named plaintiff resides in, does business in, or has some other connection to that state.

Civil Procedure > Preliminary Considerations > Justiciability > Case & Controversy Requirements

Civil Procedure > Special Proceedings > Class Actions > Class Members

HN25[] Justiciability, Case & Controversy Requirements

Prior to class certification, the named plaintiffs' failure to maintain a live case or controversy is fatal to the case as a whole. That unnamed plaintiffs might have a case or controversy is irrelevant.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

HN26[] Purchasers, Direct Purchasers

The U.S. Supreme Court held that only direct purchasers may bring claims for damages under the federal antitrust laws. To avoid the Illinois Brick rule, some states have passed repealer statutes allowing indirect purchasers to recover under state antitrust laws.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > Special Proceedings > Class Actions

HN27[] **Private Actions, State Regulation**

Several courts have concluded that the class action prohibition in the Illinois Antitrust Act is procedural in nature and that *Fed. R. Civ. P. 23* applies to determine whether a claim may be brought as a class action. So, because the availability of the class action procedure does not change the substantive rights or remedies available to plaintiffs under Illinois law, courts have refused to dismiss Illinois Antitrust Act claims on the basis of the Illinois's class action bar.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN28[] **Purchasers, Indirect Purchasers**

The West Virginia Antitrust Act permits indirect purchaser claims.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN29[] **Purchasers, Indirect Purchasers**

Indirect purchasers may not bring a cause of action under the antitrust laws of Arkansas, Massachusetts, and Missouri.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN30[] **Private Actions, State Regulation**

The Kansas Monopolies and Unfair Trade Act by its terms prohibits combinations and conspiracies only.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN31[] **Private Actions, State Regulation**

The Tennessee Trade Practices Act, *Tenn. Code Ann. § 47-25-101*, declares that certain anticompetitive conduct is against public policy, unlawful, and void. *Tenn. Code Ann. § 47-25-101*. Such conduct includes all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article. As one court has explained, none of these terms appears to include unilateral conduct. Likewise, at least two other courts have held that the Tennessee Trade Practices Act does not cover unilateral conduct claims.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN32[] Private Actions, Racketeer Influenced & Corrupt Organizations

Subsection 1962(c) of RICO makes it: unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. *18 U.S.C. § 1962(c)*. Subsection (d) makes it unlawful for any person to conspire to violate subsection (c). *18 U.S.C. § 1962(d)* RICO also provides a private civil cause of action for those who are injured by violations of *§ 1962* and allows recovery of treble damages, costs, and attorney fees. *18 U.S.C. § 1964(c)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN33[] Racketeer Influenced & Corrupt Organizations, Claims

RICO is to be read broadly. To successfully state a RICO claim, a plaintiff must allege four elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. And, to have standing to assert a RICO claim, the plaintiff must allege that the RICO violation proximately caused plaintiff's injuries.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN34[] Racketeer Influenced & Corrupt Organizations, Claims

RICO prohibits a person who is associated with an enterprise to conduct its affairs through a pattern of racketeering activity. *18 U.S.C.S. § 1962(c)*. RICO broadly defines enterprise as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. *18 U.S.C.S. § 1961(4)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN35[] Racketeer Influenced & Corrupt Organizations, Claims

The U.S. Supreme Court has explained that an enterprise includes any union or group of individuals associated in fact, and that RICO reaches a group of persons associated together for a common purpose of engaging in a course of conduct. An association-in-fact enterprise requires: (1) a purpose, (2) relationships among those associated with the enterprise, and (3) longevity sufficient to permit these associates to pursue the enterprise's purpose.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

HN36[] Racketeer Influenced & Corrupt Organizations, Claims

RICO liability depends on showing that the defendants conducted or participated in the conduct of the enterprise's affairs, not just their own affairs.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

HN37[] Racketeer Influenced & Corrupt Organizations, Claims

The Tenth Circuit has described operation and management test as a standard requiring the defendant to have some part in directing the enterprise's affairs. But importantly, the defendant need not have primary responsibility for the enterprise's affairs, a formal position in the enterprise, or significant control over or within an enterprise. This test requires less. Instead, even lower rung participants in the enterprise who are under the direction of upper management may be liable under RICO if they have some part in operating or managing the enterprise's affairs. Yet, allegations that simply describe a defendant's conduct through its regular course of business, goods and services that ultimately benefit the enterprise do not suffice to state a RICO claim.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

HN38[] Racketeer Influenced & Corrupt Organizations, Claims

The RICO statute defines a pattern of racketeering as at least two acts of racketeering activity, which occurred within ten years of one another. *18 U.S.C.S. § 1961(5)*. But proof of two or more predicate acts is not sufficient to prove a pattern unless there is a relationship between the predicate acts and a threat of continuing activity. Continuity of threat requires both proof of a series of related predicates extending over a substantial period of time, as well as a showing that the predicates themselves involve a distinct threat of long-term racketeering activity or that the predicates are a regular way of conducting the defendant's ongoing legitimate business or the RICO enterprise.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN39[] Racketeer Influenced & Corrupt Organizations, Claims

The Tenth Circuit recognizes that whether a pattern of racketeering activity exists is a question of fact for the jury to determine.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN40[] Racketeer Influenced & Corrupt Organizations, Claims

To state a plausible RICO claim, a plaintiff must allege that he was a person injured in his business or property by reason of a violation of *18 U.S.C.S. § 1964*. *18 U.S.C.S. § 1964(c)*. The U.S. Supreme Court has interpreted this provision as one requiring a RICO plaintiff's damages to flow from the commission of the predicate acts. The *§ 1964(c)* causation requirement requires a RICO plaintiff to allege that the defendant's violation not only was a but for cause of his injury, but was the proximate cause as well. The Supreme Court has defined RICO proximate causation as a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case.

Instead, proximate cause provides a label generically for the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. And it includes a particular emphasis on the demand for some direct relation between the injury asserted and the injurious conduct alleged.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN41[] **Racketeer Influenced & Corrupt Organizations, Claims**

When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. The U.S. Supreme Court has instructed that no need exists to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly. But, in the context of RICO claims premised on predicate acts of mail fraud, the Supreme Court has held that a plaintiff is not required to plead that he is a victim of the defendant's underlying crime to establish a direct injury. Rather, a plaintiff may establish proximate causation by plausibly pleading that his business or property has been directly injured as a result of the defendants' *§ 1962* violation.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN42[] **Claims, Fraud**

To state a plausible RICO claim, the class plaintiffs need not plead that they relied on the alleged false statements when purchasing the product.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN43[] **Racketeer Influenced & Corrupt Organizations, Claims**

RICO is founded on the concept of racketeering activity. This statute defines racketeering activity to encompass dozens of state and federal offenses, known in RICO parlance as predicates. These predicates include any act indictable under specified federal statutes. *18 U.S.C.S. § 1961(1)*. Such predicates include those indictable under *18 U.S.C.S. § 1341* (relating to mail fraud), § 1343 (relating to wire fraud), and *§1512* (relating to tampering with a witness, victim, or an informant). *18 U.S.C.S. § 1961(1)(B)*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN44[] **Claims, Fraud**

To support mail and wire fraud allegations in RICO claims, the plaintiffs must plausibly allege the existence of a scheme or artifice to defraud or obtain money or property by false pretenses, representations or promises, and that defendants communicated, or caused communications to occur, through the U.S. mail or interstate wires to execute that fraudulent scheme. And because *Fed. R. Civ. P. 9(b)* requires a plaintiff to plead mail and wire fraud with particularity, the plaintiffs must set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof.

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > Elements

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > Penalties

HN45[] **Obstruction of Administration of Justice, Elements**

18 U.S.C. § 1512(c)(2) makes it unlawful to obstruct, influence, or impede any official proceeding, or attempt to do so, and imposes a fine under this title or imprisonment not more than 20 years, or both. *18 U.S.C.S. § 1512(c)(2)*.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN46[] **Purchasers, Indirect Purchasers**

The Tenth Circuit has recognized, albeit in the antitrust context, that only the direct purchaser, and no other person in the distribution chain, is the party injured who may sue for and recover the full amount of the illegal overcharge.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

HN47[] **Racketeer Influenced & Corrupt Organizations, Claims**

The U.S. Supreme Court has recognized in the RICO context that its requirements for antitrust injury have no analogue in the RICO setting. And, the Supreme Court has cautioned that is use of the term "direct" should merely be understood as a reference to the proximate-cause inquiry that is informed by the concerns set out in the text.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Torts > ... > Multiple Defendants > Concerted Action > Civil Conspiracy

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN48[] **Racketeer Influenced & Corrupt Organizations, Claims**

18 U.S.C.S. § 1962(d) makes it unlawful for any person to conspire to violate subsection 1962(c). *18 U.S.C.S. § 1962(d)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN49[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The U.S. Supreme Court has held that an employee who conducts the affairs of a corporation through illegal acts comes within the terms of the RICO statute that forbids any person unlawfully to conduct an enterprise, particularly when the statute explicitly defines person to include any individual capable of holding a legal or beneficial interest in property, and defines enterprise to include a corporation. *18 U.S.C.S. § 1961(3)*, *(4)*. An individual and his wholly owned corporation are sufficiently distinct for RICO purposes.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN50[] **Sherman Act, Defenses**

The U.S. Supreme Court has described the continuing violation doctrine in the antitrust context in this fashion: ***Antitrust law*** provides that, in the case of a "continuing violation," say, a pricefixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Regulated Practices > Private Actions > Purchasers

HN51[] **Sherman Act, Defenses**

Every court to have considered the consumer's harm in the pay-for-delay context has held that a new cause of action accrues to purchasers upon each overpriced sale of the drug.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Regulated Practices > Private Actions > Purchasers

HN52[] **Sherman Act, Defenses**

Although the Tenth Circuit has not considered the question in the pay-for-delay context, it has applied the continuing violation doctrine to antitrust claims. The Circuit recognized that in the context of a continuing conspiracy to violate the antitrust laws, each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and as to those damages, the statute of limitations runs from the commission of the act. The Circuit has held that an overt act will restart the statute of limitations under the continuing conspiracy exception when the act is (1) a new and independent act that is not merely a reaffirmation of a previous act; and (2) the act inflicts new and accumulating injury on the plaintiff.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Tolling of Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN53[] **Statute of Limitations, Tolling of Statute of Limitations**

The question of whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN54[] **Justiciability, Standing**

U.S. Const. art. III limits federal courts' jurisdiction to cases and controversies. To present a case or controversy under Article III, a plaintiff must establish that he has standing to sue. Article III standing requires a plaintiff to establish (1) that he or she has suffered an injury in fact; (2) that the injury is fairly traceable to the challenged action of the defendant; and, (3) that it is likely that the injury will be redressed by a favorable decision. At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN55[] **Standing, Injury in Fact**

A injury in fact is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. The U.S. Supreme Court has explained the requirement of pleading injury in fact this way: At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss the court presume that general allegations embrace those specific facts that are necessary to support the claim.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN56[] **Standing, Injury in Fact**

Generally, economic injury is a paradigmatic form of injury in fact. Benefit of the bargain damages are sufficient to demonstrate an injury in fact.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN57[] Standing, Burdens of Proof

To satisfy the standing requirement of traceability, the defendants' conduct must have caused the injury. The traceability of a plaintiff's harm to the defendant's actions need not rise to the level of proximate causation. But U.S. Const. art. III does require proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN58[] Consumer Protection, Deceptive & Unfair Trade Practices

The question whether an act is deceptive is a factual one for the jury to decide.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN59[] Deceptive & Unfair Trade Practices, State Regulation

States apply different standards to determine what constitutes unfair or unconscionable conduct capable of violating state consumer protection laws. Some states employ the cigarette test, examining whether the alleged unfair practice: (1) offends established public policy; (2) is immoral, unethical, oppressive, unscrupulous; and (3) causes substantial injury to consumers. Other states apply a substantial injury test, considering whether the alleged unfair practice: (1) produces substantial injury to consumers; (2) is not the type of injury that a consumer reasonably could avoid; and (3) is not outweighed by countervailing benefits to consumers or competition.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN60[] Heightened Pleading Requirements, Fraud Claims

In the context of a fraud claim, the court has held that a plaintiff - to satisfy *Fed. R. Civ. P. 9(b)* s heightened pleading standard - need only allege that it relied on an alleged misrepresentation. Such allegations need not assert details concerning its reliance because the Tenth Circuit's standard does not require more.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN61[] Deceptive & Unfair Trade Practices, State Regulation

Many state consumer protection law claims do not require plaintiffs to plead reliance in asserting fraud claims. And, in certain other states, the plaintiffs need not plead reliance when they allege misrepresentations by concealment or omission.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN62[] Heightened Pleading Requirements, Fraud Claims

The Tenth Circuit requires a complaint alleging fraud to set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN63[] Heightened Pleading Requirements, Fraud Claims

The Tenth Circuit's standard requires only particular information about the representation itself. A plaintiff need not plead every fact that supports its claim of fraud, and such facts concerning a plaintiff's receipt of the statements are readily obtained in discovery.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN64[] Deceptive & Unfair Trade Practices, State Regulation

The Colorado Consumer Protection Act does not permit a plaintiff to seek injunctive relief on behalf of either himself or a class.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN65[] Equitable Relief, Quantum Meruit

Although the elements of an unjust enrichment claim differ among various state laws, generally, an unjust enrichment claim requires a plaintiff to allege that: (1) he or she conferred a benefit on defendant, and (2) defendant's retention of the benefit under the circumstances is unjust. Kansas state courts have held that the theory of unjust enrichment rests upon three elements: (1) a benefit conferred; (2) an appreciation or knowledge of the benefit by the one receiving the benefit; and (3) the acceptance or retention of the benefit under such circumstances as to make it inequitable to retain the benefit without payment of its value.

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For Heather Bresch, (KS #16-2711), Defendant: **[**14]** Adam K. Levin, David M. Foster, LEAD ATTORNEYS, PRO HAC VICE, Hogan Lovells US LLP - DC, Washington, DC.

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For Traci Brannon, (Plaintiff in Related Case #17-2497-DCCGLR), Lindsey Rizzo, (Plaintiff in Related Case #17-2497-DCCGLR), Jamie Herr, (Plaintiff in Related Case #17-2497-DCCGLR), Miscellaneous: Rex A. Sharp, Ryan C. Hudson, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS.

For Express Scripts Holding Company, (Defendant in Related Case #17-2497-DCCGLR), Express Scripts, Inc., (Defendant in Related Case #17-2497-DCCGLR), Miscellaneous: William D. Beil, LEAD ATTORNEY, German May PC, Kansas City, MO.

For UnitedHealth Group, Inc., (Defendant in Related Case #17-2497-DCC-GLR), OptumRx, Inc., (Defendant in Related Case #17-2497-DCCGLR), Miscellaneous: Bradley Joseph Schlozman, **[**16]** Mitchell L. Herren, LEAD ATTORNEYS, Hinkle Law Firm LLC - East Wichita Office, Wichita, KS.

For Judicial Panel on Multidistrict Litigation, Interested Party: Jeffrey N. Luthi, LEAD ATTORNEY, Clerk of the MDL Panel, One Columbus Circle NE, Washington, DC.

Judges: Daniel D. Crabtree, United States District Judge.

Opinion by: Daniel D. Crabtree

Opinion

[*1275] **MEMORANDUM AND ORDER**

This Order addresses the pending Motions to Dismiss in one of the two separate tracks of this MDL—the consumer class cases track. The consumer class track consists of cases filed by individual consumers or third-party payors who allege they purchased EpiPens for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries. After the Judicial Panel on Multidistrict Litigation **[*1276]** transferred five consumer class cases and one other filed by Sanofi-Aventis U.S. LLC ("Sanofi") to our court for coordinated and consolidated proceedings (Docs. 1, 5, & 9), the consumer class plaintiffs filed a Consolidated Class Action Complaint ("Class Complaint") (Doc. 60). The Class Complaint asserts federal and state antitrust claims, federal *RICO Act* violations, various state consumer protection law violations, and unjust **[**17]** enrichment claims. The Class Complaint also seeks class action certification.

The Class Complaint asserts its claims against two groups of defendants who are either sellers or manufacturers of the EpiPen. One group consists of defendants Mylan N.V., Mylan Specialty L.P., Mylan Pharmaceuticals, Inc., and Mylan's CEO Heather Bresch (collectively "the Mylan Defendants"). The other group of defendants consists of Pfizer, Inc., King Pharmaceuticals, Inc., and Meridian Medical Technologies, Inc. (collectively "the Pfizer Defendants"). When referring to both sets of defendants, this Order simply calls them, collectively, "defendants."

Defendants have filed separate motions asking the court to dismiss the Class Complaint. Doc. 92 (Pfizer Defendants' Motion to Dismiss Plaintiffs' Consolidated Class Action Complaint); Doc. 94 (Mylan Defendants' Motion to Dismiss Plaintiffs' Consolidated Class Action Complaint). The class plaintiffs have submitted an Omnibus Response to the Motions to Dismiss. Doc. 123. And both sets of defendants have filed Replies. Doc. 216 (Pfizer Defendants' Reply); Doc. 219 (Mylan Defendants' Reply). Also, on March 14, 2018, the Mylan Defendants submitted a Notice of Supplemental **[**18]** Authority under D. Kan. *Rule 7.1(f)*. Doc. 394. The class plaintiffs filed a response, objecting to the supplemental submission. Doc. 403. Then, on July 6, 2018, the class plaintiffs filed a Notice of Supplemental Authority (Doc. 765), and the Mylan Defendants submitted a response to their submission (Doc. 785). On July 11, 2018, the class plaintiffs filed another Notice of Supplemental Authority (Doc. 781), and the Mylan Defendants filed a response to that submission as well (Doc. 803). Finally, on August 12, 2018, the class plaintiffs filed another Notice of Supplemental Authority (Doc. 874), and the Mylan Defendants filed a response to that submission (Doc. 889).

Thus, to say the least, the Motions to Dismiss are now thoroughly and fully briefed. After carefully considering the arguments presented by the parties' filings, the court is prepared to rule.[1] For the reasons explained below, the court grants defendants' motions in part and denies them in part.

I. Factual Background

The following facts come from the Class Complaint. ***HN1***[] The court accepts the facts asserted in the Class Complaint as true and views them in the light most favorable to the class plaintiffs. *Mayfield v. Bethards, 826 F.3d 1252, 1255 (10th Cir. 2016)* (citation omitted).

The EpiPen[2] is **[**19]** a disposable, prefilled automatic injection device that delivers epinephrine **[*1277]** (also known as adrenaline) to treat severe allergic reactions known as anaphylaxis. Anaphylaxis is a life-threatening allergic reaction that can occur rapidly after exposure to an allergen. Anaphylaxis manifests in a variety of symptoms, including swelling of the tongue and throat, vomiting, reduced blood pressure, difficulty breathing, and, if untreated, death. Most commonly, anaphylaxis is caused by food allergens, but medications, latex, insect bites, and other unknown substances also can cause anaphylaxis. About 15 million people have food allergies in the United States. One of every 13 children in the United States has serious food allergies. And, each year, allergic reactions account for some 200,000 emergency room visits. Anaphylaxis is always considered a life-threatening medical emergency.

Epinephrine is used to treat anaphylaxis and is available only by prescription. To treat anaphylaxis effectively, one must administer epinephrine immediately. As little as a thirty minute delay in applying epinephrine can cause death. As a result, patients prone to anaphylaxis are advised to carry an epinephrine **[**20]** auto-injector ("EAI") at all

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[1] Mylan has filed a Request for Oral Argument on their Motion to Dismiss under D. Kan. *Rule 7.2*. Doc. 220. D. Kan. *Rule 7.2* provides: "The court may set any motion for oral argument or hearing at the request of a party or on its own initiative." After reviewing the parties' written submissions, the court finds that they explain the parties' positions quite effectively. The court concludes that oral argument will not assist its work and thus, to grant it, would contradict *Fed. R. Civ. P. 1*. It is, simply, unnecessary. Exercising its discretion, the court denies Mylan's request.

[2] The Class Complaint uses the term "EpiPen" to refer to the EpiPen®, EpiPen 2-Pak®, EpiPen Jr.®, EpiPen Jr. 2-Pak®, My EpiPen®, LIFE HAPPENS®, EpiPen4Schools®, Never-See-Needle®, and Be Prepared®. Like the Class Complaint, the court refers to these devices collectively as the "EpiPen" and omits the ® for readability.

times. By doing so, a patient can use the EAI in an emergency when a risk of a severe allergic reaction presents itself.

In 2007, Mylan acquired the right to market and distribute the EpiPen. Pfizer is the exclusive supplier of EpiPens to Mylan. Pfizer provides Mylan with 100% of its EpiPen supply through two of its wholly owned subsidiaries—King Pharmaceuticals, Inc., and Meridian Medical Technologies, Inc.—who manufacture the epinephrine and hold the EpiPen patents. Since at least 2009, Mylan's market share of EAI devices in the United States EAI market has remained above 80%. Since 2009, Mylan's market share consistently has exceeded 90%, and, in 2012, its share was almost 100%. During the same time—and while the cost of the EpiPen's dose of epinephrine has remained about $1—Mylan has increased the EpiPen's price by more than 600%. In 2007, Mylan priced the EpiPen at $100. By 2016, Mylan was charging more than $600. In 2015, Mylan announced that the EpiPen had reached $1 billion in annual sales for the second consecutive year—up from $200 million in 2007.

The Class Complaint alleges that the Mylan and Pfizer Defendants have maintained a monopoly over the **[**21]** EpiPen market and its profitable revenues by devising an illegal scheme to monopolize the market for EAI devices. The Class Complaint asserts that defendants carried out their illegal scheme through several different avenues. The following paragraphs briefly summarize each one, as the Class Complaint describes them.

The Mylan Defendants Paid Pharmacy Benefit Managers (PBMs) to Exclude Competition

Pharmacy Benefit Managers ("PBMs") are third-party administrators of prescription drug programs for commercial health plans, self-insured employer plans, Medicare Part D plans, the Federal Employees Health Benefits Program, and state government employee plans. More specifically, PBMs administer a health coverage provider's prescription benefit program by developing the coverage provider's formulary (the list of prescription benefits included in the coverage at various pricing "tiers"), processing claims, creating a network of retail pharmacies who provide discounts in exchange for access to a provider's plan participants, and negotiating with manufacturers. The significant majority of patients with prescription drug insurance coverage receive their benefits through a **[*1278]** third-party payor whose **[**22]** drug formulary is determined by a PBM. From 2013 to 2015, commercial third-party payors accounted for about 71% of the EAI drug device market in the United States. So, for a competitor to enter and compete vigorously in the EAI drug device market, it is imperative that it access these third-party payors' drug formularies.

Between 2013 and 2015, the Mylan Defendants took advantage of their monopoly power by imposing significant increases in the EpiPen's price. Mylan then used the additional profit margins to offer PBMs significantly higher rebates and percentage discounts conditioned upon exclusive or preferred placement on the PBMs' drug formularies. For example, when Sanofi launched a rival EAI device—Auvi-Q—in 2013, Mylan began taking steps to block Auvi-Q from drug formularies. It did so by offering large rebates to the PBMs who controlled the formularies for third-party payors—30% or higher—and expressly conditioning those rebates on: (a) granting the EpiPen exclusive position on the formulary; and (b) removing (or severely restricting) access to Auvi-Q. Mylan also targeted another rival EAI device—Adrenaclick—with the exclusionary rebate program. Adrenaclick's market share has **[**23]** ranged from only 2% in 2013 to 8% in 2016. Mylan knew that Adrenaclick—as well as Auvi-Q—could not raise prices to inflate their margins sufficiently to offer rebates or discounts similar to those that Mylan was offering to PBMs. In 2014, CVS Caremark added Adrenaclick to its Formulary Drug Removals List, effectively removing a consumer or other end-payor's opportunity to purchase Adrenaclick as an alternative to the EpiPen.

The class plaintiffs allege that the Mylan Defendants' exclusionary rebate scheme deprives patients of a fair price for EAI devices—the price that would result from normal market forces. Instead of lowering its prices to gain market share, Mylan bargains for its market share by providing ever-larger rebates and other kickbacks to PBMs, conditioned on exclusive relationships with those PBMs. Mylan can position itself on the drug formularies by using its monopoly power to charge consumers higher prices for its product. It then can share these revenues with the PBMs (the ones who create the formularies) through substantially enhanced rebates conditioned on excluding insurance coverage for rival products. This conduct, in turn, inflates the prices that consumers pay **[**24]** for the

EpiPens so that Mylan can preserve its net realized price and sales volumes. The class plaintiffs contend that the net effect of this scheme harms both consumers and competitors alike.

The Mylan Defendants Entered into an Exclusive School Access Scheme

The class plaintiffs next assert that the Mylan Defendants leveraged the EpiPen's dominant market position to foreclose competition in an EAI submarket—*i.e.*, American public schools. They did so by offering to supply a portion of each school's need for EAI devices on a free or discounted basis but conditioning those discounts on the school entering an exclusive dealing contract. The Mylan Defendants created this important submarket by increasing federal lobbying efforts to gain access to parents, educators, and medical professionals in public schools. As part of the lobbying effort, Mylan spent a reported $4 million specifically lobbying to pass the *School Access to Emergency Epinephrine Act*. The law was enacted in 2013. It gives federal funding priority to schools who stockpile EAIs. Mylan's lobbying efforts proved enormously successful. Now, a majority of states permit their public schools to stockpile EAIs while eleven states **[**25]** *require* EAI stockpiling. Given the EpiPen's dominant market position, the Act not only **[*1279]** has provided EpiPen access to schools, but also it has mandated some schools to stockpile the product.

After securing the EAI stockpiling requirement, Mylan acted quickly to exclude competing EAIs from this valuable school submarket. As part of the Mylan Defendants' scheme, Mylan launched the "EpiPen4Schools" program. The program gives away free and discounted EpiPens to school districts—ones subject to the new law now requiring (or strongly encouraging) them to stockpile the devices. But Mylan conditioned the free and discounted EpiPens on the schools entering exclusive dealing agreements with Mylan. The purpose of these exclusive dealing agreements was to exclude competitors—like Auvi-Q and Adrenaclick—from the public school submarket. In the fall of 2016, the New York Attorney General and members of the United States Senate announced investigations into the anticompetitive terms of Mylan's EpiPen4Schools program. Later, Mylan eliminated the EpiPen4Schools program's exclusivity requirement.

Defendants, Working Together, Used the Judicial and Regulatory Processes to Protect their Monopoly

The Class **[**26]** Complaint next asserts that the Mylan and Pfizer Defendants worked "hand-inhand," using patent litigation and the Food and Drug Administration ("FDA") regulatory process to erect barriers to market entry and delay EAI competition. Class Compl. ¶ 314. The Pfizer Defendants own the patents protecting the EpiPen and serve as the contract supplier of the product. The Mylan Defendants own the trademarked brand names and control the worldwide marketing and sale of the product. Together, defendants have a unified interest in protecting the EpiPen monopoly. So, the class plaintiffs allege, defendants collaborated to enhance the EpiPen's sales volume and profitability, fend off competitors, and protect the EpiPen patents by using the judicial and regulatory process to restrain competition.

Defendants did so by adding several more patents to the already-patented EpiPen to prevent the launch of competing generics. Defendants have four patents on the EpiPen. According to the class plaintiffs, none of them are designed to enhance the product. Instead, the patents' purposes are to stop generic competitors. Indeed, Mylan CEO Heather Bresch announced during a public earnings call in 2009 that Mylan **[**27]** was adding another patent to the already-patented EpiPen device that "will also put in another barrier to entry because . . . now that market preferential would be the needle protected device and drug of which we have IP and stuff around. So I just think it is a very, very difficult hurdle to get through, and so feel confident that EpiPen is in good shape." Class Compl. ¶ 238. On September 14, 2010, Meridian secured U.S. Patent No. 7,794,432—less than three weeks before Intelliject (the inventor of Auvi-Q) submitted its New Drug Application ("NDA") to the FDA.

Defendants also worked together to stop generic competition to the EpiPen by filing patent infringement lawsuits. They filed such lawsuits against three generic EpiPen rivals—Sandoz, Teva, and Intelliject—and then entered into anticompetitive settlements with impending generic manufacturers.

Teva Settlement

In December 2008, Teva filed an Abbreviated New Drug Application ("ANDA") seeking FDA approval to market a generic EpiPen. In August 2009, Pfizer's subsidiaries—King and Meridian—sued Teva for infringing U.S. Patent No. 7,449,012 ("the Teva Litigation"). In November 2010, King and Meridian filed a First Amended Complaint that included a claim for infringing the newly secured **[**28]** '432 patent. Later, King **[*1280]** and Meridian dropped their claims based on infringing the '012 patent, leaving only the claims for infringing the '432 patent.

After discovery and a bench trial in March 2012, the parties settled the Teva Litigation on April 27, 2012. According to the class plaintiffs, defendants and Teva entered an unlawful settlement agreement that required Teva to delay launching its generic EAI for three years—until June 22, 2015—in exchange for defendants providing significant consideration, incentives, and benefits to Teva. The Class Complaint lists several facts about the Teva settlement that, the class plaintiffs contend, show defendants made a substantial "reverse payment" to Teva to convince it to delay bringing its competing product to market. These facts include:

- The court's Markman rulings interpreting the terms of the '432 patent were favorable to Teva.
- The parties settled the litigation after completing a full bench trial, meaning that the parties likely would incur marginal litigation expenses going forward, as compared to the expenses already incurred at settlement.

- No rational economic actor with a viable product (and who had spent millions of dollars developing it) would refrain from entering a lucrative **[**29]** market for 36 months unless it received monetary compensation in exchange for non-entry.
- In 2012, the Federal Trade Commission reported seeing "a record number of settlements involv[ing] potential pay-for-delay agreements," and that, in patent settlements involving a "first-filer" like Teva, the majority of the settlements involved explicit compensation in return for delayed entry (Class Compl. ¶¶ 267-68).
- On the same day of the Teva settlement, Mylan issued a joint press release announcing the settlement on its own behalf and for Pfizer.
- Four days after announcing the Teva settlement, Teva and Mylan settled another lawsuit where Teva had asserted patent infringement claims against Mylan based on Mylan's application to market a generic version of Teva's drug, Nuvigil. With the Nuvigil settlement, Mylan agreed to delay market entry until June 2016. Like the EpiPen, Nuvigil had annual sales hovering near $1 billion. So, procuring delayed entry of generics for both Nuvigil and the EpiPen was valuable to all parties involved.
- The Teva settlement has come under congressional scrutiny as a "pay-for-delay" agreement.

During the same time period, the Teva settlement also prevented competition **[**30]** from any other generic EAI device. Defendants knew that their agreement with Teva would delay market entry because Teva was subject to the *Hatch-Waxman Act*'s 180-day exclusivity award. This provision grants a six-month exclusivity period to the first generic to challenge a brand firm's patent, claiming it is invalid or not infringed. The exclusivity period begins when the first-filing generic enters the market. Here, Teva was the first filer. So, with Teva delaying its market entry under the parties' settlement, Teva's exclusivity period could not begin running until at least three years in the future. As a result, defendants delayed all generics seeking ANDA applications based on the EpiPen.

In a public earnings call, Mylan's CEO Heather Bresch described how the Teva settlement had delayed market competition. Also, she appeared to concede that Mylan had participated in the Teva settlement. In July 2012, she stated publicly: "So we certainly have seen a benefit [to growing the EpiPen market] and obviously, **[*1281]** now with the runway absolutely clear for us through 2015, through *our* settlement with Teva, I can assure you, we are going to continue as we see [the] response continue to invest **[**31]** in EpiPen as a franchise." Class Compl. ¶ 277 (emphasis added).

Intelliject Settlement

Defendants initiated another patent lawsuit against Intelliject—the inventor of Auvi-Q—when Intelliject sought FDA approval for its competing EAI. In 2009, Sanofi announced it had acquired the rights to Intelliject's EAI and that under its license, Sanofi would manufacture and commercialize the product while Intelliject would continue developing the product and work to secure regulatory approval. On January 11, 2011, defendants—through King—filed a patent infringement lawsuit against Intelliject seeking to block FDA approval of its NDA for its product—one that later became known as Auvi-Q. King's lawsuit alleged that Intelliject's EAI infringed the '432 patent—a patent that Meridian secured more than a year after Intelliject began developing its product and less than three weeks before Intelliject filed its NDA.

On August 1, 2011—less than eight months after King filed its lawsuit—the FDA announced that it was giving Intelliject's EAI tentative final approval, pending resolution of the patent litigation that King filed. Six months later, the parties announced that they had settled the Intelliject litigation. Again, **[**32]** Mylan announced the settlement jointly for itself and Pfizer. Although the parties did not make public the specific terms of the agreement, they announced that the agreement prevented Intelliject and Sanofi from launching their EAI product for another nine months—until November 15, 2012. Intelliject and Sanofi made the agreement not to enter the market until November 15, 2012, in exchange for valuable consideration. Through the Intelliject litigation, defendants effectively blocked competition from Intelliject's competing device for almost two years.

Sandoz Settlement

In 2010, another EAI competitor—Sandoz, Inc. ("Sandoz")—attempted to enter the EAI market by filing an ANDA for its own generic EpiPen alternative. Similar to the other lawsuits against Teva and Intelliject, defendants—through King—filed a patent infringement suit against Sandoz. According to the class plaintiffs, defendants' approach to Sandoz was to stall its ANDA by staying the action. The court administratively terminated the Sandoz litigation, giving the parties the ability to reopen the case by letter request. No party has reopened the case. So, to date, Sandoz's FDA approval and any definitive ruling on the EpiPen **[**33]** patents are stayed indefinitely. The class plaintiffs allege that defendants entered an agreement with Sandoz to stay the case in exchange for valuable consideration paid to Sandoz.

FDA Citizen Petition

The Class Complaint next alleges that, with Teva's generic EAI entry into the market looming, defendants took another step to block generic competition from the market by filing an FDA Citizen Petition. An FDA Citizen Petition provides the public with an avenue to present safety concerns to the FDA. But here, the class plaintiffs allege, defendants used the FDA Citizen Petition process to delay—further—Teva's entry into the market and to prevent Teva's product from competing with the EpiPen.

On January 16, 2015, Mylan filed a Citizen Petition "a mere six months before Teva was scheduled (pursuant to the settlement) to enter the market." Class Compl. ¶ 311. Antitrust scholar Michael Carrier of Rutgers Law School described Mylan's Petition in this fashion:

> **[*1282]** In its petition, Mylan contended that Teva should be required to demonstrate that its product was the "same as" Mylan's EpiPen. In other words, even though the parties had already agreed through settlement to delay Teva's generic entry **[**34]** for more than three years, Mylan sought to further delay the entry of Teva's generic through its citizen petition.
>
> In addition to its January 2015 petition, the company waited almost five months after filing and only weeks before the FDA was required to respond, until May 2015, to supplement its petition with a 48-page independent study purportedly showing that patients would not use Teva's generic product correctly.
>
> Given that Teva's generic product had been in development for at least six years before the petition's filing, this late-filing of a supplemental study implicates significant timing questions. Why would such a study be submitted only weeks before the FDA was required to respond under the FDA's 150-day clock?

Id. (quoting Michael A. Carrier & Daryl Wander, *Citizen Petitions: An Empirical Study*, *34 Cardozo L. Rev. 249, 279 (2012)*). According to the class plaintiffs, Mylan's submissions to the FDA rested on fundamentally flawed studies and the medical opinions of a doctor whom Mylan had paid some $95,000 in fees.

According to the class plaintiffs, without defendants' use of the FDA Citizen Petition process, Teva would have entered the market much sooner after addressing any FDA concerns and securing FDA approval. **[**35]** The class plaintiffs also assert that, from 2009 to present, defendants' actions deterred not only Teva, but also many more potential generics companies from developing and launching competing products.

Defendants Implement a Pricing Scheme

The Class Complaint next alleges that the Mylan Defendants implemented a pricing scheme that defrauded U.S. consumers into paying an inflated price for the EpiPen—one that climbed by more than 500%. The Mylan Defendants allegedly implemented this pricing scheme working alongside PBMs. Mylan is a generics company that typically makes low margins on drug sales. But the EpiPen—a specialty branded drug—represented a unique and highly profitable revenue stream for Mylan. Recognizing this opportunity, Mylan CEO Heather Bresch and other executives decided to exploit the EpiPen to generate billions of dollars in revenue for Mylan. According to the class plaintiffs, the Mylan Defendants and the PBMs distracted consumers and regulators from the reality that defendants were raising the price of the EpiPen from $100 to $600 by launching a campaign of false and misleading statements and actions.

One of the ways that the Mylan Defendants allegedly implemented their **[**36]** pricing scheme was changing the way Mylan sold the EpiPen. On August 24, 2011, Mylan announced that it no longer would sell individual EpiPens in the U.S. Instead, Mylan forced U.S. consumers to purchase EpiPens in pairs with the EpiPen 2-Pak. The class plaintiffs refer to this change as the "hard switch." And the class plaintiffs allege that the "hard switch" forced consumers and third-party payors to overpay for the EpiPen 2-Pak because the switch, in effect, doubled the EpiPen's price.

From 1987 to 2011, Mylan and others had sold the EpiPen one at a time in the U.S. without incident. Nothing changed in 2011 that required Mylan to sell the EpiPen as a 2-Pak. The EpiPen 2-Pak is just two individual EpiPens connected by a grey piece of plastic. The class plaintiffs **[*1283]** allege that no medical reason exists to force customers to purchase a 2-Pak instead of a single EpiPen. Instead, Mylan deceptively suggested that the 2-Pak was medically required even though EpiPens are sold individually in every other country besides the United States. Also, Mylan's packaging offers no medical instructions or guidelines for patients to know whether, or when, to administer the second back-up EpiPen.

Beginning **[**37]** in 2011, Mylan began raising the price of the EpiPen while forcing customers to buy EpiPens in the 2-Pak. In October 2011, Mylan increased the price of an EpiPen 2-Pak to $181. And by May 2016, the price of an EpiPen 2-Pak jumped to $608.

The Mylan Defendants Have Made Various Misrepresentations and Omissions in an Effort to Conceal Their Anticompetitive Conduct

Finally, the Class Complaint alleges that the Mylan Defendants have spread false and misleading information and omitted material information as part of their scheme to monopolize the EAI market. They spread, the Class Complaint alleges, four broad categories of false and misleading information.

First, the class plaintiffs allege, Mylan created and spread misinformation about a competing EAI device—Auvi-Q. Although the FDA had determined that the epinephrine in Auvi-Q is a bioequivalent to the epinephrine in the EpiPen, Mylan funded and promoted a study entitled, "Auvi-Q versus EpiPen Auto-Injectors: Failure to Demonstrate Bioequivalence of Epinephrine Delivery Based on Partial Area Under the Curve." Class Compl. ¶ 229. Mylan intended the study to undermine the FDA's conclusion that Auvi-Q had demonstrated bioequivalence to the **[**38]** epinephrine in the EpiPen—in direct contradiction to the FDA's conclusion.

The class plaintiffs also allege that Mylan made false and misleading statements about Auvi-Q's formulary status. According to the class plaintiffs, Mylan's anticompetitive conduct caused major health plans either to limit their coverage of Auvi-Q or to exclude Auvi-Q from coverage altogether. Mylan did so by paying formularies to exclude Auvi-Q from coverage. But then, Mylan marketed to physicians the fact that Auvi-Q was not covered by formularies and suggested that the decision to exclude Auvi-Q from coverage was based on clinical recommendations—and not Mylan's large, conditional rebate offers.

Second, the class plaintiffs allege that Mylan made false and misleading statements about the "hard switch" to the EpiPen 2-Pak. On August 24, 2011, Mylan issued a news release entitled "Dey Pharma to Offer EpiPen 2-Pak and EpiPen Jr 2-Pak Exclusively." Class Compl. ¶ 336. The press release's subheadline provided: "Decision aligns with recent clinical guidelines for patients at risk for or who have experienced anaphylaxis to have immediate access to two doses of epinephrine." *Id.* The Class Complaint alleges that the **[**39]** press release was fraudulent and misleading for several reasons. They include:

- The press release cited a National Institute of Allergy and Infectious Diseases ("NIAID") study that did not apply to the general population. Instead, it applied only to a narrow subset: allergy sufferers who had already (1) been hospitalized for (2) a food allergy.

- Mylan purported to rely on the World Allergy Organization ("WAO") global standard in making the switch, but Mylan did not require sale of the EpiPen 2-Pak globally. Indeed, the press release states that the single EpiPen Auto-Injector **[*1284]** package configuration will remain available outside of the U.S.
- The switch to the 2-Pak did not change patient access to two doses of epinephrine. Doctors could write, and often did write, prescriptions for two EpiPens. So, no need existed for Mylan to mandate something patients could purchase already.
- The medical guidelines recited did not state that providers must sell two doses of epinephrine. Instead, Mylan used the WAO's vague statement as a false pretext for selling only the 2-Pak.
- No mandates required Mylan to sell the EpiPen exclusively as a 2-Pak, or not at all.

- No medical studies support the decision **[**40]** to sell the EpiPen exclusively as a 2-Pak.
- From 1987 until 2011, the EpiPen was sold individually without incident. Nothing changed suddenly in 2011 that required Mylan to sell only the 2-Pak.
- When Mylan switched to the 2-Pak in 2011, it did not order a recall or insist that all U.S. EpiPen patients immediately go buy a second EpiPen.
- Although the press release relies on the WAO, the U.S. is the only country where Mylan required customers to purchase a 2-Pak of the EpiPen.

- According to a study conducted by the American Academy of Allergy, Asthma & Immunology, only a small number of patients require a second dose. The reason for selling the device solely in packs of two is to account for user error due to the imperfect product design, *i.e.*, 14% of parents accidently stick the needle in their own thumb instead of in their child's leg.
- Mylan offers no medical guidelines or instructions to EpiPen 2-Pak consumers in its packaging or on the device to explain how or when to use (or even how to store) the second EpiPen in the 2-Pak.

- Mylan states that between 1-20% of patients might need a second device. But, according to class plaintiffs, the margin of 1-20% is so wide that it is meaningless **[**41]** and provides a false justification for the "hard switch" to the 2-Pak.

Class Compl. ¶ 339. The class plaintiffs also allege that the NIAID panel Mylan relied on to justify the change to the 2-Pak was influenced and tainted by Mylan's financial contributions. The August 24, 2011, press release quotes Dr. Phillip Lieberman, a member of the NIAID panel, as stating that up to 20% of patients will require more than one dose of epinephrine to relieve symptoms. According to the class plaintiffs, Dr. Lieberman's statement does not explain why a 2-Pak is necessary for 100% of patients when only "up to 20%" require more than one dose. Also, his statement never explains why all patients must purchase two EpiPens instead of having a prescription that allows two doses. The class plaintiffs allege that Dr. Lieberman made his statement justifying the switch to the 2-Pak because Mylan paid him to do so.

Third, the class plaintiffs allege, Mylan made false statements about coupons, rebates, and generics. Mylan has stated publicly on its website and to the media throughout at least 2016 that 80% of consumers with insurance pay nothing for the EpiPen. According to the class plaintiffs, this statement is **[**42]** false because third-party payors end up paying the bulk of the cost for the EpiPen and, in turn, the third-party payors pass on the costs to patients with increased premiums. Mylan also announced **[*1285]** recently that it will begin offering a $300 generic version of the EpiPen. The class plaintiffs assert that Mylan's admission that it can make a $300 generic using the same factories and components used to make the $600 EpiPen shows that Mylan is price gouging consumers with its current list price for the EpiPen.

Finally, the Class Complaint alleges that Mylan made false statements to Congress under oath to help cover up its fraud and to deceive the public about the EpiPen price increases. The Class Complaint asserts that CEO Heather Bresch falsely testified to Congress on September 21, 2016, when she: (1) misrepresented Mylan's profit on the EpiPen as $50 per device, but, according to a *Wall Street Journal* article, Mylan's profits were 60% higher than that amount; (2) misrepresented that Mylan had invested more than $1 billion in the EpiPen when, in fact, Mylan acquired the EpiPen in 2007 without incurring any research and development expenses; (3) misrepresented that Mylan had provided free **[**43]** EpiPens to more than 66,000 U.S. schools with "no strings attached," but Mylan, in fact, did attach strings to the free EpiPens by requiring the schools to sign a contract agreeing not to purchase any products from Mylan's competitors for a twelve-month period; (4) misrepresented that Mylan had reduced U.S. healthcare costs by about $180 billion; and (5) mispresented that 85% of EpiPen patients pay less than $100 for a 2-Pak and a majority pay less than $50.

II. Legal Standard

HN2[] *Fed. R. Civ. P. 8(a)(2)* provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although this Rule "does not require 'detailed factual allegations,'" it demands more than "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" which, as the Supreme Court explained, "will not do." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

When considering a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, the court must assume that the factual allegations in the complaint are true. *Id.* (citing *Twombly, 550 U.S. at 555*). But the court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* (quoting *Twombly, 550 U.S. at 555*). "'Threadbare recitals of the elements of a cause of action, supported **[**44]** by mere conclusory statements, do not suffice'" to state a claim for relief. *Bixler v. Foster, 596 F.3d 751, 756 (10th Cir. 2010)* (quoting *Iqbal, 556 U.S. at 678*). Also, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555* (citations omitted).

HN3[] For a complaint to survive a motion to dismiss under *Rule 12(b)(6)*, the pleading "must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Iqbal, 556 U.S. at 679* (quoting *Twombly, 550 U.S. at 570*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 678* (citing *Twombly, 550 U.S. at 556*). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly, 550 U.S. at 556*); *see also* *Christy Sports, LLC v. Deer Valley Resort Co., Ltd., 555 F.3d 1188, 1192 (10th Cir. 2009)* **[*1286]** ("The question is whether, if the allegations are true, it is plausible and not merely possible that the plaintiff is entitled to relief under the relevant law." (citation omitted)).

HN4[] In the antitrust context, the Supreme Court observed in *Twombly* that "proceeding to antitrust discovery can be expensive." *Twombly, 550 U.S. at 558* (applying the plausibility pleading standard to Sherman Act claims).

So, courts must **[**45]** "'insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528 n.17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. But still, antitrust cases are not subject to a standard requiring "heightened fact pleading of specifics." *Id. at 570*. Instead, an antitrust Complaint must allege "only enough facts to state a claim to relief that is plausible on its face" sufficient to "nudge[ ] the[ ] claims across the line from conceivable to plausible." *Id.; see also In re Urethane Antitrust Litig., 663 F. Supp. 2d 1067, 1074 (D. Kan. 2009)* (explaining on a *Rule 12(b)(6)* motion to dismiss antitrust claims that "the Court must ensure that plaintiffs have alleged facts to support those elements sufficient to provide the 'heft' to show an entitlement to relief and to 'nudge' plaintiffs' claims over the line from mere[ ] possibility or speculation to plausibility" (quoting *Twombly, 550 U.S. at 557, 570))*.

The court's analysis, below, applies this governing standard to defendants' *Rule 12(b)(6)* dismissal arguments.

III. Analysis

The Class Complaint asserts nine claims against the Mylan Defendants: (1) *Sherman Act §§ 1* and *2* violations (Count I); (2) *Clayton Act § 3* violations (Count II); (3) conspiracy violating state antitrust statutes (Count III); (4) monopolization violating state antitrust statutes (Count IV); (5) attempted monopolization **[**46]** violating state antitrust statutes (Count V); (6) tying violating state antitrust statutes (Count VI); (7) RICO Act violations (Count VII); (8) violation of state consumer protection laws (Count VIII); and (9) unjust enrichment (Count IX). The Class Complaint asserts just Counts I-V and VII jointly against the Mylan and Pfizer Defendants.

Both the Mylan and Pfizer Defendants move the court to dismiss each claim asserted in the Class Complaint. The court addresses each of defendants' arguments in the subsections, below. The first section addresses whether the Class Complaint states plausible claims of federal and state antitrust violations. The second section discusses whether the class plaintiffs have alleged viable RICO claims. The third section addresses whether the Class Complaint states plausible claims for relief under state consumer protection laws. Finally, the fourth section considers whether the class plaintiffs have stated a claim for unjust enrichment.

A. Antitrust Claims

Defendants assert eight different arguments why the class plaintiffs' factual allegations never state a plausible antitrust claim under either federal or state law. The court addresses each one of the eight **[**47]** arguments, in turn, below.

1. Have the class plaintiffs alleged a plausible tying claim based on the EpiPen 2-Pak?

The Mylan Defendants[3] argue that the Class Complaint fails to allege a plausible **[*1287]** tying claim because it never alleges the existence of two distinct products. Instead, the Mylan Defendants contend, the class plaintiffs premise their tying claim on the EpiPen 2-Pak, *i.e.* selling two EpiPen devices in one package. Defendants assert that this practice—because it involves selling two identical products—is not an unlawful tying arrangement.

HN5[] Tying is an arrangement involving the sale of "two distinct products or services as a package." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 33, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* (Brennan, J., concurring), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* (further citation omitted). "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Id. at 12*. But "a tying

[3] The class plaintiffs assert their tying claim just against the Mylan Defendants—not the Pfizer Defendants.

arrangement cannot exist unless two separate product markets have been linked." *Id. at 21*. And "the question whether one or two products are involved turns not **[**48]** on the functional relation between them, but rather on the character of the demand for the two items." *Id. at 19*; *see also* *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 456, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* ("[T]o be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide [one] separately from [the other].").

The class plaintiffs respond that they have alleged a tying arrangement involving two separate product markets—one for the primary EAI device, and the other for a "spare" (or "backup") EAI device. Class Compl. ¶¶ 575-79. The Class Complaint describes how Mylan and others sold the EpiPen individually in the U.S. from 1987 to 2011 without incident. But, in 2011, Mylan imposed the "hard switch," requiring patients to purchase EpiPens in pairs in the EpiPen 2-Pak. The class plaintiffs allege that, before the "hard switch," "[t]here was sufficient independent demand for some patients to either not purchase a second EpiPen at all or to purchase an EpiPen and a cheaper, alternative back-up." *Id.* ¶ 577. But, after the hard switch, Mylan forced patients to buy two separate devices—the primary EAI device and back-up EAI device—even though "each EpiPen expires annually and the vast majority of EpiPens expire before **[**49]** they can be used." *Id.* ¶ 577. As the Class Complaint describes: "Consumers no longer had the choice or ability to purchase a back-up or spare device from another manufacturer, or to decline to purchase a second EpiPen based on whether they needed it, chose to purchase it, or were prescribed it by a doctor." *Id.* ¶ 579.

Viewing these allegations in the class plaintiffs' favor, the Class Complaint alleges a "sufficient consumer demand" in the U.S. to purchase a primary EAI device separately from a back-up device or none at all "so that it is efficient for a firm to provide [one] separately from [the other]." *Eastman Kodak Co., 504 U.S. at 456*; *see also* *Multi-State Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Pubs., Inc., 63 F.3d 1540, 1547-48 (10th Cir. 1995)* (holding that the case's summary judgment facts presented a factual dispute whether "enough consumer demand [existed] in Colorado" for one product such that it was efficient to sell the two products separately).

The court recognizes that the class plaintiffs have alleged a tying relationship based on two products that are functionally identical. The Mylan Defendants assert **[*1288]** that the two products thus are interchangeable. For example, a patient could use either one of the two EpiPens in a 2-Pak as the primary device and the other one as the back-up device. The Mylan Defendants **[**50]** thus argue that it is not plausible that the primary EAI device and backup EAI device belong to separate markets. ***HN6***[🡅] Indeed, the Tenth Circuit has defined the "relevant product market in any given case" as one "'composed of products that have reasonable *interchangeability* for the purposes for which they are produced—price, use and qualities considered.'" *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1313 (10th Cir. 2017)* (quoting *SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 966 (10th Cir. 1994))* (emphasis added). Although the two products here have the same qualities, the Class Complaint defines how patients *use* them in a functional sense as two separate products. A patient uses one EpiPen as the primary EAI device and the other as the back-up device.

The parties do not cite, and the court's research has not revealed, any tying cases involving identical products with different and distinct uses—what the class plaintiffs allege here. The Mylan Defendants cite two cases where courts refused to find two separate products to support a tying claim, but those cases involved preliminary injunction motions where the factual record failed to demonstrate the existence of two separate product markets. *See* *Metromedia Broad. Corp. v. MGM/UA Entm't Co., 611 F. Supp. 415, 422-24 (C.D. Cal. 1985)* (recognizing that questions existed whether "the demand for first runs [of TV series] is separate from that for reruns," but **[**51]** refusing to "carve up" a copyright for the purposes of licensing "a single intellectual property" because both the first runs and reruns shared the "same copyright and uniqueness," which "was the product from which market power derives"); *Paul v. Pulitzer Publ'g Co., No 74-327C(A), 1974 U.S. Dist. LEXIS 8362, 1974 WL 887, at *5 (E.D. Mo. May 24, 1974)* (holding that "different issues of the same newspaper are not separate products" but never discussing whether consumer demand existed for selling weekday editions separately from the Saturday edition).

In contrast here, the Class Complaint asserts facts that plausibly allege two separate product markets—one for EAI primary devices and the other for back-up devices. These allegations are sufficient to state a claim at this stage of the litigation. Ultimately, to prevail on their tying claim, the class plaintiffs must adduce admissible evidence to support a reasonable finding that two separate product markets exist. But, to survive the Motions to Dismiss, plaintiffs need only make plausible factual allegations of two different product markets. They have satisfied that requirement.

2. Have the class plaintiffs alleged plausible exclusive dealing claims based on Mylan's exclusive dealing contracts with PBMs and schools [52]** ?

The Mylan Defendants assert that the class plaintiffs have failed to allege plausible antitrust claims based on Mylan's exclusive dealing contracts with PBMs and schools. Defendants offer five arguments to support their assertion.

First, the Mylan Defendants argue, the Class Complaint never alleges that Mylan's rebates and discount offers resulted in EpiPen prices below the cost of their production. Six days after the Mylan Defendants filed their Motions to Dismiss the Class Complaint, the court issued a Memorandum and Order in the other of the two separate tracks in this MDL—the Sanofi track. The court's Order granted Mylan's Motion to Dismiss the *Sanofi* Complaint in part, and denied that motion in part ("the *Sanofi* Order"). Doc. 98. In the *Sanofi* Order, the court rejected the same argument asserted here—*i.e.*, that Sanofi's exclusive dealing claims fail as a matter of **[*1289]** law because the *Sanofi* Complaint never alleges that Mylan's rebate offers resulted in prices that were below its costs to produce the EpiPen. *See* *id. at 10-15*. The court recognized that the price-cost test does not apply to bar exclusive dealing claims when price itself is not the clearly predominant mechanism of exclusion. *Id. at 12-13* (citing **[**53]** *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 277 (3d Cir. 2012)* (further citations omitted)). And, viewing the allegations in Sanofi's favor, the court concluded that the *Sanofi* Complaint "does not rely 'solely on the exclusionary effect of [Mylan's] prices' to support its exclusive dealing claim based on Mylan's rebate program." *Id. at 13* (quoting *ZF Meritor, 696 F.3d at 277*).

The same is true of the Class Complaint.[4] The Class Complaint alleges that Mylan leveraged its greater-than-90% market share by offering large rebates to PBMs to exclude Auvi-Q from the formularies. Class Compl. ¶ 177. The Class Complaint asserts that no legitimate business reason existed for Mylan's deep conditional rebates except blocking Auvi-Q from the market. *Id.* ¶ 178. Also, it asserts that Mylan's rebates effectively prevented competitors from accessing formularies of the two largest PBMs—Express Scripts and CVS Caremark—that combine to cover more than 50% of the PBM market in the United States. *Id.* ¶¶ 162, 168. The Class Complaint alleges that Mylan's conditional rebates unlawfully increased Sanofi's cost to enter the market if it wanted to match Mylan's rebates. *Id.* ¶ 182. And, the Class Complaint alleges, after Mylan successfully excluded Auvi-Q from coverage, it sent misleading marketing materials **[**54]** to physicians asserting that EpiPen was the "preferred" EAI device for 99% of patients while Auvi-Q was "preferred" for only 2% of patients. According to the class plaintiffs, the marketing materials suggested that the reason for Auvi-Q's exclusion was based on clinical recommendations—and not the large, conditional rebate offers. *Id.* ¶¶ 232-35. These allegations assert that Mylan's rebate program involved anticompetitive conduct—beyond pricing itself—that was designed to exclude competition in the EAI drug market.

Second, the Mylan Defendants contend that the Class Complaint never alleges that Mylan's rebates harmed the class plaintiffs by excluding Auvi-Q from the market because Sanofi's decision not to compete with the EpiPen was based on other factors, all unrelated to Mylan's conduct. The Mylan Defendants cite a paragraph from the *Sanofi* Complaint asserting that Sanofi voluntarily recalled Auvi-Q in October 2015 following reports of manufacturing issues. Doc. 95 at 44. But, as the court concluded in the *Sanofi* Order, the *Sanofi* Complaint plausibly alleges that Mylan's conduct forced Sanofi to exit the EAI drug market. Doc. 98 at 40. The Class Complaint contains similar **[**55]** allegations. As the court already has held, Mylan's arguments that the voluntary recall—and not Mylan's alleged anticompetitive conduct—caused Sanofi's injuries present a factual dispute that the court cannot resolve on a motion to dismiss. *Id.* For the same reasons as the *Sanofi* Order discussed, the court declines to

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[4] Mylan's Reply—filed after the court issued its *Sanofi* Order—concedes that the *Sanofi* Order decided against this argument and states that Mylan is not relitigating the issue. Doc. 219 at 18 n.5. But Mylan's Reply incorporates the arguments made in its opening brief and preserves the issue for further review. *Id.*

dismiss the class plaintiffs' exclusive dealing claims based on Mylan's argument that Sanofi's decision to exit the EAI market was based on factors other than Mylan's anticompetitive conduct.

[*1290] *Third*, the Mylan Defendants assert that the Class Complaint never alleges that Mylan's exclusive dealing contracts harmed competition. The court rejected this same argument in the *Sanofi* Order. It rejects it again here for the same reasons. The Class Complaint, construed in favor of the class plaintiffs, plausibly alleges that Mylan's anticompetitive conduct harmed competition. The Class Complaint alleges that defendants implemented a pricing scheme that raised the price of the EpiPen from a little over $100 for two EpiPens in 2007 to more than $600 for the same two EpiPens in 2016. Class Compl. ¶¶ 349-60. According to the class plaintiffs, the price increases allowed Mylan to share **[**56]** its monopoly profits with PBMs through larger rebates for excluding competing products. *Id.* ¶¶ 165-66. Mylan's exclusionary contracts then prevented consumers in a substantial share of the market from accessing or choosing competing EAI devices such as the Auvi-Q and others. *Id.* at ¶¶ 168, 491. These allegations, if true, are capable of supporting a finding or inference of harm to competition, and thus, they state a plausible antitrust claim.

Fourth, the Mylan Defendants assert that the class plaintiffs' claims based on discounts or rebates Mylan offered to states or state agencies are barred by the *Noerr-Pennington* doctrine. ***HN7***[] The *Noerr-Pennington* doctrine "'exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition.'" *Tal v. Hogan, 453 F.3d 1244, 1257 n.13, 1259-60 (10th Cir. 2006)* (quoting *Zimomra v. Alamo Rent-A-Car, Inc., 111 F.3d 1495, 1503 (10th Cir. 1997))*. The scope of the *Noerr-Pennington* doctrine depends "on the source, context, and nature of the anticompetitive restraint at issue." *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*.

But "*Noerr-Pennington* immunity does not apply if the purported effort to influence or obtain government action is in fact only an attempt to interfere with the business relationships of a competitor." *Classic Commc'ns, Inc. v. Rural Tel. Serv. Co., 956 F. Supp. 910, 917 (D. Kan. 1997)* (first citing *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; then citing *Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972))*. "This **[**57]** is the so-called 'sham' exception to the *Noerr-Pennington* doctrine." *Id.* The sham exception applies "when 'persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.'" *GF Gaming Corp. v. City of Black Hawk, 405 F.3d 876, 884 (10th Cir. 2005)* (quoting *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991))*. "The exception thus 'involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all,' such as a defendant who files 'frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.'" *Id.* (quoting *City of Columbia, 499 U.S. at 380*).

In the *Sanofi* Order, the court held that the *Noerr-Pennington* doctrine barred Sanofi's exclusive dealing claims based on Mylan's discounts or rebates to state-based Medicaid agencies. Doc. 98 at 22-24. The court reasoned that Sanofi's allegations accused Mylan of using the *outcome* of the government process—*i.e.*, exclusion of Auvi-Q from the drug formularies—*not the process itself*, to harm a competitor. *Id. at 22*. Thus, the court concluded, *Noerr-Pennington* immunity applied to Sanofi's claims based on discounts or rebates offered to state-based Medicaid agencies. *Id.*

[*1291] The class plaintiffs argue the court should reach a different **[**58]** result here because, they contend, the Class Complaint's allegations differ from Sanofi's. First, the class plaintiffs contend that their antitrust claims are premised on Mylan's misclassification of the EpiPen and that this misclassification influenced decisions by state-based Medicaid agencies to exclude Auvi-Q. The Class Complaint alleges that Mylan's misclassification of the EpiPen allowed it to "amass millions of dollars each year in unpaid rebates to cash-strapped state Medicaid agencies." Class Compl. ¶ 187. And, according to the Class Complaint, these "outstanding underpaid rebates led benefit managers to continue favoring the EpiPen over competitors in the expectation of receiving a large make-up payment if and when Mylan was forced to classify the EpiPen as a brand." *Id.* ¶ 188. The class plaintiffs assert that the *Noerr-Pennington* doctrine does not shield Mylan's misrepresentations about the EpiPen's classification from antitrust liability because "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Cal. Motor Transp., 404 U.S. at 513*.

The court disagrees that the class plaintiffs' allegation about the EpiPen's misclassification—in this one paragraph **[**59]** of their 1,429 paragraph Class Complaint—places the claim outside of *Noerr-Pennington* immunity. ***HN8***[] Indeed, "[n]ot every fraudulent misrepresentation during an adjudicative or administrative proceeding can give rise to antitrust liability." *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 843 (7th Cir. 2011)*. "[A] misrepresentation renders an adjudicative proceeding a sham only if the misrepresentation (1) was intentionally made, with knowledge of its falsity; and (2) was material, in the sense that it actually altered the outcome of the proceeding." *Id. at 843*; *see also* *Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 123 (3d Cir. 1999)* ("While we do not condone misrepresentations in a judicial setting, neither will we deprive litigants of immunity derived from the *First Amendment's* right to petition the government if the alleged misrepresentations do not affect the core of the litigant's . . . case.").

Here, the class plaintiffs' allegation never asserts explicitly that the misclassification caused any state-based Medicaid agencies to exclude EpiPen rivals from the formularies. Instead, the allegation refers generally to "benefit managers." And it recites that these benefit managers continued to "favor" the EpiPen over competitors. Also, the allegation asserts that the benefit managers knew about the misclassification and thus anticipated a large **[**60]** make-up payment when Mylan was forced to reclassify the EpiPen. Thus, according to the allegation, the benefit managers never made their decisions based on any false representations that Mylan made to them. To the contrary, the allegation asserts that the benefit managers understood that Mylan had misclassified the EpiPen. So, nothing about the misclassification affected the decision-making abilities of benefit managers when they chose which EAI devices to include in the formularies. Construed in the class plaintiffs' favor, the exclusive dealing allegations based on Mylan's discounts or rebates to state-based Medicaid agencies assert that Mylan's conduct violated the antitrust laws by offering the rebates in exchange for exclusivity. The *Noerr*-*Pennington* doctrine precludes liability for this type of conduct, even if the intent was to exclude competition. Thus, the Class Complaint fails to allege a plausible antitrust claim based on Mylan's discounts or rebates to state-based Medicaid agencies.

[*1292] *Finally*, the Mylan Defendants argue that the Class Complaint never alleges that Mylan's EpiPen4Schools program foreclosed competitors from a substantial share of the relevant market.[5] ***HN9***[] To assert **[**61]** a plausible exclusive dealing claim, a plaintiff must plead facts capable of supporting a finding or inference that the "probable effect" of "performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; *see also* *Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1374 (10th Cir. 1979)* ("Thus, a complaining trader must allege and prove that a particular arrangement unreasonably restricts the opportunities of the seller's competitors to market their product.").

HN10[] The Supreme Court has instructed lower courts "[t]o determine substantiality in a given case" by "weigh[ing] the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." *Tampa Elec., 365 U.S. at 329*. When considering whether the contract at issue in *Tampa Electric* tended to foreclose a substantial volume of competition, the Supreme Court considered several things. *Id. at 334-35*. They include the relative dominance of a seller's **[**62]** position in the market, whether the market has "myriad outlets with substantial sales volume," the prevalence in the

[5] The Mylan Defendants also assert that "[a]t best, Plaintiffs allege that Mylan engaged in legitimate state and federal lobbying efforts to allow schools to participate in the program" and that the *Noerr-Pennington* doctrine shields such conduct from antitrust liability. Doc. 95 at 46. But the class plaintiffs do not base their antitrust claims on Mylan's lobbying activities. Instead, the claims are premised on Mylan's alleged anticompetitive conduct in offering free and discounted EpiPens to school districts but making those offers contingent on the school districts entering into illegal exclusive dealing agreements with Mylan. The Mylan Defendants never argue that the *Noerr-Pennington* doctrine immunizes that alleged anticompetitive conduct—*i.e.*, the conduct on which the class plaintiffs base their antitrust claims for the EpiPen4Schools program.

industry of exclusive contracts, the duration of the contract, and the existence of any pro-competitive justifications for the contract. *Id.*

The class plaintiffs assert that the Class Complaint plausibly alleges facts capable of supporting a finding or inference of substantial market foreclosure. The Class Complaint alleges that Mylan's exclusionary contracts with PBMs prevented competitors from accessing formularies covering more than 50% of the PBM market in the U.S. Also, the Class Complaint alleges that Mylan created a substantial, additional need for EpiPens by adding school districts to the market for EAI devices. Class Compl. ¶ 208. More than 67,000 school districts now purchase EpiPens, and the districts usually are "bulk" purchasers. *Id.* For example, the public schools in Fairfax County, Virginia, order about 1,100 EpiPen 2-Paks annually to have them on hand for their 180,000 students. *Id.* The Class Complaint also alleges that Mylan gained another advantage by opening up the school market—gaining access to nursing staff and creating familiarity with the EpiPen **[**63]** among parents. *Id.* ¶ 209.

Although these allegations never assert definitively that the EpiPen4Schools program's exclusionary contracts foreclosed a substantial share of the market, the court declines to conclude at the motion to dismiss **[*1293]** stage that these facts fail to plead adequate foreclosure. Indeed, our court has recognized that *Tampa Electric* provides a "number of other factors which may be relevant to a rule of reason analysis in an exclusive dealing claim," and thus it has refused to "decide at the pleading stage that plaintiff had failed to plead adequate foreclosure levels" to state an exclusive dealing claim. *Suture Express, Inc. v. Cardinal Health 200, LLC, 963 F. Supp. 2d 1212, 1229 (D. Kan. 2013)* (Rogers, J.). The court comes to the same conclusion here. To determine whether the EpiPen4Schools program's exclusionary contracts foreclosed a substantial share of the market, the court must weigh the various factors outlined in *Tampa Electric*. The court cannot engage in such an analysis at the pleading stage. Instead, the court considers the Class Complaint's allegations in the light most favorable to the class plaintiffs. And it concludes that the class plaintiffs plausibly have alleged facts supporting a finding or inference that the probable effect of Mylan's exclusionary **[**64]** contracts in the EpiPen4Schools program substantially foreclosed competition. The court thus concludes that the class plaintiffs have stated a plausible exclusive dealing claim based on Mylan's EpiPen4Schools program.

3. Have the class plaintiffs alleged causation to support their antitrust claims based on the patent litigation settlements?

Next, defendants argue that the class plaintiffs lack standing to assert their antitrust claims based on the patent litigation settlements with potential competitors. This argument asserts that the class plaintiffs have alleged no facts capable of supporting a finding or inference of causation. ***HN11***[] To establish antitrust standing, a plaintiff must allege "(1) an 'antitrust injury'; and (2) a direct causal connection between that injury and a defendant's violation of the antitrust laws." *Tal v. Hogan, 453 F.3d 1244, 1253 (10th Cir. 2006)* (citations and internal quotation marks omitted); *see also* Sharp v. United Airlines, Inc., 967 F.2d 404, 406 (10th Cir. 1992) (explaining that antitrust standing requires "the causal connection between the antitrust violation and the plaintiff's injury").

Defendants contend that the class plaintiffs have not alleged plausibly that they caused any delay in the sale of potential competitors' EAI devices by initiating the patent lawsuits **[**65]** and entering into settlement agreements with potential competitors.[6] Instead, defendants provide two reasons—unrelated to the patent litigation and settlements—that prevented potential competitors Teva, Intelliject, and Sandoz from entering the EAI market. First, defendants assert, Teva and Sandoz never entered the market because they never secured FDA approval for their

[6] The Mylan Defendants also argue that the Class Complaint never alleges that Mylan was a party to or participated in the patent litigation with Teva, Intelliject, or Sandoz. Thus, the Mylan Defendants argue, the Class Complaint fails to state a claim against them based on the patent litigation and settlements. As explained in the following subsection (*see infra* Part III.A.4.), the court concludes that plaintiffs have alleged a plausible conspiracy between Mylan and Pfizer that included their coordinated scheme to initiate patent litigation against potential competitors in the EAI market, and then, to settle those lawsuits by agreeing to pay those potential competitors to postpone entry into the market. The court thus rejects the Mylan Defendants' argument that the Class Complaint never alleges that they participated in the patent litigation and settlements.

EAI devices. Second, defendants contend, these potential competitors could not enter the market lawfully without infringing Pfizer's EpiPen device patents—ones that don't expire until 2025. The class plaintiffs respond, asserting that both arguments require **[*1294]** the court to make factual determinations—something it cannot do on a motion to dismiss. Instead, the class plaintiffs argue, the Class Complaint alleges facts from which one could infer plausibly that defendants' conduct prevented potential competitors from entering the EAI market. The court agrees with them, for reasons explained below.

In response to defendants' first argument, the class plaintiffs concede that the Class Complaint recites that Teva and Sandoz never secured FDA approval for their competing EAI devices. Class Compl. ¶¶ 302, 319. But it also **[**66]** alleges that Teva and Sandoz were anticipating imminent launches into the EAI market and taking the steps to gain FDA approval of their generic, competing products so that they could enter the market. *See id.* ¶¶ 251-52 (reciting that defendants' alleged "pay-for-delay" settlements were designed "to stop Teva's imminent generic competition" after Teva had filed an ANDA in December 2008 seeking approval to market a generic EpiPen); *see also id*. ¶ 302 (reciting that "[i]n 2010, Sandoz . . . made a similar attempt to enter the market through a generic alternative to EpiPen" by filing an ANDA). And, the Class Complaint alleges, defendants' unlawful conduct—*i.e.*, filing the lawsuits and entering into reverse payment settlements for purposes of delaying these potential competitors' entry into the market—caused Teva and Sandoz's failure to secure FDA approval.

Indeed, the Class Complaint recognizes that the "FDA ultimately rejected Teva's generic product when it was under review." *Id.* ¶ 319. But it also alleges that "it is likely that Teva may have been able to fix those problems if the patent lawsuit had not delayed its ability to enter the market." *Id.* (citation and internal quotation marks **[**67]** omitted). The Class Complaint also alleges: "But for Mylan's anti-competitive assault campaign, Teva would have entered the market much sooner and fixed the deficiencies that led to the FDA's rejection of Teva's generic." *Id.* ¶ 322. And it contends: "By sidelining Teva from 2012 to 2015, Mylan, King, and Meridian disrupted Teva's trajectory toward FDA approval and also gained a three-year guaranteed monopoly period in which Mylan could raise prices on consumers without any fear of generic competition from Teva." *Id.*

Also, the Class Complaint alleges that Sandoz never secured FDA approval because defendants' litigation has resulted in "the court entering an order staying the FDA process and administratively terminating the action, to be reopened upon letter request by any of the parties." *Id.* ¶ 302. And, to date, "[n]o party has reopened the case." *Id.*

The class plaintiffs argue that these allegations plausibly assert causation because the delay for potential competitors entering the market "was a foreseeable consequence of the original antitrust violation." *In re Flonase Antitrust Litig., 798 F. Supp. 2d 619, 630 (E.D. Pa. 2011)*; *see also* *id. at 629-33* (denying summary judgment against antitrust claims because, among other things, plaintiffs presented sufficient evidence **[**68]** to raise genuine issues of material fact whether the FDA's deficiency notices sent to a potential competing generic "was indeed proximately caused by, or was the foreseeable consequences of, [defendant's] alleged antitrust violations"). The court agrees with this argument. Viewing the allegations in the class plaintiffs' favor, the Class Complaint asserts that defendants' alleged unlawful reverse payment settlements caused both the potential competitors' delay in entering the EAI device market and their delay in securing FDA approval.

Defendants cite several cases where district courts have dismissed antitrust claims **[*1295]** based on reverse payment settlements for lack of causation because, those courts held, the absence of FDA approval had caused the generic's delay in entering the market—not defendants' alleged conduct. Defendants urge the court to apply the same reasoning here. But these cases differ from this one because the complaints in those cases never alleged that defendants had *caused* the delay to secure FDA approval. *See, e.g.,* *In re Asacol Antitrust Litig., No. 15-cv-12730-DJC, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at *7 (D. Mass. July 20, 2016)* (dismissing antitrust claim based on alleged reverse payment settlements because "the amended complaint contains **[**69]** no plausible allegation that [defendants] sought to delay or sabotage FDA approval" and, instead, "the lack of FDA approval today remains 'the limiting factor' in [the generic's] ability to bring its generic drug to market"); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-02503-DJC, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at *9 (D. Mass. Aug. 16, 2015)* (holding that plaintiffs' allegations that a reverse payment settlement delayed entry of a competing product never asserted a "plausible allegation of delay by defendants" because the competing product never received FDA approval to launch its product before the parties' agreed entry date under the settlement); *Brotech Corp. v. White Eagle Int'l Tech. Grp., Inc., No. Civ.A.03-232, 2004 U.S. Dist. LEXIS 11552, 2004 WL 1427136, at *6 (E.D. Pa. June 21, 2004)* (holding that a counterclaim alleged no antitrust injury when it "[did] not allege facts establishing [a competitor's] intent and preparedness to enter the market for its [competing] product, that it would be prepared to enter the market for said product in the absence of the instant lawsuit, or that FDA approval of said products is probable). The facts alleged here differ. The class plaintiffs have alleged that defendants' reverse payment settlements delayed competing products—not only from entering the market but from securing FDA approval. *See* Class Compl. ¶¶ 302, 319, 322. **[**70]** These allegations suffice to state a claim for relief at the pleading stage.

In response to defendants' second argument—that a generic competitor could not enter the market lawfully without infringing Pfizer's patents—the class plaintiffs assert the Class Complaint plausibly alleges that Pfizer's patent rights were not sufficient to preclude generic competition (even though the patents did not expire until 2025). The class plaintiffs contend that, without defendants' alleged unlawful settlements, defendants faced a high probability of generic competition because it was likely that the courts would find the patents invalid or conclude that the generic competing devices were non-infringing. Indeed, the Class Complaint alleges that "given the trial court's previous rulings [in the Teva Litigation] it requires no great leap to infer that, had the parties waited for a decision, the '432 patent would have been found invalid." *Id.* ¶ 284. It goes on to allege: "That, in turn, would have removed the most significant barrier to entry for Teva—or any other putative generic manufacturer, making it more likely that at least one would have entered or attempted to enter the market." *Id.* The Class Complaint also **[**71]** alleges facts about the trial court proceedings that allow a plausible finding or inference of invalidity or non-infringement. These alleged facts include: (1) the trial court issued Markman rulings interpreting the '432 patent favorable to Teva; (2) the parties settled after the trial court had held a full bench trial, meaning that the parties' additional litigation expenses were minimal compared to the expenses they already had incurred when they settled; and (3) "[n]o rational economic actor with a viable product (and who had spent millions of dollars developing it) would refrain from entering a lucrative 'blockbuster' market for 36 months unless **[*1296]** it received monetary compensation in exchange for non-entry." *Id.* ¶ 265.

Defendants assert that these allegations fail to state a plausible claim because they merely speculate that a generic would have proved invalidity or non-infringement in a patent lawsuit. For support, defendants cite two cases where district courts dismissed antitrust claims based on alleged unlawful reverse payments because the plaintiffs never asserted plausible allegations about a generic's ability to prevail in patent litigation with the patent holders. *See, e.g., FTC v. AbbVie, Inc., 107 F. Supp. 3d 428, 437 (E.D. Pa. 2015)* (holding **[**72]** that plaintiff's allegations that the patent litigation was a sham "is merely speculation" because "[n]o judicial determination of the sham issue had been made when the parties settled the case"); *In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 201-02 (E.D.N.Y. 2003)* (holding that plaintiff's allegations that a generic would have prevailed in patent litigation were too speculative, especially because of judicially noticed facts about "post-settlement affirmations of the . . . [p]atent's validity").

The court disagrees that the class plaintiffs' allegations here are merely speculative. In contrast to defendants' cited cases, the class plaintiffs here allege facts capable of supporting a finding or inference that a potential generic competitor could have shown that Pfizer's patents were invalid, or that its competing device did not infringe the patents. These factual allegations include ones about what transpired in the Teva Litigation—*i.e.*, that the trial court issued a Markman ruling that was allegedly favorable to Teva and that the timing of the parties' settlement suggests the patent holders recognized the risk of the trial court finding the patents invalid or the competing product non-infringing.

Recently, the Massachusetts federal district court denied **[**73]** summary judgment against an antitrust claim based on a reverse payment settlement. ***HN12***[] Analyzing the causation issue, that court noted, "the Supreme Court [has] explained that 'it is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham)' because '[a]n unexplained large reverse payment itself would normally suggest that the patentee has some serious doubts about the patent's survival.'" *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-02503-DJC, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *14 (D. Mass. Jan. 25, 2018)* (quoting *FTC v. Actavis, Inc., 570 U.S. 136, 157, 133 S. Ct. 2223, 186 L.*

Ed. 2d 343 (2013)). Also, the court recognized "as a general matter, '[i]t is well established that the burden of proving infringement generally rests upon the patentee.'" *Id.* (quoting Medtronic, Inc. v. Mirowski Family Ventures, LLC, 571 U.S. 191, 198, 134 S. Ct. 843, 187 L. Ed. 2d 703 (2014)). The Massachusetts court thus concluded that, on summary judgment, "the standard requiring Plaintiffs to produce 'some evidence' of invalidity or noninfringement does not require Plaintiffs 'to prove that the generic defendant would have won, only that it could have.'" Id. (quoting United Food & Commercial Workers Local 1776 v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 1155 (N.D. Cal. 2017)).

Applying that reasoning here,[7] the class plaintiffs need not allege that Teva *would* have prevailed in the patent litigation—it merely needs to allege that it *could* have. **[*1297]** The Class **[**74]** Complaint's allegations assert plausibly that Teva could have prevailed in the patent litigation if the parties has not resolved the case through an alleged reverse payment settlement. These allegations thus sufficiently assert that Pfizer's patents did not bar a generic competitor from entering the market. And the class plaintiffs have stated a plausible antitrust claim based on the alleged unlawful reverse payment settlements. *See* In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 755 (E.D. Pa. 2014) (denying motion to dismiss antitrust claim for lack of an injury caused by a patent litigation settlement because, the court concluded, plaintiffs "plausibly alleged that, but for the anticompetitive settlement agreements, [the generic] would have prevailed in the underlying patent litigation against [the patent holder]").

4. Have the class plaintiffs alleged a plausible conspiracy between Mylan and Pfizer?

Defendants next assert that the class plaintiffs have failed to allege a plausible conspiracy between the Mylan and Pfizer Defendants under the antitrust laws. Defendants concede that the Class Complaint alleges that "[b]eginning in 2012 with the settlement of the Teva Litigation, Defendants [Mylan, King, Meridian] engaged in a continuing **[**75]** illegal contract, combination, and conspiracy in restraint of trade, the purpose and effect of which was to prevent the sale of a generic version of the EpiPen in the United States . . . ." Class Compl. ¶ 543 (Count III alleging state law antitrust violations); *see also id.* ¶ 530 ("By their agreement, Defendants intentionally and wrongfully conspired and combined in an unreasonable restraint of trade in a per se violation of § 1 of the Sherman Act . . . ." (Count I, alleging violations of federal ***antitrust law***)). But, defendants contend, the Class Complaint alleges no facts capable of supporting a finding or inference of an agreement or conspiracy to exclude competing devices in the EAI market.[8]

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[7] The parties do not cite, and the court's research has not located, any Tenth Circuit cases discussing the viability of antitrust claims based on reverse payment settlements. The court predicts that the Tenth Circuit, if presented with this issue, would find *In re Sologyn* persuasive and apply its reasoning to the facts alleged here.

[8] The Mylan Defendants' opening brief asserts that the class plaintiffs' claims—premised on alleged reverse payment settlements—are evaluated under a rule of reason analysis—not the per se rule. Doc. 52 at 106-07; *see also* FTC v. Actavis, Inc., 570 U.S. 136, 159, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013) (holding that courts must apply a rule of reason analysis to reverse payment settlement agreements alleged to violate the antitrust laws). The class plaintiffs' response concedes that an individual reverse payment settlement is analyzed under a rule of reason analysis. Doc. 64 at 151 n.203. But, the class plaintiffs assert, their conspiracy claims are not based just on the reverse payment settlements. *Id.* Instead, they argue, that the court must look to the totality of the conduct allegedly supporting the conspiracy claims. *Id.* But they never cite any case law showing that the per se rule applies to that other conduct that, they contend, supports their conspiracy claim. *Id.*

Nevertheless, at this stage of the litigation, the court need not decide what rule to apply to analyze the reasonableness of the alleged restraints of trade supporting the class plaintiffs' conspiracy claims. *See* CSR Ltd. v. Fed. Ins. Co., 40 F. Supp. 2d 559, 564 (D.N.J. 1998) ("At this early [motion to dismiss] stage of the proceeding, the court does not find it necessary to determine which mode of analysis [per se or rule of reason] it will ultimately employ in evaluating the defendants' activities."); *see also* ***Swarthmore Radiation Oncology, Inc. v. Lapes, 812 F. Supp. 517, 520 (E.D. Pa. 1992)*** ("[The court] need not decide, at this stage of the proceedings, whether a per se rule or a 'rule of reason' applies."). In ruling the pending motion, the court just needs to determine whether the class plaintiffs have alleged a plausible conspiracy under the antitrust laws. The class plaintiffs have shouldered that burden here.

HN13[] To state a claim under Sherman Act § 1, a complaint must allege "enough factual matter (taken as true) to suggest that an agreement was made." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *see* ***[*1298]*** *also* TV Commc'ns Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1027 (10th Cir. 1992) ("To state a claim for a violation of section one [of the Sherman Act] the plaintiff must allege facts which show: the defendant entered a contract, combination or conspiracy that unreasonably restrains trade in the relevant market.").

"An agreement or conspiracy under federal antitrust laws is said to exist when 'there **[**76]** is a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme.'" Suture Express, Inc. v. Cardinal Health 200, LLC, 963 F. Supp. 2d 1212, 1223 (D. Kan. 2013) (quoting W. Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010)). "'A plaintiff may plead an agreement by alleging direct or circumstantial evidence, or a combination of the two,' but allegations of direct evidence, that are adequately detailed, are sufficient alone." *Id.* (quoting W. Penn Allegheny, 627 F.3d at 99). However, "[b]are bones accusations of a conspiracy without any supporting facts are insufficient to state an antitrust claim." Tal v. Hogan, 453 F.3d 1244, 1261 (2006) (citation omitted).

Here, the class plaintiffs contend that they have alleged facts which one can use to infer plausibly that defendants conspired to exclude competing EAI devices from the market. The Class Complaint asserts that defendants engaged in a "multi-faceted, fraudulent scheme to obtain and maintain a monopoly" in the EAI market. Class Compl. ¶ 6. The Class Complaint alleges that defendants effectuated their scheme by combining and conspiring to: assert and prosecute invalid patents to dissuade competitors from entering the EAI market; intervene in regulatory proceedings to delay competitors' entry in the EAI market; and enter into unlawful "pay-fordelay" settlement agreements with competitors **[**77]** to maintain Mylan's power. *Id.*[9]

The Class Complaint alleges that the Mylan and Pfizer Defendants engaged in this scheme to fend off EpiPen competitors because they had a "unified interest" to protect their monopoly. *Id.* ¶ 241. It asserts that the Pfizer Defendants (as the EpiPen patent holders and suppliers) and the Mylan Defendants (as the EpiPen sellers) worked collaboratively to enhance the EpiPen's sales volume and profitability because their related revenues rise and fall together. *Id.* ¶ 241.

The Class Complaint, construed in the class plaintiffs' favor, also alleges that defendants worked together to secure patents solely for the purpose of preventing generic competition. *Id.* ¶¶ 236-39. It describes how Mylan CEO Heather Bresch announced during a public earnings call in 2009, that *Mylan* was adding another patent to the already-patented EpiPen device that "will also put in [place] another barrier to entry . . . ." *Id.* ¶ 238 (emphasis added). Shortly afterward, Meridian—not Mylan—secured the '432 patent. Also, the Class Complaint alleges that Mylan Specialty **[*1299]** LP took over as sponsor of the EpiPen patents in the Orange Book[10] from Meridian. *Id.* ¶ 247. The Class Complaint asserts **[**78]** that this sponsorship change shows "concerted action by Mylan and Pfizer to share the burdens and rewards of their EpiPen monopoly." *Id.* ¶¶ 247, 314.

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[9] This paragraph of the Class Complaint asserts other alleged unlawful conduct supported the alleged conspiracy—such as the EpiPen misclassification, the exclusivity contracts offered through the EpiPen4Schools Program, deceptive marketing practices, the "hard switch" to the EpiPen 2-Pak, and false testimony to Congress. But the Pfizer Defendants argue that the Class Complaint makes no factual allegations capable of supporting a finding or inference that Pfizer *participated* in any of this other alleged conspiratorial conduct. The court agrees. The court thus confines its discussion to the factual allegations supporting Pfizer's alleged involvement in an antitrust conspiracy to exclude EpiPen competitors—*i.e.*, the Class Complaint's allegations about Pfizer's involvement in securing patents, initiating patent infringement litigation, and entering into unlawful reverse payment settlements.

[10] The Orange Book is the common name for the FDA's publication, *Approved Drug Products with Therapeutic Equivalence Evaluations. See Approved Drug Products with Therapeutic Equivalence Evaluations (Orange Book)*, U.S. Food & Drug Administration, (2018), https://www.fda.gov/drugs/informationondrugs/ucm129662.htm. According to the FDA, the Orange Book "identifies drug products approved on the basis of safety and effectiveness by the [FDA] under the Federal Food, Drug, and Cosmetic Act (the Act) and related patent and exclusivity information." *Id.*

The Class Complaint also alleges that the Mylan Defendants and Pfizer Defendants worked together to prevent competitors from entering the market by filing patent infringement lawsuits and entering into "pay-for-delay" settlement agreements. *Id.* ¶¶ 236-303. While Mylan was not a party to the patent litigation lawsuits, one can infer plausibly from the Class Complaint's allegations that Mylan was participating in the concerted action. Indeed, the class plaintiffs allege that Mylan CEO Heather Bresch appeared to concede that Mylan participated in the Teva settlement by publicly referring to it as "*our* settlement with Teva." *Id.* ¶ 277 (emphasis added). Mylan also issued joint press releases with Pfizer announcing the Teva and Intelliject settlements. *Id.* ¶¶ 270, 298. The Class Complaint also quotes an antitrust scholar who has concluded "[a]t the time (and to this day), Mylan was working hand-in-hand **[**79]** with Meridian/King, with the former taking over Orange Book sponsorship of the drug application and the latter targeting rivals in litigation." *Id.* ¶ 314. The Class Complaint also describes that Congress has questioned whether the Teva settlement is an unlawful "pay-for-delay" settlement. *Id.* ¶ 280. In the inquiry, Congress directed questions about the settlement to Mylan, even though Mylan was not a party to the lawsuit. *Id.*

Defendants assert that all of class plaintiffs' allegations merely amount to "loosely parallel conduct" that cannot state a plausible conspiracy claim. Doc. 95 at 53 (citing *Twombly, 550 U.S. at 556* ("[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.")). Defendants assert that the allegations about patent infringement lawsuits and settlements involve different cases with different patents and different parties—and sometimes different products. Defendants contend that one cannot infer plausibly from these allegations that defendants agreed to join a conspiracy. Instead, defendants assert, these allegations just show unilateral and independent conduct—not a horizontal agreement—and thus, defendants argue, the allegations do not suffice to state a conspiracy **[**80]** claim.

HN14[] Indeed, the Supreme Court requires: "[W]hen allegations of parallel conduct are set out in order to make a *§ 1* claim, they must be placed in a context that raises a suggestion of preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly, 550 U.S. at 557*. This is so because "lawful parallel conduct fails to bespeak unlawful agreement." *Id. at 556*. *See also Mitchael v. Intracorp, Inc., 179 F.3d 847, 859 (10th Cir. 1999)* ("While consciously parallel behavior may contribute to a finding of antitrust conspiracy, it is insufficient, standing alone, to prove conspiracy."); *Cayman Express Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1361 (10th Cir. 1989)* ("[C]onscious parallel business behavior, standing alone, is insufficient **[*1300]** to prove conspiracy."). Thus, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly, 550 U.S. at 556*. Instead, a plaintiff must allege "conspiracy evidence [that] tend[s] to rule out the possibility that the defendants were acting independently." *Id. at 554*.

HN15[] The Tenth Circuit has held that "parallel behavior may, however, support the existence of an illegal agreement 'when augmented by additional evidence from **[**81]** which an understanding among the parties may be inferred.'" *Mitchael, 179 F.3d at 859* (quoting *Monument Builders of Greater Kansas City, Inc. v. Am. Cemetery Ass'n, 891 F.2d 1473, 1481 (10th Cir. 1989)* (further citation and internal quotation marks omitted)). "'Such evidence may include a showing that the parties are acting against their own individual business interests, or that there is motivation to enter into an agreement requiring parallel behavior.'" *Id.* (quoting *Monument Builders, 891 F.2d at 1481* (further citation and internal quotation marks omitted)); *see also In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 321-22 (3d Cir. 2010)* (explaining that "[s]ome courts have denominated these [additional] facts, the presence of which may indicate the existence of an actionable agreement, as 'plus factors'" and identifying "at least three such plus factors: (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy" (citations and internal quotation marks omitted)).

Here, the Class Complaint alleges parallel conduct by asserting, plausibly, that both the Mylan and Pfizer Defendants participated in a scheme to secure invalid EpiPen patents, initiate patent infringement litigation, and then settle those lawsuits with reverse payment settlements. The court also concludes that **[**82]** the Class Complaint, construed in the class plaintiffs' favor, alleges sufficient "plus factors" and thus allows one to infer plausibly that an actionable agreement existed. The class plaintiffs allege facts supporting a plausible inference that defendants were motivated to enter an agreement to exclude competitors from entering the EAI market. *See* Class Compl. ¶¶ 241 (alleging that defendants' EpiPen-related revenues rise and fall together), 244 (alleging that, when Pfizer acquired King and Meridian, "Mylan was rightly concerned that Pfizer might try to compete with Mylan by marketing the same device to consumers under a different trade name. But rather than compete with Mylan, Pfizer agreed to continue supplying the device to Mylan under terms that are not publicly available."). The class plaintiffs also allege that defendants worked together to effectuate this scheme by securing patents, litigating patent infringement lawsuits, and entering into reverse payment settlements. *Id.* ¶¶ 238-39, 247, 270, 277, 298, 314, 632. The court recognizes that "each of [these] allegations of circumstantial agreement standing alone may not be sufficient to imply agreement," but, "taken together, **[**83]** they provide a sufficient basis to plausibly contextualize the agreement necessary for pleading a *§ 1* claim." *Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 47 (1st Cir. 2013)*.

Defendants argue that the Class Complaint asserts no allegations supporting at least one of the plus factors—*i.e.*, that defendants acted against their own economic interest. Defendants assert that the Class Complaint alleges that the Mylan and Pfizer Defendants had a "unified interest" **[*1301]** in protecting the EpiPen monopoly and "work[ed] collaboratively to enhance the product['s] sales volume and profitability." Class Compl. ¶ 241. According to defendants, these allegations allow only an inference of lawful parallel conduct—not an unlawful agreement. But the class plaintiffs respond that the Class Complaint alleges that Pfizer also participates in the EAI market through its generic division Greenstone's distribution of the Adrenaclick generic EAI. *Id.* ¶ 101 n.16. So, the class plaintiffs contend, Pfizer was able to control a portion of the small amount of the EpiPen's competition. From these allegations, one could reasonably infer that Pfizer acted against its own interests by conspiring with Mylan to exclude EpiPen competition—competition that includes the generic Adrenaclick that **[**84]** Pfizer also distributes through its Greenstone division.

The court thus concludes that the Class Complaint sufficiently alleges facts capable of supporting a finding or inference of requisite "plus factors." Combined with defendants' alleged parallel business behavior, they state a plausible antitrust claim. The court thus denies defendants' Motions to Dismiss on this basis.

Finally, in a footnote, defendants assert that the *Copperweld* doctrine bars the class plaintiffs' conspiracy claims because the Mylan and Pfizer Defendants are parties with a unified interest and thus incapable of conspiring with each other for purposes of Sherman Act *§ 1*. *See* *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 777, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (holding that a parent and its wholly owned subsidiary are incapable of conspiring with each other under the Sherman Act); *see also* *Shionogi Pharma, Inc. v. Mylan, Inc., No. 10-1077, 2011 U.S. Dist. LEXIS 58774, 2011 WL 2174499, at *5 (D. Del. May 26, 2011)* (recognizing that "district courts have held that other parties with unified interests, such as a patent holder and licensee, are incapable of conspiring"). ***HN16***[] But *Copperweld* does not hold that a patent holder and licensee never can conspire to violate the antitrust laws. Indeed, as other courts have recognized, a patent holder and its licensee can conspire in violation of the antitrust laws "only if [the conspiracy] **[**85]** deprives the marketplace of independent actors." *Levi Case Co., Inc. v. ATS Prods., Inc., 788 F. Supp. 428, 431 (N.D. Cal. 1992)*; *see also* *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., No. 13-MD-2445, 2017 U.S. Dist. LEXIS 179101, 2017 WL 4910673, at *8-9 (E.D. Pa. Oct. 30, 2017)* (rejecting argument that alleged co-conspirators were "a single economic entity as patent licensor and licensee" and refusing to apply the *Copperweld* doctrine because the complaint alleged "two separate entities that engaged in concerted action to jointly advance their economic interests"); *Townshend v. Rockwell Int'l Corp., No. C99-0400SBA, 2000 U.S. Dist. LEXIS 5070, 2000 WL 433505, at *6 (N.D. Cal. Mar. 28, 2000)* (denying *Rule 12(b)(6)* motion to dismiss conspiracy claims because the case law did not establish that patent holder and licensee are "legally incapable of entering into a conspiracy" and concluding that defendants' capability of entering a conspiracy was a "question of fact" that the court could not resolve on a motion to dismiss).

Likewise, here, the court finds that the Class Complaint sufficiently alleges facts capable of supporting a finding or inference that the Mylan and Pfizer Defendants are "two separate entities that engaged in concerted action to jointly advance their economic interests." *In re Suboxone, 2017 U.S. Dist. LEXIS 179101, 2017 WL 4910673, at *9*. Although the Class Complaint alleges that the Mylan and Pfizer Defendants shared a "unified interest" in protecting the **[**86]** EpiPen monopoly (Class Compl. ¶ 241), it also alleges that defendants had separate interests—Mylan through its sale of the EpiPen and **[*1302]** Pfizer with its control of a portion of the small amount of the EpiPen's competition through its Greenstone division's distribution of the generic Adrenaclick. Indeed, the Class Complaint alleges that both compete in the EAI market. The Class Complaint also alleges "anticompetitive conduct at the heart of the alleged conspiracy"—*i.e.*, the concerted effort to procure patents, initiate patent infringement litigation, and enter into reverse payment settlements in an effort to prevent EpiPen competitors from entering the EAI market—that is "ancillary" to the patentee/licensee relationship. *In re Suboxone, 2017 U.S. Dist. LEXIS 179101, 2017 WL 4910673, at *9*. For these reasons, the court refuses to apply the *Copperweld* doctrine here.

5. Have the class plaintiffs alleged a viable antitrust claim based on the "reverse" patent litigation settlements?

Next, defendants argue that the class plaintiffs have failed to allege plausible antitrust claims based on alleged reverse payment settlements. ***HN17***[] The Supreme Court has held that reverse payment settlements "can sometimes violate the antitrust laws." *FTC v. Actavis, Inc., 570 U.S. 136, 141, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. A reverse payment settlement refers **[**87]** to an agreement by a brand-name manufacturer and patent holder to compensate a generic manufacturer and alleged patent infringer in exchange for settling patent infringement litigation, thus delaying the generic's market entry. *In re Nexium (Esomeprazole) Antitrust Litig., 842 F.3d 34, 41 (1st Cir. 2016)* (citing *Actavis, 570 U.S. at 145*). "When a brand-name manufacturer pays to delay the first filer's generic launch, that reverse payment postpones not only the first filer's product but also those of all other generic manufacturers, who must wait out the 180-day exclusivity period before going to market." *Id.* Because a reverse payment settlement effectively delays generic competition in the market, *Actavis* recognized that "a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects." *Actavis, 570 U.S. at 158*.

HN18[] To determine whether a reverse payment settlement has anticompetitive effects, the Supreme Court has instructed that "a detailed exploration of the validity of the patent itself" is not necessary. *Id. at 158*. Instead, the anticompetitive effects of a reverse payment depend on "its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other **[**88]** convincing justification." *Id. at 159*. The Supreme Court also recognized that "[t]he existence and degree of any anticompetitive consequence may also vary as among industries." *Id.* Because of "[t]hese complexities," the Supreme Court has held that courts must analyze alleged unlawful reverse payment settlements under the rule of reason. *Id.*

Here, defendants assert that the Class Complaint fails to plead facts showing that defendants actually made any payments in the patent litigation settlements with Teva, Intelliject, and Sandoz. Thus, defendants contend, the class plaintiffs fail to state a plausible claim based on any of these settlements. The court addresses each of the three settlements separately, below.

a. Teva Settlement

The class plaintiffs assert that one plausibly can infer from the Class Complaint's allegations that defendants made a large and unjustified reverse payment settlement in the Teva Litigation. The Class Complaint alleges that one reasonably can infer "[f]rom the facts surrounding the settlement" that "King and Meridian made a **[*1303]** substantial 'reverse payment' to Teva to convince it to delay bringing its competing generic auto-injector to market." Class Compl. ¶ 265. According **[**89]** to the Class Complaint, these facts include: (1) the district court in the Teva Litigation had issued a Markman ruling interpreting the '432 patent favorable to Teva; (2) the parties settled after a full bench trial, meaning that the parties already had expended significant litigation expenses compared to the marginal ones they would incur going forward; and (3) it makes little sense that a "rational economic actor with a viable product (and who had spent millions of dollars developing it) would refrain from entering a lucrative 'blockbuster' market for 36 months unless it received monetary compensation in exchange for non-entry." *Id.*

The Class Complaint never alleges the amount of the alleged settlement payment, but it explains that the terms of the Teva settlement are confidential and not publicly available. *Id.* ¶ 264. At least one court has held that a plaintiff need not plead a precise monetary settlement amount, recognizing that "very precise and particularized estimates of fair value and anticipated litigation costs may require evidence in the exclusive possession of the defendants, as well as expert analysis, and that these issues are sufficiently factual to require discovery." *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 244 (D. Conn. 2015)*. Instead, **[**90]** to plead that a large and unjustified reverse payment occurred, a plaintiff must assert "specific allegations about the terms of the settlement and their relative value that are plausible on their face." *Id.; see also King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp., 791 F.3d 388, 410 (3d Cir. 2015)* (reversing a district court's *Rule 12(b)(6)* dismissal of antitrust claims because "plaintiffs' allegations, and the plausible inferences that can be drawn from them, are sufficient to state a rule-of-reason claim under *Twombly* and *Iqbal* for violation of the Sherman Act on the ground that [defendant] sought to induce [a generic] to delay its entry into the lamotrigine tablet market by way of an unjustified no-AG agreement"); *In re Loestrin 24 Fe Antitrust Litig., 814 F.3d 538, 552 (1st Cir. 2016)* (declining to "require heightened fact pleading of specifics" such as "precise figures and calculations at the pleading stage" but holding that "the plaintiffs must allege facts sufficient to support the legal conclusion that the settlement at issue involves a large and unjustified reverse payment under *Actavis*").

Defendants assert that the class plaintiffs' allegations here fall short of this pleading standard. For support, defendants rely on *FTC v. AbbVie, Inc., 107 F. Supp. 3d 428 (E.D. Pa. 2015)*, where the court held that plaintiff had failed to state a plausible antitrust claim because the patentees **[**91]** "did not make any payment, reverse or otherwise, to the claimed infringer . . . ." *Id. at 436*. *AbbVie*'s facts differ significantly from the ones alleged here. The class plaintiffs specifically allege that defendants "provided significant consideration, incentives, and benefits to Teva to delay bringing their competing product to market." Class Compl. ¶ 263. And, the court concludes, the allegations assert specific facts—described above—that are capable of supporting a reasonable inference that the consideration provided as part of the Teva settlement constituted a substantial reverse payment. *Id.* ¶ 265.

Defendants disagree. They argue that the asserted facts cannot support a plausible inference of a reverse payment settlement. But their arguments invite the court to weigh the Class Complaint's factual allegations—something it cannot do on a motion to dismiss. For example, defendants assert that the Teva settlement was not the product of an unlawful reverse payment **[*1304]** but, instead, a settlement that the trial court expressly encouraged. Doc. 93 at 14. Defendants also disagree with the class plaintiffs' assertion that the parties settled after they had already incurred the most significant attorney's **[**92]** fees through a bench trial. Defendants argue that the Teva Litigation was "subject to the uncertainty, expense, and burden of protracted appeals and possible remands." *Id. at 15*. And, defendants contend, the Markman ruling was not favorable to Teva but instead was more of a "mixed conclusion," with the court rejecting two of Teva's proposed constructions. *Id.* (citations and internal quotations omitted).

All these arguments require the court to consider disputed factual allegations. ***HN19***[] And that function is not a proper one on a *Rule 12(b)(6)* motion to dismiss. *See In re Cardizem CD Antitrust Litig., 332 F.3d 896, 900 (6th Cir. 2003)* (affirming district court's denial of a motion to dismiss because "[t]he defendants' claim that [the generic manufacturer's] decision to stay off the market was motivated not by the [reverse payment], but by its fear of damages in the pending patent infringement litigation, merely raise[d] a disputed issue of fact that cannot be resolved on a motion to dismiss"). Instead, viewing the allegations in the class plaintiffs' favor, the court concludes that the Class Complaint alleges "enough facts" to allow a reasonable inference that the Teva settlement constituted an unlawful reverse payment and thus is sufficient to "nudge[ ] the[ ] claims across the **[**93]** line from conceivable to plausible." *Twombly, 550 U.S. at 570*.

b. Intelliject Settlement

Defendants next argue that the class plaintiffs assert conclusory allegations to support their theory that the Intelliject settlement constitutes an unlawful reverse payment settlement. Thus, defendants contend, the class plaintiffs fail to state a plausible claim for relief based on it. For the same reasons already discussed, the court rejects defendants' argument.

Viewing the Class Complaint's allegations in the class plaintiffs' favor, one can infer plausibly that defendants made a reverse payment in the Intelliject settlement. The Class Complaint alleges that, in February 2012, Mylan and Pfizer jointly announced settlement of the Intelliject litigation. Class Compl. ¶ 298. Like the Teva settlement, the terms of the Intelliject settlement are confidential. *Id.* But Mylan and Pfizer publicly stated that "the agreement prevented Intelliject and Sanofi from launching their e-cue device for another nine months, until November 15, 2012." *Id.* The Class Complaint asserts that "[t]he relatively short duration of delay before entry of the e-cue likely indicates the strength of Intelliject's defenses to the patent litigation." ***[**94]*** *Id.* The Class Complaint also contends, "on information and belief, Intelliject and Sanofi agreed not to enter the market until November 15, 2012[,] in exchange for valuable consideration." *Id.* ¶ 299. These allegations can support a plausible inference that defendants settled the Intelliject litigation by making a reverse payment.

Defendants contend that these facts won't allow such an inference because the settlement granted Intelliject a market entry date that was 13 years before the EpiPen patents expire. Defendants argue that this allegation shows just that the Intelliject settlement is a traditional settlement agreement involving a negotiated *early* entry date. And that type of settlement agreement is not subject to antitrust scrutiny. *Actavis, 570 U.S. at 158*. With this argument, defendants again ask the court to weigh disputed factual allegations. The court cannot engage in such fact-finding on a motion to dismiss. For these reasons, the court finds that the Class Complaint plausibly asserts that the **[*1305]** Intelliject settlement constituted a large and unjustified reverse payment settlement sufficient to support an antitrust claim.

c. Sandoz Settlement

Finally, defendants assert that the Class Complaint fails **[**95]** to allege that the Sandoz settlement involved a large and unjustified reverse payment settlement. The Class Complaint alleges that, in 2010, Sandoz attempted to enter the EAI market with a generic alternative to the EpiPen. Class Compl. ¶ 302. The Class Complaint asserts that "defendants conspired to have King file a patent infringement suit against Sandoz in response to its ANDA filing." *Id.* Pfizer filed a Form 10-Q with the SEC in 2016. *Id.* It recited that Sandoz's ANDA is ongoing and the litigation is stalled because the court had entered an order staying the FDA process and administratively terminating the action, subject to the parties seeking to reopen the case by letter request. *Id.* To date, no party has reopened the case. *Id.* The Class Complaint describes how staying the litigation also stays a definitive ruling on any challenge to the EpiPen patents. *Id.* And it asserts "[o]n information and belief" that defendants "entered into an agreement with Sandoz to stay the case indefinitely in exchange for valuable consideration to Sandoz." *Id.* at ¶ 303.

Although the class plaintiffs cannot provide the precise terms of the Sandoz agreement without the benefit of discovery, one plausibly **[**96]** can infer from Sandoz's actions that it received significant consideration in exchange for its actions—*i.e.*, agreeing to stay its ANDA application for its generic product. Indeed, one also could infer the opposite conclusion—that Sandoz agreed to stay its ANDA application because it considered the patent infringement claims valid and appreciated the risk that it would lose the patent infringement litigation. But, at the pleading stage, the court cannot make that determination. Instead, the court must consider the facts alleged in the class plaintiffs' favor and draw reasonable inferences from them. Applying that standard here, the court concludes that the class plaintiffs have asserted a plausible antitrust claim based on their allegations that the Sandoz settlement involved an unlawful reverse payment settlement.

6. Have the class plaintiffs stated a plausible antitrust claim based on the FDA Citizen Petition?

Next, the Mylan Defendants argue that the class plaintiffs' allegations about the FDA Citizen Petition fail to state a plausible antitrust claim. The Mylan Defendants assert two arguments supporting dismissal.

First, the Mylan Defendants contend, the Class Complaint never alleges **[**97]** that the Citizen Petition caused any delay in the FDA approval process. The Mylan Defendants explain that a federal statute requires the FDA to take final agency action on a Citizen Petition within 150 days (about five months). *21 U.S.C. § 355(q)(1)(F)*. And, *21 U.S.C. § 355(q)(1)(A)* provides that the Secretary "shall not delay approval" of a pending ANDA based on the filing of a Citizen Petition. But, as Mylan concedes, this statute also contains an exception. It authorizes "the Secretary, upon reviewing the petition," to determine whether a further delay is necessary to protect public health. 21 U.S.C. § 355(q)(1)(A)(ii). And, as the Class Complaint alleges, legal scholars and Congress have recognized the "dangerous potential" of Citizen Petitions (such as Mylan's) to extend brand monopolies and delay approval of generics. Class Compl. ¶¶ 306, 308.

The Class Complaint asserts that Mylan filed a Citizen Petition on January 16, 2015, "a mere six months before Teva was **[*1306]** scheduled (pursuant to the settlement) to enter the market." *Id.* ¶ 311. It also alleges that Mylan waited until May 2015—almost five months after filing its Citizen Petition and only weeks before the FDA was required to respond—to supplement its Petition with a 48-page independent study purportedly **[**98]** showing that patients would not use Teva's generic product correctly. *Id.* ¶ 311. The Class Complaint quotes a legal scholar who has questioned the timing of Mylan's Citizen Petition and suggested that it was part of a strategy to delay Teva's ANDA approval. *Id.* ¶¶ 311, 314. And, the Class Complaint asserts, "[b]ut for Mylan's anti-competitive assault campaign" that included the FDA Citizen Petition, "Teva would have entered the market much sooner and fixed the deficiencies that led to the FDA's rejection of Teva's generic." *Id.* ¶ 322.

At least one court has concluded that allegations similar to those asserted here—ones that asserted, generally, that citizen petitions can delay the FDA approval process, and, more specifically, that a defendant had delayed approval of a generic competitor—"plausibly pleads that the citizen petition resulted in delay of the FDA's approval of the generic ANDAs." *In re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litig., No. 13-MD-2445, 2017 U.S. Dist. LEXIS 145501, 2017 WL 3967911, at *18 (E.D. Pa. Sept. 8, 2017)* (denying a *Rule 12(b)(6)* motion to dismiss antitrust claims based on alleged delay caused by FDA citizen petition because the Amended Complaint plausibly pleaded delay and "[w]hether such a delay actually occurred in this case **[**99]** is a subject more properly left for resolution after discovery"). For the same reasons, the court finds that the class plaintiffs plausibly have alleged that Mylan's Citizen Petition delayed the FDA approval process.[11]

Second, the Mylan Defendants assert that the *Noerr-Pennington* doctrine bars the class plaintiffs' claims based on the FDA Citizen Petition. ***HN20***[] As discussed, the *Noerr-Pennington* doctrine "exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition." *Tal v. Hogan, 453 F.3d 1244, 1259 (10th Cir. 2006)* (citation and internal quotations marks omitted). But *Noerr-Pennington* immunity does not apply to "sham" activities. *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*. Petitioning the government is a "sham" activity if: (1) it is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and (2) it "uses the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id.* (citations and internal quotation marks omitted).

The Mylan Defendants assert that the Class Complaint's allegations don't satisfy these two requirements to plead adequately that Mylan's Citizen Petition falls within the sham exception **[**100]** to the *Noerr-Pennington* doctrine. First, the Mylan Defendants argue that the allegations don't plead facts capable of supporting a finding or inference **[*1307]** that Mylan's Citizen Petition was objectively baseless. ***HN21***[] Some courts have found that the question "[w]hether petitioning activity is a sham is generally [one] for the jury." *In re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 689 (E.D. Pa. 2014)* (citing *In re Flonase Antitrust Litig., 795 F. Supp. 2d 300, 310 (E.D. Pa. 2011))*. But "'a court may decide probable cause as a matter of law' where 'there is no dispute over the predicate facts of the underlying . . . proceeding.'" *Id.* (quoting *Prof'l Real Estate Inv'rs, Inc., 508 U.S. at 63*).

[11] In the same vein, the Mylan Defendants argue that the Citizen Petition never delayed the FDA approval process because the FDA ultimately denied Teva's application. But, for reasons explained in Part III.A.3. above, the Class Complaint adequately alleges "[b]ut for Mylan's anticompetitive assault campaign"—described in the Class Complaint as the patent settlement litigation, reverse payment settlements, and FDA Citizen Complaint—"Teva would have entered the market much sooner and fixed the deficiencies that led to the FDA's rejection of Teva's generic." Class Compl. ¶ 322. As the court concluded already, these allegations sufficiently allege causation. They also support the class plaintiffs' claim that Mylan's FDA Citizen Petition delayed Teva's entry into the market.

The Class Complaint asserts facts supporting a plausible inference that the Citizen Petition was objectively baseless because of its timing and contents. Mylan waited until January 2015—six months before Teva was scheduled to enter the market—to file the Citizen Petition even though Teva had been developing the drug for six years, the parties had litigated the patent infringement suit for three years, and the parties settled that litigation three years before the Petition's filing. Class Compl. ¶¶ 311, 314. The Class Complaint also asserts that Mylan's Citizen Petition relied on a medical statement from a doctor who Mylan paid to render the opinion. *Id.* ¶¶ 317, 318. And Mylan's Citizen Petition **[**101]** never disclosed that it had made such a payment. *Id.* ¶ 318.

The Class Complaint also alleges that Mylan waited just weeks before the FDA was required to respond to the ANDA to supplement its Citizen Petition by submitting a study. *Id.* ¶ 311. The Class Complaint asserts that this study had "numerous flaws that demonstrate that Mylan was not acting in good faith" by submitting it to the FDA. *Id.* ¶ 313. The Class Complaint identifies specific flaws: the study lacked a control group; it did not use the actual generic device, but a prototype; it used a small number of participants; the researchers failed to provide proper instructions to the study's participants for using the prototype; and the researchers told the participants to watch a video instead of actually use the prototype. *Id.*

The Mylan Defendants respond with various arguments attacking these allegations. They explain the legitimacy of the filings' timing, the doctor's medical statement, the payments the doctor received (noting that the doctor received payments from other pharmaceutical companies, including Teva), and the supplemental study. But these arguments present disputed fact issues that the court cannot decide at the pleading **[**102]** stage. On a motion to dismiss, the court considers the allegations in the class plaintiffs' favor and concludes they sufficiently allege that Mylan's FDA Citizen Petition was objectively baseless. *See* *In re Suboxone Antitrust Litig., 2017 U.S. Dist. LEXIS 145501, 2017 WL 3967911, at *17* (explaining that federal antitrust claims "based on the filing of a sham citizen petition survived dismissal" because the complaint "sets forth multiple facts which could create an inference that the petition was objectively baseless"); *see also* *La. Wholesale Drug Co. v. Sanofi-Aventis, No. 07 Civ.7343(HB), 2008 U.S. Dist. LEXIS 3611, 2008 WL 169362, at *5 (S.D.N.Y. Jan. 18, 2008)* (denying motion to dismiss antitrust claims based on an alleged sham petition because plaintiff alleged triable fact issues about "the reasonability and viability" of the citizen petition and was entitled to additional discovery to prove the allegations).

The court also finds that the Class Complaint plausibly alleges that Mylan used the *process* of filing the FDA Citizen Petition—not the *outcome* of that proceeding—to restrain competition. The Class Complaint repeatedly alleges that Mylan used the FDA Citizen Petition process as a means to delay Teva's market entry. Class Compl. ¶¶ 304, 310, 311, 316, 319, 321. These allegations suffice to state an antitrust **[*1308]** claim based on Mylan's Citizen Petition that falls within the sham exception to the *Noerr-Pennington* ***[**103]*** doctrine.

7. Have the class plaintiffs alleged a plausible antitrust claim based on allegedly misleading statements?

The Mylan Defendants next argue that the Class Complaint fails to allege plausible antitrust claims based on the Mylan Defendants' misrepresentations about Auvi-Q's bioequivalence and not-covered status.[12] ***HN22***[] Deceptive speech can support Sherman Act claims because "in some cases, such defamation, which plainly is not competition on the merits, can give rise to antitrust liability, especially when it is combined with other anticompetitive acts." *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 109 n.14 (3d Cir. 2010)*; *see also* Caldera, Inc. v.

[12] The Mylan Defendants also recognize another type of deceptive speech that the Class Complaint appears to allege to support an antitrust claim. The class plaintiffs assert that Mylan failed to disclose the "bought-and-paid-for" physician statements supporting the EpiPen 2-Pak. Doc. 95 at 60. The Mylan Defendants assert that these allegations cannot support an antitrust claim based on deceptive speech because they involve omissions—not deceptive statements. The class plaintiffs' Opposition never responds to this argument. Doc. 123 at 58-60. And instead, it confines its arguments to allegedly false statements that Mylan made about the Auvi-Q. *Id.* The court thus concludes that the class plaintiffs have abandoned any attempt to base their deceptive speech claims on Mylan's failure to disclose that it allegedly paid physicians for their statements supporting the EpiPen 2-Pak. The court thus dismisses any of the class plaintiffs' antitrust deceptive speech claims based on this alleged failure to disclose.

Microsoft Corp., 87 F. Supp. 2d 1244, 1249 (D. Utah 1999) (holding that alleged misleading statements about the plaintiff's product viewed with other anticompetitive behavior supported a Sherman Act § 2 claim sufficient to survive summary judgment).

HN23[] The Tenth Circuit presumes that allegedly false speech "bears only a *de minimis* effect on competition." Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114, 1127 (10th Cir. 2014); *see also* Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904, 916 (2d Cir. 1988) ("[A] plaintiff asserting a monopolization claim based on misleading advertising must overcome a presumption that the effect on competition of such a practice was de minimis." (citation and internal quotation marks omitted)).[13] An antitrust plaintiff "may rebut this presumption by satisfying a six-factor test, showing that **[**104]** the disparagement was: (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible to neutralization or other offset by rivals. Lenox, 762 F.3d at 1127 (citing Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997)); *see also* Ayerst Labs., 850 F.2d at 916 (quoting III P. Areeda & D. Turner, ***Antitrust Law*** **[*1309]** ¶ 738a, at 278-79 (1978)). The Tenth Circuit has not decided whether a plaintiff must satisfy all six factors to overcome the *de minimis* presumption. Lenox, 762 F.3d at 1128 n.9; *see also* Duty Free Ams., Inc. v. Estee Lauder Cos., 797 F.3d 1248, 1269 (11th Cir. 2015) (holding that it need not determine whether a plaintiff must allege all six factors because the complaint failed to allege falsity).

In *Ayerst*, the Second Circuit held that a district court had erred by dismissing a Sherman Act § 2 claim. Plaintiff there based its claim on an allegedly false and deceptive letter that defendant had sent to customers. The court found that plaintiff's Complaint alleged several of the factors required to overtake the *de minimis* presumption—including that the letter was clearly false, clearly material, and clearly likely to induce reasonable reliance. *Id.* But the court also agreed with defendant: plaintiff **[**105]** had not alleged other certain factors because the Complaint asserted that defendant sent the letter to pharmacists—persons likely to have knowledge about the subject matter—and that defendant only could have made the misrepresentations for a short time period. Id. at 917. Nevertheless, the court concluded, "several factors . . . cannot be adequately evaluated until the discovery process has moved forward to a greater extent than it has thus far." *Id.* The court thus held that the Complaint pleaded a Sherman Act § 2 claim sufficient to survive Rule 12(b)(6) dismissal.

Viewing the facts alleged here in the light most favorable to the class plaintiffs, the Class Complaint alleges several of the factors required to overcome a presumption that deceptive statements have had a *de minimis* effect on competition. The class plaintiffs allege that Mylan: (1) created and spread misinformation about the Auvi-Q and its bioequivalence to the EpiPen; (2) funded and promoted a study that was intended to undermine the FDA's conclusion that Auvi-Q demonstrated bioequivalence to the epinephrine in the EpiPen; and (3) made misleading statements to physicians that the EpiPen was the "preferred" brand based on Auvi-Q's coverage exclusions **[**106]** when Mylan itself produced the exclusion with its large, conditional rebate offers. Class Compl. ¶¶ 229, 232-34. The class plaintiffs assert that these allegedly false and misleading statements blocked Auvi-Q from competing in the market, thus excluding competition. *Id.* ¶¶ 229-31, 235.

The Mylan Defendants contend that the class plaintiffs' allegations fail to assert that Mylan's allegedly deceptive statements were "clearly false," as the first factor of the six-factor test requires. The court disagrees. One plausibly can infer from the Class Complaint's allegations that Mylan's statements about Auvi-Q were clearly false. Although the Class Complaint does not use those precise words, it calls the statements "misinformation" and so "misleading"

[13] The class plaintiffs assert that the *de minimis* test applies only to competitors asserting a deceptive speech claim—not consumers like the class plaintiffs here. But they cite no case law supporting this argument. And the Mylan Defendants respond that the Ninth Circuit has applied the *de minimis* presumption to competitors and consumers alike. *See* Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997) (explaining that the court "insist[s] on a preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or *customer*) before [disparaging of a rival product] can rise to the level of exclusionary conduct" (emphasis added)). Without any authority supporting the class plaintiffs' position, the court declines to hold the *de minimis* test does not apply to their claims here.

that they "ensur[ed] that physicians would think that the EpiPen was the only realistic choice for their patients." *Id.* ¶¶ 229, 234-35. Of course, to prevail on their speechbased claims, the class plaintiffs must come forward with evidence showing that these alleged statements produced anticompetitive effects in violation of the antitrust laws. But, at the pleading stage, the court applies *Ayerst*'s rationale and concludes that the class plaintiffs **[**107]** "should be allowed to go forward with the discovery process to substantiate [their] claim" that Mylan's allegedly deceptive speech violated the antitrust laws. *Ayerst Labs., 850 F.2d at 917*.

Also, following *Ayerst*, the court need not decide whether the Class Complaint alleges facts capable of supporting each factor before it could overtake the *de minimis* presumption. The *Ayerst* plaintiff did **[*1310]** not satisfy such an obligation at the pleading stage. The court finds persuasive *Ayerst*'s conclusion that these factors require factual development through the discovery process. Here, the court cannot evaluate several of the factors adequately without the facts that discovery may or may not produce. So, the court denies the motion to dismiss the class plaintiffs' deceptive speech claim at the pleading stage. *See id. at 917*.

8. Have the class plaintiffs stated plausible claims for relief under state antitrust laws?

Finally, defendants argue that the Class Complaint fails to allege any plausible claims under all the state antitrust laws invoked by the Class Complaint. Defendants contend that the state antitrust claims fail for the same reasons that the federal claims fail. But, as discussed above, the court concludes that the Class Complaint **[**108]** states plausible claims for relief under the federal antitrust laws. It reaches the same conclusion about defendants' repackaged arguments attacking the state law claims.

Also, defendants advance three other arguments that, they say, warrant dismissal of certain state antitrust claims. *First*, defendants argue that the court should dismiss state antitrust claims asserted under the laws of Alaska, Arizona,[14] the District of Columbia, Iowa, New Mexico, North and South Dakota, Oregon,[15] Puerto Rico, Rhode Island, Vermont,[16] and Wisconsin[17] because the Class Complaint includes no named plaintiff who resides in any of these states. ***HN24***[] Our court has recognized that "[s]everal courts, including other district courts in the Tenth Circuit, have determined that the plaintiffs in a putative class action may only assert a state law claim if a named plaintiff resides in, does business in, or has some other connection to that state." *Roco, Inc. v. EOG Res., Inc., No. 14-1065-JAR-KMH, 2014 U.S. Dist. LEXIS 152203, 2014 WL 5430251, at *3 (D. Kan. Oct. 24, 2014)* (first citing *Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987)*; then citing *Thomas v. Metro. Life Ins. Co., 540 F. Supp. 2d 1212, 1226-27 (W.D. Okla. 2008)* (other citations omitted)). Because the Class Complaint names no plaintiff who resides in the 12 states listed above, the court agrees with defendants. The named class plaintiffs lack standing to assert claims **[**109]** under the antitrust laws of these states.

The class plaintiffs argue that a number of courts have refused to dismiss antitrust state law claims at the motion to dismiss stage simply because the complaint includes no named plaintiff from that particular state. But the class plaintiffs cite district court cases from outside the Tenth Circuit to support this position. ***HN25***[] In contrast, the Tenth Circuit has held: "Prior to class certification, the named plaintiffs' failure to maintain a live case or controversy is fatal to the case as a whole—that unnamed plaintiffs might have **[*1311]** a case or controversy is irrelevant." *Thomas v. Metro. Life Ins. Co., 631 F.3d 1153, 1159 (10th Cir. 2011)* (citations omitted); *see also Roco, 2014 U.S. Dist. LEXIS 152203, 2014 WL 5430251, at *4* ("Where the only named plaintiff in a putative class action lacks

[14] The Class Complaint names only one plaintiff who resides in Arizona—Cassandra Bredek. Class Compl. ¶ 14. But Ms. Bredek voluntarily dismissed her claims on February 7, 2018. Doc. 139. So, no Arizona plaintiffs remain in the case.

[15] The Class Complaint names just one plaintiff who resides in Oregon—David Smith. Class Compl. ¶ 50. But Mr. Smith voluntarily dismissed his claims on February 7, 2018. Doc. 139. So, no Oregon plaintiffs remain in the case.

[16] The Class Complaint names just one plaintiff who resides in Vermont—John Dodge. Class Compl. ¶ 58. But Mr. Dodge voluntarily dismissed his claims on February 7, 2018. Doc. 139. So, no Vermont plaintiffs remain in the case.

[17] The Class Complaint names just one plaintiff who resides in Wisconsin—Heather Rutland. Class Compl. ¶ 63. But Ms. Rutland voluntarily dismissed her claims on February 7, 2018. Doc. 139. So, no Wisconsin plaintiffs remain in the case.

standing from the outset of the case, and a class is yet to be certified, the proper course is dismissal." (citations omitted)); *Smith v. Pizza Hut, Inc., No. 09-cv-1632-CMA-BNB, 2011 U.S. Dist. LEXIS 76793, 2011 WL 2791331, at *9 (D. Colo. July 14, 2011)* (holding, "Plaintiff lacks standing to bring claims under state laws to which Plaintiff has never been subjected and the class action claim must therefore be dismissed for lack of standing"). Based on this authority, including the binding Circuit precedent, the court dismisses the antitrust state law claims for which **[**110]** the Class Complaint includes no named plaintiff from that state.

Alternatively, the class plaintiffs seek leave to amend the Class Complaint to cure the absence of certain states' representatives. The court finds it premature to grant such relief. The class plaintiffs provide no information about these additional representatives, including whether they have located any representative from any of these 12 states. To the extent the class plaintiffs identify class representatives from any of these states, they may file an appropriate motion seeking leave to amend the Class Complaint to add them as parties.

Second, defendants argue, the class plaintiffs are indirect purchasers who cannot assert claims for relief under the antitrust laws of Alaska, Arkansas, Illinois, Massachusetts, Missouri, Puerto Rico, Rhode Island, and West Virginia. Defendants assert that these state laws bar indirect purchaser claims.

HN26[] In *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1997)*, the Supreme Court held that only direct purchasers may bring claims for damages under the federal antitrust laws. *Id. at 737*. To avoid the *Illinois Brick* rule, some states have passed "repealer" statutes allowing indirect purchasers to recover under state antitrust laws. *See In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 818 (N.D. Ill. 2017)*. Here, defendants **[**111]** contend, the class plaintiffs assert claims under certain state laws that still bar indirect purchaser claims consistent with the rule in *Illinois Brick*.

In response to this argument, the class plaintiffs concede that Alaska does not permit indirect purchaser claims. But they stand on their claims asserted under the other seven states' laws. For two of those seven states—Puerto Rico and Rhode Island—the Class Complaint includes no named plaintiff. The court dismisses those claims for the same reason already discussed. Thus, the court need not address defendants' argument that these state laws bar indirect purchaser claims.

For Illinois, defendants assert that the *Illinois Antitrust Act* specifically provides: "[N]o person other than the Attorney General of this State shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act." 740 Ill. Comp. Stat. § 10/7(2); *see also In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 539 (E.D. Pa. 2010)* (prohibiting plaintiffs from asserting class action claims under the Illinois Antitrust Act because "the Act does not provide relief to indirect purchasers through class actions"). ***HN27***[] But several courts have concluded that the class action prohibition in the Illinois Antitrust Act is **[**112]** procedural in nature and that *Rule 23* applies to determine whether a claim may be brought as a class action. So, because "[t]he availability of the class action procedure does not change the substantive rights or remedies available to [plaintiffs] under Illinois law," courts have refused to **[*1312]** dismiss Illinois Antitrust Act claims "on the basis of the Illinois's class action bar." *In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d at 818*; *see also, e.g., In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712, 728 (S.D.N.Y. 2017)*; *In re Aggrenox Antitrust Litig., No. 14-MD-2516(SRU), 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at *6 (D. Conn. Aug. 9, 2016)*; *In re Lithium Ion Batteries Antitrust Litig., No. 13-MD-2420-YGR, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at *21 (N.D. Cal. Oct. 2, 2014)*; *In re TFT-LCD (Flat Panel) Antitrust Litig., No. M 07-1827-SI, 2011 U.S. Dist. LEXIS 97465, 2011 WL 13152270, at *5 (N.D. Cal. Aug. 24, 2011)*. Although these cases are not binding precedent in our Circuit,[18] the court finds their reasoning persuasive. And, for the same reason, the court concludes that the class plaintiffs' Illinois antitrust claims survive dismissal at the pleading stage.

For the West Virginia claim, defendants argue that the state's Code includes a harmonization provision, directing courts to construe the state's Antitrust Act "in harmony with ruling judicial interpretations of comparable federal

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[18] The parties do not cite, and the court has not located, a Tenth Circuit decision addressing this issue, or even one from a district court within our Circuit.

antitrust statutes." *W. Va. Code § 47-18-16*. Defendants contend that the West Virginia legislature enacted this provision one year after the Supreme Court decided *Illinois Brick* and that **[**113]** it has not otherwise abrogated *Illinois Brick* by statute. But, plaintiffs respond, the West Virginia Attorney General has issued a Legislative Rule providing that "[a]ny person who is injured directly or indirectly by reason of a violation of the *West Virginia Antitrust Act* may bring an action for damages." W. Va. Code St. R. § 142-9-2. Relying on this rule, several federal courts have held that ***HN28***[] the West Virginia Antitrust Act permits indirect purchaser claims. *See, e.g., In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d at 812*; *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 582 n.55 (M.D. Pa. 2009)*; *In re Dynamic Random Access Memory (Dram) Antitrust Litig., 516 F. Supp. 2d 1072, 1097 (N.D. Cal. 2007)*; *In re New Motor Vehicles Canadian Export Antitrust Litig., 350 F. Supp. 2d 160, 173-75 (D. Me. 2004)*; *In re Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d 1365, 1376, n.8 (S.D. Fla. 2001)*. Following the reasoning of these decisions, the court joins them and denies defendants' motion to dismiss the West Virginia antitrust claims.

For the other state antitrust laws, the class plaintiffs rely on case law that does not support their argument that indirect purchasers may bring a cause of action under these state statutes. Instead, the authority that defendants cite establishes that ***HN29***[] indirect purchasers may not bring a cause of action under the antitrust laws of Arkansas,[19] Massachusetts,[20] and **[*1313]** Missouri.[21] The court thus dismisses these state law antitrust claims.

Third, defendants argue that the court must dismiss the California, Kansas, New York, and Tennessee antitrust claims brought in Counts IV, V, and VI (monopolization, attempted monopolization, and tying) because these states do not recognize unilateral conduct claims. The class plaintiffs' response concedes that the New York claims are not viable. Doc. 123 at 83 n.282. The court thus dismisses the New York claims asserted under Counts IV, V, and VI.

For the California claim, the Class Complaint asserts state antitrust claims under *California's Cartwright Act* (*Cal. Bus. & Prof. Code §§ 16700, et seq.*) and California's Unfair Competition Law (*Cal. Bus. & Prof. Code §§ 17200 et seq.*). Class Compl. ¶ 562.e. The Cartwright Act does not prohibit unilateral conduct. *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986)*; *see also Bondi v. Jewels by Edwar, Ltd., 267 Cal. App. 2d 672, 73 Cal. Rptr. 494, 498 (Cal. Ct. App. 1968)* (concluding that Cartwright Act prohibits *agreements* in restraint of trade). But, in

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[19] Plaintiffs assert their Arkansas antitrust claim under *Ark. Code Ann. § 4-75-212(b)*. Class Compl. ¶ 562.d. That statute authorizes the Attorney General to sue on behalf of persons injured "directly or indirectly." *Ark. Code Ann. § 4-75-212(b)*. Other courts have dismissed indirect purchaser claims brought under similar provisions in the *Arkansas Unfair Practices Act* because they do "not provide for a private individual to bring an action and only permit[ ] actions by the Attorney General." *In re Cast Iron Soil Pipe & Fittings Antitrust Litig., No. 1:14-md-2508, 2015 U.S. Dist. LEXIS 121620, 2015 WL 5166014, at *22 (E.D. Tenn. June 24, 2015)*. *See also In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1181 (N.D. Cal. 2009)* (holding that plaintiffs could not "circumvent the restrictions on antitrust claims under Arkansas . . . law by reframing those claims as unjust enrichment actions").

[20] The Massachusetts Supreme Court has held that "indirect purchasers can assert claims for price-fixing or other anticompetitive conduct under *[Mass. Gen. Laws ch.] 93A § 9*, *where they have no standing* [otherwise] to bring such claims under the *Massachusetts Antitrust Act* *[Mass. Gen. Laws ch.] 93 §§ 1-14A*." *Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 762 N.E.2d 303, 306 (Mass. 2002)* (emphasis added). Here, the class plaintiffs assert their state antitrust claim under the latter chapter that *Ciardi* discusses, *i.e. Mass. Gen. Laws Ch. 93, § 1 et seq.* Class Compl. ¶ 562.l. And, as *Ciardi* holds, an indirect purchaser has no standing to sue under this chapter. *Ciardi, 762 N.E.2d at 306*.

[21] The class plaintiffs' response asserts that the *Missouri Merchandising Practices Act*, *Mo. Rev. Stat. §§ 407.020*, does not bar indirect purchaser suits. But that's not the Missouri antitrust statute that the Class Complaint asserts to support its state antitrust claim. Instead, the Class Complaint relies on *Mo. Rev. Stat. § 416.011, et seq.* And, as several courts have held, "Missouri's antitrust laws . . . prohibit recovery by indirect purchasers." *In re Lithium Ion Batteries Antitrust Litig., No. 13-MD-2420-YGR, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at *19 (N.D. Cal. Oct. 2, 2014)*; *see **[**114]** also In re Asacol Antitrust Litig., No. 15-cv-12730-DJC, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at *12 (D. Mass. July 20, 2016)*; *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 946 F. Supp. 2d 554, 570 (E.D. La. 2013)*; *Duvall v. Silvers, Asher, Sher & McLaren, M.D.'s, 998 S.W.2d 821, 824 (Mo. Ct. App. 1999)*.

contrast, the class plaintiffs may assert a claim based on unilateral conduct under California's Unfair Competition Law. *See, e.g., In re Relafen Antitrust Litig., 221 F.R.D. 260, 283 (D. Mass. 2004)*; *In re Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d 1365, 1379 (S.D. Fla. 2001)*. However, the class plaintiffs' remedies under that provision are "generally limited to injunctive relief and restitution." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 539 (Cal. 1999)*; *see also In re Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d at 1379* (explaining that the "Unfair Competition Law does not authorize awards of damages at law"). The court thus denies **[**115]** defendants' motion to dismiss the claims asserted under California's Unfair Competition Law but dismisses the state antitrust claims based on unilateral conduct and asserted in Counts IV, V, and VI under California's Cartwright Act.

HN30[] For Kansas, the class plaintiffs assert that *Kan. Stat. Ann. § 50-161(b)* permits indirect purchasers to recover if "damaged or injured by any agreement, *monopoly*, trust, conspiracy or combination . . . ." *Id.* (emphasis added). But, as one court has observed, "the *Kansas Monopolies and Unfair Trade Act* . . . by its terms prohibits combinations and conspiracies only." *In re Relafen Antitrust Litig., 221 F.R.D. 260, 283 (D. Mass. 2004)* (citing *Kan. Stat. Ann. § 50-132* ("No person, servant, agent or employee of any person doing business within the state of Kansas shall *conspire or combine* with any other **[*1314]** persons, within or without the state for the purpose of monopolizing any line of business . . . ." (emphasis added))). Thus, *In re Relafin* reasoned, the *Kansas Restraint of Trade Act* does not permit unilateral conduct claims. *Id.* Finding no other case law addressing this issue and finding *In re Relafin*'s reasoning persuasive, the court dismisses the class plaintiffs' Kansas ***antitrust law*** claims based on unilateral conduct and asserted in Counts IV, V, and VI.

For Tennessee, the **[**116]** class plaintiffs assert their state antitrust claims under the *Tennessee Trade Practices Act*, *Tenn. Code Ann. § 47-25-101*. Class Compl. ¶ 562.cc. ***HN31***[] The Tennessee statute "declare[s]" that certain anticompetitive conduct is "against public policy, unlawful, and void." *Tenn. Code Ann. § 47-25-101*. Such conduct includes "all arrangements, contracts, agreements, trusts, or combinations *between persons or corporations* designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article." *Id.* (emphasis added). As one court has explained, "[n]one of these terms appears to include unilateral conduct." *In re Relafen Antitrust Litig., 221 F.R.D. at 283* (citing 6 Julian O. von Kalinowski, *Antitrust Laws and Trade Regulation* § 116.03 (2d ed. 2003)). Likewise, at least two other courts have held that the Tennessee Trade Practices Act does not cover unilateral conduct claims. *See, e.g., In re Flonase Antitrust Litig., 610 F. Supp. 2d 409, 415-16 (E.D. Pa. 2009)*; *In re Ditropan XL Antitrust Litig., 529 F. Supp. 2d 1098, 1108-09 (N.D. Cal. 2007)*.

The class plaintiffs cite only one case where a federal court has permitted antitrust claims asserted under the Tennessee Trade Practices Act to survive a motion to dismiss. *See In re Asacol Antitrust Litig., No. 15-12730-DJC, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at *15 (D. Mass. July 20, 2016)*. The *Asacol* court relied on two Tennessee cases allowing antitrust claims to proceed under the Act. *Id.* But, as *Asacol* recognized, the two Tennessee cases never addressed **[**117]** whether the statute permits claims based on unilateral conduct. *Id.* The court is not persuaded by *Asacol*'s reasoning, at least not as applied to the unilateral conduct claimed here. Instead, it finds persuasive the federal district court cases cited above. These cases considered the plain language of the Tennessee statute, specifically addressed whether it applies to unilateral conduct, and determined that it does not reach such claims. For this reason, the court dismisses the class plaintiffs' Tennessee antitrust claims based on unilateral conduct, as asserted in Counts IV, V, and VI.

B. RICO Claim

The court now considers whether the class plaintiffs have asserted a plausible RICO claim against defendants. ***HN32***[] *Subsection 1962(c)* of RICO makes it:

> unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). Subsection 1962(d) makes it "unlawful for any person to conspire to violate" subsection 1962(c). *Id.* § 1962(d). RICO also provides a private **[**118]** civil cause of action for those who are injured by violations of § 1962 and allows recovery of treble damages, costs, and attorney fees. *Id.* § 1964(c).

HN33[] When addressing plaintiffs' RICO claim below, the court is mindful that "RICO is to be read broadly." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). "To successfully state a RICO claim, a plaintiff must allege four elements: (1) conduct (2) of an enterprise (3) through a **[*1315]** pattern (4) of racketeering activity." Robbins v. Wilkie, 300 F.3d 1208, 1210 (10th Cir. 2002) (citations and internal quotation marks omitted). And, to have standing to assert a RICO claim, the plaintiff must allege that the RICO violation proximately caused plaintiff's injuries. Bixler v. Foster, 596 F.3d 751, 756 (10th Cir. 2010).

Defendants assert eight reasons why the class plaintiffs' RICO claim fails to state a plausible claim as a matter of law. The court concludes that none of these arguments warrant dismissal at the pleading stage. The court explains why in the eight subsections that follow.

1. RICO Enterprise

First, defendants assert that the Class Complaint fails to assert a plausible RICO claim because it never alleges facts capable of supporting a finding or inference of a RICO enterprise. Instead, defendants contend, the Class Complaint alleges only that defendants engaged in arms-length business activities that do not **[**119]** suffice to state a RICO claim.

HN34[] As already described, RICO prohibits a "person" who is associated with an "enterprise" to conduct its affairs through a pattern of racketeering activity. *See* 18 U.S.C. § 1962(c). "RICO broadly defines 'enterprise' as 'any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.'" George v. Urban Settlement Servs., 833 F.3d 1242, 1248 (10th Cir. 2016) (quoting 18 U.S.C. § 1961(4)).

Here, the class plaintiffs allege that the RICO enterprise is an "association-in-fact enterprise," consisting of the RICO Defendants (Mylan N.V., Mylan Specialty, LP, Heather Bresch, Pfizer, King Pharmaceuticals, and Meridian) and the PBM Conspirators (defined as at least four PBMs: CVS Health Corporation, Express Scripts Inc., Optum Rx Inc., and Prime Therapeutics LLC), "formed for the purpose of engaging in a scheme to defraud the public regarding the pricing of the EpiPen, the medical necessity, quality, and characteristics of EpiPens and the EpiPen 2-Pak, and Mylan's profits and efforts to control the price of the EpiPen." Class Compl. ¶ 604.

HN35[] The Supreme Court has explained that "'an enterprise includes any union or group of individuals associated in fact[,]' and that 'RICO reaches **[**120]** 'a group of persons associated together for a common purpose of engaging in a course of conduct.'" Boyle v. United States, 556 U.S. 938, 944, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009) (quoting United States v. Turkette, 452 U.S. 576, 580, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)). An association-in-fact enterprise requires: (1) "a purpose," (2) "relationships among those associated with the enterprise," and (3) "longevity sufficient to permit these associates to pursue the enterprise's purpose." Id. at 946.

The class plaintiffs assert that their Class Complaint alleges all three requirements of an association-in-fact enterprise. *First*, they assert, the Class Complaint alleges that the common purpose of the "EpiPen Pricing Enterprise" was to overcharge consumers for the EpiPen to enrich defendants. Doc. 123 at 99; Class Compl. ¶¶ 600, 604, 643, 648.

Second, the Class Complaint alleges relationships between the Mylan and Pfizer Defendants and that they worked together to operate and manage the EpiPen Pricing Enterprise. Also, the Class Complaint alleges that the Mylan and Pfizer Defendants worked together to stop generic competition for the EpiPen by filing patent infringement lawsuits between 2009 and 2012 against at least three generic rivals—Teva, Sandoz, and Intelliject. Class Compl. ¶ 629; *see also id.* ¶¶ 236-324. Also, the Class Complaint alleges that Pfizer **[**121]** **[*1316]** (through Meridian) and

Mylan "jointly" settled the Teva Litigation by entering a settlement agreement that secretly restrained competition and ensured that the EpiPen Pricing Enterprise could continue successfully without facing competition from Teva. *Id.* ¶¶ 630-31; *see also id.* ¶ 270 (describing how Mylan and Pfizer issued a joint press release about the Teva settlement); *see also id.* ¶ 277 (describing how Mylan CEO Heather Bresch referred to the Teva settlement as "*our* settlement with Teva") (emphasis added). The Class Complaint also alleges that Mylan Specialty LP took over for Meridian as sponsor of the EpiPen patents in the Orange Book. *Id.* ¶ 247. Although the class plaintiffs don't assert exactly why or how this change occurred, they allege that it shows "concerted action by Mylan and Pfizer to share the burden and rewards of their EpiPen monopoly." *Id.*

The Class Complaint also describes how Mylan and Pfizer's relationship is not completely clear because they never have asserted publicly that they share more than a manufacturer/seller relationship. *Id.* ¶ 632. But, as the Class Complaint describes, commenters have noted that Pfizer received significant revenues from its relationship **[**122]** with Mylan based on EpiPen sales. *Id.* And, the Class Complaint asserts, this shared interest in generating revenues has caused Mylan and Pfizer to work together to ward off competition through patent litigation and unlawful reverse payment settlements. *Id.* ¶ 241 (asserting that Mylan and Pfizer's "divided intellectual property ownership of the EpiPen and their licensing agreements for it have caused the two companies to work collaboratively to enhance the products sales volume and profitability" because their "EpiPen-related revenues rise (or fall) together").

Defendants argue that these allegations only describe how Pfizer defended its patent rights and provided Mylan products subject to a routine commercial arrangement. Defendants characterize these allegations as "routine business relationships" that cannot establish a RICO claim. Doc. 95 at 67 (first citing *Robins v. Glob. Fitness Holdings, LLC, 838 F. Supp. 2d 631, 652-53 (N.D. Ohio 2012)*; then citing *Brannon v. Boatmen's First Nat'l Bank of Okla., 153 F.3d 1144, 1148 (10th Cir. 1998)* (affirming dismissal of a RICO claim because plaintiffs' "allegations do nothing more than define a legitimate corporate and financial relationship between [defendant] and its holding company.") (further citations omitted)). But, construing the Class Complaint as describing just "routine business relationships" **[**123]** requires the court to draw inferences against the class plaintiffs' allegations. And that is not a proper endeavor for the court on a motion to dismiss. Instead, the court must take plaintiffs' allegations as true and view them in the light most favorable to the class plaintiffs. *Mayfield v. Bethards, 826 F.3d 1252, 1255 (10th Cir. 2016)*. Applying that standard, one plausibly can infer from the Class Complaint's allegations that the Mylan and Pfizer Defendants—persons or entities associated with the enterprise—formed relationships sufficient to satisfy the pleading requirements for a RICO enterprise.

Defendants also argue that the class plaintiffs' allegations about PBMs fail to allege adequately their participation in a RICO enterprise. The Class Complaint alleges, during the past decade, "the PBM Conspirators and other PBMs began to exert influence in their role as insurance-industry middle-men to dictate the success or failure of certain drugs in the marketplace by offering to include or threatening to exclude certain medications from some or all of their formularies and, in the process, extracting hundreds of millions of dollars in the form of 'discounts' or 'rebate' **[*1317]** payments from drug manufacturers in exchange." Class Compl. ¶ 636. The **[**124]** class plaintiffs assert that PBMs and drug manufacturers engage in negotiations during "complex, closed-door meetings, during which PBMs sell access to their formularies in exchange for large rebates or discounts, a substantial portion of which they pocket as pure profit." *Id.* ¶ 637. During those negotiations, the class plaintiffs contend, the RICO Defendants "participated in a scheme *with the PBM Conspirators* to increase the list price of the EpiPen." *Id.* ¶ 638 (emphasis added). The purpose of the RICO Defendants' scheme was to "[t]o facilitate the payment of 'rebates' to PBMs, and ensure their position on certain formularies without impacting their bottom line." *Id.* And also, the scheme "increase[d] the profits of PBMs through artificially increasing the list price of EpiPens" to the detriment of consumers. *Id.* ¶ 639.

The Class Complaint describes how the RICO Defendants and PBM Conspirators advanced the goals of the EpiPen Pricing Enterprise allegedly by "affirmatively misrepresent[ing] or conceal[ing] the existence of the inflated and fraudulent nature of these list price increases as well as the existence, amount, and purpose of the discounts given to the PBM Conspirators to Plaintiffs, **[**125]** the Classes, consumers, health care payers, and the general public." *Id.* ¶ 641. Also, the Class Complaint alleges that the PBM Conspirators "exerted substantial control over the

EpiPen Pricing Enterprise, and participated in the affairs of the enterprise" through a variety of specific actions. *Id.* ¶ 651. This conduct includes the PBM Conspirators' negotiating and offering to discount the EpiPen; misrepresenting and concealing the existence, amount, and purpose of the EpiPen discounts; misrepresenting and concealing the true nature of the relationship and agreements between the enterprise's members as well as its effect on the pricing of the EpiPen; and, ensuring that the other RICO Defendants and members of the EpiPen Pricing Enterprise concealed the fraudulent scheme. *Id.*

Defendants characterize these allegations as "[a] commercial negotiation, where the parties have their own independent business interests and one party demands higher rebates and lower prices from the other." Doc. 95 at 69. And, they contend, "[t]o recognize a RICO enterprise here would be tantamount to holding that negotiating strategies by PBMs, insurers, state Medicaid agencies, and other healthcare payors throughout **[**126]** the U.S. amount to organized criminal conduct—which obviously cannot be, and is not, the law." *Id.* Perhaps a factfinder would accredit defendants' characterization of these interactions. But it might not, and the court cannot accept defendants' characterization of the allegations at the pleading stage. Instead, when one accepts the allegations as true and views them in the class plaintiffs' favor, one reasonably can infer that the PBMs' alleged conduct amounted to far more than a commercial negotiation. Instead, the Class Complaint alleges that the PBMs formed relationships with defendants sufficient to plead a plausible RICO enterprise.

And finally, the Class Complaint alleges an enterprise with longevity sufficient to permit the associates to pursue the enterprise's purpose. The class plaintiffs assert that, beginning at least on January 1, 2009, to the present, the associates have engaged in various activities to pursue the enterprise's purpose. Class Compl. ¶¶ 601, 629 (discussing how the Mylan and Pfizer Defendants worked together to stop generic competition for the EpiPen by filing patent infringement lawsuits throughout 2009 to 2012); 642, 655-56. The Class Complaint plausibly **[**127]** pleads a RICO enterprise.

[*1318] 2. Conducted the Affairs of a RICO Enterprise

HN36[] Next, defendants assert that the Class Complaint never alleges that defendants "conduct[ed] or participate[d], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." *18 U.S.C. § 1962(c)*. As the Supreme Court has explained, RICO liability "'depends on showing that the defendants conducted or participated in the conduct of the "*enterprise's* affairs," not just their *own* affairs.'" *Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)* (quoting *Reves v. Ernst & Young, 507 U.S. 170, 185, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993))*.

HN37[] Our Circuit has described *Reves*'s "operation and management test" as a standard requiring the defendant to have "'some part in directing' the enterprise's affairs." *George v. Urban Settlement Servs., 833 F.3d 1242, 1251 (10th Cir. 2016)* (quoting *Reves, 507 U.S. at 179*). "But importantly, the defendant need not have 'primary responsibility for the enterprise's affairs,' 'a formal position in the enterprise,' or 'significant control over or within an enterprise.'" *Id.* (quoting *Reves, 507 U.S. at 179* & n.4, 184). This test requires less. "Instead, even 'lower rung participants in the enterprise who are under the direction of upper management' may be liable under RICO if they have 'some part' in operating or managing the enterprise's affairs." *Id.* (quoting *Reves, 507 U.S. at 179, 184)*. Yet, allegations that simply describe a defendant's **[**128]** conduct "through its regular course of business, goods and services that ultimately benefit the enterprise" do not suffice to state a RICO claim. *Id.* (citing *BancOklahoma Mortg. Corp. v. Capital Title Co., 194 F.3d 1089, 1101-02 (10th Cir. 1999))*.

Here again, defendants assert that the Class Complaint alleges nothing more than two corporations pursuing routine, arms-length business activities. And, they contend, these activities fail to allege conduct or participation in the RICO *enterprise's* affairs instead of simply their *own* affairs. The court disagrees with defendants' construction of the Class Complaint's allegations.

Instead, as the court already has described, one plausibly can infer from the Class Complaint's allegations that the Mylan and Pfizer Defendants worked together to operate and manage the EpiPen Pricing Enterprise. Class Compl. ¶ 600. Specifically, the Class Complaint alleges that the Mylan Defendants committed various acts as part of a scheme to defraud the public about the EpiPen's pricing, the medical necessity, quality, and characteristics of the EpiPen, and the EpiPen 2-Pak. *See, e.g., id.* ¶ 604; *see also id.* ¶¶ 152, 229, 325-47, 354. And the Class Complaint alleges that the Mylan and Pfizer Defendants, working together, participated in various conduct **[**129]** designed to stifle generic competition, *e.g.*, filing patent infringement lawsuits and then resolving those lawsuits through unlawful reverse payment settlements. *Id.* ¶¶ 629-31; *see also id.* ¶¶ 236-324. These alleged facts permit a reasonable inference that both the Mylan and Pfizer Defendants "played some part—even a bit part—in conducting the enterprise's affairs." *George, 833 F.3d at 1252*. And these allegations suffice to support a plausible RICO claim.

3. Pattern of Racketeering Activity

Defendants next argue that the Class Complaint never alleges a "pattern of racketeering activity," as *18 U.S.C. § 1962(c)* requires. ***HN38***[] The RICO statute defines a "pattern" of racketeering as "at least two acts of racketeering activity, . . . **[*1319]** which occurred within ten years" of one another. *18 U.S.C. § 1961(5)*. But "proof of two or more predicate acts [is] not sufficient to prove a pattern unless there is a relationship between the predicate acts and a threat of continuing activity." *Tal v. Hogan, 453 F.3d 1244, 1267 (10th Cir. 2006)* (first citing *H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)*; then citing *Duran v. Carris, 238 F.3d 1268, 1271 (10th Cir. 2001))*. "Continuity of threat requires both proof of 'a series of related predicates extending over a substantial period of time,' as well as a 'showing that the predicates themselves involve a distinct threat of long-term racketeering activity . . . or that the **[**130]** predicates are a regular way of conducting the defendant's ongoing legitimate business or the RICO enterprise.'" *Id.* (quoting *Resolution Tr. Corp. v. Stone, 998 F.2d 1534, 1543 (10th Cir. 1993))*.

Defendants assert that the Class Complaint, at best, makes conclusory allegations of a pattern of racketeering activity. Defendants describe the Class Complaint to allege unrelated predicate acts with just one thing in common—they simply involve Mylan and the EpiPen. Defendants thus assert that these allegations lack the common thread tying them together, as required to support a plausible RICO claim.

This simply is wrong. Defendants read the class plaintiffs' allegations disjunctively. But, when one views the Class Complaint's allegations in the class plaintiffs' favor and collectively, the allegations describe predicate acts made as part of the EpiPen pricing scheme—*i.e.*, defendants' fraudulent scheme caused American consumers to pay artificially inflated prices for the EpiPen. As defendants recognize, the Class Complaint alleges that defendants used the mails and the wires to disseminate fraudulent information and corrupted an official proceeding. *See, e.g.*, Class Complaint ¶¶ 655.a. (describing how Ms. Bresch made several statements about Mylan's intent **[**131]** to add more patents in a 2009 quarterly earnings call), 655.c. (describing Mylan and Pfizer's joint announcement of its settlement agreement with Teva which, the class plaintiffs contend, really was a pay-for-delay settlement), 655.g. (asserting that Ms. Bresch made several false statements when she testified before Congress on September 21, 2016). One can infer from these alleged facts that the common thread among the predicate acts is that defendants made these communications to advance their EpiPen pricing scheme. *See id.* ¶ 659 (asserting that "[t]o effectuate the goals of the EpiPen Pricing Enterprise, including but not limited to maximizing profit and controlling a dominant market position, the RICO Defendants . . . launched a campaign of false and misleading statements and actions to distract consumers and regulators from the reality that the RICO Defendants were raising the price of the EpiPen from $100 to $600" that included Mylan's false statements about competitors, Mylan and Pfizer's "pay-fordelay" settlements, and Ms. Bresch's alleged false testimony to Congress about Mylan's profits). These facts suffice to allege a pattern of racketeering activity. *See George v. Urban Settlement Servs., 833 F.3d 1242 1254-1257 (10th Cir. 2016)* **[**132]** (holding that plaintiffs adequately alleged a pattern of racketeering activity because their complaint asserted defendants committed several acts of mail and wire fraud while executing a fraudulent scheme to deny Home Affordable Modification Program loans to eligible borrowers); *see also Resolution Tr. Corp., 998 F.3d at 1543* (holding that sufficient evidence of a pattern of racketeering activity existed to support the jury's finding because the "jury could find that the wire fraud activity was associated with ongoing acts of fraud").

[*1320] ***HN39***[] Also, our Circuit recognizes that "[w]hether a pattern [of racketeering activity] exists is a question of fact for the jury to determine." *Resolution Tr. Corp., 998 F.2d at 1543*; *see also Tal, 453 F.3d at 1268* (holding that "because the extensiveness of the threat is a question of fact" the court would "assume for the purposes of this opinion that the predicate acts alleged . . . establish a pattern of racketeering activity"). Here, the Class Complaint sufficiently alleges facts that, if true, would permit a jury to find or infer a pattern of racketeering activity and thus support a RICO claim.

4. RICO Causation

Defendants next assert that the class plaintiffs' RICO claim fails because the Class Complaint never alleges causation. ***HN40***[] To state a plausible **[**133]** RICO claim, a plaintiff must allege that he was a "person injured in his business or property by reason of a violation of *section 1962* of this chapter." *18 U.S.C. § 1964(c)*. The Supreme Court has interpreted this provision as one requiring a RICO plaintiff's damages to "flow from the commission of the predicate acts." *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 497, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*; *see also* *Hemi Grp., LLC v. City of New York, 559 U.S. 1, 13, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010)* ("[T]he compensable injury flowing from a [RICO] violation . . . necessarily is the harm caused by [the] predicate acts." (citations and internal quotation marks omitted)).

Section 1964(c)'s causation requirement requires a RICO plaintiff to allege "'that the defendant's violation not only was a "but for" cause of his injury, but was the proximate cause as well . . . .'" *Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 654, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)* (quoting *Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992))*. The Supreme Court has defined RICO proximate causation as "a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.'" *Id.* (quoting *Holmes, 503 U.S. at 272 n.20* (further citations and internal quotation marks omitted)). Instead, proximate cause provides a "'label generically [for] the judicial tools used to limit a person's responsibility for the consequences of that person's own acts . . . .'" *Id.* (quoting *Holmes, 503 U.S. at 268*). And it includes "a particular emphasis on the 'demand for some direct relation between the **[**134]** injury asserted and the injurious conduct alleged.'" *Id.* (quoting *Holmes, 503 U.S. at 268*).

HN41[] Thus, "'[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.'" *Safe Streets All. v. Hickenlooper, 859 F.3d 865, 889 (10th Cir. 2017)* (quoting *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006))*. The Supreme Court has instructed that "no need [exists] to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly.'" *Id.* (quoting *Anza, 547 U.S. at 460*).

But, in the context of RICO claims premised on predicate acts of mail fraud, the Supreme Court has held that "a plaintiff is not required to plead that he is a victim of the defendant's underlying crime (*e.g.*, that he relied on the fraudulent mailings) to establish a direct injury." *Id.* (citing *Bridge, 553 U.S. at 649-50*). "Rather, a plaintiff may establish proximate causation by plausibly pleading that his business or property has been directly injured as a result of the **[*1321]** defendants' *§ 1962* violation." *Id.* (citing *Bridge, 553 U.S. at 649-50*).

Here, the Class Complaint alleges, defendants' pattern of racketeering activity has injured the class plaintiffs in their business or property. Class Compl. ¶¶ 680, 682. The Class Complaint also asserts that defendants' fraudulent scheme has allowed them to "illegally **[**135]** extract[ ] revenues of millions or billions of dollars from Plaintiffs and the Class." *Id.* ¶ 602. More precisely, the class plaintiffs allege, "but for" defendants' unlawful conduct, the class plaintiffs "would have paid less for both branded and generic versions of EpiPen by: (a) substituting their purchases of EpiPen with less-expensive generic versions of EpiPen; (b) purchasing generic EpiPen at lower prices sooner; (c) purchasing individual, rather than pairs, of EpiPen injectors; (d) buying spare auto-injectors that were generic or cheaper brands; and (e) purchasing branded EpiPen at a reduced price." *Id.* ¶ 492.

One reasonably can infer from these allegations that defendants' actions produced the alleged harm—*i.e.*, paying inflated prices for the EpiPen. Defendants disagree, asserting the Class Complaint alleges no plausible relationship between defendants' alleged false and fraudulent statements and the class plaintiffs' purchasing decisions. *See* Doc. 219 at 36. The court reads the Class Complaint quite differently. ***HN42***[] As *Bridge* held, to state a plausible

RICO claim, the class plaintiffs need not plead that they relied on the alleged false statements when purchasing the EpiPen. *Bridge, 553 U.S. at 649-50*. **[**136]** Instead, they must allege plausibly that defendants' RICO violation injured their business or property directly. Here, the class plaintiffs' allegations satisfy that pleading burden.

The class plaintiffs allege that the fraudulent statements advanced defendants' pricing scheme in several ways. They include forcing consumers to purchase the EpiPen 2-Pak (instead of individual EpiPens), restricting access to generic competition, and driving up the EpiPen's price (from $100 in 2007 to more than $600 in 2016). Class Compl. ¶¶ 600, 655, 657, 659, 664. It is plausible to infer from these allegations that defendants' conduct injured the class plaintiffs directly. With this conduct, the class plaintiffs allege, defendants effectively limited consumers' purchasing decisions by restricting consumer access to competing products—all while hiking the price of the EpiPen and thus forcing consumers to pay inflated prices.

The class plaintiffs are suing to recover for their own injuries—as EpiPen consumers or third-party payors—from having to pay the inflated prices for the EpiPen. *See* *Safe Streets, 859 F.3d at 890* (holding that plaintiffs stated a RICO claim because they sought "to recover for injuries to their own land, not harms **[**137]** to third parties"); *In re Neurontin Mktg. and Sales Practices Litig., 712 F.3d 21, 37 (1st Cir. 2013)* (affirming RICO verdict because the jury could infer from the evidence that plaintiff was a "primary and intended victim" of defendants' "scheme to defraud"). And one plausibly can infer from the Class Complaint that the class plaintiffs' alleged injuries were "a foreseeable and natural consequence of [defendants'] scheme" to defraud the public about the EpiPen's price. *See* *Bridge, 553 U.S. at 658* (concluding that the "alleged injury—the loss of valuable liens—is the direct result of petitioner's fraud" because "[i]t was a foreseeable and natural consequence of petitioners' scheme to obtain more liens for themselves that other bidders would obtain fewer liens"); *see also* *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig., 804 F.3d 633, 645 (3d Cir. 2015)* (holding plaintiffs pleaded direct injury sufficient to satisfy the RICO proximate causation requirement—regardless **[*1322]** of whether plaintiffs had relied on the alleged misrepresentations because the alleged "fraudulent scheme could have been successful only if plaintiffs paid for [a drug used to treat Type II diabetes], and this is the very injury that plaintiffs seek recovery for"); *Safe Streets, 859 F.3d at 890* (holding that plaintiffs stated a plausible RICO claim because the complaint alleged "[n]o intermediary break[ ] [in] the casual chain" between **[**138]** the enterprise's RICO violations and the plaintiffs' injuries). The court finds the class plaintiffs' allegations sufficient to allege RICO causation.

5. Predicate Acts of Racketeering Activity

Next, defendants assert that the Class Complaint never alleges any racketeering activity sufficient to support a RICO claim. "'***HN43***[🡅] RICO is founded on the concept of racketeering activity.'" *Safe Streets, 859 F.3d at 882* (quoting *RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2096, 195 L. Ed. 2d 476 (2016))*. This statute "defines 'racketeering activity' to encompass dozens of state and federal offenses, known in RICO parlance as predicates." *Id.* (quoting *RJR, 136 S. Ct. at 2097*). "'These predicates include any act "indictable" under specified federal statutes . . . . '" *Id.* (quoting *RJR, 136 S. Ct. at 2096* (quoting *18 U.S.C. § 1961(1)*)). Such predicates include those "indictable" under 18 U.S.C. "*section 1341* (relating to mail fraud)," "*section 1343* (relating to wire fraud)," and "*section 1512* (relating to tampering with a witness, victim, or an informant)." *18 U.S.C. § 1961(1)(B)*.

Here, the Class Complaint alleges that defendants engaged in a pattern of racketeering activity involving mail and wire fraud, violating *18 U.S.C. §§ 1341* & *1343*. Class Compl. ¶¶ 652, 654.a., 654.b. It also alleges that the Mylan Defendants corrupted an official proceeding, violating *18 U.S.C. § 1512(c)(2)*, by having Ms. Bresch testify falsely before Congress on September 21, 2016. *Id.* ¶¶ **[**139]** 653, 654.c.

HN44[🡅] "To support the mail and wire fraud allegations, the plaintiffs must plausibly allege 'the existence of a scheme or artifice to defraud or obtain money or property by false pretenses, representations or promises,' and that [defendants] communicated, or caused communications to occur, through the U.S. mail or interstate wires to execute that fraudulent scheme." *George v. Urban Settlement Servs., 833 F.3d 1242, 1254 (10th Cir. 2016)* (quoting *Tal v. Hogan, 453 F.3d 1244, 1263 (10th Cir. 2006))*. "And because *Fed. R. Civ. P. 9(b)* requires a plaintiff to plead mail and wire fraud with particularity, the plaintiffs must 'set forth the time, place and contents of the false representation, the identity of the party making the false statements and the *consequences thereof*.'" *Id.* (quoting *Koch v. Koch Indus., Inc., 203 F.3d 1202, 1236 (10th Cir. 2000))* (emphasis added).

Defendants assert that the Class Complaint never identifies the consequences of the alleged fraudulent communications. More specifically, they contend that the class plaintiffs' allegations never identify how defendants' fraudulent mail and wire communications advanced the alleged scheme to defraud. *See* Doc. 219 at 36. Separately, the Pfizer Defendants assert that the RICO claim fails to state a plausible claim because the class plaintiffs never alleged any predicate acts by any of the Pfizer Defendants, as required to **[**140]** support the claim. *See* Doc. 93 at 20. The court rejects defendants' arguments.

The class plaintiffs have alleged that defendants made various false representations using the mails and wires—including press releases and earnings calls. The Class Complaint describes the time, place, contents, and identity of the person making the allegedly false statements. **[*1323]** Class Compl. ¶ 655. And, the class plaintiffs allege, the purpose of the communications was "to fraudulently mislead and deceive American consumers to purchase the EpiPen at an inflated price, to purchase the EpiPen as a 2-Pak only, and to cause consumers to pay an artificially inflated price for EpiPens." *Id.* ¶ 600. These communications include various representations about the medical necessity of the EpiPen 2-Pak. The class plaintiffs allege that these representations were false and misleading because they relied on flawed medical studies and paid-for medical opinions. The communications also include various representations about Mylan's efforts to provide "free" EpiPens to schools and to encourage anaphylaxis awareness. *Id.* ¶¶ 655.d., 655.e., 659.a. But, the class plaintiffs allege, these representations were fraudulent because **[**141]** Mylan actually used the school program as an anticompetitive means to implement exclusive dealing contracts, hook consumers on the EpiPen, and then raise the EpiPen price. *Id.* ¶¶ 655.d., 655.e., 655.g.iii.

The alleged fraudulent communications also include jointly issued statements about Mylan and Pfizer's patent litigation settlements. The Pfizer Defendants assert that their settlement of patent litigation cannot support a predicate act. The court doesn't read the class plaintiffs' allegations that way. Instead, the class plaintiffs allege that Mylan and Pfizer entered into unlawful reverse payment settlements, but then—together—issued false press releases describing the settlements as a legitimate means to resolve patent litigation. One reasonably can infer the Class Complaint to allege that defendants advanced their scheme to inflate the price of the EpiPen by fraudulently representing to the public that they were resolving valid patent litigation. But the class plaintiffs allege that defendants, in reality, used the patent litigation and resulting "pay-for-delay" settlements as a means to prevent generic competition, to protect the EpiPen monopoly, and to continue raising prices **[**142]** on the EpiPen. Indeed, the Class Complaint alleges that the "pay-for-delay" settlements "concealed from consumers the true, anticompetitive aims of its pay-for-delay arrangements." *Id.* ¶ 659.e.

It is reasonable to infer from these allegations that defendants' communications fraudulently misled, deceived, and caused American consumers to purchase the EpiPen at an inflated price. These allegations sufficiently set forth the "time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof" and thus state a plausible RICO claim. *George, 833 F.3d at 1254*.

Defendants also assert that the Class Complaint fails to plead facts capable of supporting a violation of *18 U.S.C. § 1512(c)(2)* for corrupting an official proceeding. ***HN45***[] This statute makes it unlawful to "obstruct[ ], influence[ ], or impede[ ] any official proceeding, or attempt[ ] to do so," and imposes a "fine[ ] under this title or imprison[ment] not more than 20 years, or both." *18 U.S.C. § 1512(c)(2)*. The Class Complaint alleges that Ms. Bresch corruptly influenced an official proceeding by giving false testimony before Congress. Class Complaint ¶¶ 654.c., 655.g., 659.h., 659.i. Defendants assert that the class plaintiffs provided **[**143]** "no evidence" and only "bald assertions" to support the allegation that Ms. Bresch's testimony was false. Doc. 95 at 77. Defendants characterize the class plaintiffs' allegations as merely "subjective disagree[ment]" with Ms. Bresch's testimony that cannot support an obstruction violation. Doc. 219 at 38. At the pleading stage, the court cannot weigh the class plaintiffs' allegations and determine whether they describe false testimony or simply report subjective disagreement with Ms. Bresch's statements. Instead, **[*1324]** taking the allegations as true, the class plaintiffs assert that Mr. Bresch testified before Congress on September 21, 2016, and that she repeatedly gave false testimony about a number of topics in an effort to advance defendants' ongoing scheme to defraud consumers into purchasing the EpiPen at inflated prices. These allegations are sufficient to state a plausible § 1512(c)(2) violation.

6. Standing

Defendants assert that the class plaintiffs lack standing to assert a RICO claim for two reasons. Neither one permits the court to dismiss the RICO claim at the pleading stage.

First, defendants contend that the class plaintiffs—as indirect purchasers—lack standing to assert a RICO claim. **HN46**[] The **[**144]** Tenth Circuit has recognized, albeit in the antitrust context, that "only the direct purchaser, and no other [person] in the distribution chain, is the 'party injured'" who "may sue for and recover the full amount of the illegal overcharge." *In re Wy. Tight Sands Antitrust Cases, 866 F.2d 1286, 1290 (10th Cir. 1989)* (first citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*; then citing *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977))*. Citing cases from outside the Tenth Circuit, defendants argue that the court should apply this rule to civil RICO claims. *See* Doc. 95 at 77-78 (citing *McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 855 (3d Cir. 1996)* (further citations omitted)).

The class plaintiffs respond that such a rule defies the Tenth Circuit's most recent guidance about standing—*i.e.*, a RICO plaintiff has standing if he has pleaded proximate causation. *See* Safe Streets, 859 F.3d at 887 (holding that "RICO standing" is determined under "the usual pleading-stage inquiry: whether the plaintiff has plausibly pled a cause of action under RICO"); *see also* *id. at 885* (explaining that a RICO claim requires "(1) injuries to [plaintiffs'] property (2) that were caused by those [RICO] violations"); *Bixler v. Foster, 596 F.3d 751, 756 (10th Cir. 2010)* ("A plaintiff has standing only if his injuries were proximately caused by the RICO violation."). The class plaintiffs also assert that applying the indirect-purchaser rule is contrary to the Supreme Court's decision in *Bridge*, holding that first-party reliance **[**145]** is not required to allege RICO causation. *See* Bridge, 553 U.S. at 649-50.

HN47[] Indeed, the Supreme Court has recognized in the RICO context that its requirements for "antitrust injury" have "no analogue in the RICO setting." *Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 269 n.15, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*. And, the Court has cautioned, "our use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text. We do not necessarily use it in the same sense as courts before us have and [we] intimate no opinion on results they reached." *Id. at 272 n.20*; *see also* *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, 61 F.3d 1250, 1257 (7th Cir.)*, *cert. denied*, *517 U.S. 1220, 116 S. Ct. 1847, 134 L. Ed. 2d 948 (1995)* ("The Supreme Court observed that it did not mean to preclude all possibility of recovery for injury that was transmitted indirectly; the holding of *Holmes* is no more than that common law ideas about proximate causation inform the understanding of RICO." (citation omitted)). Instead, the Supreme Court has recognized that "the infinite variety of claims that may arise [under RICO] make it virtually impossible to announce a black-letter rule that will dictate the result in every case" for determining whether an alleged **[*1325]** RICO violation was the proximate cause of a plaintiff's injuries. *Id.*

Because defendants just cite cases from outside the Tenth Circuit to support **[**146]** their argument that indirect purchasers lack RICO standing,[22] the court declines to apply that rule here. Instead, applying the guidance from our Circuit in *Safe Streets*, the court already has determined that the class plaintiffs adequately have alleged that defendants' RICO violations proximately caused their injuries. *See supra* Part III.B.4. These allegations suffice to confer RICO standing. *See* Safe Streets, 859 F.3d at 886-890; *see also* Bixler, 596 F.3d at 756.

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[22] Although defendants cite a District of New Mexico case to support their argument, the cited case never holds that indirect purchasers lack RICO standing. *See* *N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., 54 F. Supp. 3d 1189 (D.N.M. 2014)*. Instead, the New Mexico court applied Supreme Court and Tenth Circuit precedent to determine whether plaintiff had alleged proximate causation because "proximate cause is necessary to confer [RICO] standing." *Id. at 1244*; *see also* *id. at 1245* ("To have standing to pursue these claims, Plaintiff must allege facts that support a finding of proximate cause.").

Second, defendants assert the class plaintiffs lack RICO standing because they cannot assert a claim based on overpaying for pharmaceuticals when they received the benefit of their bargain, *i.e.*, effective drugs. To support this argument, defendants cite two cases from the District of New Jersey. *See In re Schering-Plough Corp. Intron/Temodar Consumer Class Action, No. 2:06-cv-5774, 2009 U.S. Dist. LEXIS 58900, 2009 WL 2043604, at *10 (D.N.J. July 10, 2009)* (dismissing plaintiffs' RICO claims for failing to allege a plausible injury based on paying an inflated price for pharmaceuticals because "purchasers of pharmaceutical products have no private cause of action where they receive the benefit of their bargain in the form of effective drugs"); *see also Dist. 1199P Health & Welfare Plan v. Janssen, L.P., 784 F. Supp. 2d 508, 519 (D.N.J. 2011)* (dismissing RICO claim because "[p]laintiffs' injury theory based on financial **[**147]** losses of overpayment" for pharmaceuticals "is inadequate for sustaining a RICO injury, absent allegations that Defendants' drug was on some level inferior and therefore worth less than what [Plaintiffs] paid for it" (citations and internal quotation marks omitted)).

The persuasive value of these two cases is tempered by the Third Circuit's more recent decision, *In re Avandia Marketing, Sales Practices & Product Liability Litigation, 804 F.3d 633 (3d Cir. 2015)*. In that case, a defendant pharmaceutical manufacturer argued that plaintiffs lacked standing to bring RICO claims because plaintiffs never alleged that they received unsafe or ineffective prescriptions. Instead, defendant argued, plaintiffs "received exactly what they bargained for" and thus had "not suffered a concrete injury." *Id. at 639*. The Third Circuit disagreed. *Id. at 639-40*. It held that plaintiffs' "damages do not depend on the effectiveness of the [drug] that they purchased, but rather on the inflationary effect that [defendant's] allegedly fraudulent behavior had on the price of [the drug]." *Id. at 640*. The court thus held that plaintiffs had alleged a concrete RICO injury in the form of overpaying for pharmaceutical products. *Id.*

In reaching this conclusion, the Third Circuit explained that defendant's reliance on *In re Schering-Plough Corp. Intron/Temodar* ***[**148]*** *Consumer Class Action* was misplaced. It recognized that the district court in that case "held that the plaintiffs lacked standing to assert [an injury based on economic loss] because they failed to allege that any consumers or beneficiaries received inadequate drugs or suffered personal **[*1326]** injuries." *Id.* (citing *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action, 2009 U.S. Dist. LEXIS 58900, 2009 WL 2043604, at *16)*. But, on appeal, the Third Circuit "affirmed the District Court on causation grounds." *Id.* (citing *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 246 (3d Cir. 2012))*. The Third Circuit explained its reasoning this way: "To the extent we agreed with the District Court's injury analysis in that case, we did so in dictum, not in binding precedent." *Id.* (citing *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d at 246*). For the same reasons, defendants' reliance on that case here is misplaced.

And just as importantly, defendants cite no cases from the Tenth Circuit holding that a RICO plaintiff lacks standing to assert a claim for overpaying for pharmaceuticals when the plaintiff receives the benefit of the bargain in the form of purchasing effective drugs, even at inflated prices. The court declines to apply the holdings from the District of New Jersey cases here, as defendants urge. Instead, the court predicts that the Tenth Circuit would find more persuasive the Third Circuit's reasoning in the *Avandia* ***[**149]*** *Marketing Sales Practices & Product Liability Litigation* case and adopt it. And, the court believes, the Circuit would conclude that the class plaintiffs have alleged a plausible injury here by asserting that they paid inflated prices for the EpiPen—prices that defendants produced with alleged unlawful conduct. *See, e.g.*, Class Compl. ¶ 492 (asserting that "but for defendants' unlawful conduct . . . Plaintiffs and Class Members would have paid less for both branded and generic versions of EpiPen" and that "Plaintiffs and other members of the Class have sustained substantial losses and property in the form of overcharges, the exact amount of which will be the subject of proof at trial.").

7. RICO Conspiracy

HN48[] *Subsection 1962(d)* makes it "unlawful for any person to conspire to violate" *subsection 1962(c)*. *18 U.S.C. § 1962(d)*. Defendants assert that the Class Complaint fails to state a plausible RICO claim under *§ 1962(c)*, and so, it also fails to state a plausible RICO conspiracy claim under *§ 1962(d)*. *See Tal v. Hogan, 453 F.3d 1244, 1270 (10th Cir. 2006)* ("If a plaintiff has no viable claim under *§ 1962(a)*, *(b)*, or *(c)*, then its *subsection (d)* conspiracy claim fails as a matter of law."). For reasons already explained, the court rejects defendants' arguments that the Class Complaint fails to state a **[**150]** RICO conspiracy claim under *§ 1962(c)*. Instead, the court concludes that the class plaintiffs have alleged a plausible RICO claim under *§ 1962(c)* sufficient to survive *Rule 12(b)(6)* dismissal. The class plaintiffs also allege that defendants violated *§ 1962(d)* by conspiring to violate *§ 1962(c)*. Class Compl. ¶ 678. The class plaintiffs thus have stated a plausible claim for RICO conspiracy.

8. CEO Heather Bresch is Named as a RICO conspirator

Finally, the Mylan Defendants assert that it was malicious and improper for the class plaintiffs to name Mylan CEO Heather Bresch as one of the RICO Defendants. The Mylan Defendants argue that the Class Complaint attributes conduct to Ms. Bresch that she made on behalf of Mylan in her role as the company's CEO. And they assert that these allegations are insufficient to state a RICO claim against Ms. Bresch in her personal capacity. *See, e.g.*, *Ferrari v. Mercedes-Benz USA, LLC, No. 15-cv-04379-YGR, 2016 U.S. Dist. LEXIS 171559, 2016 WL 7188030, at *3 (N.D. Cal. Dec. 12, 2016)* (dismissing RICO claims against three named CEO defendants because the "allegations are insufficient to allege that [the CEOs] conducted or participated in the conduct of a racketeering enterprise, rather than just **[*1327]** the business of [the company] separate and apart from any alleged racketeering acts"). The **[**151]** court disagrees.

The Class Complaint alleges that Ms. Bresch engaged in various fraudulent actions and personally conducted or participated in the RICO enterprise's affairs. *See, e.g.*, Class Complaint ¶¶ 226-28, 380-84, 419-48, 613-22, 624-25. ***HN49***[] The Supreme Court has held that "an employee who conducts the affairs of a corporation through illegal acts comes within the terms of [the RICO] statute that forbids any 'person' unlawfully to conduct an 'enterprise,' particularly when the statute explicitly defines 'person' to include 'any individual . . . capable of holding a legal or beneficial interest in property,' and defines 'enterprise' to include a 'corporation.'" *Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)* (quoting *18 U.S.C. §§ 1961(3)*, *(4)*). In *Cedric Kushner*, the Supreme Court held that an individual and his wholly owned corporation were sufficiently distinct for RICO purposes. *Id. at 166*. The Court found that "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Id. at 163*. And "nothing in the [RICO] statute . . . requires more 'separateness' than that." *Id.* The Court also observed, "[a]fter all, incorporation's basic purpose **[**152]** is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Id.* Applying that principle here, the Class Complaint plausibly alleges that Ms. Bresch participated in the affairs of the RICO enterprise.

Finally, the Mylan Defendants also argue that the Class Complaint's allegations against Ms. Bresch lack any factual support. The court cannot make that kind of decision on a motion to dismiss. Taking the Class Complaint's allegations as true, the class plaintiffs have alleged that Ms. Bresch engaged in various false and fraudulent conduct sufficient to support the RICO claim. Naturally, to prevail on their claims against Ms. Bresch, the class plaintiff must come forward with admissible evidence to support their allegations. But that question is one for another day. At the pleading stage, the class plaintiffs sufficiently have alleged a plausible RICO claim against Ms. Bresch.

C. Timeliness of the Class Plaintiffs' Antitrust and State Consumer Protection Claims.

Defendants next assert that the class plaintiffs' competitive delay claims are time-barred under federal **[**153]** ***antitrust law***, the RICO statutes, and 30 of the 33 state law claims pleaded in the Class Complaint. Defendants explain that each of these laws impose a statute of limitations of four years or less. And, defendants contend, the class plaintiffs' competitive delay claims accrued more than four years before they filed their lawsuit.

Indeed, the Class Complaint alleges that defendants entered the unlawful "pay-for-delay" agreements in 2011 and 2012. Class Complaint ¶¶ 270 (alleging that defendants settled the Teva Litigation on April 27, 2012), 298 (alleging that defendants announced the Intelliject settlement on February 16, 2012), 302-03 (alleging that defendants agreed to stay the Sandoz litigation indefinitely and that the stay was entered on May 10, 2011). But, defendants assert, the class plaintiffs didn't file their competitive delay claims against Mylan until January 2017 and didn't add Pfizer as a defendant until February 3, 2017. Defendants thus contend that the four-year (or shorter) statutes of limitations governing the class plaintiffs' **[*1328]** claims under the federal antitrust laws, the RICO statute, and 30 of the 33 state law claims bar the competitive delay claims. The class plaintiffs **[**154]** respond with two arguments why their competitive delay claims are not time-barred.

First, they argue that the continuing violation doctrine applies to make their competitive delay claims timely. ***HN50***[] The Supreme Court has described this doctrine in the antitrust context in this fashion:

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

Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997) (citations and internal quotation marks omitted).

Applying the continuing violation doctrine, the class plaintiffs contend that their claims accrued—not when defendants entered the alleged "pay-for-delay" settlement agreements—but instead each time they were overcharged for the EpiPen at artificially inflated prices. As the class plaintiffs recite, other courts have held that ongoing sales of a pharmaceutical product at a supracompetitive price constitute a continuing violation that makes **[**155]** an action timely "so long as the last act evidencing the continuing practice falls within the limitations period." *See, e.g., In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 746-47 (E.D. Pa. 2014)* (citation and internal quotation marks omitted); *see also In re Nexium Antitrust Litig., 968 F. Supp. 2d 367, 400 (D. Mass. 2013)* (recognizing that "'[a]lthough the business of a monopolist's rival may be injured at the time the anticompetitive conduct occurs, a *purchaser*, by contrast, is not harmed until the monopolist actually exercises its illicit power to extract an excessive price,'" and so, "[i]ndulging all inferences in the Plaintiffs' favor" on a motion to dismiss "it is reasonable to assume here that, every time the Direct Purchasers were overcharged for brand Nexium, they suffered a cognizable injury" (quoting *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 295 (2d Cir. 1979))*).

HN51[] Indeed, *In re Niaspan Antitrust Litigation* recognized: "Every court to have considered this issue in the pay-for-delay context has held that a new cause of action accrues to purchasers upon each overpriced sale of the drug." *Id. at 746-47* (first citing *In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 549 (D.N.J. 2004)*; then citing *In re Buspirone Patent Litig., 185 F. Supp. 2d 363, 378 (S.D.N.Y. 2002)*; then citing *In re Skelaxin (Metaxalone) Antitrust Litig., No. 12-md-2343, 2013 U.S. Dist. LEXIS 70968, 2013 WL 2181185, at *29 (E.D. Tenn. May 20, 2013))*; *see also In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 248 (D. Conn. 2015)* (holding that purchasers' antitrust claims based on alleged unlawful reverse payment settlement agreements were timely because "a new claim accrues with each alleged overcharge. **[**156]** Claims are therefore not time-barred that stem from alleged overcharges incurred within the relevant statutory period, whatever that period may be for a particular statute, measured backward from the filing of the claims").

Defendants respond that the above-cited cases applied a more "lenient continuing violations standard" than the one used by the Tenth Circuit. Doc. 216 at 18. The court disagrees. ***HN52***[] Although our Circuit has not considered the question in the pay-for-delay context, it has applied the continuing violation doctrine to antitrust **[*1329]** claims. The Circuit recognized: "In the context of a continuing conspiracy to violate the antitrust laws, each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and as to those damages, the statute of limitations runs from the commission of the act." *Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC, 843 F.3d 1225, 1247-48 (10th Cir. 2016)* (quoting *Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1088 (10th Cir. 2006))*. The Circuit has held that "an overt act will restart the statute of limitations under the continuing conspiracy exception when the act is (1) a new and independent act that is not merely a reaffirmation of a previous act; and (2) the act inflict[s] new and accumulating injury on the plaintiff." *Id. at 1248* (citation and **[**157]** internal quotation marks omitted).

Auraria Student Housing illustrates a proper use of the continuing violation doctrine. There, the Tenth Circuit affirmed the district court's application of the doctrine to plaintiff's claims that defendant had conspired with a university to exclude plaintiff from the freshmen student housing market. *Id. at 1248*. The Tenth Circuit recognized that the "initial conspiratorial decision"—enactment of a residency requirement that made defendant the sole provider of new student housing—was not the "final" act of the conspiracy. *Id.* Instead, defendants' efforts to enforce the requirement each year made the injury to plaintiff "new and accumulating." *Id.* The Circuit thus held that plaintiff timely asserted its claims under the continuing conspiracy exception.

Similarly, in *Champagne Metals*, the Tenth Circuit applied the continuing conspiracy exception to a horizontal group boycott. *458 F.3d at 1078*. The Circuit held that the defendants' initial agreement to exclude a competitor was not "final" but, instead, required "further action" by the conspirators. *Id. at 1089*. The Circuit found that "[t]he subsequent actions (contacting and pressuring the mills when those mills were considering recognizing **[**158]** [the excluded competitor]) were both distinct from the act outside the limitations period (the agreement to effect a boycott) and a continuation of the same conspiracy." *Id.* (citation, internal quotation marks, and alternations omitted). Also, the Circuit observed that the alleged conspirators "did not simply sit back and watch as the unabated inertial consequences of their (alleged) anticompetitive agreement harmed [plaintiff]; rather, their actions within the limitations period manifested a commitment to renewing and enforcing that agreement." *Id.* (citation, internal quotation marks, and alternations omitted). Thus, the Circuit held, plaintiff asserted its claims timely under the continuing violation doctrine. *Id. at 1089-90*.

Likewise here, when the court reads the Class Complaint's allegations in class plaintiffs' favor, it finds allegations that defendants constructed "pay-for-delay" settlements as part of a scheme to maintain monopoly power and force consumers to pay inflated prices for the EpiPen. Construing the allegations in the light most favorable to class plaintiffs, the "pay-for-delay" settlements were not the "final" act of the conspiracy. Rather, defendants engaged in new and additional **[**159]** acts each time they charged the allegedly inflated prices for the EpiPen. And each of those acts inflicted a new and accumulating injury on the class plaintiffs because they had paid inflated prices for the EpiPen. The court concludes that the class plaintiffs asserted their claims timely under the continuing violation doctrine. It reaches this conclusion because the Class Complaint alleges damages for overcharges paid in **[*1330]** the four years before the filing of this lawsuit.

Second, the class plaintiffs contend that the doctrines of the discovery rule, fraudulent concealment, and equitable tolling apply to toll the statute of limitations. The class plaintiffs assert that the statute of limitations for their "pay-for-delay" claims did not commence when defendants entered the alleged reverse payment settlement in 2012. Instead, the class plaintiffs assert, these three doctrines toll the statute of limitations because defendants fraudulently concealed their actions and thus prevented the class plaintiffs from discovering their injuries and asserting their claims timely.

Indeed, the Class Complaint specifically alleges that the class plaintiffs "had no knowledge of the combination or conspiracy **[**160]** alleged herein, or of facts sufficient to place them on inquiry notice of the claims set forth herein, until on or about (at the earliest) August 22, 2016, the date [when] Congress publicly announced its investigation of EpiPen pricing." Class Compl. ¶ 503. The class plaintiffs assert that they are "consumers and third-party payors who had no direct contact or interaction with Defendants and had no means from which they could have discovered the combination and conspiracy described in this Complaint before August 1, 2016." *Id.* ¶ 504. They also assert that no information about the alleged unlawful activities was available in the public domain before August 1, 2016. *Id.* ¶ 505. Alternatively, the class plaintiffs allege, defendants actively concealed their anticompetitive conspiracy and also that defendants' scheme was self-concealing. *Id.* ¶¶ 509-10. The Class Complaint thus asserts that "a reasonable person under the circumstances would not have been alerted to begin to investigate the legitimacy of the Defendants' EpiPens prices before August 22, 2016." *Id.* ¶ 510. And, the class plaintiffs contend, they "could not have discovered the alleged unlawful activity, including the conspiracy **[**161]** or combination alleged herein, at an earlier date by the exercise of reasonable diligence because of the deceptive practices and techniques of secrecy employed by the Defendants and their co-conspirators to avoid detection of, and fraudulently conceal, their unlawful conduct." *Id.* ¶ 511.

HN53[] These allegations "assert[ ] affirmative conduct to conceal the fraud" and "are sufficient to invoke the doctrine of equitable tolling at this stage in the proceeding." *Aldrich v. McCulloch Props., Inc., 627 F.2d 1036, 1042 (10th Cir. 1980)* (citations omitted) (reversing district court's *Rule 12(b)(6)* dismissal of securities act violations on statute of limitations grounds because the Complaint sufficiently alleged fraudulent concealment to toll the statute of limitations and render the claims timely). Indeed, our Circuit has explained: "The question of whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law." *Id.* (citation omitted). Here, at the pleading stage, the class plaintiffs adequately have alleged facts capable of supporting the discovery rule, fraudulent concealment, and equitable tolling to avoid *Rule 12(b)(6)* dismissal on statute of limitations grounds.

D. State Consumer Protection [162] Claims**

The Class Complaint alleges that Mylan[23] has violated various state consumer protection laws. The Mylan Defendants argue that the Class Complaint fails to plead plausible claims under these state consumer **[*1331]** protection laws. And they assert four arguments why the court should dismiss the claims. The court addresses each argument separately, below.

1. Standing

First, the Mylan Defendants contend that the class plaintiffs lack standing to assert their state consumer protection claims. **HN54**[] Article III of the United States Constitution limits federal courts' jurisdiction to "cases" and "controversies." *Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)*. To present a case or controversy under Article III, a plaintiff must establish that he has standing to sue. *Id.* (citations omitted); *see also Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 133, 131 S. Ct. 1436, 179 L. Ed. 2d 523 (2011)* (citing *Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984))*. Article III standing requires a plaintiff to establish (1) that he or she has "suffered an 'injury in fact'"; (2) that the injury is "'fairly . . . trace[able] to the challenged action of the defendant'"; and, (3) that it is "'likely'" that "the injury will be 'redressed by a favorable decision.'" *Ariz. Christian Sch. Tuition Org., 563 U.S. at 134* (quoting *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*; *see also Awad v. Ziriax, 670 F.3d 1111, 1120 (10th Cir. 2012)*. "At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness **[**163]** which sharpens the presentation of issues upon which the court so largely depends for illumination." *Massachusetts v. E.P.A., 549 U.S. 497, 517, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)* (citation and internal quotation marks omitted).

The Mylan Defendants argue that the class plaintiffs lack standing to assert consumer protection claims because they neither plead (1) an injury-in-fact nor (2) that any injury is fairly traceable to defendants' conduct. Neither argument persuades the court.

HN55[] *First*, an injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan, 504 U.S. at 560* (citations and internal quotation marks omitted). The Supreme Court has explained the requirement of pleading injury in fact this way: "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id. at 561* (citations, internal quotation marks, and alterations omitted).

Like the arguments addressed above, the Mylan Defendants assert that the class plaintiffs cannot establish standing based on their pleading's allegations that they paid **[**164]** inflated prices for the EpiPen. The Mylan Defendants contend that the class plaintiffs received exactly what they purchased—an EpiPen device (or, in some contexts, two of them). And, according to the Mylan Defendants, absent allegations that the EpiPen was different

[23] The Class Complaint asserts the state consumer protection law claims just against Mylan. Class Complaint ¶¶ 683-93.

than what they expected to purchase, the class plaintiffs have no standing to assert their consumer protection claims.

For support, the Mylan Defendants rely on two cases where courts held that the plaintiffs had failed to allege actual injuries. *See* *Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315, 320 (5th Cir. 2002)* (holding that plaintiffs lacked standing to sue because they "concede they were not among the injured" by an allegedly defective drug but only claim economic injury without defining that injury); *see also* *Eike v. Allergan, Inc., 850 F.3d 315, 318 (7th* ***[*1332]*** *Cir. 2017)* (finding that class members lacked standing because "[o]ne cannot bring a suit in federal court without pleading that one has been injured in some way (physically, financially—whatever) by the defendant . . . [t]he fact that a seller does not sell the product that you want, or at the price you'd like to pay, is not an actionable injury; it is just a regret or disappointment—which is all we have here, the class having failed to allege 'an invasion of a legally protected interest.'" **[**165]** (quoting *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016)))*. But these cases differ from the class plaintiffs' allegations here. The Class Complaint in this case actually alleges injury in the form of economic loss. Specifically, the class plaintiffs allege that defendants engaged in unlawful conduct (including unfair methods of competition and unfair or deceptive acts or practices) and that, but for the unlawful conduct, the class plaintiffs "would have paid less for both branded and generic versions of EpiPen by: (a) substituting their purchases of EpiPen with less-expensive generic versions of EpiPen; (b) purchasing generic EpiPen at lower prices sooner; (c) purchasing individual, rather than pairs, of EpiPen injectors; (d) buying spare auto-injectors that were generic or cheaper brands; and (e) purchasing branded EpiPen at a reduced price." Class Compl. ¶ 492; *see also id*. ¶ 679 ("But for the Defendants' fraudulent scheme and racketeering, Plaintiffs and the Class would not have accepted, acquired, and purchased the EpiPen 2-Pak."). The class plaintiffs also allege that they—as a consequence of defendants' conduct—"have sustained substantial losses and property in the form of overcharges, the exact amount of which will be the **[**166]** subject of proof at trial." *Id.* ¶ 492.

HN56[] "Generally, economic injury is a paradigmatic form of injury in fact." *Gonzalez v. Pepsico, Inc., 489 F. Supp. 2d 1233, 1240 (D. Kan. 2007)* (citing *Danvers Motor Co. v. Ford Motor Co., 432 F.3d 286, 291 (3d Cir. 2005)* (further citations omitted)). In *Gonzalez*, our court held that a plaintiff sufficiently alleged "economic damages resulting from the difference between the purchase price of the beverage products as warranted and their actual value considering the potential presence of benzene in those products." *Id.* The court held that the "benefit of the bargain damages are sufficient to demonstrate an injury in fact." *Id.*

Although the class plaintiffs here never allege that they purchased a defective product, the court finds that they adequately have alleged economic loss sufficient to discharge the standing requirement. The class plaintiffs allege that Mylan's conduct caused them to pay inflated prices for the EpiPen, and—but for Mylan's unlawful conduct—they would have purchased other versions of the EpiPen (both branded and generic) at lower cost. *See* *Maya v. Centex Corp., 658 F.3d 1060, 1069 (9th Cir. 2011)* (holding plaintiffs' allegations that they "spent money that, absent defendants' actions, they would not have spent" constituted a "quintessential injury-in-fact" (citing *Gen. Motors Corp. v. Tracy, 519 U.S. 278, 286, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997)* (holding that consumers who paid more for gas than they **[**167]** should have as a result of discriminatory tax laws had Article III standing))); *see also* *Pirozzi v. Apple, Inc., 913 F. Supp. 2d 840, 846-47 (N.D. Cal. 2012)* ("Overpaying for goods or purchasing goods a person otherwise would not have purchased based upon alleged misrepresentations by the manufacturer would satisfy the injury-in-fact and causation requirements for Article III standing."). *Cf.* *Estrada v. Johnson & Johnson, No. 2:14-cv-01051-TLN-EFB, 2015 U.S. Dist. LEXIS 39581, 2015 WL 1440466, at *5 (E.D. Cal. Mar. 27, 2015)* (holding that plaintiff lacked **[*1333]** standing because she never alleged that she would have purchased an alternative product but for defendant's conduct). Accepting these allegations as true and in the class plaintiffs' favor—as the court must for now—the court concludes the class plaintiffs have alleged an injury in fact.

HN57[] *Second*, to satisfy the standing requirement of traceability, "the defendant[s'] conduct must have caused the injury." *Benham v. Ozark Materials River Rock, LLC, 885 F.3d 1267, 1273 (10th Cir. 2018)*. "[T]he 'traceability' of a plaintiff's harm to the defendant's actions need not rise to the level of proximate causation." *Habecker v. Town of Estes Park, Colo., 518 F.3d 1217, 1225 (10th Cir. 2008)*. But "Article III does 'require proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact.'" *Id.* (quoting *Nova Health Sys. v. Gandy, 416 F.3d 1149, 1156 (10th Cir. 2005))*.

Here, the class plaintiffs allege that Mylan engaged in unlawful anticompetitive conduct and unfair or deceptive practices. **[**168]** The class plaintiffs allege that Mylan's actions caused them to pay inflated prices for the EpiPen. And, the class plaintiffs allege, but for Mylan's unlawful conduct, they would have paid less for the EpiPen (both branded and generic versions). The court finds these alleged injuries are "fairly traceable" to Mylan's alleged conduct, and they suffice to satisfy the standing requirement at the pleading stage.

2. Preemption

The Mylan Defendants next assert that federal patent law preempts the class plaintiffs' state consumer protection law claims. In essence, the Mylan Defendants argue that the class plaintiffs are using state consumer protection laws to regulate the EpiPen's price—a patented product. The Mylan Defendants contend that federal patent law preempts these claims because the patent holder maintains the exclusive right to make pricing decisions about its patented product. Doc. 95 at 85-87 (first citing *Biotech. Indus. Org. v. District of Columbia, 496 F.3d 1362, 1374 (Fed. Cir. 2007)* (holding that federal patent law preempted the *District of Columbia's Prescription Drug Excessive Pricing Act of 2005* because the "underlying determination about the proper balance between innovators' profit and consumer access to medication . . . is exclusively one for Congress **[**169]** to make," and the local law stood "as an obstacle to the federal patent law's balance of objectives"); then citing *Se. Pa. Transp. Auth. v. Gilead Scis., Inc., 102 F. Supp. 3d 688, 703 (E.D. Pa. 2015)* (holding that "[t]o the extent that plaintiffs seek to use state law to challenge [defendant's] exercise of its exclusive patent rights to make pricing decisions, plaintiffs' claims are preempted")).

The class plaintiffs respond that their state consumer protection claims don't challenge Mylan's rights under the patent laws to make pricing decisions. Instead, the class plaintiffs explain, their state consumer protection law claims allege that Mylan engaged in unfair methods of competition, unfair or deceptive acts or practices, or unconscionable acts or practices that violated various state consumer protection laws. The class plaintiffs allege that these violations furthered defendants' scheme to charge inflated prices for the EpiPen. According to the class plaintiffs, Mylan did not confine its conduct to lawful use of its patent rights. Instead, the class plaintiffs allege, Mylan engaged in unlawful conduct that caused consumers to pay inflated prices for the EpiPen.

As the class plaintiffs point out, the Mylan Defendants cited no authority holding that federal patent **[**170]** law permits a patent holder to commit unfair and deceptive practices that violate state consumer protection laws—simply because **[*1334]** it owns patent rights. Indeed, many courts have concluded just the opposite. These cases hold that federal patent law does not preempt state consumer protection claims when a state law claim "'address[es] entirely different wrongs[,]' 'provide[s] different forms of relief,' and 'is not an impermissible attempt to offer patent-like protection to subject matter addressed by federal law.'" *In re Loestrin 24 Fe Antitrust Litig., 261 F. Supp. 3d 307, 357 (D.R.I. 2017)* (quoting *Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470, 1478 (Fed. Cir. 1998))*. "For the claim to escape preemption, it must seek a remedy for 'bad faith misconduct in the marketplace,' rather than 'bad faith misconduct in the PTO.'" *Id.* (citing *Dow Chem., 139 F.3d at 1476-78*). This standard requires a plaintiff to "allege and ultimately prove, fraud on the PTO *or* bad faith in the marketplace, regardless of whether the underlying state claim demands proof of such conduct." *Id.* (citation omitted) (emphasis added).

Applying that legal standard to the allegations here, the class plaintiffs have alleged that Mylan has committed a variety of misconduct in the marketplace and thus violated the state consumer protection laws. Class Complaint ¶¶ 684.a.-684.bb. Specifically, **[**171]** the Class Complaint alleges that Mylan violated state consumer protection laws by "engaging in misleading, false, unfair and/or deceptive acts or practices by foreclosing from consumers and the general public the opportunity to purchase cheaper generic versions of the EpiPen and/or cheaper products that could have competed with the EpiPen through anticompetitive practices including patent misuse, reverse 'pay-for-delay' settlements, and sham citizens' petitions as described herein." *Id.* ¶ 684.x.

Other courts have found allegations like this sufficient to state plausible consumer protection law claims not preempted by the federal patent laws. *See, e.g., Picone v. Shire PLC, No. 16-cv-12396-ADB, 2017 U.S. Dist. LEXIS 178150, 2017 WL 4873506, at *14 (D. Mass. Oct. 20, 2017)* (denying portion of *Rule 12(b)(6)* motion seeking dismissal of state consumer protection and ***antitrust law*** claims based on preemption because those claims "are based on tortious conduct in the marketplace—*i.e.*, the purportedly illegal settlement agreements—that require different elements than any arguably corresponding federal patent law claim (such as patent invalidity), and are therefore not protected or governed by federal patent law"); *In re Loestrin 24 Fe Antitrust Litig., 261 F. Supp. 3d at 357* (holding on **[**172]** a *Rule 12(b)(6)* motion to dismiss that federal patent law did not preempt plaintiffs' state consumer protection law claims because plaintiffs alleged that defendants enforced their patent in the marketplace with bad faith); *In re DDAVP Indirect Purchaser Antitrust Litig., 903 F. Supp. 2d 198, 224 (S.D.N.Y. 2012)* (holding on a *Rule 12(b)(6)* motion that the patent laws didn't preempt plaintiffs' state consumer protection law claims because plaintiffs alleged other "wrongful conduct in the marketplace" to support the claims such as "an invalid Orange Book listing, sham patent infringement litigation, and a sham citizen petition").

The court denies the Mylan Defendants' motion to dismiss the class plaintiffs' state consumer protection law claims based on a federal preemption defense.

3. Elements of the State Consumer Protection Law Claims

The Mylan Defendants next contend that the class plaintiffs have failed to plead the elements of their state consumer protection law claims. Specifically, the Mylan Defendants argue that the Class Complaint never alleges: (1) deceptive or misleading conduct; (2) unfair or unconscionable conduct; (3) actual loss; (4) reliance; (5) causation; or (5) the requisite particularity **[*1335]** to support the claims. The court rejects each of these arguments.

First, the Mylan Defendants **[**173]** assert that the Class Complaint never pleads any deceptive or misleading conduct capable of supporting any of their state consumer protection law claims. As the class plaintiffs explain, the various state consumer protection laws pleaded in the Class Complaint differ in their language. But all of them prohibit deceptive or misleading acts or practices in trade or commerce.

HN58[] Our court and many others have recognized that the question whether an act is deceptive is a factual one for the jury to decide. *Tufts v. Newmar Corp., 53 F. Supp. 2d 1171, 1177 (D. Kan. 1999)* (citing *Farrell v. Gen. Motors Corp., 249 Kan. 231, 815 P.2d 538, 547 (Kan. 1991))*; *see also* *Organic Consumers Assoc. v. Sanderson Farms, Inc., 284 F. Supp. 3d 1005, 1014 (N.D. Cal. 2018)* ("Whether a business practice is deceptive [and thus violates the California consumer protection laws] is generally a question of fact that requires weighing of evidence from both sides."); *Nature's Prods., Inc. v. Natrol, Inc., 990 F. Supp. 2d 1307, 1322 (S.D. Fla. 2013)* (holding that the jury must decide whether a seller's representation (*i.e.*, that certain healthcare products were gluten free) constituted an unfair or deceptive trade practice under the Florida statute because it presented "a question of fact for the jury to determine"); *Quinn v. Walgreen Co., 958 F. Supp. 2d 533, 543 (S.D.N.Y. 2013)* ("Under either [the New York or Connecticut consumer protection] statute, whether a particular act or practice is deceptive is usually a question of fact.") (citations omitted)).

Here, the class plaintiffs assert **[**174]** that they have alleged various deceptive acts capable of supporting a finding or inference that Mylan violated state consumer protection laws. The court agrees. The Class Complaint alleges that Mylan made several misrepresentations as part of defendants' scheme to monopolize the EAI market and charge consumers inflated prices for the EpiPen. These misrepresentations include: misinformation about Auvi-Q and its bioequivalence to the EpiPen (Class Complaint ¶¶ 229-31); misleading statements about EpiPen's status as the "preferred brand" and suggesting that Auvi-Q's exclusion from drug formularies was based on clinical recommendations and not Mylan's huge, conditional rebates (*id.* ¶¶ 232-34); false representations about the medical necessity of the EpiPen 2-Pak (*id.* ¶¶ 335-46); Ms. Bresch's false statement that Mylan had invested $1 billion in developing the EpiPen to create "access and awareness and improv[e] the product" (*id.* ¶ 375); and falsely claiming that 80% of consumers with insurance pay nothing for EpiPen (*id.* ¶¶ 403-04).

The Mylan Defendants assert that these alleged misrepresentations cannot possibly support state law consumer protection claims because none amounted to material **[**175]** representations, *i.e.*, these statements did not affect consumers' purchasing decisions because no reasonable person would attach importance to them. The court cannot reach this conclusion as a matter of law based on the allegations pleaded by the class plaintiffs. Indeed, as the class plaintiffs argue, in the context of reviewing orders issued by the Federal Trade Commission, courts have recognized the FTC's presumption of materiality for matters "that significantly involve health, safety, or other areas with which the reasonable consumer would be concerned, including a claim that concerns the purpose, safety, efficacy, or *cost* of the product or service, its durability, performance, warranties or quality or a finding by another agency regarding the product." *Novartis Corp. v. FTC, 223 F.3d 783, 786, 343 U.S. App. D.C. 111 (D.C. Cir. 2000)* (citations and internal quotations marks omitted) (emphasis added); *see also Kraft,* ***[*1336]*** *Inc. v. FTC, 970 F.2d 311, 322 (7th Cir. 1992)* (enforcing an FTC order finding that Kraft had misrepresented information about the amount of calcium contained in its cheese Singles relative to the calcium content in five ounces of milk and concluding that the evidence supporting the presumption of materiality). It is plausible to infer from the class plaintiffs' allegations that a consumer would **[**176]** find the alleged misrepresentations about the EpiPen's cost material to consumers. The same is true for the medical necessity of the 2-Pak and Auvi-Q's bioequivalence to the EpiPen. The court thus finds that the class plaintiffs' allegations sufficiently allege material misrepresentations to support the state consumer protection law claims and survive dismissal at the pleading stage.

Also, the Mylan Defendants assert that none of the alleged misrepresentations about the EpiPen price could have misled consumers about the actual price or the nature of the product. The court disagrees. The class plaintiffs direct the court to at least two alleged misrepresentations that—when viewed in the class plaintiffs' favor—permit a plausible inference that these statements were deceptive. First, the Class Complaint alleges that Mylan stated publicly on its website and in the media that "80% of consumers with insurance pay nothing for the EpiPen." Class Compl. ¶ 403. The Class Complaint alleges that this statement is a pernicious "half-truth" because, as one commentator has questioned, the EpiPen's retail price is over $600 and many Americans have high-deductible health plans that require making payments **[**177]** out of pocket before insurance coverage applies. *Id.* Also, the class plaintiffs contend, this statement ignores the costs that insurance companies incur to pay for the EpiPen which, in turn, produces increased premiums and higher co-pays. *Id.* ¶ 404. Construing the allegations in the class plaintiffs' favor, it is plausible to infer that this statement misled consumers about the EpiPen's true price.

Next, the class plaintiffs assert that Ms. Bresch falsely stated during a *Forbes* Summit interview that " Mylan has invested $1 billion in developing the EpiPen in creating access and awareness and improving the product." *Id.* ¶ 375 (citation and internal quotation marks omitted). The Class Complaint alleges that this statement was false because Mylan did not spend $1 billion on actual product improvement but, instead, spent it on lobbying and paying its executives. *Id.* ¶ 385. Accepting these allegations as true—as the court must on a motion to dismiss—it is plausible to infer that these false statements misled consumers about the EpiPen and influenced their purchasing decisions.[24]

The Mylan Defendants also contend that Mylan's statements about the medical **[*1337]** necessity of the EpiPen **[**178]** 2-Pak are not deceptive. For support, the Mylan Defendants have submitted a chart comparing statements from an August 2011 press release about the 2-Pak with NIAID and WAO guidelines. Doc. 95-9. In doing so, the Mylan Defendants ask the court to construe the medical guidelines and find that they support Mylan's statement in the press release that its decision to sell only the EpiPen 2-Pak "aligns" with medical guidelines. *Id. at 3*. The court cannot properly decide this factual dispute on a motion to dismiss. Also, the class plaintiffs assert that

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[24] The Mylan Defendants also assert that Ms. Bresch's statements to *Forbes* are not actionable because she did not make them to consumers. For support, the Mylan Defendants cite *Group Health Plan, Inc. v. Philip Morris, Inc., 68 F. Supp. 2d 1064 (D. Minn. 1999)*. In that case, the Minnesota federal court dismissed plaintiffs' claims under the Minnesota consumer protection laws because the complaint "contain[ed] no allegations that Defendants were attempting to sell their products" when they made the alleged misrepresentations while testifying before Congress. *Id. at 1069*. Also, plaintiffs "[did] not allege that they purchased any products from Defendants." *Id.* Those facts differ significantly from the ones here.

The class plaintiffs have alleged that they purchased the EpiPen. Also, the class plaintiffs allege that Ms. Bresch made the false statements to *Forbes* as part of defendants' scheme to monopolize the market and inflate the EpiPen's price. It is plausible to infer from the Class Complaint's allegations that Ms. Bresch directed the statements to consumers—through an interview with a nationally circulated magazine—as part of defendants' scheme to sell the EpiPen to consumers at inflated prices.

the press release is misleading because it omits material facts. These allegations suffice to allege that Mylan's statements about the EpiPen 2-Pak were deceptive or misleading.

Finally, the Mylan Defendants argue that the alleged misleading statements about Auvi-Q cannot support the state consumer protection law claims. The Mylan Defendants contend that the statements could not have caused consumers to purchase EpiPen over Auvi-Q because the class plaintiffs never allege that Auvi-Q was a superior product or less expensive than EpiPen. The Mylan Defendants assert that the class plaintiffs could make no such allegations because, in October 2015, Sanofi **[**179]** recalled Auvi-Q from the market. As the class plaintiffs argue, however, the Mylan Defendants ignore the context of the alleged misrepresentations about Auvi-Q. The Class Complaint alleges that Mylan made the misrepresentations as part of defendants' scheme to restrain competition in the EAI market and, specifically, to block Auvi-Q from that market. *See* Class Compl. ¶ 235. On a motion to dismiss, the court cannot determine—as a matter of law—whether Auvi-Q left the market because of manufacturing issues or, as the class plaintiffs assert, Mylan's conduct prevented it from gaining traction in the market. The court thus finds that the allegedly deceptive and misleading statements about Auvi-Q suffice to support the state consumer protection law claims.

Second, the Mylan Defendants argue that the class plaintiffs never allege any unfair practices that violate state consumer protection laws. Largely, the Mylan Defendants premise this argument on ones that defendants asserted earlier in their briefs. The Mylan Defendants contend that the Class Complaint fails to allege that Mylan engaged in any anticompetitive or fraudulent conduct capable of supporting a finding or inference that it engaged **[**180]** in unfair practices violating state consumer protection laws. But the court already has determined that the Class Complaint plausibly alleges that defendants—including Mylan—violated the antitrust and RICO laws by implementing a fraudulent scheme to monopolize the market and force consumers to pay inflated prices for EpiPen. As explained in the next paragraph, these allegations also suffice to assert plausibly that Mylan engaged in unfair practices violating state consumer protection laws.

HN59[] As both parties explain in their briefs, states apply different standards to determine what constitutes unfair or unconscionable conduct capable of violating state consumer protection laws. Some states employ the "cigarette test," examining whether the alleged unfair practice: (1) offends established public policy; (2) is immoral, unethical, oppressive, unscrupulous; and (3) causes substantial injury to consumers. *See, e.g., Zito v. United Techs. Corp., No. 3:15-cv-744(AWT), 2016 U.S. Dist. LEXIS 31373, 2016 WL 2946157, at *6 (D. Conn. Mar. 11, 2016)* (explaining that Connecticut has adopted the "cigarette" test for determining when a practice is unfair under the *Connecticut Unfair Trade Practices Act*); *see also Hucke v. Kubra Data Transfer Ltd., Corp., 160 F. Supp. 3d 1320, 1328 (S.D. Fla. 2015)* (applying the "cigarette test" to a **[**181]** *Florida Deceptive and Unfair Trade Practices Act* **[*1338]** claim); *Hanrahan v. Specialized Loan Servicing, LLC, 54 F. Supp. 3d 149, 154 (D. Mass. 2014)* (applying the "cigarette test" to the *Massachusetts Consumer Protection Act*); *Rodriguez v. Chase Home Fin., LLC, No. 10 C 05876CH, 2011 U.S. Dist. LEXIS 123166, 2011 WL 5076346, at *3 (N.D. Ill. Oct. 25, 2011)* (applying the "cigarette test" to an *Illinois Consumer Fraud Act* claim).

Other states apply a "substantial injury" test, considering whether the alleged unfair practice: (1) produces substantial injury to consumers; (2) is not the type of injury that a consumer reasonably could avoid; and (3) is not outweighed by countervailing benefits to consumers or competition. *See, e.g.*, *Kautsman v. Carrington Mortg. Servs., LLC*, No. C16-1940-JCC, 2017 WL 8727860, at *1 (W.D. Wash. Nov. 3, 2017) (applying the "substantial injury" test to a *Washington Consumer Protection Act* claim); *Sager v. Hous. Comm'n of Anne Arundel Cty., 957 F. Supp. 2d 627, 642 (D. Md. 2013)* (applying the "substantial injury" test to a *Maryland Consumer Protection Act* claim); *Darling v. W. Thrift & Loan, 600 F. Supp. 2d 189, 202 (D. Me. 2009)* (applying the "substantial injury" test to a *Maine Unfair Trade Practices Act* claim).

The class plaintiffs have demonstrated that their allegations suffice to state a claim under either one of these tests. The Class Complaint adequately alleges the three elements of first test recited above—the "cigarette test." First, the class plaintiffs allege that Mylan's unfair acts offend public policy. Class Compl. ¶ 1012. Construing their allegations **[**182]** in the class plaintiffs' favor, Mylan's alleged unfair conduct offended the public policy against anticompetitive and fraudulent conduct and the public policy favoring consumer protection.[25] Second, the class plaintiffs allege that the conduct is "immoral, unethical, oppressive, [and] unscrupulous . . . ." *See, e.g., Votto v. Am. Car Rental, Inc., 273 Conn. 478, 871 A.2d 981, 985 (Conn. 2005)*. One court has defined the second prong of this test as including "[a] trade practice that is undertaken to maximize the defendant's profit at the expense of the plaintiff's rights . . . ." *Id.* (applying the cigarette test to a Connecticut Unfair Trade Practices Act claim). One reasonably can infer that Mylan's alleged conduct satisfies that definition under the test's second prong. Finally, the class plaintiffs allege that the unfair conduct substantially injured consumers. *Id.* Taking the allegations as true, the Class Complaint alleges that Mylan's conduct substantially injured the class plaintiffs by forcing them to pay inflated prices for the EpiPen.

The Class Complaint also plausibly alleges the elements of the second test—the "substantial injury" test. Namely, it asserts that: (1) the class plaintiffs allege that Mylan's unfair conduct substantially harmed consumers **[**183]** by requiring them to pay inflated prices for the EpiPen; (2) the class plaintiffs allege that they could not have avoided this injury because Mylan—through its unfair conduct—restrained competition, limited consumer choice, and prevented consumers from accessing competing products, and (3) the class plaintiffs identify no countervailing benefits to consumers or competition that could outweigh Mylan's unfair conduct.

[*1339] In sum, the court concludes that the class plaintiffs' allegations plausibly allege unfair practices sufficient to support their state consumer protection law claims.[26]

Third, the Mylan Defendants assert that the state consumer protection law claims fail as a matter of law because the class plaintiffs never allege that they sustained an actual injury or ascertainable loss. The Mylan Defendants' arguments mirror the ones that they asserted to attack the class plaintiffs' standing. For the same reasons already explained, the court rejects the Mylan Defendants' arguments. The class plaintiffs have pleaded economic loss adequately to support state law consumer protection claims.

Fourth, the Mylan Defendants argue that the class plaintiffs have failed to plead reliance. But, **[**184]** when pleading their state consumer protection law claims, the Class Complaint explicitly alleges that the class plaintiffs relied on Mylan's misrepresentations and omissions about the EpiPen. *See, e.g.*, Class Complaint ¶¶ 716, 729, 748, 789, 806, 820, 835, 848, 863, 878, 893, 910, 925, 941, 956, 971, 986, 1001, 1018, 1036, 1050, 1063, 1076, 1101, 1115, 1127, 1141, 1155, 1168, 1183, 1196, 1211, 1225, 1239, 1253, 1267, 1281, 1296, 1312, 1328, 1343, 1357, 1372, 1386, 1401, 1416.

The Mylan Defendants contend that the class plaintiffs' reliance allegations are just conclusory, and thus insufficient to support the state consumer protection law claims. ***HN60***[] In the context of a fraud claim, our court has held that a plaintiff—to satisfy *Rule 9(b)*'s heightened pleading standard—need only allege that it relied on an alleged misrepresentation. Such allegations need not assert "details concerning its reliance" because "the Tenth Circuit's standard does not require more." *In re Syngenta AG MIR 162 Corn Litig., 131 F. Supp. 3d 1177, 1228 (D. Kan. 2015)* (first citing *Koch v. Koch Indus., Inc., 203 F.3d 1202, 1236 (10th Cir. 2000)*; then citing *Mattos v. Eli Lilly & Co., No. 12-1014-JWL, 2012 U.S. Dist. LEXIS 71519, 2012 WL 1893551, at *7 n.7 (D. Kan. May 23, 2012)*

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[25] The Mylan Defendants assert that public policy supports Mylan's freedom to set prices for the EpiPen—as its patent holder—because the exclusivity granted by patent rights encourages innovation. Here, the class plaintiffs allege that Mylan did more than simply set prices as a patent holder. Instead, the Class Complaint alleges that Mylan engaged in various anticompetitive and fraudulent competition for the purpose of restraining competition. The court recognizes that these are just allegations in the Class Complaint, but the court must accept them as true facts on a motion to dismiss. Taking them as true, public policy does not favor this type of conduct.

[26] The Mylan Defendants also assert that the class plaintiffs fail to allege a claim under California's Unfair Competition Law ("UCL"). This law requires a plaintiff to allege that defendant violated some other law. *See Moran v. Prime Healthcare Mgmt., Inc., 3 Cal. App. 5th 1131, 208 Cal. Rptr. 3d 303, 311 (Cal. Ct. App. 2016)* (explaining that "violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong" (citation and internal quotation marks omitted)). As the court already has concluded, the class plaintiffs plausibly have alleged that defendants (including Mylan) violated other laws—including the antitrust laws and RICO. These allegations suffice to support a plausible claims under the California UCL.

(Lungstrum, J.)). In *Syngenta*, Judge Lungstrum held that a plaintiff's allegation that it had relied on the alleged misrepresentations sufficed to state **[**185]** a fraud claim and that defendant was "free to ask about the details of [the plaintiff's] reliance in discovery." *Id.* Applying the same rationale here, the class plaintiffs' allegations that they relied on Mylan's misrepresentations adequately state a claim for relief. Like Judge Lungstrum explained in *Syngenta*, the Mylan Defendants can inquire during discovery about the details of that alleged reliance.

Also, as the class plaintiffs correctly assert, a majority of their ***HN61***[] state consumer protection law claims do not require them to plead reliance.[27] And, for other **[*1340]** states, the class plaintiffs need not plead reliance when they allege misrepresentations by concealment or omission. *See In re Motor Fuel Temperature Sales Practices Litig., 292 F.R.D. 652, 663 & n.5 (D. Kan. 2013)* (holding that plaintiffs need not prove actual reliance to support their California Unfair Competition Law claims because "actual reliance is presumed given [defendant's] material misrepresentations and omissions"). *See also, e.g.*, *Glenn v. Hyundai Motor Am., No. SA CV 15-2052-DOC, 2016 U.S. Dist. LEXIS 181318, 2016 WL 3621280, at *12-13 (C.D. Cal. June 24, 2016)* (holding that plaintiff stated a claim under the *Alabama Deceptive Trade Practices Act* based on defendants' alleged omissions that had plaintiff known the truth, he would not have made the purchase); **[**186]** *Wright v. Kia Motors Am., Inc., No. Civ. 06-6212-AA, 2007 U.S. Dist. LEXIS 7431, 2007 WL 316351, at *3 (D. Or. Jan. 29, 2007)* (denying *Rule 12(b)(6)* motion to dismiss *Oregon Unfair Trade Practices Act* claim because plaintiff need not allege reliance when she alleged that defendant failed to disclose material facts). The Class Complaint here alleges various omissions of material fact that allow the court to presume reliance under these state consumer protection statutes. *See* Class Complaint ¶¶ 684.c., 684.e., 684.i., 684.j., 684.m., 684.n., 684.o.-684.t., 684.aa., 747-49.

The Mylan Defendants also allege that the class plaintiffs' consumer protection claims under six state laws fail as a matter of law because those state laws require continuing harm. *See* Doc. 95 at 49 n.45 (citing the Georgia, Illinois, Maine, Minnesota, New Mexico, and Ohio statutes). But the Class Complaint seeks injunctive relief "to stop Mylan's *continued deceptive and unconscionable practices* of **[*1341]** selling the EpiPen 2-Pak at an inflated price." Class

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[27] These state consumer protection laws include: **Arizona** (*Siemer v. Assocs. First Capital Corp., No. CV97-281TUCJMRJCC, 2001 U.S. Dist. LEXIS 12810, 2001 WL 35948712, at *4 (D. Ariz. Mar. 30, 2001)* (holding that plaintiffs' purchases of credit life insurance was "alone . . . sufficient to show reliance to the degree necessary" under the *Arizona Consumer Fraud Act*)); **Arkansas** (*Frelin v. Oakwood Homes Corp.*, No. CIV-2001-53-3, 2002 WL 31863487, at *4 (Ark. Cir. Ct. Nov. 25, 2002)); ***Colorado** (Hall v. Walter, 969 P.2d 224, 231 (Colo. 1998))*; ***Connecticut** (Hinchliffe v. Am. Motors Corp., 184 Conn. 607, 440 A.2d 810, 815-16 (Conn. 1981))*; ***Delaware** (Stephenson v. Capano Dev., Inc., 462 A.2d 1069, 1074 (Del. 1983))*; ***Florida (Davis v. Powertel, Inc., 776 So. 2d 971, 974 (Fla. Dist. Ct. App. 2000))***; ***Hawaii** (Courbat v. Dahana Ranch, Inc., 111 Haw. 254, 141 P.3d 427, 435 (Haw. 2006))*; ***Illinois** (Connick v. Suzuki Motor Co., Ltd., 174 Ill. 2d 482, 675 N.E.2d 584, 593, 221 Ill. Dec. 389 (Ill. 1996))*; **Kansas** (*Kan. Stat. Ann. § 50-626(b)(1)*; *see also Midland Pizza, LLC v. Sw. Bell Tel. Co., No. 10-2219-CM-GLR, 2010 U.S. Dist. LEXIS 118855, 2010 WL 4622191, at *3 (D. Kan. Nov. 5, 2010)* (citing Pattern Instructions Kansas, Civil 4th § 129.01-A)); ***Kentucky** (Telcom Directories, Inc. v. Commonwealth ex rel. Cowan, 833 S.W.2d 848, 850 (Ky. Ct. App. 1991))*; ***Maine** (Doll v. Ford Motor Co., 814 F. Supp. 2d 526, 549 (D. Md. 2001)* (discussing the pleading requirements of a Maine Unfair Practices Act claim); *Tungate v. MacLean-Stevens Studios, Inc., 1998 ME 162, 714 A.2d 792, 797 (Me. 1998))*; **Maryland** (*Md. Code Ann. Com. Law § 13-302*); **Massachusetts** *(Heller Fin. v. INA, 410 Mass. 400, 573 N.E.2d 8, 13 (Mass. 1991))*; **Michigan** *(Evans v. Ameriquest Mortg. Co., No. 233115, 2003 Mich. App. LEXIS 564, 2003 WL 734169, at *3 (Mich. Ct. App. Mar. 4, 2003))*; ***Minnesota** (Wiegand v. Walser Auto. Grps., Inc., 683 N.W.2d 807, 811 (Minn. 2004))*; ***Missouri** (Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758, 774 (Mo. 2007))*; **New Hampshire** *(Mulligan v. Choice Mortg. Corp., No. CIV. 96-596-B, 1998 U.S. Dist. LEXIS 13248, 1998 WL 544431, at *11 (D.N.H. Aug. 11, 1998))*; ***New Jersey** (Gennari v. Weichert Co. Realtors, 148 N.J. 582, 691 A.2d 350, 366 (N.J. 1997))*; ***New Mexico** (Lohman v. Daimler-Chrysler Corp., 2007-NMCA 100, 142 N.M. 437, 166 P.3d 1091, 1098 (N.M. Ct. App. 2007)*; ***New York** (Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 647 N.E.2d 741, 745, 623 N.Y.S.2d 529 (N.Y. 1995))*; ***North Carolina** (Pearce v. Am. Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174, 180 (N.C. 1986))*; ***Ohio** (Delahunt v. Cytodyne Techs., 241 F. Supp. 2d 827, 835-36 (S.D. Ohio 2003))*; ***South Carolina** (City of Charleston v. Hotels.com, LP, 487 F. Supp. 2d 676, 680 (D.S.C. 2007))*; **Tennessee** *(Fleming v. Murphy, No. W2006-00701-COA-R3-CV, 2007 Tenn. App. LEXIS 451, 2007 WL 2050930, at *8 (Tenn. Ct. App. July 19, 2007))*; ***Utah** (Andreason v. Felsted, 2006 UT App 188, 137 P.3d 1, 4 (Utah Ct. App. 2006))*; **Vermont** (*Vt. Stat. Ann. tit. 9, § 2461(b)*); ***Washington** (Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 170 P.3d 10, 19-22 (Wash. 2007))*; **West Virginia** (*W. Va. Code Ann. § 46A-6-102(7)(M)*).

Compl. ¶ 692 (emphasis added). The court finds these allegations **[**187]** sufficient to assert continuing harm under the consumer protection laws of these six states.

In sum, the court declines to dismiss the class plaintiffs' state consumer protection law claims based on the Mylan Defendants' argument that the Class Complaint never pleads reliance.

Fifth, the Mylan Defendants contend that the state consumer protection law claims fail because the class plaintiffs never allege that Mylan's conduct caused their injuries. The Mylan Defendants rely again on their standing arguments. *See* Doc. 219 at 49. As the court concluded above, the Class Complaint adequately alleges that Mylan's unlawful conduct caused them to pay inflated prices for the EpiPen, and—but for Mylan's unlawful conduct—the class plaintiffs would have paid less for the EpiPen (both branded and generic versions). These allegations adequately allege causation sufficient to support the state consumer protection law claims.

Finally, the Mylan Defendants assert that the class plaintiffs have failed to plead the state consumer protection law claims with the particularity required by *Fed. R. Civ. P. 9(b)*. The class plaintiffs respond, asserting that at least 15 state consumer protection statutes don't require a plaintiff **[**188]** to plead the claims with particularity. Doc. 123 at 143 & n.567. The class plaintiffs also assert that *Rule 9(b)*'s heightened pleading standards don't apply to their allegations of fraud by omission or concealment. *See, e.g.*, *AKH Co. v. Universal Underwriters Ins. Co., No. 13-2003-JAR, 2015 U.S. Dist. LEXIS 52056, 2015 WL 1809157, at *13 (D. Kan. Apr. 21, 2015)* (explaining that "allegations of concealment, as opposed to an affirmative act, do not require the same level of specificity because often it is impossible to know of the exact 'who, when, and where' in relation to an omission" and finding that "[g]iven this relaxed standard" the alleged claims about concealment were sufficiently specific to state a fraud claim). And, the class plaintiffs contend, they need not plead their claims based on unconscionable or unfair practices with particularity. *See* *DuMont v. Litton Loan Servicing, LP, No. 12 Civ. 2677(ER), 2015 U.S. Dist. LEXIS 29787, 2015 WL 1061138, at *13 (S.D.N.Y. Mar. 11, 2015)* (explaining that " unconscionable commercial practices claims are distinct from [consumer protection] claims sounding in fraud," and thus "the heightened pleading standard of *Rule 9(b)* does not apply" (citations and internal quotation marks omitted)).

The court concludes that the class plaintiffs have alleged their state consumer protection law claims with sufficient particularity. ***HN62***[] The Tenth Circuit "requires a complaint alleging **[**189]** fraud to set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *See* *Koch v. Koch Indus., Inc., 203 F.3d 1202, 1236 (10th Cir. 2000)* (internal quotation and citation omitted). The Class Complaint satisfies that standard here.

It alleges several misrepresentations or omissions identifying the time, place, and contents of the alleged misrepresentations, as well as the identity of the party making them. For example, the Class Complaint alleges that Mylan CEO Heather Bresch gave false and misleading statements about EpiPen's profits and the reasons for raising the EpiPen's profits in her September 21, 2016, Congressional testimony, a January 27, 2017, interview with CBS News, a June 9, 2017, interview with the *Los Angeles Times*, and a December 1, 2016, *Forbes* Summit interview. *See* Class Complaint ¶¶ 194-95, 375, 417-48. It also alleges that Mylan made misleading statements in an August 24, 2011, press release **[*1342]** about its decision to sell the EpiPen exclusively as a 2-Pak. *Id.* ¶¶ 336-39. It also alleges that Mylan made misleading statements in its marketing materials distributed during 2014. *Id.* 232-34. According to the Class Complaint, the marketing materials included **[**190]** misleading statements, touting EpiPen as the "preferred brand" and suggesting that Auvi-Q's exclusion was based on clinical recommendations—not the large, conditional rebates that Mylan gave to formularies in exchange for offering EpiPen exclusively and excluding Auvi-Q. *Id.*

While it is true, the Class Complaint does not "provide[ ] details about how and when" the class plaintiffs learned about the misrepresentations, this is of no legal consequence at this stage. ***HN63***[] The "Tenth Circuit's standard requires only particular information about the representation itself." *In re Syngenta AG MIR 162 Corn Litig., 131 F. Supp. 3d at 1228* (citing *Near v. Crivello, 673 F. Supp. 2d 1265, 1285 (D. Kan. 2009))*. As Judge Lungstrum explained, "[a] plaintiff need not plead every fact that supports its claim of fraud, and such facts concerning [a plaintiff's] receipt of the statements are readily obtained in discovery." *Id.* Here, the Class Complaint's allegations about Mylan's purported misrepresentations satisfy the Tenth Circuit's standard.

The Class Complaint also alleges the consequences of Mylan's alleged misrepresentations. They caused the class plaintiffs to pay inflated prices for the EpiPen. *Id.* ¶¶ 492, 685-91. For all these reasons, the court finds that **[**191]** the class plaintiffs have alleged their state consumer protection law claims with sufficient particularity—to the extent the asserted state law claims even require such heightened pleading.

4. Specific State Consumer Protection Laws

Finally, the Mylan Defendants assert that the court must dismiss the class claims under certain state consumer protection laws because those statutes bar class actions. These statutes include the state consumer protection laws of Alabama, Colorado, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee.

The class plaintiffs respond, asserting that the Mylan Defendants' argument is premature and without merit. They contend that the court can address this issue at the class certification stage, and, even then, other courts have permitted putative class action claims for state consumer protection violations to proceed despite a statute's restrictions on class actions. *See* *Lisk v. Lumber One Wood Preserving, LLC, 792 F.3d 1331, 1336 (11th Cir. 2015)* (holding that the Alabama Deceptive Trade Practices Act "restricting class actions . . . does not apply in federal court. *Rule 23* controls."); *Suchanek v. Sturm Foods, Inc., 311 F.R.D. 239, 264 (S.D. Ill. 2015)* (holding that *Rule 23* governed plaintiffs' consumer protection act claims under Alabama, South Carolina, and Tennessee law despite those statutes' restrictions **[**192]** on class actions); *In re Hydroxycut Mktg. & Sales Practices Litig., 299 F.R.D. 648, 654 (S.D. Cal. 2014)* (explaining that "[w]hether the state statutory provisions that prohibit class actions for unfair or deceptive practices are 'procedural' or 'substantive,' is a difficult question with no clear answer" but concluding that "these limitations on class actions [are] procedural in nature" so "*Rule 23* governs Plaintiffs' claims [under the consumer protection laws of Georgia, Louisiana, Montana, South Carolina, and Tennessee] and are not subject to dismissal based on the state statutes prohibiting class actions").

As the class plaintiffs recognize, the Tenth Circuit has not provided guidance on the question. *See* *Friedman v. Dollar Thrifty Auto. Grp., Inc., No. 12-cv-02432-WYD-KMT, 2015 U.S. Dist. LEXIS 166359, 2015 WL 8479746, at *5 (D. **[*1343]** Colo. Dec. 10, 2015)* (acknowledging "there is no definitive guidance from the Tenth Circuit or the Colorado Supreme Court" whether the *Colorado Consumer Protection Act*'s class action restriction is substantive and thus controls over *Rule 23*). Although our court has dismissed class claims asserted under the Colorado Consumer Protection Act at the pleading stage based on that statute's restriction for class actions, *see* *In re Syngenta AG MIR 162 Corn Litig., 131 F. Supp. 3d at 1234-35*, this ruling never addressed whether Colorado's class **[**193]** action restriction is a substantive right or procedural rule, *see id.*[28]

Some courts have concluded that the Colorado class action restriction is substantive, thus controlling, and requires dismissal of class action claims asserted under the Act. *See, e.g.,* *Davidson v. Apple, Inc., No. 16-CV-04942-LHK, 2018 U.S. Dist. LEXIS 137707, 2018 WL 2325426, at *11 (N.D. Cal. May 8, 2018)* (holding that the Colorado Consumer Protection Act's restriction on class actions was a substantive state right that barred plaintiffs' class claims); *Friedman, 2015 U.S. Dist. LEXIS 166359, 2015 WL 8479746, at *5* (holding that "the class action restriction in the [Colorado Consumer Protection Act] is substantive, not procedural . . . [a]ccordingly, the state statute controls rather than *Fed. R. Civ. P. 23*, and the class action restriction is enforceable").

Other courts have reached the opposite conclusion. *See* *Andren v. Alere, Inc., No. 16cv1255-GPC(AGS), 2017 U.S. Dist. LEXIS 209405, 2017 WL 6509550, at *21-22 (S.D. Cal. Dec. 20, 2017)* (holding that the class action

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[28] The class plaintiffs argue that *Syngenta* differs because that case involved only money damages—not claims for injunctive relief like the class plaintiffs seek here. The court is not persuaded by this argument. ***HN64***[] Indeed, one Colorado court recently has concluded that the Colorado Consumer Protection Act does not permit a plaintiff to seek injunctive relief "on behalf of either himself or a class." *Carter v. Amica Mut. Ins. Co., No. 17-cv-02156-RM-MEH, 2018 U.S. Dist. LEXIS 104802, 2018 WL 3093320, at *9 (D. Colo. June 22, 2018)* (citation omitted). The Mylan Defendants have not moved the court to dismiss the class plaintiffs' claims for injunctive relief under the Colorado Consumer Protection Act for this reason. Their motion only seeks dismissal of the class claims generally. For reasons explained above, the court defers ruling this issue until later in the litigation.

restriction in the Colorado consumer protection statute was procedural and thus did not bar class action claims asserted under the statute); *In re Volkswagen Timing Chain Prod. Liab. Litig., No. 16-2765(JLL), 2017 U.S. Dist. LEXIS 70299, 2017 WL 1902160, at *24 (D.N.J. May 8, 2017)* (holding that class action restrictions in the state consumer protection laws of Colorado, Georgia, and South Carolina did not bar plaintiffs' class action claims in federal court because *Rule 23*—not the state law restrictions—governed **[**194]** the claims).

While it is a close call, the court declines, for now, to dismiss these state law claims. This interim conclusion is driven by pragmatic factors. For one, leaving these claims in the case will not materially affect the discovery burden borne by the parties. Also, it may provide an opportunity for our Circuit to decide the question conclusively. This tack, as plaintiffs suggest, is one other courts have employed. *See, e.g.*, *Falk v. Nissan N. Am., Inc., No. 17-cv-04871-HSG, 2018 U.S. Dist. LEXIS 82809, 2018 WL 2234303, at *7 (N.D. Cal. May 16, 2018)* (denying defendant's motion to dismiss a plaintiff's Colorado Consumer Protection Act claim based on the statute's class action restriction because the issue was too "premature to decide at this early stage" and "can be addressed on a motion for class certification"); *In re Volkswagen Timing Chain Prod. Liab. Litig., 2017 U.S. Dist. LEXIS 70299, 2017 WL 1902160, at *24* (denying motion to dismiss state consumer protection law claims based on the statutes' class action restrictions because the motion "does not attack the sufficiency of the class allegations in the Complaint, but rather directs its argument **[*1344]** as to whether the action could proceed as a class action in general" and "any attacks as to whether class certification is appropriate can be raised at the class certification phase.").

Finding these cases **[**195]** persuasive and following their guidance, the court declines to dismiss the state consumer protection claims asserted under the laws of Alabama, Colorado, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee on the *Rule 12(b)(6)* motion to dismiss. But class plaintiffs are on notice that real doubt exists about the substance of these claims. And, if the Mylan Defendants reassert these arguments at class certification or summary judgment, the court will decide them then.

The Mylan Defendants also argue that other state-specific grounds exist to dismiss the class plaintiffs' state consumer protection law claims. *See* Doc. 95 at 101 & n.78. But "[i]n the interest of judicial economy," the Mylan Defendants assert that the court need not confront all these issues now. *Id.* And the Mylan Defendants reserve their right to address their additional defenses on a motion for judgment on the pleadings under *Rule 12(c)*. The class plaintiffs don't respond to this request. The court thus permits the Mylan Defendants to raise such arguments later in the litigation, if they choose to do so.

In sum, the court finds that the class plaintiffs have stated plausible claims for relief under the various state consumer protection **[**196]** laws asserted in the Class Complaint. However, the court still dismisses the state consumer protection law claims asserted under the laws of ten states because the Class Complaint includes no named plaintiff who resides in those ten states. *See supra* Part III.A.8. Those states include: Arizona, Idaho,[29] Indiana,[30] Louisiana,[31] New Mexico, Oregon, Vermont, Washington,[32] Wisconsin, and Wyoming.[33] The court also

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[29] *See* Doc. 569. After the class plaintiffs filed a voluntary dismissal of the only class plaintiff residing in Idaho (Doc. 555), the Mylan Defendants filed a Notice asking the court to dismiss the Idaho consumer protection claim for the same reasons asserted in their previously filed Motion to Dismiss because a named plaintiff no longer exists in the Class Complaint.

[30] The Class Complaint names only one plaintiff who resides in Indiana—Alene McDaniel. Class Compl. ¶ 29. But Ms. McDaniel voluntarily dismissed her claims on July 31, 2018. Doc. 829. So the Class Complaint contains no named plaintiff residing in Indiana.

[31] *See* Doc. 569. The Notice described in note 29 *supra* also seeks dismissal of the Louisiana consumer protection claim because the class plaintiffs filed a voluntary dismissal of the only class plaintiff residing in Louisiana (Doc. 549).

[32] The Class Complaint names only one plaintiff who resides in Washington—Connie Stafford. Class Compl. ¶ 61. But Ms. Stafford voluntarily dismissed her claims on July 24, 2018. Doc. 811. So the Class Complaint contains no named plaintiff residing in Washington.

dismisses the Class Complaint's claim asserted under the Georgia Uniform Deceptive Trade Practices Act. Kimberly Dollander is the only plaintiff who asserts a claim under this statute on her own behalf and on behalf of other George residents. Class Compl. ¶ 855. But Ms. Dollander voluntarily dismissed her claims on July 31, 2018. Doc. 829. The court does not dismiss the Georgia Fair Business Practice Act claim, however, because two plaintiffs—Ms. Dollander and Local 282—assert this claim on behalf of themselves and other Georgia **[*1345]** residents. Class Compl. ¶ 841. Because Local 282 remains a plaintiff in the case, the court does not dismiss the Georgia Fair Business Practice Act claim.

E. Unjust Enrichment

Leaving no stone unturned, the class plaintiffs bring an unjust enrichment claim **[**197]** "under the common law of all 50 states" and even one under the laws of unidentified "territories" of the United States. Class Compl. ¶ 60. Because the Class Complaint includes no named plaintiff who resides in Alaska, Arizona, the District of Columbia, Idaho, Indiana, Iowa, Louisiana, Montana, New Mexico, North and South Dakota, Oregon, Puerto Rico, Rhode Island, Vermont, Washington, Wisconsin, or Wyoming, the court dismisses the unjust enrichment claims asserted under those states' laws. *See supra* Part III.A.8.

The Mylan Defendants[34] seek dismissal of the remaining unjust enrichment claims, arguing—similar to other arguments that the court has addressed above—that the class plaintiffs cannot assert unjust enrichment claims when they received exactly what they paid for—*i.e.*, the EpiPen. Other courts have refused to dismiss unjust enrichment claims for this reason at the motion to dismiss stage because, generally, the question whether a plaintiff received the benefit of the bargain is a factual one. *See, e.g.,* In re Auto. Parts Antitrust Litig., 29 F. Supp. 3d 982, 1015 (E.D. Mich. 2014) (denying motion to dismiss unjust enrichment claims because the court "disagree[d] with Defendants that the exchange of Fuel Senders for payment acts as a flat ban on [plaintiffs'] **[**198]** unjust enrichment claims," instead, "[t]he issue is whether the transaction was unjust" and plaintiffs' allegations that they "overpaid for Fuel Senders because Defendants fixed the prices of Fuel Senders and rigged the bidding process . . . [gave] rise to factual questions as to whether the consideration was reasonable, valuable or adequate"); In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig., 687 F. Supp. 2d 897, 910 (W.D. Mo. 2009) (holding that defendants' argument that "there can be no unjust enrichment because Plaintiffs received what they bargained for" involved "factual matters that the Court cannot resolve while ruling on a motion to dismiss"); In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 545 (D.N.J. 2004) (denying a Rule 12(b)(6) motion to dismiss unjust enrichment claims because "[p]laintiffs' receipt of valuable medicine for their payments does not, as Defendants contend, bar an unjust enrichment claim" and "[d]eterminations that depend on evaluating whether a benefit received approximates the value paid are primarily questions of fact, and as such, are not appropriately addressed on a motion to dismiss"). For the same reason, the court cannot conclude—as a matter of law—that the class plaintiffs' unjust enrichment claims fail simply because they have alleged that they received the EpiPen in exchange for their payments.

Instead, the **[**199]** court finds that the class plaintiffs have alleged facts that plausibly state a claim for unjust enrichment. ***HN65***[] Although the elements of an unjust enrichment claim differ among various state laws, generally, an unjust enrichment claim requires a plaintiff to allege that: (1) he or she conferred a benefit on defendant, and (2) defendant's retention of the benefit under the circumstances is unjust. *See* Doc. 95-3 (Mylan Defendants submitted a chart showing the pleading requirements for unjust enrichment claims under the **[*1346]** various state laws asserted in the Class Complaint);[35] *see also* In re Estate of Sauder, 283 Kan. 694, 156 P.3d

[33] The Class Complaint names only one plaintiff who resides in Wyoming—Curt Palmer. Class Compl. ¶ 64. But Mr. Palmer voluntarily dismissed his claims on February 7, 2018. Doc. 139. So the Class Complaint contains no named plaintiff residing in Wyoming.

[34] The Class Complaint asserts the unjust enrichment claim against just Mylan. Class Compl. ¶¶ 1421-28.

[35] The class plaintiffs agree that the Mylan Defendants' chart provides the elements of unjust enrichment claims under the various state laws asserted in the Class Complaint. *See* Doc. 123 at 147 n. 581.

1204, 1220 (Kan. 2007) ("The theory of unjust enrichment rests upon three elements: (1) a benefit conferred; (2) an appreciation or knowledge of the benefit by the one receiving the benefit; and (3) the acceptance or retention of the benefit under such circumstances as to make it inequitable to retain the benefit without payment of its value." (citations omitted)).

Here, the class plaintiffs have alleged facts sufficient to support the elements of an unjust enrichment claim. The Class Complaint alleges that the class plaintiffs conferred a benefit on the Mylan Defendants in the form of overpayments for the EpiPen. Class Compl. ¶ 1424. **[**200]** And, the class plaintiffs assert, the Mylan Defendants' retention of those benefits is unjust because they procured the benefit through "price gouging, unconscionable sales, unlawful acts, and as set forth [in other parts of the Class Complaint]." *Id.* ¶ 1427. These allegations suffice to state plausible unjust enrichment claims under the remaining state laws asserted in the Class Complaint.

IV. Conclusion

For reasons explained, the court grants defendants' Motions to Dismiss in part. The court dismisses:

(1) the class plaintiffs' exclusive dealing claims against the Mylan Defendants based on discounts or rebates that Mylan offered to state or state agencies because the *Noerr-Pennington* doctrine immunizes them from liability;
(2) the class plaintiffs' antitrust claim based on deceptive speech asserted against the Mylan Defendants to the extent the class plaintiffs base their claim on Mylan's alleged failure to disclose that it paid physicians for their statements supporting the EpiPen 2-Pak;

(3) the class plaintiffs' state law antitrust claims asserted against both sets of defendants under the laws of Alaska, Arizona, the District of Columbia, Iowa, New Mexico, North and South Dakota, Oregon, **[**201]** Puerto Rico, Rhode Island, Vermont, and Wisconsin because the Class Complaint includes no named plaintiff who resides in any of these states;
(4) the class plaintiffs' state law antitrust claims asserted under the laws of Arkansas, Massachusetts, and Missouri because indirect purchasers may not bring a cause of action under these state statutes;
(5) the class plaintiffs' state law claims based on unilateral conduct and asserted in Counts IV, V, and VI (monopolization, attempted monopolization, and tying) under California's Cartwright Act (but not its the Unfair Competition Law) and under the laws of Kansas, New York, and Tennessee because these states do not recognize unilateral conduct claims;

(6) the class plaintiffs' state law consumer protection claims asserted in Count VIII under the laws of Arizona, Idaho, Indiana, Louisiana, New Mexico, Oregon, Vermont, Washington, Wisconsin, and Wyoming and the Georgia Uniform Deceptive Trade Practices Act because the Class Complaint includes **[*1347]** no named plaintiff who resides in any of these states; and

(7) the class plaintiffs' unjust enrichment claims asserted in Count IX under the laws of Alaska, Arizona, the District of Columbia, Idaho, Indiana, **[**202]** Iowa, Louisiana, Montana, New Mexico, North and South Dakota, Oregon, Puerto Rico, Rhode Island, Vermont, Washington, Wisconsin, and Wyoming because the Class Complaint includes no named plaintiff who resides in any of these states.

In all other respects, the court denies defendants' Motions to Dismiss.

IT IS THEREFORE ORDERED BY THE COURT that the Pfizer Defendants' Motion to Dismiss Plaintiffs' Consolidated Class Action Complaint (Doc. 92) is granted in part and denied in part as set forth in this Order.

IT IS FURTHER ORDERED THAT that the Mylan Defendants' Motion to Dismiss Plaintiffs' Consolidated Class Action Complaint (Doc. 94) is granted in part and denied in part as set forth in this Order.

IT IS FURTHER ORDERED THAT the Mylan Defendants' Request for Oral Argument (Doc. 220) is denied.

IT IS SO ORDERED.

Dated this 20th day of August, 2018, at Kansas City, Kansas.

/s/ Daniel D. Crabtree

Daniel D. Crabtree

United States District Judge

In re Lipitor Antitrust Litig.

United States District Court for the District of New Jersey

August 21, 2018, Decided; August 21, 2018, Filed

Civil Action No. 3:12-cv-2389 (PGS)(DEA)

Reporter

336 F. Supp. 3d 395 *; 2018 U.S. Dist. LEXIS 143189 **; 2018-2 Trade Cas. (CCH) P80,488; 2018 WL 4006752

In re LIPITOR ANTITRUST LITIGATION

Subsequent History: Motion denied by *In re Lipitor Antitrust Litig., 2020 U.S. Dist. LEXIS 175483 (D.N.J., Sept. 24, 2020)*

Motion denied by *In re Lipitor Antitrust Litig., 2022 U.S. Dist. LEXIS 177226 (D.N.J., Sept. 29, 2022)*

Prior History: *In re Lipitor Antitrust Litig., 855 F.3d 126, 2017 U.S. App. LEXIS 6346, 2017 WL 1359474 (3d Cir. N.J., Apr. 13, 2017)*

Core Terms

patent, antitrust, Defendants', unfair, generic, consumer protection, consumers, allegations, preempted, federal patent law, class action, sham, antitrust claim, purchasers, enantiomer, citizen's petition, Plaintiffs', fraudulent, pleadings, courts, settlement agreement, federal law, patent law, indirect, motion for judgment, attorney general, deceptive act, state law, preemption, federal court

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Judges: PETER G. SHERIDAN, United States District Judge.

Opinion by: PETER G. SHERIDAN

Opinion

[*400] MEMORANDUM AND ORDER

SHERIDAN, U.S.D.J.

Presently before the Court is Defendants Pfizer Inc., Pfizer Manufacturing Limited, Pfizer Ireland Pharmaceuticals, Warner-Lambert Co., and Warner-Lambert Co. LLC's Motion for Judgment on the Pleadings pursuant *Federal Rule of Civil Procedure 12(c)*, regarding End-Payor Plaintiffs' Second Amended Consolidated Complaint. (ECF No. 755). This case arises from allegations that two drug companies, Pfizer and Ranbaxy, engaged in an anticompetitive scheme that prevented the generic drug of Lipitor from entering the market. Plaintiffs are end-payor purchasers (hereinafter "EPP") who claim to have paid inflated costs for the brand-named drug, Lipitor, due to, among other things, a delayed entry provision included in Pfizer and Ranbaxy's settlement agreement. **[**3]** Unlike the Direct Purchaser Plaintiffs, who assert claims under the Sherman Act, the EPPs base their claims on their respective **[*401]** state's antitrust and consumer protection acts.

BACKGROUND

I. Parties

Plaintiffs are a collection of organizations including insurance carriers, Taft-Hartley funds, municipalities, and individuals, who have been indirectly affected by Defendants' alleged schemes. For example, jointly administered Taft-Hartley fund and employee welfare benefit plaintiffs include: A.F.L.-A.G.C. Building Trades Welfare Plan, a self-insured health and welfare benefit plan in Alabama (*Id.* at ¶ 24); New Mexico United Food and Commercial Workers Union's and Employers' Health and Welfare Trust Fund, a Taft-Hartley fund (*Id.* at ¶ 26); Bakers Local 433 Health Fund of South Dakota; and Minnesota's Twin Cities Bakery Workers Health and Welfare Fund. (*Id.* at ¶¶ 28-29).

Health insurance carrier plaintiffs include: Louisiana Health Services Indemnity Company d/b/a Bluecross/Blueshield of Louisiana, a corporation licensed to conduct business in Louisiana that provides health benefits to covered members (*Id.* at ¶ 27); Fraternal Order of Police, Fort Lauderdale Lodge 31, Insurance Trust Fund, a **[**4]** governmental health insurance plan that provides health and major medical insurance to active and retired Fort Lauderdale police officers and their dependents. (*Id.* at ¶ 30).

Municipality plaintiffs include: the Mayor and City Council of Baltimore, Maryland (*Id.* at ¶ 25), and the City of Providence, Rhode Island, both municipal corporations with self-insured health and welfare benefit plans. (*Id.* at ¶ 31).

Finally, the six individual plaintiffs are Edward Czarnecki, a Wisconsin resident; Emilie Heinle, a North Dakota resident; Andrew Livenzey from Massachusetts; Edward Ellenson from Hawaii; Jean Ellyne Dougan, an Arkansas resident; and Nancy Billington of Montana (*Id.* at ¶¶ 32-37).

All plaintiffs claim to have purchased or provided partial payment for some of, or the entire price of, Lipitor or its generic version. (*Id.* at ¶¶ 24-46). Plaintiffs contend that they were all injured as a result of Defendants' anticompetitive schemes, since they paid a premium for the medication. (*Id.*).

Defendants in this case are Pfizer and Ranbaxy. (*Id.* at ¶¶ 38-46). Pfizer Inc., Pfizer Ireland Pharmaceuticals, and Warner-Lambert Company are collectively referred to as Pfizer. (*Id.* at ¶¶ 38-42). Pfizer Inc. **[**5]** is the parent company of Pfizer Ireland Pharmaceuticals, an Irish unlimited liability company that is a wholly owned, indirect subsidiary of Pfizer Inc. (*Id.* at ¶¶ 38-39). Pfizer acquired Warner-Lambert Company in 2000. (*Id.* at ¶ 40). According to the Complaint, reference to Warner-Lambert also includes, but is not limited to, Warner-Lambert employees Bruce D. Roth, Joan Thierstein, and Jerry F. Janssen. (*Id.* at ¶ 41). In addition, the Complaint names Defendants Ranbaxy Laboratories Limited, Ranbaxy Inc., and Ranbaxy Pharmaceuticals Inc. collectively as Ranbaxy. (*Id.* at ¶¶ 43-46). Ranbaxy Laboratories Limited is an Indian corporation that wholly owns Ranbaxy Inc., which has a place of business in New Jersey. (*Id.* at ¶¶ 43-49).

II. Facts

In the Complaint, EPPs identify several anticompetitive schemes that purportedly give rise to the present lawsuit. Specifically, Plaintiffs allege that Defendants fraudulently obtained a second, duplicative, patent from the United States Patent and Trademark Office (PTO); listed that patent in the book of Approved Drug Products with Therapeutic Equivalence Evaluations **[*402]** (the "Orange Book"); engaged in sham litigation relating to the second patent; filed **[**6]** a sham citizen petition with the FDA; entered into an unlawful reverse payment agreement with Ranbaxy; and manipulated the statutorily created 180 day first-to-file period[1] to sustain Pfizer's and Ranbaxy's exclusivity and collectively prevent other generic companies from entering the market. The Court discusses each allegation in turn.

1. Walker Process and Fraudulent Orange Book Allegations

EPPs first present a *Walker Process*[2] claim against Pfizer, based on Pfizer's enforcement of an invalid patent and fraudulent listing of the patent in the Orange Book. By way of background, Warner-Lambert, which was later acquired by Pfizer in 2000, applied for the Original Lipitor Patent on March 30, 1986 and subsequently received Patent No. 4,681,893 ('893 Patent) on July 21, 1987. (*Id.* at ¶¶ 95, 104). The Original Lipitor Patent was for a racemic mixture, which contains equal amounts of two enantiomers that inhibit the production of cholesterol. (*Id.* at ¶ 7). Enantiomers are made of mirrored images of stereoisomers, which are two or more compounds with the same atoms but arranged differently. (*Id.* at ¶¶ 85-86). In a racemic mixture, it is common for one enantiomer to have all or most of the biological activity, while the other is **[**7]** largely inactive. (*Id.* at ¶ 89).

According to the Complaint, the compounds in the '893 Patent were not limited to any particular stereochemistry; instead, the structure included four different stereoisomers possibilities: R-trans, S-trans, R-cis, and S-cis isomers. (*Id.* at ¶ 103). Even though the '893 Patent covered the multiple possibilities, Warner-Lambert focused on developing the R-trans enantiomer of the compound, in calcium salt form, which would eventually be sold as Lipitor. (*Id.* at ¶¶ 106-07). Warner-Lambert achieved patent extensions and regulatory exclusivities that postponed the patent's expiration from May 30, 2006 to March 24, 2010. (*Id.* at ¶ 104).

On July 21, 1989, Warner-Lambert applied for a patent to specifically protect the R-trans enantiomer, which later became the '995 Enantiomer Patent. (*Id.* at ¶ 126). According to the Complaint, Warner-Lambert had to prove the R-trans enantiomer's activity had a "surprising" or "unexpected" characteristic to procure a subsequent patent; put differently, they had to justify why the proposed patent was not already protected by the by the '893 Patent. (*Id.* at ¶ 109). Plaintiffs allege Warner-Lambert tasked its senior management with finding "something that could **[**8]** be mischaracterized as surprising." (*Id.* at ¶¶ 110-14). Warner-Lambert included a table in the '995 Patent application to demonstrate the surprising results that the R-trans enantiomer was one hundred times more active than the S-trans enantiomer and ten times more active than the racemic mixture. (*Id.* at ¶ 128). However, Plaintiffs claim that

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[1] *21 U.S.C. § 355(j)(5)(B)(iv)*.

[2] *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*.

one skilled in the art would know "one enantiomer is the 'active' isomer, while the other is 'inactive,' and thus the active enantiomer is about twice as active as the racemic mixture." (*Id.* at ¶ 121). Further, the Complaint states Warner-Lambert would have known, through testing and experimentation, that the R enantiomer was likely to be the active isomer. (*Id.* at ¶ 122). Plaintiffs allege that Warner-Lambert failed to calculate the average result from its various tests and, instead, "cherry-picked **[*403]** from among the results [of the tests] in order to generate a table that supported its claim of 'surprising activity.'" (*Id.* at ¶ 135). As a result, the data Warner-Lambert provided in its application was allegedly both false and misleading, since the R-trans enantiomer is approximately twice as active as the racemic mixture, not ten times. (*Id.* at ¶ 133).

The **[**9]** PTO originally rejected the '995 Patent application, since the invention was already covered and anticipated by the claims in the previously procured '893 Patent. (*Id.* at ¶ 153). Under patent law, a patent application can be rejected "if the differences between the subject matters sought to be patented and the prior art [are] such that the subject matter as a whole would have been obvious at the time of the invention was made to a person having ordinary skill in the art to which said subject matter pertains." (*Id.* at ¶ 154). In response to the PTO's rejection, Warner-Lambert then requested to amend its application to provide a declaration by Dr. Bruce Roth, who participated in developing Lipitor, in support of the newfound information regarding the R-trans enantiomer's activity. (*Id.* at ¶¶ 159-60). In his declaration, Roth asserted that the available data "shows the activity of [the R-trans enantiomer] is *surprising and unexpected* because if the [S-trans enantiomer] is accepted as inactive, the activity of [the R-trans enantiomer] would be expected to be only twice that of the racemic mixture" and not the ten times that occurred. (*Id.* at ¶¶ 165-66). Warner-Lambert argued the surprising nature of this information **[**10]** overcomes the obvious inclusion under the '893 Patent and, thus, warrants the issuance of the '995 Patent. (*Id.* at ¶ 161). Plaintiffs contend the data presented to the PTO, including the Roth Declaration were knowingly false and misleading and used to fraudulently convince the PTO to procure the new patent. (*Id.* at ¶¶ 133, 165, 170-74). Persuaded by the data submitted, the PTO eventually issued the '995 Enantiomer Patent on December 28, 1993. (*Id.* at ¶ 182).

As a result of its two approved patents, Warner-Lambert submitted a new drug application to the FDA for Lipitor, which was approved on December 17, 1996. (*Id.* at ¶ 201). Warner-Lambert then listed both the '893 Original Lipitor Patent and the '995 Enantiomer Patent in the Orange Book, which expired on May 30, 2006 and December 28, 2010, respectively. (*Id.* at ¶¶ 203-04). Thereafter, it applied for an extension of the '893 Original Lipitor Patent to account for the difference in time between the issuance of the patent covering the active ingredient in the new drug and the FDA's approval of that drug. (*Id.* at ¶¶ 206-08). As a result, the PTO postponed '893 Patent's expiration until March 24, 2010. (*Id.* at ¶ 213).

2. Sham Litigation and Citizen Petition Allegations

[11]** Plaintiffs next contend Defendants engaged in sham litigation against Ranbaxy. On August 19, 2002, Ranbaxy filed an Abbreviated New Drug Application (ANDA) to sell a generic version of Lipitor. (*Id.* at ¶¶ 221-22). While Ranbaxy verified their generic version would not violate any of the Lipitor patents, Pfizer, who had acquired Warner-Lambert by this time, filed a patent infringement lawsuit against Ranbaxy on February 21, 2003 for allegedly infringing on the '893 and '995 Patents. (*Id.* at ¶¶ 223-24). In the pre-trial proceedings, Pfizer attempted to amend its complaint to include process patent infringement claims; however, their motion was denied since these patents could not be listed in the Orange Book and, therefore, **[*404]** were not a basis for the suit.[3] (*Id.* at ¶¶ 226-27). On appeal from the District of Delaware, the Federal Circuit ruled in Pfizer's favor, finding that Ranbaxy's product infringed on the '893 Patent. However, it also dismissed Pfizer's '995 Patent infringement claim since it had

[3] In July 2000 and August 2001, Warner-Lambert acquired Patent Nos. 6,274,740 ('740 Patent) and 6,087,511 ('511 Patent). (*Id.* at ¶ 219). According to the Complaint, "[b]oth the '740 and '511 Patents are process patents, which claim a specific process for making amorphous atorvastatin calcium using crystalline Form I atorvastatin as a starting material." (*Id.*). However, while the Process Patents were valid and enforceable, they had no exclusionary effect. (*Id.* at ¶ 308). Put differently, the Process Patents could not be used to exclude any generic brands of Lipitor from the market. (*Id.*).

an improper dependent claim structure. (*Id.* at ¶ 232). As a result, Ranbaxy had to wait until the expiration of the '893 Patent in March 2010, before selling its generic version. (*Id.* at ¶¶ 232, 234).

Plaintiffs contend since the '995 Patent was fraudulently obtained, the patent infringement litigation against Ranbaxy was a baseless sham, that was intended to interfere with the introduction of Ranbaxy's generic drug into the market. (*Id.* at ¶ 230).

Plaintiffs also allege that Pfizer filed a baseless citizen petition with the FDA, in further attempt to delay the entry of generic versions of Lipitor. (*Id.* at ¶ 235). According to the Complaint, Ranbaxy's ANDA could have received FDA approval in August 2005, thereby creating generic competition. (*Id.* at ¶¶ 236-38). However, a month beforehand, July 2005, Pfizer sent a letter to the FDA, in an attempt to further delay the entry to generic versions of Lipitor. (*Id.* at ¶ 239). Four months later, November 7, 2005, Pfizer re-filed this letter, as a citizen petition, alleging that the generic brand's use of "amorphous atorvastatin calcium" could **[**12]** be "susceptible to higher levels of impurities" than Pfizer's crystalline version; as such, Pfizer averred that Ranbaxy's application needed to be carefully scrutinized and reviewed with considerable skepticism. (*Id.* at ¶¶ 241-42). However, Plaintiffs claim Pfizer had also used amorphous versions in their testing and development of Lipitor and, therefore, knew that it could be, and had been, safely made. (*Id.* at ¶¶ 242-46). As such these purported safety concerns were unfounded. (*Id.*). Further, Pfizer knew from its earlier litigation with Ranbaxy that Ranbaxy's generic drug was amorphous, rather than crystalline. (*Id.*). According to Plaintiffs, the FDA's previous decisions expressly indicated that special or additional scrutiny would not be applied when reviewing an ANDA, when a different form was used; instead, the stability of a drug, not its substance, would be the key focus in measuring the drug's quality. (*Id.* at ¶ 251). As such, given Pfizer's knowledge that amorphous versions posed no safety risks, as well as the FDA's approach to treating ANDA claims, Plaintiffs claim the petition was a baseless attempt to delay generic competition. (*Id.* at ¶¶ 261-66).

*3. Reverse Settlement **[**13]** Allegations*

Finally, Plaintiffs challenge the validity of a reverse settlement agreement made between Pfizer and Ranbaxy, after Pfizer attempted to obtain reissuance of the '995 Patent. (*Id.* at ¶ 323). To correct the invalidation of the '995 Patent, Pfizer applied for its reissuance in 2007 and conceded that the data included in its original application, concerning the R-trans enantiomer's effectiveness, contained significant errors. (*Id.* at ¶¶ 274-76). Therefore, it would no longer rely on this information in its reissuance proceedings. (*Id.* at ¶ 283). Without this information, Ranbaxy filed a protest with **[*405]** the PTO, contending that the content of the '995 Patent was "anticipated, obvious, [and] constituted double-patenting." (*Id.* at ¶¶ 279, 284). As a result, the PTO issued a non-final rejection of Pfizer's reissuance application, since it "had before it no scientific basis to conclude the enantiomer claims were anything other than obvious over the '893 Patent." (*Id.* at ¶ 285, 293). Given Pfizer's failure to receive approval for the '995 Patent, there was a strong possibility that generic brand drugs would enter the market upon expiration of the '893 Patent in March 2010. (*Id.* at ¶¶ 287-88, 294).

While Pfizer struggled to obtain a reissuance of the **[**14]** '995 Patent in 2008, it was later discovered that Ranbaxy may have infringed on another patented drug, Accupril, and, therefore, Pfizer had a potential patent infringement claim worth millions of dollars in damages. (*Id.* at ¶¶ 311-12). According to the Complaint, upon learning of this information "Pfizer needed a stage to disguise a reverse payment to Ranbaxy in order to buy Ranbaxy's agreement to delay launching of its generic version of Lipitor. If there were a pending court case against Ranbaxy involving Lipitor, Pfizer could settle with Ranbaxy through a reverse payment and (unlawfully) extend its Lipitor market exclusivity"; however, when Pfizer learned of Ranbaxy's potential Accupril infringement, there was no active litigation pending. (*Id.* at ¶ 313).

Irrespective of its reasoning, it is undisputed that Pfizer filed a complaint against Ranbaxy in March 2008 for infringing on Process Patents of the '740 and '511 Patents. (*Id.* at ¶¶ 314-315). However, as mentioned above, a court had already ruled that these patents were not exclusionary and, therefore, provided no basis for relief. (*Id.* at ¶¶ 308, 316). This being said, less than three months after the suit was filed, the parties entered into a reverse settlement **[**15]** agreement, whereby Ranbaxy would refrain from manufacturing or selling generic Lipitor until November 30, 2011. (*Id.* at ¶¶ 315, 323-26). According to the Complaint, Pfizer and Ranbaxy disguised this agreement as a way to settle the process patent litigation when, in actuality, it was a "pretext for its true anticompetitive goals and accomplishments." (*Id.* at ¶¶ 3 23 -24). Under the terms of the agreement, Ranbaxy paid Pfizer $1 million and Pfizer dismissed its multi-million dollar patent infringement claims based on Ranbaxy's generic version of Accupril. (*Id.* at ¶ 327). In addition, Ranbaxy was permitted the right to market its generic version of Lipitor in some foreign markets. (*Id.*). Further, Ranbaxy did not waive its market exclusivity right to be the first to file an ANDA for Lipitor; thereby preventing other generic competition from entering the market until after November 30, 2011. (*Id.* at ¶¶ 363-65). In return, Ranbaxy also ceased challenging Pfizer's reissuance of the '995 Patent. (*Id.* at ¶ 366). As a result, the PTO eventually granted reissuance of the '995 Patent, relying in part on Lipitor's commercial success to prove the patent could not have been obvious and, therefore, was not covered by **[**16]** the '893 Original Lipitor Patent. (*Id.* at ¶ 414).

Plaintiffs contend the accumulation of Pfizer's conduct demonstrates an anticompetitive scheme to prevent generic brands from interfering with Lipitor's market share and, as a result, Pfizer's profitability. (*Id.* at ¶ 446). Had Pfizer not fraudulently procured the '995 Patent, Plaintiffs claim there would have been no basis for its reissuance. (*Id.*). In addition, Ranbaxy only stopped protesting the '995 patent after it entered a reverse settlement agreement with Pfizer. (*Id.*). If not for these circumstances, the EPPs contend that generic versions of Lipitor would have been able to enter into the market much earlier. (*Id.* at ¶ 447).

[*406] Plaintiffs bring this case on behalf of themselves and all End-Payor class members to recover damages, calculated by the increased price they had to pay due to Pfizer's conduct in delaying the market entry of generic Lipitor. (*Id.* at ¶ 486). The class contains individuals or entities who purchased or paid for Lipitor and/or its generic version for consumption by themselves, their families, or members, employees, insureds, participants, or beneficiaries in Arizona, California, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, **[**17]** Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, and the District of Columbia. (*Id.* at ¶ 487). The Class sues for overage damages occurred from March 24, 2010 until the effects of Defendants' conduct cease. (*Id.*).

The Complaint outlines four different claims for relief in the class action. The first is for monopolization under state law against Pfizer. (*Id.* at ¶ 497). The conduct giving rise to this claim is the fraudulent obtainment of the '995 Patent, its listing in the Orange Book, its sham litigation and citizen petition, the reissuance of the patent, and the unlawful reverse settlement agreement with Ranbaxy. (*Id.* at ¶ 500). The same factual allegations and theories asserted in Count I are again alleged in Count II against all Defendants. (*Id.* at ¶ 511). In Count III, Plaintiffs allege conspiracy to restrain of trade against all Defendants. (*Id.* at ¶¶ 527, 530). Finally, Plaintiffs allege a claim unfair or deceptive trade practices against all Defendants. (*Id.* at ¶ 546). Plaintiffs contend that as a result of Pfizer's **[**18]** anticompetitive acts or practices, Plaintiffs and the Class were deprived of the opportunity to obtain a less expensive, generic equivalent to Lipitor. (*Id.* at ¶ 547). As such, Plaintiffs seek compensation from Defendants in the form of damages.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(c) permits a party to dismiss a suit "[a]fter the pleadings are closed . . . but early enough not to delay trial." *Fed. R. Civ. P. 12(c)*. "A *Rule 12(c)* motion for judgment on the pleadings is treated like a motion to dismiss under *Rule 12(b)(6)*." *Syncsort Inc. v. Sequential Software, Inc., 50 F. Supp. 2d 318, 324 (D.N.J. 1999)*. Under either rule, the Court must accept all well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party. *Id.* For a complaint to survive dismissal, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Wireless Media Innovations, LLC v. Maher Terminals, LLC, 100 F. Supp. 3d 405, 407 (D.N.J. 2015)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*). As such, "[a] complaint should not be dismissed unless it appears beyond doubt that 'the facts alleged in the complaint, even if true, fail to support the claim.'" *Syncsort Inc., 50 F. Supp. 2d at 325*.

ANALYSIS

Defendants presently challenge EPPs' Complaint on four separate bases. First, Defendants contend that EPPs' Complaint should be dismissed in its entirety based on federal preemption principles. Second, Defendants argue **[**19]** that certain states require pre-filing notices that Plaintiffs failed to comply with and proscribe class actions under their respective consumer protection statutes. Third, Defendants aver that EPPs' state antitrust claims fail because they lack standing and fail to plead a concerted act. Finally, Defendants **[*407]** challenge EPPs' consumer protection claims for failing to comply with various state consumer protection law requirements. The Court addresses each challenge in turn.

I. Federal Law Preemption

Defendants first seek dismissal of all of Plaintiffs' state law claims, since their state law claims are preempted by federal law. Plaintiffs respond, contending that because their claims are based on antitrust and consumer fraud theories, preemption is inapplicable.

"Federal patent law preempts state law claims to the extent that state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the patent laws." *Wawrzynski v. H.J. Heinz Co., 574 Fed. Appx. 99, 102 (3d Cir. 2014)* (quoting *Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262, 99 S. Ct. 1096, 59 L. Ed. 2d 296 (1979))*. Notably, "district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall **[**20]** have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights." *28 U.S.C. § 1338(a)*. "Under *§ 1338(a)*, then, jurisdiction extends 'only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiffs right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.'" *In re Lipitor Antitrust Litig., 855 F.3d 126, 143 (3d Cir. 2017)* (quoting *Christianson v. Colt Industr. Operating Corp., 486 U.S. 800, 809, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1986))*. As such, the Court is tasked with determining whether the plaintiff's claims "arise under" patent law. *Id. at 144*. "[I]f on the face of a well-pleaded complaint there are reasons completely unrelated to the provisions and purposes of the patent laws why the plaintiff may or may not be entitled to the relief it seeks," then the claims do not "arise under" patent law. *Id.* (internal quotation marks and citations omitted).

Defendants present three theories supporting their position that Plaintiffs' state law claims are preempted. First, because Plaintiffs' claims are based on the purportedly fraudulent procurement and enforcement of the '995 patent, they must demonstrate that the patent is invalid or **[**21]** unenforceable, which is preempted under federal patent law. Second, to the extent that Plaintiffs' antitrust claims are based on the reverse settlement agreement, they are preempted since they must demonstrate the validity of the generic patents, which necessarily implicates patent law. Finally, Defendants contend that Plaintiffs' "sham" citizen petition claim is preempted, since it must demonstrate the validity of the generic patents, which, again, implicates patent law.

1. Fraudulent Patent Procurement and Enforcement

Turning first to Defendants' federal patent preemption argument, Defendants argue that Plaintiffs' state law claims require them to plead and prove that the patent is invalid or unenforceable under federal patent law. According to Defendants, the allegations in Plaintiffs' complaint that trigger federal patent law include: (1) the fraudulent procurement of the '995 patent (2) the fraudulent patent listing of the '995 Patent in the FDA's Orange Book; and (3) the "sham" litigation against Ranbaxy, seeking to enforce the '995 Patent, in addition to its two **[*408]** process patents. Defendants, citing little or no supporting case law, contend that these allegations require first knowing whether the patent at issue **[**22]** is invalid or unenforceable. If the patent was valid, then the obtainment and enforcement of same would be lawful. As such, Defendants argue that because federal patent law is necessary to support these theories, they are preempted by federal law.

However, Defendants' arguments are in direct contravention with the Third Circuit's recent holding in Lipitor, 855 F.3d at 126.[4] In *Lipitor*, the Third Circuit explicitly held that the present matter does not "arise under" federal patent law. The Third Circuit held that although a resolution of a substantial question of federal patent law is necessary for a fraudulent patent claim, that alone is not sufficient to establish that the Federal Circuit has jurisdiction. Id. at 143. The court explained that unless every theory of the claim requires resolution of a substantial question of federal law, it does not "arise under" federal patent law and, therefore, the Third Circuit has jurisdiction. *Id.* The court interpreted "arises under" to mean that every theory of the claim requires the resolution of a substantial question of federal law, if it does not, federal patent law will not preempt. *Id.* Here, even if the allegations in the Complaint present substantial questions of patent **[**23]** law, because the antitrust allegations and sham citizen petition do not, this case does not arise under federal patent law for purposes of federal patent preemption. *Id.* (quoting Christianson, 486 U.S. at 812).

Moreover, federal patent law does not preempt a state law claim in which a patent law issue is implicated if "the state law cause of action [i.] includes additional elements not found in the federal patent law cause of action and [ii.] is not an impermissible attempt to offer patent-like protection to subject matter addressed by federal law." Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470, 1473 (Fed. Cir. 1998). In *Dow*, the defendant was issued a patent that disclosed certain wire and cable devices manufactured using a particular insulating polymer. Id. at 1471. At about the same time, the plaintiff introduced its own line of polymer products and filed a complaint contending that its polymer did not infringe on the defendants' patent since the defendants' patent was invalid and unenforceable. Id. at 1471-72. In addition, the plaintiff asserted a state-law unfair competition claim, alleging that that the defendant obtained its patent through inequitable conduct before the PTO. *Id.*

Finding patent preemption inapplicable, the Federal Circuit explained that there are three objectives for patent law: (1) **[**24]** to provide an incentive to invent; (2) to promote the full disclosure of inventions; and (3) to ensure "that which is in the public domain cannot be removed therefrom by action of the states." Id. at 1474 (quoting Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480-81, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (1974)). With these objectives in mind, the *Dow* court held that when the state law cause of action includes additional elements not found in the federal patent law and state law is not an obstacle to the objectives of federal patent law, it is not preempted even if patent law is implicated. Id. at 1473. As such, the Federal Circuit held that because the state law unfair competition claim included additional elements not found in federal patent law and did not otherwise conflict with the objectives of **[*409]** federal patent law, its claims were not preempted. Id. at 1478-79.

Here, as in Dow, the EPPs state antitrust and consumer protection claims require proof of elements not found in a patent cause of action. As discussed earlier, the purpose for patent protection is to provide an incentive to invent, to promote the full disclosure of inventions and to ensure "that which is in the public domain cannot be removed therefrom by action of the states." Antitrust and consumer protection law protect consumers from being overcharged **[**25]** for products, which is a wholly different goal than patent law.

This is also consistent with the Court's decision in In re Thalomid and Revlimid Antitrust Litig., No. 14-6997, 2015 U.S. Dist. LEXIS 177541 (D.N.J. Oct. 29, 2015), where the court held that even if a state court must adjudicate a question of federal patent law, it is not preempted if it includes additional elements not part of a federal cause of action. Id. at *61-63. In *Thalomid*, the plaintiffs, who were indirect purchasers, alleged that the defendants created an antitrust scheme by obtaining patents through fraud on the PTO and bringing sham lawsuits to delay generic brands from entering the market. Id. at *4-5. As is the case here, the defendants argued that the plaintiffs' antitrust claims should be preempted by federal patent law since they alleged that they obtained the patents through unjust conduct with the PTO. Id. at *61-62. Relying on *Dow*, the court held that even if a question of federal patent law must be adjudicated, the state law claim is not preempted, as long as it contains additional elements not part of a

[4] Defendants appear to be leading the Court down the same path where it was the last time — no sense putting my fingers over the fire a second time.

federal patent cause of action. *Id.* Finding the allegations were also premised on bad faith in the marketplace (an element not required in patent law) the Court reasoned that federal patent preemption was not warranted.

Here, similar to *Thalomid* ***[**26]*** , the EPPs allege that the patents were obtained through fraud on the PTO, Pfizer improperly listed the '995 patent in the Orange Book, the generic drug was delayed entry because of sham litigation, a baseless Citizens Petition was filed, and a reverse payment settlement agreement was negotiated to prolong a monopoly. As such, because EPPs claims are predicated on claims wholly separate from the federal patent law, they are not preempted.

2. Antitrust Allegations

Defendants next argue that because Plaintiffs' antitrust claims arise from the reverse settlement agreement, it implicates federal patent law and, therefore, must be preempted. Defendants rely principally on the Third Circuit's decision in *In re Wellbutrin XL Antitrust Litig., 868 F.3d 132 (3d Cir. 2017)* for support. In *Wellbutrin*, the Third Circuit held that in order to allege an antitrust injury, based on the reverse settlement agreement between pharmaceutical companies, it is the plaintiffs' burden to demonstrate that "but for" this agreement, the generic drug would have entered the market sooner. *Id. at 164-65*. As such, if a regulatory scheme or patent law would otherwise prevent the generic drug from market entry, there can be no antitrust injury. *Id.* Here, Defendants argue that because Plaintiffs must demonstrate **[**27]** that the generic patents would have entered the market, but for the settlement, this necessarily implicates patent law.

In *Wellbutrin* the defendant obtained FDA approval for bupropion hydrochloride, which was marketed as "Wellbutrin." *Id. at 145*. Between September 2004 and May 2005, four generic manufacturers filed **[*410]** ANDAs, requesting authorization to market generic versions of Wellbutrin. *Id.* On February 9, 2007, the parties entered into a settlement agreement, which included a pay-for-delay scheme, wherein the defendants agreed to not launch their own authorized generic version of the drug for 180 days and, in return, the generic manufacturer would not launch a low dosage generic version of the drug until an agreed triggering event. *Id. at 146, 162*. In May 2008, the plaintiffs filed suit, alleging that the defendants conspired with generic manufacturers to prevent a generic version of the drug from entering the market. *Id. at 146*. The Third Circuit held that because there was a patent blocking the generic versions' launch, the settlement agreement did not cause the injury. *Id. at 165*. Put differently, the Third Circuit explained that the plaintiffs were unable to prove that "but for" the defendants' settlement agreement, the generic **[**28]** drug would have entered the market, since a patent blocking the generic versions would have nevertheless created the same effect. *Id.*

The Court rejects Defendants' expansive reading of *Wellbutrin* to hold that antitrust claims, based on reverse settlement agreements, are preempted by federal patent law. *Wellbutrin* simply sets forth considerations to be made when presented with an issue of antitrust standing, based on reverse settlement agreements. At no point in its decision did the Third Circuit mention that such an issue would trigger federal patent preemption. *See Wellbutrin, 868 F.3d at 163-70*. As such, while an antitrust claim may relate to patent issues, it is not always the case that it is necessary to explore its validity. Secondly, as noted above in *Lipitor*, the Third Circuit has already held that this case was not preempted by federal law, since Plaintiffs' claims are predicated on theories of antitrust, not patent law. *Lipitor, 855 F.3d at 146*. As such, because Plaintiffs' antitrust claims do not implicate federal patent law, the Court will not dismiss these claims based on preemption. Finally, *Wellbutrin* was decided at summary judgment, where the district court had before it a full and complete record and was, therefore, capable **[**29]** of making determinations not presently available at the pleading stage. For these reasons, the Court finds Defendants' arguments, relying on *Wellbutrin*, premature.

3. Federal Patent Law Preemption of the Citizen Petition

Lastly, Defendants argue that Plaintiffs' claim that Defendants filed sham citizen petition with the FDA is also preempted. By way of background, a citizen petition is a written request made by an interested person to the FDA, asking the agency to "issue, amend, or revoke a regulation or order, or take or refrain from taking any other forms of administrative action." *21 C.F.R. §§ 10.25*, *10.30*. Here, Defendants make a similar "but for" argument as discussed above in *Wellbutrin* and contend that before addressing the merits of the sham citizen petition claim, Plaintiffs must first prove that the challenged patent was invalid, because if it is valid, then the patent, and not the citizen petition, prevented market entry of the generic brands.

This argument fails for two reasons. First, *Lipitor* expressly held that federal patent law is not implicated by a citizen petition claim, "whether [an FDA] petition was a sham is an issue independent of patent law." *Lipitor, 855 F.3d at 146* (quoting *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 686 (2d Cir. 2009))*. In any event, even if a citizen **[**30]** petition claim did implicate federal patent law, the Third Circuit has made clear that unless *every* theory of the claim requires the resolution of a substantial question of federal law, it does not "arise under" federal patent law. *Id.* Therefore, as discussed **[*411]** above, since this case does not "arise under" federal patent law, preemption is not appropriate.

Alternatively, Defendants argue that the federal law governing the FDA preempts Plaintiffs' sham citizen petition claim. Here, Defendants rely primarily on the Supreme Court's decision in *Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001)*. In *Buckman*, the Supreme Court held that fraud-on-the-FDA claims are preempted by federal law. *Id. at 353*. In that case, the defendants made two attempts to obtain FDA approval to market their bone screws, for spinal surgery. *Id. at 346*. After the FDA denied approval twice, the defendants made a third application with a more limited use, this time indicating that its use for the long bones in the arms and legs, which finally received FDA approval. *Id.* Thereafter, the plaintiffs sued under state law, alleging that the defendants made fraudulent representations to the FDA as to the intended use of their product. *Id. at 343-47*. The Supreme Court held that federal law preempted the state **[**31]** law claims, since an apparent conflict existed between the state law claims and federal law. *Id. at 348, 353*. The Supreme Court explained, "[the] conflict stems from the fact that the federal statutory scheme amply empowers the FDA to punish and deter fraud against the [FDA], and that this authority is used by the [FDA] to achieve a somewhat delicate balance of statutory objectives." *Id.* Allowing state law claims would distort the balance sought by the FDA and is, therefore, preempted by federal law. *Id.* Relying on *Buckman*, Defendants contend that Plaintiffs' sham citizen petition claim is akin to a fraud-on-the-FDA claim and should therefore be preempted.

However, courts that have been presented with this issue have narrowed the scope of *Buckman's* holding, concluding that preemption is inapplicable where the plaintiffs assert antitrust and consumer protection claims, in addition to a fraud-on-the-FDA claim. *See* *In re DDAVP Indirect Purchaser Antitrust Litig., 903 F. Supp. 2d 198, 220-21 (S.D.N.Y. 2012)*. In *DDAVP*, the Southern District of New York held that "claims mak[ing] 'freestanding allegations of wrongdoing apart from the defendant's purported failure to comply with FDA disclosure requirements'' are sufficiently pled and, therefore, not preempted. *Id.* (quoting *Desiano v. Warner-Lambert & Co., 467 F.3d 85, 95 (2d Cir. 2006))*. Here, Plaintiffs allege **[**32]** freestanding allegations, under state antitrust and consumer protection laws, that are not preempted. For example, the EPPs allege that reverse-payment settlement agreement gives rise to their state claims, which is wholly different from alleging a failure to comply with the FDA. In response, Defendants contend that "*DDAVP* unjustifiably narrows the holding of *Buckman*" and request that the Court "decline to follow its holding." However, the Court finds the reasoning in *DDAVP* persuasive. *Buckman* was concerned that fraud-on-the-FDA claims, based on state law, would interfere with the FDA's statutory scheme; however, to apply that principle to claims unrelated to FDA authority would be to severely limit the theories of relief that parties could seek. As such, this Court finds that the sham citizen petition claim is not preempted by the federal FDA law.

To sum up, the Court declines to dismiss any of Plaintiff's claims based on preemption principles.

II. Notice Challenges and Permissibility of Pursuing Class Claims

Defendants next make several challenges to EPPs' state antitrust and consumer **[*412]** protection claims. First, Defendants contend that EPPs failed to satisfy the pre-filing notice requirements **[**33]** mandated in states that require the same. Second, Defendants argue that Illinois, Montana, Tennessee, and Utah explicitly prohibit the use of class actions to enforce the rights created therein. The Court discusses each challenge in turn.

1. Pre-Filing Notice Requirements

Because the Arizona, Hawaii, Nevada, and Utah antitrust laws have notice requirements, Defendants contend that EPPs' antitrust claims in these states must be dismissed since EPPs failed to give proper notice.[5] Defendants' argument is based on the language of the respective state statutes, requiring any antitrust plaintiff to serve that state attorney general a copy of the complaint. *See* *Ariz. Rev. Stat. § 44-1415*; *Haw. Rev. Stat. § 480-13.3*; *Nev. Rev. Stat. Ann. § 598A.210(3)*; *Utah Code Ann. § 76-10-3109(9)*.

Hawaii's antitrust statutes proscribes "[u]nfair methods of competition *and* unfair or deceptive acts or practices in the conduct of or any trade or commerce." *Haw. Rev. Stat. § 480-2* (emphasis added). *Section 480-13.3* sets forth procedural requirements that must be met for a putative class of indirect purchasers alleging unfair methods of competition under *Section 480-2*. First, the class plaintiffs, within seven days of filing the lawsuit, must serve a copy of the complaint, and all supporting material, with the Hawaii attorney general, who retains sole discretion for determining **[**34]** whether the State will move forward with the action or file its own action. *Haw. Rev. Stat. §§ 480-13.3(a)(1)*, *(4)*. If the Hawaii attorney general declines to proceed with the action, the class plaintiffs then have the right to move forward. *Haw. Rev. Stat. § 480-13.3 (a)(5)(C)*.[6]

Like Hawaii, the *Utah Antitrust Act* requires notice be made to its attorney general. Specifically, the Act states, "[t]he attorney general shall be notified by the plaintiff about the filing of any class action involving antitrust violations that includes plaintiffs from this state. The attorney general shall receive a copy of each filing from each plaintiff. The attorney general may, in his or her discretion, intervene or file amicus briefs in the case, and may be heard on the question of the fairness or appropriateness of any proposed settlement agreement." *Utah Code Ann. § 76-10-3109(9)*.

Similarly, both Arizona and Nevada's antitrust statutes require the putative class plaintiff to provide notice to their respective attorney generals. Specifically, the *Arizona Uniform Antitrust Act* states that "[a] person filing a complaint, counterclaim or answer for any violation of the provisions of this article shall simultaneously with the filing of the pleading in **[*413]** the superior court or, in the case of pendent state **[**35]** law claims in the federal court, serve a copy of the complaint, counterclaim or answer on the attorney general. Proof of service on the attorney general shall be filed with the court." *Ariz. Rev. Stat. § 44-1415(A)*. Under *Nevada's Unfair Trade Practices Act*, "[a]ny person commencing an action for any violation of the provisions of this chapter shall, simultaneously with the filing of the complaint with the court, mail a copy of the complaint to the Attorney General." *Nev. Rev. Stat. Ann. § 598A.210(3)*.

Finally, both the West Virginia and Massachusetts consumer protection statutes include pre-filing notice provisions. Specifically, the *West Virginia Consumer Credit Protection Act* provides consumers who are victims to unfair, deceptive, and fraudulent business practices with a cause of action. *W. Va. Code § 46A-6-106(a)*. However, prior to initiating suit, a consumer must first inform the seller, in writing, of the alleged violation. *W. Va. Code § 46A-6-106(b)*. Courts have interpreted this statute as a "mandatory prerequisite[]" to commencing a consumer protection claim under the Act. *Harrison v. Porsche Cars N. Am., Inc., No. 15-0381, 2016 W. Va. LEXIS 245, at *5 (W.Va. 2016)*; *see also* *Stanley v. Huntington Nat'l Bank, No.11-54, 2012 U.S. Dist. LEXIS 9448, at *20-21 (N.D.W.Va. Jan. 27, 2012)*. Likewise, the *Massachusetts Consumer Protection Act* requires that "[a]t least thirty days prior to the

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[5] It should be noted that during oral argument, EPPs' attorney contended that notice was provided, "I'm the one who gave notice in this case; I gave — first of all we gave a demand to the defendants back in 2012, with respect to all states . . . so that has been fulfilled." (Tr. of June 25, 2018 Hearing at 58:35-59:4). To me, this meant Plaintiffs gave notice in accordance with the state statutes. I have no reason to disbelieve Plaintiffs' counsel, who is an officer of the Court. However, no competent proof supporting this assertion has been provided to the Court.

[6] Courts have understood this notice requirement to apply only to claims of "unfair methods of competition," not "unfair or deceptive acts or practices"; however, neither party addresses this distinction. *See* *In re Chocolate Confectionary Antitrust Litig., 749 F. Supp. 2d 224, 243-33 (M.D. Pa. 2010)*; *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1158 (N.D. Cal. 2009)*.

filing of any such action, a written demand for relief, identifying the claimant and reasonably describing **[**36]** the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent." *Mass. Gen. Laws. Ch. 93A, § 9(3)*. "The statutory notice requirement is not merely a procedural nicety, but, rather, 'a prerequisite to suit.'" *Rodi v. S. New Eng. Sch. of Law, 389 F.3d 5, 19 (1st Cir. 2004)* (quoting *Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812, 333 N.E.2d 202, 204 (Mass. 1975))*.

2. State Consumer Protection Class Bars

Defendants next contend that EPPs' Montana, Tennessee, and Utah[7] consumer fraud claims must be dismissed, since these states prohibit class actions. Each of these statutes contain language proscribing the use of class actions to enforce the rights provided therein. *See* *Mont. Code Ann. § 30-14-133(1)* ("A consumer who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by [the *Consumer Protection Act*] may bring an individual but not a class action"); *Tenn. Code Ann. § 47-18-109(a)(1)* ("Any person who suffers an ascertainable loss . . . as a result of . . . an unfair or deceptive act or practice . . . may bring an action individually to recover actual damages"); and *Utah Code Ann. § 13-11-19(2)* ("A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or $2,000, whichever is greater, plus court **[**37]** costs.").

Here, EPPs do not contest the meaning of the above-mentioned statutory provisions; instead, relying on *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393, 408, 130 S. Ct. 1431, 176* ***[*414]*** *L. Ed. 2d 311 (2010)*, EPPs contend these statutory provisions are preempted by *Federal Rule of Civil Procedure 23*, since "federal procedural rules control over conflicting state rules."

3. The Shady Grove Decision[8]

To properly analyze Defendants' motion, the Court must determine whether the discussed notice requirements and class action bars are procedural or substantive. It is blackletter law that that federal courts sitting in diversity jurisdiction must utilize federal procedural law and state substantive law. *See* *Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*. Therefore, if these states' notice requirements and class action bars are substantive in nature, they apply and must be followed in federal court. *See* *Shady Grove, 559 U.S. at 410*. However, there is no bright line between procedural and substantive law and, thus, the distinction is difficult to determine, especially since these two categories are not mutually exclusive. *Godin v. Schencks, 629 F.3d 79, 86 (1st Cir. 2010)*.

In interpreting *Erie*, the Supreme Court explained that a federal law will only be procedural and, thus, applicable, if the case's outcome would be the same in both federal and state courts. *Guaranty Trust Co. v. York, 326 U.S. 99, 109, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)*. This is consistent with *Erie's* "twin aims" to avoid forum shopping and **[**38]** the inequitable administration of law. *Id. at 111-12*. The Supreme Court further elaborated that before a court can consider *Erie's* outcome determinative test, it must first determine whether there is a direct conflict between the federal and state laws in question. *See* *Hanna v. Plumer, 380 U.S. 460, 470-74, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)*. If there is a conflict, the federal law must be used, unless it is deemed unconstitutional or outside the scope of the *Rules Enabling Act, 28 U.S.C. § 2072(b)*, which prohibits the use of federal laws if they "abridge, enlarge, or modify any [state] substantive right." *Id.* If there is not a conflict, the outcome determinative test is utilized to determine the whether to apply state or federal law. *Id.* This test has been refined as an inquiry into

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[7] Defendants also make a similar argument for Plaintiff's Illinois consumer protection claims; however, being that the *Illinois Consumer Fraud & Deceptive Business Practice Act* does not explicitly bar class actions, the Court finds it more appropriate to consider the substantive arguments Defendants present later.

[8] At the outset, it should be noted that neither party provided any post-*Shady Grove* analysis or discussion to support their position.

"whether the scope of the Federal Rule . . . is sufficiently broad to control the issue before the court." Walker v. Armco Steel Corp., 446 U.S. 740, 749-50, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980). Only if the federal law is sufficiently broad, will the court then continue with the *Hanna* analysis.

Most recently, the Supreme Court was presented with a similar issue that is before the Court. In *Shady Grove*, the Supreme Court was tasked with determining whether Federal Rule of Civil Procedure 23 or a New York law controlled if a class action may proceed in federal court. 559 U.S. at 396. The New York law at issue prohibited the use of class actions **[**39]** to recover a "penalty" or statutory minimum damages. N.Y. Civ. Prac. Law Ann. (CPLR) § 901(b). In *Shady Grove*, the class members met the prerequisites of Rule 23, but sued under Section 901(b) to recover unpaid interest from Allstate, which was classified as a "penalty" and, therefore, not permitted under the New York law. Id. at 397. In determining which of the two rules applied, the Supreme Court had to answer two related questions: first, whether the New York rule and Rule 23 addressed the same issue; and, if so, whether Rule 23 was within its statutory authority under the **[*415]** Rules Enabling Act. Id. at 398 (citing Burlington N. R. Co. v. Woods, 480 U.S. 1, 4-5, 107 S. Ct. 967, 94 L. Ed. 2d 1 (1987); Hanna, 380 U.S. at 463-64). In doing so, a majority of the Court concluded that Rule 23's conflict with the New York law was "unavoidable" and could not fairly be read to not "control the issue." Id. at 406 n.8. As such, because the New York rule attempted to answer the same question, the Court held "it cannot apply in diversity suits unless Rule 23 is ultra vires." Id. at 398-99. Turning to the second inquiry, however, no majority was able to come to an agreed standard. Writing for three justices, Justice Scalia explained that "it is not the substantive or procedural nature of the affected state law that matters, but the substantive or procedural nature of the Federal Rule." Id. at 410. As such, the validity **[**40]** of a Federal Rule turns on whether it regulates procedure, if it does, it is lawfully authorized by the Rules Enabling Act. *Id.*

However, in his concurring opinion, Justice Stevens criticized the plurality's categorical approach, at step two, that any federal rule that "really regulates procedure" is a sufficient basis for preempting a conflicting state law. Id. at 421-29 (Stevens, J., concurring in part and concurring in judgment). Instead, in Justice Stevens' view, the inquiry should "not necessarily turn on whether the state law at issue takes the form of what is traditionally described as substantive or procedural. Rather, it turns on whether the state law actually is part of a State's framework of substantive rights or remedies." Id. at 419. This is because there may be state procedural rules that "become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy" and, therefore, "make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim." Id. at 420.

Although the Third Circuit has yet to decide whether Justice Stevens' concurrence controls, the Court is persuaded by the majority of district and circuit courts **[**41]** that have done so.[9] Greene v. Gerber Prods. Co., 262 F. Supp. 3d 38, 60 (E.D.N.Y. 2017) (collecting cases). In doing so, courts presented with the same issue presently before the Court have framed the inquiry as whether the state statute "provides a procedure that is 'so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy.'" In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 416 (S.D.N.Y. 2011) (quoting Shady Grove, 559 U.S. at 420 (Stevens, J. concurring in part and concurring in judgment)); In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 409 (D. Mass. 2013). If the answer is in the affirmative, the federal rule must yield to the state law, since it would "effectively abridge[], enlarge[], or modif[y] a state-created right or remedy." Shady Grove, 559 U.S. at 422 (Stevens, J. concurring in part and concurring in judgment).

4. Application

Against this legal backdrop, the Court finds that Rule 23 is not "sufficiently broad" to cover the state statutory notice provisions. First, the conflicting rules do not attempt to answer the same question or subject. *See* Shady Grove, 559

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[9] From the Court's perspective, in agreement with Justice Stevens, the state statutes at issue focus on various forms of deceptive practices. Rule 23 is more generic and applies to all class actions. As such, the narrower and more focused approach of the state should apply.

U.S. at 399. Here, the state laws in question address notice provisions for antitrust **[*416]** and consumer protection-related lawsuits; Rule 23, on the other hand, is a general federal procedural rule governing class actions. Second, contrary to *Erie's* twin aims, to decline to apply state statutory notice provisions "in federal court would encourage forum shopping **[**42]** and the inequitable administration of laws." In re Asacol Antitrust Litig., No. 15-12730, 2016 U.S. Dist. LEXIS 94605, at *48 (D. Mass. July 20, 2016). This is also consistent with the majority of district courts that have been presented with the same issue, and have concluded that state statutory notice provisions control in federal court. *See* Asacol, 2016 U.S. Dist. LEXIS 94605, at *48 (statutory notice provisions in Arizona, Hawaii, Nevada, and Utah apply in federal court); In re Chocolate Confectionary Antitrust Litig., 749 F. Supp. 2d 224, 232-33 (M.D. Pa. 2010) (Hawaii notice provision applies); In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1158 (N.D. Cal. 2009) (same). Accordingly, because EPPs failed to comply with the notice provisions under Arizona's Uniform Antitrust Act, Hawaii's Antitrust Act, Nevada's Unfair Trade Practices Act, and Utah's Antitrust Act, as well as Massachusetts's Consumer Protection Act and West Virginia's Consumer Credit Protection Act, EPPs' class claims under these statutes are dismissed without prejudice.

For these same reasons, the Court also finds that the class action bars incorporated in the Montana, Tennessee, and Utah consumer protection laws are not preempted by Rule 23. Here, EPPs deviate from the majority of district and circuits, which have followed Justice Steven's concurrence in *Shady Grove*, and endorse the approach taken in Lisk v. Lumber One Wood Preserving, LLC, 792 F.3d 1331, 1335 (11th Cir. 2015). In *Lisk*, the Eleventh Circuit held that there was "no relevant, meaningful distinction between" the New York law in ***[**43]*** *Shady Grove* and the Alabama Deceptive Trade Practices Act, which also bars class actions. In doing so, the court, echoing Justice Scalia's plurality decision, explained, "the question whether a federal rule abridges, enlarges, or modifies a substantive right turns on matters of substance—not on the placement of a statute within a state code." Id. at 1336. However, "[t]he decision in *Lisk* has not been widely followed outside of the Eleventh Circuit." Delgado v. Ocwen Loan Servicing, LLC, No. 13-4427, 2017 U.S. Dist. LEXIS 186408, at *23 (E.D.N.Y. Nov. 8, 2017). Instead, "most courts outside of that circuit implicitly or explicitly disagree[] with its interpretation of *Shady Grove* and its determination that there was no 'meaningful distinction'" between the New York law in *Shady Grove* and the Alabama class action bar. *Id.* (collecting cases). Instead, consistent with the courts to have considered this issue, the Court finds that the class action bars in the Montana, Tennessee, and Utah consumer protection acts control in federal court. Id. at *23-24. Moreover, in *Delgado*, the court explained, "the specific inclusion of the class action bar within the Alabama, Tennessee, and Georgia consumer protection statutes . . . evinces a desire by the state legislature to limit not only the form of the action but also the remedies **[**44]** available, placing those bars squarely within Justice Stevens' concurrence." *Id.*;[10] Fejzulai v. Sam's West, ***[*417]*** Inc., 205 F. Supp. 3d 723, 728-29 (D.S.C. 2016). That same reasoning holds here.

In sum, the Court finds that the four notice provisions under Arizona, Hawaii, Nevada, and Utah antitrust laws are applicable here and Plaintiffs failed to comply. Likewise, the notice provisions in Massachusetts and West Virginia's consumer protection laws control. As such, EPPs' claims under these six statutes are dismissed without prejudice; Plaintiffs may file an amended complaint that specifically pleads compliance with each state's notice requirement. Similarly, EPPs' class claims under Montana, Tennessee, and Utah's consumer protection statutes are dismissed without prejudice; in these three states, Plaintiffs may amend their complaint to include only claims brought on behalf of Montana, Tennessee, and Utah plaintiffs in their *individual* capacities.

III. State Antitrust Challenges

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[10] Both Alabama and Georgia's consumer protection statutes contain similar language to Montana, Tennessee, and Utah, which all prohibit the use of class actions to enforce the rights created therein. Ala. Code Ann. § 8-19-10(f) ("A consumer or other person bringing an action under this chapter may not bring an action on behalf of a class"); Ga. Code Ann. § 10-1-399(a) ("Any person who suffers injury or damages . . . as a result of consumer acts or practices in violation of this part . . . may bring an action individually, but not in a representative capacity").

Defendants next seek dismissal of EPP's Illinois, Rhode Island, and Utah state antitrust claims, since these states lack standing under Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-47, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). In *Illinois Brick*, the Supreme Court held that indirect purchasers lacked Article III standing to assert federal antitrust claims against manufacturers **[**45]** since their injury was likely only a small portion of the injury caused by the defendants' alleged conduct. *Id. at 725-26*.

1. Illinois Antitrust Act

Relying on *Illinois Brick*, Defendants contend that EPPs' Illinois antitrust claim fails, since they lack standing. The plain language of the Illinois Antitrust Act ("IAA") states "no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General, who may maintain an action parens patriae." 740 Ill. Comp. Stat. § 10/7(2). EPPs respond, contending that under *Shady Grove*, the Court should treat the Illinois Antitrust Act as a procedural law and, therefore, follow Rule 23.

District courts are divided on whether the Illinois Antitrust Act precludes indirect purchasers from filing class actions. However, a majority of courts have held that the Act is distinguishable from the New York law in *Shady Grove* and that it prohibits indirect purchaser class actions. *See, e.g.,* In re Opana Er Antritrust Litig., 162 F. Supp. 3d 704, 723 (N.D. Ill. 2016); United Food & Commer. Workers Local 1776 & Participating Employers Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F. Supp. 3d 1052, 1083-84 (N.D. Cal. 2014); Digital Music, 812 F. Supp. 2d at 415-16; Wellbutrin XL, 756 F. Supp. 2d at 677. As discussed above, the New York law at issue in *Shady Grove* involved a general procedural rule that conflicted with Rule 23; here, however, the limitation **[**46]** prescribed in the IAA is "in the same paragraph of the same statute that creates the underlying substantive right." Digital Music, 812 F. Supp. 2d at 416; *see also* Wellbutrin XL, 756 F. Supp. 2d at 677. Further, the restrictions in the Illinois Antitrust Act appear to reflect a policy decision regarding the feasibility of duplicative recovery, which is explicitly entrusted to the attorney general, not indirect purchasers. Wellbutrin XL, 756 F. Supp. 2d at 677 (citing Illinois ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F. 2d 1469, 1480 (7th Cir. 1991)). In finding that the Act to bars **[*418]** indirect purchaser antitrust class actions, courts have explained "[t]he Illinois restrictions on indirect purchaser actions are intertwined with Illinois substantive rights and remedies . . . [such that] application of Rule 23 would 'abridge, enlarge or modify' Illinois' substantive rights, and therefore Illinois' restrictions on indirect purchaser actions must be applied in federal court." *Id.*; *see also* Nexium, 968 F. Supp. 2d at 408-09; In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-2503, 2015 U.S. Dist. LEXIS 125999, at *66 (D. Mass. Aug. 14, 2015) (holding that it would be inconsistent with *Shady Grove* to conclude that Rule 23 preempts the ban on class actions contained within Illinois ***Antitrust Law***).

Several district courts have taken a less restrictive interpretation of the Illinois Antitrust Act and have allowed indirect purchasers to bring class actions under the Act. *See, e.g.,* In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 817-18 (N.D. Ill. 2017); In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712, 729 (S.D.N.Y 2017); In re Aggrenox Antitrust Litig. (Aggrenox II), No. 14-2516, 2016 U.S. Dist. LEXIS 104647, at *23-28 (D. Conn. Aug. 9, 2016). In *Broiler Chicken*, the Northern District of Illinois held that **[**47]** Rule 23 applies in federal court, despite the state law's requirement that the attorney general bring class actions, since the Act does not hinder the class's substantive rights. Broiler Chicken, 290 F. Supp. 3d at 818. This is "because any indirect purchaser procedurally blocked from participation in a class action would still have the same remedy in an individual action." Aggrenox II, 2016 U.S. Dist. LEXIS 104647, at *28. As such, these courts view the Illinois Antitrust Act as a procedural conflict with Rule 23, rather than substantive, and, therefore, apply Rule 23 to permit indirect purchasers to file class actions under the Act, so long as they satisfy its prerequisites. *See, e.g.,* Propranolol., 249 F. Supp. 3d at 728.

Although district courts have taken different approaches in interpreting the Illinois Antitrust Act, the Court finds the rationale of Digital Music persuasive. The language of the Act presents a substantive conflict with Rule 23; as such, since the Illinois Antitrust Act controls, the Court finds that EPPs lack standing to assert claims under the Act and, therefore, dismisses this claim with prejudice.

2. Rhode Island Antitrust Act

Defendants next move for dismissal of EPPs Rhode Island antitrust claims since they, too, lack standing to bring an antitrust claim under *Illinois Brick*. Since the Supreme Court's decision, **[**48]** multiple states have enacted *Illinois Brick* repealer statutes that allow indirect purchasers to recover under their state law. On July 15, 2013, Rhode Island passed such a repealer, which states "[t]he fact that a person or public body has not dealt directly with the defendant shall not bar or otherwise limit recovery." *R.I. Gen. Laws § 6-36-7(d)*. As such, Plaintiffs argue the statute should be applied retroactively and, even if it cannot be applied retroactively, they nevertheless fall within the repealer's protection since Plaintiffs suffered damages past July 15, 2013.

Here, Defendants argue that the activity alleged in this claim predated July 15, 2013, since the alleged anticompetitive conduct that prevented the generic brands from entering the market occurred prior to November 30, 2011. (SAC ¶¶ 23, 469, 512, 523, 535). As such, since the conduct giving rise to the present cause of action occurred prior to the passing of Rhode Island's repealer, Defendants contend it does not apply and, under *Illinois Brick*, **[*419]** must be dismissed. In addition, Defendants aver that the statute cannot be applied retroactively.

Under Rhode Island law, it is well established that statutes cannot be applied retroactively, unless **[**49]** clearly stated. The Rhode Island Supreme Court has held that, "statutes and their amendments are construed to operate prospectively unless a specific contrary intent is expressed by the Legislature, or retroactivity must necessarily be inferred from the language employed by the law makers." *State v. Jennings, 944 A.2d 171, 173 (R.I. 2008)*; *see also* *Rodrigues v. State, 985 A.2d 311, 318 (R.I. 2009)*; *Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1140-41 (R.I. 2002)*; *Hydro-Manufacturing v. Kayser-Roth Corp., 640 A.2d 950, 954-55 (R.I. 1994)*. Additionally, courts have consistently held that the Rhode Island repealer applies prospectively. *See, e.g.,* *In re Aggrenox Antitrust Litig. ("Aggrenox I"), 94 F. Supp. 3d 224, 252-53 (D. Conn. 2015)*; *In re Cast Iron Soil Pipe & Fittings Antitrust Litig., No. 14-2508, 2015 U.S. Dist. LEXIS 121620, at *63, (E.D. Tenn. July 24, 2015)*; *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 759 (E.D. Pa. 2014)*. Finally, Plaintiffs' contention that Defendants' conduct has continued past July 15, 2013, thereby placing it within the repealer's protection, is belied by the explicit allegations set forth in their Complaint, which focus solely on Defendants' actions made prior to November 30, 2011. (SAC ¶¶ 23, 469, 512, 523, 535). As such, because Rhode Island's repealer does not apply retroactively and none of the activity giving rise to their claims occurred after the date of enactment (July 15, 2013), EPPs' Rhode Island antitrust claims are dismissed with prejudice.

3. Utah Antitrust Act

Lastly, in addition to failing to provide notice, Defendants contend that EPPs' Utah antitrust claims fail, since none of the named Plaintiffs are **[**50]** Utah residents, as required under Utah law. (SAC ¶ 487). As such, Defendants contend that EPPs lack standing to assert claims under the Utah Antitrust Act. *See* *Niaspan, 42 F. Supp. 3d at 759-60*. Plaintiffs respond that dismissal is not warranted, since only a member of a putative class must be from Utah. *See* *In re Liquid Aluminum Sulfate Antitrust Litig., No. 16-2687, 2017 U.S. Dist. Lexis 115294, at *112-13 (D.N.J. July 20, 2017)*.

Under the Utah Antitrust Act, "[a] person who is a *citizen* of this state or a *resident* of this state" can bring a claim. *Utah Code Ann. § 76-10-3109(1)(a)* (emphasis added). The majority of courts that have been presented with this statute require at least one Utah citizen or resident be a named plaintiff. *See* *Opana Er, 162 F. Supp. 3d at 725*; *Aggrenox I., 94 F. Supp. 3d at 251-52*; *Niaspan, 42 F. Supp. 3d at 759-60*; *Nexium, 968 F. Supp. 2d at 410*; *In Re Magnesium Oxide Antitrust Litig., No. 10-5943, 2011 U.S. Dist. LEXIS 121373, at *30 n.10 (D.N.J. Oct. 20, 2011)*. Here, neither party disputes that none of the named Plaintiffs are Utah residents or citizens. As such, guided by the majority of courts to address this issue, because there must be at least one named plaintiff who is a Utah citizen or resident in order to establish standing for the putative class, EPPs' claims under the Utah Antitrust Act are dismissed without prejudice.

In sum, EPPs' antitrust claims under Illinois and Rhode Island are dismissed and there is no right to amend due to futility. Under Utah, the claim is dismissed without prejudice; but Plaintiff may amend to name such plaintiff within thirty days.

[*420] *4. States Requiring* ***[**51]*** *Concerted Action*

Defendants next seek dismissal of Count I of EPPs' Kansas, New York, and Tennessee antitrust claims, which asserts a single claim of monopolization against Pfizer, based on fraudulently obtaining and listing the '995 Patent, obtaining reissuance of that patent, filing serial sham litigation and a sham citizen petition, and entering into a reverse settlement agreement with Ranbaxy. (SAC ¶ 504). Specifically, Defendants argue that because Kansas, New York, and Tennessee require unlawful behavior between two or more individuals, Count I must be dismissed since it alleges unilateral conduct by Pfizer.

It is clear from the Complaint that the allegations concerning the obtaining, listing, and reissuance of the '995 Patent, in addition to the sham litigation and sham citizen petition, are all unilateral actions by Pfizer (SAC ¶ 500). As such, since these allegations describe unilateral conduct, Defendants contend that Count I fails in Kansas, New York and Tennessee. *See* *Kan. Stat. Ann. §§ 50-101*, *-112*, *-132*; *N.Y. Gen. Bus. Law § 340(1)*; *Tenn. Code Ann. §§ 47-25-101*, *-102*.

The Kansas Monopolies and Unfair Trade Act proscribes "all arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition" and **[**52]** those "designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles." *Kan. Stat. Ann. § 50-112*. The Act defines a "trust" as a "combination of capital, skill, or acts, by two or more persons" and prohibits conspiracy or combination "with any other persons . . . for the purpose of monopolizing any line of business." *Kan. Stat. Ann. §§ 50-101*, *132*. While there is scant case law interpreting the *Kansas Monopolies and Unfair Trade Act*, the Kansas Court of Appeals has held that since the Act emphasizes agreements between two or more individuals, the legislature intended for the Act to require more than unilateral conduct. *Smith v. Philip Morris Cos., 50 Kan. App. 2d 535, 335 P.3d 644, 662-67 (Kan. Ct. App. 2014)*; *see also* *In re Relafen Antitrust Litig., 221 F.R.D. 260, 283 (D. Mass. 2004)*.

Like Kansas, the *New York Donnelly Act* defines an antitrust violation as "every contract, agreement, arrangement, or combination whereby a monopoly in the conduct of any business, trade, or commerce . . . may be established or maintained, or whereby [c]competition or the free exercise of any activity in the conduct of any business, trade, or commerce . . . is or may be restrained." *N.Y. Gen. Bus. Law § 340(1)*. As such, in New York "[a]n antitrust claim under the Donnelly Act...must allege both concerted action by two or more entities and a consequent restraint **[**53]** of trade within an identified relevant product market." *Global Reins. Corp.-US. Branch v. Equitas Ltd., 18 N.Y.3d 722, 969 N.E. 2d 187, 192, 946 N.Y.S.2d 71 (N.Y. 2012)*; *see also* *In re Aluminum Warehousing Antitrust Litig. No. 13-2481, 2014 U.S. Dist. Lexis 140765, at *23 (S.D.N.Y. Sept. 14, 2014)*. However, the Northern District of New York has held that allegations of monopolistic activities, based on conspiring with other individuals, suffices to state a claim under the Donnelly Act. *See* *N. Cnty. Communs. Corp. v. Verizon N.Y. Inc., 233 F. Supp. 2d 381, 385 (N.D.N.Y. 2002)*.

Finally, like Kansas and New York, the Tennessee Trade Practices Act proscribes "[a]ll arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition . . . and all arrangements, **[*421]** contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer." *Tenn. Code Ann. § 47-25-101*. Despite limited case law interpreting the statute, several district courts have held that "the absence of an arrangement or conspiracy between two actors is a bar" to a claim under the Tennessee statute. *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 445-46 (E.D. Pa. 2010)*; *see also* *In re Ditropan XL Antitrust Litig., 529 F. Supp. 2d 1098, 1108-09 (N.D. Cal. 2007)*; *Relafen, 221 F.R.D. at 284*.

As established above, the case law as well as the plain language of the Kansas, New York, and Tennessee antitrust statutes require concerted action between two parties. As such, allegations relating to Pfizer's **[**54]** unilateral conduct fails to state a claim under these statutes. The Court is not persuaded by Plaintiffs' argument that all alleged conduct falls within a single cause of action. Therefore, Defendants' motion as it relates to Kansas, New York, and Tennessee are granted in part and denied in part. To the extent Count I is based on Pfizer fraudulently obtaining the '995 Patent, listing that patent in the Orange Book, obtaining reissuance of the '995 Patent, filing a sham citizen petition, and engaging in sham litigation, these claims are dismissed, since the conduct is unilateral. However, the Court denies Defendants' motion to the extent that they seek dismissal of Count I based on the reverse settlement agreement with Ranbaxy.

IV. State Law Consumer Protection Claims

Defendants next challenge the sufficiency of EPPs' state consumer protection claims. The Court discusses each state individually.[11]

1. California

Defendants first seek dismissal of EPPs' claims under the California Unfair Competition Law, since EPPs failed to plead reliance. The Unfair Competition Law proscribes "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. As such, courts have understood *Section 17200* to provide relief for three varieties **[**55]** of unfair competition: "practices which are unlawful, unfair, or fraudulent." *Ditropan XL, 529 F. Supp. 2d at 1105*. However, contrary to Defendants' assertion, reliance is only required "when a[n] [Unfair Competition Law] claim is premised on allegations that the Defendants engaged in fraudulent business practices." *Id. at 1106*. Here, EPPs claims are predicated on unlawful and unfair business practices engaged by defendants. Specifically, Plaintiffs challenge, among other things, Defendants' sham litigation, fraudulent procurement of the PTO, and reverse settlement agreement. As such, "at the very least, [EPPs] allege a claim premised on the unfair prong." *Id.*; *see also* *In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 160 (E.D. Pa. 2009)*. Therefore, because EPPs' allege sufficient facts to sustain an Unfair Competition Law claim based on unfair business practices, Defendants' motion for judgment on the pleadings with respect to this claim is denied.[12]

[*422] *2. Illinois*

Defendants next seek dismissal of EPPs' claims under the Illinois Consumer Fraud and Deceptive Business Practices Act since: (1) the Act does not provide additional relief beyond antitrust claims; (2) EPPs failed to plead deception or reliance; and (3) EPPs fail to demonstrate that the alleged conduct was consumer-oriented or had a consumer **[**56]** nexus. The Illinois Consumer Fraud and Deceptive Business Practices Act states that "[u]nfair methods of competition and unfair or deceptive acts or practices . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby." *815 Ill. Comp. Stat. Ann. 505/2*. However, the state legislature did not intend for the Act to serve as an "additional antitrust enforcement mechanism." *Laughlin v. Evanston Hosp., 133 Ill. 2d 374, 550 N.E.2d 986, 993, 140 Ill. Dec. 861 (Ill. 1990)* (consumer fraud statutes cannot be used when conduct is not actionable under the state ***antitrust law***); *Siegel v. Shell Oil Co., 480 F. Supp. 2d 1034, 1046-48 (N.D. Ill. 2007)* (consumers can bring a consumer fraud claim when conduct is actionable under the Illinois Antitrust Act). As such, if the plaintiff fails to plead an antitrust claim under the Illinois Antitrust Act, those same allegations of anticompetitive conduct cannot give rise to a claim

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[11] Because the Court has already dismissed EPPs' claims under Massachusetts, Montana, Tennessee, Utah and West Virginia's consumer protection statutes, it does not address the remaining arguments pertaining to these states.

[12] Moreover, it should be noted that, at the pleading stage it is difficult to determine whether Plaintiff's claims under California law are even based on fraudulent conduct; as such, the Court also finds Defendants' motion to be premature.

under the Illinois Consumer Fraud and Deceptive Business Practices Act. *Id.*; Siegel, 480 F. Supp. 2d at 1034; Wellbutrin XL, 260 F.R.D. at 162.

As discussed above, the Illinois Antitrust Act prohibits indirect purchaser class actions. Moreover, when reviewing the Complaint, EPPs' claims are primarily focused on anticompetitive conduct and its "allegations of consumer fraud overlap entirely with the allegations of anticompetitive conduct." Wellbutrin XL, 260 F.R.D. at 162 (quoting **[**57]** Gaebler v. New Mexico Potash Corp., 285 Ill. App. 3d 542, 676 N.E.2d 228, 230, 221 Ill. Dec. 707 (Ill. App. Ct. 1996)). Simply put, "plaintiffs may not assert what are essentially antitrust claims in the guise of a claim under [the Illinois Consumer Protection Act]." *Id.* Since any amendment would be futile, judgment on the pleadings is granted without leave to amend.

3. Maine

Defendants next seek dismissal of EPPs' claims under the Maine Unfair Trade Practices Act, since EPPs failed to allege deception and, alternatively, EPPs are not considered "consumers" under the Act. The Act proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Me. Rev. Stat. tit. 5 § 207. "A business practice is 'unfair' if the injury it produces is (1) 'substantial,' (2) not 'outweighed by any countervailing benefits to consumers or competition that the practice produces,' and (3) not reasonably avoidable by consumers." In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 584 (M.D. Pa. 2009) (quoting Tungate v. MacLean-Stevens Studios, Inc., 1998 ME 162, 714 A.2d 792, 797 (Me. 1998)). "In pricing cases, the allegedly unfair practice must also induce the consumer to acquire something that he or she would not otherwise have purchased." *Id.* However, where as here, the purported conduct resulted in higher prices, the Maine Unfair Trade Practices Act provides no such relief, since higher prices do not induce a consumer to make purchases. **[**58]** In re Graphics Processing Units (GPU) Antitrust Litig., 527 F. Supp. 2d 1011, 1031 (N.D. Cal. 2007). As **[*423]** such, since any amendment to EPPs' claims under the Maine Consumer Protection Act would be futile, judgment on the pleadings is granted without leave to amend. *See* Chocolate Confectionary, 602 F. Supp. 2d at 585.

It is worth briefly noting that the court is unpersuaded by Plaintiff's reliance on In re Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160 (D. Me. 2004), which held that deception or reliance only applies to "unfair or deceptive acts," not "unfair methods of competition." Id. at 186-87. First, federal courts have criticized the rationale in *In re Motor Vehicles*, concluding that its "crabbed reading of *Tungate*" is incongruent with the Maine Supreme Court's holding since "[t]he Maine Supreme Court [did] not qualify its pronouncement as applicable to only 'unfair or deceptive acts.'" *In re Polyurethane Foam Antitrust Litig., 799 F. Supp. 2d 777, 787 (N.D. Ohio 2011)* (quoting Flash Memory, 643 F. Supp. 2d at 1159); *see also* Chocolate Confectionary, 602 F. Supp. 2d at 584-85; In re TFT-LCD Antitrust Litig., 586 F. Supp. 2d 1109, 1126-27 (N.D. Cal. 2008). Second, the allegations in that case concerned group boycotts,[13] not price fixing or reverse settlements, which the *In re Motor Vehicles* court reasoned would nevertheless support an unfair method of competition claim.

4. Nebraska

Defendants next seek dismissal of Plaintiffs' claims under the Nebraska Consumer Protection Act, since the purportedly wrongful conduct does not have a consumer nexus. The Nebraska Consumer Protection Act proscribes "[u]nfair methods of competition and unfair or deceptive **[**59]** acts or practices in the conduct of any trade or commerce" and allows injured individuals a private right of action. Neb. Rev. Stat. Ann §§ 59-1602; -1609. In order to state a valid claim under the Act, "the unfair or deceptive act or practice must have an impact upon the public interest." Nelson v. Lusterstone Surfacing Co., 258 Neb. 678, 605 N.W.2d 136, 142 (Neb. 2000). "The purpose of the Act is to provide consumers with protection against unlawful practices in the conduct of any trade or commerce

[13] In their brief in opposition to Defendants' motion, EPPs make explicitly clear that they "have not alleged a claim based on group boycott." (Pls' Brief in Opp. at 41).

which directly or indirectly affects the people of Nebraska" and "was intended to be an antitrust measure to protect Nebraska consumers from monopolies and price-fixing conspiracies." *Arthur v. Microsoft Corp., 267 Neb. 586, 676 N.W.2d 29, 37 (Neb. 2004)*. As such, "the Act allows any person who is injured by a violation of *§§ 59-1602 to 59-1606* which directly or indirectly affects the people of Nebraska to bring a civil action to recover damages." *Id. at 38*.

Here, as discussed above, EPPs allege that Defendants engaged in anticompetitive schemes to prevent the market entry of generic-brand Lipitor, which caused EPPs to pay a premium. Since the schemes alleged in the Complaint had an indirect impact on Nebraska consumers, EPPs' have adequately alleged that the scheme impacted the public interest. As such, Defendants' motion for judgment on the pleadings with respect to EPPs' claims under the Nebraska **[**60]** Consumer Protection Act is denied.

5. Nevada

Defendants argue that EPPs claims under the *Nevada Deceptive Trade Practices Act* should be dismissed, since EPPs failed to allege consumer reliance. Under *Section 41.600 of Nevada's Revised Statutes*, "any person who is a victim of . . . [a] deceptive trade practice as defined in [the Nevada **[*424]** Deceptive Trade Practices Act]" may a bring an action thereunder. *Nev. Rev. Stat. § 41.600*. Some courts have held that when a plaintiff seeks relief based on prohibited acts listed under *Section 598.0915*, the plaintiff is required to demonstrate deception or reliance. *See, e.g., Picus v. Wal-Mart Stores, Inc., 256 F.R.D. 651, 657 (D. Nev. 2009)*; *Sheet Metal Workers, 737 F. Supp. 2d at 417*. However, contrary to Defendants' contention, EPPs' claims do not arise under *Section 598.0915*; instead, EPPs' claims appear to be predicated on *Section 598.0923(3)*, which states that "[a] person engages in a 'deceptive trade practice' when in the course of his or her business or occupation he or she knowingly . . . violates state or federal statute or regulation relating to the sale or lease of goods or service." *Nev. Rev. Stat. § 598.0923(3)*.

Under *Section 598.0923(3)*, the Nevada Deceptive Trade Practices Act does not appear to require the plaintiff must plead reliance, nor do Defendants identify any case-law that would otherwise support this contention. *See In re Pharm. Indus. Average Wholesale Price Litig., 252 F.R.D. 83, 98 (D. Mass. 2008)* (parties agreeing that the Nevada Deceptive Trade Practices Act does not require **[**61]** proof of reliance); *see also In re Packaged Seafood Prods. Antitrust Litig., 242 F. Supp. 3d 1033, 1080-81 (S.D. Cal. 2017)* (rejecting the defendant's motion to dismiss the end purchaser plaintiff's Nevada Deceptive Trade Practices Act claims, arising from an alleged antirust conspiracy regarding packaged seafood products). As such, since EPPs' claims are predicated on allegations of anticompetitive conduct, which are considered prohibited acts under *Nev. Rev. Stat. § 598A.060(1)(a)*, the Court denies Defendants' motion for judgment on the pleadings.

6. New Mexico

Defendants next challenge EPPs' claims under the New Mexico Unfair Practices Act, since the Act does not provide relief for price fixing and, in any event, they fail to plead unconscionable conduct. The New Mexico Unfair Practices Act prohibits unfair, deceptive, and unconscionable trade practices. N.M. Rev. Stat. *§ 57-12-2*. Given the remedial nature of the Act, "courts construe its provisions broadly to facilitate this purpose." *Chocolate Confectionary, 602 F. Supp. 2d at 585* (citing *State ex rel. Stratton v. Gurley Motor Co., 1987- NMCA 063, 105 N.M. 803, 737 P.2d 1180, 1185 (N.M. 1987))*. The Act defines "unconscionable trade practice" as "an act or practice in connection with the sale . . . of any goods or services . . . that to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between **[**62]** the value received by a person and the price paid." *N.M. Stat. Ann. § 57-12-2(E)*.

"Federal courts generally permit [New Mexico Unfair Practices Act] actions in price-fixing cases provided that the plaintiff alleges a 'gross disparity' between the price paid for a product and the value received." *Chocolate Confectionary, 602 F. Supp. 2d at 585* (collecting cases); *see also Flash Memory, 643 F. Supp. 2d at 1159-60*; *Liquid Aluminum Sulfate, 2017 U.S. Dist. LEXIS 115294, at *108-09*; *In re Aftermarket Filters Antitrust Litig., No. 08-4883, 2009 U.S. Dist. LEXIS 104114, at *37 (N.D. Ill. Nov. 5, 2009)*. Unlike *GPU, 527 F. Supp. 2d at 1029-30*, where the court dismissed the plaintiffs' New Mexico Unfair Practices Act for failing to plead unequal bargaining power, the Court is satisfied that, at this juncture, that EPPs have sufficiently pled enough **[*425]** facts to state a claim under the New Mexico statute. EPPs Complaint is replete with allegations of price fixing and anticompetitive schemes, and it is beyond cavil that these schemes resulted in consumers paying a substantial premium for goods that they would have otherwise paid a fraction for. *See* *TFT-LCD, 586 F. Supp. 2d at 1127* (allegations of price fixing and "gross disparity" between the value of products received and amount paid sufficient to state a claim under the New Mexico Unfair Practices Act). As such, the Court denies Defendants' motion for judgment on the pleadings as to EPPs' New Mexico Unfair Practices Act claims.

7. New York

Defendants next challenge EPPs' claims under the New York Consumer **[**63]** Protection from Deceptive Acts and Practices Act, since EPPs fail to allege particular conduct directed specifically at them and, in the alternative, fail to allege consumer reliance. *Section 349 of New York's Business Law* states, "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." *N.Y. Gen. Bus. Law § 349(a)*. "[S]ection 349 is directed at wrongs against the consuming public." *In re Rezulin Prods. Liab. Litig., 392 F. Supp. 2d 597, 613 (S.D.N.Y. 2005)* (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 647 N.E.2d 741, 744, 623 N.Y.S.2d 529 (N.Y. 1995))*. In order to state a claim under *Section 349*, the plaintiff must prove three elements: (1) "the challenged act or practice was consumer-oriented;" (2) "it was misleading in a material way;" and (3) "the plaintiff suffered injury as a result of the deceptive act." *Flash Memory, 643 F. Supp. 2d at 1160* (quoting *Stutman v. Chem. Bank, 95 N.Y.2d 24, 731 N.E.2d 608, 611, 709 N.Y.S.2d 892 (N.Y. 2000))*. "To satisfy the consumer-oriented prong, plaintiffs need only allege consumer-oriented conduct that implicates the public interest in New York." *In re Dynamic Random Access Memory Antitrust (DRAM II) Litig., 536 F. Supp. 2d 1129, 1144-45 (N.D. Cal. 2008))*.

Here, contrary to Defendants' assertion, the Court is satisfied that EPPs have alleged sufficient facts to sustain a claim under *Section 349*. As discussed above, EPPs' claims focus on the anticompetitive conduct of Defendants, which prevented the earlier market entry of generic Lipitor and, as a result, caused individuals to pay a premium. *See* ***[**64]*** *MacQuarie Grp. Ltd. v. Pac. Corporate Grp., LLC, No. 08-cv-2113, 2009 U.S. Dist. LEXIS 16554, at *23-25 (S.D. Cal. Mar. 2, 2009)* (recognizing that "courts routinely treat[] antitrust violations as deceptive acts"); *see also* *New York v. Feldman, 210 F. Supp. 2d 294, 302 (S.D.N.Y. 2002))*. In fact, similar allegations were made in both *TFT-LCD, 586 F. Supp. 2d at 1128-29*, and *DRAM II, 536 F. Supp. 2d at 1143-44*, where the district courts denied the defendants' motions to dismiss, finding the plaintiffs alleged sufficient facts to state a claim. As such, for these reasons, the Court denies Defendants' motion as to EPPs' *Section 349* claims.

8. North Carolina

Defendants next contend that EPPs lack standing to assert claims under North Carolina's Unfair and Deceptive Trade Practices Act, since Plaintiffs are neither competitors nor in commercial dealings with Defendants. *Section 75-1.1* of the Act proscribes "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" and provides "any person" or "business of any person, firm or corporation" the right to sue for injuries **[*426]** arising from unfair business practices. *N.C. Gen. Stat. §§ 75-1.1*; *-16*. "Federal courts interpreting the [North Carolina's Unfair and Deceptive Trade Practices Act] have allowed claims asserted by businesses against one another as long as the challenged practices affect commerce or the marketplace." *Sheet Metal Workers, 737 F. Supp. 2d at 419*. Here, as discussed, **[**65]** EPPs claim that Defendants engaged in anticompetitive schemes, which ultimately resulted in consumers purchasing Lipitor at inflated prices. This suffices, under the Act, to confer EPPs with standing; as such, Defendants' motion for judgment on the pleadings is denied. *See id.* The Court only adds that Defendants' reliance on *Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 519-20 (4th Cir. 1999)* is of no moment. In *Food Lion*, the Fourth Circuit held that the plaintiffs could not bring a claim against the defendant under the Act, despite engaging in deceptive conduct, since the conduct "did not harm the consuming public." *Id. at 520*. Here, unlike *Food Lion*, EPPs' allegations that Defendants' anticompetitive scheme resulted in consumers paying inflated costs for Lipitor demonstrates a harm to the "consuming public."

9. Rhode Island

Finally, Defendants challenge EPPs' claims under the Rhode Island Unfair Trade Practices and Consumer Protection Act, since: (1) the misconduct alleged in the Complaint is not prohibited under the Act and (2) EPPs are not "consumers" as defined under the Act. The Rhode Island Unfair Trade Practices and Consumer Protection Act proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade **[**66]** or commerce." *R.I. Gen. Laws § 6-13.1-2*. The Act goes on to list twenty "acts or practices" that are considered unfair or deceptive competition. *R.I. Gen. Laws § 6-13.1-1(6)(i)-(xx)*. In determining whether a practice is "unfair" under the Act, courts must consider: "(1) whether the practice affronts public policy, as delineated by the common law, statutes, and 'other established concept[s] of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers (or competitors or other businessmen).'" *Chocolate Confectionary, 602 F. Supp. 2d at 587* (quoting *Ames v. Oceanside Welding and Towing Co., Inc., 767 A.2d 677, 681 (R.I. 2001))*.

The Court finds Defendants' first argument unconvincing. The majority of courts that have been presented with this issue have held that the three prong *Ames* standard "encompass price-fixing injuries, and [therefore] consumers subject to collusive pricing possess a cognizable claim under the [Act]." *Chocolate Confectionary, 602 F. Supp. 2d at 587*; *TFT-LCD, 586 F. Supp. 2d at 1129-30*; *DRAM II, 536 F. Supp. 2d at 1144-45*. As such, since EPPs allege anticompetitive conduct, which resulted in consumers purchasing Lipitor at a premium rate, EPPs have sufficiently alleged unfair conduct under the Rhode Island Unfair Trade Practices and Consumer Protection Act. *See DRAM II, 536 F. Supp. 2d at 1145* (allegations that the defendants engaged price fixing "offend[s] public policy as has been established by statute and/or common **[**67]** law").

Alternatively, Defendants seek dismissal of EPPs' Rhode Island Unfair Trade Practices and Consumer Protection Act claims since they are not "consumers" within the meaning of the Act. The Act limits claims to "[a]ny person who purchases or leases goods or services primarily for personal, family, or household purposes." *R.I. Gen. Laws § 6-13.1-5.2(a)*. Citing no supporting case law, EPPs contend **[*427]** that the Act defines "person" to include entities such as corporations, trusts, and associations. However, contrary to EPPs' assertion, "the Rhode Island Supreme Court has construed the [Rhode Island Unfair Trade Practices and Consumer Protection Act]to require that only natural persons are permitted to bring private rights of actions under the statute." *In re Dynamic Random Access Memory (DRAM I) Antitrust Litig., 516 F. Supp. 2d 1072, 1117 (N.D. Cal. 2007)* (citing *ERI Max Entm't, Inc. v. Streisand, 690 A.2d 1351, 1354 (R.I. 1997))*; *see also TFT-LCD, 586 F. Supp. 2d at 1130* (same); *Sheet Metal Workers, 737 F. Supp. 2d at 423* (same). As such, Defendants' motion for judgment on the pleadings is granted. "However, because there may be unusual circumstances under which a business entity may be able to allege that its purchases were primarily for personal, family or household purposes, the Court will not preclude plaintiffs from amending the complaint to allege such a claim on behalf of business entities." *TFT-LCD, 586 F. Supp. 2d at 1130*.

To sum up, the Court declines to grant judgment as to EPPs' **[**68]** consumer protection claims in California, Nebraska, Nevada, New Mexico, New York, and North Carolina. However, the Court grants Defendants' motion, without leave to amend as to EPPs' Illinois and Maine consumer protection claims; and *with* leave to amend with regards to EPPs' Rhode Island consumer protection claims.

ORDER

IT IS on this 21 day of August, 2018,

ORDERED that Defendants' Motion for Judgment on the Pleadings (ECF No. 755) is **GRANTED IN PART** and **DENIED IN PART** as follows:

• Defendants' Motion for Judgment on the Pleadings based on preemption principles is **DENIED**;

• Defendants' Motion for Judgment on the Pleadings as to EPPs' state consumer protection claims in California, Nebraska, Nevada, New Mexico, New York, and North Carolina is **DENIED**.

• Defendants' Motion for Judgment on the Pleadings as it pertains to EPPs' Arizona, Hawaii, Nevada, and Utah antitrust claims is **GRANTED WITHOUT PREJUDICE**; EPPs are granted leave to amend their Complaint to plead compliance with these notice provisions;

• Defendants' Motion for Judgment on the Pleadings as it pertains to EPPs' Massachusetts, Montana, West Virginia, Rhode Island, Tennessee and Utah consumer protection claims is **GRANTED WITHOUT [**69] PREJUDICE**; EPPs are granted leave to amend their Complaint to plead compliance with Massachusetts and West Virginia's notice provisions, and plead individual claims in Montana, Rhode Island, Tennessee, and Utah;

• Defendants' Motion for Judgment on the Pleadings as it pertains to EPPs' Illinois and Rhode Island antitrust claims, and EPPs' Illinois and Maine consumer protection claims is **GRANTED WITH PREJUDICE**;

• Defendants' Motion for Judgment on the Pleadings as to Count I of EPPs' Complaint under Kansas, New York, and Tennessee is **GRANTED** to the extent these claims are predicated on unilateral activity by Pfizer.
• EPPs have thirty (30) days from the filing of this Memorandum and Order to file an Amended Complaint, consistent with this Memorandum.

/s/ Peter G. Sheridan

PETER G. SHERIDAN, U.S.D.J.

United Food & Commer. Workers Unions & Employers Midwest Health Benefits Fund v. Novartis Pharms. Corp.

United States Court of Appeals for the First Circuit

August 21, 2018, Decided

No. 17-1714, No. 17-1776

Reporter

902 F.3d 1 *; 2018 U.S. App. LEXIS 23284 **; 2018-2 Trade Cas. (CCH) P80,481

UNITED FOOD AND COMMERCIAL WORKERS UNIONS AND EMPLOYERS MIDWEST HEALTH BENEFITS FUND; LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, on behalf of themselves and others similarly situated; AFSCME HEALTH AND WELFARE FUND, on behalf of themselves and others similarly situated; MINNESOTA LABORERS HEALTH AND WELFARE FUND, on behalf of themselves and others similarly situated; PENNSYLVANIA EMPLOYEES BENEFIT TRUST FUND, on behalf of themselves and others similarly situated; LOUISIANA HEALTH SERVICE & INDEMNITY COMPANY, d/b/a Blue Cross and Blue Shield of Louisiana, on behalf of themselves and others similarly situated, Plaintiffs, Appellants, v. NOVARTIS PHARMACEUTICALS CORPORATION; NOVARTIS CORPORATION; NOVARTIS AG, Defendants, Appellees.RXDN, INC., on behalf of itself and on behalf of the Direct Purchaser Class, Plaintiff, Appellant, v. NOVARTIS PHARMACEUTICALS CORPORATION; NOVARTIS CORPORATION; NOVARTIS AG, Defendants, Appellees.

Prior History: [1]** APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Allison D. Burroughs, U.S. District Judge.

UFCW v. Novartis Pharms. Corp., 2017 U.S. Dist. LEXIS 102389 (D. Mass., June 30, 2017)

Core Terms

patent, imatinib, mesylate, prior art, crystalline, salt, antitrust, immunity, plaintiffs', infringement, sham, patent application, baseless, allegations, anticipation, invention, compound, invalid, misrepresentation, enforcing, disclose, generic, complaints, expiration, motion to dismiss, representations, manufacture, purchasers, discovery, issuance

LexisNexis® Headnotes

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

HN1[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The Noerr-Pennington doctrine provides a party immunity from antitrust liability for petitioning the government for redress, in light of the *First Amendment* right to petition the government.

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

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

HN2[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington immunity doctrine has two exceptions. An antitrust defendant may not enjoy the immunity in enforcing its patent if it obtained that patent through a fraud on the Patent Office, or if its suit to enforce the patent is a "sham" for impermissible anti-competitive conduct.

Antitrust & Trade Law > Sherman Act > Claims

HN3[] **Sherman Act, Claims**

Appellate review of whether the plaintiffs have sufficiently alleged materiality to the issuance of a patent is de novo.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN4[] **Sherman Act, Claims**

The materiality requirement is a meaningful one. The heightened standard of materiality in a Walker Process case requires that the patent would not have issued but for the patent examiner's justifiable reliance on the patentee's misrepresentation or omission. In addition, like all fraud-based claims, Walker Process allegations are subject to the pleading requirements of *Fed. R. Civ. P. 9(b)*. That means that the party alleging the fraud, with respect to elements not bearing on the conditions of a person's mind, must state with particularity the circumstances constituting fraud. *Fed. R. Civ. P. 9(b)*.

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

HN5[] **Noerr-Pennington Doctrine, Sham Exception**

The Supreme Court has announced a two-part test for determining whether a suit to enforce intellectual property rights is a "sham" that is not entitled to Noerr-Pennington immunity from antitrust scrutiny. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If the challenged suit is objectively baseless, a court then proceeds to consider the alleged monopolist's "subjective motivation" under the second part of the test. Under this second prong, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon. In order to make a "sham" showing with respect to a suit to enforce an intellectual property right, a plaintiff must allege that both prongs of the test are met.

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

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN6[] **Noerr-Pennington Doctrine, Sham Exception**

Appellate review of whether the plaintiffs have plausibly alleged "sham" litigation is de novo. An appellate court proceeds on the understanding that a suit to enforce a patent, like a suit to enforce any intellectual property right, could be "objectively baseless."

Evidence > Burdens of Proof > Clear & Convincing Proof

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

HN7[] **Burdens of Proof, Clear & Convincing Proof**

A patent is presumed valid and thus its validity can be challenged only with clear and convincing evidence.

Patent Law > Anticipation & Novelty > Elements

HN8[] **Anticipation & Novelty, Elements**

Invalidation of a patent on anticipation grounds requires that every element and limitation of the claim was previously described in a single prior art reference, either expressly or inherently, so as to place a person of ordinary skill in possession of the invention.

Patent Law > Nonobviousness > Elements & Tests > Prior Art

HN9[] **Elements & Tests, Prior Art**

With respect to obviousness, the analysis involves several basic factual inquiries: the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.

Counsel: Thomas M. Sobol, with whom Hannah W. Brennan, Hagens Berman Sobol Shapiro LLP, John D. Radice, Radice Law Firm, P.C., Noah Rosmarin, Adkins, Kelston & Zavez, P.C. were on brief, for appellants.

Saul P. Morgenstern, with whom David K. Barr, Mark D. Godler, Laura S. Shores, Arnold & Porter Kaye Scholer LLP, William A. Zucker, Wyley S. Proctor, McCarter & English LLP, Grant J. Esposito, Jessica Kaufman, and Morrison & Foerster LLP were on brief, for appellees.

Judges: Before Lynch, Kayatta, and Barron, Circuit Judges.

Opinion by: BARRON

Opinion

[*4] BARRON, Circuit Judge. In these consolidated appeals from orders dismissing two putative antitrust class actions, purchasers of a brand-name, prescription drug allege that the drug maker unlawfully delayed the entry of generic versions of the drug into the United States market. Specifically, the plaintiffs allege that the drug maker committed antitrust violations by obtaining through a fraud on the United States Patent and Trademark Office

("Patent Office") a patent for a particular form of a component necessary to manufacture a drug to treat leukemia **[**2]** and by then seeking to enforce that patent through "sham" infringement litigation against manufacturers trying to enter the market with generic versions of that drug.

The drug maker moved to dismiss the antitrust actions on the ground that there was no fraud and that it was immune from antitrust liability for merely enforcing its patent through litigation. The drug maker claimed this immunity based on the Noerr-Pennington doctrine. See *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. ***HN1***[] That doctrine provides a party immunity from antitrust liability for petitioning the government for redress, in light of the *First Amendment* right to petition the government. And it is clear that the petitioning activity within this **[*5]** doctrine's protection includes enforcing one's intellectual property rights in court. See *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc. ("PREI"), 508 U.S. 49, 63-65, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (applying Noerr-Pennington immunity to copyright infringement litigation); *Amphastar Pharms. Inc. v. Momenta Pharms., Inc., 850 F.3d 52, 56-58 (1st Cir. 2017)* (applying Noerr-Pennington immunity to patent infringement litigation).

The District Court agreed with the drug maker that Noerr-Pennington immunity applied to its alleged conduct and, on that basis, dismissed the putative class actions under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* for failure to state a claim. The District Court acknowledged **[**3]** that ***HN2***[] Noerr-Pennington immunity has two exceptions. An antitrust defendant may not enjoy the immunity in enforcing its patent if it obtained that patent through a fraud on the Patent Office, *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177-78, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*, or if its suit to enforce the patent is a "sham" for impermissible anti-competitive conduct, *PREI, 508 U.S. at 51*. The District Court held, however, that the purchasers had not plausibly alleged that either exception applies here. We now affirm.

I.

The putative class actions at issue in these consolidated appeals were brought against Novartis, which distributes and holds the patents for Gleevec, a prescription drug for treating leukemia.[1] Health plans that purchased Gleevec on behalf of their beneficiaries -- so-called end payers -- are the plaintiffs in the first action. A party standing in the shoes of a direct purchaser of the drug is the named plaintiff in the other action.

The suits arise from the following events. In 1996, Novartis obtained the original patent for Gleevec, or Patent No. 5,521,184 ("Patent '184"). This patent claimed Gleevec's active ingredient -- a compound called "imatinib" -- as well as the compound's "corresponding salts." That patent's expiration date was July 4, 2015.

Four years after obtaining that patent, Novartis filed an **[**4]** application for another one. This application sought a patent that pertained to one of the compound's "corresponding salts," the "mesylate" salt of imatinib. Specifically, Novartis's patent application claimed a particular crystalline form of that salt -- namely, the non-needle or "ß-crystalline" form.

According to the complaints filed in each of the antitrust actions against Novartis, chemists commonly modify compounds from "free base" to "salt" form during the pharmaceutical process in order to enhance the drug's properties, such as its solubility. The complaints further point out that, although a salt can be left amorphous, chemists often crystallize salts in various shapes to further select for favorable properties. For this reason, a patent for a particular crystalline form of one of imatinib's corresponding salts, such as the one Novartis claimed, could be quite valuable.

The patent examiner rejected Novartis's patent application for the ß-crystalline form of imatinib mesylate. The examiner concluded that this form of imatinib mesylate was not patentable in consequence of the requirements set

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[1] "Novartis" refers collectively to all three Novartis entities that are defendants: Novartis Pharmaceuticals Corporation, Novartis Corporation, and Novartis AG.

forth in *35 U.S.C. § 102*, which provides that an invention is not patentable if it is entirely anticipated **[**5]** by a single item of prior art, and *35 U.S.C. § 103*, **[*6]** which provides that an invention is not patentable if, from a body of prior art, "the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious . . . to a person having ordinary skill in the art to which the claimed invention pertains."

With reference to *§ 102*, the patent examiner ruled that the ß-crystalline form of imatinib mesylate was "anticipated" by Patent '184. With reference to *§ 103*, the patent examiner ruled that Novartis failed to carry its burden to "show that employing routine procedures" would not produce the ß-crystalline form of the salt.

Novartis appealed the patent examiner's ruling to the Patent Trial and Appeal Board ("Board"), which reversed. With respect to *§ 102*, the Board "assume[d] arguendo, without deciding," that Patent '184, which was set to expire in 2015, anticipated the mesylate salt of imatinib. But, the Board ruled, Patent '184 "contains insufficient disclosure to support a finding of anticipation" of the ß-crystalline form of imatinib mesylate that Novartis claimed in its application for the new patent. With respect to *§ 103*, the Board concluded that the patent examiner had erroneously "shift[ed] **[**6]** the burden of persuasion to applicants to establish that the ß-crystalline form recited in their claim 'cannot be made following routine conditions.'" Moreover, the Board explained, "on this record, the examiner has not adequately explained how a person having ordinary skill would have been led from 'here to there,' i.e., from [imatinib mesylate] to the . . . ß-crystalline form of that compound."

The next month, the patent examiner issued a "notice of allowance," which issues "[i]f, on examination, it appears that the applicant is entitled to a patent" and which specifies the fees that must be paid to obtain the patent. *37 C.F.R. § 1.311*. Thereafter, Novartis made a supplemental disclosure of two prior art references that disclosed the mesylate salt of imatinib (but not the ß-crystalline form of imatinib mesylate for which Novartis sought the patent).

The Patent Office finally issued Novartis's patent for the ß-crystalline form of imatinib mesylate, or Patent No. 6,894,051 ("Patent '051"), on May 17, 2005, with an expiration date in 2019.[2] Novartis then submitted that patent to the Food and Drug Administration ("FDA") for inclusion in what is known as the "Orange Book" -- which lists FDA-approved drugs along with their corresponding patents **[**7]** -- as one of the patents, along with the as-yet-unexpired original '184 patent, that covers Gleevec.

In 2006, a generic drug manufacturer named Sun Pharma filed an abbreviated new drug application ("ANDA") with the FDA. Sun Pharma's ANDA sought to market a generic version of Gleevec in the United States. In its ANDA, Sun Pharma certified that Novartis's second patent for Gleevec, Patent '051, was invalid. Sun Pharma thus sought the FDA's approval for marketing generic Gleevec as soon as the original Gleevec patent, Patent '184, expired on July 4, 2015, even though Novartis's second Gleevec patent, Patent '051, would not expire until 2019.

Several years later, in 2013, while waiting for Patent '184 to expire, Sun Pharma sued Novartis in federal court seeking a declaratory judgment that the second **[*7]** Gleevec patent, Patent '051, was indeed invalid. Novartis counterclaimed, alleging infringement of Patent '051 and seeking a declaratory judgment that the patent was valid.

In May of 2014, before any substantive rulings in that litigation, Sun Pharma and Novartis settled. The parties to that settlement did not disclose its terms, except to announce that Sun Pharma would be permitted to launch its generic version of Gleevec on February 1, 2016, some seven months after the **[**8]** expiration of the original Gleevec patent, Patent '184.[3]

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[2] Novartis also applied for and obtained a third patent for Gleevec -- Patent No. 7,554,799, later reissued as Patent No. RE 43,932 -- which the complaints allege is invalid for the same reasons that Patent '051 is invalid. The plaintiffs discuss only Patent '051, however, on appeal.

[3] The plaintiffs allege that other generic drug manufacturers also filed ANDAs for generic versions of Gleevec, each of which certified that Novartis's second patent for the drug, Patent '051, is invalid. Because Novartis sued each of these generic drug manufacturers for patent infringement within forty-five days of receiving notice of such certifications, Novartis obtained automatic

The two putative class actions at issue here were filed in the wake of that settlement in the United States District Court for the District of Massachusetts. Each action alleged that Novartis had "engaged in an exclusionary, anticompetitive scheme designed to create and maintain a monopoly for Gleevec and its generic substitutes" in the United States market. The complaints in each case alleged that Novartis carried out this monopolistic scheme in the following way in order to delay generic Gleevec's entry into the United States market.

First, the complaints alleged that Novartis fraudulently procured Patent '051 from the Patent Office by falsely representing that the prior art did not disclose imatinib mesylate and that the discovery of its ß-crystalline form was "surprising[]." Second, the complaints alleged that Novartis listed Patent '051 in the Orange Book.[4] And, third, the complaints alleged that Novartis then pursued infringement litigation against manufacturers of generic versions of Gleevec to enforce Patent '051 that was a "sham" for anticompetitive conduct -- given that Novartis could not reasonably expect the patent to withstand an invalidity defense.

The direct purchaser alleged its monopolization claim in its suit under the federal *Sherman Act*, *15 U.S.C. § 2*, while the end payers alleged their monopolization claim under the antitrust laws of twenty-three states and the District of Columbia. See *Ill. Brick Co. v. Illinois, 431 U.S. 720, 730, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* (holding that indirect purchasers generally lack standing to enforce federal antitrust laws). The plaintiffs in both actions sought monetary damages as well as class certification on behalf of similarly situated direct purchasers and end payers respectively.

Novartis moved to dismiss the end-payers complaint under *Rule 12(b)(6)*. Proceedings in the direct-purchaser action were stayed pending adjudication of Novartis's motion to dismiss. Novartis contended in that motion that, under Noerr-Pennington, it could not incur antitrust liability for exercising its right to enforce Patent '051 in court against an infringer. Novartis did acknowledge that there are "two relevant exceptions" to Noerr-Pennington immunity -- namely, the exceptions based on a showing of Walker Process fraud and "sham" litigation. But, Novartis **[*8]** argued in its motion that the plaintiffs had failed plausibly to allege that either exception applied.

In their opposition to the motion to dismiss, the plaintiffs accepted **[**10]** that Novartis would be entitled to Noerr-Pennington immunity unless at least one exception to that immunity applied. The plaintiffs asserted, however, that they had plausibly alleged that both exceptions did apply. The plaintiffs contended that their suit should therefore proceed to discovery, given that Novartis was not entitled to Noerr-Pennington immunity and that Novartis had not otherwise contested their allegations of "the traditional elements of an antitrust claim: causation, antitrust injury, and market power."

The District Court rejected the plaintiffs' arguments about the application of the exceptions and agreed with Novartis that it was entitled to Noerr-Pennington immunity. On that basis, the District Court granted Novartis's motion to dismiss the end-payers action. The direct-purchaser plaintiff next moved for entry of a judgment of dismissal in its own action "in accordance with the orders entered in the end payors' case," which the District Court granted.

The plaintiffs in both actions then appealed.[5] In pressing these appeals, the plaintiffs contend that the District Court erred in holding that they had not plausibly alleged that Novartis had engaged in either fraud within **[**11]** the meaning of Walker Process in obtaining Patent '051 or "sham" litigation in enforcing that patent and thus that the District Court erred in dismissing their suits on the ground that Novartis was immune from antitrust liability for enforcing Patent '051. Novartis counters that the District Court's ruling with respect to Noerr-Pennington immunity was correct, though Novartis does not dispute the plaintiffs' assertion that they have otherwise plausibly alleged the

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thirty-month stays of FDA approval as to each of those ANDAs. See *21 U.S.C. § 355(j)(5)(B)(iii)*. The plaintiffs represent on appeal that all of these additional infringement suits have been dismissed without prejudice.

[4] The plaintiffs clarified in their papers below that they "do not assert the Orange Book listings as a basis for antitrust liability." They explained that they instead asserted them as the basis of a third exception to Noerr-Pennington **[**9]** immunity. However, they have not pressed this argument on appeal.

[5] The end-payer plaintiffs have filed an unopposed motion to amend their notice of appeal, which we provisionally granted and now finally grant.

elements of an antitrust claim. We thus now address the plaintiffs' position against Noerr-Pennington immunity by considering the strength of their arguments pertaining to whether Novartis had engaged in fraud within the meaning of Walker Process in obtaining the patent at issue or in "sham" litigation in enforcing that patent.

II.

In Walker Process, the Supreme Court held that "the enforcement of a patent procured by fraud on the Patent Office may be violative of [federal ***antitrust law***] provided the other elements necessary to a[n] [antitrust] case are present." *Walker Process, 382 U.S. at 174*.[6] The plaintiffs rely on the following alleged misrepresentations in Novartis's patent application to support their contention that Novartis fraudulently obtained Patent '051 from the Patent Office: **[**12]** (1) that the prior art did not disclose imatinib mesylate and (2) that Novartis's manufacture of the non-needle **[*9]** or ß-crystalline form of imatinib mesylate was "surprising[]."

The plaintiffs' complaints allege that Novartis made these allegedly false representations "[w]ith intent to mislead or deceive" the Patent Office, "but for which the '051 patent would not have issued." Accordingly, the plaintiffs contend that they have sufficiently alleged the elements of intent and materiality in asserting that they are entitled to take advantage of the Walker Process-based fraud exception to the usual rule that a patent holder cannot incur antitrust liability for enforcing its patent. See *Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337, 1346-47 (Fed. Cir. 2007)*; *C.R. Bard, Inc. v. M3 Systems, Inc., 157 F.3d 1340, 1364-65 (Fed. Cir. 1998)*.

Novartis counters that the District Court rightly concluded that the plaintiffs have failed plausibly to allege that either of these allegedly false representations by Novartis in its application for Patent '051 was material to the issuance of that patent or that Novartis made either of these representations with the requisite intent to deceive the Patent Office. Accordingly, Novartis contends that the plaintiffs have failed **[**13]** plausibly to allege Walker Process fraud.

We do not need to reach the issue of whether the plaintiffs have plausibly alleged that Novartis made either of the representations at issue with the requisite fraudulent intent. And that is because we agree with Novartis and the District Court that the plaintiffs have failed plausibly to allege that either representation, even if false, was material to the issuance of the patent. ***HN3***[] Our review of whether the plaintiffs have sufficiently alleged materiality is de novo. *SEC v. Tambone, 597 F.3d 436, 441 (1st Cir. 2010)* (en banc).

A.

HN4[] The materiality requirement is a meaningful one. "The heightened standard of materiality in a Walker Process case requires that the patent would not have issued but for the patent examiner's justifiable reliance on the patentee's misrepresentation or omission." *Dippin' Dots, 476 F.3d at 1347* (emphasis added) (citing *C.R. Bard, 157 F.3d at 1364*).

In addition, "[l]ike all fraud-based claims, Walker Process allegations are subject to the pleading requirements of *Fed. R. Civ. P. 9(b)*." *MedImmune, Inc. v. Genentech, Inc., 427 F.3d 958, 967 (Fed. Cir. 2005)*, rev'd on other grounds, *549 U.S. 118, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)*. That means that the party alleging the fraud, with respect to elements not bearing on the "conditions of a person's mind," "must state with particularity the circumstances constituting fraud." *Fed. R. Civ. P. 9(b)*.

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[6] Walker Process concerned antitrust liability under the federal *Sherman Act*. *382 U.S. at 173*. The parties assume that the Walker Process doctrine applies to the state antitrust laws at issue in the end-payers action as well.

We note that the Supreme Court has, since Walker Process, reserved the question "whether and, if so, to what extent Noerr permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *PREI, 508 U.S. at 61 n.6* (citing *Walker Process, 382 U.S. at 176-77*). Neither party suggests to us, however, that, in light of PREI, Walker Process is not an available exception to Noerr-Pennington. So we proceed on the assumption that it is.

B.

We consider first the plaintiffs' allegations **[**14]** regarding Novartis's representation in its patent application that the prior art did not disclose the mesylate salt of the imatinib compound. Novartis does not dispute that this representation was false. But, Novartis contends, the plaintiffs have failed plausibly to allege that this representation was material to the Patent Office's decision to issue Patent '051 and so cannot provide the predicate for their allegations of fraud under *Walker Process*. We agree.

Cutting against the alleged materiality of this statement in the patent application is the fact that Patent '051 covers only a particular form of imatinib mesylate, the β-crystalline form, and not the mesylate salt itself. That feature of the patent application is significant to our assessment of **[*10]** the plaintiffs' allegations concerning materiality because the Board reversed the patent examiner's initial rejection of Novartis's claim to the β-crystalline form even though the Board appears to have assumed that the mesylate salt of the imatinib compound had been previously prepared. In such circumstances, we find it difficult to conclude that, but for Novartis's inaccurate representation that the prior art did not disclose the mesylate salt of the imatinib **[**15]** compound, the patent would not have issued.

But there is also another reason to reach that conclusion, which, at least when combined with the one that we have just given, is fatal to the plaintiffs' claim that they have plausibly alleged the materiality of the representation at issue. And that reason is that, as the District Court observed and as even the plaintiffs accept, Novartis eventually actually did submit prior art to the Patent Office that disclosed imatinib mesylate, although Novartis did so -- to use the plaintiffs' word -- "belatedly."

Specifically, Novartis submitted this prior art to the Patent Office via form PTO-1449. And there is no basis for disputing that the patent examiner, in issuing Patent '051, then considered this subsequently submitted prior art. The patent examiner initialed and signed form PTO-1449, and these "initials when placed adjacent to the considered citations . . . on a form PTO-1449 . . . provide a clear record of which citations have been considered by the Office." U.S. Patent and Trademark Office, *Manual of Patent Examining Procedure § 609* (8th ed. May 2004). In addition, Patent '051 itself lists the publications referencing the prior art disclosing imatinib mesylate among the publications that the examiner **[**16]** considered in issuing the patent. See id. § 1302.12 ("All references which have been cited by the examiner during the prosecution . . . will be printed in the patent.").[7]

It is true that the patent examiner had already issued the notice of allowance for Patent '051 by the time that Novartis had submitted this prior art. But, the plaintiffs make no argument that the examiner could not have withdrawn this allowance in light of the submission of this prior art and the disclosure of the corresponding salt that it made. In fact, the notice of allowance stated, while citing to *37 C.F.R. § 1.313*, that "this application is subject to withdrawal from issue at the initiative of the office or upon petition by the applicant."

Simply put, the record shows that the patent covers only a particular form of imatinib mesylate, that the Board reversed the patent examiner's initial ruling denying the patent even after assuming that the mesylate salt of the imatinib compound had been previously prepared, that Novartis ultimately did submit prior art disclosing that salt, and that the patent examiner considered that prior art in ultimately issuing the patent for a particular form of that salt. In light of these features of the record, we **[**17]** do not see how Novartis's earlier allegedly false representation that the prior art did not disclose imatinib mesylate to the Patent Office could plausibly be said to be material to the Patent Office's ultimate decision to issue the patent for the particular crystalline form of the salt.

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[7] The complaints allege that there was additional prior art disclosing imatinib mesylate that was never provided to the Patent Office. But, the plaintiffs do not contend that these references disclosed anything of relevance to Novartis's patent application other than the mesylate salt of imatinib that the submitted references had already disclosed. See *Rothman v. Target Corp., 556 F.3d 1310, 1326 (Fed. Cir. 2009)* ("A piece of prior art is not material to patent prosecution when it is cumulative of information already before the examiner." (citing *37 C.F.R. § 1.56(b)*)).

[*11] C.

We next turn to the plaintiffs' allegations concerning a section of Novartis's patent application titled "BACKGROUND TO THE INVENTION," in which Novartis stated that "[i]t has now been surprisingly found that a crystal form may under certain conditions be found in the [mesylate] salt of [the imatinib] compound, which is described hereinafter as β-crystal form" (emphasis added). The plaintiffs contend that Novartis's description of its manufacture of the β-crystalline form of imatinib mesylate as "surprising[]" was false. The plaintiffs further contend that Novartis made the statement "in order to avoid the inevitable conclusion that the non-needle form of imatinib mesylate was obvious" and that the statement was material to the Patent Office's decision to issue Patent '051.[8]

The District Court disagreed. The District Court noted that it is "unclear whether such a statement qualifies as a **[**18]** misrepresentation." The District Court explained in this regard that "[t]he examiner was free to reach [her] own opinion about whether such a discovery was in fact 'surprising' based on the prior art that was available to her before the patent issued." The District Court went on to explain that the plaintiffs "have not sufficiently alleged that if Novartis had avoided using the word 'surprising,' the patent would not have issued in light of the relevant prior art."

In arguing on appeal that the District Court erred in finding that Novartis's use of the word "surprising" was not material to the patent's issuance, the plaintiffs assert that it would have been obvious to any pharmaceutical chemist of ordinary skill how to convert the mesylate salt from its non-needle to needle form through "routine" steps and that the process might even occur naturally. The plaintiffs thus suggest that Novartis's representation misled the Patent Office into concluding that the crystalline form of the salt at issue was not obvious, when it was.

But, the plaintiffs have not shown that Novartis's characterization of the existence of the crystalline form of that salt as "surprising" was anything more than an **[**19]** assertion of non-obviousness. And the bare assertion that an invention is not obvious -- which, of course, is implicit in any patent application -- is not in and of itself a material misrepresentation for purposes of *Walker Process*. Rather, it is merely a legal assertion that the patent examiner is free to assess in light of the prior art that is available to the examiner. See *Akzo N.V. v. U.S. Int'l Trade Comm'n, 808 F.2d 1471, 1482 (Fed. Cir. 1986)* ("The mere fact that [a patent applicant] attempted to distinguish [its claim] from the prior art does not constitute a material omission or misrepresentation. **[*12]** The examiner was free to reach his own conclusion regarding the [claim] based on the art in front of him.").

The case on which the plaintiffs rely to contend that the use of the word "surprising" was more than a standard assertion of non-obviousness, *Purdue Pharma L.P. v. Endo Pharms., Inc., 438 F.3d 1123 (Fed. Cir. 2006)*, is readily distinguishable. For one thing, that case concerned a claim that a patent was invalid because it was obtained through "inequitable conduct" in violation of a patent applicant's "duty to prosecute patents in the [Patent Office] with candor and good faith." *Id. at 1128*. And, at that time, the materiality standard for an inequitable-conduct claim was lower than the but-for standard that we must apply here. **[**20]** See *id. at 1129, 1132*.

In addition, *Purdue Pharma* did not purport to hold that a patent application's isolated description of a drug's new form as "surprising[]" could, standing alone, constitute a material misrepresentation under circumstances like those at issue here. The patent application at issue in Purdue Pharma described the improved effects of a drug's new

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[8] At oral argument, the plaintiffs asserted that Novartis's representation in this portion of its patent application from 2000 as to the timing of the β-crystalline discovery -- namely, that it had just "now" been made and that it was thus a "new" crystalline form -- also effected a fraud on the Patent Office, independent of the use of the word "surprisingly." The plaintiffs argue that the use of the words "now" and "new" meant Novartis was presenting a false chronology, given the complaints' allegation that the β-crystalline form, "upon information and belief, was used by Novartis from August 1993 forward." But, although the plaintiffs' opposition brief below did allude to that allegation, the plaintiffs did not sufficiently raise below a Walker Process argument that, but for Novartis's use of the words "now" and "new," the patent would not have issued. See *United States v. Slade, 980 F.2d 27, 30 (1st Cir. 1992)* (explaining that "[p]assing allusions are not adequate to preserve an argument"). Nor was this argument developed in their briefs to us. See *Shell Co. (P.R.) Ltd. v. Los Frailes Serv. Station, Inc., 605 F.3d 10, 19 (1st Cir. 2010)* (holding that an argument developed at oral argument but not in a party's briefs is deemed waived).

dosage-release mechanism, where those effects constituted "a prominent, and at times, the only, argument in favor of [the drug's] patentability." Id. at 1130 (internal quotation marks omitted). The Federal Circuit explained that, in the context of a patent application of that sort, the applicant, by consistently representing to the Patent Office that the effects were a "surprising discovery," was clearly representing that the alleged effects were "based on the results of clinical studies," when that was not in fact true. Id. at 1131. In fact, in finding no clear error in the trial court's conclusion that these representations were therefore material to patentability, id., the Federal Circuit emphasized that Purdue Pharma was an "unusual" case, in which -- by "repeatedly rel[ying] on that discovery to distinguish its invention from other prior art . . . while using **[**21]** language that suggested the existence of clinical results" -- the patent applicant "did much more than characterize [its invention] as a surprising discovery." Id. at 1133.

Here, by contrast, Novartis's use of the word "surprising" gives rise to no similarly misleading implication. The representation at issue in Novartis's application concerns only the existence of the salt's crystalline form; it does not concern the form's "effects." Thus, Novartis's use of the word "surprising," in this context, does not suggest the presence of underlying clinical data in the way that the use of that word, in the Purdue Pharma context, was found to have falsely implied the same.

For these reasons, the plaintiffs' second Walker Process argument, like their first one, fails to provide a basis from which we could conclude that the plaintiffs have satisfied the but-for materiality standard. And thus, this Walker Process argument fails as well.

D.

In a final attempt to challenge the District Court's Walker Process ruling, the plaintiffs contend that Novartis's inclusion in its patent application of each of the alleged misrepresentations that we have just addressed amounted to the type of "egregious misconduct" that, **[**22]** like "the filing of an unmistakably false affidavit," makes the inclusion of such representations per se material to a patent's issuance. Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1292 (Fed. Cir. 2011) (en banc); see also Intellect Wireless, Inc. v. HTC Corp., 732 F.3d 1339, 1342 (Fed. Cir. 2013) (explaining that an "unmistakably false" declaration "alone establishes materiality" if not cured). But, we do not agree.

[*13] Novartis correctly points out that the plaintiffs forfeited this argument by not making it to the District Court, and the plaintiffs do not contend that the issue was preserved or that the District Court plainly erred. See Chestnut v. City of Lowell, 305 F.3d 18, 20 (1st Cir. 2002) (en banc) (per curiam) (describing the four prongs of plain error: "error, plainness, prejudice, and miscarriage of justice or something akin to it"). Moreover, the alleged misrepresentations here, which the complaints allege to be merely "misleading, if not false," do not rise to the level of an "unmistakably false" affidavit or declaration. Intellect Wireless, 732 F.3d at 1342; Therasense, 649 F.3d at 1292. And so, for this reason, too, we reject this attempt by the plaintiffs to show that they have plausibly alleged the element of materiality in alleging Walker Process fraud.

III.

Independent of Walker Process, the plaintiffs separately contend that Novartis is subject to antitrust scrutiny for enforcing Patent '051 on the ground that its patent infringement **[**23]** litigation was "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." Noerr, 365 U.S. at 144 (emphasis added). But, we do not agree.

A.

HN5[] The Supreme Court has announced a two-part test for determining whether a suit to enforce intellectual property rights is a "sham" that is not entitled to Noerr-Pennington immunity from antitrust scrutiny. PREI, 508 U.S.

at 60. First, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." Id. If the challenged suit is objectively baseless, a court then proceeds to consider the alleged monopolist's "subjective motivation" under the second part of the test. Id. Under this second prong, "the court should focus on whether the baseless lawsuit conceals 'an attempt to interfere directly with the business relationships of a competitor' through the 'use [of] the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon.'" *Id. at 60-61* (quoting *Noerr, 365 U.S. at 144*; *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991))*.

In order to make a "sham" showing with respect to a suit to enforce an intellectual property right, a plaintiff must allege that both prongs of the test are met. Id. Novartis's **[**24]** motion to dismiss the plaintiffs' antitrust claim challenged the plaintiffs' "sham" litigation argument by contending only that the plaintiffs had failed to plausibly allege that Novartis's litigation to enforce Patent '051 was "objectively baseless." We thus focus on the plausibility of the plaintiffs' allegations with respect to the "objectively baseless" prong, as the parties agree that, at least under *PREI*, the antitrust actions cannot go forward unless the plaintiffs have plausibly alleged that Novartis's litigation to enforce Patent '051 was objectively baseless.[9]

[*14] B.

Wholly apart from their allegations concerning Walker Process fraud, the plaintiffs argue, for the following reasons, that the only reasonably foreseeable outcome of Novartis's infringement litigation was dismissal on patent-invalidity grounds and thus that the infringement litigation was "objectively baseless." The plaintiffs contend that Novartis's patent was clearly invalid on either anticipation or obviousness grounds because "the non-needle crystal was an inherent characteristic of imatinib mesylate or else entirely obvious." See *35 U.S.C. §§ 102*, *103*. In this regard, the plaintiffs point to their complaints' "key factual allegation," **[**25]** as described by the District Court: "that the two techniques Novartis described in its patent application, which produced the β-crystalline form, were commonly known methods for developing alternate crystalline forms at the time."

HN6[] Our review of whether the plaintiffs have plausibly alleged "sham" litigation is de novo. *Tambone, 597 F.3d at 441*. We proceed on the understanding that a suit to enforce a patent, like a suit to enforce any intellectual property right, could be "objectively baseless." See *PREI, 508 U.S. at 63-65* (considering whether the underlying copyright infringement litigation in the case was potentially a "sham" because it was "objectively baseless"). But, here, the only ground that the plaintiffs assert to support their contention that Novartis's infringement litigation to enforce Patent '051 was "objectively baseless" is that the patent was invalid on anticipation or obviousness grounds. And that presents a problem for the plaintiffs.

HN7[] A patent is "presumed valid" and thus its validity can be challenged only with clear and convincing evidence. *Microsoft Corp. v. i4i Ltd., 564 U.S. 91, 95, 131 S. Ct. 2238, 180 L. Ed. 2d 131 (2011)* (quoting *35 U.S.C. § 282*). Against that background, we do not see how on this record plaintiffs can satisfy the "objectively baseless" prong in light of the fact that the Patent **[**26]** Office issued the patent following the Board's earlier ruling reversing the patent examiner's rulings as to anticipation and obviousness.

Although the Board did not have all of the prior art before it at the time of its decision reversing the decision of the patent examiner, the Board had assumed what the subsequently disclosed prior art showed: that imatinib mesylate

[9] In addition to invoking this "objectively baseless" test from PREI, the plaintiffs also urge us to apply the test from *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*, which they argue is a different test that applies to allegations that a pattern of petitioning activity, as opposed to a single petition, was a "sham." The plaintiffs contend that this case involves such a pattern because their complaint alleges that Novartis sued not only Sun Pharma but also other generic manufacturers that had filed ANDAs for generic versions of Gleevec. However, the plaintiffs concede in their reply brief that "Novartis rightly points out that the end payers did not argue below that California Motor should apply." And, contrary to their assertion otherwise, our recent decision in *Puerto Rico Telephone Co. v. San Juan Cable LLC, 874 F.3d 767 (1st Cir. 2017)*, does not excuse the forfeiture of that argument, which was no less available to them to make before that decision.

was known prior to Novartis's claim to the development of its β-crystalline form. And, in ruling for Novartis notwithstanding that assumption, the Board indicated that it was not clear on the face of the prior art either that the β-crystalline form of imatinib mesylate was inherently anticipated or that it was obvious how to get "from here to there" in terms of developing it. That ruling was significant for purposes of determining whether Novartis could have reasonably expected success in its patent infringement litigation, insofar as any defense to that infringement litigation was based on the invalidity of Novartis's patent.

After all, ***HN8***[] invalidation of a patent on anticipation grounds "requires that every element and limitation of the claim was **[*15]** previously described in a single prior art reference, either expressly or inherently, **[**27]** so as to place a person of ordinary skill in possession of the invention." *Sanofi-Synthelabo v. Apotex, Inc., 550 F.3d 1075, 1082 (Fed. Cir. 2008)*. And the plaintiffs do not dispute the District Court's conclusion that the prior art "neither describes the β-crystalline form of the imatinib mesylate salt nor a method to produce it. The prior art only mentions imatinib mesylate itself, . . . which has many different crystalline forms."

Moreover, ***HN9***[] with respect to obviousness, the analysis involves "several basic factual inquiries":

> [T]he scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.

Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 17-18, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966). And, in the face of the Board's ruling and the patent's subsequent issuance, the complaints' mere allegations that "the two techniques Novartis described in its patent application, which produced the β-crystalline **[**28]** form, were commonly known methods for developing alternate crystalline forms at the time" and that a pharmaceutical chemist of ordinary skill would have been motivated to develop an advantageous crystalline form of imatinib mesylate are insufficient to allege plausibly that Novartis was unreasonable in expecting that Patent '051's presumed validity could withstand an obviousness challenge.[10] Rather, those allegations merely demonstrate that Novartis would have been subject to a serious defense to its infringement litigation, as Novartis would have had to demonstrate that, despite those allegations, it was not obvious how, as the Board had put it in reversing the patent examiner's ruling as to obviousness, to get "from here to there," i.e., from the mesylate salt of imatinib to its β-crystalline form.

Nor have the plaintiffs identified any authority to support their contention that their allegations are sufficient to plausibly allege that, despite the Board's ruling and the patent's issuance, Novartis's litigation to enforce that patent was a sham. In fact, the plaintiffs have not identified a single precedent that permitted an antitrust "sham" litigation claim to go forward based on an allegation **[**29]** that the infringement litigation was objectively baseless because the underlying patent was alleged to be invalid due to anticipation or obviousness.

We therefore reject the plaintiffs' contentions that they have plausibly alleged **[*16]** that they may take advantage of the "sham" litigation exception to *Noerr-Pennington* immunity recognized in *PREI*. And thus, in light of our rejection of the plaintiffs' *Walker Process*-based arguments for subjecting Novartis to antitrust scrutiny, we see no reason to disturb the District Court's ruling dismissing the plaintiffs' antitrust suits for failure to state a claim.

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[10] The plaintiffs do point to the Supreme Court of India's 2013 decision not to issue what they describe as Novartis's "Indian equivalent" of Patent '051. But, this effort fails. As indicated by a copy of that decision in the record, the India Supreme Court was applying a different patentability standard than under United States law. As the court explained there, under Indian law, "the mere discovery of a new form of a known substance" is not a "new product" "unless they differ significantly in properties with regard to efficacy." By contrast, under our law, a patent may be obtained so long as the differences between the claimed invention and the prior art were not so minimal that the invention was "obvious . . . to a person having ordinary skill in the art to which the claimed invention pertains." *35 U.S.C. § 103*.

IV.

For the foregoing reasons, the judgments of the District Court in both actions are **affirmed**.

23andMe, Inc. v. Ancestry.com DNA, LLC

United States District Court for the Northern District of California

August 23, 2018, Decided; August 23, 2018, Filed

Case No. 18-cv-02791-EMC

Reporter

356 F. Supp. 3d 889 *; 2018 U.S. Dist. LEXIS 220862 **

23ANDME, INC., Plaintiff, v. ANCESTRY.COM DNA, LLC, et al., Defendants.

Subsequent History: Motion granted by, Judgment entered by, Stay denied by *23andMe, Inc. v. Ancestry.com DNA, LLC, 2018 U.S. Dist. LEXIS 188327 (N.D. Cal., Nov. 2, 2018)*

Core Terms

Ancestry, patent, regions, sequences, laws of nature, tests, detecting, website, unfair, inventive, natural phenomena, recombinable, abstract idea, user, correlation, declaratory judgment, non-coding, sensors, naturally occurring, misrepresentations, coding, misleading, thiopurine, consumer, parties, cffDNA, misleading advertising, patent infringement, negotiations, inertial

LexisNexis® Headnotes

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

To survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim, a plaintiff's factual allegations in the complaint must suggest that the claim has at least a plausible chance of success. In other words, the complaint must allege factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The Ninth Circuit has settled on a two-step process for evaluating pleadings: First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] **Motions to Dismiss, Failure to State Claim**

The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Patent Law > Subject Matter

HN3[] **Patent Law, Subject Matter**

35 U.S.C.S. § 101 defines what is patent eligible. It provides as follows: Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title. *35 U.S.C.S. § 101*. The U.S. Supreme Court has held that *§ 101* contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable. Phenomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work. Monopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it.

Patent Law > Subject Matter

HN4[] **Patent Law, Subject Matter**

For all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas. An application of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection, but to transform an unpatentable law of nature into a patent-eligible application of such a law, one must do more than simply state the law of nature while adding the words apply it.

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

Patent Law > Subject Matter

HN5[] **Motions to Dismiss, Failure to State Claim**

Patent eligibility under *35 U.S.C.S. § 101* is a question of law. The Federal Circuit has repeatedly recognized that in many cases it is possible and proper to determine patent eligibility under *35 U.S.C.S. § 101* on a *Fed. R. Civ. P. 12(b)(6)* motion. However, there can be underlying factual questions to a *§ 101* inquiry-e.g., whether something is well-understood, routine, and conventional to a skilled artisan at the time of the patent is a factual determination. Adding that the mere fact that something is disclosed in a piece of prior art does not mean it was well-understood, routine, and conventional.

Patent Law > Subject Matter

HN6[] **Patent Law, Subject Matter**

There is a two-step test for patent eligibility under *35 U.S.C.S. § 101*. The test distinguishes patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts. First, the court determines whether the claims at issue are directed to one of those patent-ineligible concepts. If so, the court then asks, what else is there in the claims before the court describes step two of this analysis as a search for an inventive concept-i.e., an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the ineligible concept itself.

Patent Law > Subject Matter

HN7[] **Patent Law, Subject Matter**

With respect to step one of the two-step test for patent eligibility under *35 U.S.C.S. § 101*, the Federal Circuit has emphasized that it is not enough to merely identify a patent-ineligible concept underlying the claim; the court must determine whether that patent-ineligible concept is what the claim is directed to. In other words, what is the focus of the claim stating that, for an application of an abstract idea to satisfy step one, the claim's focus must be something other than the abstract idea itself.

Patent Law > Subject Matter

HN8[] **Patent Law, Subject Matter**

As for step two two-step test for patent eligibility under *35 U.S.C.S. § 101*, the Federal Circuit has underscored that the inventive concept cannot be furnished by the unpatentable law of nature (or natural phenomenon or abstract idea) itself. That is, a claim directed to a newly discovered law of nature (or natural phenomenon or abstract idea) cannot rely on the novelty of that discovery for the inventive concept necessary for patent eligibility; instead, the application must provide something inventive, beyond mere well-understood, routine, conventional activity. Simply appending conventional steps, specified at a high level of generality, to laws of nature, natural phenomena, and abstract ideas cannot make those laws, phenomena, and ideas patentable. In addition, the prohibition against patenting abstract ideas cannot be circumvented by attempting to limit the use of the formula to a particular technological environment or adding insignificant post solution activity.

Patent Law > Subject Matter

HN9[] **Patent Law, Subject Matter**

The mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.

Patent Law > Subject Matter

HN10[] **Patent Law, Subject Matter**

While preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility. Moreover, an abstract idea does not become nonabstract by limiting the invention to a particular field of use or technological environment.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN11[] **Heightened Pleading Requirements, Fraud Claims**

Where a Lanham Act claim is predicated on the theory that the defendant engaged in a knowing and intentional misrepresentation, then *Fed. R. Civ. P. 9(b)* is applicable.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN12[] **False Advertising, State Regulation**

Cal. Bus. & Prof. Code § 17500 essentially prohibits false or misleading advertising. *Cal. Bus. & Prof. Code § 17500*.

Contracts Law > Remedies > Restitution

HN13[] **Remedies, Restitution**

An order for restitution is one compelling a defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Scope of Declaratory Judgments

HN14[] **Federal Declaratory Judgments, Scope of Declaratory Judgments**

The difference between an abstract question and a controversy contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Civil Procedure > Judgments > Declaratory Judgments > Federal Declaratory Judgments

HN15[] **Declaratory Judgments, Federal Declaratory Judgments**

Special flexibility is called for in the declaratory judgment context, where the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.

Civil Procedure > Judgments > Declaratory Judgments > Federal Declaratory Judgments

HN16[] **Declaratory Judgments, Federal Declaratory Judgments**

That a court may take into account serious negotiations does not mean that the existence of such negotiations require dismissal of the declaratory relief claims.

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Judges: EDWARD M. CHEN, United States District Judge.

Opinion by: EDWARD M. CHEN

Opinion

[*894] **<u>REDACTED/PUBLIC VERSION</u>**

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Docket No. 29

Plaintiff 23andMe, Inc. ("23") has filed suit against three affiliated entities — Ancestry.com DNA, LLC; Ancestry.com Operations Inc.; and Ancestry.com LLC (collectively, "Ancestry") — asserting claims for, *inter alia*, patent infringement, misleading representations in violation of federal and state law, and a declaratory judgment of no trademark infringement and invalidity of trademark. Currently pending before the Court is Ancestry's motion to **[**3]** dismiss. Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** in part and **DENIES** in part Ancestry's motion.

I. <u>DISCUSSION</u>

A. <u>Legal Standard</u>

> ***HN1***[] To survive a [12(b)(6)] motion to dismiss for failure to state a claim after the Supreme Court's decisions in *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* and *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, [a plaintiff's] factual allegations [in the

complaint] "must . . . suggest that the claim has at least a plausible chance of success." In other words, [the] complaint "must allege 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'"
. . . . [The Ninth Circuit has] settled on a two-step process for evaluating pleadings:

> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected **[**4]** to the expense of discovery and continued litigation.

Levitt v. Yelp! Inc., 765 F.3d 1123, 1134-35 (9th Cir. 2014).

HN2[] Notably,
[t]he plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility 'of entitlement to relief.'"

Iqbal, 556 U.S. at 678.

In the instant case, Ancestry's 12(b)(6) motion challenges all claims asserted in the operative complaint. Those claims are as follows:
(1) Infringement of the '554 patent.

(2) Misleading representations in violation of the Lanham Act. *See 15 U.S.C. § 1125*.

[*895] (3) Misleading advertising in violation of *California Business & Professions Code § 17500*.

(4) Unlawful and unfair business practices in violation of *California Business & Professions Code § 17200* (based on, "among other things, unfair, deceptive, and misleading advertising about [Ancestry's] DNA tests"). Compl. ¶ 68.
(5) Declaratory judgment of no trademark infringement.
(6) Declaratory judgment of invalidity of trademark.

B. Claim for Patent Infringement

1. Relevant Background

23's claim of patent infringement is predicated on the '554 patent, a copy of which is attached to the complaint as Exhibit 4.

The '554 patent is titled "Finding relatives in a database." The patent specification **[**5]** begins by noting that
[e]xisting genetic ancestry testing techniques are typically based on [DNA] information of the Y chromosome (Y-DNA) or DNA information of the mitochondria (mtDNA). Aside from a small amount of mutation, the Y-DNA is passed down unchanged from father to son and therefore is useful for testing patrilineal ancestry of a man. The mtDNA is passed down mostly unchanged from mother to children and therefore is useful for testing a person's matrilineal ancestry. These techniques are found to be effective for identifying individuals that are related many generations ago (e.g., 10 generations or more), but are typically less effective for identifying closer relationships. Further, many relationships that are not strictly patrilineal or matrilineal cannot be easily detected by the existing techniques.
'554 patent, col. 1:21-35. While not explicit, it is evident (and not disputed) that this specification refers to prior art wherein the described DNA information of individuals are compared to determine common ancestry.

The '554 patent is predicated not on Y-DNA or mtDNA information but rather recombinable DNA information. *See* '554 patent, col. 2:32-35 (explaining that recombinable DNA is the autosomal DNA and **[**6]** X chromosome DNA). The recombinable DNA of a person's parents

> is shuffled at the next generation, with small amounts of mutation. Thus, only relatives will share long stretches of genome regions where their recombinable DNA is completely or nearly identical. Such regions are referred to as "Identical by Descent" (IBD) regions because they arose from the same DNA sequences in an earlier generation. The relative finder technique . . . is based at least in part on locating IBD regions in the recombinable chromosomes of individuals.

'554 patent, col. 2:35-43.

The patent specification notes that, "[i]n some embodiments, locating IBD regions includes sequencing the entire genomes of the individuals and comparing the genome sequences," but, in other embodiments, "locating IBD regions includes assaying a large number of markers that tend to vary in different individuals and comparing the markers." '554 patent, col. 2:44-49. One example of such a marker is "Single Nucleotide Polymorphisms (SNDPs), which are points along the genome with two or more common variations." '554 patent, col. 2:59-51. "Long stretches of DNA sequences from different individuals' genomes in which markers in the same locations are the same or at least compatible **[**7]** indicate that the rest of the sequences, **[*896]** although not assayed directly are also likely identical." '554 patent, col. 2:56-60.

Figure 1 of the '554 patent "is a block diagram illustrating an embodiment of a relative finding system." '554 patent, col. 2:61-62. The diagram basically shows that:

> (1) user information **110** is received by the relative finder system **102**;
>
> (2) the relative finder system **102** determines, "based at least in part on the recombinable DNA information of the first user and recombinable DNA information of the second user, a predicted degree of relationship between the first user and the second user"; and
> (3) "in the event that the expected degree of relationship between the first user and the second user at least meets [a certain] threshold," the first user at least is notified about the relative relationship with the second user.

'554 patent, abstract; *see also* '554 patent, col. 2:67-3:27 (describing Figure 1); '554 patent, claim 26 (claiming "[a] system for determining a relative relationship of people who are a common ancestor within a threshold number of generations").[1] "In this example, relative finder system **102** may be implemented using one or more server computers having one or more processors, one or more special purpose computing **[**8]** appliances, or any other appropriate hardware, software, or combinations thereof." '554 patent, col. 2:62-66.

As indicated by the above, there are three critical steps in Figure 1: (1) receiving or obtaining recombinable DNA information; (2) determining a predicted degree of relative relationship based at least in part on a comparison of recombinable DNA information; and (3) notifying a person about the relative relationship. These three steps make up the method claimed at claim 1 of the '554 patent. *See* '554 patent, claim 1 (claiming "[a] method for determining a relative relationship of people who share a common ancestor within a threshold number of generations," comprising these three steps). However, claim 1 of the '554 patent is not being asserted by 23 in the instant case.

Rather, 23 claims infringement of the following dependent claims only: claims 5, 7-8, 12-14, 17, 22, 31-32, 37-38. *See* Compl. ¶ 40. Below is the invention claimed in claim 7, one of the main claims at issue in this lawsuit.

> **7**. The method of claim **1** [*i.e.*, (1) receiving/obtaining recombinable DNA information, (2) determining a predicted degree of relative relationship based at least in part on that information, and (3) notifying person about the relationship] **[**9]** wherein:

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[1] However, 23 does not assert infringement of claim 26 in the instant case.

determining the predicted degree of relationship between the first user and the second user includes identifying one or more Inheritance by Descent (IBD)[2] regions in which a portion of recombinable DNA sequence of the first user and a portion of recombinable DNA sequence of the second user arose from same DNA sequence of an ancestor;

the predicted degree of relationship depends at least in part on an amount of DNA sequence information of the IBD regions;

the amount of DNA sequence information of the IBD regions includes a sum of the lengths of IBD regions, percentage of DNA shared in the IBD regions, or both; and

[*897] a greater amount of DNA sequence information of the IBD regions indicates a closer predicted degree of relationship.

'554 patent, claim 7 (highlight added).

2. *35 U.S.C. § 101*

In the instant case, Ancestry moves to dismiss 23's claim for patent infringement on the ground that the '554 patent is directed to unpatentable subject matter. According to Ancestry, the patent "claims an abstract idea (determining a relative relationship by comparing similarities between DNA), and a law of nature (people who share similar DNA are related)." Reply at 2.

HN3[] Title *35 U.S.C. § 101* defines what is patent eligible. It provides as follows: "Whoever **[**10]** invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." *35 U.S.C. § 101*. The Supreme Court has held that *§ 101* "'contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.'" *Genetic Techs. Ld. v. Merial L.L.C., 818 F.3d 1369, 1374 (Fed. Cir. 2016)*. "Phenomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work.'" *Id.* "[M]onopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it." *Mayo Collab. Servs. v. Prometheus Labs., Inc., 566 U.S. 66, 71, 132 S. Ct. 1289, 182 L. Ed. 2d 321 (2012)*.[3]

HN4[] On the other hand, "too broad an interpretation of [the above] exclusionary principle could eviscerate patent law. For all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas." *Id.* "'[A]n *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection,'" but "to transform an unpatentable law of nature into a patent-eligible *application* of such a law, **[**11]** one must do more than simply state the law of nature while adding the words 'apply it.'" *Id. at 71-72* (emphasis in original).

HN5[] "Patent eligibility under *35 U.S.C. § 101* is a question of law . . . ." *Genetic Techs., 818 F.3d at 1373*. The Federal Circuit has "repeatedly recognized that in many cases it is possible and proper to determine patent eligibility under *35 U.S.C. § 101* on a *Rule 12(b)(6)* motion." *Id.* However, the Federal Circuit has also noted that there can be underlying factual questions to a *§ 101* inquiry — *e.g.*, "[w]hether something is well-understood, routine, and conventional to a skilled artisan at the time of the patent is a factual determination." *Berkheimer v. HP Inc., 881 F.3d 1360, 1369 (Fed. Cir. 2018)* (adding that "[t]he mere fact that something is disclosed in a piece of prior art . . . does not mean it was well-understood, routine, and conventional").

HN6[] There is a two-step test for patent eligibility under *§ 101*.

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[2] The use of the term "Inheritance by Descent" appears to be an error. Rather, the correct term is "Identical by Descent."

[3] Of course, even though preemption concerns are "the basis for the judicial exceptions to patentability . . . , the absence of complete preemption does not demonstrate patent eligibility." *Ariosa Diagnostics, Inc. v. Sequenom, Inc., 788 F.3d 1371, 1379 (Fed. Cir. 2015)*.

> The test "distinguish[es] patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts." As set forth [by the **[*898]** Supreme Court] in *Alice [Corp. Pty. Ltd. v. CLS Bank Int'l, 573 U.S. 208, 134 S. Ct. 2347, 82 L. Ed. 2d 296, 189 L. Ed. 2d 296 (2014)]*:
>
>> First, we determine whether the claims at issue are *directed to* one of those patent-ineligible concepts. If so, we then ask, what else is there in the claims before us? . . . We have described step **[**12]** two of this analysis as a search for an *inventive concept* — i.e., an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the ineligible concept itself.[4]

Id. (emphasis added).

HN7[] With respect to step one, the Federal Circuit has emphasized that "'it is not enough to merely identify a patent-ineligible concept underlying the claim; we must determine whether that patent-ineligible concept is what the claim is "directed to."'" *Thales Visionix, Inc. v. United States, 850 F.3d 1343, 1349 (Fed. Cir. 2017)*. In other words, what is the focus of the claim? *See BSG Tech LLC v. Buyseasons, Inc., No. 2017-1980, 899 F.3d 1281, 2018 U.S. App. LEXIS 22704, at *14 (Fed. Cir. Aug. 15, 2018)* (stating that, "[f]or an application of an abstract idea to satisfy step one, the claim's focus must be something other than the abstract idea itself"); *see also Accenture Global Servs., GmbH v. Guidewire Software, Inc., 728 F.3d 1336, 1341 (Fed. Cir. 2013)* (indicating that a court must "'identify and define whatever fundamental concept appears wrapped up in the claim[s]'").

HN8[] As for step two, the Federal Circuit has underscored that

> [t]he inventive concept . . . cannot be furnished by the unpatentable law of nature (or natural phenomenon or abstract idea) itself. That is, . . . a claim directed to a newly discovered law of nature (or natural phenomenon or abstract idea) cannot rely on the novelty of that discovery for the inventive **[**13]** concept necessary for patent eligibility; instead, the application must provide something inventive, beyond mere "well-understood, routine, conventional activity." "[S]imply appending conventional steps, specified at a high level of generality, to laws of nature, natural phenomena, and abstract ideas cannot make those laws, phenomena, and ideas patentable."

Genetic Techs., 818 F.3d at 1376. In addition, "[t]he prohibition against patenting abstract ideas cannot be circumvented by attempting to limit the use of the formula to a particular technological environment or adding insignificant post solution activity." *Mayo, 566 U.S. at 73* (internal quotation marks omitted).

a. Step One: "Directed to"

Ancestry argues that, at step one, the relevant claims of the '554 patent are "directed to" a law of nature and/or an abstract idea. 23 disputes such.

In resolving the step one issue, the Court begins with the Supreme Court's 2012 *Mayo* decision. The patents in *Mayo*

> concern[ed] the use of thiopurine drugs in the treatment of autoimmune diseases, such as Crohn's disease and ulcerative colitis. When a patient ingests a thiopurine compound, his body metabolizes the drug, causing metabolites to form in his bloodstream. Because the way in which people metabolize thiopurine **[**14]** compound varies, the same dose of a thiopurine drug affects different people **[*899]** differently, and it has been difficult for doctors to determine whether for a particular patient a given dose is too high, risking harmful side effects, or too low, and so likely ineffective.

Mayo, 566 U.S. at 74.

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[4] "If a law of nature is not patentable, then neither is a process reciting a law of nature, unless that process has additional features that provide practical assurance that the process is more than a drafting effort to monopolize the law of nature itself." *Mayo, 566 U.S. at 77*.

Prior to the patents at issue, "those in the field did not know the precise correlations between metabolite levels and likely harm or ineffectiveness. The patent claims at issue here set forth processes embodying researchers' findings that identified these correlations with some precision." *Id.* For example, a representative claim covered a method of optimizing therapeutic efficacy consisting of the following steps: (1) administering a thiopurine drug and (2) determining the level of 6-TG in the blood, wherein concentrations above a certain level indicated that the dosage was likely too high and concentrations below a certain level indicated that the dosage was likely too low. *See id.* Thus, the representative claim essentially stated, *e.g.*, that, "*if* the levels of 6-TG in the blood (of a patient who has taken a dose of a thiopurine drug) exceed about 400 pmol per 8x108 red blood cells, *then* the administered dose is likely **[**15]** to produce toxic side effects." *Id. at 77* (emphasis in original).

At step one, the Supreme Court held that the patent claim was directed to a law of nature — in fact "*set forth*" a law of nature, "namely, [the] relationships between concentrations of certain metabolites in the blood and the likelihood that a dosage of a thiopurine drug will prove ineffective [too low] or cause harm [too high]." *Id. at 77* (emphasis added). The Court added:

> While it takes a human action (the administration of the thiopurine drug) to trigger a manifestation of this relation in a particular person, the relation itself exists in principle apart from any human action. The relation is a consequence of the ways in which thiopurine compounds are metabolized by the body — entirely natural processes. And so a patent that *simply describes that relation* sets forth a natural law.

Id. (emphasis added).

Since *Mayo*, the Federal Circuit has issued several decisions discussing whether a patent claim is directed to a law of nature or a natural phenomenon.

For example, in *Ariosa*, the patent inventors "discovered cell-free fetal DNA ('cffDNA') in maternal plasma and serum, the portion of maternal blood samples that other researchers had previously **[**16]** discarded as medical waste." *Ariosa, 788 F.3d at 1373*. "Applying a combination of known laboratory techniques to their discovery," the inventors "implemented a method for detecting the small fraction of paternally inherited cffDNA in maternal plasma or serum to determine fetal characteristics, such as gender." *Id.* One of the representative patent claims specifically covered a method for detecting paternally inherited cffDNA in maternal plasma or serum consisting of the following steps: "[1] amplifying the cffDNA contained in a sample of a plasma or serum from the pregnant female and [2] detecting the paternally inherited cffDNA." *Id.* At step one, the Federal Circuit stated that the asserted patent claims were

> directed to a multistep method that starts with cffDNA taken from a sample of maternal plasma or serum — a naturally occurring non-cellular fetal DNA that circulates freely in the blood stream of a pregnant woman. It is undisputed that the existence of cffDNA in maternal blood is a natural phenomenon. . . . The method ends with paternally inherited cffDNA, which is also a natural phenomenon. The method therefore begins and ends with a natural phenomenon. Thus, **[*900]** the claims are directed to matter that is **[**17]** naturally occurring.

Id. at 1376.

The court added that the patent specification made clear that the patent claims were "directed to a naturally occurring thing or natural phenomenon" — or technically, as the court later stated, "directed to detecting the presence of a naturally occurring thing or a natural phenomenon, cffDNA in maternal plasma or serum." *Id.* For example, the "Summary and Objects of the Invention" section noted that it was surprising and unexpected to find that cffDNA was detectable in maternal plasma, which had been a material routinely discarded. Also, "the description of the invention note[d]: '[w]e have demonstrated that foetal DNA is present in the maternal plasma and serum.'" *Id.* Nonetheless, that discovery did not gainsay the fact that the patent was directed to a naturally occurring matter.

The Federal Circuit's decision in *Genetic Technologies* also involved a law of nature or a natural phenomenon. There, the inventor of the patent "discovered that certain DNA sequences in coding regions (exons) of certain genes are correlated with non-coding regions (introns) within the same gene, non-coding regions in different genes, or non-coding regions of the genome that are not part **[**18]** of any gene [non-coding regions otherwise known as 'junk DNA']." *Genetic Techs., 818 F.3d at 1372*. The inventor also found that the "correlated coding and non-coding regions tend to be inherited together, with only rare shuffling. In other words, the regions are in 'linkage disequilibrium,' meaning that the coding and non-coding regions appear 'linked' together in individuals' genomes more often than probability would dictate." *Id.* The inventor "concluded that alleles of a particular gene may be detected, using well-established laboratory techniques, not by looking for the coding region of the gene itself but instead by amplifying and analyzing non-coding regions known to be linked to the coding region [*i.e.*, junk DNA]." *Id.* A representative patent claim "encompasse[d] methods of detecting a coding region allele by [1] amplifying and [2] analyzing any linked non-coding region, which would be found within the same gene as the coding region, within a different gene, or within an intergenic region." *Id. at 1372-73*.

At step one, the Federal Circuit found that the patent claim was "directed to the relationship between non-coding and coding sequences in linkage disequilibrium and the tending of such non-coding DNA sequences to be representative **[**19]** of the linked coding sequences — a law of nature." *Id. at 1374*. The court noted that "[c]laim 1 covers any comparison, for any purpose, of any noncoding region sequence known to be linked with a coding region allele at a multi-allelic locus." *Id.* It was not limited in scope to, *e.g.*, "methods of detecting any *particular* alleles linked to any *particular* non-coding sequences"; thus, "[c]laim 1 broadly covers essentially all applications, via standard experimental techniques, of the law of linkage disequilibrium to the problem of detecting coding sequences of DNA." *Id. at 1374-75* (emphasis added).

The court went on to note that the patent was "quite similar to the claims invalidated in *Mayo*": "'[J]ust as the relationship in *Mayo* was entirely a consequence of the body's natural processes for metabolizing thiopurine, so too is the correlation here (between variations in the non-coding regions and the allele presence in the coding regions) a consequence of the naturally occurring linkages in the DNA sequence.'" *Id. at 1375*. The Federal Circuit also pointed to *Ariosa* as an analogous case.

> The [*Ariosa*] court found that "the claims are directed to matter that is **[*901]** naturally occurring and that the inventors there did not purport to **[**20]** "create[] or alter[] any of the genetic information encoded in the cffDNA." The focus of the claimed advance over the prior art was allegedly newly discovered information about human biology: paternally inherited ccfDNA is to be found in maternal blood (using established detection techniques). So too in the present case: the patent claim focuses on a newly discovered fact about human biology (the linkage of coding and non-coding regions of DNA), involves no creation or alteration of DNA sequences, and does not purport to identify novel detection techniques.

Id. at 1375-76. Again, the fact that the patent concerned a newly discovered aspect of biology did not negate the fact that the patent was directed to a naturally occurring matter.

In *Cleveland Clinic Foundation v. True Health Diagnostics LLC, 859 F.3d 1352 (Fed. Cir. 2017)*, the Federal Circuit again found a patent claim was directed to a law of nature or natural phenomenon. The patents in *True Health* concerned detecting the risk of cardiovascular disease in a patient. "When an artery is damaged or inflamed, the body releases the enzyme myeloperoxidase, or MPO, in response. MPO is an early symptom of cardiovascular disease, and it can thus serve as an indicator of a patient's risk of cardiovascular disease." *Id. at 1355*. The patents at issue disclosed **[**21]** methods for detecting MPO and correlating the results to cardiovascular risk.

At step one, the Federal Circuit stated that the invention involved "'seeing' MPO already present in a bodily sample and correlating that to cardiovascular disease. Because the testing patents are based on 'the relation [between cardiovascular disease and heightened MPO levels] that exists in principle apart from human action,' they are directed to a patent-ineligible law of nature." *Id. at 1361*. "[J]ust like *Ariosa*, the method starts and ends with naturally occurring phenomena with no meaningful non-routine steps in between — the presence of MPO in a bodily sample is correlated to its relationship to cardiovascular disease." *Id.* The court underscored that "the asserted claims of the testing patents are directed to the natural existence of MPO in a bodily sample and its correlation to cardiovascular risk rather than to 'a new and useful laboratory technique' for detecting this relationship. Indeed, [the patent holder] has not created a new laboratory technique; rather it uses well-known techniques to execute the claimed method," as expressly stated in the patent specifications. *Id.*

Finally, in *BRCA1- & BRCA2-Based Hereditary Cancer Test Patent Litigation v. Ambry Genetics Corp., 774 F.3d 755 (Fed. Cir. 2014)* (hereinafter **[**22]** "*BRCA*"), the Federal Circuit acknowledged the defendant's argument that the patent at issue was directed to a law of nature or natural phenomenon but declined to reach a holding on that argument because there was an independent reason why step one was satisfied — *i.e.*, the patent was directed to an abstract idea. The plaintiffs in *BRCA* owned patents that "cover[ed] compositions of matter and methods relating to the BRCA1 and BRCA2 genes," "mutations of which are linked to hereditary breast and ovarian cancers." *Id. at 757*. The method claims "involve[d] comparisons between the wild-type BRCA sequences [*i.e.*, sequences most often found in humans] with the patient's BRCA sequences." *Id. at 759*.

The defendant argued that "*Mayo* is directly on point because the method claims here, as there, simply identify a law of nature (the precise sequence of the BRCA genes, and comparisons of the wild-type **[*902]** BRCA sequences with certain mutations of those gene sequences found in the test subject) and apply conventional techniques." *Id. at 762*. But the Federal Circuit did not decide if *Mayo* was on point "because the method claims . . . suffer from a separate infirmity: they recite abstract ideas." *Id.*

> Here, we treat separately the first **[**23]** paragraphs of claims 7 and 8, which describe the comparison of wild-type genetic sequences with the subject's genetic sequence and correspond to the first step of *Alice*, and the second paragraphs, which describe the techniques to be used in making the comparisons and correspond to the second step of *Alice*.
>
> We have already addressed the first paragraphs — the comparison step — in our own 2012 *Myriad* decision. Claims 7 and 8 at issue here depend from claim 1. Claim 1, which is the first paragraph of claims 7 and 8, is the comparison step. In our 2012 decision, we held that claim 1 was patent ineligible because it claimed an abstract mental process of 'comparing' and 'analyzing' two gene sequences.

We found:

>> [The] claim thus recites nothing more than the abstract mental steps necessary to compare two different nucleotide sequences: one looks at the first position in a first sequence; determines the nucleotide sequence at that first position; looks at the first position in a second sequence; determines the nucleotide sequence at that first position; determines if the nucleotide at the first position in the first sequence and the first position in the second sequence are the same of different, **[**24]** wherein the latter indicates an alteration; and repeats the process for the next position.
>
> Here, under our earlier decision, the comparisons described in the first paragraphs of claims 7 and 8 are directed to the patent-ineligible abstract idea of comparing BRCA sequences and determining the existence of alterations. The methods, directed to identification of alterations of the gene, require merely comparing the patient's gene with the wild-type and identifying any differences that arise. The number of covered comparisons is unlimited. The covered comparisons are not restricted by the purpose of the comparison or the alteration being detected. Because of its breadth, the comparison step covers detection of yet-undiscovered alterations, as well as comparisons for purposes other than detection of cancer. Even with respect to cancer, the comparisons are not limited to the detection of risk of breast or ovarian cancer. . . . [A]llowing a patent on the comparison step could impede a great swath of research relating to the BRCA genes, and it is antithetical to the patent laws to allow these basic building blocks of scientific research to be monopolized.

Id. at 763-64.

While *Mayo, Ariosa, Genetic Technologies,* ***[**25]*** *True Health*, and *BRCA* were all decided against the patent holder on step one, 23 points to several Federal Circuit cases that were decided in favor of the patent holder at step one.

For example, in Rapid Litigation Management v. CellzDirect, Inc., 827 F.3d 1042 (Fed. Cir. 2016), the patent concerned a process for preserving hepatocytes, a type of liver cell that has a number of attributes useful for testing, diagnostic, and treatment purposes. *See* id. at 1045-46. Prior to the patent at issue, scientists used cryopreservation techniques to preserve hepatocytes for later use. The inventors of the patent discovered that some fraction of **[*903]** hepatocytes are capable of surviving multiple freeze-thaw cycles. *See* id. at 1045. The improved preservation process at issue in the patent involved "(A) subjecting previously frozen and thawed cells to density gradient fractionation to separate viable cells from non-viable ones; (B) recovering the viable cells; and (C) refreezing the viable cells." *Id.*

The Federal Circuit noted that, at step one,

> [t]he district court identified in these claims what is called a "natural law" — the cells' capability of surviving multiple freeze-thaw cycles. We need not decide in this case whether the court's labeling is correct. It is enough in this case to recognize that the **[**26]** claims are simply not directed to the ability of hepatocytes to survive multiple freeze-thaw cycles. Rather, the claims of the '929 patent are directed to a *new and useful laboratory technique* for preserving hepatocytes. . . . The inventors certainly discovered the cells' ability to survive multiple freeze-thaw cycles, but that is not where they stopped, or is it what they patented. Rather, "as the first party with knowledge of" the cells' ability, they were "in an excellent position to claim *applications* of that knowledge."

Id. at 1048 (emphasis added).

The court distinguished many of the above cases — including *Genetic Technologies*, *Ariosa*, and *BRCA* — because the "end result of the '929 patent claims is not simply an *observation or detection* of the ability of hepatocytes to survive multiple-freeze thaws." *Id.* (emphasis added).

> That one way of describing the process is to describe the natural ability of the subject matter to *undergo* the process does not make the claim "directed to" that natural ability. If that were so, we would find patent-ineligible methods of, say, producing a new compound (as directed to the individual components' ability to combine to form the new compound), treating cancer with chemotherapy (as **[**27]** directed to cancer cells' inability to survive chemotherapy), or treating headaches with aspirin (as directed to the human body's natural response to aspirin).

Id. (emphasis in original). "[T]he claims are directed to a new and useful process of *creating* [a] pool [of multi-cryopreserved hepatocytes], not to the pool itself." *Id. at 1049* (emphasis added); *see also* *id. at 1050* (stating that "[i]t is the *process* of preservation that is patent eligible here, not necessarily the end product") (emphasis in original).

Another case on which 23 heavily relies is *Thales*. There, the patent at issue "disclose[d] an inertial tracking system for tracking the motion of an object relative to a moving reference frame." *Thales, 850 F.3d at 1344*. The tracking system involved "(1) a first inertial sensor mounted on the tracked object; (2) a second inertial sensor mounted on the moving platform; and (3) an element that uses the data from the two inertial sensors to calculate the orientation of the tracked object relative to the moving platform." *Id. at 1348*. The novelty of the tracking system was that the inertial sensors did "not use the conventional method of measuring inertial changes with respect to the earth. Instead, the platform . . . inertial sensors directly **[**28]** measure the gravitational field in the platform frame," and "[t]he object . . . inertial sensors then calculate position information relative to the frame of the moving platform." *Id. at 1345*.

The lower found the patent claims ineligible because they were "directed to the abstract idea of using laws of nature governing motion to track two objects," *id. at 1346*, but the Federal Circuit disagreed.

> **[*904]** These claims are not merely directed to the abstract idea of using "mathematical equations for determining the relative position of a moving object to a moving reference frame," as the Claims Court found. Rather, the claims are directed to systems and methods that use inertial sensors in a non-conventional manner

> to reduce errors in measuring the relative position and orientation of a moving object on a moving reference frame. . . . Just as a natural law can be utilized to create an improved laboratory technique for preserving liver cells, so can the application of physics create *an improved technique* for measuring movement of an object on a moving platform. Just as claims directed to a *new and useful technique* for defining a database that runs on general-purpose computer equipment are patent eligible, so too are **[**29]** claims directed to a *new and useful technique for using sensors to more efficiently track an object on a moving platform*. That a mathematical equation is required to complete the claimed method and system does not doom the claims to abstraction.

Id. at 1348-49 (emphasis added). The court added:

> The claims specify a *particular configuration* of inertial sensors and a *particular method of using the raw data* from the sensors in order to more accurately calculate the position and orientation of an object on a moving platform. The mathematical equations are a consequence of the arrangement of the sensors and the unconventional choice of reference frame in order to calculate position and orientation. Far from claiming the equations themselves, the claims seek to protect only the *application* of physics to the *unconventional configuration of sensors as disclosed*.

Id. at 1349 (emphasis added).

The question is whether this case falls under the *Mayo*/*Ariosa*/*Genetic Technologies*/ *True Health*/*BRCA* line (Ancestry's cases) or the *CellzDirect*/*Thales* line (23's cases). The Court finds Ancestry's cases are more on point.

The '554 patent claims at issue are "directed to" a law of nature because the focus of the claims is a correlation that exists **[**30]** in nature — *i.e.*, the more recombinable DNA information that is shared between two people, the closer the degree of relationship. That correlation "exists in principle apart from any human action." *Mayo, 566 U.S. at 77*. In fact, several of the claims of at issue, in essence, do no more than set forth or describe a law of nature, and thus are comparable to *Mayo*. Claim 5, for example, clearly falls into this category. *See* '554 patent, claim 5 (claiming a method for determining a relative relationship where the "determining" step simply involves a comparison of recombinable DNA information). Claim 5 is in all material respects indistinguishable from the patent claims at issue in *Genetic Technologies*, which focused on the observation and comparison of DNA sequences — occurrences in nature. Similarly, Claim 7 simply directs a comparison of certain regions of the users' recombinable DNA (*i.e.*, the IBD regions) and then observes that "a greater amount of DNA sequence information of the IBD regions indicates a closer predicted degree of [relative] relationship." '554 patent, claim 7 (method claim); *see also* '554 patent, claims 31, 37 (describing system and computer program product claims instead of a method claim).[5]

[*905] While some claims in the **[**31]** '554 patent involve a bit more than observations or descriptions of a law of nature, *see, e.g.*, '554 patent, claim 17 (claiming the method of claim 1 "wherein the relative relationship is one of a range of possible relative relationships between the first user and the second user, and wherein notifying includes sending an indication of the range of possible relationships"), they do not do much beyond that; notably, the Federal Circuit has held that "insignificant postsolution activity will not transform an unpatentable principle into a patentable process." *Diamond v. Diehr, 450 U.S. 175, 191-92, 101 S. Ct. 1048, 67 L. Ed. 2d 155 (1981)*.

23 protests that the focus of the claims is not a law of nature but rather "a new and useful way to identify a relative and the degree of relative relatedness, based on a specific selection and characterization of recombinable DNA." Opp'n at 7. This argument, however, is not persuasive because 23 is basically contending that the invention claimed is a new and useful way of *detecting* a relative relationship based on DNA patterns which occur in nature; 23's own authority establishes that, where a claim's focus is detecting a law of nature or natural phenomenon, that

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[5] The system and computer program product described in claims 31 and 37 involve generic computer components. ***HN9***[] Under *Alice*, the "mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention." *Alice, 134 S. Ct. at 2358* (adding that, "[g]iven the ubiquity of computers, wholly generic computer implementation is not generally the sort of 'additional feature[]' that provides any 'practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself").

meets the "directed to" standard at step one. *See* CellzDirect, 827 F.3d at 1048 (distinguishing, *inter alia, Ariosa* **[**32]** because the "end result of the '929 patent claims [at issue] is not simply an *observation or detection* of the ability of hepatocytes to survive multiple-freeze thaws") (emphasis added); *see also* Ariosa, 788 F.3d at 1376 (stating that the patent claims were "directed to a naturally occurring thing or natural phenomenon" — or rather, "directed to detecting the presence of a naturally occurring thing or a natural phenomenon, cffDNA in maternal plasma or serum"). Furthermore, as *Mayo, Genetic Technologies*, and *True Health* demonstrate, even if a patent claims discovery of a particular correlation — and even if that correlation is quantified — the patent still focuses on a naturally occurring phenomenon. Discovering some new fact about nature does not negate the patent's focus on a law of nature.[6]

To the extent 23 relies on *Thales*, that case is easily distinguishable. There, the claims were clearly not directed to any mathematical formula or equations; rather the equations were, in essence, just a useful tool in the invention claimed. The focus in *Thales* was instead on an "improved technique" for measuring movement which involved, *inter alia*, nonconventional placement of sensors. *See* Thales, 850 F.3d at 1348 (noting that, while the claims use "mathematical equations to determination the orientation of the object relative to the moving reference frame, the equations — dictated by the placement of the inertial sensors and application of laws of physics — serve only to tabulate the position and orientation in this configuration"). The patent in *Thales* thus went beyond observing a law of nature. In the case at bar, the law of nature (related people share DNA information) **[*906]** is not a mere tool in a novel application of a law of nature. Rather, the law of nature is the essence and end result of the '554 patent claims at issue.

b. Step Two: Inventive Concept

Because the "directed to" standard at step one **[**33]** has been met, the Court now turns to step two, which examines whether the claims at issue include an inventive concept. Here, as noted above, 23 contends that the claims at issue disclose a new and useful technique for detecting a relative relationship. But ultimately the only means of detecting a relative relationship is *comparing* the recombinable DNA information; an "instruction to undertake a simple comparison step does not represent an unconventional, inventive application sufficient to make [a] claim patent-eligible." Genetic Techs., 818 F.3d at 1379; *see also* BRCA, 774 F.3d at 763-64 (noting that the mental process of comparing and analyzing two gene sequences is an abstract concept).

23 disagrees, arguing, for example, that, in claim 7, the inventive concept is using IBD information to determine a relative relationship — more specifically, "by 'summing the DNA lengths of the IBD regions [and/or] percentage of DNA shared in the IBD regions.'" Opp'n at 7. But no unconventional inventive technique is claimed in making the comparison: summing (*e.g.*, DNA lengths shared in the IBD region) simply reflects the basic and conventional principle that the more DNA information that is shared, the closer the degree of relationship. *See* '554 patent, claim **[**34]** 7 (providing that "a greater amount of DNA sequence information of the IBD regions indicates a closer predicted degree of relationship"). The actual technique employed in claim 7 is not novel.[7] In this case, the '554 patent does not even quantify the degree of similarity or correlation which informs the analysis. *Cf.* Mayo, 566 U.S. at 74, 77 (noting that "[c]laim 1 . . . states that if the levels of 6-TG in the blood (of a patient who has taken a dose of a thiopurine drug) exceed about 400 pmol per 8x108 red blood cells, then the administered dose is likely to produce toxic side effects" — *i.e.*, the claim "set[s] forth processes embodying researchers' findings that identified [such] correlations with some precision"; but ultimately still finding claim patent ineligible as it simply set forth a law of nature).[8] Its methodology is left to a generalized description.

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[6] The Court acknowledges Ancestry's contention that the patent claims at issue are directed to an abstract idea — *i.e.*, comparing similarities between DNA, similar to the situation in *BRCA*. However, the Court need not reach the question whether *BRCA* additionally justifies a finding that step one is satisfied. The Court finds it more appropriate, in the instant case, to consider the act of comparing at step two of the *Alice* test.

[7] Claim 8 refers to use of a distribution pattern, but 23 does not claim to have applied a novel distribution pattern.

[8] *Compare* Vanda Pharms. Inc. v. West-Ward Pharms. Int'l Ltd., 887 F.3d 1117, 1134 (Fed. Cir. 2018) (finding claims patent eligible; distinguishing *Mayo* on the ground that "the claims in *Mayo* were not directed to a novel method of treating a disease"

To the extent 23 asserts a broader inventive concept — *i.e.*, simply using IBD regions in the first place to determine a relative relationship — it still fares no better. That claim 7 focuses on a particular region of DNA not previously used for comparison purposes does not place the claim outside the *§ 101* exception. 23 does not claim to have discovered **[**35]** IBD regions and, even if it did, the discovery of a law of nature is not protected by the patent laws, as reflected in both *Ariosa* and *Genetic Technologies. See also Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576, 579, 133 S. Ct. 2107, 186 L. Ed. 2d 124 (2013)* (holding that "a naturally occurring DNA segment is a product of nature and not patent eligible merely because it **[*907]** has been isolated"). Furthermore, the '554 specification indicates that it is an inherent characteristic of IBD regions to contain relative relationship information. *See* '554 patent, col. 2:36-40 (stating that "only relatives will share long stretches of genome regions where their recombinable DNA is completely or nearly identical[;] [s]uch regions are referred to as 'Identical by Descent' (IBD) regions . . . ."); *cf. Mayo, 566 U.S. at 77* (stating that the relationships between concentrations of certain metabolites in the blood and the effect of a thiopurine drug "exist[] in principle apart from any human action"); *True Health, 859 F.3d at 1361* (stating that the relationship between cardiovascular disease and heightened MPO levels is one that exists in principle apart from human action).

Finally, to the extent 23 argues that there is a factual dispute here that cannot be resolved at the 12(b)(6), *see Berkheimer, 881 F.3d at 1369* (stating that "[w]hether something is well-understood, routine, and **[**36]** conventional to a skilled artisan at the time of the patent is a factual determination"), that argument is unavailing. In effect, the only alleged unconventional feature of 23's claims is the requirement that specific DNA information be compared to determine a relative relationship "[b]ut this simply restates what [the Court has] determined is [a law of nature or] abstract idea." *BSG, 899 F.3d 1281, 2018 U.S. App. LEXIS 22704, at *23-24*. Again, even if the '554 patent claims a new discovery of nature, it claims no inventive, unconventional technique in making that discovery or applying it.

Accordingly, the Court concludes that, under the two-step *Alice* test, the '554 patent claims are patent-ineligible.[9]

C. Claim for Misleading Representations in Violation of the Lanham Act

1. Relevant Background

As alleged in the complaint, Ancestry has made misleading representations on its website. For example:

- On March 29, 2018, Ancestry's website stated that its DNA ancestry test tests "5X MORE REGIONS than other DNA tests." Compl. ¶ 51. 23 asked Ancestry to discontinue the claim but no changes were made to the website through at least April 16, 2018. *See* Compl. ¶ 52.

- On or about April 17, 2018, Ancestry changed its website. The website still made the claim "5X MORE REGIONS **[**37]** than other DNA tests*" but now included an asterisk footnote. The actual footnote stated: "*5x more regions than MyHeritage, Nat Geo Geno 2.0, and Family Three DNA. 2x more regions than 23andMe." Compl. ¶ 53. 23 maintains that this disclaimer was ineffective because it was "essentially hidden" — "at the end of [the] long web page and in . . . small font and color." Compl. ¶ 53.

- On or about April 21, 2018, Ancestry made another change to its website, now making the claim "AncestryDNA provides 5x more detail than other tests*" — with the actual footnote stating, "*5x more regions than MyHeritage, **[*908]** Nat Geo Geno 2.0, and Family Tree DNA. 2x more regions than 23andMe." Compl. ¶

but rather "were directed to a diagnostic method based on the 'relationships between concentrations of certain metabolites in the blood and the likelihood that a dosage of a thiopurine drug will prove ineffective or cause harm'").

[9] To the extent Plaintiffs argue that the Court should not find patent ineligibility here because there is no danger that basic building blocks of scientific research will not be monopolized, the Court is not persuaded. ***HN10***[] "While preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility." *Ariosa, 778 F.3d at 1379*. Moreover, "'[a]n abstract idea does not become nonabstract by limiting the invention to a particular field of use or technological environment . . . .'" *Intellectual Ventures I LLC v. Erie Indem. Co., 850 F.3d 1315, 1330 (Fed. Cir. 2017)*.

54. The position of the footnote was moved up. 23 contacted Ancestry again and demanded that Ancestry cease and desist; however, the website stayed the same until about May 3, 2018. *See* Compl. ¶¶ 55-56.

• On or about May 3, 2018, Ancestry changed its website, returning to the claim "5X MORE REGIONS than other DNA tests*" with the same footnote. The location of the footnote was slightly altered. 23 maintains that the disclaimer is still ineffective — represented "in small print" and with 23's name "buried following **[**38]** other company names." Compl. ¶ 49.

In addition to the above, 23 identifies one other subject on which Ancestry allegedly made misrepresentations on its website. According to 23, Ancestry "ran a perpetual 'sale' of its $99 DNA test for 'ONLY $79*,' misleading consumers to believe a sale was ongoing, when in fact it was merely a reduced price." Compl. ¶ 58. 23 adds that Ancestry stopped this "misleading advertising only after asked by [23] to desist from such misleading promotions." Compl. ¶ 58.

2. *Rule 9(b)*

The Lanham Act provides in relevant part that there is civil liability for "[a]ny person who, on or in connection with any goods or service, . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact which . . . is likely to cause confusion." *15 U.S.C. § 1125(a)(1)(A)*. In its motion, Ancestry argues that 23's Lanham Act claim should be dismissed because it is subject to *Federal Rule of Civil Procedure 9(b)*, which provides that, "[i]n alleging fraud . . . , a party must state with particularity the circumstances constituting fraud." *Fed. R. Civ. P. 9(b)*. According to Ancestry, 23 has failed state the circumstances constituting fraud with particularity — in particular, what was false and why.

As an initial matter, **[**39]** 23 disputes that the Lanham Act claim is subject to *Rule 9(b)*. ***HN11***[] The Ninth Circuit does not appear to have weighed in "as to whether *Rule 9(b)* applies to Lanham Act claims," and "district courts in California have split on the issue." *Oracle Am., Inc. v. TERiX Comput. Co., No. 5:13-cv-03385-PSG, 2014 U.S. Dist. LEXIS 561, at *35 (N.D. Cal. Jan. 3, 2014)*. But the better reasoned authority is that, where a Lanham Act claim is predicated on the theory that the defendant engaged in a knowing and intentional misrepresentation, then *Rule 9(b)* is applicable. *See, e.g., Brosnan v. Tradeline Sols., Inc., No. C-08-0694 JCS, 2009 U.S. Dist. LEXIS 48262, at *13-14 (N.D. Cal. June 5, 2009)* (citing authority for the proposition that, "although Lanham Act claims are not categorically subject to the heightened pleading requirements of 9(b)," where a plaintiff alleges knowing and intentional conduct, *Rule 9(b)* is applicable); *Rise Basketball Skill Dev., LLC v. K Mart Corp., No. 16-cv-04895-WHO, 2017 U.S. Dist. LEXIS 99608, at *9 (N.D. Cal. June 27, 2017)* (noting the same). There is no real dispute here that 23 is asserting knowing and intentional misrepresentations on the part of Ancestry. Therefore, the Court must evaluate whether the requirements of *Rule 9(b)* have been met.

Each alleged misrepresentation must be considered on its own terms.

• On March 29, 2018, Ancestry's **[**40]** website stated that its DNA ancestry test tests "5X MORE REGIONS than other DNA tests." Compl. ¶ 51. **[*909]** Ancestry contends that it is not clear from the complaint why this statement was allegedly false. But just because the statement simply references "other DNA tests," and does not mention 23 by name specifically, does not mean that Ancestry is immunized from liability. This is because 23 has explicitly alleged that it and Ancestry "are the top two companies in the market." Compl. ¶ 47. That being the case, a reasonable consumer could infer that the representation covers 23 — or at least it is a question of fact whether a reasonable consumer could be misled. Ancestry makes a better argument that it is not clear that the statement was false *when made* — "the number of regions reflected in [23's] products changed over time." Reply at 10. Ancestry points out that, although this is a 12(b)(6) motion, 23 has provided evidence showing that, in April 2018, 23's own website claimed that its services covered "150+ regions*" but with the asterisk/footnote that 23's "Ancestry Composition update with over 120 additional regions will be coming soon." Docket No. 36-10 (Gaede Decl., Ex. C) (23's website). **[**41]** Thus, as to this representation, Ancestry has a meritorious argument that 23 needs to allege more to comply with *Rule 9(b)*.

• On or about April 17, 2018, Ancestry changed its website. The website still made the claim "5X MORE REGIONS than other DNA tests*" but now included an asterisk footnote. The actual footnote stated: "*5x more regions than MyHeritage, Nat Geo Geno 2.0, and Family Three DNA. 2x more regions than 23andMe." Compl. ¶ 53. Contrary to what Ancestry argues, 23 has alleged enough here to satisfy *Rule 9(b)*. The representation "5X MORE REGIONS than other DNA tests" is false as to 23 because — as conceded in the footnote — Ancestry tests only 2x more regions than 23. And it is a question of fact as to whether a reasonable consumer could be misled because, although the footnote clarifies Ancestry's position with respect to 23, 23 has alleged that the footnote was effectively buried ("at the end of [the] long web page and in . . . small font and color"). Compl. ¶ 53.

• On or about April 21, 2018, Ancestry made another change to its website, now making the claim "AncestryDNA provides 5x more detail than other tests*" — with the actual footnote stating, "*5x more regions than MyHeritage, Nat Geo **[**42]** Geno 2.0, and Family Tree DNA. 2x more regions than 23andMe." Compl. ¶ 54. The position of the footnote was moved up. As above, it is a question of fact as to whether a reasonable consumer could be misled, even with the new positioning of the footnote.

• On or about May 3, 2018, Ancestry changed its website, returning to the claim "5X MORE REGIONS than other DNA tests*" with the same footnote. The location of the footnote was slightly changed. As above, it is a question of fact as to whether a reasonable consumer could be misled. *See* Compl. ¶ 49 (alleging that the disclaimer was ineffective — represented "in small print" and with 23's name "buried following other company names").

• Finally, Ancestry represented (*e.g.*, on its website, *see* Compl. ¶ 51) that its DNA test cost $99 but that it was running a sale so that a consumer could purchase its services for **[*910]** only $79. According to 23, the representation of a sale was false because the sale was "perpetual" or never-ending — *i.e.*, the reality was that there was no "sale" but that Ancestry had simply reduced the price of its services. Contrary to what Ancestry argues, this provides the who, what, when, where, and why, and therefore there **[**43]** is no *Rule 9(b)* issue. To the extent Ancestry argues that it did not use the word "sale" on its website but simply struck out $99 and replaced it with $79, *see* Reply at 11, it is a question of fact as to how a reasonable consumer would understand the striking out — *i.e.*, indicating a sale or simply a reduced price.

Accordingly, 23's Lanham Act claim is, for the most part, adequately pled. The Court grants the motion to dismiss the Lanham Act claim only to the extent the claim is based on the March 29, 2018, representation on Ancestry's website. 23 has leave to amend to cure this specific deficiency.

D. Claims for Violations of *California Business & Professions Code §§ 17500* and *17200*

1. Relevant Background

HN12[] *California Business & Professions Code § 17500* essentially prohibits false or misleading advertising. *See Cal. Bus. & Prof. Code § 17500* (addressing "untrue or misleading" advertising "which is known, or which by the exercise of reasonable care, should be known, to be untrue or misleading"). *Section 17200* prohibits "unlawful, unfair or fraudulent business act[s] or practice[s] and unfair, deceptive, untrue or misleading advertising." *Id. § 17200*.

In its third and fourth causes of action, 23 alleges a violation of *§ 17500* and *§ 17200*, respectively. In the *§ 17500* claim, 23 cites as misrepresentations that Ancestry's "DNA test provides '5X more regions than other **[**44]** DNA tests' and '5X more detail than other DNA tests.'" Compl. ¶ 64. In the *§ 17200* claim, 23 does not claim a fraudulent business act or practice but rather only "unlawful and unfair" ones. Compl. ¶ 68. The only unlawful or unfair acts or practices identified by 23 are the "misleading advertis[ements] about Defendants' DNA tests." Compl. ¶ 68.

2. *Rule 9(b)*

For the §§ 17500 and 17200 claims, Ancestry repeats the same argument that it made above with respect to the Lanham Act claim — *i.e.*, that the §§ 17500 and 17200 claims are subject to Rule 9(b) and that the Rule 9(b) particularity requirements have not been satisfied. The analysis above is applicable here.

3. Standing

Ancestry argues that, apart from any Rule 9(b) issue, there is an independent ground to dismiss the §§ 17500 and 17200 claims. More specifically, Ancestry asserts that, because these claims essentially claim fraud, 23 is required to allege in its complaint actual reliance on the misrepresentations — and that reliance must be 23's reliance, and not just a consumer's.

Ancestry's argument is persuasive on the § 17500 claim as well as the § 17200 claim to the extent it is based on an unlawful (as opposed to unfair) act or practice. The § 17500 claim is clearly predicated on fraud. As for the § 17200/unlawful claim, as currently pled, it is also **[**45]** based on fraud. *See* Compl. ¶ 68 (referencing "misleading advertising about Defendants' DNA tests"). Contrary to what 23 suggests in its opposition, nothing in the complaint indicates that the § 17200/unlawful claim is based on patent infringement. *See* Opp'n at **[*911]** 19 (arguing that the patent infringement claim is "not predicated on misrepresentation").

Because both the § 17500 and § 17200/unlawful claims are based on predicated on fraud, actual reliance — more specifically, reliance on the part of 23 — is required. Admittedly,

> "[n]o California [state] court has addressed" whether "competitor plaintiffs must plead their own reliance or whether pleading consumer reliance is sufficient for fraudulent business practice claims brought by competitors." [And while] [t]here is a split among district courts sitting in California on this issue, . . . the majority view appears to be that a plaintiff must be able to allege its own reliance "rather than the reliance of third parties."

*A White & Yellow Cab, Inc. v. Uber Techs., Inc., No. 15-cv-05163-JSW, 2017 U.S. Dist. LEXIS 49803, at *20-21 (N.D. Cal. Mar. 31, 2017)*. This makes sense because, "in general, a traditional fraud claim cannot be premised on third-party reliance." *Id. at *21*; *cf. O'Connor v. Uber Technologies, Inc., 58 F. Supp. 3d 989, 1003 (N.D. Cal. 2014)* (in a case where plaintiff alleged a business practice likely to deceive members **[**46]** of the public (as opposed to himself), stating that "third-party reliance is insufficient to establish [plaintiff's] standing under the fraud prong of the UCL"). Therefore, the §§ 17500 and 17200/unlawful claims are dismissed for failure to plead actual reliance by 23.

However, this analysis does not apply to the § 17200 claim to the extent it simply alleges an *unfair* act or practice. Unfairness is measured on a standard different from fraud — a defendant competitor's misrepresentation can be unfair even if the plaintiff itself was not deceived by the misrepresentation. *See Van Slyke v. Capital One Bank, No. C 07-00671 WHA, 2007 U.S. Dist. LEXIS 82690, at *31 (N.D. Cal. Nov. 7, 2007)* (noting that, in a § 17200 case brought by a plaintiff against a competitor (*i.e.*, not a consumer case), unfairness relates to actual or threatened impact on competition); *Cel-Tech Comm'ns, Inc. v. L.A. Cell. Tel. Co., 20 Cal. 4th 163, 186-87, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (stating that, "[w]hen a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition"); *see also In re Tobacco II Cases, 46 Cal. 4th 298, 325 n.17, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)* (noting **[**47]** that "[t]here are doubtless many types of unfair business practices in which the concept of reliance, as discussed here, has no application"). This aspect of § 17200 focuses on unfair *competition*.

The Court acknowledges that there are some cases that arguably hold to the contrary. *See, e.g., Thomas v. Costco Wholesale Corp., No. 5:12-CV-02908-EJD, 2014 U.S. Dist. LEXIS 46405, at *14 (N.D. Cal. Mar. 31, 2014)* ("The California Supreme Court has held that the phrase 'as a result of' in UCL section 17204 'imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong.' This also applies under the UCL's 'unlawful' and 'unfair' prong, where the predicate unlawfulness is misrepresentation and deception."); *McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 959 (N.D.* **[*912]** *Cal. 2012)* (Spero, J.) ("Although *In Re Tobacco* concerned a claim only under the fraudulent prong, it has been held that, under any prong, a UCL claim that is based in fraud must be supported by allegations of reliance in order to properly be pled."). To the extent they so hold, the Court respectfully disagrees with their analysis.

4. Relief

Finally, Ancestry argues that, even if its arguments on *Rule 9(b)* and standing are not successful, there is one more independent basis for dismissal — *i.e.*, the relief that 23 seeks is not recoverable. **[**48]** Ancestry notes, that per the complaint, the specific relief 23 seeks for the *§§ 17500* and *17200* claims includes (1) disgorgement of profits and (2) restitution.

Ancestry is correct that, to the extent 23 seeks *nonrestitutionary* disgorgement of profits, that relief is unwarranted because *§§ 17500* and *17200* allow only for restitution.

As for restitution, Ancestry persuasively argues that, on the face of the complaint, it is not plausible that there is any restitution to be had. ***HN13***[] "[A]n order for 'restitution' [is] one 'compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property.'" *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144-45, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*. In the case at bear, the *§§ 17500* and *17200* claims, as pled, are based on misleading advertising only. 23 nowhere alleges in its complaint that Ancestry obtained any money or property from 23 through its misleading advertising. Thus, there is no basis for restitution.

23 suggests, in its opposition brief, that Ancestry should have to disgorge any profits it made from its patent infringement, *see* Opp'n at 21-22 (arguing that 23 has an "ownership interest in the DNA tests offered by Defendants (in **[**49]** that the DNA tests embody [23's] intellectual property)"), but, as noted above, the *§§ 17500* and *17200* claims, as pled, are not based on patent infringement but rather only misleading advertising. In any event, as held herein, 23 fails to state a patent infringement claim.

Accordingly, to the extent 23 has asked for disgorgement of profits and restitution, its *§§ 17500* and *17200* claims are problematic. However, this only counsels in favor of a dismissal (with leave to amend) of the requests for disgorgement and restitution — and not a dismissal of the *§§ 17500* and *17200* claims themselves. This is because 23 has also asked for injunctive relief. And on the face of the complaint, nothing indicates that Ancestry has stopped making representations about, *e.g.*, "5X MORE REGIONS" on its website. Although, in its reply brief, Ancestry claims that "the allegedly misleading statements no longer appear on Ancestry's website," Reply at 13 n.12, that assertion is outside the four corners of the complaint.

5. Summary

With respect to standing, because the *§§ 17500* and *17200* claims are predicated on misleading advertising only (and not patent infringement), 23's failure to plead its own actual reliance on Ancestry's alleged misrepresentations warrants **[**50]** a dismissal of the *§ 17500* claim and the *§ 17200*/unlawful claim. However, the *§ 17200*/unfair claim (even though based on misleading advertising) survives the standing challenge.

As to the *§ 17200*/unfair claim, disgorgement and restitution are implausible remedies. **[*913]** However, injunctive relief is still a possible remedy — at least based on what the complaint alleges (*i.e.*, there is no allegation that Ancestry has ceased making misrepresentations on its website).

For the *§ 17200*/unfair claim, 23 has pled to satisfy *Rule 9(b)*, except with respect to the March 29, 2018, representation on Ancestry's website. As above, 23 has leave to amend to cure this specific deficiency. If 23 amends, then it should address whether injunctive relief is proper if, in fact, Ancestry has ceased making misrepresentations on its website.

E. Declaratory Relief Claims (Ancestry's Trademark)

1. Relevant Background

Ancestry has a registered trademark in the word mark "Ancestry." *See* Compl., Ex. 10 (trademark). According to 23, Ancestry has claimed 23's use of the word "'Ancestry' in certain of [23's] advertising and on certain of [23's] products" causes consumer confusion. Compl. ¶ 70; *see also* Compl. ¶ 75 (alleging that Ancestry has "contended that [23's] use of the phrase 'Ancestry **[**51]** Service,' 'Health + Ancestry Service,' or use of the word 'Ancestry' under 'Your information' or 'Find out what your DNA says about your health, traits and ancestry'" infringes). 23 asks for a declaratory judgment that it does not infringe because, *e.g.*:

- 23 "has priority of usage of the mark as to the DNA testing market," Compl. ¶ 73 (adding that, when Ancestry registered the word mark, "the mark was to market genealogical periodicals and genealogy websites, not . . . DNA testing services"); and
- 23 uses the word "Ancestry" to "generically describe[] the characteristics of the service" it provides and thus its usage "constitutes fair use." Compl. ¶ 77.

23 also asks for a declaration that Ancestry's trademark is invalid because "Ancestry" "has become generic for genetic testing for ancestry information and genealogical research services." Compl. ¶ 81.

Ancestry's main argument is that the declaratory relief claims should be dismissed for lack of subject matter jurisdiction — more specifically, because there is no case or controversy (Article III) or actual controversy (the Declaratory Judgment Act) for the Court to adjudicate. Because this is a 12(b)(1) motion to dismiss, both parties **[**52]** have provided evidence as to whether there is, in fact, 28 a case or controversy. The evidence provided indicates as follows.

From January to April 2017, 23 and Ancestry communicated regarding 23's use of the term "Ancestry." On April 20, 2017, Ancestry provided 23 with an initial draft of an agreement regarding 23's use of the term. *See* Chenhansa Decl. ¶ 3. Thereafter, the parties continued to negotiate the terms of the agreement through February 2018. *See* Chenhansa Decl. ¶ 4.

On March 1, 2018, Ancestry proposed an edit to the agreement. *See* Chenhansa Decl. ¶ 5. On April 30, 2018, 23 responded that it would accept that edit but then proposed its own edit to the agreement. 23 then stated: "Please finalize the agreement, have it executed by your client, and then send it to us for final review and execution by [23]." Chenhansa Decl. ¶ 7 & Ex. 5 (email). On May 1, 2018, 23 proposed another edit to the agreement and stated: "Please make that revision or contact me if you wish to discuss." Chenhansa Decl. ¶ 8 & Ex. 6 (email).

On May 11, 2018, Ancestry rejected the proposed edits and asked 23 to "revisit and let me know if you will withdraw" the **[*914]** proposed edit. Haggarty Decl. ¶ 4 & Ex. A (email). **[**53]**

Thereafter, on that same day, 23 filed the instant lawsuit.

2. Case or Controversy

HN14[↑] Title *28 U.S.C. § 2201* provides in relevant part that, "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *28 U.S.C. § 2201(a)*.

> The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941); *see also* *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127, 137, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)* (affirming *Maryland Casualty* test in a case where patent licensee sought declaratory judgment that patent was invalid, unenforceable, or not infringed; holding that licensee was not required to break or terminate **[**54]** license agreement before seeking declaratory judgment).[10] To state the matter somewhat differently, "[a] case or controversy exists justifying declaratory relief only when the challenged . . . activity . . . is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the . . . parties." Bayer v. Neiman Marcus Grp., 861 F.3d 853, 867 (9th Cir. 2017) (internal quotation marks omitted). "The requirement that a case or controversy exist under the Declaratory Judgment Act is 'identical to Article III's constitutional case or controversy requirement.'" Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005).

In the instant case, the parties had a disagreement about 23's actual use of the term "Ancestry." They never **[**55]** reached an agreement regarding 23's use. Hence, the case or controversy requirement is satisfied. *Compare, e.g.,* Merit Healthcare Int'l, Inc. v. Merit Med. Sys., 721 F. App'x 628, 629 (9th Cir. 2018) (No case or controversy where "the Original Complaint indicates that, despite the similarity of marks and similarity of goods, the parties have coexisted for thirty years without any apparent conflict. Moreover, the Original Complaint contains no allegation that Merit Medical has any plan to alter the status quo."). The Court notes that, before the Supreme **[*915]** Court's *MedImmune* decision, "Ninth Circuit precedent required a plaintiff in a trademark case to demonstrate a 'real and reasonable apprehension that [it] will be subject to liability.'" Homie Gear, Inc. v. Lanceberg Holdings, LLC, No. 16cv1062 BTM (DHB), 2016 U.S. Dist. LEXIS 159750, at *5 (S.D. Cal. Nov. 16, 2016) (citing Chesebrough-Pond's, Inc. v. Faberge, Inc., 666 F.2d 393, 396 (9th Cir. 1982)). But *MedImmune* held the reasonable-apprehension-of-suit test as simply one way that the "'declaratory judgment plaintiff can satisfy the more general all-the-circumstances test to establish that and action presents a justiciable Article III controversy.'" *Id.* In any event, even if the reasonable-apprehension-of-suit test were given more weight, the Ninth Circuit has indicated that, where a "plaintiff is engaged in the on-going [use]" of the disputed intellectual property, **[**56]** "the showing of real and reasonable apprehension beyond the [use] need not be substantial." Societe de Conditionnement en Aluminum v. Hunter Eng'g Co., 655 F.2d 938, 944 (9th Cir. 1981) (patent infringement case).

Ancestry contends that there is no case or controversy because, even though no contract was actually *signed*, the parties had, through their negotiations, reached agreement on most terms of use and the only places where they did not have agreement [TEXT REDACTED BY THE COURT] *See* Reply at 14 **[filed under seal]**. More specifically, in its complaint, 23 alleges: "[Ancestry has] contended that at least [23's] use of the phrase 'Ancestry Service,' 'Health + Ancestry Service,' or use of the word 'Ancestry' under "Your information' or 'Find out what your DNA says about your health, traits and ancestry,' somehow uses its 'Ancestry' trademark." Compl. ¶ 75. Ancestry asserts that the parties had reached agreement that [TEXT REDACTED BY THE COURT] Chenhansa Decl., Ex. 4 (§ 1 of the draft agreement) **[filed under seal]**.

There are several problems with Ancestry's argument. First, in the absence of a signed contract, it is not clear that 23 was (or is) willing [TEXT REDACTED BY THE COURT] **[filed under seal]**. Second, the allegation in the complaint covers [TEXT REDACTED BY THE COURT] **[**57]** **[filed under seal]**. Finally, Ancestry's attempt to characterize the agreement above (§ 1 in the draft contract) as dispositive fails to take into account that that the parties had a disagreement about a related term (§ 5 in the draft contract), which rendered that purported agreement questionable. *See* Chenhansa Decl., Ex. 4 (§ 5 of draft agreement) [TEXT REDACTED BY THE COURT] **[filed under seal]**; Chenhansa Decl., Ex. 5 (email from 23) [TEXT REDACTED BY THE COURT] **[filed under seal]**; Chenhansa Decl., Ex. 6 (email from 23) [TEXT REDACTED BY THE COURT] **[filed under seal]**; Haggarty Decl., Ex. A (email from Ancestry) (stating that "[w]e have a problem with these proposed [edits]" [TEXT

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[10] In *MedImmune*, the Supreme Court questioned the Federal Circuit's reasonable-apprehension-of-suit test. *See, e.g.,* MedImmune, 549 U.S. at 132 n.11. Following *MedImmune*, the Federal Circuit stated that,

> [w]hile the Supreme Court rejected the reasonable apprehension of suit test as the sole test for jurisdiction, it did not completely do away with the relevance of a reasonable apprehension of suit. Rather, following *MedImmune*, proving a reasonable apprehension of suit is one of multiple ways that a declaratory judgment plaintiff can satisfy the more general all-the-circumstances test to establish that an action presents a justiciable Article III controversy.

Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1336 (Fed. Cir. 2008).

REDACTED BY THE COURT] **[filed under seal]**. There remains a case or controversy sufficient to support 23's claim for declaratory relief.

3. Discretion

Finally, Ancestry argues that, even if this Court has subject matter jurisdiction over the declaratory relief claims, it should exercise its discretion and not entertain them. Ancestry cites *EMC Corp. v. Norand Corp., 89 F.3d 807 (Fed. Cir. 1996)*, a case where the plaintiff sought a declaration that it did not infringe certain patents and that the patents were invalid. The district court exercised discretion not to entertain **[**58]** the declaratory relief claims. On appeal, the Federal Circuit rejected the plaintiff's argument that it is an "abuse of discretion for a district court to dismiss a declaratory judgment action except when special circumstances are present." *Id. at 814*. ***HN15***[] "Rather, we heed the Supreme Court's instruction that special flexibility is **[*916]** called for in the declaratory judgment context, where 'the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.'" *Id.* The court therefore deemed it appropriate for the district court to consider "whether hearing the declaratory judgment action would serve the objectives for which the Declaratory Judgment Act was created." *Id.* The district court had declined jurisdiction on the ground that "allowing the declaratory judgment action to proceed would 'create an incentive structure that is inconsistent with the public interest in preserving declaratory proceedings for cases closer to the central objectives of declaratory proceedings.'" *Id.* In other words, "a party in [the plaintiff's] position could abuse the declaratory judgment device to obtain a more favorable bargaining **[**59]** position in its ongoing negotiations with the patentee and also to undermine the value of the patent so as to impede its sale or licensing to a third party." *Id.* The district court also indicated that discretionary dismissal was justified on the basis that allowing the claim to go forward would be inconsistent with the policy of promoting extrajudicial dispute resolution and conservation of judicial resources. In that case, declaratory relief was sought during active negotiations. It was in this context that the Federal Circuit stated:

> We agree that a court may take into account the pendency of serious negotiations to sell or license a patent in determining to exercise jurisdiction over a declaratory judgment action. While a court may conclude that ongoing negotiations do not negate the presence of a controversy for jurisdictional purposes, the court may nonetheless find . . . that the need for judicial relief is not as compelling as in cases in which there is no real prospect of a non-judicial resolution of the dispute.

Id.

HN16[] Of course that a court *may* take into account serious negotiations does not mean that the existence of such negotiations require dismissal of the declaratory relief **[**60]** claims. Moreover, in the instant case, it is not even clear that there are serious ongoing negotiations. While the parties have engaged in negotiations for a significant period of time (since January 2017), they still have not been able to reach an agreement after all that time. This suggests that the parties have reached a serious stumbling block in their negotiations.

Finally, 23 fairly makes the point that judicial economy would be served by putting in one lawsuit all of the parties' disputed intellectual property rights. *See* Opp'n at 25.

The Court therefore, in the exercise of its discretion, declines to dismiss the declaratory relief claims.

II. CONCLUSION

For the foregoing reasons, Ancestry's motion to dismiss is granted in part and denied in part. 23 has leave to amend as provided for in this order. Any amended complaint shall be filed no later than September 24, 2018.

This order disposes of Docket No. 29. This order shall be filed under seal.

IT IS SO ORDERED.

Dated: August 23, 2018

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

In re SSA Bonds Antitrust Litig.

United States District Court for the Southern District of New York

August 24, 2018, Decided; August 28, 2018, Filed

16 Civ. 3711 (ER)

Reporter

2018 U.S. Dist. LEXIS 147022 *; 2018-2 Trade Cas. (CCH) P80,498; 2018 WL 4118979

IN RE SSA BONDS ANTITRUST LITIGATION

Prior History: *In re SSA Bonds Antitrust Litig., 2016 U.S. Dist. LEXIS 178048, 2016 WL 7439365 (S.D.N.Y., Dec. 22, 2016)*

Core Terms

antitrust, Dealer, bonds, transactions, prices, investors, chats, consolidated, manipulation, conspiracy, spreads, traded, allegations, motion to dismiss, injury-in-fact, collusion, damages, failure to state a claim, bond market, Defendants', Plaintiffs'

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Judges: Edgardo Ramos, United States District Judge.

Opinion by: Edgardo Ramos

Opinion

OPINION AND ORDER

Ramos, D.J.:

This litigation arises from fourteen related complaints filed against a number of banks and certain of their employees who allegedly conspired to fix the price of supranational, sovereign, and agency ("SSA") bonds sold to and purchased from investors in the secondary market. These actions were consolidated under the caption *In re SSA Bonds Antitrust Litigation*, No. 16 Civ. 3711. *See* Docs. 36, 314. Pending before the Court are Defendants' motions to dismiss the Consolidated Amended Class Action Complaint ("CAC") for lack of subject-matter jurisdiction, failure to state a claim, lack of personal jurisdiction, and improper venue. Docs. 342, 358, 365, 373, 376, 378. For the reasons set forth below, the Court GRANTS the motions to dismiss for failure to state a claim.

I. Background

A. Factual Background [*7] [1]

SSA bonds are debt securities issued by governmental and quasi-governmental entities to fund a range of public-policy mandates. CAC ¶ 2, Doc. 306. Entities issuing SSA bonds include supranational organizations, which are multilateral institutions with shareholders from multiple countries, such as the World Bank's International Bank for Reconstruction and Development ("IBRD") and the European Investment Bank ("EIB"); sovereign and subsovereign borrowers, which are national, state, or provincial governments that issue debt in foreign currencies; and agency borrowers, which are typically entities owned by or working on behalf of governments, such as Germany's Kreditanstalt für Wiederaufbau ("KFW") (a government-owned investment bank). CAC ¶¶ 95-98. SSA bonds are generally regarded as secure investments because they often enjoy special legal status or government backing. CAC ¶¶ 2, 95. SSA bonds can be U.S. dollar denominated ("USD") as a way to target the U.S. bond market. CAC ¶ 103.

After being issued, SSA bonds can be resold and traded by dealers and investors. CAC ¶ 109. Investors trade SSA bonds in an over-the-counter market, meaning that rather than using an open, anonymous exchange **[*8]** that matches buyers and sellers, investors transact individually and privately with dealers. CAC ¶¶ 109, 396. An investor typically contacts one or more dealers by telephone, electronic chat messaging, or an electronic trading platform to request a quote, which the dealer relays to the investor, who can then place the order.[2] CAC ¶¶ 110-112. Because it is time-consuming to contact dealers and their quotes usually expire in a short amount of time, investors generally do not "shop around" with more than a few dealers at a time. CAC ¶ 113. Investors also do not have access to real-time market data and have limited ability to purchase secondary market trading information, so they rely on dealers for pricing information on SSA bonds. CAC ¶¶ 112, 114. Dealers typically quote prices for SSA bonds in basis

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[1] The following facts, drawn from the CAC, are presumed to be true for the purposes of Defendants' motions to dismiss. *See* *Koch v. Christie's Int'l PLC, 699 F.3d 141, 145 (2d Cir. 2012)*.

[2] Dealers can also trade with other dealers through interdealer brokers. CAC ¶ 116. Dealers submit bid and offer prices to interdealer brokers, which publish them to trading platforms, where other dealers can view and accept them. *Id.* Transactions through interdealer brokers are supposed to be anonymous. CAC ¶ 117.

points (one basis point is 1/100th of a percentage point) as a spread above the yield of the relevant benchmark U.S. Treasury bonds with a similar maturity.[3] CAC ¶ 119. SSA bond yields are inversely related to bond prices: the higher the spread above Treasury bond yields, the cheaper the price of the bond, and vice versa. CAC ¶ 121. Therefore, investors sought to buy SSA bonds at the highest **[*9]** available offer in basis points (*i.e.*, the highest yield, and thus the cheapest price) and to sell them at the lowest available bid in basis points (*i.e.*, the lowest yield, and thus the most expensive price). *Id.*

Defendants are several banks operating as dealers in the USD SSA bond market (the "Dealer Defendants") and certain of their employees responsible for the USD SSA bond trading business (the "Individual Defendants"). CAC ¶ 3. The Dealer Defendants are Bank of America, Barclays, BNP Paribas, Citi, Crédit Agricole, Credit Suisse, Deutsche Bank, HSBC, Nomura, RBC, and TD Bank.[4] CAC ¶¶ 32-87. The Individual Defendants, who worked at various Dealer Defendants over time, are Hiren Gudka, who worked at Bank of America and Deutsche Bank; Bhardeep Singh Heer, who worked at Nomura; Amandeep Singh Manku, who worked at Bank of America, Crédit Agricole, and HSBC; Gary McDonald, who worked at Bank of America, Citi, and TD Bank; and Shailen Pau, who worked at RBC, Credit Suisse, and Crédit Agricole. CAC ¶¶ 88-94. In addition to the Individual Defendants, the CAC alleges that the conspiracy was also carried out by several other employees of the Dealer Defendants: [TEXT REDACTED BY THE COURT] **[*10]** CAC ¶ 124.

Plaintiffs allege that Defendants conspired to not compete against each other for the sale of USD SSA bonds to customers, and instead to cooperate to achieve prices and terms more favorable to them and worse for their customers. CAC ¶¶ 7, 12, 130. In support of this allegation, Plaintiffs quote from transcripts of over 150 chats and phone calls [TEXT REDACTED BY THE COURT][5] which they dub the "cooperation materials" that were produced by two settling Dealer Defendants (Bank of America and Deutsche Bank).[6] CAC ¶ 5, Pls.' Merits Opp'n 2, Doc. 424. Generally, the communications amongst these employees purport to show that, rather than compete for business, they were actively conspiring in real time to quote prices to potential customers that would steer the customer to one or another bank, among other things. The Court will not attempt to recount all the alleged conversations here, but rather provides the following representative examples:

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In December 2015, news broke that the U.S. Department of Justice had launched an investigation into collusion in the SSA bond market, which was followed by reports of investigations by the United Kingdom Financial Conduct Authority and the European Commission. CAC ¶¶ 315-320. Media reports and public filings indicated that Bank of America, Citi, Crédit Agricole, Credit Suisse, and Nomura were among those being investigated. CAC ¶¶ 317, 319.

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[3] The Court will simply refer to "basis points" as a shorthand for this method of pricing.

[4] The CAC names as defendants numerous subsidiaries and affiliates of the Dealer Defendants, but for brevity's sake, the Court lists them here using the definitions employed in the CAC.

[5] [ILLEGIBLE FOOTNOTE]

[6] The CAC notes that "[t]he claims against Bank of America and Deutsche Bank are subject to a settlement agreement, but these parties are named herein because the settlements have not yet been finally approved, and these two Defendants have thus not yet been dismissed from the action." CAC ¶ 5 n.3.

In late 2015 or early 2016, "all or nearly all of the key participants in the cartel," including four of the five Individual Defendants, "were removed from their positions on the SSA bond trading desks" by their employers as a result of their alleged misconduct.[7] CAC ¶ 314.

Plaintiffs are the Iron Workers Pension Plan of Western Pennsylvania ("Iron Workers") and the Sheet Metal Workers Pension Plan of Northern California ("Sheet Metal Workers"). CAC ¶¶ 28-29. Plaintiffs seek to represent a class comprising "[a]ll persons or entities who, from January 1, 2005 to December 31, 2015 [the "Class Period"], directly entered into U.S.-dollar denominated SSA bond transactions with Defendants, **[*12]** or their respective subsidiaries or affiliates, in the United States or its territories or otherwise involving U.S. trade or commerce." CAC ¶ 404. Plaintiffs allege that at some point during the Class Period, one or both Plaintiffs transacted with six of the eleven Dealer Defendants for USD SSA bonds.[8] CAC ¶¶ 35, 39, 51, 60, 78, 85.

Plaintiffs do not allege that any of the approximately 150 cited chats referred to transactions to which they were a party. Instead, they allege that "the conspiracy was in operation on *every* transaction entered into by these Defendants during the Class Period," not just those associated with the chats summarized in the CAC. CAC ¶ 298. Consequently, they allege that USD SSA bond transactions with Defendants had prices that were artificially inflated or deflated across the board. CAC ¶¶ 307-308. In support of this theory, they cite several pieces of "academic literature" for the proposition that "less competition among dealers increases spreads and prices" paid by investors. CAC ¶ 303 (emphasis omitted). Although Plaintiffs have not specified the amount of their damages, they state that, among other methods, "damages can potentially be quantified by comparing **[*13]** the bid-ask spreads[9] paid by Class Members in the actual world (the world affected by the conspiracy) to the spreads paid on comparable instruments after the period of collusion ended," while controlling for other factors. CAC ¶ 312.

[TEXT REDACTED BY THE COURT]

B. Procedural Background

The first complaint in this case was filed on May 18, 2016, and was followed by several related actions. On August 22, 2016, the Court consolidated these and subsequent related actions under the above caption. Doc. 36. Ultimately, fourteen actions were consolidated, although some plaintiffs withdrew from the consolidated action or dismissed their action. *See* Docs. 304, 314. On December 22, 2016, the Court appointed Quinn Emanuel Urquhart & Sullivan, LLP and Robbins Geller Rudman & Dowd LLP as interim co-lead counsel in the consolidated action. Doc. 88.

On April 7, 2017, Plaintiffs filed a Consolidated Complaint. Doc. 130. Following their settlement with Deutsche Bank, Plaintiffs requested leave to file a Consolidated Amended Complaint ("CAC") on October 6, 2017, which the Court granted on November 3, 2017. Doc. 305. The CAC asserts a single cause of action for conspiracy to restrain trade in violation of **[*14]** *section 1 of the Sherman Act*, *15 U.S.C. § 1*. CAC ¶¶ 413-420. On December 12, 2017, Defendants moved to dismiss the CAC for lack of subject-matter jurisdiction, failure to state a claim, lack of personal jurisdiction, and improper venue. Docs. 342, 358, 365, 373, 376, 378. In March 2018, the Court preliminarily approved the settlement agreements staying proceedings between Plaintiffs and Bank of America, Deutsche Bank, and Gudka, and Plaintiffs voluntarily dismissed TD Securities Limited, a TD Bank subsidiary. Docs. 428, 430, 431, 448.

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[7] The CAC does not allege that McDonald was suspended or terminated from his position, but it alleges that he has been inactive on the Financial Conduct Authority register for traders since March 2016. CAC ¶ 314 n.45.

[8] Plaintiffs allege that they transacted with Bank of America, Barclays, Citi, Credit Suisse, RBC, and TD Bank. CAC ¶¶ 35, 39, 51, 60, 78, 85. Plaintiffs do not allege that they transacted with BNP Paribas, Crédit Agricole, Deutsche Bank, HSBC, and Nomura, although they allege that putative class members did. CAC ¶¶ 45-48, 56-57, 65-75.

[9] A "bid-ask spread" or "bid-offer spread" is the difference, or margin, between a dealer's bid to buy a bond and the dealer's offer to sell the same bond. CAC ¶¶ 119-120.

II. Subject-Matter Jurisdiction

At the outset, the Court must address the question of standing under Article III of the Constitution.[10] In a footnote, the Dealer Defendants argue that Plaintiffs' failure to allege an injury-in-fact supporting antitrust standing means they have also failed to allege an injury-in-fact sufficient to support Article III standing.[11] Dealer Defs.' Merits Mem. 10 n.10, Doc. 347. That is incorrect because "the pleading standard for constitutional standing is lower than the standard for a substantive cause of action." *Harry v. Total Gas & Power N. Am., Inc., 889 F.3d 104, 110 (2d Cir. 2018)*.

"Article III of the Constitution limits the jurisdiction of federal courts to the resolution of 'cases' and 'controversies.'" *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP, 549 F.3d 100, 106 (2d Cir. 2008)* (quoting *U.S. Const. art. III, § 2*). "To establish standing under Article III of the Constitution, a plaintiff **[*15]** must allege '(1) *injury-in-fact*, which is a concrete and particularized harm to a legally protected interest; (2) *causation* in the form of a fairly traceable connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) *redressability*, or a non-speculative likelihood that the injury can be remedied by the requested relief.'" *Total Gas, 889 F.3d at 110* (quoting *W.R. Huff, 549 F.3d at 106-07*).

It is important to note, however, that while "at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating'" an injury-in-fact, *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)* (quoting *Warth v. Seldin, 422 U.S. 490, 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975))*, "'[c]learly alleging' is a 'low[er] threshold' than that for 'sustaining a valid cause of action,'" *Total Gas, 889 F.3d at 110* (second alteration in original) (quoting *Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 222 (2d Cir. 2008))*. Put another way, while a plaintiff must show that a cause of action is "plausible" in order to state a claim, *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*, "[f]or standing purposes, [it] is enough" to merely "place [the injury] within the realm of possibility," *Total Gas, 889 F.3d at 111*.[12]

Here, Plaintiffs allege that they were injured by Defendants who engaged in a conspiracy to not compete and to charge supracompetitive prices on every SSA bond transaction, including those that Plaintiffs entered into. CAC ¶¶ 130, 298. As will be explained, the Court finds this alleged **[*16]** injury too implausible to state an antitrust claim, but because it is "within the realm of possibility," it is sufficient to confer Article III standing on Plaintiffs. *Total Gas, 889 F.3d at 111*.

III. Failure to State a Claim[13]

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[10] "A court proceeds to an antitrust standing analysis only after Article III standing has been established." *Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 222 n.1 (2d Cir. 2008)*.

[11] For this proposition, the Dealer Defendants cite the district court's decision in *Harry v. Total Gas & Power N. Am., Inc., 244 F. Supp. 3d 402, 420 n.13 (S.D.N.Y. 2017)*, *aff'd as modified*, *889 F.3d 104 (2d Cir. 2018)*, but this holding was subsequently rejected on modification by the Second Circuit, *Harry v. Total Gas & Power N. Am., Inc., 889 F.3d 104, 107 (2d Cir. 2018)*.

[12] To be sure, on a motion to dismiss, a plaintiff's allegations must "plausibly suggest that it has standing to sue." *Amidax Trading Grp. v. S.W.I.F.T. SCRL, 671 F.3d 140, 145 (2d Cir. 2011)*. But "at the pleading stage, 'general factual allegations of injury . . . may suffice,'" *John v. Whole Foods Mkt. Grp., Inc., 858 F.3d 732, 736 (2d Cir. 2017)* (quoting *Lujan v. Defs. of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*, to meet the "low threshold" of injury-in-fact under Article III, *id.* (quoting *WC Capital Mgmt., LLC v. UBS Secs., LLC, 711 F.3d 322, 329 (2d Cir. 2013))*.

[13] "Under the circumstances, the Court exercises its discretion to address [Defendants'] motion to dismiss for failure to state a claim before addressing personal jurisdiction" and venue. *In re London Silver Fixing, Ltd., Antitrust Litig., Nos. 14 MDL 2573, 14 Misc. 2573 (VEC), 332 F. Supp. 3d 885, 2018 U.S. Dist. LEXIS 124856, 2018 WL 3585277, at *5 n.5 (S.D.N.Y. July 25, 2018)*;

A. Legal Standard

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly, 550 U.S. at 556*). The plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly, 550 U.S. at 556*). However, this "flexible 'plausibility standard'" is not a heightened pleading standard, *In re Elevator Antitrust Litig., 502 F.3d 47, 50 & n.3 (2d Cir. 2007)* (quoting *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 n.2 (2d Cir. 2007))*, and "a complaint . . . does not need detailed factual allegations" to survive a motion to dismiss, *Twombly, 550 U.S. at 555*.

The question on a motion to dismiss "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Sikhs for Justice v. Nath, 893 F. Supp. 2d 598, 615 (S.D.N.Y. 2012)* (quoting *Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995))*. "[T]he purpose of *Federal Rule of Civil Procedure 12(b)(6)* 'is to test, in a streamlined **[*17]** fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits'" or "weigh[ing] the evidence that might be offered to support it." *Halebian v. Berv, 644 F.3d 122, 130 (2d Cir. 2011)* (quoting *Global Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 155 (2d Cir. 2006))*. The Court therefore must ordinarily confine itself to the four corners of the complaint and look only to the allegations contained therein. *Id.* When ruling on a motion to dismiss pursuant to *Rule 12(b)(6)*, the Court accepts all factual allegations in the complaint as true and draws all reasonable inferences in the plaintiff's favor. *Nielsen v. Rabin, 746 F.3d 58, 62 (2d Cir. 2014)*; *see also* *Twombly, 550 U.S. at 556* ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable . . . .").

Likewise, "[t]here is no heightened pleading requirement in antitrust cases." *In re Crude Oil Commodity Futures Litig., 913 F. Supp. 2d 41, 54 (S.D.N.Y. 2012)*. However, "a plaintiff must do more than cite relevant antitrust language to state a claim for relief." *Wolf Concept S.A.R.L. v. Eber Bros. Wine & Liquor Corp., 736 F. Supp. 2d 661, 667 (W.D.N.Y. 2010)* (citing *Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001))*. "A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. Conclusory allegations that the defendant violated those laws are insufficient." *Id. at 667-68* (quoting *Kasada, Inc. v. Access Capital, Inc., No. 01 Civ. 8893 (GBD), 2004 U.S. Dist. LEXIS 25257, 2004 WL 2903776, at *3 (S.D.N.Y. Dec. 14, 2004))*. "[A] bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal." **[*18]** *Id. at 668* (quoting *Heart Disease Research Found. v. Gen. Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972))*.

B. Antitrust Standing

"*Section 4 of the Clayton Act* establishes a private right of action for violations of the federal antitrust laws," such as *section 1 of the Sherman Act*, and grants that right to "[a]ny person who [is] injured in his business or property by reason of anything forbidden in the antitrust laws." *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 75 (2d Cir. 2013)* (alterations in original) (quoting *15 U.S.C. § 15*). The right to pursue private actions is limited by the concept of "antitrust standing." *Id.* "[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [the Court] must dismiss it as a matter of law." *Id.* (first alteration in original) (quoting *NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007)* (en banc)). "In determining antitrust

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see *Chevron Corp. v. Naranjo, 667 F.3d 232, 246 n.17 (2d Cir. 2012)* ("[I]n cases such as this one with multiple defendants—over some of whom the court indisputably has personal jurisdiction—in which all defendants collectively challenge the legal sufficiency of the plaintiff's cause of action, we may address first the facial challenge to the underlying cause of action and, if we dismiss the claim in its entirety, decline to address the personal jurisdictional claims made by some defendants."). Because Plaintiffs fail to state a claim, as will be explained, the Court declines to address personal jurisdiction and venue.

standing, [the Court] 'assume[s] the existence' of an antitrust violation."[14] Total Gas, 889 F.3d at 115 (quoting Gelboim v. Bank of Am. Corp., 823 F.3d 759, 770 (2d Cir. 2016)).

"To satisfy the antitrust standing requirement, a private antitrust plaintiff must plausibly allege that (i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations."[15] In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 157 (2d Cir. 2016). "To demonstrate antitrust injury, 'a plaintiff must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury **[*19]** contemplated by the statute.'"[16] Arista Records LLC v. Lime Grp. LLC, 532 F. Supp. 2d 556, 568 (S.D.N.Y. 2007) (quoting Blue Tree Hotels Inv. (Can.), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 220 (2d Cir. 2004)). "[T]o suffer antitrust injury, the putative plaintiff must be a participant in the very market that is directly restrained." Aluminum Warehousing, 833 F.3d at 161. "[U]nlike [government] agencies, [private] [p]laintiffs do not have the right to bring suit against any person they reasonably suspect has committed a certain sort of wrong. . . . Plaintiffs can only recover in a civil action if they can establish that *they themselves* have been harmed by [d]efendants' activities." Total Gas, 889 F.3d at 109-10 (emphasis added).

Plaintiffs claim they are injured because at some point during the Class Period, they transacted with certain Dealer Defendants for USD SSA bonds. CAC ¶¶ 35, 39, 51, 60, 78, 85. During that period, they argue, every USD SSA bond transaction with the Dealer Defendants closed at a price that was artificially inflated or deflated by the antitrust conspiracy. CAC ¶¶ 298, 307-308. They point to numerous chat logs evincing collusive behavior, but they do not allege that any of these chats referred to transactions to which they were a party. Pls.' Merits Opp'n 2-3, 5. Instead, Plaintiffs contend that these chats were "mere **[*20]** examples" of acts in furtherance of a continuous conspiracy that infected "each and every" transaction. Pls.' May 21, 2018 Letter 2, Doc. 488 (emphases omitted); Pls.' Merits Opp'n 3; CAC ¶¶ 20, 298, 307.

However, absent other allegations showing injury, courts have found no injury where the plaintiffs failed to allege any specific transactions that they entered into that harmed them through the defendants' misconduct. *See* Harry v. Total Gas & Power N. Am., Inc., 244 F. Supp. 3d 402, 416 (S.D.N.Y. 2017) ("The plaintiffs' failure to allege a single specific transaction that lost value as a result of the defendants' alleged misconduct precludes a plausible allegation of actual injury."), *aff'd as modified on other grounds*, 889 F.3d 104 (2d Cir. 2018); Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd., No. 08 Civ. 42 (JG) (VVP), 2011 U.S. Dist. LEXIS 51330, 2011 WL 7053807, at *11 (E.D.N.Y. Jan. 4, 2011) (finding no injury where plaintiffs failed to allege that they purchased freight forwarding services on the specific routes with allegedly anticompetitive surcharges), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 113829, 2012 WL 3307486 (E.D.N.Y. Aug. 13, 2012). Here, Plaintiffs have not alleged any specific transactions that had an artificially unfavorable price that injured them.[17]

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[14] As will be explained, because Plaintiffs fail to plausibly allege antitrust standing, the Court need not address whether Plaintiffs have adequately alleged a conspiracy in violation of the antitrust laws. *Cf.* Concord Assocs., L.P. v. Entm't Props. Tr., No. 12 Civ. 1667 (ER), 2013 U.S. Dist. LEXIS 186964, 2014 WL 1396524, at *10 n.7 (S.D.N.Y. Apr. 9, 2014) ("Since the Court may dismiss the Amended Complaint on the basis of [p]laintiffs' failure to allege a relevant market, it will not address whether [p]laintiffs have adequately alleged conduct in violation of the antitrust laws."), *aff'd*, 817 F.3d 46 (2d Cir. 2016).

[15] The suitability of the plaintiff is often described as whether the plaintiff is an "efficient enforcer" of the antitrust laws. In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 157-58 (2d Cir. 2016).

[16] "While some courts speak of 'antitrust injury' comprehensively to include" all three of these elements, the third element specifically is sometimes referred to as "antitrust injury." 2A Phillip E. Areeda, Herbert Hovenkamp, et al., ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 337a, at 99-100 (4th ed. 2014).

[17] Although absent putative class members may have been counterparties to and injured by manipulated transactions referenced in the chat logs, this is insufficient to establish injury to the named Plaintiffs. *See* W.R. Huff, 549 F.3d at 106 n.5 ("[N]amed plaintiffs in a class action 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" (emphasis omitted) (quoting Warth, 422 U.S. at 502)).

The closest Plaintiffs come to alleging a specific transaction is one occasion where [TEXT REDACTED BY THE COURT] CAC ¶ 264. Even assuming this chat shows manipulation of the market for [TEXT REDACTED BY THE COURT] bonds, **[*21]** "[t]he fact that Plaintiff[] may have traded in the same 24 hour period as traders . . . discussed manipulation . . . is simply too thin a basis for the Court to infer that it is plausible that the traders' employers caused the Plaintiff[] actual damages."[18] *In re London Silver Fixing, Ltd., Antitrust Litig., Nos. 14 MDL 2573, 14 Misc. 2573 (VEC), 332 F. Supp. 3d 885, 2018 U.S. Dist. LEXIS 124856, 2018 WL 3585277, at *27 n.36 (S.D.N.Y. July 25, 2018)*.

"That is not to say that Plaintiffs must *necessarily* allege 'the specific transactions on which they were injured.'" *2018 U.S. Dist. LEXIS 124856, [WL] at *25 n.34* (emphasis added) (quoting *In re Foreign Exch. Benchmark Rates Antitrust Litig., No. 13 Civ. 7789 (LGS), 2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at *20 (S.D.N.Y. Sept. 20, 2016))*. "Although information regarding particular transactions is a straightforward method of pleading actual damages, it is not the only means of doing so. Among other things, statistical analysis of market prices and quotes or allegations based on government enforcement actions may suffice to allege the expected impact of a manipulative tactic on a given market and the expected frequency of manipulation."[19] *Id.*

However, Plaintiffs have provided no such statistical analyses. They point to "academic literature" for the unsurprising theory that "less competition among dealers increases spreads and prices" paid by investors. CAC ¶ 303 (emphasis omitted). But they provide no analysis showing that this theory **[*22]** was actually borne out by the alleged collusion in the SSA bond market and yielded higher prices on their own trades.[20] Indeed, they acknowledge that "damages can potentially be quantified by comparing the bid-ask spreads paid by Class Members in the actual world (the world affected by the conspiracy) to the spreads paid on comparable instruments after the period of collusion ended," while controlling for other factors.[21] CAC ¶ 312. Plaintiffs have provided no such comparison of spreads paid during and after the period of collusion.[22] And although Plaintiffs cite media reports confirming the existence of government investigations into collusion in the SSA bond market, none of those reports purport to show any impact of the manipulation on the market or the manipulation's scope to suggest that Plaintiffs' prices were among those affected. CAC ¶¶ 315-320. Because "Plaintiffs do not even present evidence that they traded at 'artificial prices,'" they have alleged "no actual injury . . ., let alone a connection between Defendants' unlawful conduct and that non-injury." *Total Gas, 889 F.3d at 116*.

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[18] The requirement of "actual damages" or "actual injury" under the *Commodity Exchange Act* is similar to the requirement of injury-in-fact under the *Clayton Act*. *Total Gas, 889 F.3d at 111, 115-16* (holding that the plaintiffs satisfied neither for similar reasons).

[19] To be sure, pleading an "actual adverse effect in the marketplace" or "harm to competition [is] not required to withstand a motion to dismiss when the conduct challenged is a *per se* violation." *Gelboim, 823 F.3d at 775-76*; *see generally* *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993)* (stating that *per se* violations, such as horizontal and vertical pricefixing, "are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are 'conclusively presumed illegal without further examination'" (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979))*). But regardless of any *per se* violation, Plaintiffs are still required to plausibly allege harm to *them*, and one way of doing so is through an analysis of market prices.

[20] Plaintiffs admit that "there is no literature (yet) studying the precise effect that Defendants' reduction of competition had in the USD SSA bond market." Pls.' Merits Opp'n 48.

[21] The alleged collusion appears to be over or at least significantly reduced since "all or nearly all of the key participants in the cartel were removed from their positions" in late 2015 or early 2016 as their employers and government investigators became aware of the conspiracy. CAC ¶ 314.

[22] While the Court "do[es] not require that a plaintiff calculate damages at the pleading stage, [it] certainly need[s] some reason to believe that any damage has occurred at all." *Total Gas, 889 F.3d at 115*.

Plaintiffs essentially ask this Court to infer, based on approximately 150 chats allegedly showing manipulated transactions **[*23]** with unknown counterparties over the course of eleven years,[23] that Plaintiffs' individually negotiated transactions with the Dealer Defendants during that period must have likewise been tainted and injured them. Pls.' Merits Opp'n 2-3. This, by itself, is insufficient for the Court to reasonably draw such an inference. *See* *London Silver Fixing, 2018 U.S. Dist. LEXIS 124856, 2018 WL 3585277, at *25 n.34* (rejecting "[p]laintiffs' theory . . . that the Court can infer from the chat messages and government enforcement proceedings both that the chat messages are the 'tip of the iceberg' and, that given this presumed frequency of manipulation, [p]laintiffs must have been injured"); *cf.* *In re LIBOR-Based Fin. Instruments Antitrust Litig., 962 F. Supp. 2d 606, 623 (S.D.N.Y. 2013)* (rejecting the argument that alleged "manipulation was so constant that plaintiffs adequately plead actual damages by alleging merely that they traded during the Class Period" where allegations indicated that manipulation occurred between approximately 10% to 20% of the time over a four-year period).[24]

Accordingly, because Plaintiffs have not plausibly alleged that they themselves were injured by the alleged conspiracy, their antitrust claim must be dismissed.

IV. Leave to Amend

Federal Rule of Civil Procedure 15 instructs courts to "freely give leave [to amend a pleading] when justice **[*24]** so requires." *Fed. R. Civ. P. 15(a)(2)*. The Second Circuit has instructed courts not to dismiss a complaint "without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Shabazz v. Bezio, 511 F. App'x 28, 31 (2d Cir. 2013)* (quoting *Shomo v. City of New York, 579 F.3d 176, 183 (2d Cir. 2009))*. In *Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Securities, LLC, 797 F.3d 160 (2d Cir. 2015)*, the Second Circuit reaffirmed the "liberal spirit" of *Rule 15* and counseled strongly against the dismissal of claims with prejudice prior to "the benefit of a ruling" that highlights "the precise defects" of those claims. *Id. at 190-91* (quoting *Williams v. Citigroup Inc., 659 F.3d 208, 214 (2d Cir. 2011)* (per curiam)).

Here, although Plaintiffs have already had the opportunity to amend their original complaint, because this is the Court's first opportunity to highlight the precise defects of Plaintiffs' pleading and it is not yet apparent that another opportunity to amend would be futile, the Court will permit Plaintiffs to replead their dismissed claims.

V. Conclusion

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[23] [TEXT REDACTED BY THE COURT] Plaintiffs ask the Court to infer that the depicted conduct took place continuously over an eleven-year Class Period. CAC ¶¶ 5, 404.

[24] Plaintiffs urge the Court to infer that their transactions with the Dealer Defendants injured them because Defendants' "agreement not to compete is illegal *per se.*" Pls.' Merits Opp'n 45. "For standing purposes, however, whether there was or was not a *per se* violation is irrelevant." *Balaklaw v. Lovell, 14 F.3d 793, 800 (2d Cir. 1994)*; *see also* *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341-42, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* ("The *per se* rule is a method of determining whether *§ 1 of the Sherman Act* has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury . . . ."). "Regardless of any substantive violation of the *Sherman Act*," Plaintiffs must still plausibly allege that Defendants "engaged in anticompetitive conduct that caused them an antitrust injury." *Balaklaw, 14 F.3d at 800*. Plaintiffs rely on *New York v. Hendrickson Bros., 840 F.2d 1065 (2d Cir. 1988)*, which held that "[i]n general, the person who has purchased directly from those who have fixed prices at an artificially high level in violation of the antitrust laws is deemed to have suffered the antitrust injury," but that case is not to the contrary. *Id. at 1079*. Plaintiffs must still plausibly allege that the prices that *they* paid were fixed at an artificially high level. *See* *Arista Records, 532 F. Supp. 2d at 568-69* ("Although such a horizontal price-fixing arrangement is *per se* unlawful under *§ 1 of the Sherman Act*, [counter-plaintiff] has not established that *it* suffered injury-in-fact as a result of counter-defendants' purported arrangement." (citation and footnote omitted)).

The Court GRANTS Defendants' motions to dismiss for failure to state a claim because Plaintiffs have failed to plausibly allege an injury-in-fact sufficient to establish antitrust standing.[25] The Clerk of the Court is respectfully directed to terminate the motions, Docs. 342, 344, 358, 365, 373, 376, 378, 406, 453, 468. Plaintiffs may file a second consolidated **[*25]** amended complaint, if at all, on or before **October 23, 2018**. If Plaintiffs elect to not file a second consolidated amended complaint, they may apply to the Court for entry of judgment any time before then.

It is SO ORDERED.

Dated: August 24, 2018

New York, New York

/s/ Edgardo Ramos

Edgardo Ramos, U.S.D.J.

End of Document

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[25] Defendants' requests for oral argument on the motions and Plaintiffs' request for a conference concerning possible jurisdictional discovery are denied as moot.

Smith v. Ditech Fin. LLC

United States District Court for the Central District of California

August 27, 2018, Decided; August 27, 2018, Filed

EDCV 18-01411 JGB (SHKx)

Reporter

2018 U.S. Dist. LEXIS 227070 *; 2018 WL 6431406

Ian Michael Smith, et al. v. Ditech Financial LLC, et al.

Subsequent History: Request denied by *Smith v. Ditech Fin. Llc, 2018 U.S. Dist. LEXIS 238993 (C.D. Cal., Aug. 29, 2018)*

Dismissed by, in part *Smith v. Ditech Fin. LLC, 2018 U.S. Dist. LEXIS 191549 (C.D. Cal., Nov. 5, 2018)*

Core Terms

borrower, modification, foreclosure, mortgage, servicer, judicial notice, unfair, recorded, cause of action, motion to dismiss, documents, notice, foreclosure sale, alleged facts, single point, prong, duty of care, prevention, notice of default, allegations, fraudulent, violations, courts, lender, cases, Deed, diligence, practices, requests, damages

Counsel: **[*1]** For Ian Michael Smith, Eileen A. Smith, Plaintiffs: Anthony Paul Cara, Peter L Nisson, LEAD ATTORNEYS, CDLG PC, Costa Mesa, CA.

For Ditech Financial LLC, Defendant: Stuart B Wolfe, LEAD ATTORNEY, Wolfe and Wyman LLP, Irvine, CA; Matthew S. Vesterdahl, Wolfe and Wyman LLP, Irvine, CA.

For Select Portfolio Servicing, Inc., Defendant: Stephen C Chuck, LEAD ATTORNEY, Victoria J Tsoong, Chuck and Tsoong LLP, Glendale, CA.

Judges: JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE.

Opinion by: JESUS G. BERNAL

Opinion

CIVIL MINUTES—GENERAL

Proceedings: Order (1) GRANTING Defendants' Motions to Dismiss (Dkt. Nos. 6, 10) Pursuant to *Federal Rules of Civil Procedure 12(b)(6)*; (2) GRANTING Defendant Ditech Financial LLC's Request for Judicial Notice (Dkt. No. 6-1); (4) GRANTING-IN-PART AND DENYING-IN-PART Defendant Select Portfolio Servicing, Inc.'s Request for Judicial Notice (Dkt. No. 11) (IN CHAMBERS)

Before the Court are Defendants' Ditech Financial LLC ("Ditech") and Select Portfolio Servicing, Inc. ("Select Portfolio") motions to dismiss under *Rule 12(b)(6)* and requests for judicial notice under *Federal Rule of Evidence 201*. After considering all papers filed in support of, and in opposition to, the motions the Court considers these matters appropriate for resolution without a hearing. See *Fed. R. Civ. P. 78*; *L.R. 7-15*. On August 23, **[*2]** 2017, the Court vacated the August 27, 2018 hearing and took the matter under submission. (Dkt. No. 16.) The Court GRANTS the Defendants' Motions and DISMISSES Plaintiffs' Complaint WITH LEAVE TO AMEND.

I. BACKGROUND

On May 30, 2018, Plaintiffs Ian Michael Smith and Eileen A. Smith ("Plaintiffs") filed a complaint in the Superior Court of California, County of San Bernardino against Ditech Financial LLC; Select Portfolio Servicing, Inc.; The Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Certificateholders of CWABS Inc., Asset-Backed Certificates, Series 2007-2; and Does 1-10. ("Complaint," Dkt. No. 1-1.) On July 2, 2018, Defendants removed the case. (Dkt. No. 1.) Defendant Ditech Financial LLC filed a motion to dismiss on July 9, 2018 ("Ditech Motion," Dkt. No. 6). Ditech also filed a request for judicial notice. ("Ditech RJN," Dkt. No. 6-1.) Defendant Select Portfolio Servicing filed a motion to dismiss on July 27, 2018. ("Select Portfolio Motion," Dkt. No. 10.) Select Portfolio also requested judicial notice. ("Select Portfolio RJN," Dkt. No. 11.)[1] On August 6, 2018, Plaintiffs filed an Opposition to the Select Portfolio Motion. ("Select Portfolio Opposition," **[*3]** Dkt. No. 13.) Plaintiffs, through inadvertence, did not file their Opposition to the Ditech Motion until August 20, 2018. ("Ditech Opposition," Dkt. No. 14.) Select Portfolio filed its reply on August 20, 2018. ("Select Portfolio Reply," Dkt. No. 15.) Ditech filed its reply on August 23, 2018.[2] ("Ditech Reply," Dkt. No. 19.)

II. FACTUAL ALLEGATIONS

In their Complaint, Plaintiffs allege five causes of action against Defendants: (1) violation of *California Civil Code § 2923.5*; (2) violation of *California Civil Code § 2924.11*; (3) violation of *California Civil Code § 2923.7*; (4) negligence; and (5) violation of *California Business and Professions Code §§ 17200, et seq.*

Plaintiffs own and reside at real property known as 8323 Helms Avenue, Rancho Cucamonga, CA 91730 ("Subject Property"). (Compl. ¶ 1.) The Subject Property is owner-occupied, and Plaintiffs have lived there since the date of purchase. (Id. ¶ 10.) Plaintiffs obtained a mortgage loan from Countrywide Home Loans, Inc. for $424,000 on or about February 23, 2007. (Id. ¶ 9.) The Deed of Trust was recorded in the San Bernardino County Recorder's Office on March 2, 2007. (Id.)

On or about September 16, 2011 an Assignment of Deed of Trust was recorded that transferred beneficial interest in the Deed of Trust to Bank of New York Mellon. (Id. ¶ 11.) Ditech previously serviced the mortgage **[*4]** loan account under the directive of the beneficiary Bank of New York Mellon. (Id. ¶ 12.) Select Portfolio currently services the loan. (Id. ¶ 13.)

With the help of a non-profit agent, Plaintiffs submitted "a complete request for a loan modification application"[3] with Ditech on or about April 26, 2017. (Id. ¶ 14.) As Plaintiffs and their agent tried to obtain information on this request, they were unable to get real updates because no one at Ditech was familiar with their file. (Id. ¶ 15.) Plaintiffs and their agent spoke with several people who were unable to even locate an authorization letter to speak with Plaintiffs' agent. (Id. ¶ 41.) Defendants' employees never identified themselves as a person or team that was a Single Point of Contact, and they never provided useful information that would indicate the loan was actually being reviewed. (Id. ¶ 42.) On or about May 4, 2017, Plaintiffs were told that no Single Point of Contact was assigned to their file. (Id. ¶ 16.) Plaintiffs believed they were being reviewed for a possible loan modification. (Id. ¶ 31.) But on August 14,

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[1] Select Portfolio Motion and Select Portfolio RJN are identical documents. Counsel for Select Portfolio submitted the document twice.

[2] Ditech argues that the Court should deem the Ditech Motion unopposed as Plaintiffs' Ditech Opposition was filed late. (Ditech Reply at 1.) The Court declines to do so. Furthermore it would be unnecessary because the Court grants Ditech's motion and dismisses Plaintiffs' Complaint.

[3] Plaintiffs presumably meant to say they submitted a complete loan modification application.

2017, after review had dragged for months without any real update, Plaintiffs were advised that Ditech no longer **[*5]** serviced their loan as it had been transferred to Select Portfolio for servicing. (Id. ¶¶ 17-18.) Plaintiffs have yet to receive a denial letter or other update on this review. (Id. ¶ 19.)

On or about January 24, 2018, Defendants recorded a Notice of Default without prior notice to Plaintiffs. (Id. ¶ 21.) Despite recitations in the Notice of Default that the servicer exercised due diligence in contacting the borrower regarding foreclosure alternatives, Select Portfolio never sent any written notifications concerning foreclosure alternatives before it recorded the Notice of Default. (Id. ¶¶ 22-23.) Defendants continued the projection of sale and recorded a Notice of Sale which projected a sale date of June 4, 2018. (Id. ¶ 24.)

III. REQUEST FOR JUDICIAL NOTICE

Together with its motion to dismiss, Ditech filed a request for judicial notice asking the Court to take notice of seven exhibits, all of which are recorded in the Official Records of the County of San Bernardino. (Ditech RJN.) Included in those exhibits are (1) a Long Form Deed of Trust and Assignment of Rents for Home Equity Revolving Line of Credit on June 8, 2006 (exh. 1); (2) a Deed of Trust recorded on March 2, 2007 (exh. 2); **[*6]** (3) Assignment of Deed of Trust recorded on September 16, 2011 (exh. 3); (4) Loan Modification Agreement recorded on October 20, 2011 (exh. 4); (5) Deed of Trust (Keep Your Home California Program) recorded on December 23, 2014 (exh. 5); (6) Notice of Default recorded on January 24, 2018 (exh. 6); and (7) Notice of Trustee's Sale recorded on May 1, 2018 (exh. 7). Plaintiffs do not oppose these requests.

Pursuant to *Federal Rule of Evidence 201*, "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." *Fed. R. Evid. 201(d)*. "A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*. Judicial notice is appropriate for "materials incorporated into the complaint or matters of public record." *Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010)*. However, a court may not take judicial notice of a disputed fact in a public record. *Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001)*.

The Court finds it appropriate to take judicial notice of the seven above-referenced documents because they are matters of public record. But the Court does not notice any disputed underlying facts in these exhibits. The Court GRANTS Ditech's request for judicial notice. **[*7]**

Select Portfolio requests judicial notice for the documents listed in items (2), (6), and (7) above. (Select Portfolio RJN at 2.) Select Portfolio further requests that the Court take judicial notice of certain underlying facts in those documents. The Court may not take judicial notice of those facts in a public record that are disputed by the parties. See *Lee, 250 F.3d at 689*. The Court takes judicial notice for these documents themselves, but will not recognize the underlying facts to the extent they remain in dispute. Finally, Select Portfolio requests judicial notice for the fact that "[s]ubsequent to the origination of the Loan, in or around July 2017, [Select Portfolio] acquired the servicing rights to the Loan." Id. Select Portfolio provides no documentation to show that this fact is capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. For the reasons articulated above, the Court GRANTS IN PART and DENIES IN PART Select Portfolio's request for judicial notice.

IV. MOTION TO DISMISS

A. Legal Standard

Under *Federal Rule of Civil Procedure 12(b)(6)* ("*Rule 12(b)(6)*"), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. *Rule 12(b)(6)* must be read in conjunction with *Federal Rule of Civil Procedure 8(a)*, which requires a **[*8]** "short and plain statement of the claim showing that a pleader is entitled to relief," in order to give the defendant "fair notice of what the claim is and the grounds upon which it rests." *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); see Horosny v. Burlington Coat Factory, Inc., No. 15-05005, 2015 U.S. Dist. LEXIS 179419, 2015 WL 12532178, at *3 (C.D. Cal. Oct. 26, 2015). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint — as well as any reasonable inferences to be drawn from them — as true and construe them in the light most favorable to the non-moving party. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that **[*9]** are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556). The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

B. Discussion

1. Tender Rule

As a preliminary matter, Select Portfolio contends that Plaintiffs cannot state a claim for any of their five causes of action because they did not allege that they made a valid tender. (Select Portfolio Mot. at 3.) Defendants argue the tender requirement applies to any cause of action "implicitly integrated" with allegations of an irregular foreclosure sale. Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575, 578-79, 205 Cal. Rptr. 15 (1984).

The tender rule is an equitable doctrine meant to prevent courts "from uselessly setting aside a foreclosure sale on a technical ground when the party making the challenge has not established his ability to purchase the property." **[*10]** MacFarland v. JP Morgan Chase Bank, 2014 WL 1405968, at *12 (C.D. Cal. 2014) (citing Plastino v. Wells Fargo Bank, 873 F.Supp.2d 1179, 1187 (N.D. Cal. 2012)). Thus, "as a precondition to challenging a foreclosure sale, or any cause of action implicitly integrated to the sale, the borrower must make a valid and viable tender of payment of the secured debt." Sacchi v. Mortgage Elec. Registration Sys., Inc., 11-cv-1658—AHM, 2011 U.S. Dist. LEXIS 68007, 2011 WL 2533029, at *9 (C.D. Cal. June 24, 2011) (quotation omitted). However, "the exceptions and qualifications to California's 'tender rule' counsel against such a mechanical application of the rule at the pleading stage." MacFarland, 2014 WL 1405968, at *12 (quoting Barrionuevo v. Chase Bank, N.A., 885 F. Supp. 2d 964, 969 (N.D. Cal. 2012)). Thus, the tender rule has exceptions. Tamburri v. Suntrust Mortg., Inc., 11-cv-2899-EMC, 2011 U.S. Dist. LEXIS 144442, 2011 WL 6294472, at *3 (N.D. Cal. Dec. 15, 2011).

California courts have held that tender is not required "where it would be inequitable to impose such a condition on the party challenging the sale." Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 113, 134 Cal. Rptr. 3d 622 (2011). Courts have applied this equitable exception to cases in which a borrower asserts that the loan servicer flouted certain statutory or regulatory procedural requirements intended to protect the borrower—such as the requirements of California Civil Code § 2923.5—by conducting the trustee's sale without first following those procedural requirements. See Fonteno v. Wells Fargo Bank, N.A., 228 Cal. App. 4th 1358, 1373, 176 Cal. Rptr. 3d 676 (2014);

Pfeifer v. Countrywide Home Loans, Inc., 211 Cal. App. 4th 1250, 1280, 150 Cal. Rptr. 3d 673 (2012); Mabry v. Superior Court, 185 Cal. App. 4th 208, 225-26, 110 Cal. Rptr. 3d 201 (2010). "It would be inequitable to require tender" in such circumstances "because it would defeat the salient purpose of the [procedural **[*11]** requirements], to prevent foreclosures." Fonteno, 228 Cal. App. 4th at 1373.

Here, Plaintiffs seek to prevent a foreclosure sale they allege would violate California Civil Code Sections 2923.5, 2923.7, and 2923.11. (See generally Compl.) Thus, it would be inequitable to require tender under such circumstances because Plaintiffs seek relief under statutory provisions with the purpose of preventing foreclosure.

The Court is unpersuaded by Select Portfolio's arguments. The Court DENIES Select Portfolio's motion to the extent it relies on the tender rule.

2. Violation of California Civil Code § 2923.5

In their first cause of action, Plaintiffs allege that Defendants violated California Civil Code § 2923.5. (Compl. ¶¶ 20-26.) Section 2923.5 provides that "[a] mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not record a notice of default pursuant to Section 2924 until . . . [e]ither 30 days after initial contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (e)." Cal. Civ. Code § 2923.5(a)(1)(A). Paragraph 2 requires, among other things, that a mortgage servicer "contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." Id. § 2923.5(a)(2). Subdivision (e) defines the circumstances under which a mortgage servicers' "due diligence" can excuse a **[*12]** failure to contact the borrower. Id. § 2923.5(e). To state a claim under Section 2923, a plaintiff must allege that he suffered prejudice as a result of the defendant's failure to provide the requisite notice. Hart v. Select Portfolio Servicing, Inc., No. CV 15-7953-R, 2015 U.S. Dist. LEXIS 165152, 2015 WL 8374926, at *1 (C.D. Cal. Dec. 9, 2015).

Here, Plaintiffs allege that Defendants recorded the Notice of Default on the Subject Property without satisfying the contact or due diligence requirements of § 2923.5. (Compl. ¶¶ 22-25.) The Notice of Default was recorded on January 24, 2018. (Ditech RJN Ex. 6.) Defendants contend that Plaintiffs' claim fails because the allegations that Defendants did not contact Plaintiffs to explore foreclosure alternatives are conclusory. (Ditech Mot. at 5; Select Portfolio Mot. at 4.) Although the Court takes notice of the Notice of Default in which Select Portfolio declares it contacted Plaintiffs, this disputed fact is not established by taking such notice. See Lee, 250 F.3d at 689. Thus, the Notice of Default cannot conclusively establish that Defendants made contact with Plaintiffs. However, to state a claim Plaintiffs still must allege more than a bald assertion that the declaration was false. See Asturias v. Nationstar Mortg. LLC, 2016 U.S. Dist. LEXIS 54366, 2016 WL 1610963, at *4 (N.D. Cal. Apr. 22, 2016). Here, Plaintiffs allege facts beyond a bald assertion of the declaration's falsity. **[*13]** Plaintiffs allege they were not provided with any written notifications respecting foreclosure alternatives and that Select Portfolio never reached out to them to fulfill the contact requirement (Compl. ¶¶ 22-23). Section 2923.5(a)(1)(A), however, requires that a mortgage servicer either make contact with Plaintiffs or satisfy the due diligence requirements under Section 2923.5(e). Plaintiffs do not allege facts that make plausible their assertion that Defendants did not comply with the due diligence alternatives in Section 2923.5(e). Accordingly, even though Plaintiffs plausibly allege that Defendants did not contact them, they do not plausibly allege that Defendants failed to comply with the due diligence alternatives.

Defendants further contend that even if they violated section 2923.5, Plaintiffs fail to allege that the violation was material because Plaintiffs do not allege they were damaged or prejudiced, as no foreclosure sale has yet occurred. (Ditech Mot. at 5; Select Portfolio Mot. at 5). Where the foreclosure sale has not yet occurred, Section 2924.12(a)(1) permits a homeowner to sue for injunctive relief to enjoin a material violation of Section 2923.5. This injunction remains until the court determines that the mortgage servicer has corrected and remedied the violations giving **[*14]** rise to the action. Cal. Civ. Code § 2924.12(a)(2). Only after a deed upon sale is recorded will the mortgage servicer face liability for actual economic damages resulting from a violation of Section 2923.5. Id. ¶ 2924.12(b). Here, Plaintiffs do not allege that Defendants have sold the Subject Property. Thus, they cannot state a claim for damages resulting from a material violation of Section 2923.5. Additionally, Plaintiffs do not allege facts in their first cause of action that the alleged violation of *Section 2923.5* was material in the impending foreclosure sale of the Subject Property. (See Compl. ¶¶ 20-26.) Although Plaintiffs allege Defendants projected a sale date of the Subject Property (Id. ¶ 24), they do not allege facts that, if true, establish that the violation of *Section 2923.5* was material to the foreclosure proceedings. For example, Plaintiffs do not allege that this particular violation denied them the opportunity to obtain a loan modification. See, e.g., *Shumake v. Caliber Home Loans, Inc., 2017 U.S. Dist. LEXIS 2928, 2017 WL 1362681, at *6 (C.D. Cal. Jan. 6, 2017)* (citing *Foote v. Wells Fargo Bank, N.A., 2016 U.S. Dist. LEXIS 65019, 2016 WL 2851627, at *6 (N.D. Cal. May 16, 2016))*.

Finally, Ditech further contends that it cannot provide the sole remedy available to Plaintiffs under the statute. (Ditech Mot. at 4-5.) The Court agrees. As addressed above, the sole remedy for a pre-sale violation of *Section 2923.5* is injunctive relief. *Cal. Civ. Code ¶ 2924.12(b)*. This remedy only postpones **[*15]** a foreclosure sale to permit the violating mortgage servicer to comply with the communication requirements. *Mabry v. Superior Court, 185 Cal. App. 4th 208, 214, 110 Cal. Rptr. 3d 201 (2010)* (superseded by statute on other grounds). Here, Plaintiffs allege that Ditech is a former mortgage servicer. (Compl. ¶ 12.) Thus, Ditech cannot provide the injunctive remedy Plaintiffs seek.

For the reasons above, Plaintiffs fail to state a claim for violation of *California Civil Code Section 2923.5*. The Court GRANTS Defendants' motions to dismiss the first cause of action.

3. Violation of ***California Civil Code § 2924.11***

In their second cause of action, Plaintiffs allege that Defendants violated *California Civil Code Section 2924.11*. (Compl. ¶¶ 27-36.) *Section 2924.11(a)* prohibits a financial institution from recording a notice of sale while a loan modification application is under review. *Bevia v. Select Portfolio Servicing, Inc., 2018 U.S. Dist. LEXIS 134209, 2018 WL 3740524, at *3 (C.D. Cal. Jun. 7, 2018)* (citing *Haynish v. Bank of America, N.A., 2018 U.S. Dist. LEXIS 91274 ,2018 WL 2445516, at *5 (N.D. Cal. May 31, 2018))*. *Section 2924.11(a)* states:

> If a borrower submits a complete application for a foreclosure prevention alternative offered by, or through, the borrower's mortgage servicer, a mortgage servicer, trustee, mortgagee, beneficiary, or authorized agent shall not record a notice of sale or conduct a trustee's sale while the complete foreclosure prevention alternative application is pending, and until the borrower has been provided with a written determination by the mortgage servicer regarding that borrower's eligibility for the **[*16]** requested foreclosure prevention alternative.

Section 2924.11(f) explains that an application for a foreclosure prevention alternative is "complete" when "a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer." *Cal. Civ. Code § 2924.11(f)*. A complaint alleging a violation of *Section 2924.11(f)* requires that the plaintiff plausibly allege that her application was complete. The completeness of an application is a legal determination, and a plaintiff must make more than a mere allegation that her application was "complete." *Stokes v. CitiMortgage, Inc., 2014 U.S. Dist. LEXIS 125655, 2014 WL 4359193, at *7, *10 (C.D. Cal. Sep. 3, 2014)*. Bald allegations that a plaintiff submitted a "complete" application, without sufficient supporting factual allegation, are conclusory statements. *2014 U.S. Dist. LEXIS 125655 at *7*. Thus, a plaintiff must allege facts that demonstrate the application was complete. Id.

Here, Plaintiffs do not plausibly allege that their loan modification application was complete. Plaintiffs baldly allege that they "submitted their **COMPLETE** loan modification application . . . ." (Compl. ¶ 29) (emphasis in original.) Plaintiffs do not allege what documents Defendants required, the timeframe in which the documents were to be submitted, what documents Plaintiffs submitted, **[*17]** or when Plaintiffs submitted those documents. Thus, Plaintiffs did not plausibly allege that they submitted a complete loan modification application.

For the reasons above, Plaintiffs fail to state a claim for violation of *California Civil Code Section 2924.11*. The Court GRANTS Defendants' motions to dismiss the second cause of action.

4. Violation of *California Civil Code § 2923.7*

In their third cause of action, Plaintiffs allege that Defendants violated *California Civil Code Section 2923.7*. (Compl. ¶¶ 37-44.) *Section 2923.7* provides that "[u]pon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact." A "single point of contact" is "an individual or team of personnel each of whom has the ability and authority to perform the responsibilities described . . . The mortgage servicer shall ensure that each member of the team is knowledgeable about the borrower's situation and current status in the alternatives to foreclosure process." *Cal. Civ. Code § 2923.7(f)*.

Where the foreclosure sale has not yet occurred, *Section 2924.12(a)(1)* permits a homeowner to sue for injunctive relief for a violation of *Section 2923.7*. As with a violation under *Section 2923.5*, above, injunctive relief for a **[*18]** violation of *Section 2923.7* requires that a violation was material. *Lucioni v. Bank of America, N.A., 3 Cal. App. 5th 150, 158-159, 207 Cal. Rptr. 3d 418 (2016)*. This injunction remains in effect until the court determines that the mortgage servicer has corrected and remedied the violations giving rise to the action. *Cal. Civ. Code § 2924.12(a)(2)*.

Defendants contend that Plaintiffs fail to state a claim because they did not allege that they requested a single point of contact. (Ditech Mot. at 7.) The Court disagrees. This Court has previously held that *Section 2923.7* does not condition the appointment of a single point of contact on a borrower's specific request but instead requires appointment of such a contact when a borrower requests a foreclosure prevention alternative, such as a loan modification. *Hild v. Bank of America, N.A., 2015 U.S. Dist. LEXIS 13419, 2015 WL 401316, at *7 (C.D. Cal. Jan. 29, 2015)*; *McFarland v. JP Morgan Chase Bank, 2014 U.S. Dist. LEXIS 118240, 2014 WL 4119399, at *11 (C.D. Cal. Aug. 21, 2014)*. Thus, because Plaintiffs allege that they submitted a loan modification application in April 2017 (Compl. ¶ 38), Defendants were obligated to appoint a single point of contact.

Defendants further contend that the facts alleged are insufficient to allege plausibly that Plaintiffs never received a specific point of contact. (Select Portfolio Mot. at 6.) A single point of contact is responsible for the following:

> (1) Communicating the process by which a borrower may apply for an available foreclosure prevention alternative and the **[*19]** deadline for any required submissions to be considered for these options.
> (2) Coordinating receipt of all documents associated with available foreclosure prevention alternatives and notifying the borrower of any missing documents necessary to complete the application.
> (3) Having access to current information and personnel sufficient to timely, accurately, and adequately inform the borrower of the current status of the foreclosure prevention alternative.
> (4) Ensuring that a borrower is considered for all foreclosure prevention alternatives offered by, or through, the mortgage servicer, if any.
> (5) Having access to individuals with the ability and authority to stop foreclosure proceedings when necessary.

Cal Civ. Code § 2923.7(b)(1)-(5). The responsibilities of the single point of contact may be carried out by an appointed team in which "each member of the team is knowledgeable about the borrower's situation and current status in the alternatives to foreclosure process." *Cal. Civ. Code § 2923.7(f)*. Courts deny motions to dismiss causes of action under *Section 2923.7* when a plaintiff alleges that purported single points of contact where not able to perform these enumerated responsibilities and were not knowledgeable about the plaintiffs situation and application **[*20]** status. *Hixson v. Wells Fargo Bank, N.A., 2014 U.S. Dist. LEXIS 108617, 2014 WL 387004, at *5-6 (N.D. Cal. Aug. 6, 2014)*. This Court has previously found that a plaintiff states a claim under *Section 2923.7* when she alleges that she endured transfer through many representatives who were not able to perform the required responsibilities; that she had to repetitively resubmit the same documents because the defendant lost them; and that the defendants could not inform the plaintiff about the status of her application. *McFarland, 2014 U.S. Dist. LEXIS 118240, 2014 WL 4119399 at *11*.

Here, Plaintiffs allege sufficient facts that, if true, would indicate that Defendants violated *Section 2923.7*. Plaintiffs allege that they and their agent contacted Defendants and spoke with several people who could not locate important file information, like an authorization to speak with Plaintiffs' agent. (Compl. ¶ 41.) Plaintiffs also allege that Defendants' representatives could not provide to Plaintiffs useful information about the status of their application. (Id. at ¶ 42.) Further, Plaintiffs allege that any sporadic information they did receive was only after insistent calling. (Id.) These assertions, if true, would put Plaintiffs in a similar position to the plaintiff in McFarland because representatives with whom Plaintiffs were able to make contact were not able to assist them in any meaningful **[*21]** way and were not knowledgeable about Plaintiffs' application. Thus, Plaintiffs allege facts sufficient to state a claim that Defendants violated *Section 2923.7*.

Finally, Defendants contend that even if they did violate *Section 2923.7*, Plaintiffs do not allege facts that would establish that the violation was material. (Ditech Mot. at 7.) The Court agrees. Where a foreclosure sale has not yet occurred, *Section 2924.12(a)(1)* permits a homeowner to sue for injunctive relief to enjoin a material violation of *Section 2923.7*. This injunction remains in effect until the court determines that the mortgage servicer has corrected and remedied the violations giving rise to the action. *Cal. Civ. Code § 2924.12(a)(2)*. Here, Plaintiffs do not allege facts in their third cause of action that the violation of *Section 2923.7* was material in the impending foreclosure sale of the Subject Property. (See Compl. ¶¶ 37-44.) Although Plaintiffs allege Defendants projected a sale date of the Subject Property (Id. ¶ 24), they do not allege facts showing that the violation of *Section 2923.7* was material in the foreclosure proceedings. For example, Plaintiffs do not allege that this particular violation denied them the opportunity to obtain a loan modification. See, e.g., *Shumake v. Caliber Home Loans, Inc., 2017 U.S. Dist. LEXIS 2928, 2017 WL 1362681, at *6 (C.D. Cal. Jan. 6, 2017)* (citing *Foote v. Wells Fargo Bank, N.A., 2016 U.S. Dist. LEXIS 65019, 2016 WL 2851627, at *6 (N.D. Cal. May 16, 2016))*.

For the reasons above, Plaintiffs fail to state **[*22]** a claim for violation of *California Civil Code Section 2923.7*. The Court GRANTS Defendants' motions to dismiss the third cause of action.

5. Negligence

In their fourth cause of action, Plaintiffs allege negligence against Defendants. (Compl. ¶¶ 45-64.) The elements of a cause of action for negligence are (1) duty, (2) breach of duty, (3) causation, and (4) damages. *Merrill v. Navegar, Inc., 26 Cal.4th 465, 500, 110 Cal. Rptr. 2d 370, 28 P.3d 116 (2001)*. Defendants argue that they do not owe Plaintiffs a legal duty. (Ditech Mot. at 9; Select Portfolio Mot. at 9.) The Court agrees.

"Whether a duty of care exists is a question of law to be determined on a case-by-case basis." *Lueras v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 62, 163 Cal. Rptr. 3d 804 (2013)*. In the context of borrowers and lenders, California courts have explained that, as a general rule, "a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Id. at 63*; see also *Becker v. Wells Fargo Bank NA, Inc., 2014 U.S. Dist. LEXIS 109287, 2014 WL 3891933, at *19 (E.D. Cal. Aug. 7, 2014)* ("Liability to a borrower for negligence arises only when the lender actively participates in the financed enterprise beyond the domain of the usual money lender.") (Quoting *Wagner v. Benson, 101 Cal. App. 3d 27, 35, 161 Cal. Rptr. 516 (1980))*. The principle that a financial institution owes no duty to a borrower has been extended to loan servicers as well. *Bassam v. Bank of Am., 2015 U.S. Dist. LEXIS 193513, 2015 WL 12697873, at *5 (C.D. Cal. Nov. 3, 2015)*.

Plaintiffs argue that Defendants owed them **[*23]** a duty of care under the six-part test set forth in *Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16 (Cal. 1958)*. (Ditech Opp'n at 14-15; Select Portfolio Opp'n at 15.) The Biakanja test has been applied to determine "whether a financial institution owes a duty of care to a borrower-client." *Nymark v. Heart Fed. Savings & Loan Ass'n, 231 Cal. App. 3d 1089, 1098, 283 Cal. Rptr. 53 (1991)*. The Biakanja factors are:

> (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the

defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm.

49 Cal. 2d at 650. District courts within California are split on whether a lender owes a duty of care to borrowers during the during the loan modification process. See Faulks v. Wells Fargo & Co., 231 F. Supp. 3d 387, 409 (N.D. Cal. 2017) (collecting cases establishing a split among district courts of California on whether financial institutions owe a duty of care to borrowers during the loan modification process).

Unpublished Ninth Circuit cases appear to agree with Lueras and hold that lenders do not owe a duty of care during the loan modification process. See Anderson v. Deutsche Bank Nat. Tr. Co. Americas, 649 F. App'x 550, 552 (9th Cir. 2016) (applying Biakanja factors to find no duty of care where the borrower's negligence **[*24]** claim was based on an allegation of delay in the processing of the loan modification application); Badame v. J.P. Morgan Chase Bank, N.A., 641 F. App'x 707, 709-10 (9th Cir. 2016) (citing Lueras and holding Chase did not owe plaintiffs a duty of care when considering their loan modification application); Deschaine v. IndyMac Mortg. Servs., 617 F. App'x 690, 693 (9th Cir. 2015) (citing Lueras to hold the lender owed no duty of care when considering plaintiff's loan modification request because it acted within its conventional role as a lender).

This Court finds the Lueras line of cases to be more persuasive and has since followed the Ninth Circuit's interpretation of California law to find that financial institutions do not owe a duty of care to borrower-clients during the loan modification process. See, e.g., Hild v. Bank of America, N.A., 2018 U.S. Dist. LEXIS 129329, 2018 WL 3738956, at *5 (C.D. Cal. Jul. 31, 2018); Bailey v. Specialized Loan Serv., LLC, 2016 U.S. Dist. LEXIS 194987, 2016 WL 10651034, at *8 (C.D. Cal. Nov. 14, 2016). Thus, Plaintiffs' reliance on Segura v. Wells Fargo Bank, N.A., 2014 U.S. Dist. LEXIS 143038 , 2014 WL 4798890, at *14 (C.D. Cal. Feb. 24, 2015), in which this court held that offering the opportunity to apply for a loan modification created a duty of reasonable care to the borrower, predates the Ninth Circuit cases above and is unavailing. Accordingly, the Court concludes that Defendants did not owe Plaintiffs a duty of care during the loan modification process.

Defendants further contend that even if they did have a duty, Plaintiffs fail to properly allege a breach of that duty. (Ditech Mot. at 9.) Because the Court finds that Defendants **[*25]** did not owe Plaintiffs a duty of care, it will not consider whether Plaintiffs adequately alleged breach of duty.

For the reasons above, Plaintiffs fail to state a claim negligence against Defendants. The Court GRANTS Defendants' motions to dismiss the fourth cause of action.

6. *California Business and Professions Code §§ 17200, et seq.*

In their fifth cause of action, Plaintiffs allege Defendants violated California Business and Professions Code Section 17200 and its related provisions of the Unfair Competition Law ("UCL"). (Compl. ¶¶ 24-27; 65-74.)[4] Plaintiffs allege that Defendants violated each prong of the UCL. (Id. ¶ 25.)

A claim under the UCL requires a showing of either an unlawful, unfair, or fraudulent business act or practice, or an unfair, deceptive, untrue, or misleading advertisement. Lundy v. Selene Finance, LP, 2016 U.S. Dist. LEXIS 35547 , 2016 WL 1059423, at *17 (N.D. Cal. Mar. 17, 2016) (citing Steward v. Life Ins. Co. of N. Am., 388 F. Supp. 2d 1138, 1143 (E.D. Cal. 2005)).

Federal Rule of Civil Procedure Rule 9(b) requires that circumstances constituting a claim for fraud or mistake be pled with particularity. Fed. R. Civ. P. 9(b). Rule 9(b) applies also where the claim is "grounded in fraud" or "sound[s] in fraud." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003). The heightened

[4] Plaintiffs' Complaint has irregular numbering starting with their fifth cause of action. Instead of continuing with ¶ 65, Plaintiffs re-start their numbering with ¶ 24. This numbering continues through ¶ 27 and then jumps back to ¶ 65. For this Part, citations to ¶¶ 24-27 will refer to ¶¶ 24-27 alleged under the fifth cause of action.

particularity requirements of Rule 9(b) apply to claims under California's Unfair Competition Law. Horosny v. Burlington Coat Factory of Cal., LLC, 2015 U.S. Dist. LEXIS 179419, 2015 WL 12532178, at *4 (C.D. Cal. Oct. 26, 2015) (citing Kearns v. Ford Motor Co., 567 F.3d 1120, 1124-25 (9th Cir. 2009)). Rule 9(b) requires a plaintiff to "identify the 'who, what, when, where and how of the misconduct charged," as well as "what is false or misleading about [the purportedly fraudulent conduct], and why it is false." **[*26]** Shimono v. Harbor Freight Tools USA, Inc., 2016 U.S. Dist. LEXIS 147828, 2016 WL 6238483 at *5 (C.D. Cal. Oct. 24, 2016) (quoting Cafasso, ex rel. United States v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011)).

a. Standing

As a preliminary matter, Select Portfolio contends Plaintiffs lack standing under the UCL. (Select Portfolio Mot. at 8.)

The UCL only permits a plaintiff to sue if she has suffered an injury in fact. Cal. Bus. & Prof. Code § 17204. This requires that a Plaintiff allege injury in fact in a manner consistent with the federal constitutional standards. Troyk v. Farmers Group, Inc., 171 Cal. App. 4th 1305, 1346, 90 Cal. Rptr. 3d 589 (2009). For standing under the UCL, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." In re Turner, 859 F.3d 1145, 1151 (9th Cir. 2017) (quoting Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 322, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011) (emphasis in original)). The causation requirement fails if the plaintiff would have suffered "the same harm whether or not a defendant complied with the law." Daro v. Superior Court, 151 Cal. App. 4th 1079, 1099, 61 Cal. Rptr. 3d 716 (2007). Specifically, a plaintiff will not have standing under the UCL if her complaint fails to establish that but for the servicer's violation foreclosure would have been avoided. See In re Turner, 859 F.3d at 1151. Where a plaintiff does not allege that she continued to make payments on her loan, her own failure to pay causes the default. **[*27]** See id.

Select Portfolio contends Plaintiffs do not allege facts regarding a specific injury or any loss of money or property. (Select Portfolio Mot. at 8.) Select Portfolio further contends that any harm Plaintiffs suffered was due to Plaintiffs' default. (Id.) Plaintiffs do not allege that they continued making payments and lack UCL standing for any injuries related to their failure to make the required loan payments. See In re Turner, 859 F.3d at 1151. However, Plaintiffs allege that the UCL violation caused them harm in the following additional ways: excessive interest charges, damaged credit, late fees, copying and faxing costs, and telephone costs. (Compl. at ¶ 69.) Although some of these alleged damages are related to Plaintiffs' failure to pay (e.g., late fees, damaged credit, etc.), the costs Plaintiffs allegedly incurred while attempting to secure a modification are not similarly tied to their own failure to pay.

Thus, the Court finds that Plaintiffs lack standing based on any injury related to their own failure to make loan payments. However, Plaintiffs—if they can otherwise state a claim—have standing based on those injuries related to the costs they incurred while seeking a loan modification to the extent **[*28]** that those injuries were caused by Defendants' alleged unlawful, unfair, or fraudulent business practices.

b. Unlawful Practices

The unlawful practices prohibited are any practices forbidden by law. Saunders v. Super. Ct., 27 Cal. App. 4th 832, 838, 33 Cal. Rptr. 2d 438 (1994); see also In re Pomona Valley Med. Grp., Inc., 476 F.3d 665, 674 (9th Cir. 2007). The unlawful prong of the UCL "borrow[s] violations of other laws and treats" them as unlawful business practices "independently actionable under section 17200." Lopez v. United Guaranty Residential Ins. Co., 2017 U.S. Dist. LEXIS 29048, 2017 WL 810273, at *5 (C.D. Cal. Feb. 27, 2017) (quoting Farmers Ins. Exch. v. Super. Ct., 2 Cal.4th 377, 383, 6 Cal. Rptr. 2d 487, 826 P.2d 730 (1992) (quotation omitted)). Thus, to plead a violation of the UCL, a plaintiff must plead a violation of another statute or common law. Id.

Plaintiffs contend that Defendants' violated the unlawful prong of the UCL by violating California Civil Code Sections §§ 2923.5, 2923.7, and 2924.11. (Compl. ¶ 27f-27h.) Plaintiffs further allege that Defendants' conduct was unlawful because they implemented a flawed loss mitigation review process that is purposefully lengthy so as to avoid providing modification; they informed Plaintiffs they were under review while purposefully delaying the review so as to prevent Plaintiffs from seeking other alternative relief; they ignored Plaintiffs' communications; and gave Plaintiffs false hope for modification on which Plaintiffs relied in determining not to seek other relief. (Id. at ¶ 27a-e.) As discussed in above **[*29]** in Parts IV.B.2 through IV.B.5, the Court concludes Plaintiffs do not adequately state any of their other claims against Defendants. Because Plaintiffs do not state a claim for other unlawful practices, Plaintiffs cannot "borrow" a violation of another law to treat as an unlawful business practice for purposes of the UCL. See *Lopez, 2017 U.S. Dist. LEXIS 29048, 2017 WL 810273, at *5*.

Therefore the Court GRANTS Defendants' motions as to the extent that Plaintiffs base their UCL claim on the unlawful prong.

c. Unfair Practices

Unfair conduct is conduct "whose harm to the victim outweighs its benefits." *Saunders, 27 Cal. App. 4th at 838*. Unfair business practices may also be those that "offend an established public policy or . . . [are] immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Heighley v. J.C. Penney Life Ins. Co., 257 F. Supp. 2d 1241, 1259 (C.D. Cal. 2003)*. Unlike the unlawful prong, the unfair prong does not require borrowing another legal violation but can include a practice that not in itself unlawful. *Cal-Tech Commc'ns v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 181, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. However, a violation under the unfairness prong must be tied to some legislatively declared policy or proof that the unfair practice will have some impact on competition. *Id. at 186-87*. In Cal-Tech, the California Supreme Court, using Federal Antitrust guidance, established a standard for when a practice is "unfair" between **[*30]** direct competitors. See *id. at 186*. California courts considering unfairness in consumer cases have concluded that the analysis should similarly apply to cases brought by consumers. See *In re Firearm Cases, 126 Cal. App. 4th 959, 980, 24 Cal. Rptr. 3d 659 (2005)* (citing *Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1154 (2000))*. The term "unfair" applies to "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech, 20 Cal.4th at 187*. Importantly, the unfair practice must cause the consumer's harm. See *In re Firearm Cases, 126 Cal. App. 4th at 981* (discussing *Cel-Tech, 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527*).

Plaintiffs allege that Defendants' violated the unfair prong of the UCL by violating California Civil Code Sections *§§ 2923.5*, *2923.7*, and *2924.11*. (Compl. ¶ 27f-27h.) Plaintiffs further allege that Defendants' conduct was unlawful because they implemented a flawed loss mitigation review process that is purposefully lengthy so as to avoid providing modification; they informed Plaintiffs they were under review while purposefully delaying the review so as to prevent Plaintiffs from seeking other alternative relief; they ignored Plaintiffs' communications; and gave Plaintiffs false hope for modification on which Plaintiffs relied in determining not to seek **[*31]** other relief. (Id. at ¶ 27a-e.) For the reasons addressed in Part IV.B.6.a, above, Plaintiffs do not alleged facts sufficient that, if true, would establish that their alleged injuries were caused by Defendants' alleged wrongful conduct. Because Plaintiffs fail to allege they continued making loan payments, they cannot allege that Defendant's unfair practices caused injuries related to their default.

Therefore the Court GRANTS Defendants' motions as to the UCL claim based on the unfair prong.

d. Fraudulent Practices

A claim under the fraudulent prong requires a showing that members of the public "are likely to be deceived." *Saunders, 27 Cal. App. 4th at 838*. Plaintiffs allege Defendants engaged in fraudulent conduct by "misleading home owners into believing that they can modify their loan, when in fact Defendants never completed the loan review, and in most cases, no loan modification is approved." (Compl. ¶ 66.) Plaintiffs also allege that "Defendants' business practices were also fraudulent in that they could reasonably mislead the public." (Id. at ¶ 68.) Finally, Plaintiffs allege the information Defendants provided was "misleading and not consistent" as to the status of the loan modification and that Plaintiffs "actually **[*32]** relied" upon Defendants' actions. (Id. ¶¶ 70-71.)

Plaintiffs' conclusory assertions fail to meet the federal standard pleading requirements, much less the heightened requirement under *Rule 9(b)*. Plaintiffs fail to identify with particularity the misrepresentations that Defendants made that induced Plaintiffs to forego exploring other means of foreclosure avoidance. They also fail to allege with particularity that Defendants knew the representations were false. Plaintiffs similarly fail allege why their reliance was justifiable.

Thus, the Court GRANTS the Motion as to the UCL claim based on the fraudulent prong.

V. LEAVE TO AMEND

Rule 15 provides that leave to amend "shall be freely given when justice so requires." *Fed. R. Civ. P. 15(a)*. The Ninth Circuit has held that "'[t]his policy is to be applied with extreme liberality.'" *Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003)* (quoting *Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001))*. Generally, a "district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by allegation of other facts." *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (en banc) (internal quotation marks and citation omitted).

Here, the Court has identified deficiencies in Plaintiff's complaint, which may be cured by additional factual allegations. As **[*33]** a result, the Court DISMISSES Plaintiff's Complaint WITH LEAVE TO AMEND.

VI. CONCLUSION

For the foregoing reasons, the Court GRANTS both the Ditech Motion (Dkt. No. 6) and the Select Portfolio Motion (Dkt. No. 10). Plaintiffs shall file an amended complaint, if any, by September 17, 2018.

IT IS SO ORDERED.

End of Document

LifeWatch Servs. v. Highmark Inc.

United States Court of Appeals for the Third Circuit

January 16, 2018, Argued; August 28, 2018, Opinion Filed

No. 17-1990

Reporter
902 F.3d 323 *; 2018 U.S. App. LEXIS 24318 **; 2018-2 Trade Cas. (CCH) P80,491

LIFEWATCH SERVICES INC, Appellant v. HIGHMARK INC; BLUE CROSS & BLUE SHIELD ASSOCIATION; WELLPOINT INC; HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY;BLUE CROSS & BLUE SHIELD OF SOUTH CAROLINA; BLUE CROSS & BLUE SHIELD OF MINNESOTA

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. Civil Action No. 2-12-cv-05146). District Judge: Honorable Eduardo C. Robreno.

LifeWatch Servs. v. Highmark, Inc., 248 F. Supp. 3d 641, 2017 U.S. Dist. LEXIS 50176 (E.D. Pa., Apr. 3, 2017)

Core Terms

monitors, telemetry, Plans, cardiac, patient, antitrust, alleges, outpatient, anticompetitive, insurers, effects, conspiracy, sellers, relevant market, purchases, cases, coverage, deny coverage, anti trust law, consumers, providers, pled, medically necessary, restraint of trade, recommends, compete, parties, Shield, interchangeability, arrhythmias

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

HN1[] **Clayton Act, Claims**

Section 1 of the Sherman Act makes illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 1*. To state a *Section 1* claim, then, a plaintiff must allege (1) an agreement (2) to restrain trade unreasonably. A private plaintiff suing under the *Clayton Act* must also allege antitrust standing, including that its injury is of the type the antitrust laws were intended to prevent and flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN2[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The *McCarran-Ferguson Act*, *15 U.S.C.S. §§ 1011-1015*, exempts insurance providers from federal antitrust liability in certain instances.

Civil Procedure > Appeals > Standards of Review > De Novo Review

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

HN3[] Standards of Review, De Novo Review

Appellate courts exercise plenary review of dismissals under *Fed. R. Civ. P. 12(b)(6)*, accepting all factual allegations in the complaint as true and, examining for plausibility, determining whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Admissibility > Circumstantial & Direct Evidence

HN4[] Sherman Act, Claims

15 U.S.C.S. § 1 of the *Sherman Act* prohibits every contract, combination, or conspiracy that unreasonably restrains trade. *15 U.S.C. § 1*. Courts have interpreted these three terms collectively simply to mean an agreement. Unilateral activity by a defendant, no matter the motivation, cannot give rise to a *Section 1* violation. Instead, a plaintiff must plead some form of concerted action, in other words, a unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme. An agreement may be shown by either direct or circumstantial evidence.

Antitrust & Trade Law > Sherman Act > Claims

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN5[] Sherman Act, Claims

To survive a motion to dismiss, a plaintiff alleging violation of *15 U.S.C.S. § 1* of the *Sherman Act* must plead enough factual matter (taken as true) to suggest that an agreement was made. An allegation of parallel conduct and a bare assertion of conspiracy, such as a conclusory allegation of agreement at some unidentified point, will not suffice. Rather, allegations of parallel conduct must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Admissibility > Circumstantial & Direct Evidence

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN6[] **Sherman Act, Claims**

For circumstantial evidence of an agreement, a plaintiff alleging violation of *15 U.S.C.S. § 1* of the *Sherman Act* must allege both parallel conduct and something "more," which courts have sometimes called a "plus factor. This "more" could include evidence (1) that the defendant had a motive to enter into a conspiracy, (2) that the defendant acted contrary to its interests, or (3) implying a traditional conspiracy. In cases involving concentrated markets like oligopolies or oligopsonies—where a small number of sellers or buyers of a particular product dominate the market—courts have recognized that competitors are more likely to be influenced by each other's behavior even without agreeing to act in concert. For example, one oligopolist may refrain from lowering its price because it fears, indeed knows, that its rivals will match it. In those cases we de-emphasize the first two types of evidence, which largely restate that phenomenon of interdependence, often called conscious parallelism. Courts focus instead on the third, which is non-economic evidence that there was an actual, manifest agreement, which may include proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.

Antitrust & Trade Law > Sherman Act > Claims

HN7[] **Sherman Act, Claims**

Concerted action is established by proof of a causal relationship between pressure from one conspirator and an anticompetitive decision of another conspirator.

Antitrust & Trade Law > Sherman Act > Claims

HN8[] **Sherman Act, Claims**

A restraint among competitors—called "horizontal," as opposed to "vertical" restraints on market participants at different points in a product's supply chain—is more rigorously scrutinized for an antitrust violation because it could more easily facilitate competitive harms, such as the exclusion of rivals, price fixing, or the consolidation of market power. In particular, when a firm exercises monopsony power pursuant to a conspiracy, its conduct is subject to more rigorous scrutiny. Unlike independent action, concerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands. Indeed, some horizontal restraints, including price fixing and market division, are considered anticompetitive by their very nature. These are treated as per se *Sherman Act* *15 U.S.C.S. § 1* violations.

Antitrust & Trade Law > Sherman Act > Claims

HN9[] **Sherman Act, Claims**

Many horizontal restraints are not so clearly harmful to competition under *Sherman Act* *15 U.S.C.S. § 1*. Instead, or in addition, they may, for example, facilitate the creation of new products, improve efficiencies, or lead to lower consumer costs. A restraint that is not per se unreasonable is analyzed under some form of a "rule of reason" burden-shifting framework, which seeks to determine whether the restraint's harmful effects are outweighed by any procompetitive justifications and, if so, whether there are less restrictive alternatives.

Antitrust & Trade Law > Sherman Act > Claims

HN10[] **Sherman Act, Claims**

Under the rule of reason framework for a violation of *Sherman Act* *15 U.S.C.S. § 1*, a party can satisfy the unreasonable-restraint element in two ways. It can plead actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market. Alternatively, it can plead that the defendants have market power, plus some evidence that the challenged restraint harms competition. Under either approach, courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market because, in most cases, a court must conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition.

Antitrust & Trade Law > Sherman Act > Claims

HN11[] **Sherman Act, Claims**

The relevant market in a *Sherman Act*, *15 U.S.C.S. § 1*, case is the area of effective competition within which significant substitution in consumption or production occurs. In other words, the outer boundaries of a relevant market are determined by reasonable interchangeability of use of a particular product within a particular geographic area. In addition to substitutability or interchangeability, courts also look to cross-elasticity of demand, which is defined as a relationship between two products, usually substitutes for each other, in which a price change for one product affects the price of the other. Critically, in a buyer-side conspiracy case, seller rather than consumer or purchaser behavior is the focus. The market is comprised of buyers who are seen by sellers as being reasonably good substitutes. Thus a court should be wary of applying the market-definition analysis for sellerside conspiracies mechanically in the context of monopsony or oligopsony.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN12[] **Sherman Act, Claims**

A *Sherman Act*, *15 U.S.C.S. § 1*, complaint may be properly dismissed if it defines the relevant market without reference to interchangeability or cross-elasticity of demand or if it alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor. However, absent such obvious oversights, courts are cautious before dismissing for failure to define a relevant market. Ultimately the relevant market must both correspond to the commercial realities of the industry and be economically significant. That is why, in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers or purchasers, in seller-side conspiracies, or sellers, in buyer-side conspiracies.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN13[] **Sherman Act, Claims**

A *Sherman Act*, *15 U.S.C.S. § 1*, plaintiff bears the burden of defining both a relevant geographic and a relevant product market.

Antitrust & Trade Law > Clayton Act > Claims

HN14[] Clayton Act, Claims

Sections 4 and *16 of the Clayton Act* enable private plaintiffs to sue for treble damages for and to enjoin antitrust injuries. *15 U.S.C.S. §§ 15*, *26*. While the statutory language of those provisions is broad, and apparently requires only constitutional standing to bring suit, the Supreme Court has held that private plaintiffs must also have "antitrust standing." The Court articulated several factors to consider when analyzing whether a plaintiff has such standing. These are summarized as: (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Antitrust & Trade Law > Clayton Act > Claims

HN15[] Clayton Act, Claims

An antitrust injury (1) flows from that which makes the defendants' acts unlawful and (2) is an injury of the type the antitrust laws were intended to prevent. To analyze the first prong of antitrust injury, courts must examine the causal connection between the purportedly unlawful conduct and the injury.

Antitrust & Trade Law > Clayton Act > Scope

HN16[] Antitrust & Trade Law, Clayton Act

As a general matter, the class of plaintiffs capable of satisfying the antitrust-injury requirement is limited to consumers and competitors in the restrained market and to those whose injuries are the means by which the defendants seek to achieve their anticompetitive ends.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Evidence > Burdens of Proof > Allocation

HN17[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

A defendant bears the burden of establishing its immunity under the *McCarran-Ferguson Act*, *15 U.S.C.S. §§ 1011-1015*.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN18[] Scope, Exemptions

The *McCarran-Ferguson Act*, *15 U.S.C.S. §§ 1011-1015*, provides that the *Sherman Act* still applies to the business of insurance to the extent that such business is not regulated by State Law and to agreements to boycott, coerce, or intimidate. 15 U.S.C.S. §§ 1012(b), 1013(b). Therefore, for an insurer to be exempted from liability in a case, its challenged conduct (1) must constitute the business of insurance, (2) must be regulated by state law, and (3) must not amount to a boycott, coercion, or intimidation.

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For Blue Cross & Blue Shield Association, Appellee: Sheryl L. Axelrod, Esquire, The Axelrod Firm, Philadelphia, PA; Sarah J. Donnell, Esquire, Daniel E. Laytin, Esquire (Argued), David J. Zott, Esquire, Kirkland & Ellis, Chicago, IL.

For Wellpoint Inc.; Horizon Blue Cross Blue Shield of New Jersey, Blue Cross & Blue Shield of South Carolina; Blue Cross & Blue Shield of Minnesota, Appellees: Justin W. Bernick, Esquire, John R. Robertson, Esquire, Hogan Lovells US LLP, Columbia Square, Washington, DC; Stephen A. Loney, Jr., Esquire, Hogan Lovells US LLP, Philadelphia, PA.

Judges: Before: AMBRO, RESTREPO, and FUENTES, Circuit Judges.

Opinion by: AMBRO

Opinion

[*329] OPINION OF THE COURT

AMBRO, Circuit Judge

The seller of a medical device, believing it was shut out of the market for it, brought suit on federal antitrust grounds against associated health insurance companies. The claim **[**2]** was that they shielded themselves from patient demand for the seller's device by agreeing to deny coverage **[*330]** as "not medically necessary" or "investigational," even while the medical community, other insurers, and independent arbiters viewed it as befitting the standard of care. The District Court dismissed the claim. For the reasons that follow, we reverse its judgment and remand the case for further consideration.

I. Factual Background

We base our analysis, as we must on review of a Rule 12(b)(6) dismissal, on the allegations in the operative complaint—here the Third Amended Complaint (for convenience, the "Complaint"). According to it, cardiovascular disease and disorders are the leading cause of death in the United States. Plaintiff LifeWatch Services, Inc. ("LifeWatch") is one of the two largest sellers of telemetry monitors. They are one of several types of outpatient cardiac monitoring devices used to diagnose and treat arrhythmias, or changes in heart rate or rhythm, which may signal or lead to more serious medical complications. An arrhythmia can be without noticeable symptoms; hence the patient may not know it is occurring.

Other outpatient cardiac monitors include Holter monitors, various **[**3]** forms of event monitors, and insertable monitors. All record the electrical activity of a patient's heart to catch any instance of an arrhythmia. But they vary in price, method of data capture, and mechanism by which the data are transmitted to an analyst or physician for diagnosis. For example, telemetry monitors are about three times as expensive as event monitors. They record up to 30 days of a patient's cardiac activity and automatically transmit the data to an analyst center. Event monitors, by contrast, record short windows of data (in some cases no more than a minute), which the patient must then take some action to transmit. Many event monitors also require the patient to trigger the data capture, creating a risk that asymptomatic arrhythmias go undetected. Insertable monitors, which are surgically implanted and less frequently used, are the most expensive; they cost eight to ten times more than event monitors. While the Complaint quotes from medical studies that recommend only telemetry monitors to treat some patients with certain conditions, in other cases telemetry and other monitors are all appropriate treatments.

LifeWatch brought suit against the Blue Cross Blue Shield **[**4]** Association (the "Association") and five of its member insurance plan administrators[1] (the "Blue Plans"; together with the Association, "Blue Cross") for violating *Section 1 of the Sherman Act, 15 U.S.C. § 1*. It claims the Blue Plans have impermissibly conspired with each other and the Association to deny coverage of telemetry monitors.

The Association, which is not an insurer itself, owns the rights to the Blue Cross and Blue Shield trademarks and trade names. It licenses the right to the Blue Cross brand to 36 insurers nationwide. **[*331]** These Blue Plans are allegedly the largest commercial health insurance group in the country, collectively insuring 105 million Americans, with a national network that covers 96% of hospitals and 92% of doctors. As a group, they are a major purchaser of medical devices and services nationwide.

The Association maintains a model medical policy that recommends to the Blue Plans which treatments, devices, or services to cover. Each Blue Plan participates in the development of these recommendations by voting on them. A panel of some kind—the Complaint is vague—then meets several times a year to finalize the model policy.[2]

For more than a decade the model policy has recommended against **[**5]** covering prescriptions for telemetry monitors, explaining that in some cases they are not "medically necessary" and in the rest they are "investigational." This provision of the model policy has been adopted in near lockstep[3] by the Association's member Blue Plans. Though the Plans' language denying coverage is not always identical, the reasoning is the same.

Meanwhile, Medicare, Medicaid, and other private insurers, including Aetna, cover telemetry monitor prescriptions. Multiple medical studies—the Complaint references 10—have reviewed telemetry monitors and found them to be effective, superior to other treatments in some cases, or medically necessary. In at least 20 cases brought between 2010 and 2012 by patients appealing a denial of telemetry monitor coverage, independent, expert review boards overturned the insurers' denials; the review board frequently determined that telemetry monitors were a standard of care or clinically necessary. Blue Plans were parties to several, if not all, of those appeals.

Nonetheless, with near uniformity, and for a decade, the Blue Plans have declined to cover telemetry monitors. As a result, LifeWatch claims both its sales and cardiac monitoring treatment **[**6]** in general have suffered. It seeks treble damages for its losses and an injunction under *Sections 4* and *16* of the Clayton Act, *15 U.S.C. §§ 15* and *26*, which authorize private plaintiffs to sue for *Sherman Act* violations.

II. Analysis

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[1] The Defendant Blue Plans named in the Complaint are: Wellpoint, Inc., allegedly an Indiana corporation that, combined with its affiliates, serves more than 71 million people in California, Colorado, Connecticut, Georgia, Indiana, Kentucky, New York, Maine, Missouri, Nevada, New Hampshire, Ohio, Virginia, and Wisconsin, or more than a third of all privately insured Americans; Horizon Blue Cross Blue Shield of New Jersey, allegedly the largest health insurer in New Jersey; Blue Cross and Blue Shield of Minnesota, which allegedly has more members, products, and services than other insurers in that state; BlueCross BlueShield of South Carolina; and Highmark, Inc., allegedly one of the largest health insurers in the country serving, with affiliates, insureds in Pennsylvania, Delaware, and West Virginia. As described later, LifeWatch has since settled its case against Highmark.

[2] LifeWatch's brief on appeal explains that the "Medical Policy Panel" is "the name Defendants give to themselves acting in concert." Appellant Br. 3. However, we see no basis in the pleadings on which to infer who or what the panel comprises.

[3] The Complaint references only two Blue Plans that ever contracted with LifeWatch to cover telemetry. One, a Plan in Illinois, settled with LifeWatch outside this lawsuit. As described later, the other, Highmark, partially changed course and stopped covering telemetry in some cases. The claims against Highmark were dismissed on June 9, 2016, after the parties reached a settlement.

HN1[] Section 1 of the Sherman Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 1. To state a Section 1 claim, then, a plaintiff must allege (1) an agreement (2) to restrain trade unreasonably. In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010). A private plaintiff suing under the Clayton Act must also allege antitrust standing, including that its "injury [is] of the type the antitrust laws were intended to prevent and . . . flows from that which makes defendants' acts unlawful." Id. n.9. (quoting (A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 247 (3d Cir.2001)). Finally, the claim **[*332]** in this case could still fail under HN2[] the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, which exempts insurance providers from federal antitrust liability in certain instances.

The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337. Blue Cross moved the Court to dismiss LifeWatch's Sherman Act Section 1 claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. It argued that the Complaint fails to allege either agreement or anticompetitive effects in the relevant product **[**7]** market, that LifeWatch lacks antitrust standing because it could not show antitrust injury, and that Blue Cross's telemetry monitor coverage decisions are immune from antitrust challenge under the McCarran-Ferguson Act.

The District Court dismissed for failing to allege anticompetitive effects, and therefore failing to establish the restraint was unreasonable. LifeWatch Servs., Inc. v. Highmark, Inc., 248 F. Supp. 3d 641, 648-49 (E.D. Pa. 2017). The Court emphasized that, because "each Blue [P]lan treats all telemetry providers *equally*," LifeWatch failed to allege "competition-reducing" conduct. Id. at 649 (alteration and emphasis in original) (internal quotation marks omitted). It concluded that, "even assuming . . . a conspiracy amongst Blue Plans to deny coverage for telemetry devices, . . . this alleged conspiracy does not violate antitrust laws." Id. at 646. "[T]he Defendants' refusal—whether concerted or not—to purchase any telemetry device—whether produced by LifeWatch or not—is not an antitrust violation, but rather a legal exercise of Defendants' monopsony power."[4] Id. at 650.

The Court also suggested in a *dictum* that LifeWatch failed to allege an agreement, as it believed the Plans could have independently decided "that the benefits of telemetry devices do not (yet) **[**8]** outweigh their costs." Id. at 649. It did not reach antitrust standing or the McCarran-Ferguson Act. Id. at 650.

LifeWatch timely appealed, and the same four issues are now before us for review. We have appellate jurisdiction under 28 U.S.C. § 1291. HN3[] We exercise plenary review of dismissals under Rule 12(b)(6), "accept[ing] all factual allegations in the complaint as true and, examining for plausibility, 'determin[ing] whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" In re Lipitor Antitrust Litig., 868 F.3d 231, 249 (3d Cir. 2017) (quoting Bronowicz v. Allegheny County, 804 F.3d 338, 344 (3d Cir. 2015)); *see also* Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011).

For the reasons that follow, we hold that LifeWatch plausibly stated a claim and has antitrust standing. However, we leave Blue Cross's McCarran-Ferguson Act argument for the District Court's consideration on remand.

A. Agreement

We take in order the elements of a claim under Section 1. HN4[] It prohibits "every contract, combination . . . , or conspiracy" that unreasonably restrains trade. 15 U.S.C. § 1. We have interpreted these three terms collectively simply to mean an agreement. Ins. Brokerage, 618 F.3d at 315. "Unilateral activity by a defendant, no matter the motivation, cannot give rise to a [S]ection 1 violation." InterVest, Inc. v. **[*333]** Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003). Instead, a plaintiff must plead "some form of concerted action . . . , in other words, a unity of purpose

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[4] A monopoly exists if only "one supplier or producer" has "control or advantage . . . over the commercial market within a given region." *Black's Law Dictionary* 1160 (10th ed. 2014). If "one buyer controls the market" instead of a seller, that is a monopsony. *Id.* Likewise, if "a few large sellers" have "control or domination of a market," it is an oligopoly, while oligopsony is where "a few large buyers or customers" do. *Id.* at 1260.

or a common design and understanding **[**9]** or a meeting of minds or a conscious commitment to a common scheme . . . ." *Ins. Brokerage, 618 F.3d at 315* (citations and internal quotation marks omitted).

An agreement may be shown by either direct or circumstantial evidence. *W. Penn Allegheny Health Sys., Inc. v. UPMC ("West Penn"), 627 F.3d 85, 99 (3d Cir. 2010)*. LifeWatch asserts it has provided allegations of both. Because we hold it pled sufficient circumstantial evidence of agreement here, we do not reach its direct evidence theory.

As the Supreme Court explained in detail in *Bell Atlantic Corp. v. Twombly*, ***HN5***[] to survive a motion to dismiss, a plaintiff must plead "enough factual matter (taken as true) to suggest that an agreement was made." *550 U.S. 544, 556-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "[A]n allegation of parallel conduct and a bare assertion of conspiracy," such as "a conclusory allegation of agreement at some unidentified point," will not suffice. *Id.* Rather, "allegations of parallel conduct . . . must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id. at 557*.

HN6[] For circumstantial evidence of an agreement, then, a plaintiff must allege both parallel conduct and something "more," which we have sometimes called a "plus factor." *Ins. Brokerage, 618 F.3d at 321*. This "more" **[**10]** could include evidence (1) "that the defendant had a motive to enter into a . . . conspiracy," (2) "that the defendant acted contrary to its interests," or (3) "implying a traditional conspiracy." *Id. at 321-22* (quoting *In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004))*. In cases involving concentrated markets like oligopolies or oligopsonies—where a small number of sellers or buyers of a particular product dominate the market—we have recognized that competitors are more likely to be influenced by each other's behavior even without agreeing to act in concert. For example, "[o]ne oligopolist may refrain from lowering its price because it fears, indeed knows, that its rivals will match it." Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of* ***Antitrust Law*** ("*Fundamentals*") § 14.10[G] n.24 (4th ed. Supp. 2017). In those cases we de-emphasize the first two types of evidence, which "largely restate [that] phenomenon of interdependence," *Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 193 (3d Cir. 2017)* (quoting *Flat Glass, 385 F.3d at 360*), often called "conscious parallelism," *see id.* We focus instead on the third, *id.*, which is "'non-economic evidence "that there was an actual, manifest agreement . . . ,"' which may include 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though **[**11]** no meetings, conversations, or exchanged documents are shown,'" *Ins. Brokerage, 618 F.3d at 322* (quoting *Flat Glass, 385 F.3d at 361*).

LifeWatch pled parallel conduct. The Complaint quotes the provision in the Association's model policy that recommends the Blue Plans deny telemetry monitor coverage. It then asserts the Blue Plans adopted the model policy's approach with near total uniformity and references their use of similar or identical language to deny coverage of telemetry monitors.

Blue Cross proposes that we end our analysis here because the Complaint alleges, at best, no more than parallel conduct. In particular, Blue Cross cites the alleged **[*334]** higher price of telemetry monitors relative to event monitors (but lower price relative to insertable monitors) as providing all the Plans an independent basis for denying coverage. Indeed, if LifeWatch had alleged *only* that the Association and the Plans reached the same telemetry monitor coverage decisions *en masse* multiple years in a row, and that telemetry monitors are more expensive than some other treatment options, Blue Cross might have the better argument. However, LifeWatch also pled something "more": evidence implying a traditional conspiracy.

As an initial matter, the Complaint states that **[**12]** the Association's model policy is set during meetings several times a year, where a panel reviews the votes of all Blue Plans regarding whether to cover particular treatments. As noted, this model policy, which the Blue Plans participate in creating, recommends denying coverage of telemetry monitors as either not medically necessary or investigational. Blue Cross does not dispute this description of the model policy or its creation. Instead, it argues that its member Plans are not bound to follow the model policy; in fact, it explicitly disclaims that notion in its text. Thus, according to Blue Cross, the Plans must make wholly independent decisions regarding which treatments are medically necessary.

This argument apparently misunderstands the nature of the alleged agreement, which is not contained within the model policy's text.[5] LifeWatch claims instead that the Blue Plans agreed with each other and the Association that they would *substantially comply with* the model policy. It dubs this agreement the "Uniformity Rule." The Association then allegedly enforces the Plans' conformance with the model policy through audits. If a Plan strays too far from the model, it could face sanctions, **[**13]** including losing the right to use the Blue Cross name.

Even if these allegations were too conclusory to tip the scales in favor of plausibility, the Complaint then provides a particular example of the Uniformity Rule's enforcement. Highmark initially contracted with LifeWatch to deem telemetry monitors medically necessary and cover prescriptions for them. Under that contract, Highmark covered claims for telemetry monitors submitted both by Highmark subscribers and by subscribers to other Blue Plans; those Blue Plans would then reimburse Highmark in some fashion. However, allegedly under pressure by the other Blue Plans and the Association, it stopped paying for claims from non-Highmark subscribers. As we and other courts have observed, ***HN7***[] "[c]oncerted action is established . . . [by] proof of a causal relationship between pressure from one conspirator and an anticompetitive decision of another conspirator."[6] *Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005)*; *see also* *Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397, 397-99 (7th Cir. 1989)*.

That so many sophisticated third parties allegedly view telemetry monitors as medically necessary or meeting the standard of care further undercuts Blue Cross's theory that nearly three dozen Plans independently made the opposite determination **[*335]** for 10 consecutive years. As **[**14]** noted, according to the Complaint, other large insurers, including Aetna as well as Medicaid and Medicare, cover telemetry monitors as medically necessary. Multiple medical studies reached similar conclusions. In states that mandate independent, expert review of appeals of insurance coverage denials, LifeWatch also funded many costly patient appeals of telemetry monitor denials. It allegedly prevailed in an overwhelming number of cases; the Complaint identifies 20 successful appeals between 2010 and 2012 decided by at least six different independent review boards. The Complaint indicates that many, if not all, were appeals of a Blue Plan's denial. The review boards in several cases determined that telemetry monitors were clinically necessary or a standard of care.

Viewed in the light most favorable to LifeWatch, *see, e.g.,* *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig., 804 F.3d 633, 638 (3d Cir. 2015)*, these allegations make an agreement among the Defendants plausible. While a claim based on parallel—even consciously parallel—conduct alone would be insufficient to survive dismissal, *see* *Ins. Brokerage, 618 F.3d at 321*, the Complaint provides more. It alleges the type of agreement reached by the Blue Plans and the Association, an auditing mechanism by which the agreement is enforced, a particular **[**15]** time when a Blue Plan declined to cover telemetry monitors due to pressure from the Association and other Plans, and the improbability that the same coverage decision would be reached by nearly all the Blue Plans independently.[7] The agreement and enforcement mechanism pled here provide the "reasonably founded hope that the [discovery] process will reveal relevant evidence." *Twombly, 550 U.S. at 559*; *see also* *Ins. Brokerage, 618 F.3d at 324*.

B. Unreasonable Restraint of Trade

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[5] As we have noted in the criminal conspiracy context, "common sense suggests, and experience confirms, that illegal agreements are rarely, if ever, reduced to writing or verbalized with the precision that is characteristic of a written contract." *United States v. McKee, 506 F.3d 225, 238 (3d Cir. 2007)*.

[6] Although LifeWatch's claim against Highmark has been dismissed, it and other unsued Blue Plans remain alleged coconspirators to the purported agreement. Thus their conduct can be evidence of the agreement's existence.

[7] The Complaint also gestures at a motive to conspire when it describes the Defendants' shared goal to save costs and increase profits by shifting demand to less expensive treatment options. However, in our case law the mere desire to shift demand to lower cost devices is not a plus factor establishing an agreement without further evidence "of concerted, collusive conduct." *Burtch, 662 F.3d at 229* (quoting *In re Baby Food Antitrust Litig., 166 F.3d 112, 137 (3d Cir. 1999))*. "In a free capitalistic society, all entrepreneurs have a legitimate understandable motive to increase profits." *Id.* (same).

To state a *Section 1* claim, LifeWatch must also plead that Blue Cross's agreement has unreasonably restrained trade. *See* *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* ("[T]he *Sherman Act's* prohibition of '[e]very' agreement in 'restraint of trade' . . . prohibits only agreements that *unreasonably* restrain trade." (emphasis in original) (citation omitted)). An "unreasonable" restraint is one that inhibits competition in the relevant market. *Eichorn v. AT & T Corp., 248 F.3d 131, 138 (3d Cir. 2001)*.

HN8[] A restraint among competitors—called "horizontal," as opposed to "vertical" restraints on market participants at different points in a product's supply chain—is more rigorously scrutinized for an antitrust violation because it could more easily facilitate competitive harms, such as the exclusion of rivals, price fixing, or the consolidation of market power. *See* Areeda & Hovenkamp, **[**16]** *Fundamentals, supra*, § 14.11[A]. In particular, "when a firm exercises monopsony power pursuant to a conspiracy, its conduct is subject to more rigorous scrutiny . . . ." *West Penn, 627 F.3d at 103*. "[U]nlike independent action, concerted activity inherently is fraught with anticompetitive **[*336]** risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." *Id.* (internal quotation marks omitted). Indeed, some horizontal restraints, including price fixing and market division, are considered anticompetitive by their very nature. *NYNEX Corp., 525 U.S. at 133-34* (citing *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 60 S. Ct. 811, 84 L. Ed. 1129* (horizontal price-fixing), and *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (per curiam) (horizontal market division)). These are treated as *per se* Sherman Act *Section 1* violations. *Id.*

HN9[] However, many horizontal restraints are not so clearly harmful to competition. *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 829-30 (3d Cir. 2010)*. Instead, or in addition, they may, for example, facilitate the creation of new products, improve efficiencies, or lead to lower consumer costs. A restraint that is not *per se* unreasonable is analyzed under some form[8] of a "rule of reason" burden-shifting framework, which seeks to determine whether the restraint's harmful effects are outweighed by any procompetitive justifications and, if so, whether there are less restrictive alternatives. ***[**17]*** *Id.; see also* *United States v. Brown Univ., 5 F.3d 658, 678-79 (3d Cir. 1993)*.

LifeWatch claims the Blue Plans are engaged in a horizontal, concerted refusal to deal. The parties agree that this conduct should be analyzed ***HN10***[] under the rule of reason framework.[9] Thus LifeWatch can satisfy the unreasonable-restraint element in two ways. It can plead "'actual detrimental effects [on competition],' . . . such as reduced output, increased prices, or decreased quality in the relevant market." *Am. Express Co., 138 S. Ct. at 2284* (quoting *Ind. Fed'n of Dentists, 476 U.S. at 460*). Alternatively, it can plead that the Blue Cross Defendants have "market power[,] plus some evidence that the challenged restraint harms competition." *Id.* Under either approach, "courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market" because, in most cases, a court must "conduct a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition." *Id. at 2284-85* (alteration in original) (quoting *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*.

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[8] Some horizontal restraints may warrant only a "quick look," rather than a complete rule-of-reason analysis. *See* *F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*; *see also* *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 n.7, 201 L. Ed. 2d 678 (2018)*. A quick look "presum[es] competitive harm without detailed market analysis" because "the anticompetitive effects on markets and consumers are obvious." *Deutscher Tennis Bund, 610 F.3d at 832*. It is inappropriate if "'the contours of the market' . . . are not 'sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition . . . .'" *Id.* (quoting *Worldwide Basketball &Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n., 388 F.3d 955, 961 (6th Cir. 2004))*.

[9] We note that some group boycotts, which are similar to concerted refusals to deal, are treated as unlawful *per se.* *Ind. Fed'n of Dentists, 476 U.S. at 458*. But "the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor," *id.*, which LifeWatch does not allege here.

[*337] The parties do not dispute that LifeWatch must allege a relevant market in this case. We thus begin with those allegations, which provide the context for both its assertions of anticompetitive effects and the District Court's rationale **[**18]** in granting Blue Cross's motion to dismiss.

1. Market Definition

HN11[] The relevant market in a *Section 1* case is "the area of effective competition . . . within which significant substitution in consumption or production occurs." *Am. Express Co., 138 S. Ct. at 2285* (internal quotation marks omitted). In other words, "the outer boundaries of a relevant market are determined by reasonable interchangeability of use" of a particular product within a particular geographic area. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 437, 442 (3d Cir. 1997)*. In addition to substitutability or interchangeability, "[w]e also look to . . . cross-elasticity of demand, which is defined as '[a] relationship between two products, usually substitutes for each other, in which a price change for one product affects the price of the other.'" *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 435-36 (3d Cir. 2016)* (quoting *Black's Law Dictionary* 458 (10th ed. 2014)).

Critically, in a buyer-side conspiracy case, seller rather than consumer or purchaser behavior is the focus. *Todd v. Exxon Corp., 275 F.3d 191, 201 (2d Cir. 2001)* (Sotomayor, J.) (citing Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, *76 Cornell L. Rev. 297, 324 (1991)*). "[The] market is comprised of buyers who are seen by sellers as being reasonably good substitutes." *Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1118 (10th Cir. 2008)* (quoting *Todd, 275 F.3d at 202*). Thus a court should be wary of applying the market-definition analysis for sellerside conspiracies "mechanically in the **[**19]** context of monopsony or oligopsony." *Todd, 275 F.3d at 202*.

HN12[] A complaint may be properly dismissed if it defines the relevant market without reference to interchangeability or cross-elasticity of demand or if it "alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor . . . ." *Queen City Pizza, 124 F.3d at 436*. However, absent such obvious oversights, courts are cautious before dismissing for failure to define a relevant market. *See* *Todd, 275 F.3d at 199-200* (collecting cases). Ultimately the relevant market must "both correspond to the commercial realities of the industry and be economically significant." *Brown Shoe Co. v. United States, 370 U.S. 294, 336-37, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* (internal quotation omitted). That is why, "in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers" or purchasers, in seller-side conspiracies, or sellers, in buyer-side conspiracies. *Queen City Pizza, 124 F.3d at 436*; *see also* *Todd, 275 F.3d at 199-200* ("Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market."). Our case deals with the latter: commercial realities faced by medical device sellers seeking purchases. For example, **[**20]** these might be direct, out-of-pocket purchases by the end-user patients, patient purchases funded by a health insurer intermediary, or patient purchases reimbursed by a health insurer after the fact.

HN13[] A plaintiff bears the burden of defining both a relevant geographic and a relevant product market. The Complaint asserts several relevant markets here: national and regional markets for the sale of **[*338]** health insurance plans and a national market for the purchase of outpatient cardiac monitors. However, LifeWatch forfeited its insurance-market theories by not fully briefing them on appeal. *Fed. R. App. P. 28(a)(8)(A)*; *Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist., 877 F.3d 136, 145 (3d Cir. 2017)*. When pressed during oral argument, it then explicitly waived them. We therefore turn to the only market definition still before us: the national outpatient cardiac monitor market.

The parties do not dispute that the alleged market is national, and the Complaint alleges commercial realities to support a nationwide market. Patients nationwide suffer arrhythmias that may require treatment with cardiac monitors. Telemetry device firms and other unspecified monitoring-device firms allegedly sell their products nationwide. Insurers on the buyer side that allegedly compensate sellers of cardiac monitors also **[**21]** operate nationally, including Medicaid and Medicare. The Association's model policy recommending that Blue Plans not pay for telemetry monitors is distributed nationally to each Blue Plan. And, as noted, the Blue Plans operating across the country allegedly cover 105 million Americans collectively, purportedly about half of all Americans with private insurance.

However, the parties vigorously dispute whether LifeWatch has pled a relevant product market. The focus of the parties' briefing on appeal is whether telemetry monitors compete with other types of monitors. According to LifeWatch, *all* outpatient cardiac monitor sellers compete within the same market. The Complaint repeatedly references an "outpatient cardiac monitor" market and describes the four categories of monitors that compete within it: telemetry, Holter, event, and insertable monitors.

Although its opinion does not say so outright, the District Court seemingly rejected that market when it dismissed LifeWatch's claim. It reasoned that the Blue Plans' alleged refusal to purchase telemetry monitors had no anticompetitive effects *among telemetry monitor providers* because it treated them all equally. *See LifeWatch Servs., 248 F. Supp. 3d at 649*. Blue Cross argues **[**22]** the District Court implicitly, and correctly, held that LifeWatch's claimed product market was implausible and therefore adopted a telemetry-monitor-only market for purposes of its anticompetitive-effects analysis.

Read in the light most favorable to LifeWatch, however, the Complaint alleges competition among all outpatient cardiac monitors such that they are plausibly within the same product market. All four of the alleged categories of monitors capture the same type of data from a patient's heart. They capture it for the same purpose: to identify and treat cardiac arrhythmias. The principal harm LifeWatch alleges is that Blue Cross is shifting demand to other outpatient cardiac monitors—presumably conduct that would be impossible if the monitors were not interchangeable to some relevant degree. Indeed, LifeWatch claims many doctors have given up prescribing telemetry monitors and instead rely exclusively on other cardiac monitors to treat their patients. The Complaint also quotes a medical study by the American Heart Association recommending telemetry monitors alongside other cardiac monitors to treat certain conditions.

Undoubtedly the Complaint alleges that certain monitors are less **[**23]** able to function in some areas than others, while others are costlier. It describes telemetry monitors as superior to Holter and event monitors in their ease of use, greater data capture, and ability to diagnose infrequent or incapacitating arrhythmias. It asserts that only **[*339]** telemetry monitors ought to be prescribed for patients with certain conditions.

Blue Cross argues these allegations are fatal to LifeWatch's claim because they establish that telemetry monitors are not reasonably interchangeable with other cardiac monitors. But differentiation is often present among competing products in the same market. For example, as we have long observed, different brands of cars may compete to provide a consumer's main transportation to and from work—and, depending on the circumstances, they may also compete with other modes of travel. *Queen City Pizza, 124 F.3d at 437*. "Many machines performing the same function—such as copiers, computers, or automobiles—differ not only in brand name but also in performance, physical appearance, size, capacity, cost, price, reliability, ease of use, service, customer support, and other features." Areeda & Hovenkamp, *Fundamentals, supra*, § 5.11[A]. "Nevertheless, they generally compete with one another sufficiently that **[**24]** the price of one brand is greatly constrained by the price of others." *Id.*

Beyond the question of competition among cardiac monitors, however, there is apparently a more fundamental problem with the District Court's reasoning and Blue Cross's arguments on appeal. The underlying question driving the unreasonable-restraint analysis in a buyer-side conspiracy case is whether the defendants' *purchasing power* is constrained by competition from other purchasers in the relevant market. Thus, from the perspective of a seller, the interchangeability that matters is for *purchasers* of outpatient cardiac monitors.

Once again, as LifeWatch argues, the Complaint alleges sufficient facts to survive a motion to dismiss. It notes that sellers of medical devices like LifeWatch "are often small and highly dependent on a limited number of products," suggesting they cannot easily change their products or expand their offerings to induce a disinterested buyer to purchase from them.[10] Third Am. Compl. ¶ 63. It also plausibly alleges that health insurers are gatekeepers controlling patient purchases in the market. According to the Complaint, it is exceedingly rare for a patient to pay for a medical device out **[**25]** of pocket. It describes in detail the difficulties patients face in obtaining outpatient cardiac monitors not covered by their insurers, including the opaque, costly appeals process for coverage denials and that patients are often locked into whatever health plan their employer sponsors. Thus it is fair to infer that individual consumers do not constrain the Blue Plans' ability to control purchases or purchase prices. The Complaint acknowledges that other insurers like Aetna, Medicaid, and Medicare also fund patient purchases of outpatient cardiac monitors. It also describes the prohibitively high entry barriers to the health insurance business. According to these allegations, only established insurers effectively control purchases of outpatient cardiac monitors.

In this context, we conclude the Complaint plausibly states that the Blue Plans compete with other insurers, but not individual consumers, in a national market for **[*340]** the purchase of outpatient cardiac monitors.

2. Anticompetitive Effects

Armed with the proper market definition, the unreasonable-restraint analysis becomes straightforward. The Complaint alleges various "actual anticompetitive effects," which, as noted, could include **[**26]** "reduction of output, increase in price, or deterioration in quality of goods and services." *Deborah Heart & Lung Ctr. v. Virtua Health, Inc., 833 F.3d 399, 403 (3d Cir. 2016)* (quoting *Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 276 (3d Cir. 1999))*.

According to the Complaint, the Blue Plans refuse to pay for telemetry monitors "not as a result of independent decisionmaking, but pursuant to a conspiracy" with each other and the Association. *See West Penn, 627 F.3d at 104*. We have held in similar cases that it is "certainly plausible" for this sort of agreement to "unreasonably restrain[] trade." *Id.* "Such shortchanging poses competitive threats similar to those posed by conspiracies among buyers to fix prices . . . and other restraints that result in artificially depressed payments to suppliers—namely, suboptimal output, reduced quality, allocative inefficiencies, and (given the reductions in output) higher prices for consumers in the long run." *Id.* (citation omitted).

Indeed, these are the anticompetitive effects LifeWatch claims. According to the Complaint, Blue Cross's concerted denial of telemetry monitor coverage has harmed consumers by reducing demand for and output of more effective devices, by interfering with a patient's choice of medical treatment, and by reducing the quality of cardiac monitors in general. LifeWatch alleges the restraint artificially **[**27]** shifts demand from telemetry monitors to lower quality substitutes. It discourages physicians and their patients from choosing the most appropriate treatment. Further, physicians, who typically do not know which insurance a patient has, are allegedly deterred from prescribing telemetry monitors altogether, even if it is the preferred treatment for patients whose insurance would cover it. They simply prescribe a cardiac monitor that will certainly be covered, rather than risk discovering later that the patient cannot afford a telemetry monitor. And because the restraint reduces current and anticipated demand for telemetry monitors in favor of older technology, it hinders research, development, and innovation in the market for cardiac monitors.

The District Court's reasoning that there can be no anticompetitive effects from a restraint that treats all sellers of telemetry monitors equally rests on a telemetry-monitor-only product market that was not alleged. A concerted refusal to deal with all sellers of telemetry monitors, regardless of its equality, may still restrain competition in the alleged market for the purchase of outpatient cardiac monitors.

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[10] We note that LifeWatch allegedly began offering a lowerpriced "Elite" monitor after Highmark's decision to stop covering telemetry monitors in part. However, the Complaint suggests that the Elite product still costs LifeWatch the same amount to make and that it operates at less-than-optimal performance, as it is a standard telemetry monitor with some functions either not provided or disabled. LifeWatch's Elite monitor allegations illustrate that medical device sellers may not be able to change their inventories readily in response to changing buyer preferences. No allegations support a contrary inference.

The District Court also attempted **[**28]** to distinguish this case from *Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*. But with our understanding of the alleged product market, those distinctions disappear. In *McCready*, a plaintiff patient denied coverage for psychological treatment brought a class action against Blue Shield health insurance companies and a group of psychiatrists for allegedly agreeing "to exclude and boycott clinical psychologists from receiving compensation under the Blue Shield plans." *457 U.S. at 470*. In analyzing whether the patient's injury was of a type the antitrust laws were intended to prevent, the Supreme Court described the alleged agreement as an "anticompetitive scheme." *Id. at 483*. **[*341]** "Blue Shield sought to induce its subscribers into selecting psychiatrists over psychologists" by "refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists." *Id. at 467, 483-84*. A subscriber presented with this alleged "Hobson's choice . . . between visiting a psychologist and forfeiting reimbursement, or receiving reimbursement by forgoing treatment by the practitioner of their choice" was injured by "that which makes the defendants' acts unlawful"—*i.e.*, by their anticompetitive effects. *Id. at 484*.

Similarly, LifeWatch **[**29]** claims that the Blue Plans induce doctors and insureds to use other outpatient cardiac monitors instead of telemetry monitors by refusing to fund telemetry monitor prescriptions while funding comparable treatment with other monitors. *See id. at 483-84*. The District Court suggested there can be no "Hobson's choice" as in *McCready* where the Blue plans "do not cover *any* telemetry device supplied by *any* provider." *LifeWatch Servs., 248 F. Supp. 3d at 648*. But the "Hobson's choice" here is not among telemetry monitor brands but among all cardiac monitors—just as in *McCready* the choice was not among psychologists but among all psychotherapy providers.

Because LifeWatch has alleged actual anticompetitive effects in the relevant market, the unreasonable restraint element of the *Section 1* claim is satisfied directly. We thus need not consider whether LifeWatch also satisfied it indirectly by alleging Blue Cross's market power over the purchase of outpatient cardiac monitors. *See Am. Express Co., 138 S. Ct. at 2284*.

C. Antitrust Standing

In the preceding analysis we concluded that LifeWatch pled a *Section 1* violation. However, its claim could nonetheless fail if it lacks antitrust standing to bring suit under the *Clayton Act*.

HN14[] *Sections 4* and *16* of the Clayton Act enable private plaintiffs to sue for treble damages **[**30]** for and to enjoin antitrust injuries. *15 U.S.C. §§ 15*, *26*. While the statutory language of those provisions is broad, and apparently requires only constitutional standing to bring suit,[11] the Supreme Court has held that private plaintiffs must also have "antitrust standing." *See Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 171 (3d Cir. 2015)*. The Court articulated several factors to consider when analyzing whether a plaintiff has such standing. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 538, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. We have summarized these factors as:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were **[*342]** intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce

[11] Standing is a term for "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Black's Law Dictionary* 1625 (10th ed. 2014). Constitutional standing derives from Article III of the U.S. Constitution, which limits the federal court's "judicial power," or jurisdiction, to deciding "cases" or "controversies." *U.S. Const. art. III, § 2*; *see also Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)*. For a federal court to have jurisdiction over any claim, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id. at 1547*.

> speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1165-66 (3d Cir. 1993).

The parties here dispute only whether LifeWatch alleged the second factor, antitrust injury, which "is a necessary but insufficient condition of antitrust **[**31]** standing." *Hanover* *3201 Realty, 806 F.3d at 171*. It seeks to ensure that the antitrust laws are enforced to protect competition and not individual competitors. *Brunswick Corp. v. Pueblo Bowl—O—Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. ***HN15***[] An antitrust injury (1) "flows from that which makes [the] defendants' acts unlawful" and (2) "is an injury of the type the antitrust laws were intended to prevent." *West Penn, 627 F.3d at 101* (quoting *Brunswick Corp., 429 U.S. at 489*).

To analyze the first prong of antitrust injury, "we must examine the causal connection between the purportedly unlawful conduct and the injury." *City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 265 (3d Cir. 1998)*. Blue Cross argues that intervening factors, such as the Plan's independent ability to decline coverage of telemetry monitors, a doctor's choice not to prescribe telemetry monitors, and a patient's desire for alternative treatments, "'cut[] the causal chain' and convert any claim of causation into 'a speculative exercise.'" Appellee Br. 32 (quoting *City of Pittsburgh, 147 F.3d at 267-68*).

We find this causation argument unpersuasive. The Complaint asserts that the Plans' near universal decision to deny coverage of telemetry monitors would not occur without enforcement of the Uniformity Rule—as evidenced by other insurers' coverage, independent arbitrators' decisions that they should be covered, and scientific studies finding them effective **[**32]** and in some circumstances preferable. It also alleges that doctors are deterred from prescribing telemetry monitors because of the Blue Plans' decision not to cover them and the hassle caused by not knowing whether a patient's insurer will deny coverage. And it alleges that the Uniformity Rule insulates the Plans from demand for telemetry treatment. This sufficiently pleads a causal link between LifeWatch's injury—lost profits from depressed telemetry monitor sales—and the Plans' denial of telemetry monitor coverage due to the Uniformity Rule. *See* *McCready, 457 U.S. at 480-81, 483* (noting providers, in addition to consumers, of a medical treatment would have a claim for "Blue Shield's selective refusal to reimburse" (internal quotation marks omitted)); *cf.* *City of Pittsburgh, 147 F.3d at 267* (finding no causal link where plaintiff's injury was due to regulations preventing competition between defendant utility companies, not the defendants' proposed merger).

Likewise, LifeWatch's alleged injury due to anticompetitive effects in the outpatient cardiac monitor market is "of the type" the antitrust laws were meant to prevent. ***HN16***[] "As a general matter, the class of plaintiffs capable of satisfying the antitrust-injury requirement is limited to consumers and **[**33]** competitors in the restrained market . . . and to those whose injuries are the means by which the defendants seek to achieve their anticompetitive ends." *West Penn, 627 F.3d at 102* (internal citations omitted). Denying coverage for LifeWatch's **[*343]** telemetry device was the means by which the Blue Plans and the Association depressed demand for telemetry monitors in the outpatient cardiac monitor market. Its ability to compete as a seller of outpatient cardiac monitors has been allegedly hindered by the Uniformity Rule. *See* *McCready, 457 U.S. at 483-84* (noting where insureds "were compelled to choose" between a covered treatment provider and one for whom Blue Shield denied coverage, the denied treatment provider also had antitrust injury). Its injury "reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *West Penn, 627 F.3d at 101* (quoting *Brunswick Corp., 429 U.S. at 489*).

Blue Cross counters that no competition-reducing conduct was alleged because all telemetry monitor providers are treated equally; therefore LifeWatch's injury is not "of the type" the antitrust laws seek to prevent. Of course, this only reiterates the District Court's implicit product market analysis with which we have already disagreed.

In sum, LifeWatch sufficiently **[**34]** pled both elements of antitrust injury, and its antitrust standing is not otherwise in dispute.

D. *McCarran-Ferguson Act*

Finally, LifeWatch's claim can only survive Blue Cross's motion to dismiss if the *McCarran-Ferguson Act*, *15 U.S.C. §§ 1011-1015*, does not exempt Blue Cross from antitrust liability. As Blue Cross acknowledged at oral argument, ***HN17***[] a defendant bears the burden of establishing its immunity under that Act. *See* *Doctors, Inc. v. Blue Cross of Greater Phila., 490 F.2d 48, 50 n.2 (3d Cir. 1973)* ("The motions to dismiss were filed before either defendant submitted an answer. As a result, the essential facts necessary to support this claim of immunity have not as yet been pleaded."); *Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 216, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979)* (analyzing the Act's exemption according to what the defendants demonstrated).

On the heels of a Supreme Court ruling that "insurance transactions were subject to federal regulation under the *Commerce Clause*, and that the antitrust laws in particular, were applicable to them," Congress passed the *McCarran-Ferguson Act* to clarify that regulation of the "business of insurance" should be relegated to the states. *Sec. & Exch. Comm'n v. Nat'l Sec., Inc., 393 U.S. 453, 458, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969)*. However, ***HN18***[] the Act provides that the *Sherman Act* still applies to "the business of insurance to the extent that such business is not regulated by State Law" and to "agreement[s] to boycott, coerce, or intimidate." **[**35]** *15 U.S.C. §§ 1012(b)*, *1013(b)*. Therefore, for Blue Cross to be exempted from liability in this case, its challenged conduct "(1) must constitute the business of insurance, (2) must be regulated by state law, and (3) must not amount to a boycott, coercion, or intimidation." *Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 124, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982)*. The parties agree that Blue Cross has satisfied the third element but dispute whether it can satisfy the first two.

Because it dismissed on other grounds, the District Court did not address whether Blue Cross has shown it is exempt. We do not decide the issue and leave it for the Court's consideration on remand.

III. Conclusion

LifeWatch plausibly pled an agreement between the Blue Plans and the Association that unreasonably restrains trade in the national market for outpatient cardiac monitors. It pled that its injury stems from **[*344]** the competitive harms caused by this agreement. Thus LifeWatch has stated a Sherman Act *Section 1* claim.

Blue Cross nonetheless may be exempt from liability under the *McCarran-Ferguson Act*, a question the District Court did not reach in its opinion. We therefore reverse its dismissal and remand for it to consider Blue Cross's *McCarran-Ferguson Act* argument.

End of Document

Card v. Ralph Lauren Corp.

United States District Court for the Northern District of California

August 29, 2018, Decided; August 29, 2018, Filed

Case No.18-cv-02553-JSC

Reporter
2018 U.S. Dist. LEXIS 147609 *; 2018-2 Trade Cas. (CCH) P80,497; 2018 WL 4108082

VICTORIA CARD, Plaintiff, v. RALPH LAUREN CORPORATION, et al., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Dismissed by, in part *Card v. Ralph Lauren Corp., 2018 U.S. Dist. LEXIS 204473, 2018 WL 6308192 (N.D. Cal., Dec. 3, 2018)*

Dismissed by, in part, Sanctions disallowed by *Card v. Ralph Lauren Corp., 2020 U.S. Dist. LEXIS 9816, 2020 WL 353464 (N.D. Cal., Jan. 21, 2020)*

Motion denied by, Without prejudice *Card v. Ralph Lauren Corp., 2021 U.S. Dist. LEXIS 208421, 2021 WL 4923362 (N.D. Cal., Aug. 19, 2021)*

Summary judgment granted by, Motion granted by *Card v. Ralph Lauren Corp., 2021 U.S. Dist. LEXIS 184664, 2021 WL 4427433 (N.D. Cal., Sept. 27, 2021)*

Later proceeding at *Card v. Ralph Lauren Corp., 2022 U.S. App. LEXIS 28513 (9th Cir. Cal., Oct. 13, 2022)*

Core Terms

allegations, futile, motion to dismiss, good faith, motion to amend, leave to amend, quotation, unfair, amended complaint, marks, breach of implied contract, fair dealing, covenant, products, intentional infliction of emotional distress, propose an amendment, misrepresentation, parties, price discrimination, factual allegations, fiduciary duty, Unruh Act, discounts, promises, amend, MOOT, contract claim, give rise, competitors, outrageous

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For Ralph Lauren Corporation, Ralph Lauren Company West LLC, EJ Victor, Inc., Defendants: Lien Hoang Payne, LEAD ATTORNEY, Neil A. Friedman Popovic, Sheppard Mullin Richter & Hampton LLP, A Limited Liability Partnership, Including Professional Corp, San Francisco, CA; Matthew William Turetzky, Sheppard Mullin Richter Hampton LLP, San Francisco, CA.

Judges: JACQUELINE SCOTT CORLEY, United States Magistrate Judge.

Opinion by: JACQUELINE SCOTT CORLEY

Opinion

ORDER RE: MOTION TO DISMISS; MOTION TO AMEND; AND ADMINISTRATION MOTION FOR RELIEF FROM SCHEDULING ORDER

Re: Dkt. Nos. 10, 15, 18

Plaintiff Victoria Card filed this civil action in San Francisco Superior Court alleging various claims arising out of a business arrangement between Plaintiff and Defendants the Ralph Lauren Corporation, Ralph Lauren Company West, LLC, and E.J Victor Inc. Defendants thereafter removed the action to federal court based on diversity of citizenship and federal question jurisdiction, *28 U.S.C. §§ 1331*, *1332*. (Dkt. No. 1.) Defendants then moved to dismiss the claim for failure to state a claim. (Dkt. No. 10.) Plaintiff failed to timely file an opposition or statement **[*2]** of non-opposition, but the parties subsequently agreed to a new briefing schedule. (Dkt. No. 13.) Plaintiff again missed the deadline to file her opposition, and instead, filed a motion to amend her complaint three days after her opposition brief was due. (Dkt. No. 15.) Defendants' motion to dismiss, Plaintiff's motion to amend, and Plaintiff's motion for administrative relief from the case management schedule are now pending before the Court. Having considered the parties' briefs, and their joint case management conference statement, the Court concludes that oral argument is unnecessary. *See* *N.D. Cal. Civ. L.R. 7-1(b)*. For the reasons explained below, the Court GRANTS IN PART and DENIES IN PART Plaintiff's motion for leave to amend, and DENIES Defendants' motion to dismiss and Plaintiff's motion for administrative relief as MOOT.[1]

BACKGROUND

A. Allegations of the Complaint

The Court briefly summarizes the allegations of the complaint. While Plaintiff's proposed First Amended Complaint added several pages of additional factual allegations, the general facts as alleged between the two complaints are consistent. The citations here are to the proposed First Amended Complaint. (Dkt. No. 16-2.)

Plaintiff **[*3]** Victoria Card owned a business in San Francisco from 2006 through 2015 called Pacific Heights Place. (*Id.* at ¶ 2.) Prior to that, Plaintiff owned a business from 2001 through 2005 called Bluestone Main. (*Id.*) Both businesses sold home furnishing products such as furniture, lighting, fabrics and accessories. (*Id.* at ¶ 1.) From 2001 to 2015, Plaintiff had a "contractual and partnership relationship" with the Ralph Lauren Corporation to act as an approved dealer of Ralph Lauren Home products. (*Id.* at ¶ 8.) In 2015, Ralph Lauren terminated Plaintiff's account "thereby killing Plaintiff's business, which she had built up over 14 years, thereby causing her great economic and non-economic damages." (*Id.*) This termination was preceded by a series of interactions between Plaintiff and various representatives of Ralph Lauren as well as entities associated with the Ralph Lauren Corporation including E.J. Victor, which manufactures Ralph Lauren's products. (*Id.* at ¶¶ 5, 20-83.)

For example, in 2011, Plaintiff became aware that Defendants were offering discounts to other vendors such as One Kings Lane that they was not offering to her which led to a loss of business in 2012. (*Id.* at ¶¶ 24-28.) When **[*4]** Plaintiff raised this issue, Defendants agreed to allow Plaintiff to buy product at the same price it was offering to One Kings Lane. (*Id.* at ¶ 29.) However, in November 2012, Plaintiff discovered that Defendants were not honoring this agreement. (*Id.* at ¶ 35.) Around this same time, E.J. Victor imposed a new requirement that Plaintiff pre-pay 50 percent of any order. (*Id.* at ¶ 34.)

Then, in April 2013, Plaintiff received an email from Ralph Lauren advising her that she was no longer allowed to sell Ralph Lauren products on her website outside of "authorized distribution channels" and imposing other restrictions. (*Id.* at ¶ 37.) Six months later, Plaintiff was told by a representative from a lighting company with whom she did business that he had heard her account with Ralph Lauren Home had been closed and that he was going to

[1] Both parties have consented to the jurisdiction of a magistrate judge pursuant to *28 U.S.C. § 636(c)*. (Dkt. Nos. 6 & 9.)

close her account with the lighting company as a result. (*Id.* at ¶¶ 41-42.) Late 2013, Plaintiff received a call from William Li of Ralph Lauren during which he raised his voice and threatened to close her account three different times. (*Id.* at ¶¶ 47-48.) Plaintiff then contacted Ian Sears, the President of Ralph Lauren Home, to follow up on her call with Mr. Li. **[*5]** (*Id.* at ¶53.) Mr. Sears suggested that Ralph Lauren had the right to cancel her account because she had not upheld the high standard of quality and prestige associated with Ralph Lauren products and her website continued to contain impermissible information regarding Ralph Lauren products. (*Id.* at ¶ 54.) In response, Plaintiff contacted David Lauren and a few days later Plaintiff's account was "re-opened" pending reapplication. (*Id.* at ¶¶ 55-56.) Although Plaintiff completed the reapplication, she questioned whether any other retailer had been put through such an onerous process. (*Id.* at ¶¶ 60-61.)

A year later, in November 2014, Plaintiff published her new revised website "to great praise by the Lauren Defendant partners." (*Id.* at ¶ 67.) However, Defendants did not authorize Plaintiff to use the name "Ralph Lauren" in advertising, which "began swiftly to affect Plaintiff's business towards a standstill." (*Id.* at ¶¶ 70-73.)

In May of 2015, Plaintiff received an email from Nicholas Manville, Ralph Lauren Home's Vice President of Global Business Development and Merchandising, informing her that her account was closed because they had re-evaluated their wholesale and e-commerce network **[*6]** and decided to make changes to their distribution. (*Id.* at ¶ 76.)

B. Procedural Background

Two years later, in May 2017, Plaintiff filed suit in San Francisco Superior Court. (Dkt. No. 1-1.) Plaintiff alleged 11 claims for relief against Defendants, the Ralph Lauren Corporation, Ralph Lauren Company West, LLC, and E.J Victor Inc., including claims for: (1) breach of implied contract; (2) promises without intent to perform; (3) intentional misrepresentation; (4) breach of the covenant of good faith and fair dealing; (5) violation of fiduciary obligations; (6) intentional wrongdoing in violation of *California Civil Code § 1708*; (7) intentional infliction of emotional distress; (8) discrimination in violation of the Unruh Act; (9) violation of *California Business and Professions Code § 17200*; (10) violation of the Robinson-Patman Act; and (11) RICO.

Defendants were not served until March of 2018 at which point they removed this action to federal court based on diversity and federal question jurisdiction. (Dkt. No. 1.) Upon removal, Defendants moved to dismiss the complaint for failure to state a claim. (Dkt. No. 10.) Plaintiff filed to file a timely opposition, but the parties stipulated to an amended briefing schedule. (Dkt. No 13.) Plaintiff again failed to file **[*7]** her opposition, and instead, three days after her opposition was due she filed a motion to amend the complaint. (Dkt. No. 15.) Plaintiff's amended complaint pleads 11 claims for relief including: (1) breach of implied contract; (2) promises without intent to perform; (3) intentional misrepresentation; (4) breach of the covenant of good faith and fair dealing; (5) violation of fiduciary obligations; (6) interference with prospective advantage; (7) intentional infliction of emotional distress; (8) violation of the Robinson-Patman Act; (9) RICO; (10) discrimination in violation of the Unruh Act; and (11) violation of *California Business and Professions Code § 17200*.

The motion to amend is fully briefed. Plaintiff never filed an opposition to the motion to dismiss, but did file an ex parte request for leave to file a sur-reply in opposition after Defendants filed their reply. (Dkt. No. 22.) This ex parte request is DENIED as Plaintiff had ample opportunity to file an opposition to the motion to dismiss. Around the same time she filed the ex parte motion, Plaintiff filed an administrative motion for relief from the scheduling order. (Dkt. No. 18.)

DISCUSSION

There are three motions currently pending: (1) Defendants' motion to dismiss; (2) **[*8]** Plaintiff's motion to amend the complaint; and (3) Plaintiff's administrative motion for relief from the case scheduling order. The administrative motion is now moot as the parties have agreed to proceed with initial disclosures and that discovery will be stayed pending disposition of the pending motions. (Dkt. No. 25.) Of the two remaining motions, the Court first addresses the motion to amend because, if that motion is granted, then the motion to dismiss will be moot.

A. Plaintiff's Motion to Amend

Pursuant to *Federal Rule of Civil Procedure 15(a)*, once a responsive pleading has been filed, "a party may amend its pleading only with the opposing party's written consent or the court's leave." *Fed. R. Civ. P. 15(a)(2)*. The court should "freely give leave [to amend] when justice so requires," *Fed. R. Civ. P. 15(a)*, and "[t]his policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003)*. In the absence of an "apparent reason," such as undue delay, bad faith, dilatory motive, prejudice to defendants, futility of the amendments, or repeated failure to cure deficiencies in the complaint by prior amendment, it is an abuse of discretion for a district court to refuse to grant leave to amend a complaint. *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; *Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999)*. These factors do not "merit equal weight," and "it is the consideration of **[*9]** prejudice to the opposing party that carries the greatest weight." *Eminence Capital, 316 F.3d at 1052*. "The party opposing leave to amend bears the burden of showing prejudice[,]" *Serpa v. SBC Telecomm'cns, Inc., 318 F. Supp. 2d 865, 870 (N.D. Cal. 2004)*, and generally of demonstrating why leave to amend should not be granted, *Genentech, Inc. v. Abbott Labs., 127 F.R.D. 529, 530-31 (N.D. Cal. 1989)*.

Here, there is no dispute that four of the five factors—undue delay, bad faith, prejudice, and previous amendment—weigh in favor of amendment. While Plaintiff delayed in filing her amended complaint until after the time for an amendment as of right, there is no suggestion that the delay was in bad faith. Rather, Plaintiff contends that upon review of the motion to dismiss, she decided that she should amend her complaint to add additional details bolstering her claims, but that it took longer than expected. Likewise, given that the case is in its early stages, any prejudice to Defendants is minimal, although the Court notes that Plaintiff's repeated failure to timely comply with deadlines has needlessly compounded motion practice on these matters. Finally, Plaintiff has not previously amended her complaint.

Defendants nonetheless insist that leave to amend would be futile because Plaintiff's proposed amended complaint fails to cure many of the original complaint's defects. **[*10]** The Court agrees in part. "The proper test to be applied when determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under *Rule 12(b)(6)*." *Nordyke v. King, 644 F.3d 776, 788 n.12 (9th Cir. 2011)*, on reh'g en banc, *681 F.3d 1041 (9th Cir. 2012)* (internal citation and quotation marks omitted). Thus, an amended "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal citation and quotation marks omitted). Futile amendments, that is, proposed amendments to a complaint that do not state a claim, should not be permitted. *DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 188 (9th Cir. 1987)*. "Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995)*. The Court addresses the futility of amendment of each of Plaintiff's claims separately.

1) First Claim: Breach of Implied Contract

"A cause of action for breach of implied contract has the same elements as does a cause of action for breach of contract, except that the promise is not expressed in words but is implied from the promisor's conduct." *Yari v. Producers Guild of Am., Inc., 161 Cal. App. 4th 172, 182, 73 Cal. Rptr. 3d 803 (2008)*. The "essential elements" of a breach of contract claim are: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, **[*11]** and (4) the resulting damages to plaintiff." *Reichert v. Gen. Ins. Co. of Am., 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377 (1968)*. Plaintiff alleges that Defendant Victor agreed to sell excess product to her and notify her of discounts to others, that she accepted the agreement and bought millions of dollars of products, that both sides performed under the contract for 15 years, and that Defendants breached the agreement by imposing "uniquely burdensome requirements and unique competitive disadvantages...without legal reason or reasonable justification," by destroying her business, and by failing to honor promises to continue to do business with Plaintiff. (Dkt. No. 16-2 at ¶¶ 86-88.) This is sufficient to plausibly state a claim based on breach of implied contract. Plaintiff is granted leave to amend her implied breach of contract claim.

2) Second and Third Claims: Promises without Intent to Perform and Intentional Misrepresentation

A claim of deceit by false promise arises under *Civil Code section 1709* which provides that "one is liable for fraudulent deceit if he 'deceives another with intent to induce him to alter his position to his injury or risk....'" *Beckwith v. Dahl, 205 Cal. App. 4th 1039, 1059, 141 Cal. Rptr. 3d 142 (2012)* (quoting *Cal. Civ. Code § 1709*). "The essential elements of a count for intentional misrepresentation are (1) a misrepresentation, (2) knowledge **[*12]** of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage." *Chapman v. Skype Inc., 220 Cal. App. 4th 217, 230-31, 162 Cal. Rptr. 3d 864 (2013)*. Fraud claims are subject to the heightened pleading standard of *Rule 9(b)*, which requires a plaintiff to "state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. A plaintiff must include the "who, what, when, where, and how" of the fraud. *Vess v. Ciba—Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)*. Ultimately, "[a] pleading is sufficient under *Rule 9(b)* if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." *Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989)*.

Plaintiff alleges that Defendants falsely represented that "if she continued to produce as she had always done" they "would support her" with the intent that she rely on the representations which she did to her detriment. (Dkt. No. 16-2 at ¶¶ 91-101.) While these allegations are sufficient to give rise to a breach of an implied contract claim, they are not sufficient under *Rule 9(b)* to give rise to a fraud claim. Plaintiff must do more than recite the elements of a claim, she must identify when the misrepresentation occurred, what the actual misrepresentation was, and who made it, as well as that it was knowingly false and made with the intent to deceive. **[*13]** Because Plaintiff's amended complaint fails to do so, the proposed amendment is futile.

3) Fourth Claim: Breach of the Covenant of Good Faith and Fair Dealing

Every contract possesses an implied covenant of good faith and fair dealing in which "neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Foley v. Interactive Data Corp., 47 Cal. 3d 654, 684, 254 Cal. Rptr. 211, 765 P.2d 373 (1988)*. When a plaintiff brings both a breach of contract and a breach of the implied covenant claim, the latter will be superfluous and subject to dismissal if both claims cite the same underlying breach. *See* *Landucci v. State Farm Ins. Co., 65 F. Supp. 3d 694, 716 (N.D. Cal. 2014)* (citation omitted); *Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1395, 272 Cal. Rptr. 387 (1990)*. A plaintiff may, however, bring both claims if they are based on two different breaches. *Id.; see also* *Daly v. United Healthcare Ins. Co., No. 10-CV-03032-LHK, 2010 U.S. Dist. LEXIS 116048, 2010 WL 4510911, at *4 (N.D. Cal. Nov. 1, 2010)*.

Plaintiff's breach of the covenant of good faith and fair dealing claim is based on the same allegations as the breach of contract allegations, as well as allegations that Defendants treated Plaintiff differently from other retailers including by placing additional requirements on Plaintiff, blocking the use of the Ralph Lauren name in Plaintiff's online advertising, emotionally abusive treatment, and threatening to take false action on false charges. While **[*14]** some of these additional allegations may overlap with Plaintiff's breach of contract claim (for example, to the extent that the parties' alleged implied contract allowed Plaintiff to advertise that she was a Ralph Lauren retailer, any breach of that agreement would be actionable in the context of the breach of contract claim), it is plausible that some of the allegations arise out a separate agreement that the parties should conduct themselves in good faith. "[I]n the context of the insurance contract, it has been held that the insurer's responsibility to act fairly and in good faith with respect to the handling of the insured's claim is not the requirement mandated by the terms of the policy itself—to defend, settle, or pay. It is the obligation ... under which the insurer must act fairly and in good faith in discharging its contractual responsibilities." *Careau, 222 Cal. App. 3d at 1394-95* (internal citation and quotation marks omitted). Here, taking the allegations as true—as the Court must at this stage—Plaintiff's allegation that

Defendants placed requirements on her that they did not on other retailers, and that these requirements were punitive and had the effect of destroying Plaintiff's business, is sufficient **[*15]** to allege "a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." *Id. at 1395*.

Plaintiff's motion to amend this claim is therefore granted.

4) Fifth Claim: Violation of Fiduciary Obligations

The elements of a claim for a breach of fiduciary duty are: (1) existence of a fiduciary duty, (2) breach of the fiduciary duty, and (3) damages proximately caused by the breach. *See* *Tribeca Cos., LLC v. First Am. Title, 239 Cal. App. 4th 1088, 1114, 192 Cal. Rptr. 3d 354 (2015)*. Only certain legal relationships trigger automatic fiduciary duties. *See* *Gilman v. Dalby, 176 Cal. App. 4th 606, 614, 98 Cal. Rptr. 3d 231 (2009)*. For example, joint ventures, partnerships and agency relationships. *City of Hope Nat'l Med. Ctr. v. Genentech, Inc., 43 Cal. 4th 375, 386, 75 Cal. Rptr. 3d 333, 181 P.3d 142 (2008)*. A plaintiff cannot generally "turn an ordinary breach of contract claim into a breach of fiduciary duty." *Gilman, 176 Cal. App. 4th at 614* (citing *Wolf v. Superior Court, 107 Cal. App. 4th 25, 30, 130 Cal. Rptr. 2d 860 (2003))*. Fiduciary duties attach to a contractual relationship only when the relationship requires that the fiduciary act with undivided loyalty on behalf of the beneficiary and never profit or advantage from the parties' dealings. *See* *Wolf, 107 Cal. App. 4th at 30*.

Although Plaintiff alleges that the parties "expressly entered into a partnership relationship with Plaintiff," she does not allege that Defendants "knowingly undert[ook] to act on behalf and **[*16]** for the benefit of another, or [] enter[ed] into a relationship which imposes that undertaking as a matter of law." *Genentech, 43 Cal. 4th at 386* (internal citation and quotation marks omitted). (Dkt. No. 16-2 at ¶ 108.) Plaintiff has thus not alleged facts which plausibly suggest that the parties entered into a partnership which gave rise to fiduciary obligations beyond the contractual relationship alleged here. Accordingly, allowing the proposed amendment of this claim would be futile.

5) Sixth Claim: Interference with Prospective Advantage

The elements of a claim for intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's intentional acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's acts." *Reeves v. Hanlon, 33 Cal. 4th 1140, 1152 n.6, 17 Cal. Rptr. 3d 289, 95 P.3d 513 (2004)* (citation omitted). In addition, "a defendant's conduct must be 'wrongful by some legal measure other than the fact of interference itself.'" *MJC Am., Ltd. v. Gree Elec. Appliances, Inc. of Zhuhai, 2014 WL 12600963, at *4 (C.D. Cal. Jan. 21, 2014)* (quoting *Della Penna v. Toyota Motor Sales, USA, Inc., 11 Cal. 4th 376, 393, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1995))*. "[A]n act is independently wrongful if it **[*17]** is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*.

Plaintiff alleges that the same conduct which gives rise to her breach of implied covenant of good faith and fair dealing gives rise to an action for intentional interference with prospective advantage because Defendants knew their conduct would "interfere with the economic relationship that existed between PLAINTIFF and the clientele she had built up over the course of approximately 15 years." (Dkt. No. 16-2 at ¶ 115.) These allegations are not sufficiently specific to state a claim because Plaintiff must identify a specific relationship with which Defendants have allegedly interfered. "Without an existing relationship with an identifiable buyer, [plaintiff]'s expectation of a future sale was 'at most a hope for an economic relationship and a desire for future benefit.'" *Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc., 2 Cal. 5th 505, 516, 213 Cal. Rptr. 3d 568, 388 P.3d 800 (2017)* (quoting *Westside Ctr. Assocs. v. Safeway Stores 23, Inc., 42 Cal. App. 4th 507, 527, 49 Cal. Rptr. 2d 793 (1996))*. Amendment of this claim based on the presently alleged facts would be futile.

6) Seventh Claim: Intentional Infliction of Emotional Distress

The elements of a claim for intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant **[*18]** with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Corales v. Bennett, 567 F.3d 554, 571 (9th Cir. 2009)* (internal citation omitted). Conduct is outrageous if it is so extreme as to exceed all bounds of that usually tolerated in a civilized community. *Id. at 571*.

Plaintiff alleges that Defendants engaged in a conspiracy "intended to intimidate and terrify PLAINTIFF" that was "extreme and outrageous." (Dkt. No. 16-2 at ¶ 120.) This is not sufficient to state a claim for intentional infliction of emotional distress. "Liability for intentional infliction of emotional distress does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Hughes v. Pair, 46 Cal. 4th 1035, 1051, 95 Cal. Rptr. 3d 636, 209 P.3d 963 (2009)* (internal citation and quotation marks omitted) (concluding that threats that, unless plaintiff granted the defendant sexual favors, he would use his authority as a trustee of the trust set up for plaintiff's son to deny her requests for funds, "fall far short of conduct that is so outrageous" that it exceed[s] all bounds of that usually tolerated **[*19]** in a civilized community.") (internal citation and quotation marks omitted). Plaintiff has not identified the statements which give rise to her intentional infliction of emotional distress claim beyond describing them as containing "hatefulness, viciousness, animosity, and malice." (Dkt. No. 16-2 at ¶ 48.) To state a claim, Plaintiff must identify conduct that "exceeds all bounds of that usually tolerated in a civilized community." *Hughes, 46 Cal.4th at 1050-51*. Because she has failed to do so, the proposed amendment of this claim is futile.[2]

7) Eighth Claim: Violation of the Robinson-Patman Act

The Robinson—Patman Act of 1936, *15 U.S.C. § 13*, prohibits price discrimination that is likely to have an anticompetitive effect. In essence, this Act makes it unlawful for a seller to discriminate in price between purchasers of similar commodities when the price discrimination results in competitive harm. *See, e.g., Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 584 (2d Cir.1987)*. Accordingly, to state a claim under the Robinson—Patman Act, a plaintiff must allege: (1) two or more contemporaneous sales by the same seller; (2) at different prices; (3) of commodities of like grade and quality; (4) the discrimination had the requisite anticompetitive effect; and (5) the discrimination caused injury **[*20]** to the plaintiff. *Rutledge v. Elec. Hose & Rubber Co., 511 F.2d 668, 677 (9th Cir.1975)*.

The Robinson—Patman Act "does not ban all price differences charged to different purchasers of commodities of like grade and quality[]; rather, the Act proscribes price discrimination only to the extent that it threatens to injure competition." *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006)* (internal citation and quotation marks omitted). Secondary line cases such as this "involve price discrimination that injures competition among the discriminating seller's customers (here, [Ralph Lauren

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[2] Defendants also contend that this claim is barred by the statute of limitations. The statute of limitations for the intentional infliction of emotional distress is two years. *See* *Cal. Civ. Proc. Code § 335.1* (identifying two-year statute of limitations); *Pugliese v. Superior Court, 146 Cal. App. 4th 1444, 1450, 53 Cal. Rptr. 3d 681 (2007)*("Causes of action for assault, battery and intentional infliction of emotional distress are governed by the two-year statute of limitations set forth in Code of Civil Procedure *section 335.1*."). Because the complaint was filed May 8, 2017, the offensive phone call—which occurred in November 2013—cannot be the basis for the intentional infliction of emotional distress claim. (Dkt. No. 16-2 at ¶ 47). However, Plaintiff contends that some of the conduct of which she complains occurred within two years of the filing of the complaint. (Dkt. No. 30 at 13:8-9.) The Court is uncertain how this can be the case given that the complaint alleges that Ralph Lauren terminated its relationship with Plaintiff on May 8, 2015—exactly two years prior to the filing of the complaint. (*Id.* at ¶ 76.) Plaintiff will nonetheless be granted leave to amend this claim to the extent that she has a good faith basis to allege outrageous conduct that occurred within the two-year statute of limitations.

wholesalers]); cases in this category typically refer to 'favored' and 'disfavored' purchasers." *Id.* "A hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser." *Id. at 177*. Alternatively, plaintiff may allege that a favored competitor received "a significant price reduction over a substantial period of time" to support a permissible inference of competitive injury. *Id.* (internal citation and quotation marks omitted).

Plaintiff alleges that Defendants "lessened competition by greatly disadvantaging and thereby injuring a particularly successful competitor," that Defendant gave "unfair discounts" to third party competitors "which directly **[*21]** cost PLAINTIFF sales and growth" because customers saw the lower prices offered by Plaintiff's competitors. (Dkt. No. 16-2 at ¶ 127.) As pled, Plaintiff's claim lacks the specificity necessary to plead a claim under the Robinson—Patman Act. Other than Plaintiff's vague allegation that Defendants gave unfair discounts to her competitors, Plaintiff has not identified the discounts, that they were for the same or comparable products, that they were contemporaneous, or that they had an anti-competitive effect. Plaintiff cannot simply recite the elements of a claim, but rather, must provide sufficient factual allegations so that Defendants have fair notice of the claims against them. *See* *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (holding that while a complaint "does not need detailed factual allegations, ... a plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.... Factual allegations must be enough to raise a right to relief above the speculative level."); *see also* *GVF Cannery, Inc. v. California Tomato Growers Ass'n, Inc., 511 F. Supp. 711, 717 (N.D. Cal. 1981)* ("bare, conclusory allegation does not set forth a basis for relief under the Act.") This is particularly true for a **[*22]** Robinson—Patman Act claim because the Act "proscribes price discrimination only to the extent that it threatens to injure competition." *Volvo, 546 U.S. at 176*. Accordingly, the proposed amendment of this claim is futile.

8) Ninth Claim: RICO

The civil RICO Act makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *18 U.S.C. § 1962(c)*. To state a civil RICO claim, a plaintiff must allege facts showing: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as predicate acts) (5) causing injury to plaintiff's business or property." *Living Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005)* (internal quotation marks and citation omitted).

Plaintiff's RICO claim appears predicated on her allegations that Defendants gave unfair discounts to other retailers including One Kings Land and Bloomingdales and Defendants "whipsaw[ed]" Plaintiff with contradictory communications. (Dkt. No. 16-2 at pp 132.) Plaintiff lists a series of communication which she alleges constitute the predicate **[*23]** acts. (*Id.*) Plaintiff's allegations fail to state a RICO claim. In particular, Plaintiff has failed to allege the members of the enterprise or the racketeering activity. While she alleges a pattern of racketeering activity under *18 U.S.C. § 1961(5)*, based on violations of *18 U.S.C. § 1341* (mail fraud) and *18 U.S.C. § 1343* (wire fraud), she has failed to allege facts that support a plausible inference that Defendants' conduct violates these statutes; instead, Plaintiff has merely quoted the statutes. To state a claim, Plaintiff must plead conduct which would constitute mail or wire fraud, or another offense specified in *18 U.S.C. § 1961(1)*.

The Court thus concludes that leave to amend Plaintiff's RICO claim based on the present allegations would be futile.

9) Tenth Claim: Discrimination

Plaintiff's tenth claim for relief alleges that Defendants violated the Unruh Civil Rights Act under *California Civil Code §§ 51*, *51.5*. *California Civil Code § 51* provides, in general terms, that all persons are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. *Id.; Sprewell v. Golden State Warriors, 266 F.3d 979, 989 (9th Cir.)*, opinion amended on denial of reh'g, *275 F.3d 1187 (9th Cir. 2001)*. *California Civil Code § 51.5* prohibits a business establishment from discriminating against any person because of their sex. *Id.* To establish a claim for **[*24]** violation of the Unruh Act, with an exception not relevant to the facts of this lawsuit, a plaintiff must prove intentional discrimination by a business establishment. *See Cohn v. Corinthian Colleges, Inc., 169 Cal. App. 4th 523, 528, 86 Cal. Rptr. 3d 401 (2008)* ("The Unruh Act requires intentional discrimination to protect against "all unreasonable, arbitrary, or invidious discrimination.").

Plaintiff alleges that Defendants discriminated against her on the basis of her gender and ethnicity by engaging in "extraordinarily harsh and rude direct communications," making "baseless complaints," and favoring other vendors such that "the only conclusion that can reasonably be drawn is that the treatment...could only be explained by animus toward her immutable characteristics of gender, and apparent nationality and sexual orientation." (Dkt. No. 16-2 at ¶ 144.) These allegations are insufficient to state a claim for violation of the Unruh Act. Plaintiff must "state in [her] complaint nonconclusory allegations setting forth evidence of unlawful intent." *Grier v. Brown, 230 F. Supp. 2d 1108, 1120 (N.D. Cal. 2002)* (internal citations and quotations omitted) (dismissing Unruh Act claims where plaintiff pled that defendant "discriminated against them" and "intended to deprive them" of their civil rights, and noting that the Unruh Act and the **[*25]** *Equal Protection Clause* require the same showing of discriminatory intent). Plaintiff's FAC does not include factual allegations that plausibly suggest such intent.

Accordingly, leave to amend Plaintiff's Unruh Act claim based on the present allegations would be futile.[3]

10) Eleventh Claim: *California Business and Professions Code § 17200*

Plaintiff's eleventh claim for relief is for violation of California's Unfair Competition Law, Business and Professions Code *§ 17200 et seq.* ("UCL"). To state a claim under the UCL, a plaintiff must allege an "unlawful, unfair, or fraudulent business act or practice" or "unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. To succeed on a UCL claim under any of these theories, a plaintiff must establish that the defendant engaged in one of the practices that the statute prohibits and that, as a result of that conduct, he or she suffered actual injury. *Marolda v. Symantec Corp., 672 F.Supp.2d 992, 1003 (N.D. Cal. 2009)*.

Plaintiff alleges that Defendants violated the UCL through "the unfair business practices alleged hereinabove, including but not limited to the conduct set forth in ¶s 24, 26. 28, 30-35, 37-44, 36, 52, 56-57, 60-62, 64 and 69-78." (Dkt. No. 16-2 at ¶ 151.) Plaintiff's general reference to 21-pages of factual allegations is insufficient to state a claim **[*26]** under the UCL. "[W]ith respect to business-competitor cases, to state a claim under the UCL's 'unfair' prong the alleged unfairness must 'be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.'" *Levitt v. Yelp! Inc., 765 F.3d 1123, 1136 (9th Cir. 2014)* (quoting *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 186-87, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (an act or practice is "unfair" under the UCL only if the conduct "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."). Plaintiff has not tethered her UCL claim to a violation of antitrust laws. To the extent that Plaintiff seeks to tether it to her price discrimination or RICO claims, because the Court has concluded that those claims are inadequately pled, the UCL claim necessarily fails as well. *See Hicks v. PGA Tour, Inc., 165 F.Supp.3d 898, 911 (N.D. Cal. Feb. 9, 2016)* ("[W]here the same

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[3] Defendants also insist that Plaintiff's Unruh Act claim is barred by the one-year statute of limitations. The actual statute of limitations for Unruh Act claims is somewhat unsettled. *See Kemp v. Regents of Univ. of Cal., No. C-09-4687 PJH, 2010 U.S. Dist. LEXIS 79654, 2010 WL 2889224, at *6 (N.D. Cal. July 22, 2010)* (discussing split within the California appellate courts and the absence of Ninth Circuit or California Supreme Court authority on point). Because this issue has not been fully briefed and the basis for Plaintiff's discrimination claim is unclear, the Court declines to address this issue now; however, the parties should address this issue should Plaintiff amend this claim.

conduct alleged to be unfair under the UCL is also alleged to be a violation of another law, the UCL claim rises or falls with the other claims.") (internal citation omitted).

Accordingly, the proposed amendment to Plaintiff's UCL claim is futile and is denied.

***

The Court thus grants the motion to amend with respect **[*27]** to Plaintiff's first claim for breach of implied contract and her fourth claim for breach of the implied covenant of good faith and fair dealing. The motion for leave to amend is denied with respect the remainder of Plaintiff's proposed claims because as currently pled amendment would be futile. However, because the Court cannot hold that the claims cannot be saved by further amendment, Plaintiff is granted leave to amend her second, third, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh claims, but only to the extent that she has a good faith basis consistent with *Federal Rule of Civil Procedure 11* to do so. *See* *Nordyke v. King, 644 F.3d 776, 788-89 (9th Cir. 2011)*, on reh'g en banc, *681 F.3d 1041 (9th Cir. 2012)* (finding that even if a court denies leave to amend based on futility, it should grant further leave to amend if the proposed complaint could be saved by amendment). While the Court cannot say with certainty that no viable amendment is possible, these claims appear farfetched and merely an as-of-yet unsuccessful attempt to turn an ordinary contract dispute into a tort action.

B. Defendant's Motion to Dismiss

Having granted in part and denied in part Plaintiff's motion to amend her complaint, the prior version of the complaint on which Defendants' motion to dismiss is based is no **[*28]** longer operative. The motion to dismiss is therefore denied a moot. This denial is without prejudice to the filing of a new motion to dismiss should Plaintiff elect to file a second amended complaint.

CONCLUSION

For the reasons stated above, Plaintiff's motion to amend the complaint the complaint is GRANTED IN PART and DENIED IN PART. (Dkt. No. 15.) Defendants' motion to dismiss is DENIED AS MOOT. (Dkt. No. 10.) Plaintiff's administrative motion regarding case scheduling is also DENIED AS MOOT. (Dkt. No. 18.)

Within 21 days, Plaintiff shall either file a further amended complaint or a statement that she intends to stand on her First Amended Complaint and its two claims (breach of implied contract and breach of the implied contract of good faith and fair dealing). The case management conference scheduled for August 30, 2018 is continued to September 27, 2018 at 11:00 a.m. One week before the conference that parties shall submit a new joint case management conference statement that includes a proposed case schedule and a proposal for early ADR.

This Order disposes of Docket Nos. 10, 15, and 18.

IT IS SO ORDERED.

Dated: August 29, 2018

/s/ Jacqueline Scott Corley

JACQUELINE SCOTT CORLEY

United **[*29]** States Magistrate Judge

Geico Corp. v. Autoliv, Inc.

United States District Court for the Eastern District of Michigan, Southern Division

August 30, 2018, Decided; August 30, 2018, Filed

Case No. 16-13189

Reporter
345 F. Supp. 3d 799 *; 2018 U.S. Dist. LEXIS 180216 **; 2018-2 Trade Cas. (CCH) P80,506

GEICO CORPORATION, et al., Plaintiffs, v. AUTOLIV, INC., et al., Defendants.

Core Terms

auto parts, Defendants', insurer, allegations, purchasers, multidistrict litigation, conspiracies, suppliers, Repair, antitrust, Reimbursement, indirect, unjust enrichment, antitrust claim, settlement, claimants, factors, price-fixing, part-specific, consumer protection, third-party, observe, Nexus, anti trust law, cases, transactions, Plaintiffs', total loss, pleaded, state law

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

In addressing a defendant's jurisdictional challenge under Fed. R. Civ. P. 12(b)(1), a court takes the allegations in the complaint as true, inquiring whether these allegations establish a basis for the exercise of subject matter jurisdiction. Yet, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to withstand a properly supported Rule 12(b)(1) motion to dismiss.

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

HN2[] **Motions to Dismiss, Failure to State Claim**

When determining whether a plaintiff's claims are subject to dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, a court must construe the complaint in a light most favorable to plaintiff and accept all well-pleaded factual allegations as true. However, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN3[] Motions to Dismiss, Failure to State Claim

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Rather, to withstand a motion to dismiss, the complaint's factual allegations, accepted as true, must be enough to raise a right to relief above the speculative level and to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. This plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not shown -- that the pleader is entitled to relief. If a plaintiff does not nudge its claims across the line from conceivable to plausible, its complaint must be dismissed.

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN4[] Joinder of Parties, Permissive Joinder

Under *Fed. R. Civ. P. 20(a)(2)*, parties may be joined in one action as defendants if: (i) the claims against them arise out of the same transaction, occurrence, or series of transactions or occurrences, and (ii) any question of law or fact common to all defendants will arise in the action. The standards for permissive joinder under this Rule are liberally construed, in order to promote trial convenience and expedite the final determination of disputes by avoiding multiple lawsuits where possible. In this manner, permissive joinder serves the larger objective under the Federal Rules of entertaining the broadest possible scope of action consistent with fairness to the parties. The permissive joinder of defendants is also encouraged for purposes of judicial efficiency.

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN5[] Joinder of Parties, Permissive Joinder

To warrant the joinder of specific conspiracy claims in a single suit, a plaintiff must show that these claims (i) arise out of the same transaction, occurrence, or series of transactions or occurrences, and (ii) involve a question of law or fact common to all defendants. *Fed. R. Civ. P. 20(a)(2)(A)-(B)*.

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN6[] Joinder of Parties, Permissive Joinder

In addressing the question of whether claims arise out of the same transaction, occurrence, or series of transactions or occurrence, courts have inquired whether there is a logical relationship between the separate causes of action that a plaintiff seeks to join in a single case. The logical relationship test is satisfied if there is substantial evidentiary overlap in the facts giving rise to the cause of action against each defendant. Stated differently, the plaintiffs' claims must share an aggregate of operative facts. This is a flexible and case-specific standard, and the mere fact that a case involves independent actors as defendants does not necessarily bring the case outside the scope of *Fed. R. Civ. P. 20*.

Civil Procedure > Parties > Joinder of Parties > Misjoinder

HN7[] Joinder of Parties, Misjoinder

Misjoinder of parties is not a ground for dismissing an action. *Fed. R. Civ. P. 21*. Nonetheless, a court has wide latitude in fashioning appropriate relief, including adding or dropping a party or severing any claim against a party.

Civil Procedure > Trials > Consolidation of Actions

HN8[] Trials, Consolidation of Actions

Fed. R. Civ. P. 42(a) authorizes a court to join for hearing or trial any or all matters at issue in the actions and to issue any other orders to avoid unnecessary cost or delay.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

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

HN9[] Standing, Burdens of Proof

To demonstrate U.S. Const. art. III standing, a plaintiff must first allege that it has suffered an "injury in fact" -- that is, an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, the alleged injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, the plaintiff must allege that a favorable federal court decision is likely to redress the alleged injury. The party invoking federal jurisdiction bears the burden of establishing these elements. Because Article III standing is not a mere pleading requirement but rather an indispensable part of the plaintiff's case, each element of this standard must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the motion to dismiss stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss a court presumes that general allegations embrace those specific facts that are necessary to support the claim.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN10[] Justiciability, Standing

The United States Supreme Court has cautioned that standing is not dispensed in gross, and that a plaintiff instead must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Constitutional Law > ... > Case or Controversy > Standing > Elements

Evidence > Inferences & Presumptions > Inferences

HN11[] Justiciability, Standing

Standing cannot be inferred but instead must affirmatively appear in the record.

Civil Procedure > Special Proceedings > Class Actions > Class Members

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN12[] Class Actions, Class Members

It may be appropriate to defer a standing inquiry until a plaintiff has an opportunity to engage in discovery that could uncover evidence of relevant transactions and resulting injury in each of the pertinent jurisdictions. Yet, the courts typically adopt this approach in class actions, where the named plaintiffs generally lack information about transactions engaged in by members of the putative plaintiff class.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN13[] Purchasers, Indirect Purchasers

The United States District Court for the Eastern District of Michigan has rejected challenges to the Article III standing of end-payor plaintiffs in antitrust matters. In one of these decision, the court explained that the defendant part suppliers had cited no authority requiring an indirect purchaser to allege the detailed mechanics of the pass-through process to plead injury-in-fact and causation for purposes of constitutional standing to survive a *Fed. R. Civ. P. 12(b)(6)* motion.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN14[] Standing, Requirements

The Sixth Circuit has emphasized that antitrust standing and Article III standing are not one and the same, and that a claim is subject to dismissal under *Fed. R. Civ. P. 12(b)(6)* when the former is lacking. To establish the requisite antitrust standing, a plaintiff cannot rely solely upon allegations of harm resulting from a violation of the antitrust laws, because Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property. Rather, even when a plaintiff alleges an antitrust violation and resulting harm, his claim may not go forward if other relevant factors -- the nature of the plaintiff's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the plaintiff's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy -- weigh heavily against judicial enforcement of the plaintiff's antitrust claim.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN15[] **Standing, Requirements**

Antitrust standing is a threshold, pleading-stage inquiry, and when a complaint by its terms fails to establish this requirement, a court must dismiss it as a matter of law. Yet, the United States Supreme Court's AGC factors are to be balanced, and no single factor is conclusive. Although AGC by its terms applies only to claims under federal ***antitrust law***, the same or similar principles of antitrust standing govern state law antitrust claims.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN16[] **Standing, Requirements**

The alleged injury of paying higher prices for a product due to a lack of competition in the market is sufficient to establish antitrust standing.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN17[] **Purchasers, Indirect Purchasers**

The United States District Court for the Eastern District of Michigan has recognized that a state's enactment of an Illinois Brick repealer statute evidences a state policy to allow indirect purchasers to bring antitrust claims despite a heightened risk of duplicative recovery. Yet, the court has not gone so far as to say that these enactments render the threat of duplicative recovery wholly irrelevant to an antitrust standing inquiry under the United States Supreme Court's decision in AGC. To the contrary, rather than relying solely on a state's repeal of Illinois Brick as conclusively resolving AGC's "duplicative recovery" factor in favor of an indirect purchaser's antitrust standing, the court has gone on to cite specific allegations by the indirect purchaser that lessen the risk of duplicative recovery. In its Fuel Senders decision, for example, the U.S. District Court for the Eastern District of Michigan pointed to the indirect purchasers' allegations that the overcharges they paid were distinct and traceable, and it further observed that the direct purchaser original equipment manufacturers were not pursuing their own antitrust claims.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN18[] **Standing, Requirements**

For antitrust standing purposes, a plaintiff need not be a direct participant in the relevant markets, so long as the market in which it did participate is inextricably linked and intertwined with these markets.

Insurance Law > Claim, Contract & Practice Issues > Subrogation > Equitable Subrogation

HN19[] Subrogation, Equitable Subrogation

The doctrine of equitable subrogation, as applied in the insurance context, allows an insurer to sue a third party for injuries that the third party caused to the insured, when the insurer compensated the insured for those injuries. Although this theory of recovery is governed by state law and an insurer's right of subrogation therefore varies from state to state, the doctrine of equitable subrogation generally allows insurers to stand in the shoes of their insured to seek indemnification by pursuing any claims that the insured may have had against third parties legally responsible for the loss. In pursuing this recovery, the insurer (or subrogee) succeeds to the rights of its insured (the subrogor), and seeks to require the party who caused the damage to reimburse the insurer for the payment the insurer has made to its insured.

Insurance Law > Claim, Contract & Practice Issues > Subrogation > Equitable Subrogation

HN20[] Subrogation, Equitable Subrogation

As a general matter, a subrogation claim by an insurer depends upon the claim of the insured and is subject to whatever defenses the tortfeasor has against the insured. Thus, when an insured settles with or releases a third party from liability for a loss that the third party has caused, the insurer's subrogation right against such party may be destroyed. There is an exception to this general rule. Where a third party obtains a release from an insured with knowledge that the latter has already received payment from the insurer or with information that, reasonably pursued, should give him knowledge of the existence of the insurer's subrogation rights, such a release does not bar the insurer's right of subrogation. This exception is intended to prevent a release from operating as a fraud upon the insurer.

Insurance Law > Claim, Contract & Practice Issues > Subrogation > Equitable Subrogation

HN21[] Subrogation, Equitable Subrogation

A subrogation claim brought by an insurer depends upon the claim of its insured and is subject to whatever defenses the tortfeasor has against the insured. Ordinarily, then, once an insured settles with or releases a third party from liability for a loss that the third party has caused, the insurer's right of subrogation is extinguished.

Insurance Law > Claim, Contract & Practice Issues > Subrogation > Equitable Subrogation

HN22[] Subrogation, Equitable Subrogation

Where a third party obtains a release from an insured with knowledge that the latter has already received payment from the insurer or with information that, reasonably pursued, should give him knowledge of the existence of the insurer's subrogation rights, such a release does not bar the insurer's right of subrogation.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Releases

HN23[] Affirmative Defenses, Releases

Fed. R. Civ. P. 8(c)(1) identifies "release" as an affirmative defense that must be asserted in response to a complaint.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Affirmative Defenses

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

HN24[] Defenses, Demurrers & Objections, Affirmative Defenses

It generally is not appropriate to grant a Fed. R. Civ. P. 12(b)(6) motion to dismiss on the basis of an affirmative defense, because a plaintiff ordinarily has no obligation to plead around this affirmative defense in order to state a viable claim. To be sure, a motion to dismiss may be granted where the undisputed facts as set forth in the pleadings conclusively establish an affirmative defense as a matter of law.

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

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Statute of Limitations

HN25[] Motions to Dismiss, Failure to State Claim

A defendant's statute of limitations challenge is an affirmative defense that must be set forth in response to a complaint. Fed. R. Civ. P. 8(c)(1). A plaintiff ordinarily need not plead around such affirmative defenses, and a motion under Fed. R. Civ. P. 12(b)(6), which considers only the allegations in the complaint, is generally an inappropriate vehicle for dismissing a claim based upon the statute of limitations. Nonetheless, dismissal under Rule 12(b)(6) is appropriate where the allegations in the complaint affirmatively show that the claim is time-barred, and it is the plaintiff's burden in this instance to affirmatively plead circumstances which would indicate why the events giving rise to a claim were not discovered earlier or why the statute of limitations should be tolled.

Antitrust & Trade Law > Regulated Practices > Private Actions

Governments > Legislation > Statute of Limitations > Time Limitations

HN26[] Regulated Practices, Private Actions

A federal antitrust claim must be brought within four years after the claim accrues. 15 U.S.C.S. § 15b.

Antitrust & Trade Law > Regulated Practices > Private Actions

Governments > Legislation > Statute of Limitations > Time Limitations

HN27[] Regulated Practices, Private Actions

In antitrust matters, the requisite inquiry notice that triggers claim accrual is not established through the availability of limited information in the public domain regarding a government investigation. More generally, the statute of limitations inquiry is not made in light of all the connections that subsequently came to light, but rather must be confined to the information disclosed at the time of the publicity in question.

Antitrust & Trade Law > Regulated Practices > Private Actions

Governments > Legislation > Statute of Limitations > Extensions & Revivals

HN28[] **Regulated Practices, Private Actions**

As an example of a "continuing violation," the United States Supreme Court has cited a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, explaining that each sale to the plaintiff qualifies as an overt act that is part of the antitrust violation and thereby starts the statutory period running again. Sixth Circuit decisions have emphasized that under the continuing violation doctrine, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act.

Antitrust & Trade Law > Regulated Practices > Private Actions

Governments > Legislation > Statute of Limitations > Extensions & Revivals

HN29[] **Regulated Practices, Private Actions**

Although each overt act starts a new period of limitation for antitrust claims arising from this act, the commission of a separate new overt act generally does not permit a plaintiff to recover for the injury caused by old overt acts outside the limitation period.

Civil Procedure > ... > Notice of Class Action > Content of Notice > Opt Out Provisions

Governments > Legislation > Statute of Limitations > Tolling

HN30[] **Content of Notice, Opt Out Provisions**

The commencement of a class action suit tolls the applicable statutes of limitation for all those who would have been members of the putative class but instead elect to opt out of the class action and file individual claims.

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > Tolling

HN31[] **Statute of Limitations, Pleadings & Proof**

A plaintiff generally need not plead facts in avoidance of a statute of limitations defense. However, a plaintiff must affirmatively allege facts in support of tolling where it is otherwise apparent from the face of the complaint that the time limit for bringing the claim has passed.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN32[] **Private Actions, State Regulation**

Under the antitrust laws of certain states -- i.e., Alabama, Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, and West Virginia, as well as the District of Columbia, a plaintiff must allege a nexus between the defendant's conduct and intrastate commerce.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN33[] **Private Actions, State Regulation**

Under Utah law, a plaintiff must be a citizen of the state or a resident of the state in order to bring to claim under Utah's Antitrust Act. *Utah Code Ann. § 76-10-3109(1)(a)*. In reliance on this statutory language, a number of courts have dismissed claims brought under Utah ***antitrust law*** by plaintiffs who were neither citizens nor residents of Utah.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN34[] **Private Actions, State Regulation**

The Oregon legislature has mandated that the state's ***antitrust law*** applies only to intrastate trade or commerce, and to interstate trade or commerce involving an actual or threatened injury to a person or property located in this state. *Or. Rev. Stat. § 646.715(2)*.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN35[] **Private Actions, State Regulation**

A number of states have enacted so-called "Illinois Brick repealer statutes" -- that is, statutes that override the United States Supreme Court's decision in Illinois Brick and allow recovery by indirect purchasers under state law. Effective January 1, 2008, New Hampshire passed such a law allowing recovery of damages by indirect purchasers. *RSA § 356.11*. Likewise, effective May 1, 2006, Utah amended a provision of its ***antitrust law*** to permit recovery by indirect purchasers. *Utah Code Ann. 76-10-3109(1)(a)*.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN36[] **Private Actions, State Regulation**

In Static Random Access Memory, the United States District Court for the Northern District of California discussed the Hawaiian Supreme Court's holding in 1999 that the Hawaiian legislature had not conferred a private claim for relief under *Haw. Rev. Stat. § 480-13* for unfair methods of competition in violation of *Haw. Rev. Stat. § 480-2*. As explained in Static Random Access Memory, although the Hawaiian legislature's 2002 enactment supplanted this particular aspect of the Hawaiian Supreme Court's decision in Robert's Hawaii School Bus, the Hawaiian court emphasized in that same decision that its interpretation of *Haw. Rev. Stat. § 480-2* as it read in 1999 did not operate to limit private claims for violations of *Haw. Rev. Stat. §§ 480-4* or *480-9*. Because the indirect purchaser plaintiffs in Static Random Access Memory were pursuing a price-fixing conspiracy claim under *Haw. Rev. Stat. § 480-4*, and not a claim for unfair methods of competition under *Haw. Rev. Stat. § 480-2*, the court in that case reasoned that the state legislature's 2002 amendment to *§ 480-2* could not properly be construed as an implied repeal of a previously existing Illinois Brick-style limitation on indirect purchaser recoveries under *Haw. Rev. Stat. § 480-4*, where this latter provision was wholly unaffected by the legislature's 2002 enactment.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN37[] **Private Actions, State Regulation**

One way a plaintiff can establish a deceptive trade practice under Nevada law is by showing that the defendant knowingly violated a state or federal statute or regulation relating to the sale or lease of goods or services. *Nev. Rev. Stat. § 598.0923*. Nevada is s "nexus state," and a plaintiff's antitrust claim under Nevada law is subject to dismissal for lack of allegations of a nexus between defendants' allegedly unlawful conduct and injury sustained by plaintiff in Nevada. It follows that a plaintiff cannot establish a deceptive trade practice under *§ 598.0923* by appealing to a violation of Nevada ***antitrust law***. There are other ways to demonstrate that a defendant has engaged in a "deceptive trade practice" as defined under Nevada law. In particular, *§ 598.0923* provides that a person engages in a deceptive trade practice if he or she knowingly fails to disclose a material fact in connection with the sale or lease of goods or services.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN38[] **Deceptive & Unfair Trade Practices, State Regulation**

Ark. Code Ann. § 4-88-107(a) defines the deceptive and unconscionable trade practices made unlawful and prohibited by this chapter. *N.M. Stat. Ann. § 57-12-2(E)* defines an unconscionable trade practice.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN39[] **Deceptive & Unfair Trade Practices, State Regulation**

Ark. Code Ann. § 4-88-107(a) does not limit itself to unconscionable acts. Allegations of false or deceptive acts suffice to state a claim.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN40[] **Deceptive & Unfair Trade Practices, State Regulation**

The definition of an "unconscionable trade practice" in N.M. Rev. Stat. 57-12-2(E) encompasses acts or practices that take advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree or that result in a gross disparity between the value received by a person and the price paid.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN41[] **Standing, Requirements**

Courts have applied the factors identified in the United States Supreme Court's AGC decision to determine whether a plaintiff's injuries are too remote from a defendant's alleged wrongdoing to permit a recovery under federal or state ***antitrust law***. The courts have engaged in a similar "remoteness" inquiry, either with or without specific reference to the AGC factors, in determining whether a plaintiff may pursue a claim under the consumer protection laws of Arkansas, New York, or Vermont.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN42[] **Deceptive & Unfair Trade Practices, State Regulation**

Under the Vermont Consumer Fraud Act (VCFA), *Vt. Stat. Ann. tit. 9, § 2451 et seq.*, only a "consumer" may bring a suit alleging a violation of this statute. *Vt. Stat. Ann. tit. 9, § 2461(b)*. The VCFA defines a "consumer" as a person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for the use or benefit of his or her business or in connection with the operation of his or her business, *Vt. Stat. Ann. tit. 9, § 2451a(a)*, and Vermont law provides more generally that a statutory reference to a "person" encompasses corporations. *Vt. Stat. Ann. tit. 1, § 128*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN43[] **Deceptive & Unfair Trade Practices, State Regulation**

In Wilder, a plaintiff brought a claim under the Vermont Consumer Fraud Act (VCFA), *Vt. Stat. Ann. tit. 9, § 2451 et seq.*, based on the defendant insurer's alleged failure to make a payment as allegedly called for under a settlement agreement, but the Supreme Court of Vermont held that this claim was subject to dismissal on two grounds. First, the court reasoned that the selling of an insurance policy is not a contract for "goods or services" within the meaning of the VCFA. Next, the court observed that it was not dealing with a contractual situation between buyer and seller, but that the court instead was being asked to read into the VCFA a transaction one step removed from a transaction in which a buyer purchases goods or services. In the court's view, the VCFA deals solely with consumer transactions in which there is an actual sale of goods or services involving a buyer, a seller, and the goods or services, and it declined to stretch the Act's meaning as to evade the Legislature's intent.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN44[] **Private Actions, State Regulation**

Unjust enrichment may not supply a valid cause of action in states where the plaintiffs are otherwise barred from recovery under the relevant antitrust and consumer protection statutes. However, a plaintiff is permitted under *Fed. R. Civ. P. 8(a)(3)* to plead multiple theories of recovery in the alternative, and there is no requirement that each such theory must rest upon its own independent set of allegations.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN45[] **Purchasers, Indirect Purchasers**

A number of states have enacted so-called Illinois Brick repealer statutes that permit recovery by indirect purchasers under state ***antitrust law*** despite the prohibition against such a recovery under federal ***antitrust law***. In the absence of such a repealer statute, however, some courts have reasoned that an indirect purchaser plaintiff should not be permitted to recover under the equitable theory of unjust enrichment, as this would permit the plaintiff to circumvent the bar expressed through state law and policy against recovery by an indirect purchaser.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN46[] **Equitable Relief, Quantum Meruit**

The critical inquiry in evaluating the direct benefit element of a claim of unjust enrichment is not whether the benefit is conferred directly on the defendant, but whether the plaintiff can establish that the relationship between his detriment and the defendant's benefit flows from the challenged conduct of the defendant.

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Judges: Hon. Marianne O. Battani, United States District Judge.

Opinion by: Marianne O. Battani

Opinion

[*808] **OPINION AND ORDER REGARDING DEFENDANTS' COLLECTIVE MOTION TO DISMISS SECOND AMENDED COMPLAINT**

I. INTRODUCTION

Plaintiffs GEICO Corporation and a number of affiliated entities (collectively "GEICO") brought this suit on September 2, 2016, asserting federal antitrust and state law claims against fourteen auto parts manufacturers and suppliers **[**3]** arising from alleged conspiracies among the Defendant manufacturers and suppliers to fix prices, rig bids, and allocate the markets for sixteen auto parts. GEICO was a putative member of the proposed liability and settlement classes in a number of the class action suits comprising *In re Automotive Parts Antitrust Litigation*, No. 12-md-02311. However, GEICO has elected to opt out of the settlement classes certified to date in this multidistrict litigation ("MDL"), and to instead pursue its own claims as, in effect, an indirect purchaser of certain of the auto parts involved in the MDL.

Before the Court is Defendants' collective motion to dismiss GEICO's second amended complaint. Among other grounds for dismissal, Defendants contend (i) that GEICO has alleged an implausible single conspiracy involving sixteen auto parts or, alternatively, has improperly joined sixteen separate conspiracies in a single suit, (ii) that GEICO lacks both Article III and antitrust standing, (iii) that GEICO's claims have been released by virtue of the settlements reached by GEICO's insureds, (iv) that GEICO's claims are barred by the relevant statutes of limitation, and (v) that GEICO's state law claims are **[**4]** subject to dismissal for a number of reasons.

On November 9, 2017, the Court heard oral argument on Defendants' motion.[1] For the reasons set forth below, Defendants' motion is **GRANTED IN PART and DENIED IN PART**, and Plaintiffs are granted leave to file amended pleadings in accordance with the Court's rulings.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff GEICO offers several forms of insurance coverage, including automobile insurance. It brought this suit under federal ***antitrust law*** and the laws of a number of states, alleging that the fourteen Defendant auto part manufacturers and suppliers unlawfully conspired among themselves and with other non-party co-conspirators to fix prices, rig bids, and allocate the markets for sixteen auto parts: air flow meters, alternators, ATF warmers, automotive wire harness systems, electronic throttle bodies, fuel injection systems, high intensity discharge ("HID") ballasts, ignition coils, inverters, motor generators, occupant safety restraint systems, radiators, starters, steering angle sensors, switches, and valve timing control devices. The named Defendants include (i) Autoliv, Inc., and its subsidiaries, Autoliv ASP, Inc., Autoliv B.V. & Co. KG, **[**5]** Autoliv Safety Technology, Inc., and Autoliv Japan Ltd.; (ii) Hitachi Automotive Systems, Ltd. ("HIAMS"); (iii) Lear Corporation and an affiliated joint venture, Kyungshin-Lear Sales and Engineering, LLC; (iv) Panasonic Corporation and its subsidiary, Panasonic Corporation of North America; (v) T.RAD Co., Ltd. and its subsidiary, T.RAD North America; and (v) TRW Deutschland Holding GmbH and its affiliate, **[*809]** ZF TRW Automotive Holdings Corporation.

According to GEICO's complaint, each of the sixteen auto parts at issue is installed in new cars as part of the automotive manufacturing process. In particular, original equipment manufacturers ("OEMs") purchase these parts from automotive parts suppliers, including Defendants, by issuing requests for quotes ("RFQs") to the suppliers and selecting winning bidders. These supply arrangements typically last between four and six years. In addition,

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[1] The Court also heard argument on a separate motion to dismiss brought by Defendants Lear Corporation and Kyungshin-Lear Sales & Engineering, LLC. This motion will be addressed in a separate opinion and order.

Defendants and other auto parts suppliers sell the auto parts at issue to automotive repair professionals, who install these parts in automobiles to replace worn out, defective, or damaged parts.

In 2010, authorities in the United States, the European Union, and Japan began investigating a suspected conspiracy **[**6]** among auto part manufacturers and suppliers to engage in anticompetitive cartel conduct. Over time, a number of manufacturing firms and executives have pleaded guilty to conspiracies to fix prices, rig bids, or allocate the market for specific auto parts. The firms that have pleaded guilty and paid criminal fines include five Defendants in this case: Autoliv, Inc., HIAMS, Panasonic Corporation, T.RAD Co. Ltd., and TRW Deutschland Holding GmbH. In addition, the guilty pleas that resulted from this antitrust investigation encompass each of the sixteen auto parts at issue here.

Beginning in 2011, civil antitrust suits were brought in federal district courts throughout the United States on behalf of various classes of plaintiffs who alleged that they were injured as a result of the auto part price-fixing conspiracies revealed in the above-cited government investigations. On February 7, 2012, the United States Judicial Panel on Multidistrict Litigation transferred these actions to the Eastern District of Michigan, and this Court subsequently entered a series of orders to coordinate and consolidate these suits in multidistrict litigation designated as *In re Automotive Parts Antitrust Litigation* ***[**7]*** , No. 12-md-02311. Generally speaking, this litigation has been organized into separate class actions for each of the dozens of auto parts that were the subject of alleged price-fixing conspiracies among the suppliers of these parts.

GEICO alleges that it was a putative member of the proposed classes in sixteen of these suits — *i.e.*, the class actions corresponding to the sixteen auto parts identified in the present complaint. In April of 2016, GEICO elected to opt out of the settlement classes certified in these class actions. Instead, it brought the present suit on September 2, 2016, asserting federal antitrust and state law claims similar to those being pursued in the ongoing multidistrict litigation. In support of these claims brought on its own behalf, GEICO alleges that it has been injured by Defendants' alleged conspiracies to fix the prices of the designated sixteen auto parts, by virtue of (i) its own purchase of these auto parts for use in a fleet of vehicles that it owns, and (ii) its reimbursement of insureds and third-party claimants for either (a) payments made to repair professionals involving the replacement of these auto parts, or (b) the full value of a vehicle that **[**8]** has been declared a total loss. Defendants now seek the dismissal of GEICO's federal and state law claims on a variety of grounds.

III. STANDARD OF REVIEW

In their present motion, Defendants ask the Court to dismiss GEICO's second amended complaint under *Fed. R. Civ. P. 12(b)(1)* for lack of subject matter jurisdiction, and under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted. ***HN1***[] In addressing Defendants' **[*810]** jurisdictional challenge under the first of these two *Rule 12* provisions, the Court "takes the allegations in the complaint as true," inquiring whether these allegations establish a basis for the exercise of subject matter jurisdiction. *Gentek Building Products, Inc. v. Steel Peel Litigation Trust, 491 F.3d 320, 330 (6th Cir. 2007)*. Yet, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice" to withstand a properly supported *Rule 12(b)(1)* motion to dismiss. *O'Bryan v. Holy See*, *556 F.3d 361, 376 (6th Cir. 2009)* (internal quotation marks and citation omitted).

Similarly, ***HN2***[] when determining whether GEICO's claims are subject to dismissal under *Rule 12(b)(6)* for failure to state a claim, the Court must construe the complaint in a light most favorable to Plaintiff and accept all well-pleaded factual allegations as true. *League of United Latin American Citizens v. Bredesen, 500 F.3d 523, 527 (6th Cir. 2007)*. Again, however, "the tenet that a court must accept as true all of the allegations contained in **[**9]** a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*.

Moreover, ***HN3***[] "[w]hile a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)* (internal quotation marks, alteration, and citations omitted). Rather, to withstand a motion to dismiss, the complaint's factual allegations, accepted as true, "must be enough to raise a right to relief above the speculative level," and to "state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 555, 570, 127 S. Ct. at 1965, 1974*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949*.

The Supreme Court has emphasized that this plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949*. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not shown **[**10]** — that the pleader is entitled to relief." *Iqbal, 556 U.S. at 679, 129 S. Ct. at 1950* (internal quotation marks, alteration, and citation omitted). If a plaintiff does "not nudge[] [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed." *Twombly, 550 U.S. at 570, 127 S. Ct. at 1974*.

IV. ANALYSIS

A. GEICO's Complaint Properly Pleads a Separate Conspiracy for Each of the Auto Parts Involved in This Case.

As the first of the several challenges advanced in their motion, Defendants argue that GEICO's complaint "posits farfetched allegations of an overarching, sixteen-part conspiracy involving all Defendants." (Dkt. 62, Defendants' Motion to Dismiss, Br. in Support at 3.) In Defendants' view, this claimed conspiracy encompassing all of the Defendant auto part suppliers is not plausible for two reasons: (i) all but two of these suppliers make completely different auto parts, and (ii) GEICO has failed to alleged specific facts in support of its conclusory assertion that "[e]ach Defendant acted **[*811]** as the principal of or agent for the other Defendants with respect to the acts, violations, and common course of conduct alleged" in the complaint, (Dkt. 53, Second Amended Complaint ("SAC") at ¶ 41).

In response, GEICO asserts that Defendants have "misconstrued **[**11]** [its] conspiracy allegations," and that its complaint is more properly read as "alleg[ing] sixteen separate conspiracies, each involving different Defendants, different parts and different price fixing arrangements." (Dkt. 65, Plaintiffs' Response Br. at 5-6.) GEICO further denies any intention to "allege that each Defendant acted as a principal or agent for [all of] the other Defendants" across all sales of the sixteen parts referenced in the complaint. Instead, it insists that the allegations in question link each Defendant only to those other Defendants or non-party co-conspirators who are involved in alleged price-fixing activities with respect to a particular part. (*Id.* at 6.) As discussed below, the Court agrees with GEICO that Defendants' suggested reading of the complaint is not tenable. In the Court's view, the complaint is properly construed as pleading sixteen separate part-specific conspiracies, with each Defendant auto part supplier facing liability only for the particular part-specific conspiracies in which it is alleged and found to have joined.

As Defendants observe, this Court has previously addressed (and rejected) an attempt by indirect purchaser plaintiffs ("IPPs") in the **[**12]** multidistrict litigation to combine multiple separate part-specific cases into a consolidated complaint alleging a single, overarching conspiracy to fix the prices of eighteen different auto parts. *See* *In re Automotive Parts Antitrust Litigation, No. 12-md-02311, 2016 U.S. Dist. LEXIS 193193, 2016 WL 8200512, at *3-*4 (E.D. Mich. April 13, 2016)*. In so ruling, the Court relied in part on the assessment of the U.S. Department of Justice ("DOJ"), following "six years of grand jury investigation," that the auto part suppliers that were the target of the DOJ's investigation "engaged in various and separate and independent conspiracies" that each involved a particular component part. *2016 U.S. Dist. LEXIS 193193, [WL] at *4*. The Court further noted the absence of allegations "of deals between makers of different component parts," of competition among the defendant part suppliers "for the sales of all eighteen parts," or of a given defendant's knowledge of the conduct and actions of other defendants regarding parts that it did not sell. *Id.*

As GEICO correctly explains, this Court's ruling in the multidistrict litigation is readily distinguishable, where the IPPs in that case sought to plead a "massive hub-and-spoke conspiracy" that is nowhere to be found in the present complaint. (Plaintiffs' Response Br. at **[**13]** 6.) Here, in contrast, at the very outset of the portion of the complaint captioned "Factual Allegations," GEICO refers to Defendants' "[c]onspiracies" to "fix prices, rig bids and allocate markets" for sixteen auto parts. (SAC at ¶ 44.) GEICO then proceeds to allege sixteen separate price-fixing conspiracies, one for each auto part identified in the complaint, and each involving a subset of one or more specific Defendants along with unnamed co-conspirators. (*See id.* at ¶¶ 45-125.) Immediately following these part-specific allegations, the complaint features a section captioned "Defendants and Their Co-Conspirators Entered into Multiple Auto Part Conspiracies," in which GEICO expressly alleges (i) that "Defendants and their co-conspirators entered into numerous Auto Parts conspiracies," and (ii) that according to a DOJ official, "there were more than a dozen separate [auto part] conspiracies each operating independently." (*Id. at ¶ 126*.) Finally, GEICO enumerates each such part-specific **[*812]** conspiracy, setting forth the time periods of these conspiracies and the particular Defendant suppliers involved in each. (*See id.* at ¶¶ 126(a)-(p).) Against this backdrop, Defendants cannot succeed **[**14]** in their argument that GEICO seeks to hold them jointly and severally liable for an overarching conspiracy to fix the prices of sixteen auto parts.

To be sure, Defendants contend in their reply brief that GEICO's complaint lacks detailed allegations as to "specific meetings or instances of collusive conduct" through which the Defendant suppliers carried out the part-specific conspiracies in which they allegedly participated. (Dkt. 67, Defendants' Reply Br. at 2.) Similarly, Defendants observe that GEICO identifies only one or, occasionally, two specific Defendants as participants in each conspiracy, "leaving both Defendants and the Court to guess . . . in which of the sixteen component part conspiracies any Defendant allegedly participated." (*Id.*) Yet, because Defendants raise these attacks on the sufficiency of GEICO's allegations of conspiracy for the first time in their reply brief, the Court elects not to consider them. *See Sundberg v. Keller Ladder, 189 F. Supp.2d 671, 682-83 (E.D. Mich. 2002)* (declining to address an argument raised for the first time in a reply brief). In any event, the Court has previously rejected similar challenges to the sufficiency of the plaintiffs' allegations of a price-fixing conspiracy in its rulings in the multidistrict **[**15]** litigation, *see, e.g., In re Automotive Parts Antitrust Litigation (In re Fuel Senders), 29 F. Supp.3d 982, 995-96 (E.D. Mich. 2014)("Fuel Senders")* ; *In re Automotive Parts Antitrust Litigation (In re Instrument Panel Clusters), 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *5-*6 (E.D. Mich. July 3, 2014)* ("*Instrument Panel Clusters")*, and there is no basis for departing from these rulings here. Accordingly, GEICO's allegations of separate part-specific conspiracies are sufficient to withstand scrutiny under *Rule 12(b)(6)*.

B. Although GEICO Has Improperly Joined Its Sixteen Part-Specific Conspiracy Claims in a Single Suit, This Misjoinder Does Not Warrant the Dismissal of This Action in Its Entirety.

Even if — as the Court has now ruled — GEICO's complaint is construed as alleging sixteen separate part-specific conspiracies, Defendants argue that the complaint nonetheless runs afoul of *Fed. R. Civ. P. 20(a)(2)* by joining multiple claims and defendants in a single action despite the absence of common transactions or occurrences. Although there is some degree of overlap in the Defendant suppliers involved in the sixteen alleged conspiracies, Defendants contend that this alone does not suffice to permit joinder, where the facts and evidence needed to prove each conspiracy will be unique to a given part, the market for the part, and the specific suppliers of the part. Defendants further assert that joinder would unfairly prejudice those suppliers that are involved in only one or a few **[**16]** of the sixteen alleged conspiracies. As discussed below, the Court agrees that these sixteen alleged conspiracies may not be joined in a single suit, but finds that the remedy sought by Defendants — *i.e.*, the dismissal of GEICO's complaint in its entirety — is inappropriate and would not serve the interests of the parties or of judicial economy. Rather, the Court directs GEICO to commence a separate suit for each of the alleged part-specific conspiracies. The parties are further instructed to negotiate the terms of a proposed order to facilitate the efficient management and coordination of these several part-specific actions.

HN4[] Under *Fed. R. Civ. P. 20(a)(2)*, parties "may be joined in one action as **[*813]** defendants if," as relevant here: (i) the claims against them "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences," and (ii) "any question of law or fact common to all defendants will arise in the action." The standards for permissive joinder under this Rule are "liberally construed," in order to "promote trial convenience and expedite the final determination of disputes" by avoiding multiple lawsuits where possible. *Patrick Collins, Inc. v. John Does 1-21, 282 F.R.D. 161, 166 (E.D. Mich.)* (internal quotation **[**17]** marks and citations omitted), *adopted at 286 F.R.D. 319 (E.D. Mich. 2012)*. In this manner, permissive joinder serves the larger objective under the Federal Rules of "entertaining the broadest possible scope of action consistent with fairness to the parties." *Patrick Collins, 282 F.R.D. at 166* (internal quotation marks and citation omitted). "The permissive joinder of defendants is also encouraged for purposes of judicial efficiency." *282 F.R.D. at 166*.

HN5[] To warrant the joinder of its sixteen part-specific conspiracy claims in a single suit, GEICO must show that these claims (i) "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences," and (ii) involve a "question of law or fact common to all defendants." *Fed. R. Civ. P. 20(a)(2)(A)-(B)*. GEICO states without contradiction that the conspiracies alleged in its complaint implicate common questions of fact and law, including (i) whether GEICO's reimbursement of its insureds for auto parts qualifies as antitrust injury, and (ii) whether evidence of the business practices of a particular Defendant auto part supplier shows that this supplier participated in more than one of the alleged conspiracies. Thus, the dispositive issue presented by Defendants' claim of misjoinder is whether the part-specific conspiracies alleged **[**18]** by GEICO arise out of the "same transaction, occurrence, or series of transactions or occurrences."

HN6[] In addressing this question, the courts have inquired whether "there is a logical relationship between the separate causes of action" that the plaintiff seeks to join in a single case. *In re EMC Corp., 677 F.3d 1351, 1358 (Fed. Cir. 2012)*; *see also Mosley v. General Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974)*; *Stojcevski v. County of Macomb, 143 F. Supp.3d 675, 682-83 (E.D. Mich. 2015)*. "The logical relationship test is satisfied if there is substantial evidentiary overlap in the facts giving rise to the cause of action against each defendant." *EMC Corp., 677 F.3d at 1358*. "Stated differently, the plaintiffs' claims must share an aggregate of operative facts." *Stojcevski, 143 F. Supp.3d at 683* (internal quotation marks, citations, and emphasis omitted). This is a flexible and case-specific standard, and "the mere fact that a case involves independent actors as defendants does not necessarily bring the case outside the scope of *Rule 20*." *EMC Corp., 677 F.3d at 1357-58*.

Applying this standard here, the part-specific conspiracies alleged by GEICO lack a sufficient logical relationship or evidentiary overlap to permit joinder under *Rule 20(a)(2)*. To establish a given part-specific conspiracy, GEICO must show that the particular Defendant suppliers involved in this conspiracy entered into an agreement to fix prices, rig bids, or otherwise manipulate the market for a specific auto part. **[**19]** As Defendants observe, the evidence needed to make this showing will be largely unique to the limited subset of Defendants suppliers involved in the market for the component part at issue and the characteristics of this particular market. In contrast, the remaining Defendants joined in GEICO's suit will have little or no involvement in or relationship to the **[*814]** operative facts for this conspiracy. *See Michaels Building Co. v. Ameritrust Co., N.A., 848 F.3d 674, 682 (6th Cir. 1988)* (affirming the district court's finding of improper joinder of a defendant lender, where the various loan transactions giving rise to the plaintiffs' claims "involve[d] different banks, different contracts and different terms"). Even as to those Defendant suppliers that are involved in more than one of the alleged conspiracies, the facts that establish a supplier's participation in one such conspiracy — *e.g.*, evidence of meetings, discussions, or other opportunities to collude in the setting of prices or allocation of the market — are likely to be largely if not entirely distinct from the facts that demonstrate this supplier's involvement in another part-specific conspiracy. In addition, Defendants point to the prejudice and additional expense faced by suppliers that are involved in only **[**20]** one or two of the sixteen alleged conspiracies but nonetheless must participate in large-scale discovery efforts and other pretrial proceedings encompassing all of these alleged conspiracies.

Although the Court has not addressed precisely this issue in the multidistrict litigation, it has cited similar considerations in denying a request by IPPs to consolidate eighteen separate part-specific cases into a single suit. In so ruling, the Court explained:

> [A]lthough the alleged conduct by Defendants follows a similar pattern, the facts are not the same. [In addition], the existence of different Defendants weighs against consolidation. Even though the [part-specific cases] involve overlapping parties, there are twenty-two different Defendant Groups, six Settling Defendant Groups, and eighteen different product markets. Consolidation would be unfairly prejudicial to the eighteen Defendants

> who are parties in only one or two of the eighteen [part-specific cases] and to those Defendants that have never pleaded guilty.

In re Automotive Parts Antitrust Litigation, 2016 U.S. Dist. LEXIS 193193, 2016 WL 8200512, at *2. Accordingly, the Court concluded that "rather than simplify[ing] this already complex litigation, consolidation will serve only to confuse the legal claims/defenses of the parties **[**21]** and delay a definite outcome for the parties," and thus "would not serve judicial economy or the convenience of the court and of the parties." *Id.* These same factors are present here, and militate against GEICO's joinder of sixteen separate part-specific conspiracies in a single suit.

It remains to determine the proper remedy for GEICO's misjoinder. As Defendants recognize, ***HN7***[] "[m]isjoinder of parties is not a ground for dismissing an action." Fed. R. Civ. P. 21; *see also* Letherer v. Alger Group, L.L.C., 328 F.3d 262, 267 (6th Cir. 2003), *overruled on other grounds as recognized in* Blackburn v. Oaktree Capital Management, LLC, 511 F.3d 633, 636 (6th Cir. 2008). Nonetheless, the Court has wide latitude in fashioning appropriate relief, including "add[ing] or drop[ping] a party" or "sever[ing] any claim against a party." Fed. R. Civ. P. 21; *see also* Letherer, 328 F.3d at 267.

In Defendants' view, the proper remedy here would be to dismiss this suit and require GEICO to file separate part-specific actions. (*See* Defendants' Motion, Br. in Support at 6 n.4.) Yet, to the extent that this would inconvenience the parties or fail to serve judicial economy, the Court has recognized its "expansive" authority to implement procedures that will assist in coordinating and administering GEICO's several part-specific suits. In re Automotive Parts Antitrust Litigation, 2016 U.S. Dist. LEXIS 193193, 2016 WL 8200512, at *2; *see also* ***HN8***[] Fed. R. Civ. P. 42(a) (authorizing the Court to "join for hearing or trial any or all matters **[**22]** at issue **[*815]** in the actions" and to "issue any other orders to avoid unnecessary cost or delay"). Accordingly, though the Court agrees with Defendants that the eighteen part-specific conspiracies alleged by GEICO are not properly joined in a single suit, it elects to address this misjoinder by (i) directing GEICO to sever each of its part-specific conspiracy claims into a separate suit, and (ii) instructing the parties to negotiate the terms of a proposed order to facilitate the efficient management and coordination of the sixteen part-specific actions filed by GEICO in accordance with the Court's ruling.

C. Although GEICO Has Failed in Certain Respects to Sufficiently Plead the Elements of Article III Standing for Each of the Federal and State Law Claims Asserted in Its Complaint, It Will Be Granted Leave to Address These Deficiencies in Amended Pleadings.

Defendants next mount three separate challenges to GEICO's Article III standing to pursue the federal and state law claims asserted in its complaint. First, although GEICO claims that the payments it made in its role as insurer were adversely affected by Defendants' alleged price-fixing schemes, Defendants observe that some of these payments did not entail the purchase of auto parts from any of the Defendant suppliers, and they argue that GEICO lacks "standing to sue for alleged overcharges on [a]uto [p]arts that were never purchased." (Defendants' Motion, Br. in Support at 7.) Next, Defendants **[**23]** maintain that GEICO lacks standing to sue under "the laws of any of the thirty-two states and the District of Columbia under which it seeks to recover," where it fails to allege in its complaint that it made any excessive payments for relevant auto parts "in any particular state." (*Id.* at 8.) Finally, Defendants contend that the allegations of GEICO's complaint fail to forge the requisite causal link between Defendants' alleged overcharges for auto parts and increased payments made by GEICO under its contracts with its insureds. The Court addresses each of these challenges in turn, after first summarizing the law governing Article III standing.

HN9[] To demonstrate Article III standing, a plaintiff must first allege that it has suffered an "injury in fact" — that is, "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (internal quotation marks and citations omitted). Second, the alleged injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Lujan, 504 U.S. at 560, 112 S. Ct. at 2136 (internal quotation marks, alterations, and citation **[**24]** omitted). Third, the plaintiff must allege that a favorable federal court decision is likely to redress the alleged injury. *504 U.S. at 561, 112 S. Ct. at 2136*.

As the "party invoking federal jurisdiction," GEICO "bears the burden of establishing these elements." *504 U.S. at 561, 112 S. Ct. at 2136*. Because Article III standing is "not [a] mere pleading requirement[] but rather an indispensable part of the plaintiff's case," each element of this standard "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *504 U.S. at 561, 112 S. Ct. at 2136*. At the present pleading stage of this case, "general factual allegations of injury resulting from the defendant's conduct **[*816]** may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *504 U.S. at 561, 112 S. Ct. at 2137* (internal quotation marks, alteration, and citation omitted).

1. GEICO Has Sufficiently Pleaded Injury in Fact, Even as to Those Transactions That Do Not Necessarily Involve the Purchase of a Relevant Auto Part.

As their first challenge to GEICO's allegations of Article III standing, Defendants argue that GEICO cannot establish the "injury in fact" element **[**25]** of standing with respect to alleged transactions that did not entail the purchase of any of the auto parts at issue in this case. Specifically, Defendants take issue with GEICO's assertion that it was injured each time it made a payment to an insured or third-party claimant as reimbursement for the cost of vehicle repairs. (*See, e.g.*, SAC at ¶ 49.) Defendants observe that the recipient of such a payment might elect not to repair his vehicle and instead "simply pocket the claim payment." (Defendants' Motion, Br. in Support at 7.) Similarly, Defendants point out that when GEICO reimburses an insured or third-party claimant for the value of a vehicle that is declared a total loss, (*see, e.g.*, SAC at ¶ 49), this payment almost certainly does not lead to the purchase of any of the auto parts at issue here. In such cases where "there is no sale of an [a]uto [p]art at all" flowing from GEICO's payment to an insured or third-party claimant, Defendants contend that "GEICO simply does not have standing to sue for alleged overcharges on Auto Parts that were never purchased." (Defendants' Motion, Br. in Support at 7.)

In response, GEICO first observes that the claims asserted in its complaint do **[**26]** not rest solely on reimbursement payments to insureds or third-party claimants. Rather, the complaint also alleges (i) that GEICO itself purchased the auto parts at issue, (*see, e.g.*, SAC at ¶¶ 17-25, 49),[2] and (ii) that GEICO "directly paid repair professionals" for auto parts "after the repair professional[s] repaired [the] insureds' or claimants' vehicles," (*see, e.g., id.* at ¶ 49). Because auto parts were purchased in these transactions, GEICO has adequately pleaded the "injury in fact" element of Article III standing through its allegations of injury flowing from the *supra*-competitive prices charged by Defendants for these parts. (*See id.* at ¶¶ 8, 164-65.)

Admittedly, although Defendants do not squarely raise this issue in their motion, ***HN10***[] the Supreme Court has cautioned that "standing is not dispensed in gross," and that a plaintiff instead "must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. Federal Election Commission,* ***[*817]*** *554 U.S. 724, 734, 128 S. Ct. 2759, 2769, 171 L. Ed. 2d 737 (2008)* (internal quotation marks, alteration, and citations omitted). The question then becomes whether GEICO's direct purchases of auto parts and its reimbursement payments to insureds and third-party claimants give rise to discrete "claims" for **[**27]** which GEICO must separately establish its Article III standing, or whether GEICO's direct purchases and reimbursement

[2] In its brief in opposition to Defendants' motion, GEICO indicates that it made at least some of these direct purchases in its capacity as the owner of "thousands of vehicles (provided for use by its adjusters and other employees) as part of its fleet program." (Plaintiffs' Response Br. at 4.) As Defendants observe, however, these alleged purchases as a fleet owner are not expressly identified as such in the complaint, and a plaintiff ordinarily may not "amend [its] complaint through a response brief." *Jocham v. Tuscola County, 239 F. Supp.2d 714, 732 (E.D. Mich. 2003)*. Nonetheless, given that GEICO has been directed to file a separate suit for each of the eighteen part-specific conspiracies identified in its present complaint, the Court will allow GEICO to address this pleading deficiency when it commences these separate actions, particularly where it already has alleged that it made direct purchases of relevant auto parts, and simply did not identify the fleet-owner context in which some of these purchases were made.

payments are more properly characterized as separate items of damages that GEICO may or may not be entitled to recover upon establishing its overarching claim of a price-fixing conspiracy.

The parties' briefs have little to offer on this subject. Defendants cite a number of cases for the proposition that a plaintiff's purchase of a particular item does not confer standing to bring claims involving different, albeit similar, items that the plaintiff did not purchase. *See, e.g., Dapeer v. Neutrogena Corp., 95 F. Supp.3d 1366, 1373 (S.D. Fla. 2015)* (holding that the named plaintiff in a putative class action "lack[ed] Article III standing to bring claims on behalf of the Neutrogena [sunscreen] products he did not purchase"); *Ferrari v. Best Buy Co., No. 14-2956, 2015 U.S. Dist. LEXIS 61706, 2015 WL 2242128, at *9 (D. Minn. May 12, 2015)* (concluding that the named plaintiff "lack[ed] standing to assert claims on behalf of the class for televisions that he did not purchase or advertising that he did not see or rely upon"); *Granfield v. NVIDIA Corp., No. 11-05403, 2012 U.S. Dist. LEXIS 98678, 2012 WL 2847575, at *6 (N.D. Cal. July 11, 2012)* ("[W]hen a plaintiff asserts claims based both on products that she purchased and products that she did not purchase, claims relating to products not purchased must be dismissed for lack of standing."). Yet, these cases are wholly **[**28]** inapposite here, given GEICO's express allegations that it directly purchased and/or made reimbursement payments involving each of the relevant auto parts at issue. (*See SAC* at ¶¶ 17-25, 49, 54, 59, 64, 69, 74, 79, 84, 89, 94, 99, 105, 110, 115, 120, 125.) The decisions cited by Defendants, in contrast, involve efforts by plaintiffs to derive Article III standing from the purchases of putative class members or third parties who are not yet (and may never be) parties to the suit. These cases therefore have nothing whatsoever to say about the salient issue here — namely, whether GEICO's own direct purchases and various types of reimbursement payments are properly viewed as giving rise to separate claims that necessitate their own distinct showings of Article III standing.

GEICO's discussion on this point is similarly unhelpful. GEICO first states, as a matter of *ipse dixit* and without citation to authority, that apart from its direct purchases, it "has standing simply as an insurance company." (Plaintiffs' Response Br. at 10.) GEICO further contends that Defendants' allegedly anticompetitive conduct "illegally inflated the prices GEICO pays, whether GEICO pays for [a]uto [p]arts for its **[**29]** cars, pays repair shops directly or pays the insured or claimants." (*Id.*) Unfortunately, GEICO fails to tie these assertions in its response brief to specific allegations in its complaint, and the Court's own review of this pleading has uncovered only scant and largely conclusory support for the proposition that Defendants' allegedly anticompetitive conduct has inflicted injury on GEICO in the form of higher reimbursement payments to insureds or third-party claimants, even in instances when these insurance transactions did not entail the purchase of relevant auto parts. (*See, e.g.*, SAC at ¶¶ 164-68, 170, 193.)

Although the question is a close one, the Court finds that GEICO's allegations, albeit somewhat threadbare, are sufficient to establish the injury-in-fact element of Article III standing for each of the claims GEICO has asserted, whether as a direct **[*818]** purchaser or as an insurer reimbursing its insureds or third-party claimants. As explained, GEICO has affirmatively alleged that it sustained injuries in both capacities. On the other hand, its complaint admittedly lacks supporting detail as to precisely how Defendants' alleged price-fixing activities might have led to higher reimbursement **[**30]** payments for insurance claims that did not entail the purchase of relevant auto parts. Yet, this Court has observed in a similar context that such an "elongated . . . chain" of allegations linking price-fixing activities to increased payments poses "difficulties of proof, not pleading deficiencies." *Fuel Senders, 29 F. Supp.3d at 998*. "At this stage of the proceedings," where GEICO's claims are evaluated on the pleadings alone, GEICO need not allege precisely "how [it] intend[s] to establish" each of its theories of damages. *29 F. Supp.3d at 998*. Moreover, GEICO is not altogether relieved of the obligation to put forward allegations linking Defendants' allegedly anticompetitive activities to resulting injury: as discussed below, GEICO must overcome similar obstacles to satisfy the "fairly traceable" element of Article III standing and the requirement of antitrust standing.

2. GEICO Has Not Adequately Alleged Its Standing to Pursue Claims Under the Laws of Each of the States Referenced in Its Complaint, But It Will Be Granted Leave to Rectify This Pleading Deficiency.

Defendants' next Article III challenge is directed at GEICO's assertion of claims under the laws of thirty-two states and the District of Columbia. In Defendants' view, GEICO **[**31]** lacks standing to sue under the law of a given state in the absence of allegations that it made a payment, and hence suffered an injury, in that specific state. Because GEICO "does not allege any [p]ayments in any particular state," Defendants contend that its "conclusory assertions that it paid for something somewhere do[] not give it the right to sue under the laws of the thirty-three jurisdictions cited in the Complaint." (Defendants' Motion, Br. in Support at 8.)

In response, GEICO first suggests that it has, in fact, alleged that it suffered an actual injury in each of the states listed in the complaint. Citing Michigan as an example, GEICO points to its allegations that Defendants' conspiratorial activities (i) produced "artificially high" prices for the relevant auto parts and "eliminated price competition" for these parts "throughout Michigan," (ii) "deprived GEICO and its insureds and claimants of free and open competition" in the markets for these auto parts, and (iii) "resulted in GEICO paying supra-competitive, artificially high prices" for these auto parts. (SAC at ¶ 211(a).) GEICO further alleges that "Defendants' illegal conduct substantially affected commerce in Michigan," **[**32]** and that GEICO "has been injured in its business and property" as a "direct and proximate result" of this unlawful conduct. (*Id.* at ¶¶ 211(b)-(c).) GEICO makes essentially the same allegations for each of the other thirty-one states and the District of Columbia. As Defendants correctly observe, however, these allegations fall short of a direct assertion that GEICO actually purchased an auto part or made a reimbursement payment in Michigan or any other particular state.

Nonetheless, GEICO insists that it is reasonable to assume that it has made a purchase or reimbursement payment in each of the relevant states, where it is "the second largest automobile insurer in the United States" and "issu[es] insurance policies and adjust[s] claims in all 50 states and the District of Columbia." (Plaintiffs' Response Br. at 12.) Indeed, GEICO flatly states in its response brief that it has **[*819]** "conducted business, purchased parts and made payments for parts in every state and the District of Columbia." (*Id.*) Yet, these supposed facts about the nature and extent of GEICO's auto part purchases and insurance business are nowhere to be found in the complaint, and Defendants aptly cite the principle that **[**33]** ***HN11***[] "[s]tanding cannot be inferred" but instead "must affirmatively appear in the record." *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132, 1139 (E.D. Pa. 1993)*. As confident as GEICO might be that it will ultimately be able to produce evidence of a purchase or payment in each of the relevant states that was adversely impacted by Defendants' allegedly anticompetitive activities, Defendants quite rightly insist that GEICO still must plead this "injury in fact" element of its Article III standing in order to pursue claims under the laws of each of the jurisdictions identified in its complaint.

To be sure, Defendants acknowledge this Court's holding in the multidistrict litigation that ***HN12***[] it may be appropriate to defer a standing inquiry until the plaintiff has an opportunity to engage in discovery that could uncover evidence of relevant transactions and resulting injury in each of the pertinent jurisdictions. *See, e.g., Fuel Senders, 29 F. Supp.3d at 1000*. Yet, Defendants correctly observe that the courts typically adopt this approach in class actions, where the named plaintiffs generally lack information about transactions engaged in by members of the putative plaintiff class. Here, in contrast, GEICO's claims rest solely upon transactions in which this insurer itself participated. Thus, there **[**34]** is no justification in this case for a wait-and-see approach to the requirement that a plaintiff must plead each of the elements of Article III standing.

Nonetheless, even though GEICO's present pleading falls short of this standard, this is not the end of the matter. The Court has previously determined that GEICO should be granted leave to bring a separate suit for each of the part-specific conspiracies alleged in its complaint, and to address other pleading deficiencies in its existing complaint. Accordingly, GEICO may avail itself of this opportunity to ensure that it has properly alleged injuries sustained in each of the jurisdictions identified in its complaint.

3. GEICO Has Sufficiently Alleged That Its Alleged Injuries Are Fairly Traceable to Defendants' Allegedly Anticompetitive Conduct.

As their final challenge to GEICO's Article III standing, Defendants argue that GEICO has failed to plead the requisite causal connection between Defendants' alleged price-fixing conspiracies and resulting injury to GEICO. It bears emphasis, as a threshold matter, that this is not an across-the-board challenge. Most notably, in transactions in which GEICO itself allegedly purchased the auto parts at issue, Defendants **[**35]** concede that such allegations, taken as true, suffice to establish a causal connection between Defendants' alleged price-fixing activities and GEICO's payment of allegedly supra-competitive prices for these parts.

Moreover, in its capacity as owner of a fleet of vehicles, GEICO is similarly situated to the End-Payor Plaintiffs ("EPPs") in the multidistrict litigation. As GEICO observes, ***HN13***[] this Court has rejected challenges to the Article III standing of EPPs. *See, e.g., Fuel Senders, 29 F. Supp.3d at 997-99*; *Instrument Panel Clusters, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *7-*8*; *In re Automotive Parts Antitrust Litigation (In re Wire Harness Cases), 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *8-*9 (E.D. Mich. June 6, 2013)* ("*Wire Harnesses")*. In one of these decision, the Court explained that the defendant part suppliers had "cited no authority requiring an indirect purchaser to allege the detailed mechanics of the pass-through process to plead injury-in-fact **[*820]** and causation for purposes of constitutional standing to survive a *Rule 12(b)(6)* motion." *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *8*. GEICO's theory of causation, in its role as the owner of a fleet of vehicles, is fully consonant with this Court's rulings on Article III standing in the multidistrict litigation, and there is no basis for a different outcome here.[3]

Nonetheless, Defendants contend that GEICO has insufficiently pleaded the "fairly traceable" element of Article III standing in those instances "where no one — much less GEICO **[**36]** — purchased an Auto Part." (Defendants' Reply Br. at 5.) Specifically, Defendants cite the examples of claim payments (i) to insureds or third-party claimants who do not actually purchase replacement auto parts but instead pocket the payments, and (ii) made when vehicles are determined to be a total loss. As Defendants recognize, this Court has not demanded detailed allegations regarding the mechanisms by which supra-competitive auto part prices are passed through to end purchasers of vehicles. Yet, GEICO must establish a more elaborate pass-through mechanism here, under which the same allegedly anticompetitive activities that inflate the prices of new vehicles somehow result in higher claim payments for damaged or totaled vehicles. In addition, GEICO potentially has the opportunity to offset these higher claim payments through such means as increased insurance premiums. In Defendants' view, GEICO's complaint fails to address these complexities in the causal relationship between an alleged price-fixing conspiracy and resulting injury to GEICO as an insurer making claim payments. Defendants further note that GEICO's claims of injury arising from reimbursement payments for totaled vehicles **[**37]** pose a risk of double recovery, given that the original purchasers of the vehicles already have an opportunity to recover from the Defendant auto part suppliers in the multidistrict litigation for the increased cost of their vehicles due to Defendants' alleged price-fixing conspiracies.

These concerns are legitimate, and lead back to the question noted earlier: namely, whether GEICO's efforts to recover for direct part purchases, vehicle purchases as a fleet owner, and reimbursement payments as an insurer all constitute separate claims for which GEICO must establish its Article III standing, or instead reflect separate types of damages that GEICO seeks to recover through its overarching claims that Defendants engaged in price-fixing conspiracies. At a minimum, GEICO has pleaded the causal element of Article III standing as to at least some of its theories of recovery, and Defendants, as the moving parties, have not explained why more should be required at this juncture. Moreover, Defendants' challenge to GEICO's allegations of antitrust injury implicates similar issues of causation, and the Court finds that these questions are better addressed in that context. Accordingly, the Court **[**38]** concludes that GEICO has adequately alleged that its injuries are fairly traceable to Defendants' allegedly anticompetitive activities.

D. GEICO Has Adequately Alleged Its Standing Under *Antitrust Law* to Seek Redress As a Fleet Owner and a Direct Purchaser of Defendants' Auto Parts, But Not As an Insurer.

Apart from adequately pleading the elements of Article III standing, GEICO also **[*821]** must establish antitrust standing — *i.e.*, that it is appropriately situated to obtain relief under federal and state ***antitrust law***. Citing the multi-factor test adopted by the Supreme Court for determining whether a plaintiff has antitrust standing, *see*

[3] As noted earlier, to the extent that the allegations of GEICO's present complaint do not clearly set forth a theory of recovery based on GEICO's status as the owner of a fleet of vehicles, GEICO will have an opportunity to address this deficiency in the pleadings it files in response to the Court's rulings in this opinion and order.

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 545, 103 S. Ct. 897, 912, 74 L. Ed. 2d 723 (1983) (*"AGC"*), Defendants argue that GEICO's antitrust claims are subject to dismissal because this insurer's alleged injuries are too remote from the alleged price-fixing schemes carried out by the Defendant auto part suppliers.

In response, GEICO first maintains that Defendants' challenge to its antitrust standing is foreclosed by this Court's rulings in the multidistrict litigation. To the extent that GEICO owns a fleet of vehicles and has reimbursed repair shops for their purchases of auto parts installed in the vehicles of GEICO's insureds and third-party **[**39]** claimants, GEICO argues that it is similarly situated to the EPPs in the multidistrict litigation that have withstood challenges to their antitrust standing. Moreover, GEICO points to its allegations of direct auto part purchases as demonstrating its antitrust standing. Finally, to the extent that GEICO participates in the insurance market, as opposed to the market for auto parts, it contends that these two markets are sufficiently intertwined to support a finding of antitrust standing with respect to GEICO's alleged injuries arising from its payment of insurance claims. As discussed below, the Court finds that GEICO has sufficiently pleaded its antitrust standing to pursue claims in its roles as fleet owner and direct purchaser of auto parts, but not in its capacity as an insurer making claim payments to its insureds or third-party claimants.

HN14[] The Sixth Circuit has emphasized that "antitrust standing and Article III standing are not one and the same," and that a claim is subject to dismissal under *Rule 12(b)(6)* when the former is lacking. *NicSand, Inc. v. 3M Co., 507 F.3d 442, 449 (6th Cir. 2007)*. To establish the requisite antitrust standing, a plaintiff cannot rely solely upon "allegations of consequential harm resulting from a violation **[**40]** of the antitrust laws," because "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *AGC, 459 U.S. at 535, 545, 103 S. Ct. at 907, 912* (internal quotation marks and citation omitted). Rather, even when a plaintiff alleges an antitrust violation and resulting harm, his claim may not go forward if "[o]ther relevant factors — the nature of the [plaintiff's] injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the [plaintiff's] alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy — weigh heavily against judicial enforcement of the [plaintiff's] antitrust claim." *AGC, 459 U.S. at 545, 103 S. Ct. at 912*.

HN15[] "[A]ntitrust standing is a threshold, pleading-stage inquiry[,] and when a complaint by its terms fails to establish this requirement[,] [the court] must dismiss it as a matter of law." *NicSand, 507 F.3d at 450*. Yet, the *AGC* factors "are to be balanced," and "no single factor is conclusive." *Bodie-Rickett & Associates v. Mars, Inc., 957 F.2d 287, 290 (6th Cir. 1992)*; *see also Fuel Senders, 29 F. Supp.3d at 1001*. Although *AGC* by its terms applies only to claims under federal ***antitrust law***, Defendants state without **[**41]** contradiction that the same or similar principles of antitrust standing govern the state law antitrust claims asserted in GEICO's **[*822]** complaint. *See Fuel Senders, 29 F. Supp.3d at 1002* (recognizing that the jurisdictions under which the plaintiffs in that case brought state law antitrust claims "either apply the *AGC* factors, look to federal law to interpret their state statutes, or apply a similar remoteness analysis to state antitrust claims").

In determining whether GEICO has antitrust standing, the Court must distinguish among the types of injuries alleged in GEICO's complaint and elsewhere in the record. First, GEICO alleges that it has directly purchased relevant auto parts, (*see, e.g.*, SAC at ¶¶ 17-25, 165), although the complaint does not provide any details as to the circumstances in which these purchases have occurred. Next, GEICO states — albeit in its response to Defendants' motion, and not in its complaint — that it is an indirect purchaser of relevant auto parts by virtue of its ownership of a fleet of vehicles. Finally, GEICO identifies three types of payments it has made in its role as an insurer: (i) payments to auto repair professionals on behalf of insureds and third-party claimants for replacement auto **[**42]** parts installed by the repair shop (referred to by Defendants as "Repair Payments"); (ii) reimbursement payments to insureds or third-party claimants to settle automotive damage or repair claims that potentially involved the purchase and installation of replacement auto parts ("Reimbursement Payments"); and (iii) payments to insureds or third-party claimants for the full value of vehicles declared a total loss ("Total Loss Payments"). (*See, e.g.*, SAC at ¶ 49.)

Turning first to the injuries allegedly suffered by GEICO that did not arise from the payment of insurance claims, it is clear that GEICO has standing to pursue antitrust claims arising from these injuries. To the extent that GEICO itself has purchased relevant auto parts at supra-competitive prices, this direct link between Defendants' alleged antitrust violations and resulting harm to GEICO obviates the need for consideration of the *AGC* factors. *See, e.g., In re Cardizem CD Antitrust Litigation, 332 F.3d 896, 911 (6th Cir. 2003)* (holding that ***HN16***[] the alleged injury of "paying higher prices for a product due to a lack of competition in the market" is sufficient to establish antitrust standing). As for the injuries allegedly sustained by GEICO as the owner of a fleet of vehicles, GEICO contends that this **[**43]** alleged harm is precisely the same as the injury claimed by the EPPs in the multidistrict litigation, who likewise are indirect purchasers of auto parts that were installed either (i) in new vehicles purchased by the EPPs, or (ii) in the process of repairing damaged vehicles owned by the EPPs. *See, e.g., Fuel Senders, 29 F. Supp.3d at 992-93*. As GEICO observes, this Court has held in the multidistrict litigation that EPPs satisfy the *AGC* standard for antitrust standing, *see, e.g., Fuel Senders, 29 F. Supp.3d at 1001-03*; *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *14-*18*, and Defendants fail to suggest why the outcome should be different here.

Matters are more complicated, however, when considering the injuries allegedly sustained by GEICO in its role as auto insurer. In particular, the *AGC* factors must be separately analyzed for each type of payment GEICO has made in this capacity. The Court addresses in turn each of the forms of payment made by GEICO as an insurer.

1. Repair Payments

In the case of Repair Payments, GEICO reimburses a repair professional for the cost of replacement auto parts installed in the course of repairing an insured's or third-party claimant's vehicle. In this instance — unlike the other types of payments made by GEICO as an auto **[*823]** insurer — Defendants have no cause for concern that GEICO's **[**44]** payment might have been wholly unrelated to the purchase of auto parts, such that this transaction should be characterized as occurring outside the auto parts market in which Defendants allegedly carried out their price-fixing conspiracies. Rather, the principal *AGC* factors implicated by GEICO's Repair Payments are the risk of duplicative recovery and the existence of more direct victims of Defendants' alleged antitrust violations. Accordingly, the Court focuses primarily on these two factors in determining whether GEICO has sustained an antitrust injury as a result of its Repair Payments.

In Defendants' view, "[t]he risk of duplicative recovery weighs heavily against standing here." (Defendants' Motion, Br. in Support at 14 (footnote omitted).) In particular, Defendants point to the EPPs in the multidistrict litigation as more direct victims of the alleged price-fixing conspiracies who have "already asserted . . . and settled" claims against the Defendant auto part suppliers, and thereby "vindicated the public interest" that might otherwise be served through GEICO's purportedly less direct effort to recoup its Repair Payments. (*Id.* at 15 (internal quotation marks omitted).) Indeed, Defendants **[**45]** go further in their reply brief, submitting that GEICO "seeks recovery for the same transaction — the *same* Auto Parts installed in the *same* vehicles — as the end-payors." (Defendants' Reply Br. at 7 (emphasis in original).) In light of this purported "certainty" that "a more directly affected plaintiff" may challenge — and, in Defendants' view, has challenged — the price-fixing conspiracies alleged by GEICO, Defendants assert that the relevant *AGC* factors "could not weigh more heavily against antitrust standing." (Defendants' Motion, Br. in Support at 15.)

In response, GEICO does not deny that its claims arising from Repair Payments pose a risk of duplicative recovery. Instead, it more broadly contends that "duplicative recovery is not a properly considered *AGC* factor in this case," (Plaintiffs' Response Br. at 16), where it has asserted antitrust claims under the laws of jurisdictions that have enacted so-called "*Illinois Brick* repealer statutes" — that is, statutes that override the Supreme Court's decision in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, and allow recovery by indirect purchasers under state law. In support of this sweeping invitation to disregard the possibility of duplicative recovery, GEICO points to this **[**46]** Court's decision in *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *18*, as well as another district court ruling, *In re Flash Memory Antitrust Litigation, 643 F. Supp.2d 1133, 1156 (N.D. Cal. 2009)*, that this Court has cited with approval in the multidistrict litigation.

To be sure, ***HN17***[] this Court has recognized that a state's enactment of an *Illinois Brick* repealer statute evidences a state policy to "allow indirect purchasers to bring [antitrust] claims" despite a heightened risk of duplicative recovery. *Fuel Senders, 29 F. Supp.2d at 1003*; *see also* *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *18*. Yet, the Court has not gone so far as to say that these enactments render the threat of duplicative recovery wholly irrelevant to an antitrust standing inquiry under *AGC*. To the contrary, rather than relying solely on a state's repeal of *Illinois Brick* as conclusively resolving *AGC*'s "duplicative recovery" factor in favor of an indirect purchaser's antitrust standing, this Court has gone on to cite specific allegations by the indirect purchaser that "lessen the risk of duplicative recovery." *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *18* (citing *In re Flash Memory, 643 F. Supp.2d at 1156*); *see also* *Fuel Senders, 29 **[*824]** F. Supp.3d at 1003*. In its *Fuel Senders* decision, for example, the Court pointed to the indirect purchasers' allegations that the overcharges they paid were "distinct and traceable," and it further observed that the direct purchaser OEMs were not pursuing their own antitrust claims. *29 F. Supp.3d at 1003*; *see also* *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *18* (citing similar allegations **[**47]** of "distinct and traceable" overcharges as "lessen[ing] the risk of duplicative recovery").

Here, in contrast, Defendants state without contradiction that duplicative recovery is not only a possibility but a certainty, where the settlements reached in the multidistrict litigation between the defendant auto parts suppliers and the EPPs define the settlement classes as including indirect purchasers of replacement auto parts. (*See* Defendants' Motion, Ex. B-2 (chart of relevant settlement agreement provisions).)[4] Thus, the repair professionals who are reimbursed through Repair Payments evidently are eligible to recover in the multidistrict litigation as part of the EPP settlement classes. Moreover, although the *Illinois Brick* repealer statutes reflect a policy that indirect purchasers should be permitted to bring claims even at the risk of duplicative recovery by direct purchasers, Defendants correctly observe that GEICO's Repair Payment claims "seek[] recovery for the same transaction[s] — the *same* Auto Parts installed in the *same* vehicles" — that the indirect purchaser repair professionals rely upon to obtain reimbursement through the Repair Payments. (Defendants' Reply Br. at 7 (emphasis **[**48]** in original).) Under these circumstances, two of the *AGC* factors — the risk of duplicative recovery and the existence of more direct victims — weigh heavily against GEICO's antitrust standing.

The remaining *AGC* factors do not tip the balance in GEICO's favor with respect to its Repair Payment claims. First, regarding "the nature of [GEICO's] alleged injury[,] including the status of [GEICO] as consumer or competitor in the relevant market," *Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085 (6th Cir. 1983)*, all are agreed that the injuries allegedly incurred by GEICO as a result of its Repair Payments were not a product of GEICO's participation in the markets for the various auto parts at issue here. Rather, GEICO made the Repair Payments to reimburse repair professionals, who in turn were indirect purchasers of the relevant auto parts that were the subject of Defendants' alleged price-fixing conspiracies. Nonetheless, GEICO correctly observes that ***HN18***[] it need not be a direct participant in the relevant auto part markets, so long as the market in which it did participate is "inextricably linked and intertwined" with these markets. *Fuel Senders, 29 F. Supp.3d at 1002*.

The allegations of GEICO's complaint fail to forge this link. Admittedly, GEICO has affirmatively **[**49]** alleged that "[t]he individual Auto Parts Submarkets and the market for vehicles are inextricably linked and intertwined," (SAC at ¶ 166), and this Court has deemed such an allegation sufficient to establish the antitrust standing of indirect purchasers in the multidistrict litigation, *see, e.g.,* *Fuel Senders, 29 F. Supp.3d at 1002*; *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *15-*16*. These rulings are unavailing here, however, because GEICO **[*825]** has not explained how its Repair Payments could be characterized as made in "the market for vehicles" or some other market that has been recognized as inextricably intertwined with the auto part markets in which Defendants carried out their alleged price-fixing conspiracies. Rather, GEICO makes Repair Payments in its role as an auto insurer, and although GEICO insists that "this [insurance] market too is inextricably intertwined with the market[s] for Auto Parts," (Plaintiffs' Response Br. at 17), Defendants aptly observe that GEICO has neither

[4] In some more recent cases, the proposed classes do not include indirect purchasers of replacement parts, but only those individuals or entities who have purchased or leased new vehicles. (*See, e.g., Ascher v. Alpha Corp.*, No. 16-13997, Dkt. 1, Complaint at ¶¶ 143-44 (part of the Access Mechanisms Actions, No. 16-04103).) The EPP settlements identified by Defendants, however, encompass these indirect purchases of replacement parts.

pleaded any such connection in its complaint nor cited any authority recognizing such a link between a product market and an insurer of participants in that market. *Cf. Southaven Land Co., 715 F.2d at 1086* (explaining that a plaintiff's injury is "inextricably intertwined" with the injury allegedly inflicted by an antitrust **[**50]** defendant on participants in the relevant market if the plaintiff is "manipulated or utilized by [the defendant] as a fulcrum, conduit or market force to injure" the participants in that market).

To the contrary, Defendants have pointed to case law that casts doubt on GEICO's effort to forge a sufficiently close connection between its Repair Payments and the pertinent auto part markets. In *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc., 185 F.3d 957 (9th Cir. 1999)*, for example, the plaintiff health and welfare benefit plans brought suit against tobacco companies, asserting claims under federal and state Racketeer Influenced and Corrupt Organizations ("RICO") and antitrust laws for costs incurred in paying for treatment of smoking-related illnesses suffered by plan participants and beneficiaries. Applying the *AGC* factors, as well as similar considerations governing RICO standing, the court held that the plaintiffs could not recover under either RICO or ***antitrust law***. *Oregon Laborers-Employers, 185 F.3d at 966-67*. In support of this ruling, the court reasoned that the plaintiff benefit plans were "neither consumers nor competitors in the relevant market of cigarettes and tobacco products," and that "[t]o the extent they have suffered injury, their claims are entirely derivative of the injuries suffered **[**51]** by smokers." *185 F.3d at 967*. The court further explained that the plaintiffs' claimed injuries were too remote from the alleged wrongdoing of the defendant tobacco companies to permit a recovery under ***antitrust law***, where absent "any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers." *185 F.3d at 963*; *see also Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 239 (2d Cir. 1999)* (holding in a similar case involving only RICO claims that the plaintiff health and welfare benefit funds lacked standing because their claimed injuries were "purely contingent on harm to third parties" and "their damages [we]re entirely derivative of the harm suffered by plan participants as a result of using tobacco products").

In an effort to distinguish this case law involving the tobacco industry, GEICO contends that it has alleged "direct" rather than indirect or derivative injuries by virtue of "paying inflated prices for Auto Parts." (Plaintiffs' Response Br. at 16 n.13.) Yet, in making Repair Payments, GEICO does not directly "pay[] inflated prices for Auto Parts," but instead reimburses indirect purchasers for the allegedly *supra*-competitive prices they paid to acquire those parts. This is an indirect **[**52]** injury, purely derivative of the harm suffered by participants in the markets for auto parts. To be sure, GEICO has alleged that this injury is directly traceable to the harm allegedly inflicted by Defendants on the markets for auto parts, but this consideration **[*826]** is relevant to another *AGC* factor, discussed below. The fact that GEICO's alleged injuries might be directly traceable to Defendants' alleged price-fixing conspiracies does not assist GEICO in showing either (i) that it sustained these injuries as a participant in the auto part markets in which Defendants allegedly conspired, or (ii) that these auto part markets were inextricably intertwined with the insurance market in which GEICO operated when making Repair Payments. Accordingly, this *AGC* factor militates against a finding of antitrust standing.

The remaining *AGC* factors, in contrast, tend to support a finding of antitrust standing. These factors call for consideration of "the causal connection between the violation and the harm," and "the directness of the injury, and whether damages are speculative." *Fuel Senders, 29 F. Supp.2d at 1001*. Defendants posit a "complex" chain of distribution for auto parts and prices that are "affected by numerous market factors." **[**53]** (Defendants' Motion, Br. in Support at 19; *see also id.* at 13-14 (diagrams representing these distribution chains).) GEICO, on the other hand, alleges that the relevant auto parts are "identifiable, discrete physical products" that "may be traced through the chain of distribution," and that the "cost and price" of these parts "also may be traced." (SAC at ¶ 167.) The complaint further alleges that the supra-competitive prices charged by Defendants are passed along to repair professionals who obtain replacement parts in order to repair vehicles belonging to GEICO's insureds and third-party claimants, and that GEICO in turn is impacted by these supra-competitive prices when it reimburses these repair professionals for the artificially inflated costs they have incurred. (*See id.* at ¶¶ 164-65.) This Court has cited similar allegations of overcharges that are passed and traceable through the chain of distribution as sufficient to satisfy the pertinent *AGC* factors. *See, e.g., Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *17*. Though GEICO's claims admittedly add one more link to this chain of alleged overcharges, the Repair Payments theory of recovery does not inject an insurmountable degree of uncertainty or speculation into the task of tracing overcharges **[**54]** and resulting injuries through the distribution chain, particularly in the pleading stage of this litigation.

Upon balancing these various *AGC* factors, the Court concludes that GEICO lacks antitrust standing to pursue its claims arising from Repair Payments. Most notably, GEICO's recovery under this theory would be entirely duplicative of the recoveries obtained by EPPs in their settlements with Defendants in the multidistrict litigation. Moreover, these indirect purchasers of relevant auto parts are better positioned than GEICO to vindicate the public interest in holding Defendants accountable for their alleged price-fixing conspiracies. In addition, GEICO has failed to plead facts from which it could be concluded that the insurance market in which GEICO sustained its injuries is inextricably intertwined with the auto part markets in which Defendants carried out their alleged conspiracies. Although other factors tend to support a finding of antitrust standing, these considerations tip the balance decisively in the other direction.

2. Reimbursement Payments

The next type of injury identified by GEICO as supporting a recovery under ***antitrust law*** is its Reimbursement Payments — that is, **[**55]** payments made to insureds or third-party claimants to settle automotive damage or repair claims that potentially entail the purchase and installation of replacement auto parts. Much of the preceding analysis addressing GEICO's Repair Payments applies with equal **[*827]** force here, so the Court may proceed more quickly through its consideration of the *AGC* factors.

First, to the extent that GEICO's Reimbursement Payments cover the cost of replacement auto parts used in the process of repairing an insured's or third-party claimant's vehicle, these payments are materially indistinguishable from GEICO's Repair Payments in terms of the risk of duplicative recovery and the existence of more direct victims of Defendants' alleged price-fixing conspiracies. In either case, an indirect purchaser obtains replacement auto parts for use in vehicle repair, and GEICO in turn makes an insurance payment that covers the cost of this indirect purchase. Accordingly, the Court's earlier assessment of Repair Payments applies here as well: duplicative recovery is not only a possibility but a near certainty, given the settlements reached in the multidistrict litigation between the Defendant auto part suppliers and **[**56]** the indirect purchasers, and the definition of the settlement classes as including indirect purchasers of replacement auto parts.[5] Likewise, these indirect purchasers are more direct victims of Defendants' alleged antitrust violations, and they have already challenged this alleged wrongdoing and obtained relief through the settlements in the multidistrict litigation.

Next, it is clear that GEICO makes both Repair and Reimbursement Payments in its role as insurer, and not as a participant in the pertinent markets for auto parts. Consequently, the Court's analysis of the *AGC* factor concerning the nature of GEICO's alleged injury applies with equal force to both Repair and Reimbursement Payments. In

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[5] In its response to Defendants' motion, GEICO suggests that Defendants' protest against duplicative recovery should be viewed as "a case of buyers' remorse," where Defendants agreed to settlement classes in the multidistrict litigation that "included automobile insurers" among the indirect purchasers of replacement parts, but then failed to negotiate settlement terms that accounted for the situations in which "automobile insurers [we]re the party paying for" these replacement parts. (Plaintiffs' Response Br. at 20 n.16.) In GEICO's view, "[b]ecause automobile insurers pay for the vast majority of replacement parts in the United States," Defendants' negotiation of settlement agreements that frequently result in payments to two parties arising from a single purchase of replacement parts reflects a missed opportunity to craft settlement classes that account for this marketplace reality. (*Id.*)

As Defendants observe, however, any such potential for duplicative recoveries among members of the settlement classes in the multidistrict litigation is unhelpful to GEICO in establishing antitrust standing in this case. Rather, GEICO must show that the *AGC* factors, including the risk of duplicative recovery, favor a finding of antitrust standing under the circumstances presented here, and it is wholly immaterial that insurers who are similarly situated to GEICO have been included in settlement classes in the multidistrict litigation without having to make this showing. GEICO could have obtained this benefit by participating in the settlements, but it instead elected to opt out and pursue its own claims.

short, just as with the Repair Payments, three of the *AGC* factors weigh strongly against a finding of antitrust standing.

However, the comparison between Repair and Reimbursement Payments breaks down in situations where the latter are not, in fact, used to cover the cost of purchasing replacement auto parts. As Defendants observe, the recipient of a Reimbursement Payment will not necessarily use this payment to purchase replacement parts, but instead might elect to forgo repairs and pocket **[**57]** the insurance proceeds. In these circumstances, two of the *AGC* factors no longer militate against standing, because the absence of a part purchase means that there is neither a risk of duplicative recovery nor a more direct victim **[*828]** who is better positioned to challenge Defendants' alleged antitrust violations. Yet, any advantage to GEICO under these two factors is more than offset by other considerations. After all, if a Reimbursement Payment is not used to cover the cost of replacement parts, it cannot possibly be viewed as made in either the market for auto parts or any other market that is inextricably intertwined with this market. GEICO has not cited any authority for treating such payments in a wholly separate market as antitrust injuries. *Cf. Southaven Land Co., 715 F.2d at 1086-87* (finding that an injury that was only a "tangential by-product" of the defendant's allegedly anticompetitive conduct was "not sufficiently linked to the pro-competitive policy of the antitrust laws" to confer antitrust standing). It follows that the *AGC* factor addressing the nature of GEICO's alleged injury tilts the balance decisively against a finding of antitrust standing in instances where a Reimbursement Payment is not associated with **[**58]** the purchase of a relevant auto part.

As for the remaining *AGC* factors — the causal connection between the violation and the harm, and the directness of the injury and the related question whether damages are speculative — they are no more favorable to a claim of antitrust standing derived from Reimbursement Payments than from Repair Payments, and arguably less so under some circumstances. To the extent that a Reimbursement Payment compensates for the purchase of auto parts, GEICO has alleged (i) that both the parts and their costs may be traced through the chain of distribution, and (ii) that the *supra*-competitive prices charged by Defendants for these parts were passed along to GEICO by its insureds, third-party claimants, or the repair professionals that obtained and installed these parts. (*See* SAC at ¶¶ 164-65, 167.) As discussed earlier, similar allegations were deemed sufficient in the multidistrict litigation to establish the antitrust standing of indirect purchasers, *see, e.g. Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612 at *17*, and the Court has explained that GEICO's Repair Payment claims do not add so much complexity to the pass-through of overcharges that they should tip the balance of the relevant *AGC* factors against standing. **[**59]** It follows, then, that the Court's reasoning with respect to GEICO's Repair Payments should likewise govern the analysis of GEICO's Reimbursement Payments, at least insofar as these two types of payments reflect similar reimbursements to indirect purchasers for the cost of obtaining auto parts at allegedly supra-competitive prices.

The same cannot be said for the situation in which no parts are purchased in connection with a Reimbursement Payment. Even assuming that the claim payments made by GEICO in these circumstances bear some relationship to the allegedly supra-competitive prices of auto parts that would have to be acquired if the insured's or third-party claimant's vehicle were actually repaired, Defendants correctly observe that GEICO's complaint is wholly silent as to the claim adjustment process used by GEICO to determine the amounts of these payments. Thus, the Court is left to speculate on such relevant matters as (i) whether insureds and third-party claimants are reimbursed for the full amount they would have paid for the replacement parts necessary to repair their vehicles, and (ii) whether GEICO's agreements with its insureds invariably provide for this full reimbursement **[**60]** or instead apply different claim adjustment schemes and formulas that depend upon the insured's choice of a particular policy or type of coverage. As Defendants aptly summarize, GEICO's Reimbursement Payments are "a further step removed from the market[s] in which Defendants participated," **[*829]** (Defendants' Reply Br. at 12), which injects additional uncertainty into the analysis of the *AGC* factors that call for consideration of (i) the causal connection between Defendants' alleged antitrust violations and harm to GEICO, and (ii) the directness of GEICO's injury and speculative nature of the resulting harm. In light of the Court's conclusion that GEICO's allegations are insufficient to establish its antitrust standing to pursue its Repair Payment claims, these same allegations necessarily fail to overcome the additional obstacles that stand in the way of GEICO's effort to recover its Reimbursement Payments under ***antitrust law***.

3. Total Loss Payments

The final type of injury for which GEICO seeks to recover is its Total Loss Payments — *i.e.*, payments made to insureds or third-party claimants for vehicles declared a total loss. Again, the analysis of the *AGC* factors with respect to GEICO's Total **[**61]** Loss Payments does not differ considerably from the analysis of GEICO's other claims arising from its payments as an insurer. Indeed, because the injuries arising from GEICO's Total Loss Payments are materially indistinguishable from the injuries sustained by this insurer as a result of Reimbursement Payments where no auto parts are purchased, the Court travels no new ground in addressing GEICO's antitrust standing to recover its Total Loss Payments.

First, because GEICO's Total Loss Payments do not reimburse their recipients for any purchase of replacement auto parts, there is neither a risk of duplicative recovery nor a more direct victim who is better situated to challenge the alleged antitrust violations that led to GEICO's injuries. Accordingly, as is the case with Reimbursement Payments where no auto parts are purchased, these two *AGC* factors favor a finding of antitrust standing for GEICO's claims arising from Total Loss Payments.

The remaining *AGC* factors, however, tip the balance decisively against a finding of antitrust standing. First, because Total Loss Payments are not made in connection with the purchase of auto parts, the injury allegedly inflicted on GEICO does not occur **[**62]** in the auto part markets in which Defendants allegedly conspired. As already discussed in the context of Reimbursement Payments that do not cover the cost of replacement parts, GEICO has not put forward any allegations or authority to support a finding that the insurance market in which Total Loss Payments are made is inextricably linked with the market for auto parts.

The final two *AGC* factors — the causal connection between the violation and the harm, and directness of the injury and the related question whether the resulting damages are speculative — also militate against a finding of antitrust standing. GEICO's apparent theory of harm with respect to Total Loss Payments is that these payments, like the prices paid for new vehicles, are inflated by virtue of Defendants' overcharges for the component parts of the vehicles. As observed earlier, however, GEICO has not described its claim adjustment process for determining the amount of Total Loss Payments, much less alleged that Defendants' alleged overcharges somehow affect this process in a predictable manner and produce increased payments that can be traced to Defendants' overcharges and quantified in order to arrive at a non-speculative **[**63]** award of damages. Rather, the complaint addresses this subject at only the highest level of generality, inviting the Court to assume (i) that the supra-competitive prices allegedly charged by Defendants somehow pass into the insurance market and produce increased Total Loss Payments, (ii) that the extent of these increases can be accurately **[*830]** measured and properly apportioned among the Defendant auto part suppliers, and (iii) that any such means of measuring and apportioning damages will be equally valid across the various forms of auto insurance coverage offered by GEICO.

Indeed, Defendants correctly point out that GEICO's effort to recover for its Total Loss Payments introduces still more levels of uncertainty into the process of attributing fault to particular Defendant suppliers and quantifying the resulting harm to GEICO. As Defendants observe, GEICO "fails entirely to allege how insureds or claimants came to possess" the vehicles for which Total Loss Payments are made, leading to the possibility that some of these vehicles might have "passed through multiple, intervening, used vehicle transactions — including private sales transactions, dealer trade-ins, and non-arm's-length transactions **[**64]** like gifts from family members — on the path from the OEMs to the insureds." (Defendants' Motion, Br. in Support at 22.) Even assuming that GEICO could provide a reasonable measure of harm resulting from a Total Loss Payment for a vehicle purchased as new by an insured, GEICO does not limit its attempted recovery to only this subclass of Total Loss Payments, nor does its complaint attempt to address, or even acknowledge, the myriad complicating factors that must be considered when Total Loss Payments are made for used vehicles. Accordingly, GEICO lacks standing to assert antitrust claims arising from this type of payment.

E. To the Extent That GEICO Seeks to Recover from Defendants Under a Theory of Subrogation, the Court Cannot Determine the Viability of This Potential Avenue of Recovery Under the Present Record.

To the extent that GEICO seeks to recover in this case as an insurer, rather than a direct purchaser of auto parts or the owner of a fleet of vehicles, Defendants argue that any such claims have been settled and released under the terms of the settlement agreements entered into by the EPPs and the defendant auto parts suppliers in the multidistrict litigation. Specifically, **[**65]** Defendants point to provisions in these settlements in which the EPPs (i) broadly released all claims they could bring against the defendant suppliers arising from the conduct alleged in the multidistrict litigation, and (ii) agreed that these releases encompassed not only any claims that the EPPs themselves had brought or could have pursued, but also any claims that could be asserted derivatively on their behalf. (*See* Defendants' Motion, Ex. B-2, Index of Relevant Settlement Agreement Provisions in Multidistrict Litigation.) Indeed, most of these settlement agreements expressly included "insurers" in the list of non-parties whose derivative claims were released by the members of the EPP settlement classes. Defendants further observe that GEICO plainly had notice of these settlements, given its election to opt out of the settlement classes, but that it nonetheless failed to lodge any objections to the releases or any other terms of these agreements. It follows, in Defendants' view, that any claims asserted by GEICO in this case in its role as insurer have been released by GEICO's insureds as members of the EPP settlement classes.

In response, GEICO first insists — and Defendants do **[**66]** not dispute — that Defendants' appeal to the releases in the EPP settlement agreements has no effect on GEICO's ability to pursue recoveries based on (i) its direct purchases of relevant auto parts, or (ii) its purchase and ownership of a fleet of vehicles. In these capacities, GEICO is properly characterized as an EPP. Because it opted out of the settlements **[*831]** reached by the EPPs in the multidistrict litigation, it preserved its right to independently assert claims of the sort advanced, and then settled and released, by the EPPs — namely, claims of injury to vehicle and replacement part purchasers resulting from Defendants' alleged price-fixing conspiracies. Although Defendants challenge these claims on other grounds, they do not contend that the releases granted to them in the multidistrict litigation operate to bar GEICO from seeking to recover in its roles as automobile and auto part purchaser. Rather, the parties disagree only as to the viability of GEICO's claims in its capacity as insurer.

Despite their differences as to the merits of GEICO's claims as insurer, the parties seemingly agree that these claims — and, more specifically, the possible release of these claims via the EPP **[**67]** settlement agreements — are properly analyzed under the law governing an insurer's right of subrogation. As explained by the Sixth Circuit, ***HN19***[] the doctrine of equitable subrogation, "as applied in the insurance context, allows an insurer to sue a third party for injuries that the third party caused to the insured, when the insurer compensated the insured for those injuries." *National Surety Corp. v. Hartford Casualty Insurance Co., 493 F.3d 752, 756 (6th Cir. 2007)*. Although this theory of recovery is governed by state law and an insurer's right of subrogation therefore varies from state to state, the parties agree upon the general contours of the law of subrogation as it applies here. In particular, "[t]he doctrine of equitable subrogation allows insurers to 'stand in the shoes' of their insured to seek indemnification by pursuing any claims that the insured may have had against third parties legally responsible for the loss." *Allstate Insurance Co. v. Mazzola, 175 F.3d 255, 258 (2d Cir. 1999)*. In pursuing this recovery, the insurer (or subrogee) "succeeds to the rights of" its insured (the subrogor), and seeks to "require the party who caused the damage to reimburse the insurer for the payment the insurer has made" to its insured. *Allstate, 175 F.3d at 258* (internal quotation marks and citations omitted).

HN20[] "As a general matter, a subrogation claim by an insurer depends **[**68]** upon the claim of the insured and is subject to whatever defenses the tortfeasor has against the insured." *Allstate, 175 F.3d at 260* (internal quotation marks and citations omitted). Thus, "[w]hen an insured settles with or releases a third party from liability for a loss that the third party has caused, the insurer's subrogation right against such party may be destroyed." *Gibbs v. Hawaiian Eugenia Corp., 966 F.2d 101, 106 (2d Cir. 1992)*. There is an exception to this general rule. "Where a third party obtains a release from an insured with knowledge that the latter has already received payment from the insurer or with information that, reasonably pursued, should give him knowledge of the existence of the insurer's subrogation rights, such a release does not bar the [insurer's] right of subrogation." *Gibbs, 966 F.2d at 107*. This exception is intended to prevent a release from "operat[ing] as a fraud upon the insurer." *Allstate, 175 F.3d at 261*.

As discussed, the law of subrogation is relevant here only with respect to GEICO's claims arising from payments to its insureds or third-party claimants. GEICO does not dispute that under the terms of the settlements reached with the defendant auto part suppliers in the multidistrict litigation, the EPPs (i) broadly agreed to release the defendants from liability for any claims **[**69]** the EPPs brought or could have pursued relating to the conduct alleged in their complaints, and (ii) defined this release as encompassing not just the EPPs themselves, but also any third party **[*832]** that could assert the EPPs' claims derivatively. (*See id.*) Indeed, Defendants note that nearly all of the settlement agreements expressly listed insurers as among the third parties whose claims were released. Moreover, there is no dispute that GEICO was aware of the terms of the EPP settlements, given its express election to opt out of the settlement classes, but it did not lodge any objections to any aspect of these settlements.

It follows, in Defendants' view, that GEICO's claims in the present suit are barred to the extent that they arise from GEICO's role as insurer and seek to recover for payments made to insureds or third parties as reimbursement for the purchase of auto parts at *supra*-competitive prices. As Defendants observe, these insureds and third-party claimants "are members of the EPP settlement classes," (Defendants' Motion, Br. in Support at 24), and they therefore have settled and released their claims against Defendants arising from the auto part purchases covered by the settlements. **[**70]** Moreover, these releases encompass not only the claims that were brought or could have been brought by the EPPs themselves, but also claims asserted derivatively by third parties such as GEICO that rest upon the same underlying auto part transactions. Accordingly, Defendants maintain that any claims asserted by GEICO as an insurer, regardless of the underlying legal theory of recovery, have been released as a result of the EPPs' settlements in the multidistrict litigation.[6]

As Defendants recognize, however, the doctrine of subrogation arguably provides an avenue for GEICO to avoid this result, assuming it can identify a viable basis for such a recovery here. Under this theory, GEICO "succeeds to the rights of" its insureds in order to "require [Defendants] to reimburse [GEICO] for the payment[s] [it] has made" to its insureds arising from the losses they sustained in purchasing auto parts at *supra*-competitive prices. *Allstate, 175 F.3d at 258* (internal quotation marks and citations omitted). This "right of subrogation attaches, by operation of law, upon [GEICO's] payment of an insured's loss," *Allstate, 175 F.3d at 260*, and it is precisely these claim payments that GEICO seeks to recover from Defendants through the various claims it **[**71]** has asserted in its role as insurer.

As observed earlier, ***HN21***[] a subrogation claim brought by GEICO as insurer "depends upon the claim of [its] insured and is subject to whatever defenses the tortfeasor has against the insured." *Allstate, 175 F.3d at 260* (internal quotation marks and citations omitted). Ordinarily, then, once an insured "settles with or releases a third party from liability for a loss that the third party has caused," the insurer's right of subrogation is extinguished. *Gibbs, 966 F.2d at 106*. Defendants contend that under this usual rule, the EPPs' settlements and releases in the multidistrict litigation preclude GEICO from pursuing claims of subrogation in this case, as these claims are subject to the same defense of release that would prevent the EPPs themselves from seeking any additional recovery from Defendants. Defendants further point out that GEICO does not even purport to assert any claims of subrogation in its complaint. This pleading deficiency is particularly acute, in Defendants' view, where GEICO's rights to subrogation "depend[] **[*833]** on the terms of its contracts with its insureds and the [state] law[s] governing those contracts," but where GEICO has failed to "allege[] any of the terms of its insurance contracts" **[**72]** or "any facts showing that it could meet the required elements for a subrogation claim under the laws of any state." (Defendants' Motion, Br. in Support at 25-26.)

Yet, while the releases granted by the EPPs in their settlements ordinarily would operate to defeat GEICO's right of subrogation, this rule is subject to a recognized exception that arguably might apply here. Specifically, ***HN22***[] "[w]here a third party obtains a release from an insured with knowledge that the latter has already received payment from the insurer or with information that, reasonably pursued, should give him knowledge of the existence of the insurer's subrogation rights, such a release does not bar the [insurer's] right of subrogation." *Gibbs, 966 F.2d at 107*. In GEICO's view, Defendants cannot establish that they lacked knowledge or notice of GEICO's claim

[6] Of course, to the extent that the Court has determined elsewhere in this opinion and order that GEICO's claims as an insurer are defeated on other grounds, it need not decide whether these claims were released under the EPP settlements. This includes, most notably, GEICO's claims under ***antitrust law*** resting upon repair, replacement, and total loss payments made pursuant to GEICO's policies with its insureds.

payments to its insureds and its resulting right of subrogation, particularly in light of "the nature of the [a]uto [p]arts business (in which insurance companies are intricately involved in paying for parts and labor to restore insureds' vehicles to pre-loss condition)." (Plaintiffs' Response Br. at 32.) Defendants, for their part, note the absence of any allegations in the complaint **[**73]** that GEICO "notified Defendants of any subrogation rights that may have accrued as a result of paying claims to the EPPs," and they further observe that GEICO has not "attempt[ed] to identify the EPPs whose claims might be subrogated, to notify the Defendants of the number or value of EPP claims that might be subrogated, or to put Defendants on notice that they were at risk of paying the EPP claims twice if the Settlement Agreements became effective." (Defendants' Motion, Br. in Support at 27.)

This dispute cannot be resolved in the context of the present *Rule 12(b)(6)* motion to dismiss. First, Defendants correctly observe that GEICO has not even attempted to plead a theory of subrogation in its present complaint, and the Court cannot analyze the viability of this theory of recovery in a vacuum. Next, through their appeal to the release provisions in the EPP settlement agreements, Defendants have raised an affirmative defense to GEICO's claims as an insurer. *See* ***HN23***[] *Fed. R. Civ. P. 8(c)(1)* (identifying "release" as an affirmative defense that must be asserted in response to a complaint). As uniformly recognized in the case law, ***HN24***[] it generally is not appropriate to grant a *Rule 12(b)(6)* motion to dismiss on the basis of an affirmative defense, **[**74]** because a plaintiff ordinarily has no obligation to plead around this affirmative defense in order to state a viable claim. *See, e.g., Estate of Barney v. PNC Bank, N.A., 714 F.3d 920, 926 (6th Cir. 2013)*; *Cataldo v. U.S. Steel Corp., 676 F.3d 542, 547 (6th Cir. 2012)*; *see also Deckard v. General Motors Corp., 307 F.3d 556, 560 (7th Cir. 2002)*.

To be sure, a motion to dismiss may be granted where the "undisputed facts" as set forth in the pleadings "conclusively establish an affirmative defense as a matter of law." *Estate of Barney, 714 F.3d at 926* (internal quotation marks and citations omitted). Here, however, the pleadings do not address, much less conclusively resolve, the factual question whether Defendants had knowledge or notice of GEICO's potential subrogation rights arising from its claim payments to EPPs, such that the releases granted by the EPPs to Defendants did not operate to extinguish these rights. Consequently, GEICO's ability to pursue its claimed right of subrogation — assuming that it intends to pursue such a theory of recovery, and that such a **[*834]** claim is properly asserted in the amended pleadings authorized elsewhere in this opinion and order — is not defeated at the present juncture by the affirmative defense of release.

F. The Timeliness of This Suit Turns upon Factual Issues That The Court Cannot Resolve in the Context of a *Rule 12(b)(6)* Motion to Dismiss.

According to Defendants, GEICO's federal antitrust **[**75]** claims are governed by a four-year statute of limitations, and its state law antitrust claims "are subject to statutes of limitation ranging from two to four years." (Defendants' Motion, Br. in Support at 30.) Similarly, GEICO's state law consumer protection and unjust enrichment claims are governed by statutes of limitation "ranging from three to six years." (*Id.*) Defendants contend that all of GEICO's federal and state law claims are time-barred under these statutes of limitation, where GEICO's claims purportedly accrued "at the very latest . . . in February 2010," when the DOJ and foreign investigative agencies announced raids and investigations of auto part manufacturers, yet GEICO did not bring this suit until more than six years later, in September of 2016. (*Id.* at 30-32.) Although Defendants acknowledge that GEICO has invoked various mechanisms — including state discovery rules, the doctrine of fraudulent concealment, class action tolling, and the continuing violation doctrine — in an effort to bring its claims within the applicable limitation periods, they argue that GEICO's allegations fail to support these various attempts to save its allegedly untimely filing.

In response, GEICO views **[**76]** the pertinent case law — including, most notably, this Court's rulings in the multidistrict litigation — as supporting its appeals to discovery rules, fraudulent concealment, and class action tolling to extend the deadline for timely commencement of this suit. At a minimum, to the extent that Defendants offer speculation or cite extrinsic evidence that might cast doubt upon GEICO's allegations of timely filing, GEICO contends that such factual issues are not properly resolved in the context of a *Rule 12(b)(6)* motion to dismiss. As discussed below, the Court finds that GEICO has the better of this argument.

HN25[] Defendants' statute of limitations challenge is an affirmative defense that must be set forth in response to a complaint. *See* Fed. R. Civ. P. 8(c)(1). A plaintiff ordinarily need not plead around such affirmative defenses, and "a motion under Rule 12(b)(6), which considers only the allegations in the complaint, is generally an inappropriate vehicle for dismissing a claim based upon the statute of limitations." Cataldo, 676 F.3d at 547; *see also* In re Automotive Parts Antitrust Litigation (In re Wire Harness Cases — Truck & Equipment Dealer Actions), 2015 U.S. Dist. LEXIS 176199, 2015 WL 10376960, at *3 (E.D. Mich. Dec. 30, 2015) ("Wire Harnesses — Trucks"). Nonetheless, dismissal under Rule 12(b)(6) is appropriate where "the allegations in the complaint affirmatively show that **[**77]** the claim is time-barred," Cataldo, 676 F.3d at 547, and it is the plaintiff's burden in this instance to affirmatively "plead circumstances which would indicate why [the events giving rise to a claim] w[ere] not discovered earlier" or "why the statute [of limitations] should be tolled," Auslender v. Energy Management Corp., 832 F.2d 354, 356 (6th Cir. 1987).

Both sides agree that HN26[] a federal antitrust claim must be brought within four years after the claim accrues. *See* In re Automotive Parts Antitrust Litigation (In re Occupant Safety Restraints), 2014 U.S. Dist. LEXIS 120725, 2014 WL 4272784, at *10 (E.D. Mich. Aug. 29, 2014) **[*835]** (*"Occupant Safety Restraints")* (citing 15 U.S.C. § 15b). In addition, GEICO's state law antitrust claims "are subject to statutes of limitation ranging from two to four years." (*See* Defendants' Motion, Br. in Support at 30 (citing authorities collected in Ex. C).) GEICO's state law "consumer protection claims are subject to statutes of limitation ranging from three to six years," and its equitable claims of unjust enrichment likewise are subject to the same periods of limitation that govern its state law antitrust and consumer protection claims. (*Id.*) As GEICO observes, however, even where its state law consumer protection and unjust enrichment claims may be governed by the same statutes of limitation, these claims "may be subject to different accrual and tolling rules." (Plaintiffs' Response Br. at 25 n.23.)

As the starting point **[**78]** of their statute of limitations challenge, Defendants maintain that the statutes of limitation for GEICO's various claims "began to run, at the latest, in February 2010, which is when GEICO alleges both that Defendants engaged in the last overt act in furtherance of the alleged conspiracy and that it learned of investigations of suppliers of [a]uto [p]arts for antitrust violations." (Defendants' Motion, Br. in Support at 28.) Because "all of GEICO's claims are governed by limitations periods of six years or less," (*id.*), and because GEICO did not bring this suit until September of 2016, Defendants contend that GEICO's complaint is subject to dismissal in its entirety as untimely filed. In response, GEICO asserts that the allegations of its complaint are sufficient to raise factual issues as to both the accrual of its claims and the availability of tolling, so that it would not be appropriate to resolve these questions of fact in the context of a Rule 12(b)(6) motion to dismiss.

Turning first to the matter of claim accrual, Defendants cite two sets of allegations in GEICO's complaint as purportedly demonstrating that GEICO's claims accrued in February of 2010 at the latest. First, GEICO alleges that **[**79]** the DOJ and its law enforcement counterparts in Europe and Japan conducted "[p]arallel raids" in February of 2010 as "part of a coordinated international operation" to investigate suspected anticompetitive activities by auto part suppliers. (SAC at ¶¶ 129-31.) In connection with these raids, the DOJ "issued a general statement that it was 'investigating the possibility of anticompetitive cartel conduct of automotive electronic component suppliers' but provided no further detail." (Id. at ¶ 131.) Next, Defendants read GEICO's complaint as alleging that "Defendants committed the last overt acts in furtherance of the alleged conspiracy" in February of 2010. (Defendants' Motion, Br. in Support at 31 (citing SAC at ¶ 179).)

Neither of these allegations, properly construed in the context of the complaint as a whole, demonstrates conclusively that GEICO's claims accrued by February of 2010 at the latest. Regarding the February 2010 announcements by the DOJ and other law enforcement authorities that they were investigating possible anticompetitive conduct by auto part suppliers, this Court has found that HN27[] the requisite inquiry notice that triggers claim accrual is not established through the **[**80]** "availability of limited information in the public domain" regarding a government investigation. In re Automotive Parts Antitrust Litigation (In re Ceramic Substrates), No. 16-03802, Dkt. 27, 2017 U.S. Dist. LEXIS 221151 at *22 (E.D. Mich. May 5, 2017) (*"Ceramic Substrates")*. As the Court explained in the multidistrict litigation, although the government investigations into the suspected antitrust activities of auto part suppliers garnered "substantial and widespread" publicity over time, the initial February 2010 announcements identified only some **[*836]** auto part suppliers and a small subset of the auto parts, markets, and alleged conspiratorial activities that have since engendered the multiplicity of complaints filed in the multidistrict litigation. *See* [*Wire Harnesses — Trucks, 2015 U.S. Dist. LEXIS 176199, 2015 WL 10376960, at *4-*5*]. More generally, this Court emphasized that "[t]he statute of limitations inquiry is not made in light of all the connections that subsequently came to light," but rather must be confined to the information disclosed "at the time of the publicity" in question. [*2015 U.S. Dist. LEXIS 176199, [WL] at *6*].

In addition, GEICO affirmatively alleges that it remained unaware of Defendants' alleged price-fixing conspiracies for a period of time after the DOJ's initial February 2010 announcement. **[**81]** Specifically, GEICO alleges (i) that Defendants and their coconspirators "met and communicated in secret and agreed to keep the facts about their collusive conduct from being discovered," (ii) that they "engaged in other surreptitious activity, including the use of code names and meeting at private residences or remote locations," (iii) that they "coordinated their pricing in a manner to avoid detection," and (iv) that due to these affirmative efforts to conceal price-fixing activities, GEICO lacked knowledge or inquiry notice "until the public announcements of the government investigation[s] into each Auto Part." (SAC at ¶¶ 183-84.) This Court has repeatedly held that similar allegations of active concealment were sufficient to support appeals to the doctrine of fraudulent concealment, and thereby defer the accrual of claims. *See, e.g.,* [*Occupant Safety Restraints, 2014 U.S. Dist. LEXIS 120725, 2014 WL 4272784, at *10-*11*]; [*In re Automotive Parts Antitrust Litigation (In re Fuel Senders), 2014 U.S. Dist. LEXIS 61635, 2014 WL 1746121, at *11 (E.D. Mich. April 30, 2014)*]; [*In re Automotive Parts Antitrust Litigation (In re Wire Harness Cases), 2013 U.S. Dist. LEXIS 80337, 2013 WL 2456584, at *12 (E.D. Mich. June 6, 2013)*]. Therefore, factual issues remain as to the significance of the DOJ's February 2010 announcement to the accrual of GEICO's claims.

Nonetheless, Defendants insist that there must be an ascertainable end date to GEICO's appeals to discovery rules and fraudulent concealment, and they point to the allegation in the complaint that "the statutes of limitations **[**82]** as to GEICO's claims did not begin to run, at the earliest, until [the] DOJ publicly announced the investigation into each Auto Part." (SAC at ¶ 176.) Based on this allegation, Defendants have produced a chart summarizing their views as to which of GEICO's part-specific claims would be time-barred by a statute of limitations that began to run on the date of the public announcement of an investigation into a given auto part. (*See* Defendants' Reply, Exhibit A.) Yet, GEICO's invocation of discovery rules and the doctrine of fraudulent concealment cannot be addressed in isolation, without regard for its concurrent appeals to the continuing violation doctrine and class action tolling, both of which are discussed below. GEICO notes, for example, that although a Defendant supplier's sales of a specific auto part at [*supra*]-competitive prices "may have stopped when the Department of Justice made an announcement for that ***particular*** part," discovery might yet reveal that "some conspirators . . . did not exit the conspiracy immediately upon the DOJ announcement and continued to [sell this part at] illegally inflated prices." (Plaintiffs' Response Br. at 24 n.20 (emphasis in original).) Once again, **[**83]** then, factual issues preclude the Court from accepting Defendants' argument that the dates of the DOJ's public announcements should be viewed as hard-and-fast deadlines for the accrual of GEICO's claims.

As for Defendants' contention that GEICO has acknowledged the February 2010 accrual of its claims by alleging that **[*837]** "Defendants engaged in the last overt acts in furtherance of the alleged conspiracies in February 2010," (Defendants' Reply Br. at 18), this argument both misreads GEICO's complaint and misstates the law governing continuing violations. First, GEICO alleges that "Defendants committed their last overt acts in furtherance of the various conspiracies ***beginning*** in February of 2010," (SAC at ¶ 179 (emphasis added)), not that the last of the overt acts for ***each and every one*** of the sixteen alleged part-specific conspiracies occurred by February 2010 at the latest. Next, although Defendants suggest that GEICO "contradicts . . . controlling Sixth Circuit precedent" by asserting that "claims accrued with each sale of an Auto Part," (Defendant's Reply Br. at 20 n.22), GEICO points to controlling Supreme Court precedent that supports its appeal to the continuing violation doctrine. **[**84]** Specifically, ***HN28***[] as an example of a "continuing violation," the Court cited a "price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years," explaining that "each sale to the plaintiff" qualifies as an "overt act that is part of the violation" and thereby "starts the statutory period running again." [*Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 1990, 138 L. Ed. 2d 373 (1997)*] (internal quotation marks and citations omitted). The Sixth Circuit decisions cited by Defendants are not to the contrary, but merely emphasize that under the continuing violation doctrine, "an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." [*DXS, Inc. v. Siemens Medical Systems, Inc., 100*]

F.3d 462, 467 (6th Cir. 1996) (quoting Peck v. General Motors Corp., 894 F.2d 844, 849 (6th Cir. 1990)). Consistent with this case law, GEICO alleges that "Defendants committed an overt act in furtherance of the conspiracies each time they sold an Auto Part to an OEM," and that "[f]or each [such] overcharge . . ., a cause of action accrued, restarting the relevant statute of limitations." (SAC at ¶¶ 178-79.) Accepting these allegations as true, the Court finds that GEICO's claims continued to accrue after February of 2010, and it rejects Defendants' appeal to this date as the last viable point of accrual.[7]

Finally, Defendants **[**85]** challenge GEICO's attempt to invoke class action tolling as an additional means of avoiding the applicable statutes of limitation. As all parties here recognize, ***HN30***[] the commencement of a class action suit tolls the applicable statutes of limitation for all those who would have been members of the putative class but instead "elect[] to opt out of the **[*838]** class action [and] file individual claims." Weston v. AmeriBank, 265 F.3d 366, 368 (6th Cir. 2001). GEICO alleges in its complaint that it "was a putative member of the proposed classes" in each of the sixteen part-specific cases that were transferred into the multidistrict litigation before this Court. (SAC at ¶ 186.) It follows, in GEICO's view, that the running of the relevant statutes of limitation was "tolled from the filing of the[se] class [action] suits until GEICO opted out of the litigation on April 11, 2016." (*Id.*)

Defendants argue that this blanket allegation of class membership and attendant tolling is inadequate on two grounds. First, Defendants point to GEICO's failure to identify any specific putative class in the multidistrict litigation, much less "explain how it was a member of that class." (Defendants' Motion, Br. in Support at 33.) Next, Defendants fault GEICO for failing **[**86]** to "allege which (if any) state law claims, covering which (if any) Auto Part and which (if any) of its Payments, were tolled and for how long those claims were tolled, let alone whether any tolling in fact was long enough to rescue any of its claims." (*Id.*) Defendants maintain that these gaps in GEICO's allegations are especially problematic in light of the evolving definitions of the indirect purchaser classes in the multidistrict litigation, where at least some of the EPP complaints defined the plaintiff classes as all persons and entities that indirectly purchased specified auto parts "for personal use and not for resale." *See, e.g., LaCava v. Delphi Automotive LLP*, No. 11-14399, Dkt. 1, Complaint at ¶ 75 (E.D. Mich. Oct. 5, 2011); *In re Automotive Parts Antitrust Litigation (In re Wire Harness Systems)*, No. 12-103, Dkt. 132, Second Consolidated Amended Class Action Complaint at ¶ 177 (E.D. Mich. June 20, 2013). In Defendants' view, GEICO's claims arising from payments made to insureds or third-party claimants cannot plausibly be characterized as involving purchases of auto parts "for personal use and not for resale."

In response, GEICO first contends that it is enough that it was **[**87]** a putative member of the settlement classes certified by the Court in each of the settlements reached by the EPPs and the auto part suppliers in the multidistrict litigation. (*See* Plaintiffs' Response, App. A (chart listing the settlement class definitions for each of the sixteen part-specific settlements reached between EPPs and auto part suppliers).) Even assuming that the initial complaints in some of these cases featured narrower definitions of the plaintiff classes, GEICO points to case law holding that class action tolling extends to members of the expanded class ultimately certified by the Court. *See* Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 114 F.R.D. 48, 54 (S.D.N.Y. 1987); *see also* Harris v. Union Electric Co., 787 F.2d 355, 361 n.2 (8th Cir. 1986) (finding that class action tolling extended to "those members who were subsequently added to the class as a result of the court's redefinition"); Smith v. Pennington, 352 F.3d 884, 894 (4th

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[7] As Defendants observe, ***HN29***[] athough each overt act starts a new period of limitation for claims arising from this act, "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitation period." Klehr, 521 U.S. at 189, 117 S. Ct. at 1990-91. Accordingly, Defendants argue that GEICO should not be permitted to recover "for acts (and damages) that are alleged to have occurred years outside any applicable limitations period," and they have provided a chart summarizing the purported cut-off dates for recoverable auto part purchases under the relevant statutes of limitation of various states that govern each of the state law theories of recovery asserted by GEICO. (*See* Defendants' Reply Br. at 20-21 (citing Defendants' Reply, Exhibit B).)

Plainly, however, GEICO cannot be expected at this juncture to identify and allege each individual auto part sale for which it seeks to recover, so this matter cannot be resolved in the context of a Rule 12(b)(6) motion. Moreover, it is possible, as already discussed, that the accrual of claims arising from earlier auto part sales might be deferred by resort to discovery rules or the doctrine of fraudulent concealment, and this again is not an issue that is amenable to resolution through a motion to dismiss.

Cir. 2003) (similarly looking to a plaintiff's motion for class certification as supplying the operative definition for tolling purposes, even though this definition was "more narrow than is arguably dictated by [the plaintiff's] complaint"). Although Defendants attempt to distinguish *Genden* on the ground that the court's initial (and narrower) class certification ruling in that case was "conditional" and subject to later reevaluation, **[**88]** *see* Genden, 114 F.R.D. at 54, they fail to suggest why the same rule should not apply here, where no class at all had been certified, conditional or otherwise, prior to the settlement classes proposed by the parties (including Defendants here) and accepted by the Court. Moreover, even **[*839]** accepting that *Genden* and the other above-cited cases are not directly on point, it bears emphasis that Defendants have cited no case in which a court has declined to apply class action tolling to the members of a broader settlement class, and instead limited this tolling to a narrower class as defined in the plaintiff's initial complaint.

As for Defendants' protest that GEICO's complaint lacks specificity as to precisely which of the complaints or settlement classes in the multidistrict litigation operated to "toll[] which of [GEICO's] claims over what period of time," (Defendants' Reply Br. at 18-19), GEICO points in response to the rule, cited earlier, that ***HN31***[] a plaintiff generally need not plead facts in avoidance of a statute of limitations defense. *See* *Bishop v. Lucent Technologies, Inc., 520 F.3d 516, 520 (6th Cir. 2008)*. Although it is true that a plaintiff must affirmatively allege facts in support of tolling where it is otherwise "apparent from the face of the complaint that the time limit **[**89]** for bringing the claim has passed," *Bishop, 520 F.3d at 520* (internal quotation marks, alteration, and citation omitted), nothing of the sort is apparent here. Rather, GEICO has alleged that it is a member of the putative EPP class in each of the relevant part-specific cases in the multidistrict litigation. It further states without dispute that prior to opting out, it was a member of the settlement class in each of these cases. Moreover, GEICO's appeal to class action tolling must be considered in conjunction with its invocation of the discovery rule and the doctrine of fraudulent concealment and its allegations of continuing violations. The complex, fact-intensive interactions among these legal principles preclude a determination as a matter of law that Defendants necessarily will prevail on their affirmative defense of the statute of limitations.

G. Defendants' Challenges to GEICO's Antitrust Claims Under the Laws of Various States

Defendants next seek the dismissal of many of GEICO's state law antitrust claims on various grounds. The Court addresses each of these challenges in turn.

1. GEICO's Antitrust Claims Under the Laws of the So-Called "Nexus" States Must Be Dismissed for Failure to Allege a Nexus [**90] Between Defendants' Conduct and Intrastate Commerce.

The parties agree that ***HN32***[] under the antitrust laws of certain states — *i.e.*, Alabama, Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, and West Virginia, (*see* Defendants' Motion, Br. in Support at 35 (citing Ex. D, collecting relevant authority)) — as well as the District of Columbia (collectively, the "Nexus States"), the plaintiff must "allege a nexus between the defendant's conduct and intrastate commerce." *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *19*. In seeking the dismissal of GEICO's claims brought under the antitrust laws of these jurisdictions, Defendants argue that the allegations of GEICO's complaint fail to establish this requisite nexus, where "GEICO does not allege purchases of [relevant] [a]uto [p]arts in the Nexus States or that any GEICO plaintiff resides in the Nexus States." (Defendants' Motion, Br. in Support at 35.) The Court agrees.

In an effort to turn aside Defendants' challenge to its allegations of a nexus with intrastate commerce, GEICO points to the passages in its complaint alleging that Defendants' conduct "(i) fixed, raised, maintained and stabilized" the prices of relevant auto parts in each of the Nexus States, (ii) "restrained, **[**91]** suppressed and eliminated price competition for" the relevant auto parts throughout each of the Nexus States, (iii) "deprived GEICO and **[*840]** its insureds and claimants of free and open competition" in the submarkets for the relevant auto parts, and (iv) "resulted in GEICO paying supra-competitive, artificially high prices for" relevant auto parts. (SAC at ¶¶ 202-27.) GEICO further alleges that "in each of the . . . states" identified in its complaint, it "has been injured in its business and property" as a result of Defendants' alleged price-fixing conspiracies. (*Id.* at ¶ 228.) In GEICO's view, this Court has "found the EPPs' similar allegations to be sufficient to support [the] EPPs' state antitrust claims." (Plaintiffs' Response Br. at 34 (citing *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *20)*.)

Yet, as Defendants correctly observe, this Court has distinguished its *Wire Harnesses* ruling in other decisions in the multidistrict litigation, and the grounds for this distinction are present here. Most notably, in *In re Automotive Parts Antitrust Litigation (In re Wire Harness Cases), 2015 U.S. Dist. LEXIS 176199, 2015 WL 10376960, at *7 (E.D. Mich. Dec. 30, 2015)*, the Court observed that the EPPs in *Wire Harnesses* had "alleged residency of the named plaintiffs in the nexus states," while the truck and equipment dealership ("TED") plaintiffs had made no such "express or implied allegations **[**92]** of in-state residency or injury." Because none of the TED plaintiffs alleged that they "reside[d] or were injured in the nexus states," the Court ordered the dismissal of the antitrust claims brought under the laws of those states. *Id.*

This reasoning leads to the same outcome here. Although GEICO views the allegations of its complaint as establishing that it paid "supracompetitive, artificially high prices for [a]uto [p]arts in" each of the Nexus States, (Plaintiffs' Response Br. at 34), Defendants correctly observe that the complaint stops short of "mentioning where any purchases were made," (Defendants' Reply Br. at 21). Rather, the complaint alleges only (i) that Defendants' alleged price-fixing conspiracies "resulted in GEICO paying supra-competitive, artificially high prices for" relevant auto parts, (*see, e.g*. SAC at ¶ 202(a)), and (ii) that as a result, GEICO "has been injured in its business and property" in "each of" the jurisdictions identified in its complaint, (*id.* at ¶ 228). As Defendants point out, GEICO "does not dispute that it must allege a purchase in a Nexus State to maintain a claim under a Nexus State's antitrust laws," yet it notably fails to do so. (Defendants' **[**93]** Reply Br. at 21.) As with the TED plaintiffs, the Court likewise concludes here that GEICO's antitrust claims under the laws of the Nexus States are subject to dismissal for lack of allegations of a nexus between Defendants' allegedly unlawful conduct and GEICO's commercial activity within those jurisdictions.

To be sure, if the Court were to consider GEICO's alleged injuries sustained in its role as insurer, it might be reasonable to infer that GEICO, as one of the nation's largest automotive insurers, has made relevant payments to its insureds or third-party claimants in each of the Nexus States. As explained earlier, however, the allegations of GEICO's complaint are insufficient to establish GEICO's standing as an insurer to bring antitrust claims under federal or state law. Rather, GEICO's antitrust claims are viable only to the extent that they rest upon GEICO's direct purchase of relevant auto parts or its ownership of a fleet of vehicles, and GEICO's complaint fails to allege any such purchases of relevant auto parts or vehicles in any of the Nexus States. It follows that GEICO's antitrust claims under the laws of the Nexus States must be dismissed.

2. Because None of the GEICO [94] Entities Is a Citizen or Resident of Utah, GEICO Cannot Pursue an Antitrust Claim Under Utah Law**.

HN33[] Under Utah law, a plaintiff must be "a citizen of this state or a resident of **[*841]** this state" in order to bring to claim under Utah's Antitrust Act. *Utah Code Ann. § 76-10-3109(1)(a)*. In reliance on this statutory language, a number of courts have dismissed claims brought under Utah ***antitrust law*** by plaintiffs who were neither citizens nor residents of Utah. *See, e.g., In re Opana ER Antitrust Litigation, 162 F. Supp. 3d 704, 725 (N.D. Ill. 2016)*; *In re Aggrenox Antitrust Litigation, 94 F. Supp.3d 224, 251-52 (D. Conn. 2015)*; *In re Niaspan Antitrust Litigation, 42 F. Supp.3d 735, 759-60 (E.D. Pa. 2014)*. Defendants contend that GEICO's claim under Utah ***antitrust law*** is likewise subject to dismissal, where none of the GEICO entities named as plaintiffs in this action is a Utah citizen or resident.

In response, GEICO states that it has sufficient contacts with the State of Utah to sue or be sued in the courts of that state. Be that as it may, Utah ***antitrust law*** demands Utah citizenship or residency, and not the capacity to sue or be sued in that state. Although GEICO suggests that the above-cited cases are inapposite, those cases precisely track the language of the pertinent Utah statute, and do not engage in the jurisdictional inquiry urged by GEICO. Nor has GEICO identified any case law or other authority that supports its proposed reading of Utah

antitrust **[**95]** ***law***. In accordance with the uniform weight of authority, the Court finds that GEICO's antitrust claim under Utah law must be dismissed.

3. GEICO's Antitrust Claim Under Oregon Law Is Subject to Dismissal for Lack of Allegations of Injury to a Person or Property in That State.

HN34[] The Oregon legislature has mandated that the state's ***antitrust law*** applies only to "intrastate trade or commerce, and to interstate trade or commerce involving an actual or threatened injury to a person or property located in this state." *Oregon Rev. Stat. § 646.715(2)*. As already discussed with respect to the antitrust laws of the Nexus States, the allegations of GEICO's complaint do not establish a connection between Defendants' allegedly unlawful conduct and any relevant intrastate activities engaged in by any of the GEICO entities in the state of Oregon, where none of these entities reside in that state. This leaves only the possibility that Defendants' allegedly anticompetitive activities had an effect on interstate trade or commerce that threatened or caused injury "to a person or property located in" Oregon.

The Court agrees with Defendants that the allegations of the complaint fail to support this theory of recovery. Again, the GEICO **[**96]** entities do not reside in Oregon, nor is there any allegation that GEICO owns any property in that state. To the extent that GEICO points to the allegations of its complaint as demonstrating that "Defendants caused GEICO to pay supracompetitive, artificially high prices for [a]uto [p]arts in Oregon," (Plaintiffs' Response Br. at 36), the cited portion of the complaint alleges only that Defendants' alleged price-fixing conspiracies "resulted in GEICO paying supracompetitive, artificially high prices for [a]uto [p]arts," (SAC at ¶ 221(a)), without indicating that any such purchases occurred in Oregon. Although GEICO further asserts that it made payments to repair facilities located in Oregon and to insureds and third-party claimants who reside in that state, (Plaintiffs' Response Br. at 36), the complaint lacks any such specific allegations and, in any event, the Court has already determined that GEICO lacks standing as an insurer to bring antitrust claims under state or federal law arising from its alleged reimbursement payments to repair facilities, insureds, or third-party claimants. Finally, Defendants aptly observe that even if GEICO made such payments **[*842]** as an insurer to facilities **[**97]** or individuals located in Oregon, the resulting injury presumably would be sustained by the GEICO entities in the states where they reside, and this would not establish the requisite injury "to a person or property located in" Oregon as necessary to bring an antitrust claim under that state's law. Thus, GEICO has failed to plead a viable antitrust claim under Oregon law.

4. GEICO Cannot Recover Damages Under New Hampshire's or Utah's Antitrust Laws for Conduct That Occurred Prior to the Enactment of Legislation That Permits Recovery by Indirect Purchasers.

As noted earlier, ***HN35***[] a number of states have enacted so-called "*Illinois Brick* repealer statutes" — that is, statutes that override the Supreme Court's decision in *Illinois Brick, supra*, and allow recovery by indirect purchasers under state law. Effective January 1, 2008, New Hampshire passed such a law allowing recovery of damages by indirect purchasers. *See* *N.H. Rev. Stat. Ann. § 356.11*. Likewise, effective May 1, 2006, Utah amended a provision of its ***antitrust law*** to permit recovery by indirect purchasers. *See* *Utah Code Ann. 76-10-3109(1)(a)*. Defendants contend, and GEICO does not dispute, (*see* Plaintiffs' Response Br. at 36-37), that these enactments operate to limit GEICO's recovery under the antitrust laws of **[**98]** New Hampshire and Utah to the damages resulting from Defendants' alleged anticompetitive activities that occurred on or after the effective dates of these *Illinois Brick* repealer provisions. Indeed, the Court so held in the multidistrict litigation, *see* *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *19*, and GEICO does not suggest any basis for a different outcome here.

Defendants further contend that GEICO's recovery under Hawaiian ***antitrust law*** is similarly limited by the Hawaiian legislature's June 2002 passage of an amendment to *Haw. Rev. Stat. § 480-2*. In Defendants' view, this enactment created an avenue for indirect purchaser recovery where none was available before. Defendants recognize that this Court rejected this same argument in the multidistrict litigation, *see* *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *18*, but they suggest that the Court mistakenly relied on a ruling, *In re*

Static Random Access Memory (SRAM) Antitrust Litigation, No. 07-md-01819, 2010 U.S. Dist. LEXIS 131002, 2010 WL 5094289, at *5 (N.D. Cal. Dec. 8, 2010), that cannot be reconciled with certain decisions of the Hawaiian courts holding that the relevant June 2002 amendment to the Hawaiian law of unfair competition should be applied only prospectively. (Defendants' Reply Br. at 22 n.25 (citing Hawaii Medical Ass'n v. Hawaii Medical Service Ass'n, Inc., 113 Haw. 77, 148 P.3d 1179, 1209 (Haw. 2006), and Tour2000 Co. v. Koreana Tour Service, Inc., No. 28209, 2009 Haw. App. LEXIS 675, 2009 WL 3437431, at *12 (Haw. Ct. App. Oct. 23, 2009)).)

The state court decisions cited by Defendants do not warrant a departure from the Court's **[**99]** ruling in the multidistrict litigation. As noted, this Court relied on the decision in Static Random Access Memory, 2010 U.S. Dist. LEXIS 131002, 2010 WL 5094289, at *5, and ***HN36***[] that court, in turn, discussed the Hawaiian Supreme Court's holding in 1999 that the Hawaiian legislature had not conferred "a private claim for relief under [Haw. Rev. Stat.] § 480-13 for unfair methods of competition in violation of [Haw. Rev. Stat.] § 480-2." Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transportation Co., 91 Haw. 224, 982 P.2d 853, 880 (Haw. 1999) (footnote omitted). As explained in Static Random Access Memory, 2010 U.S. Dist. LEXIS 131002, 2010 WL 5094289, at *5, although the Hawaiian legislature's 2002 enactment supplanted this particular aspect of the Hawaiian Supreme Court's decision in *Robert's Hawaii School Bus*, the **[*843]** Hawaiian court emphasized in that same decision that its interpretation of Haw. Rev. Stat. § 480-2 as it read in 1999 did not operate to limit "private claims for violations of [Haw. Rev. Stat.] §§ 480-4 or 480-9." Robert's Hawaii School Bus, 982 P.2d at 880. Because the indirect purchaser plaintiffs in *Static Random Access Memory* were pursuing a price-fixing conspiracy claim under Haw. Rev. Stat. § 480-4, and not a claim for unfair methods of competition under Haw. Rev. Stat. § 480-2, the court in that case reasoned that the state legislature's 2002 amendment to § 480-2 could not properly be construed as an implied repeal of a previously existing *Illinois Brick*-style limitation on indirect purchaser recoveries under § 480-4, where this latter provision was wholly unaffected by the legislature's 2002 enactment. Static Random Access Memory, 2010 U.S. Dist. LEXIS 131002, 2010 WL 5094289, at *5.

Viewed against this backdrop, **[**100]** the state court decisions cited by Defendants are inapposite, and do nothing to undermine this Court's reliance on Static Random Access Memory. In each of these cases, the court held that the legislature's 2002 amendment to Haw. Rev. Stat. § 480-2 did not apply retroactively to permit recovery ***under § 480-2*** for unlawful acts committed prior to the June 28, 2002 effective date of this amendment. *See* Hawaii Medical Ass'n, 148 P.2d at 1209; Tour2000 Co., 2009 Haw. App. LEXIS 675, 2009 WL 3437431, at *12. Here, however, as in *Static Random Access Memory*, GEICO has asserted claims of price-fixing conspiracies, which are governed by Haw. Rev. Stat. § 480-4 rather than § 480-2. Nothing in the Hawaiian legislature's 2002 amendment of the latter statute suggests an intention to repeal an *Illinois Brick* limitation that was previously found in the former statute. To the contrary, § 480-4 was wholly unchanged by this 2002 amendment. Accordingly, the Court adheres to its ruling in Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *18, and finds that the 2002 amendment does not limit GEICO's recovery under Hawaiian ***antitrust law***.

H. Defendants' Challenges to GEICO's Claims Under the Consumer Protection Laws of Various States

In the third count of its second amended complaint, GEICO seeks to recover under the consumer protection statutes of various states. Defendants challenge these claims on various grounds, **[**101]** each of which is addressed below.

1. GEICO Has Adequately Pleaded Violations of the Consumer Protection Laws of Arkansas, New Mexico, and Nevada.

In Defendants' view, three of GEICO's state law consumer protection claims — *i.e.*, the claims brought under the consumer protection laws of Arkansas, New Mexico, and Nevada — are subject to dismissal as wholly derivative of federal or state law antitrust claims that likewise should be dismissed. In support of their challenges to GEICO's claims under Arkansas and New Mexico law, Defendants point primarily to the decision in In re Graphics Processing Units Antitrust Litigation, 527 F. Supp.2d 1011, 1029-30 (N.D. Cal. 2007), as purportedly "dismissing

Arkansas and New Mexico consumer protection claims based on failed antitrust claims." (Defendants' Motion, Br. in Support at 38-39.) Yet, as GEICO points out, the court in *Graphics Processing Units* did not dismiss the Arkansas and New Mexico claims due to the plaintiffs' purported failure to establish an underlying violation of ***antitrust law***, but rather for failure to allege unconscionable conduct within the meaning of the relevant state statutes. *See* *Graphics Processing Units, 527 F. Supp.2d at 1029-30*. Similarly, although Defendants cite the decision in **[*844]** *Wallis v. Ford Motor Co., 362 Ark. 317, 208 S.W.3d 153, 161-62 (Ark. 2005)*, as support for the proposition that a claim under the Arkansas Deceptive Trade Practices **[**102]** Act ("ADTPA") is subject to dismissal if it is "premised on antitrust violations," (Defendants' Motion, Br. in Support at 38-39), the court in that case addressed a design defect claim, not allegations of antitrust violations, and it held that the plaintiff had not pleaded the requisite "actual damage or injury" through allegations of "diminution in value of the product," *Wallis, 208 S.W.3d at 161*. Accordingly, *Wallis* is inapposite, as this Court previously explained in the multidistrict litigation. *See* *Instrument Panel Clusters, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *19-*20*.

Defendants fare somewhat better in their challenge to GEICO's consumer protection claim under Nevada law, but not enough to secure the dismissal of this claim. As Defendants observe, ***HN37***[] one way a plaintiff can establish a "deceptive trade practice" under Nevada law is by showing that the defendant "knowingly. . . [v]iolate[d] a state or federal statute or regulation relating to the sale or lease of goods or services." *Nev. Rev. Stat. § 598.0923*. In this case, GEICO has alleged that "Defendants' unlawful conduct constitutes deceptive trade practices in violation of *Nevada Revised Statutes § 598.0923*[] because Defendants knowingly violated" Nevada's antitrust statute. (SAC at ¶ 236(b).) As discussed earlier, Nevada is one of the "Nexus States," and GEICO's antitrust claim **[**103]** under Nevada law is subject to dismissal for lack of allegations of a nexus between Defendants' allegedly unlawful conduct and injury sustained by GEICO in Nevada. It follows that GEICO cannot establish a deceptive trade practice under *§ 598.0923* by appealing to a violation of Nevada ***antitrust law***. *See* *Sobel v. Hertz Corp., 698 F. Supp.2d 1218, 1230 (D. Nev. 2010)* (dismissing the plaintiffs' claim under *§ 598.0923* for failure to establish an underlying violation of another Nevada statute), *rev'd on other grounds*, *674 F. App'x 663 (9th Cir. 2017)*.

This is not the end of the matter, however, because there are other ways to demonstrate that a defendant has engaged in a "deceptive trade practice" as defined under Nevada law. In particular, GEICO points to different language in *§ 598.0923* providing that a person engages in a deceptive trade practice if he or she knowingly "[f]ails to disclose a material fact in connection with the sale or lease of goods or services." Admittedly, GEICO's complaint does not expressly cite to or rely upon this particular definition of a deceptive trade practice, but GEICO nonetheless insists that it has sufficiently invoked this provision through its citation to Nevada's Deceptive Trade Practices Act as a whole. (*See* SAC at ¶ 236.) GEICO further asserts that it has adequately pleaded **[**104]** this type of unlawful practice through its allegations that Defendants knowingly agreed to fix prices of auto parts and "undertook efforts to conceal their agreements from GEICO and other purchasers." (*Id.* at ¶ 236(a).) Although this Nevada claim has not been artfully pleaded, the Court finds that it withstands Defendants' present challenge, particularly where GEICO will have an opportunity to provide more detailed allegations when it files the amended pleadings authorized elsewhere in this opinion and order.

Next, Defendants contend that GEICO's claims under the consumer protection laws of Arkansas and New Mexico are subject to dismissal on the additional ground that GEICO has failed to allege unconscionable conduct as purportedly dictated by the relevant state statutes. *See* ***HN38***[] *Ark. Code Ann. § 4-88-107(a)* (defining the "[d]eceptive and unconscionable trade practices made unlawful and prohibited by this chapter"); *N.M. Stat. Ann. § 57-12-2(E)* **[*845]** (defining an "unconscionable trade practice"). As GEICO observes in response, however, this Court rejected essentially the same challenges in the multidistrict litigation. *See* *Fuel Senders, 29 F. Supp.3d at 1008-09*; *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *24-*25*. Regarding Arkansas's consumer protection law, the Court explained that ***HN39***[] the state statute "does not limit itself to unconscionable **[**105]** acts," and that allegations of "false or deceptive acts" suffice to state a claim. *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *24*. As for the New Mexico statute, the Court observed that ***HN40***[] its definition of an "unconscionable trade practice" encompasses acts or practices that "take[] advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree" or that "result[] in a gross disparity between the value received by a person and the price paid." *2013 U.S. Dist. LEXIS 80338, [WL] at *25* (quoting *N.M. Rev. Stat. 57-12-2(E)*). In support of their consumer protection claims under

Arkansas and New Mexico law, the EPPs and IPPs in the multidistrict litigation made allegations similar to those advanced by GEICO here, and the Court found these allegations sufficient to withstand scrutiny under *Rule 12(b)(6)*. *See Fuel Senders, 29 F. Supp.3d at 1008-09*; *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *24-*25*. Defendants do not acknowledge these rulings, much less explain why the result here should be different. Accordingly, the Court finds that GEICO has sufficiently pleaded claims under the consumer protection laws of Arkansas, New Mexico, and Nevada.

2. To the Extent It Seeks to Recover as an Insurer, GEICO's Alleged Injuries Are Too Remote from Defendants' Alleged Wrongdoing To Sustain Its Consumer Protection Claims Under the Laws of Arkansas, New York, [106] and Vermont.**

As discussed earlier, the ***HN41***[] courts have applied the factors identified in the Supreme Court's *AGC* decision to determine whether a plaintiff's injuries are too remote from the defendant's alleged wrongdoing to permit a recovery under federal or state ***antitrust law***. Defendants argue, and GEICO does not dispute, that the courts have engaged in a similar "remoteness" inquiry, either with or without specific reference to the *AGC* factors, in determining whether a plaintiff may pursue a claim under the consumer protection laws of Arkansas, New York, or Vermont. *See, e.g. Independence County v. Pfizer, Inc., 534 F. Supp.2d 882, 888-89 (E.D. Ark. 2008)* (addressing a claim under Arkansas's consumer protection statute), *aff'd*, *552 F.3d 659 (8th Cir. 2009)*: *State of New York v. Daicel Chemical Industries, Ltd., 42 A.D.3d 301, 840 N.Y.S.2d 8, 12 (N.Y. App. Div. 2007)* (applying New York law); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, 536 F. Supp.2d 1129, 1142 (N.D. Cal. 2008)* (finding that a claim under New York's consumer protection statute "should be assessed with reference to [the] *AGC* factors"); *Fucile v. Visa U.S.A., Inc., No. S1560-03, 2004 Vt. Super. LEXIS 42, 2004 WL 3030037, at *3 (Vt. Super. Ct. Dec. 27, 2004)* (applying Vermont law). In Defendants' view, just as GEICO purportedly has failed to satisfy the *AGC* factors with respect to its claims under federal and state ***antitrust law***, it likewise cannot satisfy these factors in support of its claims under the consumer protection laws of these three states.

The Court addressed this issue in the multidistrict **[**107]** litigation, explaining that its analysis of the *AGC* factors with respect to the plaintiffs' antitrust claims applied as well to the remoteness inquiry called for under the consumer protection laws of Arkansas, New York, and Vermont. *See Fuel Senders, 29 F. Supp.3d at 1012*; *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612,* ***[*846]*** *at *30*. In this case, the Court's earlier analysis of the *AGC* factors led to the conclusion that GEICO could pursue antitrust claims in its capacities as a purchaser of auto parts and the owner of a fleet of vehicles, but not as an insurer. As in the multidistrict litigation, the Court finds that this analysis applies as well to GEICO's consumer protection claims under the laws of Arkansas, New York, and Vermont. Thus, GEICO may pursue these claims only to as to transactions in which it purchased relevant auto parts or acted in its capacity as owner of a fleet of vehicles, but not in its capacity as an insurer that made payments to repair facilities, insureds, or third-party claimants.

3. GEICO Has Alleged a Sufficient Nexus Between Defendants' Alleged Anticompetitive Conduct and the States of California, New Hampshire, New York, and North Carolina.

Defendants next point to requirements under the consumer protection laws of California, New Hampshire, New **[**108]** York, and North Carolina that there must be a nexus between a defendant's allegedly unlawful conduct and intrastate commerce, and they argue that the allegations of GEICO's complaint fail to establish this required nexus. In response, GEICO observes that this Court addressed precisely these same challenges in the multidistrict litigation, finding that the allegations in those cases satisfied the nexus requirements of the various state consumer protection statutes. *See Fuel Senders, 29 F. Supp.3d at 1010-12* (considering claims under the consumer protection laws of California, New York, and North Carolina); *Instrument Panel Clusters, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *21-*23* (same); *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *28-*29* (addressing claims under California law).

To be sure, these rulings were based in part on allegations that residents of these states purchased the auto parts at issue. *See, e.g., Fuel Senders, 29 F. Supp.3d at 1010*. Despite GEICO's claims to the contrary, the complaint here lacks comparable allegations that GEICO paid supra-competitive prices for relevant auto parts in each of the states in question. Nonetheless, this Court also cited allegations that the defendant auto suppliers' "anticompetitive conduct caused supracom[]petitive price effects nationwide" as sufficient to establish the required nexus with intrastate commerce, *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *29*; *see also Fuel Senders, 29 F. Supp.3d at 1010-12*; *Instrument Panel Clusters, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *21-*23*, and **[**109]** GEICO has made similar allegations in support of the claims at issue here, (*see* SAC at ¶¶ 234(c), 237(c), 239(e), 240(e)). Moreover, although this Court has not addressed claims under New Hampshire's consumer protection statute in its decisions in the multidistrict litigation, GEICO points to the ruling of another court that the nexus requirement of the New Hampshire statute was satisfied through allegations that the "defendants colluded to fix the price of chocolate products that were then introduced into the New Hampshire market." *In re Chocolate Confectionary Antitrust Litigation, 749 F. Supp.2d 224, 235 (M.D. Pa. 2010)*. It follows that GEICO's similar allegations here are likewise sufficient to satisfy this requirement.

Faced with these arguments by GEICO, Defendants do not even acknowledge the relevant rulings of this Court in the multidistrict litigation, much less endeavor to explain why GEICO's allegations here are sufficiently distinguishable to warrant a different outcome. In the absence of any suggestion why it should not do so, the Court elects to adhere to its decisions in the multidistrict litigation, and therefore holds that GEICO has adequately pleaded **[*847]** the nexus element of its consumer protection claims under the laws of California, New Hampshire, New York, **[**110]** and North Carolina.

4. GEICO Need Not Satisfy the Standards of *Fed. R. Civ. P. 9(b)* to State a Consumer Protection Claim Under Florida Law.

Defendants next challenge GEICO's claim under Florida consumer protection law, arguing that such claims must be pleaded with the particularity mandated by *Fed. R. Civ. P. 9(b)* for allegations of fraud. Once again, however, the Court squarely rejected this assertion in *Wire Harnesses, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *23-*24*, despite the defendants' appeal in that case to precisely the same unpublished opinion relied upon by Defendants here. Defendants do not attempt to distinguish this Court's prior ruling, nor even acknowledge it. Thus, the Court finds no basis for departing from its analysis of this issue in the multidistrict litigation.[8]

5. GEICO's Consumer Protection Claim Under Vermont Law May Rest Upon Its Purchases of Auto Parts for Its Own Benefit, But Not Its Payments as an Insurer.

HN42[] Under the Vermont Consumer Fraud Act ("VCFA"), *Vt. Stat. Ann. tit. 9, § 2451 et seq.*, only a "consumer" may bring a suit alleging a violation of this statute, *Vt. Stat. Ann. tit. 9, § 2461(b)*. As relevant here, the VCFA defines a "consumer" as "a person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business **[**111]** but for the use or benefit of his or her business or in connection with the operation of his or her business," *Vt. Stat. Ann. tit. 9, § 2451a(a)*, and Vermont law provides more generally that a statutory reference to a "person" encompasses corporations such as the GEICO entities in this case, *see Vt. Stat. Ann. tit. 1, § 128*. In Defendants' view, even if an insurance company such as GEICO might qualify as a "person" under the VCFA, it is not eligible for treatment as a "consumer" under the Vermont act because, to the extent that it made payments as an insurer, it did not engage in

[8] In their reply brief, Defendants do not address GEICO's consumer protection claim under Florida law, but instead suggest for the first time that GEICO's claim under New York's consumer protection law must be pleaded with particularity. (*See* Defendants' Reply Br. at 23-24.) Because this argument was advanced for the first time in Defendants' reply brief, the Court declines to consider it. *See Sundberg, 189 F. Supp.2d at 682-83*.

these transactions for the "use or benefit" of its own business, but rather for the benefit of its insureds. It follows, according to Defendants, that GEICO's claim under the VCFA must be dismissed.

In response, GEICO points to case law holding, in reliance on the plain language of the VCFA itself, that this Vermont statute "countenances a lawsuit brought by a corporation that purchased goods or services for the use or benefit of the business or in connection with the operation of the business, as long as the goods or services were not purchased for resale." *Ascension Technology Corp. v. McDonald Investments, Inc., 327 F. Supp.2d 271, 276 (D. Vt. 2003)*. In light of this interpretation, GEICO argues that it has sufficiently pleaded a claim under the VCFA through **[**112]** its allegations that it "purchased [relevant] [a]uto [p]arts from Defendants at artificially and illegally inflated prices on behalf of itself and as part of its contractual obligations to its insureds and claimants." (Plaintiffs' Response Br. at 42.) GEICO asserts that under either circumstance, auto parts were purchased "in connection with the operation of [GEICO's] business," whether as an **[*848]** owner of vehicles or as an insurer, and it maintains that this is sufficient to support a claim under the VCFA.

As Defendants point out, however, the Supreme Court of Vermont has held to the contrary, at least as to transactions engaged in by an insurer. ***HN43***[] In *Wilder v. Aetna Life & Casualty Insurance Co., 140 Vt. 16, 433 A.2d 309 (Vt. 1981)*, the plaintiff brought a claim under the VCFA based on the defendant insurer's alleged failure to make a payment as allegedly called for under a settlement agreement, but the court held that this claim was subject to dismissal on two grounds. First, the court reasoned that "the selling of an insurance policy is not a contract for 'goods or services' within the meaning of" the VCFA. *Wilder, 433 A.2d at 310*. Next, and of relevance here, the court observed that "we are not dealing with a contractual situation between buyer and seller," but that the court instead was **[**113]** being "asked to read into the [VCFA] a transaction one step removed" from a transaction in which a buyer purchases goods or services. *433 A.2d at 310*. In the court's view, the VCFA "deal[s] solely with consumer transactions in which there is an actual sale of goods or services involving a buyer, a seller, and the goods or services," and it declined to "stretch [the Act's] meaning as to evade the Legislature's intent." *433 A.2d at 310*.

The Court agrees with Defendants that this reading of the VCFA by Vermont's highest court precludes GEICO from recovering under the Act in its role as insurer. Although GEICO's payments as an insurer may reflect or somehow involve an underlying purchase of a relevant auto part — though, as already discussed, this is not invariably the case — such an insurance transaction is one step removed from the consumer transaction that the VCFA is intended to regulate — *i.e.*, the underlying purchase of a relevant auto part by a buyer from a seller. To be sure, GEICO allegedly engages in some consumer transactions of this sort in its role as the owner of a fleet of vehicles, and it may pursue a claim under the VCFA arising from these transactions. To the extent, however, that GEICO seeks to recover **[**114]** in its capacity as an insurer that makes payments to insureds or third-party claimants, the Court finds that such a recovery is not permitted under the VCFA.

I. Defendants' Challenges to GEICO's State Law Claims of Unjust Enrichment

Finally, Defendants argue that GEICO's common-law claims of unjust enrichment brought under the laws of various states are subject to dismissal on a number of grounds. The Court addresses each of these challenges in turn.

1. GEICO May Properly Pursue Its Claims of Unjust Enrichment as an Alternative Theory of Recovery, Even If These Claims Rest Upon the Same Allegations as GEICO's State Law Antitrust Claims.

First, and most broadly, Defendants argue that all of GEICO's state law claims of unjust enrichment are subject to dismissal because the allegations in support of these claims "do nothing more than recast, and are duplicative of, the allegations of anticompetitive conspiratorial conduct that underlie GEICO's antitrust claims." (Defendants' Motion, Br. in Support at 42.) In support of this challenge, Defendants point to cases holding that ***HN44***[] "unjust enrichment may not supply a valid cause of action in states where [the] plaintiffs are otherwise barred from **[**115]** recovery under [the] relevant antitrust and consumer protection statutes." *In re Packaged Seafood Products*

Antitrust Litigation, 242 F. Supp.3d 1033, 1088 (S.D. Cal. 2017); *see also* In re Opana ER Antitrust Litigation, MDL 2580, 2016 U.S. Dist. LEXIS 105915, 2016 WL 4245516, at *2 (N.D. Ill. Aug. 11, 2016).

[*849] As GEICO correctly observes in response, however, a plaintiff is permitted under Fed. R. Civ. P. 8(a)(3) to plead multiple theories of recovery in the alternative, and there is no requirement that each such theory must rest upon its own independent set of allegations. *See, e.g.,* In re K-Dur Antitrust Litigation, 338 F. Supp.2d 517, 544 (D.N.J. 2004). Defendants' argument to the contrary rests upon an overly broad reading of the above-cited cases, which hold only that a plaintiff who would otherwise be ***barred from recovery*** under the law of a particular state or its underlying policies cannot invoke a theory of unjust enrichment as a means of avoiding this state law bar. In *In re Packaged Seafood Products*, for example, the court first held that the end purchaser plaintiffs in that case could not pursue unjust enrichment claims "where the state otherwise bars indirect-purchaser recovery," but it then proceeded to evaluate the plaintiffs' "unjust enrichment arguments in states where their claims ***are not otherwise barred*** under [the] relevant antitrust and consumer protection laws." 242 F. Supp.3d at 1089 (emphasis added). To be sure, Defendants separately challenge GEICO's unjust enrichment claims under the laws of **[**116]** various states as an inappropriate end run around state laws that would otherwise bar its recovery, and the Court addresses these challenges below. Yet, Defendants' proposed application of this principle as an across-the-board bar to GEICO's recovery under a theory of unjust enrichment is not well taken, and the Court rejects it.

2. Defendants Have Failed to Provide Support for Their Assertion That the Antitrust Laws of Illinois, Maryland, and Rhode Island Preclude Recovery by Indirect Purchasers.

Defendants next advance a more specific variation on the broad contention addressed above: namely, that Plaintiff cannot pursue claims of unjust enrichment under the laws of three specific states — Illinois, Maryland, and Rhode Island — because indirect purchasers purportedly are precluded from recovering under the antitrust laws of these states. As noted earlier, ***HN45***[] a number of states have enacted socalled *Illinois Brick* repealer statutes that permit recovery by indirect purchasers under state ***antitrust law*** despite the prohibition against such a recovery under federal ***antitrust law***. In the absence of such a repealer statute, however, some courts have reasoned that an indirect purchaser plaintiff **[**117]** should not be permitted to recover under the equitable theory of unjust enrichment, as this would permit the plaintiff to circumvent the bar expressed through state law and policy against recovery by an indirect purchaser. *See* In re Packaged Seafood Products, 242 F. Supp.2d at 1088-89; In re Opana ER, 2016 U.S. Dist. LEXIS 105915, 2016 WL 4245516, at *2. In their present motion, Defendants assert that the three above-referenced states have not enacted *Illinois Brick* repealer statutes, but rather "continue to bar indirect purchaser claims under state ***antitrust law***." (Defendants' Motion, Br. in Support at 43.) It follows, in Defendants' view, that GEICO should not be permitted to pursue claims of unjust enrichment under the laws of these states.

As GEICO aptly observes in response, however, Defendants cite no authority whatsoever for their *ipse dixit* assertion that the three specified states bar recovery by indirect purchasers under state ***antitrust law***. To the contrary, GEICO states without contradiction that under Illinois law, at least, indirect purchaser plaintiffs are barred only from pursuing a ***class action*** antitrust suit. *See* 740 Ill. Comp. Stat. 10/7(2). Likewise, while the court in *In re Packaged Seafood Products* found **[*850]** that unjust enrichment claims could not be brought under the laws of states that "otherwise bar[] indirect-purchaser **[**118]** recovery," it notably proceeded to address the unjust enrichment claims of the indirect purchaser plaintiffs under the laws of states that did not "otherwise bar[]" recovery by indirect purchasers, and it identified Rhode Island as one such state. 242 F. Supp.3d at 1089, 1092. This leaves only Maryland, and Defendants do not identify any support whatsoever for their contention that indirect purchasers are barred from recovering under Maryland ***antitrust law***. Accordingly, Defendants have not identified a basis for the dismissal of GEICO's unjust enrichment claims under the laws of Illinois, Maryland, or Rhode Island.

3. GEICO Has Adequately Pleaded That Its Alleged Overpayments for Auto Parts Conferred a Benefit on Defendants, and That These Injuries Flowed from Defendants' Allegedly Unlawful Conduct.

In the fourth count of its second amended complaint, GEICO has asserted claims of unjust enrichment under the laws of 28 states and the District of Columbia. According to Defendants, the unjust enrichment laws of thirteen of these states, as well as the District of Columbia, require a plaintiff to allege that it conferred a direct benefit upon the defendant. As this Court has observed in the multidistrict litigation, **[**119]** ***HN46***[] the "critical inquiry" in evaluating this "direct benefit" element of a claim of unjust enrichment is "not whether the benefit is conferred directly on the defendant, but whether the plaintiff can establish [that] the relationship between his detriment and the defendant's benefit flows from the challenged conduct" of the defendant. *Fuel Senders, 29 F. Supp.3d at 1015* (internal quotation marks and citation omitted). In Defendants' view, GEICO has failed to allege this requisite relationship, nor has it "describe[d] how it is possible to trace [GEICO's] alleged detriment through a quagmire of insurance contracts, deductibles, full and partial reimbursements, apportionments of fault, discount arrangements with suppliers and repair shops, payment caps, or insurance settlements for total losses to the Defendants' benefit." (Defendants' Motion, Br. in Support at 44.)

Yet, as a threshold matter, although this Court in the multidistrict litigation found it necessary to conduct a lengthy and comprehensive state-by-state inquiry in order to resolve a similar "direct benefit" challenge, *see, e.g., Fuel Senders, 29 F. Supp.3d at 1015-29*; *Instrument Panel Clusters, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *26-*38*, Defendants fail to engage in any such analysis here. Instead, Defendants merely provide a list of purportedly relevant case law **[**120]** as an exhibit to their motion, (*see* Defendants' Motion, Ex. F-1), without discussing these decisions or otherwise attempt to illustrate how the "direct benefit" element of a claim of unjust enrichment might be construed or applied under the law of any given state. Plainly, the Court is under no obligation to fashion arguments or conduct such a state law survey on Defendants' behalf.

In any event, Defendants' challenge on this point is largely defeated by the Court's analysis of this issue in the multidistrict litigation. As the Court emphasized at the threshold of its state-by-state inquiry, GEICO's allegations in support of its claims of unjust enrichment must not be considered "in isolation, but in light of all of the factual allegations in the complaint[]." *Fuel Senders, 29 F. Supp.3d at 1014*; *see also* *Instrument Panel Clusters, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *25*. The Court further observed that "although the particular elements of [a claim of] unjust enrichment **[*851]** vary from jurisdiction to jurisdiction," this theory of recovery generally entails a showing "that Defendants received a benefit and under the circumstances of the case, retention of the benefit would be unjust." *Fuel Senders, 29 F. Supp.3d at 1014*.

Against this backdrop, the Court has repeatedly embarked on the state-by-state analysis that Defendants **[**121]** have failed to provide in their present motion. Specifically, on at least three separate occasions in the multidistrict litigation, this Court has expressly addressed and rejected the "direct benefit" challenge advanced by Defendants here under the laws of eleven of the thirteen states identified in Defendants' motion, as well as the District of Columbia. *See* *In re Automotive Parts Antitrust Litigation (In re Bearings), 50 F. Supp.3d 836, 864-65 (E.D. Mich. 2014)* ("Bearings"); *Fuel Senders, 29 F. Supp.3d at 1017-28*; *Instrument Panel Clusters, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *30-*38*. In the course of this state-by-state inquiry, the Court considered, and distinguished, many of the cases cited in Defendants' table of purportedly relevant authority. Defendants have not acknowledged this Court's rulings in the multidistrict litigation, much less attempted to distinguish them, so there is no basis for the Court to depart from its prior treatment of the very same issues advanced by Defendants here.

These leaves only the unjust enrichment laws of two states, Alabama and Mississippi, that the Court had no occasion to address in the multidistrict litigation. In support of their reading of Alabama law as demanding that a plaintiff must have conferred a direct benefit upon the defendant, Defendants point to the decision in **[**122]** *Danny Lynn Electrical & Plumbing, LLC v. Veolia ES Solid Waste Southeast, Inc., No. 2:09cv192, 2011 U.S. Dist. LEXIS 78557, 2011 WL 2893629, at *6 (M.D. Ala. July 19, 2011)*. In that case, the plaintiffs alleged that they paid unlawfully inflated waste removal fees to the corporate defendant, and that this defendant, in turn, paid a portion of its increased profits to the individual defendant employees in the form of higher annual bonuses. Because "there was no money paid *by* the plaintiffs *to* the named individual[]" defendants, and there likewise was "no benefit conferred upon the individual defendants *by* the plaintiffs," the court held that the plaintiffs could not pursue claims of unjust enrichment against these individuals. *Danny Lynn Electrical, 2011 U.S. Dist. LEXIS 78557, 2011 WL 2893629, at *6* (emphasis in original). Yet, as explained by this Court in distinguishing an analogous "direct benefit" case decided under Florida law, the decision in *Danny Lynn Electrical* does not "involve the flow of payment up a chain of distribution." *Fuel Senders, 29 F. Supp.3d at 1018*. Rather, the plaintiff in that case sought to expand the pool of defendants to include not only the corporate defendant that had demanded allegedly excessive fees, but also those individuals to whom the company had distributed a portion of its allegedly unlawful profits. Thus, the Alabama case law identified by Defendants fails to establish the proposition for which it is cited: **[**123]** namely, that a claim of unjust enrichment under Alabama law cannot rest upon a benefit that allegedly is traceable through a chain of distribution from the indirect purchaser plaintiff to the defendant supplier.

The Mississippi decision cited by Defendants is likewise distinguishable — and, indeed, this Court has already distinguished it in the multidistrict litigation, albeit on slightly different grounds. In *Omnibank of Mantee v. United Southern Bank, 607 So.2d 76, 93 (Miss. 1992)*, the court held that "a person who has conferred a benefit on another, by making a contract with a third person, is not entitled to restitution from the other merely because of the failure of performance by the **[*852]** third person." As this Court observed in the multidistrict litigation, *Omnibank* "does not address the relationship of indirect purchasers [to defendant suppliers] on a price-fixing conspiracy claim, and there was no allegation of wrongdoing by the defendant" in that case. *Fuel Senders, 29 F. Supp.2d at 1022*. Just as *Omnibank* did not support the "benefit of the bargain" challenge advanced by the defendants in *Fuel Senders*, it has nothing to say about the "direct benefit" issue raised by Defendants here, and Defendants have not even attempted to put forward an argument that might lead the Court to conclude **[**124]** otherwise.

To be sure, Defendants point out that GEICO, in its role as insurer, has a more attenuated relationship with the Defendant auto parts suppliers than the indirect purchaser plaintiffs in the multidistrict litigation. Most notably, when GEICO makes a Total Loss Payment — *i.e.*, a payment to an insured or third-party claimant for the total loss of a vehicle — none of this payment is spent on the purchase of auto parts for the totaled vehicle, and Defendants therefore derive no benefit from such payments. Even where GEICO's payment as an insurer can ultimately be traced to the purchase of auto parts, Defendants observe that this payment is affected by myriad factors apart from Defendants' allegedly supracompetitive pricing, such as the terms of insurance contracts, deductibles, discount arrangements, payment caps, and insurance settlements. (*See* Defendants' Motion, Br. in Support at 44.) Although this Court has recognized in the multidistrict litigation that, under the laws of the relevant states, the requisite benefit to the defendant need not be conferred through direct contact with the plaintiff, *see Bearings, 50 F. Supp.3d at 864-65* (collecting cases), and other federal district courts have reached the same **[**125]** conclusion under the laws of many of the same states, *see, e.g., In re Processed Egg Products Antitrust Litigation, 851 F. Supp.2d 867, 927-34 (E.D. Pa. 2012)*; *In re TFT-LCD (Flat Panel) Antitrust Litigation, 599 F. Supp.2d 1179, 1189-90 (N.D. Cal. 2009)*, GEICO nonetheless must allege that there is a "relationship between [its] detriment and [Defendants'] benefit [that] flows from the challenged conduct" of the Defendant auto parts suppliers, *Fuel Senders, 29 F. Supp.3d at 1015* (internal quotation marks and citation omitted).

Admittedly, this requisite relationship between GEICO's detriment and benefit to one or more Defendant suppliers may be difficult, if not impossible, to ascertain in the case of at least some of GEICO's payments as an insurer. Nevertheless, GEICO has identified other transactions in which it makes payments analogous to those remitted by a traditional indirect purchaser. Most significantly, in its role as owner of a fleet of automobiles, GEICO stands in precisely the same role as other end purchaser plaintiffs who have bought vehicles at allegedly inflated prices due to Defendants' alleged price-fixing conspiracies. Even in GEICO's role as an insurer that makes payments to repair shops to cover the cost of replacement parts used in fixing an insured's or third-party claimant's vehicle, GEICO points to the widespread reliance on insurance to pay for replacement parts, (*see* Plaintiffs' **[**126]** Response Br. at 17), and it argues that this "generally-understood insurance paradigm" will enable it to forge a connection between its payments and a benefit to the Defendant parts suppliers, (*id.* at 45-47). Against this backdrop, the Court is satisfied that GEICO has adequately pleaded a relationship between its detriment and benefit to the Defendant suppliers for at least some of the transactions identified in the complaint, and the Court declines at this juncture to inquire too deeply into **[*853]** which particular transactions may support a recovery under the unjust enrichment laws of a given state and which may not.

4. GEICO Need Not Allege That It Failed To Receive the Benefit of the Bargain or Bargained-For Consideration in the Transactions Giving Rise to Its Claims of Unjust Enrichment.

Defendants next point to the laws of seventeen states, as well as the District of Columbia, as purportedly mandating the dismissal of claims of unjust enrichment "where [the] parties voluntarily have negotiated, entered into and fully performed their bargain." (Defendants' Motion, Br. in Support at 44 (quoting *In re Intel Corp. Microprocessor Antitrust Litigation, 496 F. Supp.2d 404, 421 (D. Del. 2007)* (internal quotation marks and citation omitted)).) In Defendants' view, although GEICO alleges that it **[**127]** was overcharged for relevant auto parts, this allegation alone "is insufficient to state a claim for unjust enrichment where, as here, GEICO does not assert that it did not obtain what it bargained for (*e.g.*, the settlement of an insurance claim)." Similarly, Defendants contend that GEICO's unjust enrichment claims under the laws of nine states are defeated by virtue of Defendants having provided "bargained-for consideration" in the form of functioning auto parts delivered to OEMs or other direct purchasers. (Defendants' Motion, Br. in Support at 45-46.) Once again, however, Defendants' support for these challenges consists largely of tables of purportedly relevant authorities, (*see* Defendants' Motion, Exs. F-2, F-3), without any accompanying explanation of what these cases hold or how they might apply to the facts and allegations presented here.

More importantly, Defendants again have made no attempt to distinguish the decisions of this Court in the multidistrict litigation that addressed and rejected these very same challenges. In *Bearings, 50 F. Supp.3d at 865*, for instance, the defendant auto part suppliers contended that the IPPs' claims of unjust enrichment were subject to dismissal because the plaintiffs **[**128]** had "entered into . . . voluntary agreement[s] and received the benefits of their respective bargains." The Court found that the case law cited by the defendants in support of this challenge — a series of decisions that overlaps considerably with the cases cited by Defendants here — "does not support dismissal of a price-fixing claim on this basis," but instead was distinguishable on the ground that the plaintiffs in those cases had entered into contractual relationships with the defendants. *Bearings, 50 F. Supp.3d at 865-67* (surveying cases from a number of jurisdictions). Thus, the Court concluded that the IPPs' unjust enrichment claims were not subject to dismissal, explaining that "[i]n contrast to the case law cited by Defendants, here the parties were not in a direct bargaining relationship" through which the IPPs could have attained the benefit of a contractually agreed-upon bargain. *50 F. Supp.3d at 867*; *see also* *Fuel Senders, 29 F. Supp.3d at 1015-28* (likewise addressing most of the cases cited by Defendants here and concluding that the IPPs' claims of unjust enrichment were not subject to dismissal under this authority); *Instrument Panel Clusters, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *26-*38* (same).

These same decisions in the multidistrict litigation likewise defeat Defendants' contention that they cannot be held liable for unjust **[**129]** enrichment because they "provided consideration in exchange for any payments they received." (Defendants' Motion, Br. in Support at 46 (footnote omitted).) In *Bearings, 50 F. Supp.3d at 863*, for example, the Court first observed that the defendants had "failed to cite a single case finding that payment or receipt of anything **[*854]** of value from a defendant will defeat a plaintiff's claim[] for unjust enrichment." As for the cases cited by the defendants in support of this challenge — nearly all of which Defendants likewise rely upon in this case — the Court found them distinguishable as either (i) arising "in the context of general contractor/subcontractor relationships," or (ii) addressing "inapposite" and fact-specific circumstances such as the terms of a particular contract or the liability of a principal for the actions of its agent. *Bearings, 50 F. Supp.3d at 863-64* (surveying cases); *see also* *Fuel Senders, 29 F. Supp.3d at 982*; *Instrument Panel Clusters, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *26*. Consistent with these prior rulings in the multidistrict litigation, the Court holds that GEICO's unjust enrichment claims withstand Defendants' "benefit of the bargain" challenge, as well as Defendants' contention that the remedy of unjust enrichment is unavailable where the Defendant auto part suppliers provided consideration in exchange for the payments **[**130]** they received.

5. GEICO Has Satisfied the Specific Pleading Requirements Identified in Defendants' Motion.

Finally, Defendants maintain that GEICO has not met the specific pleading requirements purportedly imposed under the unjust enrichment laws of Illinois, Mississippi, New York, Tennessee, and West Virginia. As GEICO correctly observes in response, however, the Court rejected these very same challenges to state law claims of unjust enrichment in its decisions in the multidistrict litigation. *See* *Bearings, 50 F. Supp.3d at 867* (rejecting the defendants' challenge under Illinois law);[9] *Fuel Senders, 29 F. Supp.3d at 1022* (declining to dismiss the IPPs' claim under Mississippi law); *Fuel Senders, 29 F. Supp.3d at 1024* (rejecting the contention that the IPPs' claim under New York law was subject to dismissal because the connection between them and the defendant suppliers was "too attenuated"); *Bearings, 50 F. Supp.3d at 868* (declining to apply an exhaustion-of-remedies requirement to the IPPs' claim under Tennessee law); *Fuel Senders, 29 F. Supp.3d at 1028* (finding that the IPPs had adequately pleaded the elements of a claim of unjust enrichment under West Virginia law).

This leaves only Defendants' cursory contention — advanced in the span of three sentences and unaccompanied by any reasoned argument or discussion of supporting authority — that the **[**131]** laws of eleven states and the District of Columbia foreclose a claim for unjust enrichment where "the subject of the dispute is covered by a contract" that "affords [the plaintiff] an adequate remedy at law." (Defendants' Motion, Br. in Support at 47.) Although Defendants state as a matter of *ipse dixit* that the subject of the dispute in this case is covered by the "contract[s] between GEICO and its insureds," (*id.)*, GEICO correctly observes in response that the true matter in dispute here — namely, "the artificially inflated prices caused by Defendants' [allegedly] illegal conduct" — cannot remotely be viewed as covered by or addressed in GEICO's insurance contracts with its insureds. (Plaintiffs' Response Br. at 49.) Nor do Defendants suggest how any relief available to GEICO under its insurance contracts might serve as an adequate remedy at law for the overcharges giving rise to its claims of unjust enrichment. Finally, the **[*855]** Court has addressed and distinguished many of the cases identified by Defendants in support of this challenge. *See* *Fuel Senders, 29 F. Supp.3d at 1019*; *Instrument Panel Clusters, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *27*. Accordingly, this final challenge to GEICO's claims of unjust enrichment lacks merit.

V. CONCLUSION

For these reasons, the Court **GRANTS IN PART [**132]** and **DENIES IN PART** Defendants' April 14, 2017 collective motion to dismiss GEICO's second amended complaint (Dkt. 62). Specifically, this motion is granted as to: (i) GEICO's improper joinder of sixteen part-specific antitrust conspiracy claims in a single suit; (ii) GEICO's inadequate allegations of Article III standing to assert claims under the laws of each of the various jurisdictions identified in its complaint; (iii) GEICO's lack of antitrust standing in its capacity as insurer to pursue claims under federal and state ***antitrust law***; (iv) GEICO's assertion of antitrust claims under the laws of the nine jurisdictions identified earlier in this opinion as the "Nexus States," as well as the laws of Utah and Oregon; (v) GEICO's assertion of antitrust claims under the laws of New Hampshire and Utah arising from conduct that predated the states' enactment of *Illinois Brick* repealer provisions; and (vi) GEICO's assertion of consumer protection claims under the laws of Arkansas, New York, and Vermont in its capacity as insurer. With respect to GEICO's improper joinder of separate part-specific conspiracies in a single suit and its inadequate allegations of Article III standing, GEICO **[**133]** is granted leave to file separate suits for each of the alleged part-specific conspiracies, and it may take this opportunity to address the Article III standing deficiencies identified in this opinion and order. In all other respects, Defendants' motion is denied.

IT IS SO ORDERED.

Date: August 30, 2018

/s/ Marianne O. Battani

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[9] It also is worth noting that the Illinois decision cited by Defendants here, *Martis v. Grinnell Mutual Reinsurance Co., 388 Ill. App. 3d 1017, 905 N.E.2d 920, 928, 329 Ill. Dec. 82 (Ill. App. Ct. 2009)*, has been called into doubt as "not an accurate statement of the [Illinois] law on the equitable claim for unjust enrichment," *National Union Fire Insurance Co. v. DiMucci, 2015 IL App (1st) 122725, 393 Ill. Dec. 495, 34 N.E.3d 1023, 1043 (Ill. App. Ct. 2015)*.

MARIANNE O. BATTANI

United States District Judge

United States v. Horma

United States District Court for the Eastern District of Virginia, Richmond Division

September 4, 2018, Decided; September 4, 2018, Filed

Criminal No. 3:18cr18

Reporter

2018 U.S. Dist. LEXIS 150598 *; 2018 WL 4214136

UNITED STATES OF AMERICA v. MOHAMED ABDELLAHI MOHAMED HORMA, Defendant.

Subsequent History: Motion denied by *United States v. Horma, 2019 U.S. Dist. LEXIS 8182 (E.D. Va., Jan. 16, 2019)*

Core Terms

immigration status, alien, asylum, authorization, Indictment, visa, USCIS, parties, business practice, motion to dismiss, offenses, Qualifying, expired, enumerated offense, unlawfully, firearm, challenges, accrue, restraint of trade, consumers, practices, unfair trade practice, illegal immigration, vagueness, Notice, antitrust violation, Immigration, regulation of a business, Residual, tourist

Counsel: **[*1]** For Mohamed Abdellahi Mohamed Horma, also known as Mohamed Abdellahi Moham Horma, also known as Mohamed Abdel Mohamed Horma, Defendant: Joseph Stephen Camden, LEAD ATTORNEY, Office of the Federal Public Defender, Richmond, VA; Robert James Wagner, Office of the Federal Public Defender (Richmond), Richmond, VA.

For USA, Plaintiff: Angela Mastandrea-Miller, LEAD ATTORNEY, US Attorney's Office, Richmond, VA.

Judges: M. Hannah Lauck, United States District Judge.

Opinion by: M. Hannah Lauck

Opinion

MEMORANDUM OPINION

This matter comes before the Court on Defendant Mohamed Abdellahi Mohamed Horma's Motion to Dismiss Counts One through Four of the Indictment (the "Motion to Dismiss"). (ECF No. 14.) The United States responded,[1] (ECF No. 21), and Horma replied, (ECF No. 24). The United States filed a Sur-Reply,[2] which the Court will not

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[1] The United States also filed an "Amended Response" the day after filing its Response, and one day after its deadline to respond to Horma's Motion to Dismiss. (ECF No. 22.) No motion accompanied the "Amended Response." The Court will not consider the Amended Response.

[2] *Local Rule of Criminal Procedure 47* governs motions in criminal cases. *Local Criminal Rule 47(F)(1)* prescribes the timeline by which parties must file response and reply briefs to criminal motions. *See* *E.D. Va. Loc. Crim. R. 47(F)(1)*. It also states: "No further briefs or written communications may be filed without first obtaining leave of Court." *Id.*

consider. (ECF No. 25.) Pursuant to the Court's order, the parties submitted additional briefing on several discrete issues. (ECF Nos. 37, 38.) On July 9, 2018, the Court heard arguments on the Motion to Dismiss, during which the parties referred to stipulations and presented exhibits, which they later filed.[3] (ECF Nos. 41, 42.) The Motion to Dismiss is ripe for disposition. For the reasons discussed **[*2]** below, the Court must deny without prejudice the Motion to Dismiss as to all Counts.

I. Factual and Procedural Background

Horma, bom in Morocco and a citizen of Mauritania, came to the United States on December 29, 2013, at the age of nineteen. He entered on a valid six-month B-l/B-2 tourist visa, which expired on June 28, 2014. On February 4, 2014, more than four months before his tourist visa expired, Horma filed an Application for Asylum (the "Asylum Application") with the United States Citizenship and Immigration Services (the "USCIS"). USCIS received the Asylum Application on February 13, 2014. Pursuant to *8 U.S.C. § 1158(d)(2)*,[4] Horma could not have been granted employment authorization "prior to 180 days after the date of filing" of the Asylum Application. *8 U.S.C. § 1158(d)(2)*. Given this timing, Horma became eligible for work authorization after his six-month visa expired. On September 21, 2015, USCIS notified Horma that he was eligible to apply for work authorization, (Referral Not. 2, ECF No. 41-3), but nothing in the record establishes whether Horma actually received it. The record indicates that he worked as an Uber driver. (Nov. 15, 2016 Tr. 17, ECF No. 41-9.)

On April 16, 2014, the Asylum Office Director sent Horma a "Notice of Intent to Deny" (the "NOID"), expressing an intent to deny Horma's Asylum Application and articulating why. On May 13, 2014, Horma submitted a rebuttal through counsel responding to the reasons articulated in the NOID for the intended denial and including additional information. On September 17, 2015, Horma received a Notice to Appear to demonstrate why he should not be removed from the United States. The Notice to Appear included notification to Horma that he was "removable" as a non-citizen who overstayed his tourist (nonimmigrant) visa and remained in the United States "without authorization." (Not. Appear 1, ECF No. 41-4.) The Notice to Appear also ordered Horma to "appear before an immigration judge" to show cause why he should not be removed from the United States, but it did not set a date for Horma's hearing, noting it **[*4]** only as "TBD," or To Be Determined. (*Id.*)

On September 21, 2015, USCIS issued a Referral Notice stating that, "after careful consideration," Horma's Asylum Application was not deemed credible. (Stip. 8; Referral Not. 1.) The Referral Notice also advised Horma that his

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The United States did not seek leave of Court to file its Sur-Reply, instead declaring that some of Horma's arguments in his Reply "warrant[] only a brief response." (U.S. Reply 1, ECF No. 25.) *E.D. Va. Local Criminal Rule 47* provides that the Court (and not a party) determines the need for additional briefing. *See* *E.D. Va. Loc. Crim. R. 47(F)(1)*. The Court will disregard the Sur-Reply.

[3] At the hearing, the parties presented the record unconventionally. They did not have a list of proposed stipulations or a complete version of exhibits. An oral recitation of stipulated facts proved unfruitful: the United States could not identify important dates, and gave conflicting dates for some events. The United States also offered, contrary to local rules, only unredacted versions of exhibits that included sensitive identifying information about Horma.

So as not to further delay the hearing, the Court directed the parties to jointly file redacted exhibits and written stipulations. At the end of the hearing, the parties requested until close of business July 12, 2017, to make this joint filing, which the Court ordered. On July 12, 2017, Horma filed an Unopposed Motion for Leave, seeking additional time to file the Stipulations. (ECF No. 40.) Soon thereafter, Horma filed the Stipulations. (ECF No. 42.) The Court will grant the Motion for Leave. (ECF No. 40.)

[4] *Section 1158(d)(2)* provides that

> [a]n applicant for asylum is not entitled to **[*3]** employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

8 U.S.C. § 1158(d)(2).

Asylum Application was referred to an immigration judge who would independently consider it. The Referral Notice stated in bold: "**This is not a denial of your asylum application**." (Referral Not. 1.) On May 5, 2016, USCIS sent Horma a Notice of Hearing in Removal Proceedings in Immigration Court informing Horma that an immigration judge would hear his matter on March 2, 2021.[5] Nothing in the record suggests that Horma has ever appeared before an immigration judge.[6]

On July 13, 2016, while Horma's Asylum Application was pending, he was arrested in Howard County, Maryland, and charged with: (1) shipping, importing, selling into or within, or transporting into Maryland cigarettes or other tobacco products on which the tobacco tax had not been paid, in violation of *Maryland Tax Code § 13-1015(a)*[7] (the "Maryland Tax Statute"); and, (2) unlawful and willing possession, sale, or attempt to sell unstamped or improperly stamped cigarettes, in violation **[*5]** of *Maryland Tax Code 13-1014*.[8] (Stip. 10; Md. Compl., ECF No. 41-6.) On July 27, 2016, a grand jury in Howard County indicted Horma on both of those charges. On September 2, 2016, Horma was arraigned in the Circuit Court for Howard County, Maryland ("the Howard County Court"), on both charges.[9] At the arraignment, the Howard County Court informed Horma of the charges against him and their maximum possible penalties, and Horma stated on the record that he had received a copy of the indictment.

Just over two months later, on November 15, 2016, Horma, with the assistance of an interpreter, pled guilty to felony transportation of untaxed cigarettes, in violation of the Maryland Tax Statute. Horma was sentenced to eleven months' imprisonment, all suspended; a fine of $107,550, with all but $2,000 suspended; and two years of unsupervised **[*6]** probation.

The next day, on November 16, 2016, law enforcement obtained and executed a search warrant for Horma's residence. During the execution of that warrant, law enforcement allegedly recovered a Ruger firearm and ammunition.[10]

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5 The United States asserts in briefing that this date was later advanced to August 3, 2018. (Resp. Mot. Dismiss 3.) The United States submitted no stipulation or exhibit supporting this assertion. No evidence before the Court indicates that Horma's hearing before an immigration judge might occur on a date other than March 2, 2021. To date, neither party has reported that a hearing has occurred.

6 Horma asserts in briefing that he has "submitted to biometrics administered by immigration officials[, and] attended all scheduled interviews[,]" to facilitate a full adjudication of his Asylum Application. (Mot. Dismiss 2.) This claim has no bearing on the Court's holding.

7 The Maryland Tax Statute provides that

> [a] person who willfully ships, imports, sells into or within, or transports within, [Maryland] cigarettes or other tobacco products on which the tobacco tax has not been paid in violation of [various regulations governing the sale and transportation of cigarettes] is guilty of a felony and, on conviction, subject to the penalties set forth in *subsections (b)* and *(c)* of this section.

Md. Code, Tax-Gen. § 13-1015(a).

8 *Section 13-1014* of the Maryland Tax Code provides that "[a] person who willfully possesses, sells, or attempts to sell unstamped or improperly stamped cigarettes in [Maryland] in violation of [various regulations governing the sale and transportation of cigarettes] is guilty of a misdemeanor." *Md. Code, Tax-Gen. § 13-1014(a)(1)*.

9 Horma's arraignment occurred without the benefit of an interpreter. Given Horma's presentation in this Court, and having reviewed the record, nothing that occurred in the Howard County Court gives the Court pause.

10 The United States asserted in its briefing that: (1) on November 16, 2016, Horma was arrested in Albemarle County on charges of Possession of Cigarettes with the Intent to Distribute; (2) law enforcement executed a search warrant on Horma's vehicle, during which they uncovered a receipt for a firearm purchased for cash on November 12, 2016, from the War Store; (3) the Ruger recovered during the search of Horma's residence was found in Horma's bedroom dresser; and, (4) Horma admitted that he "had taken the gun from the purchaser" and kept it in his room. (Resp. Mot. Dismiss 4-5.) The United States put none of these facts before the Court in the form of either exhibit or stipulation. The Court, therefore, will not consider them in ruling on the Motion to Dismiss.

On February 20, 2018, a federal grand jury in the Eastern District of Virginia returned a five-count Indictment, (ECF No. 9), and on May 15, 2018, returned a five-count Superseding Indictment,[11] (ECF No. 28). The Superseding Indictment charges Horma as follows:[12]

> **Count One**: Possession of a Firearm by an Illegal Alien, in violation of *18 U.S.C. § 922(g)(5)(A)*, on September 21, 2016.
>
> **Count Two**: Possession of a Firearm and Ammunition by an Illegal Alien, in violation of *18 U.S.C. § 922(g)(5)(A)*, on November 12, 2016.
>
> **Count Three**: Receipt of a Firearm by a Person Under Indictment, in violation of *18 U.S.C. §§ 922(n)* and *924(a)(1)(D)*, on September 21, 2016.
>
> **Count Four**: Receipt of a Firearm by a Person Under Indictment, in violation of *18 U.S.C. §§ 922(n)* and *924(a)(1)(D)*, on November 12, 2016.
>
> **Count Five**: False Statements in the Acquisition of a Firearm, and Aiding and Abetting that Crime, in violation of *18 U.S.C. §§ 922(a)(6)* and *(2)*, on November 12, 2016.

Horma moves to dismiss Counts One through Four of the Superseding Indictment.[13] As to Counts One and Two, Horma contends that the charges must be dismissed **[*7]** because he does not qualify as "an alien . . . illegally or unlawfully in the United States," as set forth in *18 U.S.C. § 922(g)(5)(A)* because he "has only ever been present in the United States on a valid visa, or later under a period of authorized stay due to a pending bona fide asylum application." (Mot. Dismiss 1-2.) As to Counts Three and Four, Horma argues that the Maryland Indictment cannot support a charge under *18 U.S.C. § 922(n)* because the crime for which he was under indictment does not constitute "a crime punishable by imprisonment for a term exceeding one year," *18 U.S.C. § 922(n)*, as that phrase is defined in *18 U.S.C. § 921(a)(20)*. (Mot. Dismiss 1.) Horma argues in the alternative that *§ 922(n)* is void for vagueness, and that it amounts to an unconstitutional infringement of the *Second Amendment to the United States Constitution*.

Based on the record presented to the Court, Horma's challenge to Counts One and Two must fail because the parties did not brief the proper legal issues or provide determinative factual evidence. *Title 18, Section 922(g)(5)(A)* prohibits someone who "is illegally or unlawfully in the United States" from possessing a firearm. *18 U.S.C. § 922(g)(5)(A)*. On the record presented, the Court cannot determine the legality of Horma's presence in the United States after his visa expired.

First, USCIS policies and provisions distinguish **[*8]** between a person's immigration status and the lawfulness of his or her presence in the United States. *See infra* Part II B. A person may be in illegal *immigration status* and be

[11] The Superseding Indictment contains only typographical changes, and charges Horma with the same five crimes arising from the same alleged conduct as the original Indictment. Although the United States filed the Superseding Indictment after much of the briefing on the Motion to Dismiss concluded, the parties' arguments regarding the original Indictment apply with equal force to the Superseding Indictment. The Court did not order new briefing after the United States filed the Superseding Indictment, nor did Horma seek any. For clarity, the Court refers to the Superseding Indictment, throughout this Memorandum Opinion.

[12] In briefing, the United States expanded on the facts underlying the charges in the Superseding Indictment. Specifically, the United States asserted that, underlying the charges in Counts One and Three, on September 21, 2016, Horma went to a Richmond shooting range and rented a gun and ammunition, which he paid for using his credit card. As to the charges in Counts Two, Four, and Five, the United States contended that, on November 12, 2016, Horma and an unidentified individual went to a federally licensed firearms dealer, where the unidentified individual purchased a handgun and ammunition. Horma and the individual returned to Horma's residence, and Horma put the handgun in his bedroom dresser. The United States introduced no stipulation or exhibit supporting these facts, however. The Court therefore will not consider these facts in ruling on the Motion to Dismiss.

[13] Horma does not challenge Count Five in the Motion to Dismiss.

unlawfully present. Under certain circumstances, a person may be in *illegal immigration status*, but retain *lawful presence* in the United States. Horma may have illegal immigration status but retain legal presence.

Second, because parties failed to identify this critical distinction, they also failed to develop the factual record necessary to make this fact-specific determination. Despite the Court's specific request to identify the date of Horma's work authorization, the parties failed to include that information in the record they placed before the Court. The determination of Horma's lawful or unlawful presence turns on that date. The Court will deny without prejudice the Motion to Dismiss Counts One and Two.

As to the challenges to *§ 922(n)* with regard to Counts Three and Four, Horma's argument that the Maryland Tax Statute does not constitute "a crime punishable by imprisonment for a term exceeding one year," *18 U.S.C. § 922(n)*, as defined in *18 U.S.C. § 921(a)(20)* fails. His vagueness challenge to *§ 922(n)* also fails. Those aspects of Horma's challenge will be denied **[*9]** with prejudice. But, given the parties' briefing and relevant United States Court of Appeals for the Fourth Circuit precedent, the Court declines to reach Horma's *Second Amendment* challenge on this record. The Court will deny without prejudice that aspect of Horma's Motion to Dismiss Counts Three and Four.

II. Counts One and Two: Possession of a Firearm by an Illegal Alien

Title 18, *Section 922(g)(5)(A)* prohibits someone who is "illegally or unlawfully in the United States" from possessing a firearm. *18 U.S.C. § 922(g)(5)(A)*. The United States contends that, because Horma's tourist visa expired before the adjudication of his asylum application, he was illegally or unlawfully in the United States at the time he allegedly possessed the firearm. Horma counters that he applied for asylum before his tourist visa expired, meaning that he never became illegally or unlawfully present for purposes of *18 U.S.C. § 922(g)(5)(A)*.

USCIS guidance and policies make clear that a material difference exists between a person's immigration status and the lawfulness of his or her presence in the United States. A person's immigration status may be illegal, but he or she may still be lawfully present in the United States. Because neither party identified the distinction between a person's immigration **[*10]** status and the lawfulness of his or her presence, the parties did not brief whether "illegally or unlawfully in the United States" in *18 U.S.C. § 922(g)(5)(A)* refers to a person's immigration status, the lawfulness of his or her presence, or both. Conflicting findings about status and presence could create an ambiguity when *§ 922(g)(5)(A)* is applied.

Critical to the finding here, though, is whether and when Horma received a work authorization. Horma's immigration status became illegal when he overstayed his original visa. However, whether Horma accrued unlawful presence from that day forward depends upon whether he worked without first receiving a work authorization. Here, Horma may present a hybrid situation: he has illegal immigration status, but, if he did not work without authorization, he has not yet begun to accrue unlawful presence.

The United States failed to present, and the Court has been unable to find, any authority that suggests that *Section 922(g)(5)(A)* contemplates only a person's illegal immigration status. Horma may, then, distinguish himself from the defendants in the cases cited by the United States in support of their position. For the reasons outlined below, the Court finds that, absent a more complete record, it must deny **[*11]** without prejudice the Motion to Dismiss Counts One and Two.

A. Legal Standard: In This Criminal Motion to Dismiss, The Court May Consider the Stipulated Evidence Before It

Federal Rule of Criminal Procedure 12(b)(1) states that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." *Fed. R. Crim. P. 12(b)(1)*. A court may not decide a criminal case on a motion for summary judgment, *United States v. Weaver, 659 F.3d 353, 355 n.* (4th Cir. 2011)*, so in deciding a pretrial motion to dismiss the indictment, "a court may not dismiss an indictment . .

. on a determination of facts that should have been developed at trial," United States v. Engle, 676 F.3d 405, 415 (4th Cir. 2012). However, "a district court may consider a pretrial motion to dismiss an indictment where the government does not dispute the ability of the court to reach the motion and proffers, stipulates, or otherwise does not dispute the pertinent facts." Weaver, 659 F.3d at 355 n. * (citing United States v. Flores, 404 F.3d 320, 325 (5th Cir. 2005); United States v. Yakou, 428 F.3d 241, 247, 368 U.S. App. D.C. 162 (D.C. Cir. 2005)). In *Engle*, the Fourth Circuit affirmed the District Court's denial of Engle's motion to dismiss and distinguished *Weaver* by stating: "*Weaver* is inapplicable . . . because the government did not proffer or stipulate to the pertinent facts . . . and . . . some of the relevant . . . facts were developed only at trial." Engle, 676 F.3d at 416 n. 7.

B. Legal Standard: A Distinction [*12] Exists Between Immigration Status and Unlawful Presence

USCIS guidance makes clear that an alien's immigration status and the lawfulness of his or her presence constitute related, but separate inquiries. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ADJUDICATOR'S FIELD MANUAL ch. 40.9(a)(2) ("Adjudicator's Field Manual"), available at https://www.uscis.gOv/ilink/docView/AFM/HTML/AFM/0-0-0-l/0-0-0-17138/0-0-0-18383.html#0-0-0-617 (last accessed Aug. 26, 2018).[14]

1. USCIS Determines an Alien's Immigration Status by Examining Compliance with His or Her Visa Requirements

An alien maintains legal immigration status as long as he or she complies with the requirements of his or her visa. *See, e.g.*, Adjudicators Field Manual ch. 40.9(a)(2)-(3); Memorandum for Thomas E. Cook, Acting Assistant Comm'r, Office of Adjudications, Immigration and Naturalization Serv. from Janice Podolny, Chief, Inspections Law Div., Office of Gen. Counsel (Mar. 27, 2003) ("Cook Memo"), available at https://www.uscis.gov/sites/default/files/files/pressrelease/PofStav4023Pub.pdf (last accessed Aug. 26, 2018). The USCIS Policy Manual states that "[f]oreign nationals in unlawful immigration status generally include: **[*13]** foreign nationals who entered the United States without inspection and admission or parole; and [f]oreign nationals whose lawful immigration status expired or was rescinded, revoked, or otherwise terminated." UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, POLICY MANUAL vol. 7, pt. B, ch. 3 (2017) ("USCIS Policy Manual"), available at https://www.uscis.gov/policvmanual/HTML/PolicvManual-Volume7-PartB-Chapter3.html. The USCIS Policy Manual states that an alien's immigration status changes to illegal "[o]n the day after the foreign national's authorized status has . . . expired . . . while he or she is physically present in the United States." *Id.*

As described in other USCIS guidance, whether a foreign national has a pending asylum application or other pending change of status application does not affect whether the person's immigration status changes to illegal. "[A] pending application or petition does not automatically afford protection against removal if the foreign national's status expires after submission of the application." *Id.* The Cook Memo explains that a pending application for extension of status or change of status does not create a "'bridge' of continuing status." Cook **[*14]** Memo. 3. The pending application, if filed while the alien maintains legal status, will result in "a continuation of the period of stay authorized by the Attorney General," even though it does not result in "a continuation of 'status.'" *Id.* at 4. In this circumstance, the alien would have illegal immigration status, but would not begin to accrue unlawful presence.[15]

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[14] Agency "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant" the level of deference given under Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Christensen v. Harris Cty., 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000). The USCIS's interpretation "is nonetheless 'entitled to respect ... to the extent that [its] interpretations have the power to persuade.'" FDIC v. Cashion, 720 F.3d 169, 179 (4th Cir. 2013) (quoting Christensen, 529 U.S. at 587). The Court finds the USCIS's interpretation of the interaction between lawful status, period of authorized stay, and unlawful presence to be reasonable and persuasive.

[15] An alien may regain legal status after his or her status has changed to illegal status. For example, if an alien has timely filed an application for extension of status or change in status that USCIS then grants, his or her immigration status reverts back to legal status as of "the date the adjustment application [was] filed." USCIS Policy Manual ch. (E)(1).

2. USCIS Policies and the *Immigration and Nationality Act ("INA")* Allow an Alien's Presence to Remain Lawful, Even After His or Her Status Becomes Illegal

The lawfulness of an alien's presence in the United States depends upon his or her immigration status, but requires a different inquiry. Title 8 of the United States Code defines an alien as unlawfully present "if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." *8 U.S.C. § 1182(a)(9)(B)(ii)*. The Adjudicator's Field Manual describes the process of accruing unlawful presence as "[n]onimmigrants admitted until a specific date will . . . begin to accrue unlawful presence on the day following the date the authorized period of admission expires." Adjudicator's Field Manual **[*15]** ch. 40.9(E)(i).

Certain exceptions exist to these general rules. Relevant here, the Immigration and Nationality Act ("INA") creates a statutory exception for those aliens who file an asylum application. *8 U.S.C. § 1182(a)(9)(B)(iii)(II)*.[16] In that circumstance, "[t]he period of authorized stay begins on the date the alien files a bona fide application for asylum," Adjudicator's Field Manual ch. 40.9 (F)(ii), and continues until that application has been adjudicated, Cook Memo 5. However, this tolling provision applies only if the alien complies with all requirements, including refraining from working without authorization during the pendency of his or her asylum application.[17] *8 U.S.C. § 1182(a)(9)(B)(iii)(II)*.

In sum, with regard to an alien who files for asylum, whether he or she presents as unlawfully present, or has accrued time qualifying as unlawful, depends upon when he or she filed his or her asylum application. If he or she filed the application **[*16]** while in legal immigration status, then he or she accrues no unlawfully present days, even if his or her visa expires during the pendency of his or her asylum application. See *8 U.S.C. § 1182(a)(9)(B)(iii)(II)*; Adjudicator's Field Manual ch. 40.9(F)(ii); Cook Memo. In that circumstance, the alien's immigration status would be illegal, but his or her presence in the United States would not be unlawful.[18]

C. Analysis: On the Record Before it, the Court Cannot Determine Whether Horma was "Illegally or Unlawfully Present in the United States," for the Purposes of *18 U.S.C. § 922(g)(5)(A)*

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[16] *Title 8, Section 1182(a)(9)(B)(iii)(II)* states:

> No period of time in which an alien has a bona fide application for asylum pending under *section 1158* of this title shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

8 U.S.C. § 1182(a)(9)(B)(iii)(II).

[17] An alien may also be in illegal immigration status, have already accrued some unlawful presence time, but not currently accruing additional unlawful presence time. This situation occurs when an alien does not timely file for a change of status or extension of status, but files once his or her immigration status has become illegal. The Adjudicator's Field Manual states that "[a] grant of asylum does not eliminate any prior periods of unlawful presence." Adjudicator's Field Manual ch. 40.9 (F)(ii). If an alien files for asylum after his or her immigration status has become unlawful, then he or she will not accumulate any additional unlawful presence from the date he or she files his or her application, but he or she will be subject to the days already accumulated at the time he or she filed for asylum. *Id.* While the record plainly demonstrates that Horma filed for asylum, it remains silent as to whether he ever filed for an extension of status.

[18] While not relevant here, if an alien filed the application while in illegal immigration status, then he or she would accrue unlawfully present days beginning the day after his or her visa expires until the day he or she files his or her asylum application. See Adjudicator's Field Manual ch. 40.9(F)(ii). And any subsequently-filed asylum application would not retroactively convert unlawfully present days into lawful presence, but it does prevent the applicant from accruing additional unlawful presence. *Id.*

The Court may consider this motion pursuant to *Federal Rule of Criminal Procedure 12(b)(1)* because the United States and Horma have submitted stipulated facts, (ECF No. 42), and joint exhibits, (ECF No. 41), and the United States has not contended that the Court lacks the ability to decide this motion. *Weaver, 659 F.3d at 355* n. *. However, the Court lacks the necessary factual record to resolve the legal issue before it.[19] Neither the exhibits nor the stipulated facts establish the essential fact of whether Horma received work authorization before working as an Uber driver. Although the United States did not allege that Horma violated the mandate to refrain from working without authorization, Horma did not expressly claim, either **[*17]** at the hearing or in his briefing, that he worked only in compliance with the work authorization requirements. Counsel for Horma declined to do so even when given the opportunity at the hearing, and both parties failed to answer the Court's inquiry when they subsequently filed stipulations and exhibits. The Court must make this threshold determination before it can decide whether *18 U.S.C. § 922(g)(5)(A)* applies to Horma. The Court must deny Horma's Motion to Dismiss without prejudice as to Counts One and Two because to do otherwise on the incomplete record before it would require the Court to improperly resolve a factual uncertainty.[20] *Engle, 676 F.3d at 415*.

1. Horma's Immigration Status Has Become Illegal

To maintain his or her legal immigration status, an alien must comply with the requirements of his or her visa, including the date by which he or she must leave the country. *See* Adjudicator's Field Manual ch. 40.9 (a)(2); Cook Memo 4. If the alien does not comply with those requirements, such as overstaying the validity of his or her visa, then his or her immigration status changes from legal to illegal. Id The filing of an extension of status or change of status application does not create a "bridge" of continuing legal **[*18]** status, but USCIS's subsequent approval of that application retroactively converts the alien's status from illegal to legal as of the date he or she filed his or her application. Cook Memo 3-4.

On December 29, 2013, Horma entered the United States on a valid tourist visa. On February 4, 2014, while that visa was still in effect and Horma still had lawful immigration status, he applied for asylum with USCIS. Horma's tourist visa expired on June 28, 2014—more than two months after he applied for asylum. Horma's timely filing for asylum may have tolled his accrual of unlawful presence. However, as recognized in the Cook Memo, "[t]here is simply no analogous rule or guidance providing for a continuation of the alien's 'status.'" Cook Memo 4. On June 29, 2014, the day after his visa expired, Horma's status became illegal.[21]

2. Horma's Presence May Be Lawful or Unlawful

That said, the Court cannot determine the legality of Horma's presence on the record before it. Under current USCIS policies, an alien may be in illegal or unlawful immigration status, but not accruing unlawful presence. *See* Adjudicator's Field Manual ch. 40.9; Cook Memo. Generally, if an alien's status expires on a specific **[*19]** day, the alien's status becomes illegal and he or she begins to accrue unlawful presence on the following day. Adjudicator's Field Manual ch. 40.9(E)(i). An exception exists for asylum applicants: "[n]o period of time in which an alien has a bona fide application for asylum pending under *[§] 1158* of this title shall be taken into account in determining the period of unlawful presence in the United States ..." *8 U.S.C. § 1182(a)(9)(B)(iii)(II)*; *see* Adjudicator's Field Manual

[19] The Court cannot resolve factual uncertainties on a pre-trial motion and the factual record must drive the legal analysis. *See Weaver, 659 F.3d at 355 n ** (concluding that a district court may rule on a pretrial motion to dismiss "where the government does not dispute the ability of the court to reach the motion and proffers, stipulates, or otherwise does not dispute the pertinent facts").

[20] Per *Weaver*, the Court may rule on motions in criminal cases by relying on stipulated facts to make legal determinations. *659 F.3d at 355 n. **. In the alternative, all factual uncertainties must be submitted to the fact finder at trial.

[21] If USCIS grants Horma's asylum application, then that approval may convert Horma's immigration status to legal status. *See* USCIS Policy Manual vol. 7, pt. B, ch. 3 (E)(1).

ch. 40.9(F)(ii). This exception tolls the accrual of unlawful presence time. It does not apply if the alien worked without authorization.[22] *8 U.S.C. § 1182(a)(9)(B)(iii)(II)*.

On December 29, 2013, Horma entered the United States on a valid tourist visa. On February 4, 2014, he applied for asylum while that visa was still in effect and Horma still had lawful immigration status. Horma's tourist visa expired on June 28, 2014—more than two months after he applied for asylum. Horma was therefore legally and lawfully present in the United States and in legal immigration status when he entered "[a] period of authorized stay." (Resp. Mot. Dismiss 16.) Although Horma states in his Motion to Dismiss that "after a certain amount of time had passed, he was given authorization to work in the United States," **[*20]** (Mot. Dismiss 2), Horma presents nothing, despite two opportunities to do so, establishing that he began employment only after receiving that authorization. Indeed, neither party provided the date on which Horma received this authorization. The parties submitted joint exhibits and stipulated facts that merely establish that Horma was eligible to receive work authorization as of at least September 21, 2015, and that—at some point in time—he worked as an Uber driver. (Referral Not. 2, ECF No. 41-3; Nov. 15, 2016 Tr. 17, ECF No. 41-9). Given this factual uncertainty, the Court cannot ascertain the lawfulness of Horma's continued presence in the United States.

This information is critical because whether Horma received work authorization before he began work affects the lawfulness of his presence in the United States. If Horma began working before receiving his work authorization, then he has started to accrue unlawful presence. See *8 U.S.C. § 1182(a)(9)(B)(iii)(II)*. Combined with his illegal immigration status, Horma would have no claim that *18 U.S.C. § 922(g)(5)(A)* fails to reach him.

But if he did not begin working until after he received his work authorization, Horma would be in illegal immigration status, but would be lawfully present. *8 U.S.C. § 1182(a)(9)(B)(iii)(II)*. **[*21]** Only in this second factual scenario would it be necessary, or appropriate, for the Court to determine how or if *18 U.S.C. § 922(g)(5)(A)* applies to Horma. Because the record does not establish the necessary facts, as the discussion below demonstrates, the Court cannot determine the applicability of the challenged statute to Horma.

3. *Section 922(g)(5)(A)* May Be Ambiguous As to Horma

Section 922(g)(5)(A) makes it unlawful for "any person . . . who, being an alien . . . is illegally or unlawfully in the United States" to possess a firearm. *18 U.S.C. § 922(g)(5)(A)*. The statute does not make clear whether it applies only to a person's immigration status or the lawfulness of his or her presence. The case law cited by the parties and expanded upon by the Court does not provide determinative precedent for this case. *Section 922(g)(5)(A)* may be ambiguous when applied to Horma.[23]

Neither party identifies any case law addressing whether an alien who applies for a change in status while, as Horma was, in *legal* immigration status acquires unlawful presence by virtue of his or her continued presence in the United States awaiting final determination of a pending status adjustment application. Nor does the Court see such a case. Rather, several federal circuit courts have addressed the applicability of *Section 922(g)* when **[*22]** an alien applied for a change of status *after* his or her immigration status became illegal, which lead to him or her being unlawfully present in the United States and in an illegal immigration status. *See, e.g.,* *United States v. Rehaif, 888 F.3d 1138, 1140-41, 1147-48 (11th Cir. 2018)* (affirming the jury instruction that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law," and affirming the defendant's *18 U.S.C. § 922(g)(5)(A)* conviction when the defendant rented a gun nine months after USCIS terminated his visa); *United States v. Al Sabahi, 719 F.3d 305, 309-10 (4th Cir. 2013)* (finding that *18 U.S.C.*

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[22] An asylum applicant can only become eligible for work authorization 180 days after filing his or her asylum application. *8 U.S.C. § 1158(d)(2)*.

[23] If, in fact, Horma's immigration status has become illegal, but his presence has not become unlawful, the statute may not apply to Horma. A question would exist whether Horma was "in" the United States "unlawfully or illegally" to a degree that would establish that element of the offense. The Court cannot decide that knotty issue here.

§ 922(g)(5)(A) applied when the defendant applied for a change of status four years after his status became illegal); *United States v. Latu, 479 F.3d 1153,1157-59 (9th Cir. 2007)* (finding that *18 U.S.C. § 922(g)(5)(A)* applied when the defendant applied for a change of status three months after his status became illegal); *United States v. Elrawy, 448 F.3d 309, 312-14 (5th Cir. 2006)* (finding that *18 U.S.C. § 922(g)(5)(A)* applied when the defendant filed for a change of status one month after his status became illegal); *United States v. Bazargan, 992 F.2d 844, 847-49 (8th Cir. 1993)* (finding that *18 U.S.C. § 922(g)(5)* applied when the defendant filed an asylum application four months after violating his visa requirements).

If, in fact, Horma did not work without authorization, then his situation may be distinguishable from the defendants in *Al Sabahi, Latu, Elrawy*, and *Bazargan*. Specifically, each of those defendants presented **[*23]** as in illegal immigration status and either accruing or having accrued some amount of unlawful presence. In those cases, Title *18 U.S.C. § 922(g)(5)(A)* clearly applies. If Horma began to drive for Uber before he received his work authorization, then his situation cannot be distinguished from that faced by the defendants in *Al Sabahi, Latu, Elrawy*, and *Bazargan*. In that case, Horma's immigration status would be illegal, as discussed supra, and he would have accrued unlawful presence time because the tolling provision in *8 U.S.C. § 1182(a)(9)(B)(iii)(II)* would not apply.

The parties put into play Horma's work status without tying together necessary loose ends. A claim that Horma received work authorization stands alongside evidence that Horma worked. But the joint exhibits and stipulated facts show only that Horma became eligible to receive work authorization and that he worked. They do not identify receipt of work authorization, or whether Horma received work authorization before commencing employment. The timing of these events are critical to a finding of lawful or unlawful presence. Given these circumstances, the Court must deny without prejudice Horma's Motion to Dismiss Counts One and Two.

III. Counts Three and Four: Possession of a Firearm [*24] While Under Indictment

Horma brings several challenges to the charges in Counts Three and Four. First, he contends that a plain reading of the Maryland statute under which he was convicted does not qualify as a predicate conviction for purposes of a *§ 922(n)* charge for receipt of a firearm by a person under indictment. For the reasons below, this challenge fails. Next, Horma contends that *Section 922(n)* is void for vagueness under *Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)*. This challenge also fails given the statutory construct of the Maryland law, and given *Johnson's* narrow holding.

As to Horma's *Second Amendment* challenge, however, the Court is constrained to deny his challenge without prejudice. It must do so because both parties failed to identify or apply the governing standard of review within the Fourth Circuit for evaluating *Second Amendment* challenges. This failure presented the Court with an inadequate record on which to evaluate the constitutionality of the statute. More understandably, the parties also did not brief these constitutional challenges based on what is now the law of the case: that Horma's immigration status has changed to illegal status, but that his presence may be either lawful or unlawful. These deficiencies oblige this Court to deny the Motion to Dismiss **[*25]** Counts Three and Four, but to do so without prejudice.

A. Horma's Challenge That the Maryland Indictment Cannot Support a Charge Under *18 U.S.C. § 922(n)* Fails

1. Statutory Framework

Two statutes are relevant to the charges in Counts Three and Four. First, *18 U.S.C. § 922(n)* (the "Non-Receipt Statute") provides that "[i]t shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to . . . receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." *18 U.S.C. § 922(n)*. Congress also exempted certain crimes from the definition of "a crime punishable by imprisonment for a term exceeding one year." Relevant here, *18 U.S.C. §*

921(a)(20)(A) (the "Business Practices Clause") states: "[t]he term 'crime punishable by imprisonment for a term exceeding one year' does not include . . . any [f]ederal or [s]tate offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." 18 U.S.C. § 921(a)(20)(A).

The Business Practices Clause thus provides that someone under indictment for a federal or state offense "pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business **[*26]** practices" does not violate the Non-Receipt Statute by receiving, possessing, or shipping a firearm. 18 U.S.C. §§ 921(a)(20)(A); 922(n). Horma contends that the Maryland Indictment constitutes just such an indictment, meaning that he cannot have violated § 922(n), the Non-Receipt Statute.

2. Principles of Statutory Interpretation Guide the Court's Analysis

Under well-settled principles of statutory construction, the Court's analysis must "begin, as always, with the language of the statutory text," and "[i]n the absence of a definition from Congress, [the Court] accord[s] words in a statute their ordinary, contemporary, common meaning." United States v. Midgett, 198 F.3d 143, 145-46 (4th Cir. 1999) (internal citation and quotation marks omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). When "the terms of [a] statute are unambiguous on their face, or in light of ordinary principles of statutory interpretation," judicial inquiry normally ends. United States v. Morison, 844 F.2d 1057, 1064 (4th Cir. 1988) (quoting United States v. James, 834 F.2d 92, 92 (4th Cir. 1987)); *see also* United States v. Wells, 519 U.S. 482, 495, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997) ("[Courts] presume that Congress expects its statutes to be read in conformity with th[e] [Supreme] Court's precedents).

a. "Relating to" Modifies Only "Other [*27] Similar Offenses"

"According to the rule of the last antecedent, 'a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" United Seniors Ass'n v. Soc. Sec. Admin., 423 F.3d 397, 402 (4th Cir. 2005) (quoting Barnhart v. Thomas, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003)). Applying this basic grammatical rule to the Business Practices Clause, the Qualifying Clause, "relating to the regulation of business practices" refers only to the preceding antecedent "other similar offenses." *See, e.g.,* United States v. Stanko, 491 F.3d 408, 414 (8th Cir. 2007) (applying the rule of the last antecedent similarly and rejecting the defendant's suggestion that the Qualifying Clause serves as a "descript[or] of the commonalities between each of the enumerated offenses and as an indication of a congressional intent to exclude any business-related offense"). The question for the Court, then, is how to determine the scope of "other similar offenses related to the regulation of business practices." Principles of statutory interpretation guide that analysis as well.

b. The Qualifying Clause Is Limited By the Enumerated List of "Antitrust Violations, Unfair Trade Practices, [and] Restraints of Trade"

Congress's inclusion of the word "similar" to modify "offenses" in the Qualifying Clause "indicates an intent to limit the [B]usiness [P]ractices [C]lause's reach to offenses which are 'comparable' or 'nearly corresponding' to the enumerated offenses." Stanko, 491 F.3d at 414 (quoting *Webster's Third* ***[*28]*** *New International Dictionary* 2120 (2002)). Construing the statute otherwise would render the word "similar" superfluous and without meaning. *See, e.g.,* Bowsher v. Merck & Co., 460 U.S. 824, 833, 103 S. Ct. 1587, 75 L. Ed. 2d 580 (1983) (identifying the "settled principle of statutory construction that [the court] must give effect, if possible, to every word of the statute"); *see also* United States v. Ivester, 75 F.3d 182, 185 (4th Cir. 1996) (stating that the Fourth Circuit is "reluctant to interpret statutory provisions so as to render superfluous other provisions within the same enactment").

Other established principles of statutory interpretation support this reading. Under the doctrines of *ejusdem generis* (of the same kind or class) and *noscitur a sociis* (it is known by its associates), "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *United States v. Bursey, 416 F.3d 301, 306 (4th Cir. 2005)* (quoting *Wash. State Dep't of Soc. & Health Servs. v. Guardianship of Danny Keffeler, 537 U.S. 371, 384, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003))*. Here, the Qualifying Clause refers generally to "offenses relating to the regulation of business practices," certainly less specific than the three enumerated types of offenses preceding the Qualifying Clause—"antitrust violations, unfair trade practices, and restraints of trade." *18 U.S.C. § 921(a)(20)(A)*. These doctrines of statutory interpretation therefore instruct that the Qualifying Clause should be **[*29]** "understood as a reference to subjects akin" to the specifically enumerated offenses.[24] *United Seniors Ass'n, 423 F.3d at 403* (defining the doctrine of *ejusdem generis*).

In light of established principles of statutory construction, the Court interprets the Qualifying Clause, "other similar offenses relating to the regulation of business practices," as referring to offenses similar to the Enumerated Offenses, "antitrust violations, unfair trade practices, [and] restraints of trade." *18 U.S.C. § 921(a)(20)(A)*.

c. The Business Practices Clause Does Not Cover Horma's Maryland Indictment

The Maryland Tax Statute undergirding Horma's Maryland Indictment makes it a felony to "willfully ship[], import[], sell[] into or within, or transport[] within, [Maryland] cigarettes or other tobacco products on which the tobacco tax has not been paid." *Md. Code, Tax-Gen. §13-1015(a)*. For the Business Practices Clause to apply to the Maryland Tax Statute, the Maryland Tax Statute would have to constitute an offense similar to "antitrust violations, unfair trade practices, [or] restraints of trade." *18 U.S.C. § 921(a)(20)(A)*. The Maryland Tax Statute is not similar to those offenses, and the Business Practices Clause does not therefore exempt it from the definition of a crime punishable by imprisonment for a term exceeding one year.

i. The Enumerated Offenses All Directly Regulate Business Activity in Order to Prevent Unfair Competition

All of the enumerated **[*30]** offenses share commonalities: they each regulate business directly, broadly seek to prevent unfair competition, and govern behavior affecting consumers and competitors.

Antitrust law is "the body of laws designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination." ***Antitrust Law***, *Black's Law Dictionary* (10th ed. 2014). The Supreme Court has expressed its "general view that the primary purpose of the antitrust laws is to protect interbrand competition." *State Oil Co. v. Khan, 522 U.S. 3, 15, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*; *see also* *Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 315 (4th Cir. 2007)* ("Antitrust laws . . . are the Magna Carta of free enterprise." (alteration in original) (quoting *United States v. Topco Associates, Inc., 405 U.S. 596, 610, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)))*.

The phrase "unfair trade practices" could have a much broader definition than "antitrust violations." *See, e.g.,* *Stanko, 491 F.3d at 416* (noting that "unfair trade can include generally any 'inequitable business practice'"). Indeed, unfair trade practices surely include unfair competition, which involves "[d]ishonest or fraudulent rivalry in

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[24] Horma argues that, when interpreting statutes that include the phrase "relating to," courts have given "relating to" broad meaning, and therefore the Qualifying Phrase, "the phrase 'relating to the regulation of business practices' should likewise be given a broad meaning sufficient to cover transportation of unstamped cigarettes." (Mot. Dismiss 11.) The Supreme Court of the United States has instructed that the doctrine of *noscitur a sociis* (it is known by its associates), "while not an inescapable rule, is often wisely applied where a word [or phrase] is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307, 81 S. Ct. 1579, 6 L. Ed. 2d 859, 1961-2 C.B. 254 (1961)*. Given the relevant principles of statutory interpretation, and given that the specific language "antitrust violations, unfair trade practices, [and] restraints of trade" precedes "offenses relating to business practices," Horma's proposed broad reading of the Qualifying Clause cannot prevail.

trade and commerce; [especially] the practice of endeavoring to pass off one's own goods or products in the market for those of another by means of imitating or counterfeiting the name, brand, size, shape, or other distinctive characteristic of the article or its packaging." **[*31]** *Unfair Competition*, Black's Law Dictionary (10th ed. 2014).

Finally, "restraint of trade" broadly includes "[a] limitation on business dealings or professional or gainful operations," and in the antitrust context involves "[a]n agreement between two or more businesses or a combination of businesses intended to eliminate competition, create a monopoly, artificially raise prices, or otherwise adversely affect the free market." *Restraint of Trade*, Black's Law Dictionary (10th ed. 2014). The term "refers not to a particular list of agreements, but *to a particular economic consequence*, which may be produced by quite different sorts of agreements in varying times and circumstances." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 731, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (emphasis added).

Despite the different scope of each of these phrases, the Court does not interpret each phrase in a vacuum. Rather, under the doctrine of *noscitur a sociis*, reading each phrase in light of the terms around it, the Court interprets the enumerated offenses so as to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co., 513 U.S. 561, 575, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995)*. It therefore becomes apparent that,

> while the term 'unfair trade practices' **[*32]** *can* apply broadly to any inequitable business practice, the meaning it carries here must be determined by reference to the other two enumerated terms[—]antitrust violations and restraints of trade[—] both of which clearly involve negative economic effects on consumers or competition.

Stanko, 491 F.3d at 416.

Furthermore, each of the enumerated offenses speaks to competition and the effects on *consumers* and *competitors. See, e.g., Stanko, 491 F.3d at 416* (noting that the enumerated offenses include "criminal statutes addressing only economic harm to competition or consumers"). This focus on consumers and competitors—rather than other general societal concerns—becomes apparent when looking at the purpose of the enumerated offenses. A United States District Court for the District of New Jersey persuasively discussed this purpose, stating:

> [T]he purpose of the antitrust and other laws specifically mentioned in [the Business Practices Clause] is to lay down a scheme of acceptable and unacceptable behavior by imposing direct restraints against certain business procedures, and requirements and regulations for the carrying out of a business enterprise. Such regulatory laws have the purpose of protecting the consumer while promoting appropriate competitive business **[*33]** and pricing practices.

*United States v. Kruckel, No. 92-61 l(JBS), 1993 U.S. Dist. LEXIS 20777, 1993 WL 765648, at *16 (D.N.J. Aug. 13, 1993)*. The Kruckel court correctly concludes that the enumerated offenses focus on consumers and competitors. *Id.*

ii. The Maryland Tax Statute Prevents Unfair Competition Only Indirectly

Even Horma admits that the Maryland Tax Statute only incidentally regulates business activities or unfair competition. (Mot. Dismiss 10 ("[T]he [Maryland Tax Statute] punishes commercial activity *which necessarily impacts* competition and consumers . . . ." (emphasis added)).) This indirect effect on competition and consumers cannot bring the Maryland Tax Statute within the ambit of the Qualifying Clause.

Each of the enumerated offenses is specifically designed to minimize unfair practices that affect business and consumers. The Maryland Tax Statute, in contrast, addresses transportation or sale of cigarettes or tobacco products on which a state tobacco tax has not been paid. *See Md. Code, Tax-Gen. § 13-1015(a)*. Although, as Horma argues, it is certainly true that businesses who sell tobacco products lawfully—by paying the state tobacco tax—"face unfair competition when illicit cigarettes enter a market," because those tobacco products can be sold at a lower retail price, (Mot. Dismiss 10 (quoting **[*34]** *Protecting Our Cigarette Brands*, http://www.altria.com/our-companies/philipmorrisusa/protecting-our-cigarette-brands/Pages/default.aspx), the Maryland Tax Statute does not regulate *business* practices in the same way that "federal or state offenses pertaining to antitrust violations, unfair trade practices, [or] restraints of trade" do, *18 U.S.C. § 921(a)(20)(A)*. The Maryland Tax Statute *indirectly* affects competition and consumers, but does not do so in a way that makes it similar to the enumerated offenses.

The Maryland Tax Statute, therefore, falls outside the Business Practices Clause, and does not qualify as an exception to a "crime punishable by imprisonment for a term exceeding one year," on which a prosecution under the Non-Receipt Statute could not be based. Given this finding, the Court will next evaluate Horma's void for vagueness argument.

B. Horma's Contention That *§ 921(a)(20)(A)* is Void for Vagueness Under the *Due Process Clause* Poes Not Succeed

Horma contends that *§ 921(a)(20)(A)* is void for vagueness under the Supreme Court's 2015 holding in *Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)*. The plain meaning of the Business Practices Clause demonstrates congressional intent to limit the offenses within that exclusion to those pertaining to antitrust violations, unfair trade practices, restraints of trade, or offenses *similar* to them, countermanding **[*35]** Horma's proposed broad reading of the Qualifying Clause. Given the clear meaning of the Business Practices Clause and Johnson's narrow holding, the statute survives a vagueness analysis.

1. Legal Standard

The government violates Due Process when it deprives a person of "life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson, 135 S. Ct. at 2556* (citing *Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983))*. The doctrine of vagueness "is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Sessions v. Dimaya, 138 S. Ct. 1204, 1212, 200 L. Ed. 2d 549 (2018)*. The touchstone of the vagueness analysis "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier, 520 U.S. 259, 265, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)*.

A defendant asserting that a statute is void for vagueness must show a lack of fair warning of "what the law intends to do if a certain line is passed." *McBoyle v. United States, 283 U.S. 25, 27, 51 S. Ct. 340, 75 L. Ed. 816 (1931)*. "The . . . principle is that no [person] shall be held criminally responsible for conduct which he [or she] could not reasonably understand to be proscribed." *Lanier, 520 U.S. at 265* (first alteration in original) (quoting *Bouie v. City of Columbia, 378 U.S. 347, 351, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964))*. Courts have identified three means to evaluate **[*36]** whether a statute meets the fair warning requirement:

> First, the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Second . . . the canon of strict construction of criminal statutes . . . ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third . . . due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.

Id. at 266 (citations and quotation marks omitted). "[T]he failure of 'persistent efforts . . . to establish a standard' [for enforcing or applying a law] can provide evidence of vagueness." *Johnson, 135 S. Ct. at 2558* (second alteration in original) (quoting *United States v. L. Cohen Grocery Co., 255 U.S. 81, 91, 41 S. Ct. 298, 65 L. Ed. 516 (1921))*.

2. *Johnson*'s Narrow Holding

Horma asserts that *§ 921(a)(20)(A)* is void for vagueness under the Supreme Court holding in *Johnson. Johnson* decided a vagueness challenge to the so-called "Residual Clause" of *18 U.S.C. § 924(e)*, the *Armed Career Criminal Act ("ACCA")*.[25] ACCA provides enhanced penalties for individuals convicted of firearm crimes **[*37]** under *18 U.S.C. § 922(g)* who have three or more previous convictions "for a violent felony or a serious drug offense, or both." *18 U.S.C. § 924(e)(1)*. ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or[,]
>
> (ii) is burglary, arson, extortion, involves [the] use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.

18 U.S.C. § 924(e)(2)(B) (emphasis added).

Although courts generally "do not doubt the constitutionality of laws that call for the application of a qualitative standard . . . to real-world conduct," *Johnson, 135 S. Ct. at 2561*, the Supreme Court held that two features of ACCA's Residual Clause "conspire[d] to make it unconstitutionally vague," *id. at 2557*. First, it left "grave uncertainty about how to estimate the risk posed by a crime" because "[i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case'[26] of a crime, not to real-world facts or statutory elements." *Id.* Further, ACCA's Residual Clause simultaneously left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id. at 2558*.

The Supreme Court reasoned that most laws "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Id. at 2561*. ACCA's Residual Clause, however,

> requires application of the "serious potential risk" standard to an idealized ordinary case of the crime. Because "the elements necessary to determine the imaginary ideal are uncertain *both in nature*[27] *and degree of effect*,"

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[25] ACCA's Residual Clause defines a violent felony as including any felony that "involves conduct that presents a serious potential risk of physical injury to another." *18 U.S.C. § 924(e)(2)(B)(ii)*.

[26] *Johnson*'s finding of vagueness also rested on the uncertainty created by using the "ordinary case" analysis coupled with a qualitative standard. This "ordinary case" analysis follows from the requirement that a court "[d]eciding whether the residual clause covers a crime . . . picture the kind of conduct that the crime involves in 'the ordinary case,' and . . . judge whether that abstraction presents a serious potential risk of physical injury." *Johnson, 135 S. Ct. at 2557*. This categorical approach requires courts in the sentencing context to apply the facts considering a so-called ordinary case of the offense, instead of contemplating the facts underlying the defendant's previous conviction. *See Mathis v. United States, 136 S. Ct. 2243, 2251, 195 L. Ed. 2d 604 (2016)*; *see also* 3 Charles Alan Wright & Sarah N. Welling, *Federal Practice and Procedure* § 549 (4th ed. 2018) (describing that the categorical approach governs when "the government seeks to use a previous conviction to increase the sentence being imposed for the current conviction," and is used to analyze "whether the previous conviction qualifies to increase the sentence"); **[*38]** *Chapman v. United States, No. 1:16cv512, 326 F. Supp. 3d 228, 2018 U.S. Dist. LEXIS 121172, 2018 WL 3470304, at * 11 (E.D. Va. July 19, 2018)*, *appeal filed by United States v. Chapman* (4th Cir. 2018) ("As the Supreme Court explained in *Johnson*, one of the predominant features of the ACCA residual clause that gave rise to its unconstitutional indeterminacy was that it did not limit the risk-of-force analysis to the conduct surrounding the elements of the crime but instead required courts to 'imagine' how a stylized version 'of the crime subsequently plays out.'" (quoting *Johnson, 135 S. Ct. at 2557-58*)).

[27] Regarding the uncertainty as to the nature of a crime that carries a "serious potential risk," the Supreme Court noted that other laws using

> terms like "substantial risk," "grave risk," and "unreasonable risk" . . . . [did not] link[] a phrase such as "substantial risk" to a confusing list of examples. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but

> this abstract inquiry offers significantly less predictability than one "[t]hat deals with the actual, not with an imaginary condition other than the facts."

Id. (emphasis added) (quoting *Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 216, 223, 34 S. Ct. 853, 58 L. Ed. 1284 (1914))*. The combined "indeterminacy about how to measure the risk posed by a crime [and] indeterminacy about how much risk it takes for the crime to qualify as a violent felony" rendered ACCA's Residual Clause "more unpredictab[le] and arbitrar[y] than the *Due Process Clause* tolerates." *Id. at 2558*.

3. *Section 921(a)(20)(A)* Survives a Vagueness Analysis

Horma contends that "[b]y enumerating certain offenses, and then announcing a mismatched residual category, [*18 U.S.C.] § 921(a)(20)(A)* is remarkably similar to [ACCA's] Residual Clause." (Mot. Dismiss 13.) This contention, however, flows from Horma's proposed broad reading of the Qualifying Phrase, "relating to the regulation of business practice." *18 U.S.C. § 921(a)(20)(A)*. The phrase "other similar offenses" precedes the Qualifying Phrase, however, and the Court interprets the statute in a way that avoids rendering the word "similar" superfluous and without meaning. *See supra* Part III.A.; *see also* *Bowsher, 460 U.S. at 833* (articulating the "settled principle of statutory construction that [the court] must give effect, if possible, to every word of the statute"). Moreover, the design of each of the enumerated offenses in the Business Practices Clause specifically minimizes unfair practices that affect business and consumers, meaning that *§ 921(a)(20)(A)* does not suffer from the same lack of similarity among specified crimes that contributed to render ACCA's Residual Clause unconstitutionally vague.

Furthermore, the Fifth, Seventh, and Eighth Circuits have each held that the Business Practices Clause is not unconstitutionally vague.[28] In *Stanko*, the Eighth Circuit **[*40]** held that "Congress used the comparative term 'similar' to modify 'offenses[.]' . . . The term 'similar' indicates an intent to limit the business practices clause's reach to offenses which are 'comparable' or 'nearly corresponding' to the enumerated offenses." *Stanko, 491 F.3d at 414*. Similarly, the Seventh Circuit upheld the Business Practices Clause against a vagueness challenge, stating that "the word 'similar' limits the term 'offenses,' so that it refers back to the three enumerated offenses, and is further limited by 'relating to the regulation of business practices.'" *United States v. Schultz, 586 F.3d 526, 531 (7th Cir. 2009)*. "Accordingly, an ordinary individual would have notice that the *§ 921(a)(20)(A)* exception applies only if he or she committed an enumerated or similar offense related to the regulation of business practices." *Id.* Finally, the Fifth Circuit concluded that "the plain meaning of the statute indicates Congress's intent to limit the offenses that fall within the *§ 921(a)(20)(A)* exclusion to those pertaining to antitrust violations, unfair trade practices, restraints of

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> the phrase 'fire-engine red, light pink, maroon, navy blue, **[*39]** or colors that otherwise involve shades of red' assuredly does so."

Johnson, 135 S. Ct. at 2561 (quoting *James v. United States, 550 U.S. 192, 230 n.7, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007)* (Scalia, J., dissenting)). ACCA's Residual Clause, however, "forces courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives[, each of which is] . . . 'far from clear in respect to the degree of risk each poses.'" *Id. at 2558* (quoting *Begay v. United States, 553 U.S. 137, 143, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2007))*. This lack of clarity contributed to the statute's unconstitutional vagueness.

[28] Horma describes the analysis in these cases as inapposite because each was decided before *Johnson*, and thus "do[] not address the contention . . . that the reasoning of *Johnson* applies to *§ 921(a)(20)*." (Reply Mot. Dismiss 6, ECF No. 24.) Undergirding *Johnson*'s holding of unconstitutional vagueness, however, was the fact that

> the enumerated crimes [in ACCA] were themselves too varied to provide . . . assistance. Trying to reconcile them with each other, and then **[*41]** compare them to whatever unlisted crime was at issue drove many a judge a little batty. And more to the point, the endeavor failed to bring any certainty to [ACCA's Residual Clause's] application.

Dimaya, 138 S. Ct. at 1221. The enumerated offenses in the Business Practices Clause, however, lack such incongruity. Nothing in the subsequent history of these cases indicates that their vagueness holdings were abrogated by *Johnson*, and counsel for Horma stated at oral argument that he had not seen anything indicating such an abrogation. (July 9, 2018 Tr. 41, ECF No. 43.) Horma's argument under *Johnson* fails to persuade.

trade, or offenses *similar* to them." United States v. Coleman, 609 F.3d 699, 707 (5th Cir. 2010) (emphasis added) (quoting Dreher v. United States, 115 F.3d 330, 332 (5th Cir. 1997)).

The Business Practices Clause does not suffer from the infirmities underlying ACCA's Residual Clause that led to the Supreme Court's holding in Johnson. Rather, the statute makes it "reasonably clear at the relevant time that [Horma's] conduct was criminal." Lanier, 520 U.S. at 265. Horma was on notice that his indictment for possession of unstamped cigarettes in violation of the Maryland Tax Statute did not amount to an offense exempted under § 921(a)(20)(A), meaning that, pursuant to § 922(n), he could not receive a gun. The Court cannot find that 18 U.S.C. § 921(a)(20)(A) is unconstitutionally vague. The Motion to Dismiss on that basis must be denied.

IV. The Inadequate Record as to Horma's Second Amendment Challenge

Given that § 922(n) is not unconstitutionally vague, the Court must evaluate Horma's Second Amendment challenge. Here, the record prevents a finding. In their briefing, both parties failed to apply the governing Fourth Circuit standard for Second Amendment challenges. Reliance on the governing standard would have guided the parties to place necessary information before the Court to assess the purpose and fit of § 922(n). Furthermore, the applicable law of the case may **[*42]** change materially based on the Court's decision about Horma's illegal immigration status versus his lawful or unlawful presence.

A. Neither Party Articulates or Applies the Fourth Circuit's Standard for Second Amendment Challenges

Supreme Court precedent and the governing standard within the Fourth Circuit for evaluating Second Amendment challenges direct that courts should first address an as-applied review, and only then proceed to the facial validity of a statute if the as-applied challenge falters. Despite this long established principle, both parties bypass Horma's as-applied challenge and proceed directly to arguing the facial validity of § 922(n).

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

> Whe[n] a party brings both as-applied and facial constitutional challenges, it is appropriate to determine first whether the law is constitutional as applied to the challenging party's conduct, and then only if the as-applied challenge fails, to determine whether it is necessary to consider the facial challenge. This is so "for reasons relating both to the proper **[*43]** functioning of courts and to their efficiency," as addressing facial challenges unnecessarily "would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws."

United States v. Masciandaro (Masciandaro I), 648 F. Supp. 2d 779, 786 (E.D. Va. 2009) (quoting Board of Trustees v. Fox, 492 U.S. 469, 485, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) and citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502-04, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985)), *aff'd*, 638 F.3d 458 (2011). Furthermore, because "a party ordinarily 'can only succeed in a facial challenge by "establish[ing] that *no set of circumstances exists* under which the [law] would be valid," *i.e.*, that the law is unconstitutional in *all* of its applications,'" if a defendant fails to establish that a challenged law is unconstitutional as applied to *him*, that will often also, *a priori*, decide the facial challenge. Masciandaro I, 648 F. Supp. 2d at 792; *see also* United States v. Masciandaro (Masciandaro II), 638 F.3d 458, 474 (4th Cir.), *cert. denied*, *565 U.S. 1058, 132 S. Ct. 756, 181 L. Ed. 2d 482 (2011)* ("[A] person, such as Masciandaro, to whom a statute was constitutionally applied, 'will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.'" (quoting Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973))).

Despite this caselaw and his statement that he challenged "both the facial validity of *§ 922(n)* as well as its particular application to him," (Mot. **[*44]** Dismiss 16), Horma's *Second Amendment* argument reads only as a facial challenge. Nowhere does Horma discuss the particular facts of *his* case or the conduct in which *he* engaged that the statute proscribed. Horma also never discussed whether the Court should address one challenge before the other, or how the outcome of the Court's analysis of his as-applied challenge would impact the outcome of his facial challenge. The United States also proceeds straight to an argument of facial invalidity without addressing how or why it should do so. According to the United States, although Horma "challenges the constitutionality of *18 U.S.C. § 922(n)* as applied to him, . . . the facial validity of the statute means that it provides little cover for [Horma]." (Resp. Mot. Dismiss 15.)

Moreover, neither party presents their arguments regarding the constitutionality of *§ 922(n)* under the governing—and binding on this Court—Fourth Circuit standard. Clear Fourth Circuit law dictates how the Court must undertake a *Second Amendment* analysis. This Court must first ask "whether the challenged law imposes a burden on conduct falling within the scope of the *Second Amendment's* guarantee." *United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010)*. Second, "[i]f the challenged regulation burdens conduct that was within the scope of the *Second Amendment* as historically **[*45]** understood, then [the court] moves to the second step of applying an appropriate form of means-end scrutiny." *Id.*

In order to determine the "appropriate form of means-end scrutiny," a court must determine whether the challenged law encumbers "core" *Second Amendment* rights.[29] "[L]aws burdening 'core' *Second Amendment* conduct receive strict scrutiny, while less severe burdens receive only intermediate scrutiny." *United States v. Hosford, 843 F.3d 161, 168 (4th Cir. 2016)* (citing *Masciandaro II, 638 F.3d at 471*). Finally, "unless the conduct at issue is not protected by the *Second Amendment* at all, the Government bears the burden of justifying the constitutional validity of the law." *Chester, 628 F.3d at 680*.

The United States, apparently relying on the reasoning of *United States v. Laurent, 861 F. Supp. 2d 71 (E.D.N.Y 2011)*, a case from a district court within the Second Circuit, contends that "because the statute places some burden on the right, but does not substantially burden the right, intermediate scrutiny is the appropriate form of means-end scrutiny." (Resp. Mot. Dismiss 14.) Horma, citing to a Fourth Circuit case but seemingly ignoring the progression of its analysis, asserts that "[t]he corollary of *Kolbe [v. Hogan, 849 F.3d 114 (4th Cir. 2017)* (en banc),] is that, when a statute does effectively disarm individuals, and leaves them unable to acquire any firearm for protections, strict scrutiny should be the proper standard." **[*46]** (Mot. Dismiss 22.) The Court cannot find that a ruling on a constitutional issue would serve the ends of justice when both parties failed to identify, articulate, and present their arguments in the context of the binding law this Court must apply.

B. The Parties Premise Their Arguments on Opposite Findings as to Horma's Immigration Status

Throughout briefing, the parties premise their *Second Amendment* arguments on diametrically different assumptions about Horma's immigration status, neither of which this Court adopts. Horma did not even acknowledge the *potential* that his immigration status could affect this Court's constitutionality determination until the Court expressly ordered him to do so. (*See* June 4, 2018 O. 3-4, ECF No. 36.) At that point, Horma stated that his immigration status "is not relevant to the challenge to the *facial* validity of *§ 922(n)*, but would preclude an *as-applied* challenge to *§ 922(n)*." (Def.'s Suppl. Br. 1, ECF No. 37 (emphasis added).) To the extent any status could be determined, Horma contended that he remained in the United States legally.

The United States argued consistently that Horma's status as a nonimmigrant alien, whether legally present or not, "defeats [Horma's] alleged expectation **[*47]** of a right to acquaint himself with a firearm for self-defense purposes because his possession of any firearm is manifestly illegal." (Resp. Mot. Dismiss 15.) According to the United

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[29] *Heller* identified the "core" *Second Amendment* right as "the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense." *Chester, 628 F.3d at 683* (emphasis omitted) (citing *Heller, 554 U.S. at 634-35*).

States, a separate provision in *§ 922(g)*, *18 U.S.C. § 922(g)(5)(B)*, which prohibits even *lawfully* present nonimmigrant aliens from possessing firearms absent certain narrow exceptions "reflects Congress's judgement that non[]immigrant aliens are not entitled to the *Second Amendment* right to bear arms." (*Id.*) In its supplemental brief, the United States reiterated its position that "[i]f this [C]ourt concludes that Horma is an illegal alien, he would not enjoy the protection of the *Second Amendment*, and his invocation of it to mount a challenge to *§ 922(n)*—or any statute under the sun—would necessarily fail." (U.S. Suppl. Br. 5, ECF No. 38 (footnote omitted).)

Because the parties premise their arguments on their opposing positions regarding Horma's immigration status, they brief past each other. The Court now has concluded that Horma may lie somewhere between these two positions: he may not be *unlawfully* present for the purposes of *§ 922(g)(5)(A)*, but neither has his immigration status remained legal. *See supra* Part II. In light of the distinction between immigration status and presence, **[*48]** and given that the Court lacks a record to determine the issue of presence or the constitutionality of the statue, much of the parties' briefing does not address the *Second Amendment* issue this Court must decide.

C. The Court Has an Inadequate Record Before It

Finally, it would not serve the ends of justice for the Court to rule on Horma's *Second Amendment* challenge on the present record. At least twice, the Fourth Circuit has remanded cases presenting *Second Amendment* challenges to statutes because of an inadequate record from which to determine whether the United States carried its burden under intermediate scrutiny.[30] *See* *United States v. Carter, 669 F.3d 411, 421 (4th Cir. 2012)*; *Chester, 628 F.3d at 683*. In *Chester*, the Fourth Circuit noted that "[t]he government has offered numerous plausible *reasons* why the disarmament of domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient *evidence* to establish a substantial relationship between [the statute at issue there] and an important governmental goal." *628 F.3d at 683*. Similarly, in *Carter*, recognizing that "the burden of demonstrating the fit rests on the government," and noting that "the government did not present sufficient evidence to substantiate the fit," the Fourth Circuit also remanded **[*49]** "the case to allow [the government] to do so and to allow Carter to respond." *669 F.3d at 421*.

Here, the Court has a record perhaps even less hearty than those in *Chester* and *Carter*. Although the parties offered evidence related to Horma's immigration status and his asylum application, neither side presented evidence as to the relationship between *§ 922(n)* and an important governmental goal.[31] Moreover, the bulk of the United States' argument related to the *fit* of the statute—not any relationship between the statute and the government interest.

The fit inquiry, however, merely constitutes the *start* of a court's intermediate scrutiny analysis. The Fourth Circuit directs that courts "begin [the] reasonable fit inquiry by considering the precise contours of' the challenged statute. *United States v. Staten, 666 F.3d 154, 162 (4th Cir. 2011)*. At this initial stage, the court looks at the kind of conduct prohibited by the statute, and whether the statute contains any narrowing features. *See, e.g.,* *United States v.*

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[30] The Court makes no determination at this point about what level of scrutiny would apply to Horma's *Second Amendment* claim, noting only that, on this record, intermediate scrutiny likely would apply to Horma's *Second Amendment* challenge.

The Fourth Circuit has held that "laws burdening 'core' *Second Amendment* conduct receive strict scrutiny, while less severe burdens receive only intermediate scrutiny." *Hosford, 843 F.3d at 168* (citing *Masciandaro II, 638 F.3d at 471*). Heller identified the "core" *Second Amendment* right as "the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense." *Chester, 628 F.3d at 683* (emphasis omitted) (citing *Heller, 554 U.S. at 634-35*). Because both parties agree that Horma is not a citizen, Horma could not likely invoke the core *Second Amendment* right. *See id.* (holding that Chester's *Second Amendment* claim "is not within the core right identified in *Heller* . . . by virtue of Chester's criminal history as a domestic violence misdemeanant"). The parties remain free to argue otherwise.

[31] "[I]intermediate scrutiny places the burden of establishing the required fit squarely upon the government." *Chester, 628 F.3d at 683*.

Chapman, 666 F.3d 220, 228-29 (4th Cir. 2012) ("Of critical importance to our reasonable fit analysis is the fact that numerous features of [the challenged statute] keep its prohibitory sweep exceedingly narrow."). After the Court has established "the narrowness of [the challenged statute's] prohibitory sweep, **[*50]** . . . [it] tum[s] to evaluate *the evidence offered by the government in support of its reasonable fit burden*." Staten, 666 F.3d at 163 (emphasis added). At this second stage, under intermediate scrutiny, the United States would have the burden of establishing a reasonable fit between the *specific, identified* government interest and the *specific scope* of the challenged regulation.

The Fourth Circuit has identified that "the Constitution does not mandate a *specific* method by which the government must satisfy its burden under heightened judicial scrutiny." Carter, 669 F.3d at 418 (emphasis added). Under intermediate scrutiny, for instance, in order to carry its burden of establishing a reasonable fit between the governmental interest and the regulation, "the government may resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense." Id. at 418. The Fourth Circuit also has suggested that when a statute includes an "important limiting principle," the United States need not establish an especially "fulsome" record. *See id.* Even when a statute contains such a limiting principle, however, "the government still bears the burden of showing that [the statute]'s limited imposition on Second Amendment rights **[*51]** *proportionately advances* the goal of preventing gun violence." Id. at 419 (emphasis added). Furthermore, "the nature and quantity of any showing required by the government 'to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.'" *Id.* (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000)).

Although, during oral argument, the United States relied heavily on the record laid out in Laurent in attempting to make its showing, this Court will not base such a finding on a factual record established seven years ago by a different court, with different litigants, with material not before this Court. *See* Laurent, 861 F.Supp.2d at 105 (citing to the Bureau of Justice Statistics *Compendium of Federal Justice Statistics*, 2004 54 (2006), which found that "only 1.8% of felony defendants violated the terms of their pre-trial release by committing any other crime.").

With these principles in mind, cognizant of the Fourth Circuit's apparent reluctance to decide Second Amendment challenges on inadequate evidentiary records, and in the interests of justice, the Court will deny this aspect of Horma's Motion to Dismiss as to Counts III and IV without prejudice.

For the reasons stated above, the Court will deny without **[*52]** prejudice aspects of the Motion to Dismiss as to all Counts; and grant the Motion for Leave. An appropriate Order shall follow.

/s/ M. Hannah Lauck

M. Hannah Lauck

United States District Judge

Date: 9/4/18

Richmond, Virginia

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Inline Packaging, LLC v. Graphic Packaging Int'l, LLC

United States District Court for the District of Minnesota

September 5, 2018, Decided; September 5, 2018, Filed

Civil No. 15-3183 ADM/LIB

Reporter

351 F. Supp. 3d 1187 *; 2018 U.S. Dist. LEXIS 188377 **; 2018-2 Trade Cas. (CCH) P80,526

Inline Packaging, LLC, Plaintiff, v. Graphic Packaging International, LLC, Defendant.

Subsequent History: Affirmed by *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC, 962 F.3d 1015, 2020 U.S. App. LEXIS 19061, 2020 WL 3273238 (8th Cir. Minn., June 18, 2020)*

Prior History: *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc., 164 F. Supp. 3d 1117, 2016 U.S. Dist. LEXIS 22342, 2016 WL 727112 (D. Minn., Feb. 23, 2016)*

Core Terms

susceptor, Patents, bundle, discount, paperboard, packaging, products, sleeve, bid, customers, prices, contracts, market power, inventor, shampoo, argues, purchasing, designs, food, auction, buyer, attribution, contestable, antitrust, supplier, sales, anticompetitive, infringement, allegations, drawing

LexisNexis® Headnotes

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

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

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

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party can demonstrate that it is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. A fact is material if it might affect the outcome of the suit, and a dispute is genuine if the evidence is such that it could lead a reasonable jury to return a verdict for either party. A court considering a motion for summary judgment must view the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences to be drawn from those facts. However, the nonmoving party may not rest upon allegations, but must produce probative evidence sufficient to demonstrate a genuine issue of material fact for trial.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN2[] Scope, Monopolization Offenses

Section 2 of the Sherman Antitrust Act imposes liability on every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states. 15 U.S.C.S. § 2. To establish a § 2 violation, a plaintiff must show that the defendant (1) possessed monopoly power in the relevant market, and (2) willfully acquired or maintained the monopoly power by anticompetitive conduct as opposed to gaining that power as a result of a superior product, business acumen, or historical accident. Minnesota anti-trust law is interpreted consistent with the federal court's construction of the Sherman Act.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN3[] Scope, Monopolization Offenses

Enforcement of a patent procured by fraud on the United States Patent and Trademark Office (PTO) may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present. To succeed on a Walker Process sham litigation claim, a plaintiff must prove: (1) the defendant fraudulently obtained patents through knowing and willful misconduct before the PTO, and maintained and enforced the patents with knowledge of the fraudulent procurement; and (2) all other elements to establish a Sherman Act monopolization claim are present.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

HN4[] Defenses, Fraudulent Procurement of Patent

The evidentiary showing required to satisfy the first Walker Process sham litigation element is nearly identical to that required to prove inequitable conduct. The inequitable conduct standard requires proof by clear and convincing evidence that a patentee acted with the specific intent to deceive the United States Patent and Trademark Office (PTO). A finding of gross negligence or negligence under a should have known standard does not satisfy the intent requirement. Rather, clear and convincing evidence must establish that an individual owing a duty of candor to the PTO (1) had actual knowledge of omitted information; (2) knew that the omitted information was material to the PTO's 's decision to award the patent; and (3) made a deliberate decision to withhold it. 37 C.F.R § 1.56(c). Because direct evidence of deceptive intent is rarely present, the intent to deceive may be inferred from indirect and circumstantial evidence. However, to meet the clear and convincing evidence standard, the specific intent to deceive must be the single most reasonable inference able to be drawn from the evidence. Indeed, the evidence must be sufficient to require a finding of deceitful intent in the light of all the circumstances. Thus, where multiple reasonable inferences may be drawn, intent to deceive cannot be found.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Inequitable Conduct

HN5[] Defenses, Inequitable Conduct

When an alleged omitted co-inventor does not claim to be such, it can hardly be inequitable conduct not to identify that person to the United States Patent and Trademark Office (PTO) as an inventor.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Anticompetitive & Predatory Practices

HN6[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Bundling is the practice of offering, for a single price, two or more goods or services that could be sold separately. A bundled discount occurs when a firm sells a bundle of goods or services for a lower price than the seller charges for the goods or services purchased individually. Bundled discounts are generally pro-competitive because they result in lower prices to consumers. Sellers also benefit through bundling by saving on consumer transaction costs and capitalizing on economies of scope. Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively, conduct that is entirely consistent with the Sherman Act. However, bundled discounts have the potential to be anticompetitive if they exclude an equally or more efficient competitor who sells only a single product in the bundle.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Anticompetitive & Predatory Practices

HN7[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Bundled discounts are somewhat similar to predatory pricing and tying. Predatory pricing occurs when a seller prices its product below cost and has a reasonable probability of recouping its losses by charging monopoly prices after the predation period has ended. Tying occurs when a seller coerces buyers into purchasing two products by tying them together, thereby forcing buyers to purchase the "tied" product from that seller rather than from a rival. But, there is an important distinction between bundling and tying claims. In a traditional tying claim, a seller forces the buyer to purchase the products as a package and will not sell the "tied" products separately. In a bundling claim, the buyer has the option of accepting the cost savings by purchasing the bundle or forgoing the savings by purchasing the products separately. The buyer is only "coerced" into taking the bundle because of the lower prices. Due to the distinction, an essential element of unlawful package discounting is that the purchaser is "forced" to take the bundle, which means that a rational, profit-maximizing buyer did not have good competitive options.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Anticompetitive & Predatory Practices

HN8[] **Actual Monopolization, Anticompetitive & Predatory Practices**

An essential element of unlawful package discounting is that the purchaser be "forced" to take the bundle, which means that a rational, profit-maximizing buyer did not have good competitive options.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Anticompetitive & Predatory Practices

HN9[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The discount attribution test is performed by allocating the full amount of the discounts given by a defendant on a bundle to the competitive product or products. If the resulting price of the competitive product or products is below the defendant's average variable cost to produce them, the bundle has the potential to exclude an equally efficient rival who makes only the competitive product. However, if the resulting price of the competitive product remains above the defendant's cost to produce them, the bundle falls into a safe harbor and is not actionable as exclusionary.

Antitrust & Trade Law > Procedural Matters

HN10[] **Antitrust & Trade Law, Procedural Matters**

Antitrust injury is a required element in any private antitrust action. Antitrust injury means harm to competition, not merely harm to competitors.

Antitrust & Trade Law > Sherman Act

HN11[] **Antitrust & Trade Law, Sherman Act**

It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition. Indeed, the mere fact that a market has few competitors does not transform every action by one of them into an antitrust violation. Rather, even in a duopoly, a plaintiff must offer some other reason to think that the challenged behavior harmed competition. Harm to competition is measured by increased price, reduced output, or decreased quality.

Torts > ... > Contracts > Intentional Interference > Elements

HN12[] **Intentional Interference, Elements**

To establish tortious interference with a contract under Minnesota law, a plaintiff must show: (1) the existence of a contract, (2) the defendant's knowledge of the contract, (3) the defendant's intentional procurement of the breach of contract, (4) the defendant acted without justification, and (5) damages.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN13[] **Intentional Interference, Elements**

A claim for tortious interference with prospective economic advantage has five elements: (1) the existence of a reasonable expectation of economic advantage belonging to the plaintiff; (2) the defendant's knowledge of that expectation; (3) the defendant's wrongful interference with that expectation; (4) a reasonable probability that the plaintiff would have realized the expectation absent the defendant's conduct; and (5) damages. Liability for a tortious interference with prospective economic advantage claim rests on whether the actor's conduct was improper. For purposes of the tort, "improper" means are those that are independently wrongful, such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade, or any other wrongful act recognized by statute or the common law.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

HN14[] **Defenses, Bad Faith Enforcement**

Federal patent law preempts state-law tort liability for a patentholder's good faith communications asserting infringement of its patent and warning about potential litigation. A plaintiff claiming that a patent holder has engaged in wrongful conduct by asserting claims of patent infringement must establish that the claims of infringement were objectively baseless.

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Common Law

Trade Secrets Law > Trade Secret Determination Factors > Economic Value

Trade Secrets Law > Trade Secret Determination Factors > Generally Known

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Uniform Act

HN15[] **Trade Secret Determination Factors, Definition Under Common Law**

A party seeking protection under the Minnesota Trade Secrets Act must show both the existence and the misappropriation of a trade secret. For information to be considered a trade secret, a party must show that: (1) the information is not generally known or readily ascertainable; (2) the information derives independent economic value from being secret; and (3) the party made reasonable efforts to maintain the information's secrecy.

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Judges: ANN D. MONTGOMERY, UNITED STATES DISTRICT JUDGE.

Opinion by: ANN D. MONTGOMERY

Opinion

[*1193] MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On June 6, 2018, the undersigned United States District Judge heard oral argument on Plaintiff Inline Packaging, LLC's ("Inline") Motion for Partial Summary Judgment [Docket No. 540] and Motion to Exclude Expert Testimony [Docket No. 610]. Defendant Graphic Packaging International, LLC's ("Graphic") Motion for Summary Judgment [Docket No. 635], Motion to Exclude Expert Testimony [Docket No. 773], and Motion to Strike Pleading [Docket No. 788] were also heard on the same date.

Additionally before the Court is Inline's Objection [Docket No. 538] to Magistrate **[**2]** Judge Leo I. Brisbois' March 8, 2018 Order **[*1194]** [Docket No. 534] denying Inline's Motion to Amend to Plead Punitive Damages [Docket No. 504]. For the reasons set forth below, Graphic Packaging's motion for summary judgment is granted, Inline's motion for partial summary judgment is denied, all other motions are denied as moot, and Inline's Objection is denied as moot.

II. BACKGROUND

A. Parties

Inline and Graphic compete in the susceptor food packaging industry. Compl. [Docket No. 1] ¶ 2. Inline alleges Graphic is a monopolist in the United States susceptor food packaging market who has maintained its dominant position through a combination of anticompetitive tactics including unlawful discount bundling and sham intellectual property assertions. See generally, id. Inline contends that these tactics were employed in response to Inline's inroads at major food companies, and that Graphic's conduct has foreclosed Inline from selling to the market's largest purchasers of susceptor food packaging.

B. Susceptor Market

Susceptor food packaging is active food packaging that converts microwave energy to high surface temperatures which crisp and brown foods. Compl. ¶ 60. Of the handful of companies that **[**3]** supply susceptor products in the U.S., Graphic holds by far the largest market share at approximately 95% of the market, and Inline is second with approximately 4.6%. Hicks Decl. [Docket No. 638] Ex. 2 [Docket No. 640] ("Levinsohn Report") Ex. 4.

Inline and Graphic compete for supply contracts with consumer packaged goods food companies ("CPGs"). Compl. ¶¶ 20-21. The five largest purchasers of susceptor products in the U.S. are Nestlé, Conagra, Heinz, Schwan's, and Pinnacle. Levinsohn Report ¶ 187, Ex. 5. These five CPGs accounted for nearly 93% of U.S. susceptor sales in 2016. Id. Ex. 5.

C. Paperboard Market

Although Inline manufactures and sells only susceptor products, Graphic manufactures and sells paperboard/folding carton food packaging as well as susceptor products. Lindell Decl. [Docket No. 614] Ex. E [Docket No. 619] ("Saravia Report") ¶¶ 46-51. Graphic operates seven North American mills that produce paperboard to be used for manufacturing folding cartons. Id. ¶ 48. Graphic's paperboard customers include the five large CPGs listed above. Id. ¶ 52. Graphic's revenue and profits from sales of paperboard to these five customers far exceed its revenue and profits from sales of susceptor **[**4]** products to these same CPGs. Id. From 2010 to 2016, Graphic's revenue from paperboard sales to these CPGs was $1.9 billion, whereas its revenue from susceptor sales was $0.4 billion. Id. Graphic's gross profits from paperboard sales to these customers was $0.8 billion over this time period, while its gross profits from sales of susceptors was $0.2 billion. Id.

Graphic faces intense competition in the paperboard market from WestRock (formerly RockTenn), International Paper, Burd & Fletcher, and other regional and private label competitors. Id. ¶¶ 48, 53. In 2015, WestRock's reported revenue was $15.5 billion, which more than tripled Graphic's revenue of $4.3 billion for that year. Id. ¶ 53. Competition between Graphic, WestRock, and International Paper is intensified because these three firms are vertically integrated with paper mills. Id. ¶ 54. To cover the large fixed costs of running the mills while also offering competitive prices, the firms must operate the mills at full or close to full capacity. Id. **[*1195]** Thus, these firms are dependent on and must compete for large paperboard orders that will enable them to operate more efficiently and offer lower prices. Id.

Companies purchasing paperboard **[**5]** products employ strategies to encourage direct competition between paperboard suppliers to drive down prices. Id. ¶ 56. Business is sometimes awarded through reverse auctions and by seeking multiple bids for new lines of products or before re-signing contracts for an existing line of products. Id.

For example, in early 2014, Heinz conducted an open market bid and reverse product auction on its folding carton volume, even though Graphic had an existing contract for that volume of products through April 2015. Id. Although Graphic was successful in retaining the business, Heinz extracted a 5.8% price reduction on some products, with the reductions starting before the end of the original contract term. Id. Customers also seek discounts and incentives that suppliers agree to in order to retain business. Id. ¶ 58. This competition suggests that customers wield significant power in dictating contract terms and is likely one reason why Graphic's profit margins on paperboard products are lower than susceptor products, 9% to 23% for paperboard versus 32% to 46% for susceptors. Levinsohn Report ¶ 101.

D. Graphic's Supply Agreements

Graphic holds multi-year supply agreements with four of the five **[**6]** major CPGs for the supply of susceptor and paperboard products. See id. ¶¶ 132-185; Hicks Decl. ¶ 30. These contracts govern their purchases of susceptor and paperboard products from Graphic. Levinsohn Report ¶¶ 133, 144, 151, 158, 164, 168, 175, 179. The contracts, which extend from one to four years, are common in the industry. See, e.g. Hicks Decl. Ex. 12 [Docket No. 650] ("Jones Dep.") 124:7-11; Hicks Decl. Ex. 14 [Docket No. 652] ("Ferrara Dep.") 95:12-12; Hicks Decl. Ex. 15 [Docket No. 653] ("Dorman Dep.") 142:17-144:1; 145:6-23.

These supply contracts also include an array of financial incentives. For example, Graphic's supply agreement negotiated in 2010 with Heinz included price caps, price reductions, and improved payment terms for both paperboard and susceptor products. Levinsohn Report ¶ 139. Graphic's 2012 contract with Schwan's included year-over-year price reductions and an annual rebate program that provided discounts for both paperboard and susceptor products if Schwan's purchased a target incremental amount of susceptor products. Id. ¶ 156. Graphic's 2014 contract with Conagra included fixed pricing, caps on paperboard price fluctuations, annual price reductions, and **[**7]** required Graphic to pay all tooling and die and equipment costs. Id. ¶ 168. Graphic's 2014 amendment to its supply agreement with Pinnacle included a cap on paperboard prices, a $1.25 million signing bonus that Pinnacle would have to repay if it stopped purchasing from Graphic, and a commitment to pursue productivity improvements to reduce Pinnacle's costs by at least 4% each year. Id. ¶ 180. Similar contractual terms are common in the paperboard and susceptor industries. See, e.g. Jones Dep. 124:7-11; Ferrara Dep. 95:3-12; Dorman Dep. 145:13-23.

Graphic's 2010 contract with Heinz was contingent upon Graphic receiving Heinz's Smart Ones Artisan Pizza business, which was under contract with Inline at the time. Levinsohn Report ¶ 136. During the negotiation period leading up to the 2010 Heinz contract, Graphic viewed Inline as a "competitive threat." Id. ¶ 141. Graphic's internal emails from May 2009 reflect concern that Inline is "pushing to get business at a major CPG[s] like Heinz, Nestlé, or Schwan [sic]. We want to keep them out of **[*1196]** these locations to limit their credibility and growth." Id. ¶ 154.

E. Nestlé's Susceptor Sleeve Business

Since at least 2005, Nestlé has been one of Graphic's **[**8]** major customers. First Lorentz Decl. [Docket No. 543] Ex. 65 ("Best Dep.") 60:25-61:6. Unlike the other four large CPGs, however, Nestlé's purchases from Graphic are not covered by a supply agreement.

In 2009, Graphic viewed Inline's competitive efforts to secure business from Nestlé as having risen to a "troubling level." First Lorentz Decl. Ex. 67 [Docket No 557]. Graphic understood that Nestlé perceived Graphic's susceptor prices as "very high" because Graphic was "'unchecked' in the market." Id. Ex. 68 [Docket No. 558]. In late 2011, Inline was successful in securing Nestlé's Kahiki susceptor sleeve[1] business for supply in 2012. Id. Ex. 69 ("Seefeldt Dep.") 179:10-20.

All of Nestlé's susceptor sleeve business—including the Kahiki line that Inline secured in 2012—was scheduled for renewal at the end of June 2014. Graphic was aware that Inline was a serious competitor for this business. First Lorentz Decl. Ex. 72 [Docket No. 561]; id. Ex. 73 [Docket No. 562] at GPI 00104156. In the summer of 2013, Nestlé sent requests for proposals ("RFP") to Graphic, Inline, and other suppliers that covered three Nestlé product lines: Kahiki, Croissant Pocket, and Hot Pocket sleeves. Id. Ex. 87 [Docket **[**9]** No. 575]; First Watkins Decl. [Docket No. 590] ¶ 3. Nestlé explained that the product specifications would be distributed through an online system called "Ariba." First Watkins Decl. ¶ 3. Suppliers would submit proposals through the Ariba system for Nestlé's review. Id. If Nestlé elected to award business on the basis of a RFP proposal, that decision would be communicated to the supplier. Id. Ex. A [Docket No. 591].

Inline submitted RFP proposals for Nestlé's Kahiki, Croissant Pocket, and Hot Pocket susceptor sleeve business. Wolfe Decl. [Docket No. 600] ¶ 4. Nestlé, however, elected not to award any business through the RFP process, but decided to conduct a one-day, best and final auction event on January 7, 2014 using the Ariba system. Id. Ex. B [Docket No. 602].

Shortly before the auction, Inline received an email from Nestlé stating that "the Susceptors that you bid on in the previous RFP Susceptor Part I are going to be taken to a best and final auction." First Watkins Decl. ¶ 6. The terms and conditions governing the auction provided that a two or three year contract would be awarded, that the lowest bid price does not guarantee a business award, and that a formal contract would **[**10]** be drafted after the auction that would take precedent over anything specified in the RFP. Id. Ex. B [Docket No. 592].

Inline bid on five susceptor sleeve lots. First Watkins Decl. ¶ 9. As bidding on each lot progressed on the Ariba system, participants were able to see if another supplier had submitted a lower bid. Id. ¶ 10. If a lower bid had been received, there was an opportunity for suppliers to respond with another, lower bid of their own. Id. This bidding activity occurred on lot 2, which was the Kahiki business. Id. The back-and-forth competition resulted in a 20% reduction from the starting bid. Id.

[*1197] For each the five susceptor sleeve lots on which Inline submitted bids, Inline's bid price was the lowest. Id. ¶ 12. Nestlé communicated to Inline through the Ariba system that Inline had been awarded each of the five susceptor sleeve lots. Id. ¶ 12, Ex. F [Docket No. 596].

After the auction closed, Nestlé informed Graphic that it intended to move its entire susceptor sleeve business to the lowest bidder. Seefeldt Dep. 230:13-23; First Lorentz Decl. Ex. 96 [Docket No. 583]. Nestlé "[e]xpressed disappointment in [Graphic's] lack of an aggressive move and the fact [Graphic] did not **[**11]** get aggressive in the auction." First Lorentz Decl. Ex. 96. Graphic viewed Nestlé's statement as an attempt to elicit a reaction from Graphic. Id. Graphic intended to respond by "send[ing] a very strong message to Nestlé on how [Graphic] perceive[d] this underhanded move." Id.

Graphic suspected Inline was the lowest bidder in the Ariba auction. First Lorentz Decl. Ex. 9 [Docket No. 546] ("Voyzey Dep.") 192:23-193:9. Graphic communicated to Nestlé that it had patents on susceptor sleeves, and that a new supplier would likely be infringing those patents if Nestlé elected to steer its susceptor business away from Graphic. Seefeldt Dep. 221:19-222:18.

On February 24, 2014, Nestlé informed Inline that it was going to purchase only lots 2, 5 and 6, the Kahiki and Croissant Pocket sleeves, from Inline, representing about 10% of Nestlé's total susceptor sleeve business. First Lorentz Decl. Ex. 76 at 246:15-23; Ex. 99 [Docket No. 586] 68:6-8. Nestlé awarded Graphic lots 3 and 4, the Hot Pocket product line, which were overwhelmingly Nestlé's largest susceptor sleeve lines. Voyzey Dep. 207:7-10.

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[1] Nestlé uses susceptor sleeves to package certain food products. Hot Pockets, for example, are packaged in a foldable and tearable susceptor sleeve that serves the dual function of browning and crisping as well as providing a holder for carrying the Hot Pocket. First Lorentz Decl. Ex. 55 [Docket No. 553].

F. Graphic's Patent Assertions

In December 2013, before the Ariba auction, Jeff Martinez ("Martinez"), **[**12]** Graphic's representative for the Nestlé account, emailed Nestlé and stated that at least two Graphic patents covered Nestlé susceptor sleeves. Second Lorentz Decl. [Docket No. 824] Ex. 177 [Docket No. 888].[2] After the auction ended, Graphic communicated to Nestlé that Graphic's patents would likely be infringed if Nestlé awarded any its susceptor sleeve business to Inline. Seefeldt Dep. 222:10-18; Voyzey Dep. 199:13-18. Because infringement threats can create concerns about the viability of a supplier and the impairment of Nestlé's supply chain, Nestlé takes threats relating to intellectual property infringement "very seriously." First Lorentz Decl. Ex. 101 [Docket No. 588] ¶ 6. Graphic eventually did retain the Hot Pocket sleeve business. Id. Ex. 97 [Docket No. 584]. After Inline lost the Hot Pocket business to Graphic, Nestlé employee Judge stated to Inline's president, Jeffrey Watkins ("Watkins"), that Graphic had told Nestlé that Inline would be infringing Graphic's patents if Inline were to become the supplier of the Hot Pocket packaging. Second Lorentz Decl. Ex. 167 [Docket No. 879] 256:21-257:8.

Shortly after Nestlé awarded its 2014 business to Graphic and Inline, Graphic considered **[**13]** reminding Nestlé of Graphic's patents on the susceptor sleeves, but decided that "the patent issue will not force **[*1198]** Nestlé to give us any more share or prevent them from bringing In Line [sic] in with a simple die change." Id. Ex. 184 [Docket No. 892]. Graphic decided instead to use the patent issue "with In Line [sic] where the legal issue would be anyway." Id. William Sedlacek ("Sedlacek") of Graphic suggested waiting until the current contract had nearly ended and then "play the patent card." Id. Doing so would force Inline to "requalify a revised die cut, essentially starting over again, having wasted time and expense while they pursue the current die cut." Id. In his deposition, Sedlacek defended this practice, describing waiting to "play the patent card until it has the most impact and turmoil" on Inline as "competitive strategy." Id. Ex. 185 [Docket No. 893] ("Sedlacek Dep.") 137:16-20.

On May 5, 2015, Graphic sent Inline a cease and desist letter asserting that Inline was infringing Graphic's intellectual property, specifically U.S. Patent Nos. 8,872,078 (the "'078 Patent"); D694,106; D694,124; and D727,145 (collectively, the "Asserted Patents"), which related to Nestlé's susceptor sleeves. Second Lorentz Decl. Ex. **[**14]** 187 [Docket No. 895]. The letter stated that Graphic intended to serve Inline with a patent infringement lawsuit unless Inline cease all infringing activities. Id. The following day, Graphic notified Nestlé about the cease and desist letter sent to Inline. Id. Ex. 186 [Docket No. 894].

When considering Nestlé's 2016 business award, Nestlé's Andrew Leach ("Leach") recognized that "Inline offered slightly higher savings although moving more volume away from [Graphic] would increase the likelihood of [Graphic] taking legal action on the perceived patent infringement." Id. Ex. 191 [Docket No. 898]. Nestlé eventually agreed to a three year extension with Graphic, which obligated Nestlé to purchase at least 85% of its susceptor sleeve business from Graphic. Id. Ex. 192 [Docket No. 899].

G. Origin of Asserted Patents

In 2005, Graphic obtained the Asserted Patents relating to susceptor sleeves. These are the same patents that Graphic asserted to Nestlé before the Ariba auction and to Inline in 2015. Kelly Fitzwater ("Fitzwater"), a Graphic designer, is identified as the first and sole inventor of the Asserted Patents and their underlying applications. Because Inline challenges the validity of **[**15]** the Asserted Patents on inventorship grounds, their origin is reviewed here.

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[2] The issue of patent infringement had been a component of Graphic and Nestlé's relationship. In a 2012 email discussing moving sleeve business from Graphic to Inline, Nestlé employee Shannon Gavie ("Gavie") told Nestlé's head of packaging procurement, Lou Judge ("Judge"), to "be careful given [Graphic's] likelihood to want to sue us." Second Lorentz Decl. Ex. 173 [Docket No. 884]. Judge and Gavie respectively characterized Graphic as "litigation happy" and "Patent happy and like to threaten to sue." Id. Exs. 174 [Docket No. 885]; 175 [Docket No. 886].

The Asserted Patents represent the end result of susceptor sleeve redesigns. In the early 2000s, Corey Brower ("Brower"), a Nestlé packaging engineer, was involved in Projects Quantum and Roxanne.[3] First Lorentz Decl. Ex. 11 ("Brower Dep.") 15:11-16; 17:8-13. Project Quantum addressed increasing the filling within the Hot Pocket, and Project Roxanne was directed to increasing the portability of the Hot Pocket. Id. 17:16-19:18.

Brower communicated with Graphic regarding particular sleeve design features that Nestlé wanted. Id. 33:9-12. After receiving instructions from Brower, Graphic would supply susceptor sleeve design samples to Nestlé, which Brower and others at Nestlé would test and rate. Brower would then typically relay the suggested revisions **[*1199]** or changes back to Jeff Voyzey ("Voyzey") at Graphic. Id. 33:14-36:3.

In a June 12, 2001 memo, Brower described Nestlé's interest in particular design concepts with tear strips, pillow packs, and gussets. Id. 25:13-26:13; First Lorentz Decl. Ex. 14. Shortly after the June 2001 memo, Deb Pair ("Pair"), then a designer at Graphic, created drawings 50019D and 50019F **[**16]** that included the requested features. First Lorentz Decl. Exs. 18, 19. Graphic made 500 sample sleeves from each drawing and sold them to Nestlé for a total of $3,632. Id. Exs. 15-16.

After July 2001 and prior to 2005, Nestlé explored sleeve options without pillow packs and tear strips. Id. 39:9-13. Nestlé briefly explored a flexible sleeve, but decided to move back to the pillow pack and tear strip because it was unable to achieve product quality out of a flexible susceptor. Id. 39:14-40:23.

On March 30, 2005, Graphic and Nestlé entered into a Joint Development Agreement ("JDA") to "cooperate in the development of certain thermal insulating, hand held microwave sleeve packaging for hand held food products . . . and/or new cost reducing processes for producing Nestlé's existing microwave sleeve for hand held products." First Lorentz Decl. Ex. 22. Nestlé agreed to furnish Graphic with packaging criteria and concepts, assist Graphic as requested, and to test concepts developed by Graphic. Id. ¶ 4. The JDA provided for seven years of mutual exclusivity—Nestlé would purchase 100% of its requirements from Graphic and Graphic would not provide the same packaging to Nestlé's competitors—for **[**17]** any designs that Nestlé ultimately selected. Id. ¶ 5.1. The JDA also contemplated patents. Inventions that were solely invented by one party were to remain the property of the originating party. Id. ¶ 5.2 Inventions that were jointly invented were to be owned jointly "in accordance with the law governing such jointly owned patents." Id.

Fitzwater, who became a designer for Graphic in 2003, began working on Project Roxanne near the end of 2005. First Lorentz Decl. Ex. 5 ("Fitzwater Dep.") 19:16-22, 27:11-18. Between September 6 through September 23, 2005, Fitzwater drafted five drawings in response to instructions from Voyzey. Id. 144:13-20; First Lorentz Decl. Exs. 26, 28-34. Fitzwater began by modifying drawing 50019D, which had been created by Graphic designer Pair in 2001. First Lorentz Decl. Ex. 25, 26. Fitzwater testified in her deposition that each of her later drawings was "very different" from Pair's original design, and that she ultimately "changed the whole package." Hicks Decl. Ex. 17 [Docket No. 655] 145:18-25, 197:10-21.

Shortly after Fitzwater drafted the drawings, draft invention disclosures were prepared for Fitzwater's signature. First Lorentz Decl. Exs. 35-37. These **[**18]** partially completed, unsigned disclosure forms briefly describe the different opening features of each drawing. Id. Exs. 35-37. Each of the three forms list September 13, 2005 as the conception date of the invention, and September 23, 2005 as the date the first drawing was made. Id.

On September 30, 2005, Brower emailed Fitzwater and expressed his excitement for the concepts that Fitzwater had drafted. Id. Ex. 38. Brower requested a variation on the design that would "reduc[e] the number of tear down panels from two to one. The tear would be located approximately half way down the sleeve, exposing more of the sandwich with the first tear." Id. Fitzwater then created a new drawing that incorporated Brower's requests. Id. Ex. 40.

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[3] Prior to Nestlé's acquisition of Chef America, Incorporated ("Chef America"), Brower was a Chef America employee. Brower Dep. 14:12-17. When Nestlé acquired Chef America, Brower became a Nestlé employee. Id. 15:11-16. For ease of clarity, hereinafter, Chef America will be referred to as Nestlé when discussing events that occurred prior to Nestlé's acquisition of Chef America.

In an October 2, 2005 email, Voyzey relayed Brower's excitement for the pillow **[*1200]** pack designs to Mark Sinclair, a Graphic employee. Id. Ex. 38. In the email, Voyzey stated that Fitzwater "has submitted these designs to see if they are patentable. We need to move quickly to see if these are patentable concepts and if so to get them protected as soon as possible." Id.

Three new invention disclosures were drafted. Id. Exs. 41-43. Unlike the invention disclosure forms **[**19]** prepared the month before, these new forms were fully completed and bear Fitzwater's signature, dated October 7, 2005. Id. The September 13, 2005 conception date and September 23, 2005 date of first drawing remain, but one of the signed disclosure forms also identifies drawing 51616G as first being drawn on September 23, 2005. Id. Inline claims this date is incorrect, because drawing 51616G was created on October 3, 2005 in response to Brower's September 30, 2005 request. Compare id. Ex. 35, with id. Ex. 43.

On December 8, 2005, Graphic filed a Provisional Application with the U.S. Patent and Trademark Office ("USPTO") for "Package with Removable Panel." Id. Ex. 54. The Provisional Application lists Fitzwater as the inventor and includes many of the drawings Fitzwater drafted in September 2005. Id.

Brower does not recall Graphic advising him that it was seeking patent protection on these designs. Brower Dep. 66:15-19. Voyzey also does not recall telling anyone at Nestlé that the patent would be filed showing Fitzwater as the sole inventor. Second Lorentz Decl. Ex. 141 [Docket No. 859] 112:5-21.

During the week of December 12, 2005, Nestlé conducted consumer testing on three sleeve designs. **[**20]** First Lorentz Decl. Ex. 55. Although the consumer testing was generally positive, some customers complained the bottom did not stay closed. Id. An alternative design with a locking tab was developed for a second testing group, which was well received. Id. After testing, Brower directed Fitzwater to add a locking tab to the design preferred by the customers. Id. Ex. 57. Fitzwater drafted the new design on December 20, 2005. Id. Ex. 58 [Docket No. 555].

On December 5, 2006, Graphic added the locking tab to a Non-Provisional Application, which also listed Fitzwater as the inventor. Id. Ex. 59. In addition to making other claims and acknowledgments, Fitzwater stated in a Declaration for Patent Application that she believes she is "an original, first and sole inventor" of the "Package with Removable Panel" design submitted on December 8, 2005. Id. Ex. 60. In her deposition, however, Fitzwater agreed that once she submitted the designs the patent application "was out of her hands," and that she was never involved in the "actual process, sitting with the lawyers." Fitzwater Dep. 174:25-175:4; 178:1-4.

H. Graphic's Manufacture of Smart Ones Design

Another issue in contention is Graphic's alleged **[**21]** misappropriation of a susceptor design that Inline had shared with Heinz. On September 3, 2008, Jeffrey Watkins, the president of Inline, met with Richard Parysek ("Parysek") of Heinz. Second Watkins Decl. [Docket No. 817] ¶ 2. During this meeting, Watkins provided a prototype of the "Micro-Bake II" design, which was an improvement on Inline's original Micro-Bake susceptor disk that Inline produced and sold to Heinz. Id. ¶¶ 3-4. Watkins provided the prototype to Heinz under express terms that it be treated as confidential. Id. ¶ 3.

In early 2011, Heinz agreed to move its susceptor disk business to Graphic. Second Lorentz Decl. Ex. 178 [Docket No. 889] at 5-6. However, Graphic was unable to provide a susceptor disk that matched the **[*1201]** performance of the disk Inline supplied. Id. at 6. Heinz directed Graphic to "review current Microbake susceptor" and provided recommended designs. Id. Graphic later began supplying Heinz with a new dual susceptor disk that included similar specifications and materials to Inline's confidential "Micro-Bake II" design. Id.

I. Graphic's Patent Suit Against Inline

On June 5, 2015, Graphic filed a patent infringement suit against Inline. See Graphic Packaging Int'l, Inc. **[**22]** v. Inline Packaging, LLC, No. 15-3476 (JNE/LIB) (the "Patent Suit"). In the Patent Suit, which remains pending, Graphic alleges that Inline infringed its Asserted Patents. See generally Patent Suit Compl. [Patent Suit Docket No. 1].

On January 12, 2016, the Patent Office's Patent Trial and Appeal Board ("PTAB") granted a petition by Inline seeking *inter partes* review ("IPR") of the claims in the '078 Patent. See Inline's Mem. Supp. Mot. Stay [Patent Suit Docket No. 52] at 2. The Patent Case was stayed pending the PTAB's decision in the IPR proceedings. See Order, Apr. 6, 2016 [Patent Suit Docket No. 66]. On January 10, 2017, the PTAB issued a Final Written Decision invalidating the '078 Patent. The Federal Circuit affirmed the judgment and denied Graphic's request for a panel rehearing and rehearing en banc. The mandate issued on April 17, 2018, and the stay in the Patent Case was lifted on July 20, 2018. See Order, July 20, 2018 [Patent Suit Docket No. 82].

J. Inline's Antitrust Suit Against Graphic

On July 31, 2015, Inline filed this lawsuit (the "Antitrust Suit") against Graphic. Inline alleges that Graphic, in response to price competition from Inline and others, engages in anticompetitive conduct to maintain **[**23]** a monopoly in the crisping and browning susceptor packaging market. Compl. ¶¶ 23-58, 81-110. According to Inline, Graphic's conduct has caused Inline to lose existing and potential customers. Id. ¶¶ 111, 114.

Inline asserts five claims against Graphic: Count I—Tortious Interference with Prospective Business Relations; Count II—Tortious Interference with Existing Contractual Relations; Count III—Misappropriation of Trade Secrets; Count IV—Violation of *Minn. Stat. § 325D.52* for Maintenance or Use of a Monopoly Power; and Count V—Violation of the Sherman Antitrust Act, *15 U.S.C. § 2*. Id. ¶¶ 121-48.

The tortious interference claims relate to Graphic's assertions to Nestlé that the Hot Pockets sleeve design was protected by the Asserted Patents. The misappropriation of trade secrets claim is based on Graphic's alleged copying of the susceptor packaging design that Inline had created for Heinz's Weight Watcher's Smart Ones pizza. The antitrust claims are premised on two theories of anticompetitive behavior: baseless threats of sham litigation (relating to the Asserted Patents) and predatory discount bundling (relating to Graphic's supply agreements with four of the five major susceptor purchasers).[4]

III. DISCUSSION

A. Summary [24] Judgment Motions**

1. Standard of Review

HN1[] Summary judgment is appropriate if there are no genuine issues of material **[*1202]** fact and the moving party can demonstrate that it is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. A fact is material if it might affect the outcome of the suit, and a dispute is genuine if the evidence is such that it could lead a reasonable jury to return a verdict for either party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A court considering a motion for summary judgment must view the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences to be drawn from those facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. However, the nonmoving party "may not rest upon allegations, but must produce probative evidence

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[4] Inline also alleged that Graphic engaged in the anti-competitive practice of "baiting/submarine patent activities." Compl. ¶¶ 55-58; 106-10. Claims based on this theory of antitrust liability were dismissed by the Court in February 2016. See Mem. Op. Order, Feb. 23, 2016 [Docket No. 36] at 22-23, 32.

sufficient to demonstrate a genuine issue [of material fact] for trial." *Davenport v. Univ. of Ark. Bd. of Trs., 553 F.3d 1110, 1113 (8th Cir. 2009)* (citing *Anderson, 477 U.S. at 247-49*).

2. Graphic's Summary Judgment Motion

Graphic moves for summary judgment on all of Inline's claims.

a. Antitrust Claims (Counts IV and V)

Inline asserts antitrust claims against Graphic under both *Minn. Stat. § 325D.52* (Count IV) and the Sherman Antitrust Act, *15 U.S.C. § 2* (Count V). ***HN2***[] *Section 2* of the Sherman Act imposes liability on "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, **[**25]** to monopolize any part of the trade or commerce among the several States." *15 U.S.C. § 2*. To establish a *§ 2* violation, Inline must show that Graphic (1) "possessed monopoly power in the relevant market," and (2) "willfully acquired or maintained this monopoly power by anticompetitive conduct as opposed to gaining that power as a result of a superior product, business acumen, or historical accident." *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1060 (8th Cir. 2000)* (internal quotations omitted). "Minnesota anti-trust law is interpreted consistent with the federal court's construction of the Sherman Act." *Lamminen v. City of Cloquet, 987 F. Supp. 723, 734 (D. Minn. 1997)* (citing *State by Humphrey v. Road Constructors, Inc., 474 N.W.2d 224, 225 n.1 (Minn. Ct. App. 1991)*; see also *Lorix v. Crompton Corp., 736 N.W.2d 619, 626 (Minn. 2007)* ("As the purposes of Minnesota and federal ***antitrust law*** are the same, it is sensible to interpret them consistently.").

Inline alleges that Graphic is a monopolist in the United States susceptor food packaging market who has maintained its dominant position through a combination of anticompetitive tactics. Compl. ¶¶ 20-120. Inline identifies these tactics to include sham intellectual property assertions and unlawful discount bundling. Id. ¶¶ 23-38, 81-97. Inline claims that this conduct foreclosed Inline from selling to the market's largest susceptor purchasers.

i. Sham Patent Threats and Litigation

Inline argues that Graphic engaged in sham **[**26]** patent threats and litigation by obtaining the Asserted Patents through fraud on the PTO (commonly referred to as Walker Process fraud), and maintaining and enforcing the Asserted Patents with knowledge of the fraud. Compl. ¶ 4, 29-38, 89-97; Hicks Decl. Ex. 98 [Docket No. 736] ("Pl.'s Resp. Interrog.") at Resp. Nos. 28, 29. Inline explains that Graphic procured the Asserted Patents through fraud by not disclosing that: (1) persons at Nestlé were joint inventors of the Asserted Patents; and (2) sales of the 50019D and 50019F designs were made to Nestlé in 2001.

[*1203] ***HN3***[] "[E]nforcement of a patent procured by fraud on the Patent Office may be violative of *§ 2* of the Sherman Act provided the other elements necessary to a *§ 2* case are present." *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. To succeed on a Walker Process sham litigation claim, a plaintiff must prove: (1) the defendant fraudulently obtained patents through knowing and willful misconduct before the PTO, and maintained and enforced the patents with knowledge of the fraudulent procurement; and (2) all other elements to establish a Sherman Act monopolization claim are present. *TransWeb, LLC v. 3M Innovative Props. Co., 812 F.3d 1295, 1306 (Fed. Cir. 2016)*.

HN4[] The evidentiary showing required to satisfy the first Walker Process element is "nearly **[**27]** identical" to that required to prove inequitable conduct. *Id. at 1307*. The inequitable conduct standard requires proof by clear and convincing evidence that "the patentee acted with the specific intent to deceive the PTO." *Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1290 (Fed. Cir. 2011)*. A finding of gross negligence or negligence under a "should have known standard" does not satisfy this intent requirement. Id. Rather, clear and convincing evidence must establish that an individual owing a duty of candor to the PTO (1) had actual knowledge of omitted information; (2) knew that the omitted information was material to the PTO's decision to award the patent; and (3) made a deliberate decision to withhold it. Id.; *37 C.F.R § 1.56(c)*.

Because direct evidence of deceptive intent is rarely present, the intent to deceive may be inferred from indirect and circumstantial evidence. *Therasense, 649 F.3d at 1290*. "However, to meet the clear and convincing evidence standard, the specific intent to deceive must be the single most reasonable inference able to be drawn from the evidence. Indeed, the evidence must be sufficient to require a finding of deceitful intent in the light of all the circumstances." Id. (internal quotations and citations omitted) (emphasis in original). Thus, where multiple reasonable inferences **[**28]** may be drawn, intent to deceive cannot be found. *Id. at 1290-91*.

a. Inventorship

Inline argues that Fitzwater, Voyzey, and Graphic's chief intellectual property counsel, Barry Biddle, Esq., all engaged in inequitable conduct because all three owed a duty of candor to the PTO and knew that Fitzwater was not the first and sole inventor of the Asserted Patents.

In arguing that Fitzwater was not the first and sole inventor, Inline does not identify the specific individual or individuals who allegedly co-invented the Asserted Patents. Rather, Inline and its expert contend that "someone at or associated with Nestlé," such as Brower or one of his colleagues, contributed to the inventions claimed in the Asserted Patents and should have been named as a co-inventor. Hicks Decl. Ex. 4 [Docket No. 642] ("Kowalchyk Report") ¶¶ 8, 92; Pl.'s Mem. Opp'n Summ. J. [Docket No. 812] at 37. Graphic responds that neither Brower nor anyone else at Nestlé has ever claimed to be an inventor or co-inventor of the Asserted Patents. Graphic argues there can be no specific intent to deceive the PTO by failing to name an alleged co-inventor when no person claims they are a co-inventor.

The Federal Circuit has held that "[w]hen an **[**29]** alleged ***HN5***[] omitted co-inventor does not claim to be such, it can hardly be inequitable conduct not to identify that person to the PTO as an inventor." *Pro-Mold & Tool Co., Inc. v. Great Lakes Plastics, Inc., 75 F.3d 1568, 1576 (Fed. Cir.* ***[*1204]*** *1996)*; see also Keystone Retaining Wall Sys., Inc. v. Rockwood Retaining Walls, Inc., No. 00-496, 2001 WL 951582, at *9 (D. Minn. Aug. 22, 2001) (finding non-disclosure of alleged co-inventor did not constitute intent to deceive PTO where alleged co-inventor submitted an affidavit stating he was not an inventor); *Brixham Sols. Ltd. v. Juniper Networks, Inc., No. 13-616, 2014 U.S. Dist. LEXIS 7929, 2014 WL 250204, at *7 (N.D. Cal. Jan. 22, 2014)* ("In the absence of allegations identifying the specific individual or individuals who allegedly co-invented the claimed invention and setting forth specific facts showing how each of these individuals contributed to the conception of a particular claim or claims, [a plaintiff's] inequitable conduct allegation based on this theory is insufficient as a matter of law.").

To this day, neither Brower nor anyone else at Nestlé claims to be an inventor of the Asserted Patents. Brower testified in his deposition that he does not consider himself an inventor of the '078 Patent. Hicks Decl. Ex. 19 [Docket No. 657] 74:11-24. He also submitted a declaration stating that he "was not previously familiar with the legal standard for inventorship" and that he is "not prepared now, many years after the applications were filed, to determine whether [he] or anyone else at Nestlé is or is **[**30]** not an inventor." First Lorentz Decl. Ex. 8 ("Brower Decl.") [Docket No. 543, Attach. 3] ¶ 19. Lou Judge, head of packaging procurement for Nestlé, has testified that no one at Nestlé claims to be an inventor of the Asserted Patents. Judge Decl. [Docket No. 770] ¶ 111. Despite Brower and Nestlé's knowledge of this lawsuit and Inline's allegations that Graphic intentionally excluded Nestlé personnel as inventors, no current or former Nestlé employee has challenged inventorship before the PTO. Stoll Decl. [Docket No. 760] Ex. 1 [Docket No. 761] ("Stoll Report") ¶ 93.

Based on the absence of any person claiming to be a co-inventor with Fitzwater of the Asserted Patents, Inline cannot show that an individual associated with the filing or prosecution of the Asserted Patents acted with specific intent to deceive the PTO by failing to name an alleged co-inventor. Thus, Graphic's nondisclosure of joint inventors does not satisfy the first element of Inline's Walker Process sham litigation claim.

b. Prior Sales

Inline argues that Graphic engaged in inequitable conduct by not disclosing to the PTO the sales of the 50019D and 50019F design samples to Chef America in 2001. Inline argues that the **[**31]** sales were material to the prosecution of the Asserted Patents.[5] Graphic disputes that the prior sales were material or that it engaged in inequitable conduct.

The Court need not resolve the issue of whether the prior sales were material because even if they were, Inline has offered no argument or evidence (and certainly not clear and convincing evidence) that anyone at Graphic owing a duty of candor to the PTO knew that the prior sales were material yet deliberately chose not to disclose them. The evidence shows that Biddle did not begin working for Graphic until 2004, years after Project Quantum and the sale of the 50019D and 50019F designs to Chef America had occurred. Hicks Decl. Ex. 18 [Docket No. 656] ("Biddle Dep.") 12:21-13:1, 207:20-24. Biddle has testified that he had no knowledge of Project Quantum, the 50019D and 50019F designs, or the sale of the designs, and there is no evidence to the contrary. Id. 129:15-130:23, 207:20-24.

[*1205] To the extent that Inline suggests Biddle was obligated to investigate Project Quantum—a project he did not know about—Inline must show that Biddle was presented with "sufficient information . . . to suggest the existence of specific information the **[**32]** materiality of which may be ascertained with reasonable inquiry." *Brasseler, U.S.A. I., L.P. v. Stryker Sales Corp., 267 F.3d 1370, 1382 (Fed. Cir. 2001)*. In other words, Inline must prove that Biddle "had notice that a potentially invalidating event took place, and that [he] willfully ignored such notice in a conscious effort to avoid complying with [his] duty to disclose." *Id. at 1385*. The record lacks any evidence to support such a finding.

Even if Inline could establish that Biddle had notice of the 50019D and 50019F designs and prior sales, Inline offers no evidence that Biddle knew they were material. Indeed, Biddle continues to believe that the designs are not material to the Asserted Patents. Biddle Dep. 207:6-208:10; see Biomed. Enters., Inc. v. Solana Surgical, LLC, No. 14-95, 2016 WL 4198305, at *5 (W.D. Tex. May 9, 2016) (finding that a patentee's continued assertion that references were not prior art "support[ed] the conclusion that no one with a duty to disclose knew [the references] to be material prior art").

Similarly, there is no evidence that Fitzwater had any knowledge of the 50019F design or the sales to Chef America in 2001. Although she had knowledge of the 50019D design, she testified it was "very different" than the claimed design. Hicks Decl. Ex. 17 at 145:18-25, 222:15-225:16. Although Inline contends that 50019D served as a starting point for Fitzwater's **[**33]** work on Project Roxanne, Fitzwater testified that she "changed the whole package." Id. at 197:10-21. Thus, clear and convincing evidence that Fitzwater had actual knowledge of (1) the materiality of the 50019D and 50019F designs, or (2) the prior sales is totally lacking.

Further, even if Voyzey could somehow be considered as owing a duty of candor to the PTO,[6] Inline offers no evidence or argument that he knew the designs were material or that he intended to deceive the PTO by not disclosing them.

Thus, Inline cannot show that the "single most reasonable inference" to be drawn is that Biddle, Fitzwater, or Voyzey intended to deceive the PTO by not disclosing the prior sales. *Therasense, 649 F.3d at 1290*.

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[5] The sale of a purported invention more than one year prior to the filing of a patent application bars patentability. *35 U.S.C. § 102(a)-(b)*.

[6] Under *37 C.F.R. § 1.56(c)*, persons owing a duty of disclosure to the PTO include the inventor named in the application, the attorney or agent who prepares or prosecutes the application, and "[e]very other person who is substantively involved in the preparation or prosecution of the application and who is associated with the inventor." Inline's own expert admits that the facts do not support a determination that Voyzey owes a duty of candor to the PTO. Hicks Decl. Ex. 16 [Docket No. 654] ("Kowalchyk Dep.") 31:22-32:4.

Because Graphic's naming of Fitzwater as the sole inventor and nondisclosure of prior sales did not constitute inequitable conduct, Inline cannot satisfy the first element of its Walker Process sham litigation claim. Thus, Graphic is entitled to summary judgment on this claim.

c. Additional Sham Litigation Theory

Inline argues that its sham litigation claim rests on a second theory in addition to Walker Process fraud. Specifically, Inline contends that antitrust liability for sham litigation can also arise if the **[**34]** litigation is (1) objectively baseless, and (2) brought with subjective bad faith. Pl.'s Mem. Opp'n Summ. J. at 23 (citing *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998))*. Inline contends that it was objectively baseless for Graphic to threaten and then **[*1206]** to pursue the patent litigation against Inline "in light of the known collaboration with Nestlé, the Joint Development Agreement, and the direct evidence demonstrating Fitzwater was not the first and sole inventor." Id. at 24.

This argument is a recycled version of Inline's argument that Graphic procured the Asserted Patents through fraud by not disclosing that others at Nestlé were joint inventors of the Asserted Patents. Just as Graphic cannot have engaged in fraud on the PTO by failing to name someone from Nestlé as a co-inventor when no one at Nestlé claims to be a co-inventor, Graphic's pursuit of litigation on the Asserted Patents cannot be objectively baseless on inventorship grounds when no one at Nestlé claims to be a co-inventor. Therefore, Inline's sham litigation claim must be dismissed.

ii. Discount Bundling

Inline alleges that Graphic engaged in anticompetitive bundling of food susceptor packaging with other discounted paperboard packaging. ***HN6***[] "Bundling is the practice of offering, **[**35]** for a single price, two or more goods or services that could be sold separately. A bundled discount occurs when a firm sells a bundle of goods or services for a lower price than the seller charges for the goods or services purchased individually." *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008)*.

Bundled discounts are generally pro-competitive because they result in lower prices to consumers. *Id. at 895*. Sellers also benefit through bundling by saving on consumer transaction costs and capitalizing on economies of scope. *Id. at 895-96*. The Supreme Court has observed that "[b]uyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively—conduct that is entirely consistent with the *Sherman Act*." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*.

However, bundled discounts have the potential to be anticompetitive if they exclude an equally or more efficient competitor who sells only a single product in the bundle. *PeaceHealth, 515 F.3d at 896*. The following hypothetical provides an example of how a bundled discounter can exclude single-product rivals without pricing its products below its cost to produce them:

> Assume for the sake of simplicity that the case involved the sale of two hair products, shampoo and conditioner, the latter made only by A and the former by **[**36]** both A and B. Assume as well that both must be used to wash one's hair. Assume further that A's average variable cost for conditioner is $2.50, that its average variable cost for shampoo is $1.50, and that B's average variable cost for shampoo is $1.25. B therefore is the more efficient producer of shampoo. Finally, assume that A prices conditioner and shampoo at $5 and $3, respectively, if bought separately but at $3 and $2.25 if bought as part of a package. Absent the package pricing, A's price for both products is $8. B therefore must price its shampoo at or below $3 in order to compete effectively with A, given that the customer will be paying A $5 for conditioner irrespective of which shampoo supplier it chooses. With the package pricing, the customer can purchase both products from A for $5.25, a price above the sum of A's average variable cost for both products. In order for B to compete, however, it must persuade the customer to buy B's shampoo while purchasing its conditioner from A for $5. In

> order **[*1207]** to do that, B cannot charge more than $0.25 for shampoo, as the customer otherwise will find A's package cheaper than buying conditioner from A and shampoo from B. On these assumptions, **[**37]** A would force B out of the shampoo market, notwithstanding that B is the more efficient producer of shampoo, without pricing either of A's products below average variable cost.

Ortho Diagnostic Sys. v. Abbott Lab., 920 F. Supp. 455, 467 (S.D.N.Y. 1996), as corrected (Mar. 22, 1996).

HN7[] Bundled discounts are somewhat similar to predatory pricing and tying. *PeaceHealth, 515 F.3d at 900*; 3A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 749d2 at 325 (2008). Predatory pricing occurs when a seller prices its product below cost and has a reasonable probability of recouping its losses by charging monopoly prices after the predation period has ended. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. Tying occurs when a seller coerces buyers into purchasing two products by tying them together, thereby forcing buyers to purchase the "tied" product from that seller rather than from a rival. 3A Areeda & Hovenkamp ¶ 749d2 at 324.

But, there is an important distinction between bundling and tying claims. In a traditional tying claim a seller forces the buyer to purchase the products as a package and will not sell the "tied" products separately. In a bundling claim, the buyer has the option of accepting the cost savings by purchasing the bundle or forgoing the savings by purchasing the products separately. Id. at 325. The buyer is only "coerced" into taking **[**38]** the bundle because of the lower prices. Id. Due to this distinction, "an essential element of unlawful package discounting is that the purchaser be 'forced' to take the bundle—which means that a rational, profit-maximizing buyer did not have good competitive options." Id. ¶ 749d3 at 326.

To determine whether bundled discounts have the potential to exclude an equally efficient rival from the market, the Ninth Circuit has developed the "discount attribution" standard.[7] Under this cost-based rule:

> the full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products. If the resulting price of the competitive product or products is below the defendant's incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of *§ 2*. This standard makes the defendant's bundled discounts legal unless the discounts have the potential to exclude a hypothetical equally efficient producer of the competitive product.

Peace Health, 515 F.3d at 906 (emphasis in original). The discount attribution standard has been recognized by multiple **[*1208]** courts as the appropriate test to apply to bundling claims. See, e.g., *Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 273-74 (6th Cir. 2015)*; *Safeway Inc. v. Abbott Labs., 2010 U.S. Dist. LEXIS 2145, 2010 WL 147988, at *3-5 (N.D. Cal. Jan. 12, 2010)*.

Inline contends that its expert, Dr. Levinsohn, performed the discount attribution test for nine of Graphic's supply contracts with its customers and that all nine failed the discount attribution test. See Levinsohn Report. Graphic disputes this conclusion and argues that it is entitled to summary judgment on Inline's discount bundling claim because: (1) Graphic did not bundle susceptor and paperboard products; (2) Inline has not shown that Graphic has monopoly power in the leveraging market (paperboard); (3) the discount attribution test shows Graphic's susceptor price is above cost; and (4) the alleged bundles have not harmed competition.

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[7] There is no current Eighth Circuit precedent addressing the applicable standard for evaluating bundling claims. In 2010, the Eighth Circuit analyzed a discount bundling theory in which the Court seemed to, at least implicitly, endorse a discount bundling test that requires a below cost pricing component after attributing the entire discount on all products within a package to the competitive product. See *Southeast Missouri Hosp. v. C. R. Bard, Inc., 616 F.3d 888, 893 (8th Cir. 2010)* ("Bard I"). However, this decision was vacated shortly after its publication and decided on alternative grounds while making no reference to the discount bundling theory. See *Southeast Missouri Hosp. v. C. R. Bard, Inc., 642 F.3d 608 (8th Cir. 2011)* ("Bard II"). Because Bard **[**39]** I was vacated, this Court gives it no precedential value in determining how, in the future, the Eighth Circuit may evaluate a discount bundling claim.

a. Whether Graphic Bundled

Graphic argues that it did not engage in bundling because the discounts on paperboard were not conditioned upon the purchase of susceptor packaging. Graphic contends that Inline leaps to the conclusion that whenever susceptors and paperboard are included in the same contract, any discount, rebate, or signing bonus in the contract was necessarily conditioned on the purchase of susceptors and would not have been available if only paperboard had been purchased. Graphic argues that this assumption lacks evidentiary support **[**40]** and is contradicted by the declarations and deposition testimony its customers. Several customers have testified that their discounts were not conditioned on the purchase of susceptors, and that it was the customer, not Graphic, who made the decision of which products to include in its purchase from Graphic. See Hicks Decl. Ex. 12 [Docket No. 650] ("Jones Dep.") 27:1-15, 109:1-111:9, 118:15-125:14; Hicks Decl. Ex. 13 [Docket No. 651] ("Sitterly Dep.") 180:18-181:4; Hicks Decl. Ex. 14 [Docket No. 652] ("Ferrara Dep.") 89:1-92:23, 97:5-17; Hick Decl. Ex. 15 [Docket No. 653] ("Dorman Dep.") 142:8-144:21. Thus, argues Graphic, discounts cannot constitute anticompetitive bundling when the customers ask for the discounts, deny that the discounts were conditioned on the purchase of susceptors, and deny that they were coerced into purchasing susceptors from Graphic.

Inline responds that because this is not a tying case, it need not show that discounts on one product were expressly tied to the purchase of another product. This argument misses the mark. Although Inline need not show that a customer who purchased paperboard was required to also purchase susceptors (a traditional tying claim), **[**41]** Inline must show that if customers had purchased only paperboard (and no susceptor packaging) from Graphic, they would not have received any discount on their paperboard purchases. Thus, Inline must show that Graphic conditioned discounts and incentives on the purchase of susceptor and paperboard as a bundle.

That being said, Inline has adduced sufficient evidence to raise a fact issue about whether the discounts were conditioned on the purchase of susceptor and paperboard as a bundle. The supply contracts at issue include both paperboard and susceptor products as well as discount terms that are specific to those contracts. Levinsohn Report ¶ 109; Hicks Decl. Exs. 28-36 [Docket Nos. 666-674] (Supply Agreements). Viewing this evidence in the light most favorable to Inline, a reasonable jury could conclude that the discounts were conditioned upon the purchase of both product categories as a discounted bundle.

[*1209] b. No Monopoly or Market Power in Leveraging Market

Graphic also argues that even if Inline could show that bundling occurred, a bundling claim requires the plaintiff to also show the defendant had monopoly power in the leveraging market (here, the paperboard market) and Inline has **[**42]** failed to do so. Inline responds that, although monopoly power or significant market power is required for a tying claim, the discount attribution test imposes no such requirement for a plaintiff to prevail on a discount bundling claim. Rather, contends Inline, courts look to the economic realities of a bundling claim to determine if the bundle is anticompetitive. Inline argues that the economic reality here is that Graphic's paperboard volume was so massive that even a small discount on the paperboard component of the bundle dwarfed any discount a single-product susceptor competitor could feasibly offer on the purchase of susceptors alone.

The Tenth Circuit has recognized that there is no support in the caselaw for the proposition that the discount attribution test can properly be used to show coercion by a non-monopolist in the leveraging market. *Suture Express v. Owens & Minor Distrib. Inc., 851 F.3d 1029, 1043 (10th Cir. 2017)* (citing *Collins Inkjet, 781 F.3d at 270-78* (applying test to defendant with 100% market share in leveraging market); *PeaceHealth, 515 F.3d at 891-92, 910* (applying test to near-monopolist in leveraging market)).

Regardless of whether monopoly power in the leveraging market is required, Inline's economic expert, Dr. Levinsohn, admits that at least some market power is needed in the leveraging market for Inline's **[**43]** discount bundling theory to be viable. Hicks Decl. Ex. 10 [Docket No. 648] ("Levinsohn Dep.") 20:8-12; 38:16-24; 39:13-18.[8] Despite admitting that some market power is needed, Dr. Levinsohn did not claim that Graphic possesses market power in paperboard in either of his expert reports. See generally Levinsohn Report; Levinsohn Rebuttal. Dr. Levinsohn's only opinion about Graphic's market power is that Graphic holds substantial market power in the susceptor market. Levinsohn Report ¶ 101.

The only content in Dr. Levinsohn's Reports that arguably addresses Graphic's market power in the paperboard market is found in a footnote in Dr. Levinsohn's Rebuttal Report. See Levinsohn Rebuttal at 5 n.20. The footnote references selected statements in Graphic's sales and marketing documents regarding Graphic's market shares in various market segments such as "frozen pizza," "frozen foods," and "CRB/SUS food markets." See id. Dr. Levinsohn testified in his deposition that these documents "give context to Graphic's position in the folding market" and constitute "the evidentiary record on what Graphic's position in the folding carton market is." Levinsohn Dep. 52:21-53:8. However, Dr. Levinsohn provides no analysis of the **[**44]** documents, much less a conclusion stating what Graphic's market position is in the paperboard market. Additionally, Dr. Levinsohn conceded that he was "not sure" whether the market shares referenced in some of the documents pertained to both **[*1210]** paperboard and susceptor, or to paperboard only. Id. 52:5-16. He also stated that "[o]ne would need to do a little more research" to determine whether a document stating Graphic's position in the North American market was relevant to Graphic's market power in the U.S. paperboard market. Id. 49:7-13.

After the submission of his expert reports, Dr. Levinsohn testified in his deposition that Graphic had sufficient market power to offer exclusionary bundles because Graphic's accounting margins in the paperboard market were large enough to absorb discounts on the bundle. Id. at 24:5-25:5; 132:2-10; 133:21-136:25. To the extent that this constitutes an expert opinion on Graphic's market power in paperboard, the opinion is untimely. Additionally, accounting margins are not reliable evidence of market power. 3 Areeda & Hovenkamp ¶ 516f at 142 ("[S]ubstantial accounting profits—say, 20%—may be consistent with trivial or zero economic profit and thus do not **[**45]** necessarily indicate any market power."); *Bailey v. Allgas, Inc., 284 F.3d 1237, 1252 (11th Cir. 2002)* (stating a company's profit margins "reveal[] very little about its market power"); *Garnica v. HomeTeam Pest Def., Inc., 230 F. Supp. 3d 1155, 1159 (N.D. Cal. 2017)* ("[I]nferring market power from gross margins is a dicey proposition, and high gross margins are generally not by themselves sufficient to prove such power."). Thus, Inline has not produced sufficient evidence from which a reasonable jury could find that Graphic had the necessary market power in the paperboard market to economically coerce a buyer into accepting the bundle.

Inline's failure to show that Graphic had market power in the leveraging paperboard market is fatal to its bundling claim. "[A]n essential element ***HN8***[] of unlawful package discounting is that the purchaser be 'forced' to take the bundle—which means that a rational, profit-maximizing buyer did not have good competitive options." 3A Areeda & Hovenkamp ¶ 749d3 at 326. The unrebutted evidence shows that a buyer does have good competitive options, because Graphic faces vigorous competition in the paperboard market. Thus, buyers are not coerced to take Graphic's bundle. Rather, they can purchase susceptors from Inline and purchase paperboard from another source at competitive prices.

Resisting this **[**46]** conclusion, Inline argues that market power in the leveraging market is not a required element of a bundling claim under PeaceHealth. However, Inline's own economic expert admits that market power in paperboard is needed for Graphic's bundling claim to be anticompetitive.

c. Discount Attribution Test

[8] Dr. Levinsohn also opined that market power is not necessary for an incumbent to foreclose a new entrant when only a fraction of shares are contestable in a given time period. Hicks Decl. Ex. 6 [Docket No. 644] ("Levinsohn Rebuttal") ¶ 18. However, the example he provides to support this proposition involves a single-product hypothetical. Id. This hypothetical does not support Inline's allegations that Graphic has willfully maintained its monopoly in susceptor packaging by bundling it with a second product—paperboard packaging. See Compl. ¶¶ 81-88.

Even if Inline could show that Graphic held sufficient market power in paperboard to support a claim for unlawful bundling, Dr. Levinsohn did not correctly apply the discount attribution test to Graphic's allegedly bundled contracts. When the test is properly applied, it is undisputed that eight of the nine contracts pass the test.

HN9[] As explained earlier, the discount attribution test is performed by allocating "the full amount of the discounts given by the defendant on the bundle . . . to the competitive product or products." *PeaceHealth, 515 F.3d at 906*. If the resulting price of the competitive product or products is below the defendant's average variable cost to produce them, the bundle has the potential to exclude an equally efficient rival who makes only the competitive product. However, if the resulting price of the competitive product remains above the defendant's cost to produce them, the bundle **[*1211]** falls into a **[**47]** safe harbor and is not actionable as exclusionary. *Id. at 906, 909*.

Here, Dr. Levinsohn allocated the full amount of the discounts on the bundle to only 20% of the competitive product (susceptors), rather than to the full amount of susceptors in the bundle. Levinsohn Report Ex. 7. Dr. Levinsohn explained that he allocated the discounts to only a fraction of the susceptors in the bundle because large buyers are unwilling to "put all of their eggs in the basket" of a susceptor manufacturer who has not previously supplied susceptors to a given buyer, and thus "only a subset of a buyer's susceptor purchases are 'contestable' to an entrant." Levinsohn Report ¶ 97. Dr. Levinsohn estimated the "contestable share" here to be 20% because "Inline's share of a buyer's purchases . . . never exceeds 20 percent in the first year of supply, and Inline never supplied more than one new product line to a large buyer in the first year of supply." Id. Under Dr. Levinsohn's "contestable share" variation of the discount attribution test, none of Graphic's contracts passed the test. Id. ¶¶ 97, 114, 148-49, 161-62, 171-72, 183-85, Ex. 7.

No precedent exists for Dr. Levinsohn's "contestable share" variation of the discount **[**48]** attribution test.[9] Although the contestable share method might, in some instances, identify discount bundles that are capable of excluding an equally efficient rival who cannot contest all sales of the competitive product, the method is prone to error, would increase enforcement and litigation costs, and would chill procompetitive price cuts. See *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983)* ("Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. . . . [W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.") (internal citations omitted).

The contestable share method is prone to error because it has the potential to condemn an overly broad category of bundled discounts that include non-predatory, above-cost discounts that could be matched by an equally efficient rival.

A modification of the earlier referenced shampoo/conditioner hypothetical illustrates this point. Suppose Firm A prices shampoo (the competitive product) at $3 and conditioner at $5 **[**49]** if purchased separately, and sells the products as a bundle for $7. Firm A's average variable cost for shampoo is $1.50. Under the PeaceHealth discount attribution test, the entire packaged discount, $1, would be subtracted from the shampoo price of $3, resulting in an effective price of $2, which is above Firm A's average variable cost. The bundled price of $7 thus passes the PeaceHealth test and falls within the safe harbor for packaged discounts that will not be condemned as anticompetitive, because the $7 bundle is not "below the defendant's incremental cost" and could be matched by an "equally efficient producer of the competitive product." *PeaceHealth at 909*.

[*1212] However, the same $7 bundle would fail Dr. Levinsohn's "contestable share" test. For example, if Firm A sells 10 bundles of shampoo and conditioner, and the total discount of $10 ($1 per bundle x 10 bundles) were

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[9] Inline argues that support for the contestable share analysis can be found in a Competitive Impact Statement filed in U.S. v. United Regional Health Care Sys., No. 11-00030, 2011 WL 13054949 (N.D. Texas Feb. 25, 2011). The Competitive Impact Statement is a document filed in the case by the government in connection with a proposed final judgment. Moreover, the document acknowledges that the contestable share method differs from the PeaceHealth test, and that measuring the contestable share "may in some cases be impractical." Id.

applied to only 20% of the shampoo sales (2 shampoos x $3 = $6), the effective price of the two shampoos would be $-4.

The contestable share analysis would also add to enforcement costs by fueling litigation over the proper percentage of contestable shares. Mark S. Popofsky, Section 2, Safe Harbors, and the Rule of Reason, 15 Geo. Mason L. Rev. 1265, 1295 (2008). Here, for example, **[**50]** Graphic's expert, Dr. Saravia, opines that Dr. Levinsohn's selection of a 20% contestable share is flawed for at least three reasons: Inline has provided no evidence that it ever attempted to obtain more than 20% of a customer's susceptor purchases in the first year; there is no reason to assume that the asserted 20% first-year contestable share is appropriate to use during the entire term of the contracts; and if historic shares of sales volume rather than unit volume are measured, Inline's contestable share increases to over 40% for Inline's first-year contract with Schwan's. Saravia Report ¶¶ 99-108.

Additionally, and perhaps most significantly, the contestable share analysis would chill competition by eliminating the safe harbor of the discount attribution test. As Dr. Levinsohn admits, "[t]here is no basis to assume that Graphic would know exactly what portion of a buyer's demand is contestable to an entrant, and therefore there is no basis to assume Graphic would be able to exactly tailor its bundle offering to foreclose Inline with minimum amounts of discounts and incentives." Levinsohn Rebuttal at 19, n.74. Thus, it would be impossible for a seller to know whether its bundled discount conforms with ***antitrust*** **[**51]** ***law*** or has the potential to violate of the Sherman Act. The Supreme Court has repeatedly cautioned that "the costs of erroneous findings of predatory-pricing liability [a]re quite high because 'the mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition,' and, therefore, mistaken findings of liability would 'chill the very conduct the antitrust laws are designed to protect.'" *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)* (quoting *Brooke Grp., 509 U.S. at 226* (alterations omitted); accord *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 451, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*. "Because cutting prices in order to increase business often is the very essence of competition, . . . it 'is beyond the practical ability of a judicial tribunal to control [above cost discounting] without courting intolerable risks of chilling legitimate price cutting.'" *Concord Boat, 207 F.3d at 1061* (alteration in original) (quoting *Brooke Grp., 509 U.S. at 223*).

Inline does not dispute that if the contestable share analysis is not applied, only one of Graphic's nine challenged contracts fail the PeaceHealth test. Moreover, Dr. Levinsohn admits that he has not analyzed whether this single contract has caused anticompetitive injury. Levinsohn Dep. 171:20-172:9, 283:2-287:24.

d. Harm

Even assuming all of Graphic's alleged bundles fail the discount attribution **[**52]** test, Inline has not shown ***HN10***[] antitrust injury, which is a required element in any private antitrust action. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Antitrust injury means harm to competition, not merely harm to competitors. See **[*1213]** *id. at 488* ("The antitrust laws . . . were enacted for the protection of competition, not competitors.") (internal quotations omitted). Thus, to prevail on its bundling claim, Inline must show that Graphic's conduct resulted in harm to consumers.

Inline argues that consumers have been harmed because Graphic's conduct has resulted in the exclusion of its only viable competitor, Inline, from 93% of the susceptor packaging market. Inline thus contends that consumers were deprived of access to a budding secondary supplier that was capable of challenging Graphic's dominant market position with lower prices and innovative products. ***HN11***[] However, "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. Indeed, "the mere fact that a market has few competitors does not transform every action by one of them into an antitrust violation. Rather, even in a duopoly, a plaintiff must offer some other reason to think that the challenged behavior harmed competition." **[**53]** *MacDermid Printing Sols. LLC v. Cortron Corp., 833 F.3d 172, 186 (2d Cir. 2016)*.

Harm to competition is measured by increased price, reduced output, or decreased quality. See *Brooke Grp., 509 U.S. at 242* (finding no antitrust injury where challenged practices did not threaten to restrict output or raise prices above a competitive level); *MacDermid, 833 F.3d at 184* ("[P]roving an adverse effect on competition without showing increased price, reduced output, or reduced quality in the market has remained possible in theory but elusive in practice."). Here, other than arguing that prices would have been lower absent Graphic's bundling, Inline's expert, Dr. Levinsohn, performed no analysis. See Levinsohn Report ¶ 189; Levinsohn Rebuttal ¶¶ 11-13. Moreover, when Dr. Levinsohn was asked how there could be "any consumer harm" from Graphic's bundled discounts if another company such as Westrock was able to sell paperboard at competitive prices, his only response was that he "completely understand[s] the question" and would "need to think it through." Levinsohn Dep. 167:11-18. (quotations omitted).

Based on this record, no reasonable jury could conclude that Graphic's alleged discounted bundles resulted in harm to competition.

iii. Exclusivity

In addition to opposing Graphic's summary judgment arguments on bundling, Inline argues **[**54]** that the contracts are anticompetitive for an additional reason: "they are exclusive, all-requirements contracts that have foreclosed in excess of 40% of the susceptor market for almost a decade." Pl.'s Mem. Opp'n Summ. J. at 812. Inline contends that Graphic's summary judgment does not address this aspect of Inline's challenge to Graphic's contracts.

The operative Complaint, even broadly construed, does not allege an exclusive dealing claim. Indeed, the word "exclusive" does not appear anywhere in the Complaint or in Inline's memorandum in opposition to Graphic's motion to dismiss in 2015. See generally Compl.; Pl.'s Mem. Opp'n Mot. Dism. [Docket No. 31].[10] The **[*1214]** only reference in the Complaint to requirements contracts are Inline's allegations that "[s]upplier needs are often met through longterm requirements and related contracts," and that "Graphic's competitors operating in the susceptor food packaging market, but not the paperboard food packaging market, such as Inline, are precluded from securing contracts with food company buyers who purchase susceptor and paperboard packaging through Graphic's discounted bundle because, in order to do so, Inline and other smaller competitors would **[**55]** need to sell their susceptor food packaging at a loss." Compl. ¶¶ 66, 84.

Moreover, even if Graphic's antitrust claim could be construed as alleging exclusive dealing, such a claim would still be subject to a price-cost test such as the discount attribution test because the bundled discounts are the alleged mechanism by which Graphic induced its customers to enter into the contracts. See *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 273 (3d Cir. 2012)* ("[I]n the context of exclusive dealing, the price-cost test may be utilized . . . when the plaintiff alleges that price is the vehicle of exclusion.") (citing *Concord Boat, 207 F.3d at 1060-63*). Inline's argument premised upon exclusive all-requirements contracts as anticompetitive conduct is rejected.

b. Tortious Interference Claims (Counts I and II)

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[10] In January 2018, Inline moved to amend its Complaint to add a claim for punitive damages. Among the changes in the Proposed Amended Complaint are 9 additional paragraphs in the "Discount Bundling" section. See Redlined Proposed Am. Compl. [Docket No. 504, Attach 2] ¶¶ 29-37. The added paragraphs describe Graphic's supply contracts as "bundled, exclusive requirements contracts" which gave Graphic the right to supply a customer for a multi-year term, and allege that "Graphic knew that the bundled requirements would tie up the vast majority of the market, thereby foreclosing Inline from selling susceptor food packaging to any contracted food company buyers, and that such a result would have anticompetitive effects." Id. ¶¶ 29, 35. However, exclusive dealing is not among the theories of liability listed in the Proposed Amended Complaint. Rather, the stated theories are: discount bundling, sham litigation and threats thereof, interference with business relationships, misappropriation and misuse of intellectual property, and baiting/submarine patent activities. See generally, id. Moreover, Inline's stated purpose in seeking to amend the Complaint was solely to plead punitive damages, not to add a claim for exclusive dealing. See Pl.'s Mem. Supp. Mot. Am. Compl. [Docket No. 381] at 1, 42.

Inline's tortious interference claims are predicated on Graphic's patent assertions and threats of litigation that allegedly impacted Nestlé's award of its Hot Pocket sleeve business in 2014 and 2016. Pl.'s Mem. Opp'n Summ. J. at 39. The contract claim relates to the 2014 award, and the prospective economic business advantage relates to both the 2014 and 2016 award. Id.

Graphic seeks summary judgment on these claims, arguing that state law tort liability cannot **[**56]** arise from a patent holder's good faith conduct in warning about potential litigation. Graphic further argues that the tortious interference with contract fails for the additional reason that there was no contract with which to interfere.

HN12[] To establish tortious interference with a contract under Minnesota law, a plaintiff must show: (1) the existence of a contract, (2) the defendant's knowledge of the contract, (3) the defendant's intentional procurement of the breach of contract, (4) the defendant acted without justification, and (5) damages. *Kjesbo v. Ricks, 517 N.W.2d 585, 588 (Minn. 1994)*.

HN13[] A claim for tortious interference with prospective economic advantage also has five elements: "(1) the existence of a reasonable expectation of economic advantage belonging to the plaintiff; (2) the defendant's knowledge of that expectation; (3) the defendant's wrongful interference with that expectation; (4) a reasonable probability that the plaintiff would have realized the expectation absent the defendant's conduct; and (5) damages." *Daum v.* ***[*1215]*** *Planit Sols., Inc., 619 F. Supp. 2d 652, 658 (D. Minn. 2009)* (citations omitted). Liability for a tortious interference with prospective economic advantage claim rests on whether the actor's conduct was improper. *Fox Sports Net N., L.L.C. v. Minn. Twins P'ship, 319 F.3d 329, 337 (8th Cir. 2003)*. "For purposes of this tort, improper means are those that **[**57]** are independently wrongful such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade or any other wrongful act recognized by statute or the common law." *Harman v. Heartland Food Co., 614 N.W.2d 236, 241 (Minn. Ct. App. 2000)*.

Graphic's assertions of patent rights did not constitute improper conduct because, as discussed above, the assertions were not objectively baseless. ***HN14***[] "Federal patent law preempts state-law tort liability for a patentholder's good faith communications asserting infringement of its patent and warning about potential litigation." *Matthews Int'l Corp. v. Biosafe Eng'g, LLC, 695 F.3d 1322, 1332-33 (Fed. Cir. 2012)*. "A plaintiff claiming that a patent holder has engaged in wrongful conduct by asserting claims of patent infringement must establish that the claims of infringement were objectively baseless." *Id. at 1332* (quoting *Globetrotter Software, Inc. v. Elan Computer Grp., Inc., 362 F.3d 1367, 1375 (Fed. Cir. 2004))*. Based on the absence of improper conduct, Graphic is entitled to summary judgment on the tortious interference claims.

Inline's tortious interference with contract claim fails for the additional, independent reason that no contract existed. Inline argues that a contract with Nestlé was created by the notification Inline received through the Ariba system stating that Inline had been awarded all lots in the auction. See First Watkins Decl. Exs. F, G [Docket Nos. 596, 597]. **[**58]** Inline contends that the terms of the contract are set forth in the Terms and Conditions circulated by Nestlé before the RFP process, as well as the supplemental terms that Nestlé circulated prior to the auction. Id. Exs. B, D [Docket Nos. 592, 594].

However, the Terms and Conditions for the RFP process include the following provisions which establish that a business award through the Ariba system does not constitute a final award or a contract:

> • Bid format — Initial bid will be a request for proposal. Nestlé reserves the right to go to a second phase ranking event.
> • Bidding Process — Bidding for this RFP package will be through an online bidding process. Nestlé reserves the right to continue negotiations post-RFP completion.
>
> • Supplier Selection and Participation — Each supplier must honor its final bid pricing. Additional volume may be added or removed due to changes in the business plan or as a result of allocation — it is expected that each supplier will support reasonable volume changes. Any business award is contingent upon successful completion of the Nestlé qualification Process. Business may be awarded individually or in aggregate based on competitive factors. **Lowest bid price [**59] does not guarantee a business award**.

• Contract — It is Nestlé's intent to draft a formal contract for the supply of cartons to each of these locations. The terms of the contract, as agreed to and signed by both parties, shall take precedence over anything specified in this RFP.

Hicks Decl. Ex. 55 [Docket No. 693] at GPI_00008791 (emphasis in original).

"[T]he mere acceptance of a bid does not necessarily constitute a contract. **[*1216]** When a bid requires certain formalities . . ., such as a written contract, or the furnishing of a bond, such language often indicates that even after acceptance of the bid no contract is formed until the requisite formality has been complied with." *City of Lonsdale v. NewMech Cos., Inc., No. 07-105, 2008 Minn. App. Unpub. LEXIS 31, 2008 WL 186251, at *7 (Minn. Ct. App. Jan. 22, 2008)* (internal citations and quotations omitted). Here, the RFP provision addressing the issue of "Contract" explicitly states Nestlé's "intent to draft a formal contract," the terms of which would "take precedence over anything specified in this RFP." Hicks Decl. Ex. 55 at GPI_00008794. This language clarifies that no contract was formed by the Ariba notification. Nestlé also "reserve[d] the right to continue negotiations post-RFP completion," and expressly stated that the "[l]owest bid price does not guarantee a business **[**60]** award." Id. at GPI_00008789-90.

Further, Nestlé included the following language in its emails to vendors when inviting them to participate in the RFP and auction through Ariba: "If you are not familiar with Ariba, Nestlé uses Ariba as an information gathering tool to help us run and collect information and price proposals from multiple suppliers in an efficient manner." Hicks Decl. Ex. 52 [Docket No. 690]; Wolfe Decl. Ex. C [Docket No. 603] (emphasis added). This language clearly expresses Nestlé's intent that the Ariba auction, by itself, would not create a binding contract. Thus, the record unequivocally establishes that Nestlé's award notification through the Ariba system was not a binding contract between Nestlé and Inline.

Summary judgment is granted to Graphic on Inline's tortious interference claims.

c. Trade Secrets Claim (Count III)

Graphic argues that it is entitled to summary judgment on Inline's trade secrets claim because there is no evidence that Inline's design meets Minnesota's standard for trade secret protection. Inline's trade secrets claim is based on allegations that in 2013, Graphic began producing susceptor food packaging for Weight Watchers' Smart Ones pizza that **[**61]** copies a design created by Inline. Compl. ¶ 53. Inline alleges that it shared the design with Heinz in 2008 under the condition that it remain confidential. Id.

HN15[] A party seeking protection under the Minnesota's Trade Secrets Act must show both the existence and the misappropriation of a trade secret. *Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890, 897 (Minn. 1983)*. For information to be considered a trade secret, a party must show that: (1) the information is not generally known or readily ascertainable; (2) the information derives independent economic value from being secret; and (3) the party made reasonable efforts to maintain the information's secrecy. *Wilson v. Corning, Inc., 171 F. Supp. 3d 869, 881-82 (D. Minn. 2016)* (citing *Electro-Craft, 332 N.W.2d at 899-901*).

Graphic argues there is no evidence that the design was a secret, that the design of a product available for purchase at a grocery store derived economic value from being secret, or that Inline took efforts to keep it secret. Inline responds that Inline's president, Jeffrey Watkin,s met with Richard Parysek of Heinz in Chicago in September 2008 and provided him with a prototype of the "Micro-Bake II" design under the express terms that it be treated as confidential. Second Watkins Decl. ¶¶ 1-3; Hicks Decl. Ex. 178 [Docket No. 889] (Pl's Resp. Interrogs.) Resp. No. 30. However, in his **[**62]** deposition testimony, Watkins could not recall whether it had **[*1217]** been communicated to Heinz that the design remain confidential. Hicks Decl. Ex. 25[Docket No. 663] ("Watkins Dep.") 306:9-23. Nor could Watkins recall what specific confidentiality agreements were in place with Heinz. Id. Similarly, a research and development employee from Heinz testified in his deposition that he was not aware of a confidentiality agreement between Heinz and Inline. Hicks Decl. Ex. 13 [Docket No. 651] ("Sitterly Dep.") 195:6-9. Thus, the Court will not consider the conclusory statements in Watkins' declaration. See *Ballard v. Heineman, 548 F.3d 1132, 1136 (8th Cir. 2008)* ("[C]onclusory affidavits devoid of specific allegations rebutting the moving party's evidence cannot defeat a summary judgment motion."); *Denson Int'l Ltd. v. Liberty Diversified Int'l, Inc., No. 12-3109, 2015 U.S. Dist.*

*LEXIS 116092, 2015 WL 5123262, at *5-6, n.4 (D. Minn. Sept. 1, 2015)* (granting summary judgment on trade secrets claim and disregarding conclusory allegations in corporate designee's declaration).

Other than Watkins' conclusory and inconsistent assertions that Inline took efforts to keep the information secret, Inline has not directed the Court to any evidence showing that the design was a secret, that Inline took efforts to maintain the design's secrecy, and that those efforts were reasonable. Moreover, Inline provides no **[**63]** analysis of damages for its trade secrets claim. Based on the absence of evidence for each element of the trade secrets claim, Graphic is entitled to summary judgment on this claim.

d. Damages Claims

Graphic also argues it is entitled to summary judgment on all damages claims because Inline cannot prove damages related to foreclosed customers or the Nestlé sales with a reasonable degree of certainty. This issue need not be discussed because all claims have been dismissed on other grounds.

3. Inline's Motion for Partial Summary Judgment

Inline moves for partial summary judgment on two issues: (1) that the Asserted Patents are invalid due to incorrect inventorship, and (2) on the liability elements of Inline's tortious interference with contract claim. Based on the conclusion that Graphic is entitled to summary judgment on Inline's antitrust and tortious interference claims, Inline's motion for partial summary judgment is denied.

B. Additional Motions, Pending Objection

Because summary judgment is granted to Graphic on all claims, the parties' Daubert motions, Graphic's Motion to Strike, and Inline's pending Objection are denied as moot.

IV. CONCLUSION

Based upon the foregoing, and all of the **[**64]** files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiff Inline Packaging, LLC's Motion for Partial Summary Judgment [Docket No. 540] is **DENIED**;

2. Inline's Motion to Exclude Expert Testimony [Docket No. 610] is **DENIED** as moot;

3. Defendant Graphic Packaging International, LLC's Motion for Summary Judgment [Docket No. 635] is **GRANTED**;

4. Graphic's Motion to Exclude Expert Testimony [Docket No. 773] is **DENIED** as moot;

5. Graphic's Motion to Strike Pleading [Docket No. 788] is **DENIED** as moot; and

[*1218] 6. Inline's Objection [Docket No. 538] to Magistrate Judge Leo I. Brisbois' March 8, 2018 Order [Docket No. 534] denying Inline's Motion to Amend to Plead Punitive Damages [Docket No. 504] is **DENIED** as moot.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/s/ Ann D. Montgomery

ANN D. MONTGOMERY

U.S. DISTRICT JUDGE

Dated: September 5, 2018.

In re Comcast Corp.

United States District Court for the Eastern District of Pennsylvania

September 5, 2018, Decided; September 5, 2018, Filed

CIVIL ACTION NO. 09-md-2034

Reporter

2018 U.S. Dist. LEXIS 150712 *; 2018-2 Trade Cas. (CCH) P80,504; 2018 WL 4252463

IN RE: COMCAST CORP. SET-TOP CABLE TELEVISION BOX ANTITRUST LITIGATION

Prior History: *In re Comcast Corp. Set-Top Cable TV Box Antitrust Litig., 311 F.R.D. 145, 2015 U.S. Dist. LEXIS 150160 (E.D. Pa., Nov. 5, 2015)*

Core Terms

Settlement, Subscribers, Notice, Box, Set-Top, class member, rented, class action, putative class member, Cable, certification, settlement agreement, parties, proposed claim, in-kind, proposed settlement, maximum, cash payment, negotiations, arbitration, rentals, preliminary approval, arbitration clause, rental fee, preliminarily, Consolidated, Benefits, television show, predominance, Customers

Counsel: **[*1]** For JAMES DEANNE, WILLIAM GONZALES, STATE OF WEST VIRGINIA, Appellants: DIANNE M. NAST, NASTLAW LLC, PHILADELPHIA, PA.

Judges: ANITA B. BRODY, J.

Opinion by: ANITA B. BRODY

Opinion

MEMORANDUM

Plaintiffs James E. Deanne, William Gonzales, John Martich, and Carrie D. Cooper (collectively, "Plaintiffs"), on behalf of themselves and the putative class members they seek to represent, have negotiated and agreed to a Fourth Amended Class Action Settlement Agreement ("Settlement Agreement") with Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., and Comcast Cable Communications Holdings, Inc. (collectively, "Comcast") in this multidistrict litigation ("MDL"). On February 22, 2018, Plaintiffs filed a Motion for Certification of a Settlement Class and Preliminary Approval of Class Action Settlement. Plaintiffs move for an order: (1) granting preliminary approval of the Settlement Agreement; (2) certifying a Settlement Class; (3) approving the proposed forms of Notice and directing Notice to the Settlement Class; (4) approving the proposed Claim Form; (5) appointing a Claims Administrator to disseminate Notice and receive and process Class Members' claims; and (6) setting a schedule **[*2]** for completion of the Settlement approval process. For the reasons set forth below, I will grant the motion in part and preliminarily approve the Settlement Agreement and preliminarily certify the Settlement Class. Because of deficiencies in the proposed Notice and proposed Claim Form, I will deny the portion of the motion that seeks approval of the proposed Notice and proposed Claim Form, the appointment of a Claims Administrator, and the establishment of a schedule for completion of the Settlement approval process. In order to cure these deficiencies, Plaintiffs will be ordered to submit an amended motion that only seeks approval of revised proposed forms of Notice, a revised proposed Claim Form, appointment of a Claims Administrator, and a revised proposed schedule for completion of the Settlement approval process.

I. BACKGROUND

Comcast is the largest provider of cable multi-channel video programming distribution in the United States, servicing over twenty-four million customers in thirty-nine states and the District of Columbia. Comcast provides cable services in exchange for a monthly fee based upon the level of service provided. Comcast provides two cable products, Basic Cable **[*3]** and Premium Cable. Customers who subscribe to Premium Cable pay higher monthly fees than those who subscribe only to Basic Cable. Customers who subscribe to Premium Cable have access to high-definition channels, On Demand, numerous specialty channels, an interactive programming guide, and the ability to purchase pay-per-view programs and additional channels, like HBO. Premium Cable customers must rent a cable television set-top box ("Set-Top Box") from Comcast in order to access Premium Cable. The Set-Top Box enables Premium Cable subscribers to view Premium Cable content and use Premium Cable services.

In 2008, individuals began filing lawsuits against Comcast, alleging that Comcast unlawfully tied the sale of Premium Cable to the rental of a Set-Top Box from Comcast. On June 17, 2009, the Judicial Panel on Multidistrict Litigation transferred and consolidated these lawsuits before me as a multidistrict litigation, pursuant to *28 U.S.C. § 1407*. *See* MDL Panel Transfer Order, ECF No. 1. In total, twenty-four civil actions were consolidated into this MDL.[1]

On November 23, 2009, Plaintiffs filed a First Amended **[*4]** Consolidated Class Action Complaint. *See* First Am. Consolidated Class Action Compl., ECF No. 26. On September 30, 2010, Plaintiffs filed a Second Amended Consolidated Class Action Complaint. *See* Second Am. Consolidated Class Action Compl., ECF No. 109. On June 10, 2011, Plaintiffs filed a Third Amended Consolidated Class Action Complaint. *See* Third Am. Consolidated Class Action Compl., ECF No. 122. On October 24, 2017, Plaintiffs filed the currently operative Fourth Amended Consolidated Class Action Complaint, alleging that Comcast's unlawful tying arrangement violates *Section 1 of the Sherman Act, 15 U.S.C. § 1*, the antitrust and consumer protection laws of Washington, the Business & Professions Code of California, and the Consumer Credit and Protection Act of West Virginia. *See* Fourth Am. Consolidated Class Action Compl., ECF No. 253 [hereinafter Compl.].

From the outset of the class action, Comcast sought arbitration of certain claims. On January 6, 2010, Comcast moved to compel arbitration. *See* Mot. Compel, ECF No. 35. On July 22, 2011, after the filing of Plaintiffs' Third Amended Consolidated Class Action Complaint, Comcast filed a new motion to compel arbitration. *See* Mot. Compel, ECF No. 127. During **[*5]** 2010 and 2011, the parties engaged in discovery only regarding arbitration.

From January 2012 through September 2012, the parties engaged in five formal mediation sessions before Thomas Rutter, Esquire, of ADR Options in Philadelphia. Thereafter, the parties continued to engage in settlement negotiations.

During the pendency of this class action, the Supreme Court of the United States issued two important opinions on arbitration—*AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)* and *American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013)*. While the parties awaited the Supreme Court's decisions in these cases, significant delay occurred in the litigation and the

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[1] On October 16, 2014, I entered an order approving and adopting the parties' stipulation of dismissal without prejudice of nineteen of the twenty-four civil actions. *See* Stipulation for Dismissal Order, ECF No. 201. On October 12, 2017, I entered an order voluntarily dismissing without prejudice the claims in another one of the twenty-four civil actions. *See* Voluntary Dismissal Order, ECF No. 252. On November 13, 2017, I entered an order approving the parties' stipulation of dismissal without prejudice of two additional actions. *See* Stipulation for Dismissal of Certain Pls. Order, ECF No. 258. Only two of the twenty-four civil actions remain pending: *Deanne v. Comcast Corp., et al.*, No. 09-3659 and *West Virginia ex rel. McGraw v. Comcast Corp., et al.*, No. 09-4671.

settlement negotiations. *See, e.g.* Stipulation and Order, ECF No. 114 (staying the case until the Supreme Court rendered its decision in *Concepcion*).

On November 12, 2014, Comcast filed a renewed motion to compel arbitration, reflecting the recent Supreme Court jurisprudence of *Concepcion* and *American Express*.[2] *See* Mot. Compel, ECF No. 209. This renewed motion to compel arbitration is pending. Although Comcast previously sought only to compel individual arbitration of the Sherman Act claim, it now seeks to compel individual arbitration of the Sherman Act and Washington state law claims.

Now, nearly nine years after the inception **[*6]** of this MDL and several failed settlement attempts, the parties have reached a Fourth Amended Class Action Settlement Agreement.

II. PROPOSED CLASS ACTION SETTLEMENT

A. Proposed Settlement Class

The parties define the Settlement Class as follows:

> All persons who:
>
> > (i) resided in and subscribed to Premium Cable in California, Washington, or West Virginia during the Class Period, or
> >
> > (ii) subscribed to Premium Cable in any state in the United States during the Class Period and elected to opt out of Comcast's arbitration clause as reflected in Comcast's records;
>
> and paid Comcast a rental fee for a Set-Top Box at any time during the Class Period.
>
> Excluded from the Settlement Class are: (i) those persons who opt out of this Agreement as identified in paragraph 6; (ii) all commercial account customers; (iii) Comcast officers, directors, or employees, any entity in which Comcast has a controlling interest, and the affiliates, legal representatives, attorneys, heirs, or assigns of Comcast; (iv) Class Counsel and Class Counsel's employees; and (v) Judge Anita B. Brody and members of her judicial staff of the United States District Court for the Eastern District of Pennsylvania, as well as any federal, **[*7]** state, or local governmental agency, and any judge, justice, or judicial officer presiding over this matter and members of their immediate families and judicial staffs.

Fourth Am. Class Action Settlement Agreement § 3.1, ECF No. 266 Ex. 1. [hereinafter Agreement].

B. Proposed Settlement

The Class Period covers all Class Members who rented a Set-Top Box anytime starting on or after January 1, 2005 and ending on or before the date of this Court's Order granting preliminary approval of the Settlement Agreement. *Id.* § 2.8. The Settlement is a claims-made settlement.[3] *Id.* § 9.1. Comcast will pay all claims made in the aggregate that do not exceed $15.5 million in value. *Id.* § 9.1.6. If Class Members submit more than $15.5 million worth of claims, then benefits will be distributed on a pro rata basis. *Id.* If Class Members submit less than $15.5 million worth of claims, then Comcast will retain the balance. *Id.*

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[2] Additionally, on October 27, 2015, Comcast filed a supplemental motion to compel arbitration that is also pending. *See* Supp. Mot. Compel, ECF No. 231.

[3] "A 'claims-made' settlement is a settlement that does not have a fixed settlement fund, but rather provides that the defendant will pay claims of class members who file them, usually up to some fixed ceiling." 4 William B. Rubenstein, Newberg on Class Actions § 13:7 (5th ed.).

All Class Members will be entitled to a cash payment and Current Subscribers[4] will have the choice of either a cash payment or in-kind relief. *Id.* § 9.1. Class Members will be entitled to a cash payment in accordance with the length of time they rented a Set-Top Box from Comcast, regardless of the number of Set-Top Boxes they **[*8]** rented, as follows:

9.1.1.1 If the Claimant rented at least one Set-Top Box from 1 to 35 months (0 to 3 years), the Claimant is entitled to ten U.S. dollars and no cents ($10.00) payable by check.

9.1.1.2 If the Claimant rented at least one Set-Top Box from 36 to 59 months (3 to 5 years), the Claimant is entitled to twelve U.S. dollars and fifty cents ($12.50) payable by check.

9.1.1.3 If the Claimant rented at least one Set-Top Box for 60 or more months (more than 5 years), the Claimant is entitled to fifteen U.S. dollars and no cents ($15.00) payable by check.

Id. § 9.1.1. Current Subscribers will be entitled to elect to receive in-kind relief in lieu of a cash payment. Current Subscribers will be entitled to in-kind relief in accordance with the length of time they rented a Set-Top Box from Comcast, and will receive additional in-kind relief if they rented more than one Set-Top Box, as follows:

9.1.2.1 If the Claimant rented at least one Set-Top Box from 1 to 35 months (0 to 3 years), the Claimant is entitled to select one of the following options:

(a) three (3) free months of Showtime (up to a maximum $30.00 value); or

(b) five (5) movie or television show rentals or purchases (up to a maximum **[*9]** $29.95 value).

<u>Plus</u>, if the Claimant rented more than one Set-Top Box, one (1) additional movie or television show rental or purchase (up to a maximum $5.99 value).

9.1.2.2 If the Claimant rented at least one Set-Top Box from 36 to 59 months (3 to 5 years), the Claimant is entitled to select one of the following options:

(a) three (3) free months of Showtime (up to a maximum $30.00 value) <u>and</u> one (1) movie or television show rental or purchase (up to a maximum $5.99 value) (a combined up to maximum $35.99 value); or

(b) six (6) movie or television show rentals or purchases (up to a maximum $35.94 value).

<u>Plus</u>, if the Claimant rented more than one Set-Top Box, two (2) additional movie or television show rentals or purchases (up to a maximum $11.98 value).

9.1.2.3 If the Claimant rented at least one Set-Top Box for 60 or more months (more than 5 years), the Claimant is entitled to select one of the following options:

(a) three (3) free months of Showtime (up to a maximum $30.00 value) <u>and</u> two (2) movie or television show rentals or purchases (up to a maximum $11.98 value) (a combined up to maximum $41.98 value); or

(b) seven (7) movie or television show rentals or purchases (up to a maximum **[*10]** $37.97 value).

<u>Plus</u>, if the Claimant rented more than one Set-Top Box, three (3) additional movie or television show rentals or purchases (up to a maximum $17.97 value).

Id. § 9.1.2.

III. DISCUSSION

A. Preliminary Approval of the Proposed Settlement[5]

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[4] Current Subscribers are "Class Members who are cable television subscribers of Comcast in the United States as of the date of the Notice provided . . . ." Agreement § 2.11.

[5] Because the Court will preliminarily certify the Settlement Class, the Court will address the fairness of the Settlement Agreement.

Plaintiffs move for preliminary approval of the Settlement Agreement. Under *Federal Rule of Civil Procedure 23(e)*, the settlement of a class action requires court approval. *Fed. R. Civ. P. 23(e)(2)*. Review of a proposed class action settlement typically proceeds in two stages. At the first stage, the parties submit the proposed settlement to the court, which must make a preliminary fairness evaluation. If the proposed settlement is preliminarily acceptable, the court then directs that notice be provided to all class members who would be bound by the proposed settlement in order to afford them an opportunity to be heard on, object to, and opt out of the settlement. *See Fed. R. Civ. P. 23(c)(3)*, *(e)(1)*, *(e)(5)*. At the second stage, after class members are notified of the settlement, the court holds a formal fairness hearing where class members may object to the settlement. *See Fed. R. Civ. P. 23(e)(2)*. If the court concludes that the settlement is "fair, reasonable and adequate," the settlement is given final approval. *Fed. R. Civ. P. 23(e)(2)*.

In deciding whether to grant preliminary approval, **[*11]** a court determines whether "the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval." *Mehling v. New York Life Ins., 246 F.R.D. 467, 472 (E.D. Pa. 2007)* (quoting *Thomas v. NCO Fin. Sys., No. 00-5118, 2002 U.S. Dist. LEXIS 14157, 2002 WL 1773035, at *5 (E.D. Pa. July 31, 2002))*; *Mack Trucks, Inc. v. Int'l Union, UAW, No. 07-3737, 2011 U.S. Dist. LEXIS 51514, 2011 WL 1833108, at *2 (E.D. Pa. May 12, 2011)* (stating same standard); *Tenuto v. Transworld Sys., Inc., No. 99-4228, 2001 U.S. Dist. LEXIS 17694, 2001 WL 1347235, at *1 (E.D. Pa. Oct. 31, 2001)* (same). Under *Rule 23*, a settlement falls within the "range of possible approval," if there is a conceivable basis for presuming that the standard applied for final approval—fairness, adequacy, and reasonableness—will be satisfied. *See Mehling, 246 F.R.D. at 472*. In making a preliminary determination, my first and primary concern is whether there are any obvious deficiencies that would cast doubt on the proposed settlement's fairness. I will also consider whether the negotiations occurred at arm's length, whether there was significant investigation of Plaintiffs' claims, and whether the proposed settlement provides preferential treatment to certain class members. *See In re Linerboard Antitrust Litig., 292 F. Supp. 2d 631, 638 (E.D. Pa. 2003)*.

1. Whether the Settlement is Fair, Reasonable and Adequate

a. There Are No Obvious Deficiencies to Cast Doubt on the Proposed Settlement's Fairness

If the parties were to continue to litigate rather **[*12]** than settle this action, Plaintiffs would face several significant hurdles including, the risk of dismissal or ultimate loss,[6] the possibility that some putative Class Members would have to arbitrate their claims,[7] and the risk that the Court would decline to certify the case or only certify regional subclasses.[8] In light of the risks attendant with this litigation, the Settlement Agreement provides sufficient compensation to putative Class Members. Because the Settlement Agreement does not raise any red flags and adequately compensates putative Class Member, there are no obvious deficiencies to cast doubt on the proposed Settlement Agreement's fairness.

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[6] There have been several lawsuits by cable television customers claiming that their cable television providers unlawfully tied the provision of cable services to the rental of set-top boxes. In a few of these lawsuits, Circuit Courts have rejected the claims. *See In re: Cox Enterprises, Inc., 871 F.3d 1093 (10th Cir. 2017)*; *Kaufman v. Time Warner, 836 F.3d 137 (2d Cir. 2016)*.

[7] Comcast still has pending motions to compel arbitration. In part, these motions seek to compel individual arbitration of the Sherman Act and Washington state law claims.

[8] For instance, in *In re Cox Enterprises, Inc. Set-Top Box Antitrust Litig., No. 09-ML-2048-C, 2011 U.S. Dist. LEXIS 149656, 2011 WL 6826813, at *16 (W.D. Okla. Dec. 28, 2011)*, a similar antitrust tying case against a different cable television provider, the district declined to certify a national class, holding that market power and antitrust injury could not be proven on a national level and would require multiple regional analyses.

b. The Proposed Settlement Appears to Be the Product of Good Faith, Extensive Arm's Length Negotiations

Whether a settlement arises from arm's length negotiations is a key factor in deciding whether to grant preliminary approval. *See* *Gates v. Rohm & Haas Co., 248 F.R.D. 434, 439, 444 (E.D. Pa. 2008)* (stressing the importance of arm's length negotiations in deciding to grant preliminary approval and highlighting the fact that the negotiations included "two full days of mediation before an experienced mediator"); *In re CIGNA Corp. Sec. Litig., No. 02-8088, 2007 U.S. Dist. LEXIS 51089, 2007 WL 2071898, at *2 (E.D. Pa. July 13, 2007)* (noting that a presumption of **[*13]** fairness exists where parties negotiate at arm's length, assisted by a mediator); *In re Auto. Refinishing Paint Antitrust Litig, MDL No. 1426, 2004 U.S. Dist. LEXIS 29163, 2004 WL 1068807, at *2 (E.D. Pa. May 11, 2004)* (preliminarily approving class action settlement that "was reached after extensive arms-length negotiation between very experienced and competent counsel"); 4 William B. Rubenstein, Newberg on Class Actions § 13:45 (5th ed.) ("[A] court will presume that a proposed class action settlement is fair when certain factors are present, particularly evidence that the settlement is the product of arms-length negotiation, untainted by collusion.").

Here, the parties participated in five formal mediation sessions before Thomas Rutter, Esquire, of ADR Options in Philadelphia. Thereafter, the parties participated in numerous additional robust settlement negotiations, and only reached this Fourth Amended Class Action Settlement Agreement after several failed attempts at settlement. Therefore, it appears that the proposed Settlement Agreement is the product of good faith, arm's length negotiations.

c. The Investigation of Plaintiffs' Claims Supports Preliminary Approval

Class Counsel has engaged in both formal discovery related to Comcast's motions to compel arbitration and informal discovery related to Set-Top Box technology **[*14]** and the antitrust tying allegations involved in the case.[9] The proposed Settlement was reached after repeated briefing on the threshold issue of whether Plaintiffs were compelled to individually arbitrate their claims—two full rounds of briefs prior to the Supreme Court's decisions in *Concepcion* and *American Express* and an additional round of briefs after these decisions.

By the time the parties reached this Settlement Agreement, Class Counsel had a strong grasp of the legal hurdles that Plaintiffs would face in order to succeed on their claims. Class Counsel understood that many of Plaintiffs' claims could have been dismissed at this early stage of the litigation if Comcast had prevailed on the arbitration issue. In addition, Class Counsel recognized the risk that the Court would decline to certify the case or only certify regional subclasses. Moreover, Class Counsel understood that Plaintiffs would face significant obstacles in proving their case-in-chief.

Because of the formal and informal discovery and the parties' multiple rounds of briefing on the arbitration issue, Class Counsel knew the strengths and weaknesses of the case during settlement negotiations with **[*15]** Comcast. Therefore, the investigation of Plaintiffs' claims supports preliminary approval of the proposed Settlement.

d. There Appears to Be No Preferential Treatment of Certain Settlement Class Members

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[9] Courts have preliminarily approved class action settlements where the litigation is in its early stages and limited or no formal discovery has occurred. *See, e.g.,* *In re Nat'l Football League Players Concussion Injury Litig., 821 F.3d 410, 436-37 (3d Cir. 2016)*, *as amended* (May 2, 2016) ("In some cases, informal discovery will be enough for class counsel to assess the value of the class' claims and negotiate a settlement that provides fair compensation."); *Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1239 (9th Cir. 1998)* (In regards to class action settlements, "'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." (quoting *In re Chicken Antitrust Litig. Am. Poultry, 669 F.2d 228, 241 (5th Cir. 1981))*.

The proposed Settlement does not appear to provide undue preferential treatment to any individual Class Member. The Settlement Agreement provides that all putative Class Members are entitled to the same amount of cash-payment in accordance with the length of time they rented a Set-Top Box from Comcast, regardless of the number of Set-Top Boxes they rented. These cash payments range from $10.00 to $15.00 depending on the length of time a Class Member rented a Set-Top Box. If a Class Member is a Current Subscriber to Comcast, the Class Member may opt to receive in-kind relief in lieu of a cash payment from Comcast. The in-kind relief for a Class Member who rented one Set-Top Box ranges in maximum value from $29.95 to $41.98 depending on the length of time a Class Member rented a Set-Top Box. If, however, a Current Subscriber rented more than one Set-Top Box, the in-kind relief for a Class Member ranges in maximum value from $35.94 to $59.95 depending on the length of time a Class Member **[*16]** rented a Set-Top Box.

On the surface, it may appear that Current Subscribers receive preferential treatment in the Settlement Agreement because unlike Former Subscribers,[10] they are entitled to in-kind relief with a higher maximum value than the cash payment available to Former Subscribers and they receive additional in-kind relief for the rental of more than one Set-Top Box. Take for example a Former Subscriber and a Current Subscriber who each rented two Set-Top Boxes for 60 or more months. The Former Subscriber would be entitled to a $15.00 cash payment. Whereas, the Current Subscriber would be entitled to the same $15.00 cash payment or to in-kind relief with a total maximum value of $59.95 in the form of three free months of Showtime and two movie or television show rentals, plus three additional movie or television show rentals or purchases because the Current Subscriber rented more than one Set-Top Box.

It may appear inequitable that a Former Subscriber only gets $15.00 in cash and a Current Subscriber may get up to $59.95 in Comcast services. In reality, however, Current Subscribers receive nothing more from Comcast than Former Subscribers because the actual cost to Comcast to **[*17]** provide higher-value in-kind relief to Current Customers is much less than the actual cost to Comcast to provide lower-value cash payments to putative Class Members. Thus, the $59.95 maximum value of in-kind relief that a Current Subscriber may receive only costs Comcast $15.00 or less. At best, the in-kind relief is equivalent to the cash payments available to all putative Class Members. Because all putative Class Members have the option to receive an equal cash payment based on the length of time they rented a Set-Top Box, I preliminarily find that the Settlement Agreement does not provide preferential treatment to any segment of the Settlement Class.

In sum, the Settlement Agreement falls within the range of possible approval. Therefore, I will grant preliminary approval of the Settlement Agreement.

B. Preliminary Certification of the Settlement Class

Plaintiffs move for certification of the Settlement Class. Although Plaintiffs move for final certification of the Settlement Class, at the preliminary approval stage of a class action settlement, a court may instead opt to preliminarily certify a settlement class pursuant to *Federal Rule of Civil Procedure 23(e)* and reserve the certification decision for a later date. *In re Nat'l Football League Players Concussion Injury Litig., 775 F.3d 570, 583-84 (3d Cir. 2014)* **[*18]** [hereinafter *NFL I*]. "[F]or uncertified settlement classes [this] makes sense, particularly from a notice perspective." *Id. at 584*. "Permitting a district court to manage a settlement class in this manner provides the flexibility needed to protect absent class members' interests and efficiently evaluate the issues of class certification and approval of a settlement agreement." *Id. at 586*. Accordingly, the Court opts to conduct a preliminary certification analysis at this time and reserves the certification decision until after Notice of the proposed Settlement Agreement has been sent to putative Class Members.

"This preliminary determination employs a 'less rigorous analysis than that necessary for final certification' because courts conduct a 'fairness hearing in order to issue a final class certification and approve the settlement.'" *In re: Shop-Vac Mktg. & Sales Practices Litig., MDL No. 2380, 2016 U.S. Dist. LEXIS 69345, 2016 WL 3015219, at *3*

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[10] Former Subscribers are "Class Members who were cable television subscribers of Comcast in the United States but are no longer subscribers." Agreement § 2.14.

(M.D. Pa. May 26, 2016) (quoting In re: Amtrak Train Derailment, MDL No. 2654, 2016 U.S. Dist. LEXIS 46552, 2016 WL 1359725, at *2, *4 (E.D. Pa. Apr. 6, 2016)); *see also* NFL I, 775 F.3d at 586 (noting that when the district court made a preliminary determination on class certification, "it reserved the 'rigorous analysis'" on certification until after the fairness hearing). In making this preliminary certification determination a court examines whether "the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." Manual for Complex Litigation § 21.632 (4th ed. 2004); In re: Shop-Vac, 2016 U.S. Dist. LEXIS 69345, 2016 WL 3015219, at *3 (same).

Plaintiffs seek certification of a Rule 23(b)(3) settlement class. Federal Rule of Civil Procedure 23(a) contains four threshold requirements for certification:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of **[*19]** the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Rule 23(b)(3) imposes two additional requirements: "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[11] Fed. R. Civ. P. 23(b)(3). The Rule 23(b)(3) requirements are commonly referred to as predominance and superiority. Sullivan v. DB Investments, Inc., 667 F.3d 273, 296 (3d Cir. 2011) (en banc).

"[T]he party proposing class-action certification bears the burden of affirmatively demonstrating by a preponderance of the evidence her compliance with the requirements of Rule 23." Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015), *as amended* (Apr. 28, 2015). However, the existence of a settlement means that "certain Rule 23 considerations . . . are not applicable." Rodriguez v. Nat'l City Bank, 726 F.3d 372, 378 (3d Cir. 2013). For example, because a settlement obviates the need for trial, concerns regarding the manageability of a Rule 23(b)(3) class disappear. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619-20, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); *see also* Sullivan, 667 F.3d at 297 (noting that "concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class"); In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 529 (3d Cir. 2004) ("[C]oncerns with regards to case manageability that arise with litigation classes are not **[*20]** present with settlement classes, and thus those variations are irrelevant to certification of a settlement class" (citing Amchem, 521 U.S. at 620)).

1. Rule 23(a) Requirements

a. Numerosity

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001). The parties represent that there are over 3.5 million proposed Class Members. Accordingly, Plaintiffs satisfy the numerosity requirement of Rule 23(a).

b. Commonality

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[11] Ascertainability is typically a "necessary prerequisite" of a Rule 23(b)(3) class. Byrd v. Aaron's Inc., 784 F.3d 154, 162 (3d Cir. 2015), *as amended* (Apr. 28, 2015). In this case, however, the Third Circuit has concluded that ascertainability is not a proper basis to deny certification. *See* ORDER of USCA, ECF No. 241.

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. To satisfy commonality, class members' claims "must depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*. Commonality may be shown by "demonstrat[ing] that the class members 'have suffered the same injury.'" *Id.* (quoting *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))*. A single common question or fact is sufficient to satisfy the commonality requirement **[*21]** of *Rule 23(a)(2)*. *Wal-Mart, 564 U.S. at 359*; *Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)*.

Here, Plaintiffs allege the same harm from the same illegal conduct: the payment of supracompetitive prices as a result of Comcast's unlawful tying of its Premium Cable to the rental of a Set-Top Box. Whether Comcast engaged in such conduct and Plaintiffs suffered harm as a result are common questions of law and fact. Thus, commonality exists.

c. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. The typicality inquiry asks "whether the named plaintiffs' claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class." *Beck v. Maximus, Inc., 457 F.3d 291, 295-96 (3d Cir. 2006)* (quoting *Baby Neal, 43 F.3d at 55*).

The Third Circuit has "set a low threshold for satisfying" the typicality requirement. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3d Cir. 2001)*, *as amended* (Oct. 16, 2001). The typicality requirement "acts as a bar to class certification only when 'the legal theories of the named representatives potentially conflict with those of the absentees.'" *Id.* (quoting *Georgine v. Amchem Prod., Inc., 83 F.3d 610, 631 (3d Cir. 1996)*, *aff'd sub nom.*, *Amchem Prods. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*. "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." **[*22]** *Newton, 259 F.3d at 183-84*.

Named Plaintiffs allege that they and all putative Class Members suffered economic damages from Comcast's illegal tying arrangement. Specifically, Plaintiffs allege that Comcast unlawfully tied the sale of its Premium Cable to the rental of a Comcast Set-Top Box, and that this tying arrangement enabled Comcast to reap supracompetitve profits from Plaintiffs and all putative Class Members who were forced to pay rental fees to Comcast to enjoy Premium Cable services. Plaintiffs satisfy the typicality requirement because the claims of the named Plaintiffs and the putative Class Members involve the same conduct by Comcast.

d. Adequacy of Representation

The final prong of *Rule 23(a)* requires that "the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. "The adequacy inquiry under *Rule 23(a)(4)* serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem, 521 U.S. at 625*. The adequacy of representation requirement addresses two components: (1) the qualifications of class counsel; and (2) the interests and incentives of the class representatives. *Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 181 (3d Cir. 2012)*.

i. Adequacy of Class Counsel

When examining settlement classes, courts "have emphasized the special need to **[*23]** assure that class counsel: (1) possessed adequate experience; (2) vigorously prosecuted the action; and (3) acted at arm's length from the defendant."[12] *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995)*.

Plaintiffs seek the appointment of Dianne M. Nast, Kenneth A. Wexler and, Stephen A. Corr as Co-Lead Class Counsel. Ms. Nast, Mr. Wexler, and Mr. Corr have been involved in this litigation since its inception and were among the first counsel to file individual complaints before the creation of this MDL. Each has played an integral role in organizing and pursuing this MDL on behalf of Plaintiffs and the putative Settlement Class. Ms. Nast, Mr. Wexler, and Mr. Corr. have extensive knowledge of ***antitrust law***, complex litigation and class action practice, and have substantial experience handling class actions and multidistrict litigations. *See* Pls.' Mem., ECF No. 266 Exs. 3, 4, and 5.

Throughout the course of this litigation, Ms. Nast, Mr. Wexler, and Mr. Corr have identified and investigated potential claims in the action. In addition, in recognition of two important Supreme Court opinions on arbitration, *Concepcion* and *American Express*, they have on several occasions re-examined the strength of their legal claims.

Moreover, **[*24]** Ms. Nast, Mr. Wexler, and Mr. Corr have vigorously prosecuted the action at arm's length from Comcast. They have engaged in adversarial motions practice, specifically related to the arbitrability of claims of putative Class Members and participated in five formal mediation sessions before Thomas Rutter, Esquire, of ADR Options in Philadelphia, as well as other negotiation sessions with Comcast.

Accordingly, Ms. Nast, Mr. Wexler, and Mr. Corr have adequately represented the putative class.

ii. Adequacy of Class Representatives

"A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem, 521 U.S. at 625-26* (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977))*. "[T]he linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class." *Dewey, 681 F.3d at 183*. The purpose of the adequacy requirement is to identify intra-class conflicts that may prevent the representative plaintiffs from adequately representing the entire class. *Id. at 183-4*. "An intra-class conflict will not necessarily prevent certification if the settlement agreement contains sufficient structural protections to ensure that the interests of the class will be adequately **[*25]** represented despite the conflict." *Id. at 185*.

Only a fundamental intra-class conflict will violate *Rule 23(a)(4)*. *Id. at 184*. "A fundamental conflict exists where some [class] members claim to have been harmed by the same conduct that benefitted other members of the class." *Id. at 184*. (quoting *Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003))*. Additionally, "[a] conflict concerning the allocation of remedies amongst class members with competing interests can be fundamental." *Id.* Thus, a court must address two questions to determine whether the representative plaintiffs adequately represent the putative class: "(1) whether an intra-class conflict exists; and if so, (2) whether that conflict is 'fundamental.'" *Id.*

Plaintiffs James E. Deanne, William Gonzales, John Martich, and Carrie D. Cooper are adequate representatives of the proposed Settlement Class. The named Plaintiffs include both Current Subscribers and Former Subscribers

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[12] In 2003, Congress amended *Rule 23* to include subdivision 23(g), which provides a non-exhaustive list of factors for a court to consider when scrutinizing the adequacy of class counsel's representation. *See* *Fed R. Civ. P. 23(g)*. The addition was meant to transfer the analysis of class counsel's representation from *Rule 23(a)(4)*, where it had little textual support, to *Rule 23(g)*. *See* 1 William B. Rubenstein, Newberg on Class Actions § 3.80 (5th ed.). *Rule 23(g)* "builds on" the existing *23(a)(4)* jurisprudence instead of "introducing an entirely new element into the class certification process." *See* *Fed. R. Civ. P. 23(g)* advisory committee's notes (2003 amendments). Accordingly, the Third Circuit continues to apply the factors relied on prior to the addition of *Rule 23(g)*. *See* *In re Cmty. Bank of N. Va., 622 F.3d 275, 304-05 (3d Cir. 2010)*; *In re Cmty. Bank of N. Va., 418 F.3d 277, 307 (3d Cir. 2005)*. Class Counsel's representation of the Class satisfies both *Rule 23(a)(4)* and *23(g)*.

from Washington, California, and West Virginia. No fundamental intra-class conflict exists because Mr. Deanne, Mr. Gonzales, Mr. Martich, and Ms. Cooper share the same strong interest in establishing Comcast's liability and seek the same type of damages for the same alleged anticompetitive conduct.

2. *Rule 23(b)(3)* Requirements

a. Predominance

Under *Rule 23(b)(3)*, an opt-out **[*26]** class may be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." *Fed. R. Civ. P. 23(b)(3)*. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem, 521 U.S. at 623*, to determine whether the proposed class "'would achieve economies of time, effort, and expense,'" *id. at 615* (quoting *Fed R. Civ. P. 23(b)(3)* advisory committee's notes (1966 amendments)). The predominance inquiry is a more stringent version of the commonality analysis; common questions must drive the litigation. *See* *Danvers Motor Co. v. Ford Motor Co., 543 F.3d 141, 148 (3d Cir. 2008)* ("[T]he commonality requirement 'is subsumed by the predominance requirement.'" (quoting *Georgine, 83 F.3d at 626*)); *Warfarin, 391 F.3d at 528* (noting the predominance requirement to be "far more demanding" than the commonality requirement).

"[T]he focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan, 667 F.3d at 298*. Although it is sometimes necessary to determine whether the elements of each claim can be proved through evidence common to the class, *Sullivan, 667 F.3d at 306*, a settlement "obviates the difficulties inherent in proving the elements of varied claims at trial **[*27]** or in instructing a jury on varied state laws," *Sullivan 667 F.3d at 304*. "[W]hen dealing with variations in state laws, the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those variations are irrelevant to certification of a settlement class." *Warfarin, 391 F.3d at 529* (citing *Amchem, 521 U.S. at 620*). Additionally, because certification of a settlement class is sought, a court is "not as concerned with formulating some prediction as to how [an] element of a Sherman Act violation would play out at trial, for the proposal is that there be no trial." *In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 269 (3d Cir. 2009)* (citations and internal quotation marks omitted).

Here, the allegation is that Comcast engaged in a common course of conduct—it unlawfully tied the sale of its Premium Cable to the rental of a Comcast Set-Top Box—and putative Class Members suffered the same injury—the payment of supracompetitve prices for their Set-Top Boxes. Accordingly, Plaintiffs satisfy the predominance requirement.

b. Superiority

Rule 23(b)(3) requires "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. "The superiority requirement 'asks the court to balance, in terms of fairness and efficiency, the* **[*28]** merits of a class action against those alternative available methods of adjudication.'" *Warfarin, 391 F.3d at 533-34* (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 316 (3d Cir. 1998))*. In determining whether a settlement class action is superior, a court "consider[s] the class members' interests in individually controlling litigation, the extent and nature of any litigation, the desirability or undesirability of concentrating the litigation, and the likely difficulties in managing a class action." *In re Nat'l Football League Players Concussion Injury Litig., 821 F.3d 410, 434-35 (3d Cir. 2016)*, as amended (May 2, 2016) [hereinafter *NFL II*] (citing *Fed. R. Civ. P. 23(b)(3)(A)-(D)*).

The parties indicate that there are at least 3.5 million putative Class Members with low-dollar-value claims. Although there are numerous putative Class Members, there are a very small number of individual lawsuits pending against

Comcast. "[I]ndividual consumer class members have little interest in 'individually controlling the prosecution or defense of separate actions' because each consumer has a very small claim in relation to the cost of prosecuting a lawsuit." *Warfarin, 391 F.3d at 534* (quoting *Fed. R. Civ. P. 23(b)(3)(A)*). These costs are especially burdensome in an antitrust lawsuit. *See* ECF Nos. 128, 133. The small number of lawsuits also indicates a lack of interest in individually bringing claims. *See* *Warfarin, 391 F.3d at 534*. "[F]rom the consumers' standpoint, a class action facilitates **[*29]** spreading of the litigation costs among the numerous injured parties and encourages private enforcement of the statutes." *Id.* Moreover, settlement on a classwide basis is superior to individual adjudication because it provides putative Class Members with prompter compensation. Accordingly, Plaintiffs satisfy the superiority requirement.

In conclusion, I will preliminarily certify the Settlement Class because the Settlement Class appears to satisfy the requirements of *Rule 23*.

C. The Proposed Form and Manner of Notice

Under *Rule 23(e)(1) of the Federal Rules of Civil Procedure*, a district court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." *Fed. R. Civ. P. 23(e)(1)*. For classes certified under *Rule 23(b)(3)*, a court must also ensure that class members receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Fed. R. Civ. P. 23(c)(2)(B)*; *see* *Amchem, 521 U.S. at 617*. *Rule 23(c)(2)(B)* provides:

> The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that **[*30]** the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under *Rule 23(c)(3)*.

Fed. R. Civ. P. 23(c)(2)(B). "In addition to the requirements of *Rule 23*, due process further requires that notice be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *NFL II, 821 F.3d at 435* (quoting *Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950))*.

Plaintiffs suggest several different means to provide Notice of the proposed Settlement to putative Class Members. Comcast will provide a summary Notice to Current Subscribers in their monthly Comcast bill. *See* Agreement Ex. C. Notice by publication will also be provided in the following nationwide publications: Parade, People, Better Homes & Gardens, National Geographic, Sports Illustrated, and Reader's Digest. *See* Agreement Ex. D. Additionally, an Internet settlement website will be established to display the following: (1) a long-form Notice of the Settlement Agreement; (2) contact information for Co-Lead Class Counsel, in the form of firm name, attorney name, a phone number, address, e-mail address, and website address; (3) a **[*31]** complete copy of the Settlement Agreement; (4) frequently asked questions; and (5) a Claim Form that can be submitted electronically. All Notice sent to Current Subscribers in their monthly Comcast bill and disseminated via national publications will direct putative Class Members to the settlement website. The proposed manner of disseminating Notice appears to satisfy the requirements of *Rule 23* and due process. *See* *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1985)* ("It is well settled that in the usual situation first-class mail and publication in the press fully satisfy the notice requirements of both *Fed. R. Civ. P. 23* and the *due process clause*."). The form and content of the proposed Notice and the proposed Claim Form contain several flaws and do not appear to satisfy either *Rule 23* or due process. Some of the most significant deficiencies in the Notice and Claim Form are set forth below.

1. Proposed Summary Notice to Current Subscribers in their Monthly Bill

The proposed Notice to Current Subscribers in their monthly bill contains significant deficiencies, including:

a. An Inaccurate Definition of the Settlement Class

The proposed Notice defines the Settlement Class as "all persons who, *or entities which*: (a) *reside within* the states of California, Washington, or West Virginia **[*32]** or have opted out of Comcast's arbitration clause as recorded within the arbitration clause opt-out list kept at Comcast's offices; and (b) have paid Comcast a rental fee for a Set-Top Box." Agreement Ex. C (emphasis added). The italicized portions of the definition of the Settlement Class in the Notice do not comport with the following definition of the Settlement Class provided in the Settlement Agreement:

> All persons who:
>
> > (i) resided in and subscribed to Premium Cable in California, Washington, or West Virginia during the Class Period, or
> >
> > (ii) subscribed to Premium Cable in any state in the United States during the Class Period and elected to opt out of Comcast's arbitration clause as reflected in Comcast's records;
>
> and paid Comcast a rental fee for a Set-Top Box at any time during the Class Period.

Agreement § 3.1. Despite what is stated in the proposed Notice, putative Class Members are persons and not entities and putative Class Members don't currently have to reside in California, Washington or West Virginia—they had to reside there at any time during the Class Period and had to subscribe to Premium Cable during the time they lived there.

b. An Incorrect Statement Regarding Incentive Awards [*33]

The proposed Notice states that the Court will consider whether to approve incentive awards to three named Plaintiffs even though there are four named Plaintiffs.

c. A Failure to Inform Putative Class Members of the Settlement Cap

The proposed Notice does not inform putative Class Members that Comcast will only pay all claims made in the aggregate that do not exceed $15.5 million in value.

2. The Proposed Summary Notice in Nationwide Publications

The proposed Notice to be disseminated in nationwide publications contains significant deficiencies, including:

a. An Inaccurate Definition of the Settlement Class

The proposed Notice defines the Settlement Class as "all persons who, *or entities which*: (a) *reside within* the states of California, Washington, or West Virginia or have opted out of Comcast's arbitration clause as recorded within the arbitration clause opt-out list kept at Comcast's offices; and (b) have paid Comcast a rental fee for a Set-Top Box *from the start of the Class Period to the Effective Date*." Agreement Ex. D (emphasis added). The italicized portions of the definition of the Settlement Class in the Notice do not comport with the following definition of the Settlement Class **[*34]** provided in the Settlement Agreement:

> All persons who:
>
> > (i) resided in and subscribed to Premium Cable in California, Washington, or West Virginia during the Class Period, or
> >
> > (ii) subscribed to Premium Cable in any state in the United States during the Class Period and elected to opt out of Comcast's arbitration clause as reflected in Comcast's records;
>
> and paid Comcast a rental fee for a Set-Top Box at any time during the Class Period.

Agreement § 3.1. Despite what is stated in the proposed Notice, putative Class Members are persons and not entities and putative Class Members don't currently have to reside in California, Washington or West Virginia—they had to reside there at any time during the Class Period and had to subscribe to Premium Cable during the time they lived there. Moreover, putative Class Members did not have to rent a Set-Top Box during from the start of the Class Period to the Effective Date—they had to rent a Set-Top Box at any time during the Class Period.

b. A Failure to Inform Putative Class Members of the Settlement Cap

The proposed Notice does not inform putative Class Members that Comcast will only pay all claims made in the aggregate that do not exceed $15.5 million in **[*35]** value.

3. The Proposed Long-Form Notice on the Settlement Website

The proposed Notice to be published on the settlement website contains significant deficiencies, including:

a. An Inaccurate Description of the Settlement Class

The introduction to the proposed Notice states: "The Settlement offers a cash benefit *and/or* credits to *current* Comcast Customers who *reside in* the States of California, Washington, or West Virginia or who opted-out of Comcast's arbitration clause as recorded within the arbitration clause opt-out list kept at Comcast's offices, depending on the period of time each customer rented a Set-Top Box from Comcast and *how many Set-Top Boxes each customer rented.*" Agreement Ex. E, at 1 (emphasis added). The italicized portions of the definition of the Settlement Class in the Notice do not comport with the following definition of the Settlement Class provided in the Settlement Agreement:

> All persons who:
>
> > (i) resided in and subscribed to Premium Cable in California, Washington, or West Virginia during the Class Period, or
> >
> > (ii) subscribed to Premium Cable in any state in the United States during the Class Period and elected to opt out of Comcast's arbitration clause as reflected **[*36]** in Comcast's records;
>
> and paid Comcast a rental fee for a Set-Top Box at any time during the Class Period.

Agreement § 3.1. Despite what is stated in the proposed Notice, Current Subscribers either receive a cash benefit or in-kind relief. Putative Class Members don't currently have to reside in California, Washington or West Virginia—they had to reside there at any time during the Class Period and had to subscribe to Premium Cable during the time they lived there. Moreover, putative Class Members include Former Subscribers who receive the same amount of compensation regardless of the number of Set-Top Boxes they rented.

b. An Inaccurate Statement of the Available Compensation

The introduction to the proposed Notice contains a box titled "Your Legal Rights And Options In This Settlement," which includes the statement that a Class Member may "Submit a Claim Form seeking cash payment *and/or* other benefits." Agreement Ex. E, at 1 (emphasis added). The italicized portion is inaccurate because Current Subscribers either receive a cash payment or in-kind relief and Former Subscribers only receive a cash payment.

c. A Failure to Inform Current Subscribers Who Select In-Kind Relief of the Risk of Receiving [*37] No Compensation if they Leave Comcast Prior to Distribution of Benefits

In Section 9, the proposed Notice fails to inform Current Subscribers that it may take a considerable amount of time before distribution of benefits, and if they select in-kind relief and are no longer a Comcast subscriber at the time of distribution, then they will receive no compensation.

d. An Inappropriate Statement Regarding Arbitration

In Section 14, the proposed Notice states: "Unless you have opted out of Comcast's arbitration clause and class action ban, you *must arbitrate* your claim if you exclude yourself from the Settlement and Settlement Class." Agreement Ex. E § 14 (emphasis added). Because the Court has not ruled on any of Comcast's motions to compel arbitration, the italicized portion should be changed from "must arbitrate" to "may have to arbitrate."

e. An Improper Statement Regarding Certification

In Section 20, the proposed Notice states: "[T]he Court will hold a public hearing . . . to determine whether the Settlement Class *was properly certified* . . . ." Agreement Ex. E § 20 (emphasis added). Because the Court reserves decision on certification of the Settlement Class until after the fairness hearing, the italicized potion should be **[*38]** changed from "was properly certified" to "should be certified."

4. The Proposed Claim Form

The proposed Claim Form contains significant deficiencies, including:

a. A Failure to Define the Settlement Class and the Class Period

The proposed Claim Form does not provide a definition of the Settlement Class and the Class Period.[13]

b. An Imprecise Request for Subscriber Information

Part 2 of the proposed Claim Form, labeled "Subscriber Information," requires a Class Member to list his/her "Service Address (where you receive(d) Comcast service, if different from Mailing Address)." Agreement Ex. A § 2. Part 2 assumes that a Class Member only received Comcast service at one address during the thirteen-year Class Period. In thirteen years, however, many Class Members may have received Comcast service at multiple **[*39]** locations.

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[13] As discussed, the proposed forms of Notice and the Claim Form fail to properly describe the Settlement Class and the benefit amount each Class Member may be entitled to. The Settlement Agreement defines the Settlement Class as:

> All persons who:
>
> > (i) resided in and subscribed to Premium Cable in California, Washington, or West Virginia during the Class Period, or
> >
> > (ii) subscribed to Premium Cable in any state in the United States during the Class Period and elected to opt out of Comcast's arbitration clause as reflected in Comcast's records;
>
> and paid Comcast a rental fee for a Set-Top Box at any time during the Class Period.

Agreement § 3.1. The Settlement Agreement also provides that the amount of benefit that a Class Member may receive is determined by the length of time that the Class Member rented a Set-Top Box. Therefore, the Notice and Claim Form should explain that a Class Member who paid Comcast a rental fee for a Set-Top Box will receive credit: (1) for each month that s/he lived in any of the following states, California, Washington, or West Virginia, during the Class Period and subscribed to Premium Cable; and/or (2) for each month that s/he resided in any state in the United States during the Class Period and subscribed to Premium Cable, but elected to opt out of Comcast's arbitration clause. For instance, a person who subscribed to Premium Cable in California for 24 months during the Class Period and later subscribed to Premium Cable in Washington for an additional 12 months during the Class Period would be entitled to receive a benefit amount in accordance with a Class Member who rented a Set-Top Box for 36 months.

c. An Improper Organization of Information

Part 2 of the proposed Claim Form, labeled "Subscriber Information," contains information about the validity of Settlement Credits. This information should be moved to Part 3 labeled "Benefits."

d. A Failure to Inform Current Subscribers Who Select In-Kind Relief of the Risk of Receiving No Compensation if they Leave Comcast Prior to Distribution of Benefits

Part 3 of the proposed Claim Form, labeled "Benefits," fails to inform Current Subscribers that it may take a considerable amount of time before distribution of benefits, and if they select in-kind relief and are no longer a Comcast subscriber at the time of distribution, then they will receive no compensation.

e. A Failure to Clearly Present the Compensation Available to Each Class Member

Part 3 of the proposed Claim Form, labeled "Benefits," requires a Class Member to select the type of compensation that s/he would like to receive, but provides instructions that are extremely difficult to understand and follow. Because of this confusion, there is a strong likelihood that some putative Class Members will select invalid benefit options.

f. A Failure to Properly Define the Length of [*40] Time a Class Member had to Rent a Set-Top Box in Order to Receive Maximum Compensation

Part 3 of the proposed Claim Form, labeled "Benefits," provides that a Class Member is eligible for maximum compensation if s/he "rented a Set-Top Box from 60 to 96 months (5 to 8 years)." The Settlement Agreement, however, provides maximum compensation to any putative Class Member who rented a Set-Top Box "for 60 or more months (more than 5 years)." Agreement § 9.1.

g. A Failure to Narrowly Tailor the Certification Requirements

Part 4 of the proposed Claim Form, labeled "Certification," requires each Class Member to declare under penalty of perjury that s/he is a Class Member who rented a Set-Top Box during the Class Period. Additionally, all Class Members are required to "enclos[e] a true and correct copy/copies of one of the following as proof of payments of the rental fee(s) referenced in Part 3: [] Cancelled check(s) reflecting payment; <u>or</u> [] Credit card or bank statement(s) reflecting payment; <u>or</u> [] Invoice from Comcast reflecting rental fee(s) for set-top Boxes." Agreement Ex. A § 4. This enclosure requirement should not apply to Current Subscribers because Comcast should already have proof in its possession **[*41]** that these customers rented Set-Top Boxes. As to Former Subscribers, the enclosure requirement should be more narrowly tailored to state that Class Members are required to enclose a true and correct copy of one of the following as proof of payments of the rental fee(s) referenced in Part 3: [] A Cancelled check reflecting payment to Comcast; <u>or</u> [] A Credit card or bank statement reflecting payment to Comcast; <u>or</u> [] An Invoice from Comcast reflecting a rental fee charge for one or more Set-Top Box.

Because the proposed Notice does not meet the requirements of *Rule 23* and due process, I cannot approve the proposed Notice.

IV. CONCLUSION

For the reasons set forth above, I will grant the motion in part and preliminarily approve the Settlement Agreement and preliminarily certify the Settlement Class. Because of deficiencies in the proposed Notice and proposed Claim

Form, I will deny the portion of the motion that seeks approval of the proposed Notice and proposed Claim Form, the appointment of a Claims Administrator, and the establishment of a schedule for completion of the Settlement approval process. In order to cure these deficiencies, Plaintiffs will be ordered to submit an amended motion that **[*42]** only seeks approval of revised proposed forms of Notice, a revised proposed Claim Form, appointment of a Claims Administrator, and a revised proposed schedule for completion of the Settlement approval process.

/s/ Anita B. Brody

ANITA B. BRODY, J.

ORDER

AND NOW, this 5th day of September, 2018, it is **ORDERED** that Plaintiffs' Motion for Certification of a Settlement Class and Preliminary Approval of a Class Action Settlement (ECF No. 266) is **GRANTED in part** and **DENIED in part** as follows:

- The Court preliminarily approves the Settlement Agreement and preliminarily certifies the Settlement Class.
- The Court denies the portion of the motion that seeks approval of the proposed Notice and proposed Claim Form, the appointment of a Claims Administrator, and the establishment of a schedule for completion of the Settlement approval process.

It is further **ORDERED** that, on or before **November 5, 2018**, Plaintiffs must submit an amended motion that only seeks approval of revised proposed forms of Notice, a revised proposed Claim Form, appointment of a Claims Administrator, and a revised proposed schedule for completion of the Settlement approval process.

/s/ Anita B. Brody

ANITA B. BRODY, J.

LexisNexis®

In re Packaged Seafood Prods. Antitrust Litig.

United States District Court for the Southern District of California

September 5, 2018, Decided; September 5, 2018, Filed

Case No.: 15-MD-2670 JLS (MDD)

Reporter

338 F. Supp. 3d 1079 *; 2018 U.S. Dist. LEXIS 151388 **; 2018-2 Trade Cas. (CCH) P80,562; 2018 WL 4222677

IN RE: PACKAGED SEAFOOD PRODUCTS ANTITRUST LITIGATION

Prior History: *In re Packaged Seafood Prods. Antitrust Litig., 148 F. Supp. 3d 1375, 2015 U.S. Dist. LEXIS 166042 (J.P.M.L., Dec. 9, 2015)*

Core Terms

parens patriae, attorney general, cause of action, authorizes, unjust enrichment, injunctive relief, Antitrust, argues, allegations, bring an action, declaratory relief, amended complaint, standing to bring, packaged, district court, quasi-sovereign, standing requirement, anti trust law, state law, Clayton Act, cases, supplemental jurisdiction, civil action, bring suit, courts, Reply, Sherman Act, residing, seafood, brings

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(1)* challenges a court's subject matter jurisdiction. Federal district courts are courts of limited jurisdiction that may not grant relief absent a constitutional or valid statutory grant of jurisdiction and are presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears. The plaintiff bears the burden of establishing jurisdiction.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Fed. R. Civ. P. 12(b)(1) motions may challenge jurisdiction facially or factually. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. To adjudicate the factual challenge, the court may review evidence beyond the complaint without converting the *Rule 12(b)(1)* motion into one for summary judgment. Once the moving party makes a factual challenge by bringing evidence before the court, the opposing party must furnish its own affidavits or other evidence to establish subject matter jurisdiction. Without assuming the truth of the complaint's factual allegations, the court nonetheless resolves factual disputes in favor of the non-moving party. Alternatively, in a facial challenge, the defendant asserts the insufficiency of the complaint's allegations to invoke federal jurisdiction as a matter of law. To adjudicate the facial challenge, the Court assumes the truth of the allegations in the complaint and draws all reasonable inferences in favor of the plaintiff.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN3[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 12(b)(6) permits a party to raise by motion the defense that the complaint fails to state a claim upon which relief can be granted, generally referred to as a motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and sufficient facts in light of *Fed. R. Civ. P. 8(a)*, which requires a short and plain statement of the claim showing that the pleader is entitled to relief. Although *Rule 8* does not require detailed factual allegations, it does demand more than an unadorned, the-defendant-unlawfully-harmed-me accusation. In other words, a plaintiff's obligation to provide the grounds' of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. A complaint will not suffice if it tenders naked assertions devoid of further factual enhancement.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN4[] Motions to Dismiss, Failure to State Claim

In order to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Fed. R. Civ. P. 12(b)(6)*. A claim is facially plausible when the facts pled allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. That is not to say that the claim must be probable, but there must be more than a sheer possibility that a defendant has acted unlawfully. Facts merely consistent with a defendant's liability fall short of a plausible entitlement to relief. Further, the court need not accept as true legal conclusions contained in the complaint. This review requires context-specific analysis involving the Court's judicial experience and common sense. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not shown-that the pleader is entitled to relief. Where a complaint does not survive 12(b)(6) analysis, the Court will grant leave to amend unless it determines that no modified contention consistent with the challenged pleading will cure the deficiency.

Civil Procedure > Preliminary Considerations > Justiciability > Case & Controversy Requirements

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN5[] Justiciability, Case & Controversy Requirements

U.S. Const., art. III, § 2 vests federal courts with the authority to hear Cases and Controversies. Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong. Standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction. Prudential standing is not derived from Article III and encompasses at least three broad principles: the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

HN6[] **Standing, Burdens of Proof**

One particular aspect of the standing doctrine is parens patriae standing. States or Indian nations asserting parens patriae standing must establish Article III standing and meet the unique requirements of the parens patriae doctrine. Generally, there are two elements to establish standing to bring a parens patriae claim. First, the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party. Second, the State must express a quasi sovereign interest. Parens patriae means literally parent of the country. Proprietary standing is appropriate when a state itself has proprietary interests, such as owning land or participating in a business venture.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN7[] **Standing, Burdens of Proof**

If the requirements are prudential then Congress generally can expand standing to reach the full limits of *U.S. Const., art. III, § 2*. The United States District Court for the Southern District of California assumes without deciding that parens patriae standing is prudential and not constitutional.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN8[] **Justiciability, Standing**

U.S. Const., art. III, § 2 and prudential standing are distinct concepts; prudential standing is a judicially crafted doctrine and does not derive from Article III. Some courts have determined that the parens patriae standing requirements are prudential and not rooted in Article III. So long as the States have shown they have standing under Article III, the standing inquiry is at an end. A quasi sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant. This might suggest that parens patriae is rooted in Article III, but the language does not clearly hold that parens patriae is a constitutional consideration. Given the Supreme Court's language and this Court's finding that Plaintiff is not bringing a claim under the statutory parens patriae section, *15 U.S.C.S. § 15c*, it is sufficient to assume without deciding that parens patriae standing is prudential, not constitutional in nature.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] **Public Enforcement, State Civil Actions**

The Hart-Scott-Rodino Antitrust Improvements Act, *15 U.S.C.S. § 15c et seq.*, creates a new right of action for States under existing federal ***antitrust law***. The Act provides that an attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title. *§ 15c(a)(1)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN10[] **Public Enforcement, State Civil Actions**

The United States Congress has expressly authorized state attorneys general to bring suit under the Hart-Scott-Rodino Antitrust Improvements Act, *15 U.S.C.S. § 15c et seq.*, and a plaintiff need not demonstrate prudential standing, so long as it brings a claim for monetary relief under *15 U.S.C.S. § 15c*. *Section 15c* only allows monetary relief.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN11[] **Public Enforcement, State Civil Actions**

The Hart-Scott-Rodino Antitrust Improvements Act, *15 U.S.C.S. § 15c et seq.*, does not amend section 16 of the Clayton Act, which is codified at *15 U.S.C.S. § 26*, which provides a private cause of action for injunctive relief. The plain language of the *§ 15c* only mentions monetary-not injunctive-relief. *Section 15c* only created a new procedural means-the parens patriae civil action-through which a State could enforce already existing rights of recovery under section 4 of the Clayton Act. The Burch court's statement did not hold that *§ 15c* extends to injunctive relief, but merely recognized that the Supreme Court already allowed parens patriae actions for injunctive relief under section 16, and the Act does not disturb the United States Supreme Court's holding.

Governments > Native Americans > Authority & Jurisdiction

HN12[] **Native Americans, Authority & Jurisdiction**

The Cherokee Nation Attorney General acting as parens patriae, may bring a civil cause of action in any district court of the United States having jurisdiction over a defendant, to secure monetary or injunctive relief based on any applicable federal statute, common law, or the laws of any state. 12 CNCA § 7 (2018). Similarly, 51 CNCA § 105.B.2 authorizes the Attorney General to initiate or appear in any action in which the interests of the Nation or the People of the Nation are at issue. The court reads the Cherokee Nation provisions as authorizing the Attorney General to bring a suit under applicable substantive law, whether federal or state. That is half the equation; the other half is what constitutes applicable law.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Native Americans > Authority & Jurisdiction

HN13[] **Public Enforcement, State Civil Actions**

The concept of prudential standing in the antitrust context is intertwined with the substantive content of and intent behind the particular statute authorizing the cause of action. In sum, it is not enough that Cherokee Nation law authorizes the Attorney General to bring suit; the Nation must also demonstrate that it meets the prudential standing requirements of the state or federal substantive law in question, i.e., that it is within the class of persons who can sue under a statute.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN14[] Remedies, Injunctions

Injunctive relief is governed by section 16 of the Clayton Act, *15 U.S.C.S. § 26*, which provides any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN15[] Defenses, Demurrers & Objections, Motions to Dismiss

A jurisdictional dismissal is warranted only where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN16[] Public Enforcement, State Civil Actions

The United States Supreme Court's decisions, in particular Georgia v. Pennsylvania Railroad and Snapp, demonstrate that a parens patriae plaintiff must meet the two-part test outlined in Snapp.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN17[] Public Enforcement, State Civil Actions

The summary of the case law involving parens patriae actions leads to the following conclusions. In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party. The State must express a quasi-sovereign interest.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN18[] Public Enforcement, State Civil Actions

A plaintiff must demonstrate the parens patriae standing requirements outlined in Snapp to bring a section 16 of the Clayton Act, *15 U.S.C.S. § 26*, claim.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN19[] Public Enforcement, State Civil Actions

Because section 16 of the Clayton Act, *15 U.S.C.S. § 26*, does not explicitly confer plaintiff standing to bring an injunctive relief claim, a plaintiff must demonstrate it meets the standing requirements outlined by the United States Supreme Court in Snapp.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN20[] Standing, Burdens of Proof

While the United States Supreme Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior, the court does require that more must be alleged than injury to an identifiable group of individual residents.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Grounds for Relief

HN21[] Case & Controversy Requirements, Actual Controversy

A court may grant declaratory relief in a case of actual controversy within its jurisdiction. *28 U.S.C.S. § 2201(a)*. Accordingly, a district court must determine at the outset whether the parties have presented an actual case or controversy within the court's jurisdiction. The Declaratory Judgment Act is a procedural device only; it does not confer an independent basis of jurisdiction on the federal court. A declaratory judgment action may be entertained in federal court only if the coercive action that would have been necessary, absent the declaratory judgment procedure, could have been heard in a federal court. The Declaratory Judgment Act merely creates a remedy in cases otherwise within the court's jurisdiction; it does not constitute an independent basis for jurisdiction.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN22[] Standing, Burdens of Proof

Declaratory relief is a remedy and does not modify standing requirements. In order for a plaintiff to seek declaratory relief, it must still meet the parens patriae requirements.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN23[] **Public Enforcement, State Civil Actions**

Infineon holds that if there is legal authority in a state that expressly authorized a parens patriae action, then courts presume the existence of such authority, and, the Cherokee Nation Attorney General has such authorization under Cherokee Nation law.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Employees & Officials

HN24[] **Public Enforcement, State Civil Actions**

The California Cartwright Act, *Cal. Bus. & Prof. Code § 16760(a)(1)*, specifically authorizes the California Attorney General to bring suit on behalf of the people of California. *Cal. Bus. & Prof. Code § 16760(a)(1)* provides that the Attorney General may bring a civil action in the name of the people of the State of California, as parens patriae on behalf of natural persons residing in the state. This provision could not be plainer: where the Attorney General is empowered to bring a damages action seeking relief for violation (s) of the Cartwright Act, it is only the California Attorney General who is so empowered, and on behalf of California residents only. The out-of-state Attorneys General therefore have no parens patriae authority under the Act.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Employees & Officials

HN25[] **Public Enforcement, State Civil Actions**

The plain language of the Cartwright Act belies no statutory authorization for a foreign attorney general to bring a parens patriae suit under California ***antitrust law***. The plain language of the statute only discusses a singular attorney general, i.e., the attorney general. This is different from statutory language that authorizes multiple attorneys general. *15 U.S.C.S. § 15c* (Any attorney general of a State. Thus, only the California Attorney General can bring suit under *section 16760*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN26[] **Deceptive & Unfair Trade Practices, State Regulation**

Like the Cartwright Act, the Unfair Competition Law authorizes damages which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General. *Cal. Bus. & Prof. Code § 17206(a)*; *Cal. Bus. & Prof. Code § 17204*. Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General in the name of the people of the State of California. For the same reasons as discussed in the Cartwright Act analysis, the Unfair Competition Law does not authorize foreign attorneys general to bring a parens patriae suit.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN27[] **Equitable Relief, Quantum Meruit**

In California, there is not a standalone cause of action for unjust enrichment, which is synonymous with restitution. Rather, California courts describe the theory underlying a claim that a defendant has been unjustly conferred a benefit through mistake, fraud, coercion, or request. A court may construe an unjust enrichment claim as a quasi-contract claim seeking restitution.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN28[] **Equitable Relief, Quantum Meruit**

When no statute authorizes standing to bring an unjust enrichment claim, a plaintiff must demonstrate it meets the prudential standing requirements outlined by the Supreme Court in Snapp. The State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN29[] **Deceptive & Unfair Trade Practices, State Regulation**

The Kansas Restraint of Trade Act, *Kan. Stat. Ann. § 50-101, et seq.*, authorizes the attorney general to bring an action. *Kan. Stat. Ann. § 50-103(a)*. § 50-109. The attorney general shall: (a) Enforce this act throughout the state. The statute does not explicitly authorize a foreign attorney general as evidenced by the use of the term the attorney general rather than an or any attorney general.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Native Americans > Authority & Jurisdiction

Governments > State & Territorial Governments > Employees & Officials

HN30[] **Public Enforcement, State Civil Actions**

Kansas law allows the Kansas attorney general to bring a representative action. *Kan. Stat. Ann. § 50-103*. It also allows private parties to assert a private cause of action. *Kan. Stat. Ann. § 50-148*. It does not follow, however, that a private cause of action allows a foreign attorney general, suing on behalf of a different sovereign, to vindicate the public rights of the Cherokee Nation. A parens patriae action is expressly defined as a means for a state to seek redress for wrongs affecting the public at large, while a class action is generally a means by which individual private rights may be collectively enforced. The Court does not doubt that individual private citizens, residing in Kansas and holding dual Cherokee-Kansan citizenship, could bring an action, but the Court will not bootstrap the statutory language to presume a sovereign entity could bring a public action under the same private provision without express authorization.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN31[] **Standing, Burdens of Proof**

In Kansas, unjust enrichment is an equitable doctrine, a modern designation for the older doctrine of quasi-contracts. Because unjust enrichment is not statutory, Snapp applies.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Employees & Officials

HN32[] **Public Enforcement, State Civil Actions**

The Arizona Uniform State Antitrust Act, *Ariz. Rev. Stat. § 44-1401, et seq.*, provides that the attorney general may bring an action for appropriate injunctive or other equitable relief and civil penalties in the name of the state for a violation of this article. *Ariz. Rev. Stat. § 44-1407*. The plain language of the statute references the attorney general and authorizes the attorney general to bring suit in the name of the state. Arizona law does not authorize a foreign attorney general to bring a parens patriae action under Arizona law.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Employees & Officials

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN33[] **Public Enforcement, State Civil Actions**

The Arizona Uniform State Antitrust Act, *Ariz. Rev. Stat. § 44-1408(A)*, allows the state to bring an action for appropriate relief and, as previously discussed, *Ariz. Rev. Stat. § 44-1407* authorizes the Arizona attorney general to bring an action. Thus, the statute provides for public causes of action in *Ariz. Rev. Stat. § 44-1408(A)* and *Ariz. Rev. Stat. § 44-1407* and a private cause of action in *Ariz. Rev. Stat. § 44-1408(B)*. Because the structure distinguishes the causes of action, the Arizona legislature likely did not intend to allow a representative type action in a private cause of action. Or, at least, the Court does not make such a finding without authority saying so. The Arizona Uniform State Antitrust Act provides no authorization for a foreign attorney general to bring a parens patriae suit.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN34[] **Equitable Relief, Quantum Meruit**

In Arizona, unjust enrichment is a form of restitution to enforce contract rights when there exists no valid contract.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Native Americans > Authority & Jurisdiction

Governments > State & Territorial Governments > Employees & Officials

HN35[] **Public Enforcement, State Civil Actions**

Colorado law explicitly authorizes a parens patriae civil action, but only the attorney general may bring such an action. *Colo. Rev. Stat. Ann. § 6-4-111(3)(a)*. As was true with the statutes previously discussed, the reference to the attorney general means the Colorado attorney general, not foreign attorneys general. Contends that Cherokee Nation law authorizes the Cherokee Nation Attorney General to bring an action under Colorado law and the right of the Colorado attorney general should be extended to the Nation's Attorney General. It is not enough that Cherokee

Nation law authorizes the Nation's Attorney General to bring an action under Colorado law; Colorado law must also authorize such a suit. The plain language of the statute does not authorize such an action.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN36[] Equitable Relief, Quantum Meruit

Unjust enrichment is a judicially-created remedy under Colorado law.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN37[] Public Enforcement, State Civil Actions

The New Mexico Antitrust Act, *N.M. Stat. Ann. § 57-1-1*, states the attorney general may bring an action in the name of the state against any person. *N.M. Stat. Ann. § 57-1-8*. Like the statutes previously discussed, the reference to the attorney general means the New Mexico attorney general, not foreign attorneys general. *N.M. Stat. Ann. § 57-1-1.2* includes any governmental or other legal entity with the exception of the state within its definition of a person. Those persons have a cause of action under *N.M. Stat. Ann. § 57-1-3*; the New Mexico attorney general has a cause of action under *N.M. Stat. Ann. § 57-1-8*.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN38[] Equitable Relief, Quantum Meruit

Under New Mexico law, unjust enrichment is a form of restitution cutting across contract and tort law.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Employees & Officials

HN39[] Public Enforcement, State Civil Actions

The Consumer Protection Act, *Okla. Stat. Ann. tit. 15, § 756.1(A)*, states the attorney general or a district attorney may bring an action. The reference to the attorney general means the Oklahoma attorney general, not foreign attorneys general.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN40[] Equitable Relief, Quantum Meruit

Oklahoma treats unjust enrichment as an equitable remedy, not based in statute.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN41[] **Public Enforcement, State Civil Actions**

Unlike other states, Florida's Deceptive and Unfair Trade Practices Act, *Fla. Stat. Ann. § 501.207(1)*, does not empower the state attorney general; instead, the Act authorizes the enforcing authority to bring various remedies. The Act defines enforcing authority as either the office of the state attorney or the Department of Legal Affairs depending on the type of violation. § 501.203(2). Neither of these entities is a government entity outside Florida and the law does not reference language indicative of a parens patriae action. The it is availing itself of the section of the Act whereby anyone aggrieved by a violation of this part may bring an action. The Nation's Attorney General is not a person who was aggrieved; the individual and private citizens of the Nation, residing in Florida, are the aggrieved persons.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN42[] **Equitable Relief, Quantum Meruit**

As with other states, Florida treats unjust enrichment as an equitable remedy.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN43[] **Remedies, Injunctions**

Injunctive relief under federal ***antitrust law*** requires a quasi-sovereign interest and an interest apart from the interests of particular private parties.

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

HN44[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

28 U.S.C.S. § 1367 allows a federal district court to hear all state law claims as long as there is an independent basis for jurisdiction. Under *section 1367*, a district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. *§ 1367(a)*. The United States Supreme Court has held that supplemental jurisdiction may be exercised when federal and state claims have a common nucleus of operative fact and would ordinarily be expected to be tried all in one judicial proceeding. However, a Court may decline to exercise supplemental jurisdiction over any state claim if (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. *28 U.S.C.S. § 1367(c)(1)-(4)*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

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

HN45[] **Defenses, Demurrers & Objections, Motions to Dismiss**

In Gibbs, the United States Supreme Court states that if federal claims are dismissed before trial the state claims should be dismissed as well. In Carnegie-Mellon, the court clarifies that this was not a mandatory rule, but rather simply recognizes that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise jurisdiction over the remaining state law claims.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN46[] Amendment of Pleadings, Leave of Court

Pursuant to *Fed. R. Civ. P. 15(a)*, a plaintiff may amend its complaint once as a matter of course within specified time limits. *Fed. R. Civ. P. 15(a)(1)*. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires. *Fed. R. Civ. P. 15 (a)(2)*.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN47[] Motions to Dismiss, Failure to State Claim

While courts exercise broad discretion in deciding whether to allow amendment, they have generally adopted a liberal policy. Accordingly, leave is generally granted unless the court harbors concerns such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. Amendments seeking to add claims are to be granted more freely than amendments adding parties. Additionally, the party opposing amendment has the burden of showing that amendment is not warranted. Generally a proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense. Courts ordinarily do not consider the validity of a proposed amended pleading in deciding whether to grant leave to amend, and instead defer consideration of challenges to the merits of a proposed amendment until after leave to amend is granted and the amended pleadings are filed. Arguments concerning the sufficiency of the proposed pleadings, even if meritorious, are better left for briefing on a motion to dismiss.

Counsel: **[**1]** For Olean Wholesale Grocery Cooperative, Inc., on behalf of itself and all others similarly, Plaintiff: Bonny E Sweeney, Christopher L. Lebsock, Samantha Stein, LEAD ATTORNEYS, Michael Lehmann, Hausfeld LLP, San Francisco, CA; Emily Catherine Aldridge, Lesley E Weaver, LEAD ATTORNEYS, Bleichmar Fonti & Auld LLP, Oakland, CA; Irving Scher, LEAD ATTORNEY, PRO HAC VICE, Hausfeld LLP, New York, NY.

For Beverly Youngblood, on behalf of herself and all others similarly situated, Plaintiff: Susan Rogers Schwaiger, LEAD ATTORNEY, Nussbaum Law Group, P.C., New York, NY; Whitney E. Street, LEAD ATTORNEY, Block & Leviton LLP, Oakland, CA.

For Pacific Groservice Inc., on behalf of itself and all others similarly situated doing business as PITCO Foods, Plaintiff: Barbara J. Hart, Sung-Min Lee, LEAD ATTORNEYS, Lowey Dannenberg, P.C., White Plains, NY; Bonny E Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Mark I. Labaton, LEAD ATTORNEY, Motley Rice LLP, Los Angeles, CA.

For Capitol Hill Supermarket, on behalf of itselfand all others similarly situated, Plaintiff: Alec Blaine Finley , Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC; Camille Joy DeCamp, LEAD ATTORNEY, Del Mar Law **[**2]** Group, LLP, San Diego, CA; Christian Hudson, Peter Gil-Montllor, LEAD ATTORNEYS, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY; Joel Davidow, Jonathan W Cuneo, LEAD ATTORNEYS, PRO HAC VICE, Cuneo Gilbert & LaDuca LLP, Washington, DC; John H Donboli, LEAD ATTORNEY, Donboli Law Group, APC, San Diego, CA; John Barton Goplerud, LEAD ATTORNEY, PRO HAC VICE, Shindler, Anderson, Goplerud & Weese, P.C., West Des Moines, IA; Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ; Maxwell M Blecher, LEAD ATTORNEY, Blecher and Collins, Los Angeles, CA; Michael James Flannery, LEAD ATTORNEY, Cuneo Gilbert & Laduca LLP, St. Louis, MO.

For Louise Ann Davis Matthews, on behalf of herself and all others similarly, Plaintiff: Kimberly A. Kralowec, LEAD ATTORNEY, Kralowec Law, P.C., San Francisco, CA.

For James Walnum, on behalf of himself and all others similarly sitated, Plaintiff: Christopher T. Micheletti, Jiangxiao Athena Hou, Judith A. Zahid, LEAD ATTORNEYS, Zelle LLP, San Francisco, CA.

For Colin Moore, on behalf of himself and all others similarly situated, Plaintiff: Chad Saunders, LEAD ATTORNEY, Sundeen Salinas & Pyle, Oakland, CA; Kathleen Styles Rogers, Kimberly **[**3]** A. Kralowec, LEAD ATTORNEYS, Kralowec Law, P.C., San Francisco, CA.

For Jennifer A. Nelson, on behalf of herself and all others similarly situated, Elizabeth Davis-Berg, on behalf of herself and all others similarly situated, Laura Childs, on behalf of herself and all others similarly situated, Plaintiffs: Betsy Carol Manifold, Brittany Nicole DeJong, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred T Isquith, Jr., LEAD ATTORNEY, Lovell Stewart Halebian Jacobson LLP, New York, NY; Michelle L. Kranz, LEAD ATTORNEY, Zoll & Kranz, LLC, Toledo, OH; Nancy A. Kulesa, LEAD ATTORNEY, Levi & Korsinsky, LLP, New York, NY; Theodore Bell, LEAD ATTORNEY, Skokie, IL; Thomas H. Burt, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, New york, NY.

For Laura Childs, on behalf of herself and all others similarly situated, Bonnie Vanderlaan, on behalf of herself and all others similarly situated, Kristin Millican, on behalf of herself and all others, similarly situated, Plaintiffs: Betsy Carol Manifold, Brittany Nicole DeJong, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein **[**4]** Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred T Isquith, Jr., LEAD ATTORNEY, Lovell Stewart Halebian Jacobson LLP, New York, NY; Michelle L. Kranz, LEAD ATTORNEY, Zoll & Kranz, LLC, Toledo, OH; Nancy A. Kulesa, LEAD ATTORNEY, Levi & Korsinsky, LLP, New York, NY; Theodore Bell, LEAD ATTORNEY, Skokie, IL; Thomas H. Burt, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, New york, NY.

For Trepco Imports and Distribution LTD, on behalf of itself and all others similarly situated, Plaintiff: Abbas Kazerounian, LEAD ATTORNEY, Kazerounian Law Group, APC, Costa Mesa, CA; Bonny E Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Jason S Hartley, LEAD ATTORNEY, Hartley LLP, San Diego, CA; Robert G. Eisler, LEAD ATTORNEY, PRO HAC VICE, Grant & Eisenhofer P.A., Wilmington, DE; Vincent J Esades, LEAD ATTORNEY, PRO HAC VICE, Heins Mills & Olson, P.L.C., Minneapolis, MN.

For Jinkyoung Moon, on behalf of themselves and all others similarly situated, Clarissa Simon, on behalf of themselves and all others similarly situated, Plaintiffs: Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, **[**5]** CA.

For Corey Norris, on behalf of themselves and all others similarly situated, Plaintiff: Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Christopher Van Le, Timothy Battin, LEAD ATTORNEYS, PRO HAC VICE, Straus & Boies LLP, Fairfax, VA; Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA.

For Nigel Warren, on behalf of themselves and all others similarly situated, Plaintiff: Christopher Van Le, Timothy Battin, LEAD ATTORNEYS, PRO HAC VICE, Straus & Boies LLP, Fairfax, VA; Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA; Rachele R Byrd, Betsy Carol Manifold, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA.

For Amy Joseph, individually and on behalf of all others similarly situated, Plaintiff: Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Gayle M Blatt, LEAD ATTORNEY, Casey, Gerry, Schenk, Francavilla, Blatt & Penfield LLP, San Diego, CA; Thomas A. Zimmerman, Jr., LEAD ATTORNEY, Sharon A Harris, Zimmerman Law Offices, P.C., Chicago, IL.

For Steven M. Colberg, on behalf of themselves and all others similarly **[**6]** situated, Plaintiff: Christopher T. Micheletti, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Dennis James Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA; Jiangxiao Athena Hou, Judith A. Zahid, LEAD ATTORNEYS, Zelle LLP, San Francisco, CA.

For Michael Juetten, on behalf of themselves and all others similarly situated, Carla Lown, on behalf of themselves and all others similarly situated, Plaintiffs: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Christopher T. Micheletti, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Dennis James Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA; Jiangxiao Athena Hou, Judith A. Zahid, LEAD ATTORNEYS, Zelle LLP, San Francisco, CA.

For Truyen Ton-Vuong, as an individual and on behalf of all others similarly situated, also known as David Ton, Plaintiff: Craig McKenzie Nicholas, LEAD ATTORNEY, Nicholas and Tomasevic, San Diego, CA.

For A-1 Diner, on behalf of itself and others similarly situated, Plaintiff: Alec Blaine Finley , Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC; Christian Hudson, LEAD ATTORNEY, **[**7]** Cuneo Gilbert & LaDuca LLP, Brooklyn, NY; Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Joel Davidow, LEAD ATTORNEY, PRO HAC VICE, Cuneo Gilbert & LaDuca LLP, Washington, DC; John H Donboli, LEAD ATTORNEY, Donboli Law Group, APC, San Diego, CA; John Barton Goplerud, LEAD ATTORNEY, PRO HAC VICE, Shindler, Anderson, Goplerud & Weese, P.C., West Des Moines, IA; Jonathan W Cuneo, LEAD ATTORNEY, PRO HAC VICE, Cuneo Gilbert & LaDuca, LLP, Washington, DC; Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ; Maxwell M Blecher, LEAD ATTORNEY, Blecher and Collins, Los Angeles, CA; Michael James Flannery, LEAD ATTORNEY, Cuneo Gilbert & Laduca LLP, St. Louis, MO; Peter Gil-Montllor, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY.

For Dwayne Kennedy, on behalf of himself and all others similarly situated, Plaintiff: Dennis James Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA; Stephen Ademi, LEAD ATTORNEY, Ademi & O'Reilly, LLP, Cudahy, WI; Rachele R Byrd, LEAD ATTORNEY, Wolf Haldenstein **[**8]** Adler Freeman and Herz, San Diego, CA.

For Rick Musgrave, individually, and on behalf of himself and all others similarly situated, Plaintiff: Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Gordon M Fauth , Jr., LEAD ATTORNEY, Litigation Law Group, Alameda, CA.

For Dutch Village Restaurant, on behalf of itself and all others similarly situated, Plaintiff: Alec Blaine Finley , Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC; Christian Hudson, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY; Joel Davidow, LEAD ATTORNEY, PRO HAC VICE, Cuneo Gilbert & LaDuca LLP, Washington, DC; John H Donboli, LEAD ATTORNEY, Donboli Law Group, APC, San Diego, CA; John Barton Goplerud, LEAD ATTORNEY, PRO HAC VICE, Shindler, Anderson, Goplerud & Weese, P.C., West Des Moines, IA; Jonathan W Cuneo, LEAD ATTORNEY, PRO HAC VICE, Cuneo Gilbert & LaDuca, LLP, Washington, DC; Maxwell M Blecher, LEAD ATTORNEY, Blecher and Collins, Los Angeles, CA; Michael James Flannery, LEAD ATTORNEY, Cuneo Gilbert & Laduca LLP, St. Louis, MO; Peter Gil-Montllor, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY.

For Lisa Burr. an individual, **[**9]** Plaintiff: Alex M Tomasevic, LEAD ATTORNEY, Nicholas and Tomasevic LLP, San Diego, CA; Craig McKenzie Nicholas, LEAD ATTORNEY, Nicholas and Tomasevic, San Diego, CA; Dennis James Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold, Critchlow and Spector, Miami, FL; Kirk B Hulett, LEAD ATTORNEY, Hulett Harper Stewart, San Diego, CA.

For Larry Demonaco, an individual; and all others similarly situated, Ellen Pinto, an individual; and all others similarly situated, Robby Reed, an individual; and all others similarly situated, Blair Hysni, an individual; and all others similarly situated, Dennis Yelvington, an individual; and all others similarly situated, Plaintiffs: Alex M Tomasevic, LEAD ATTORNEY, Nicholas and Tomasevic LLP, San Diego, CA; Craig McKenzie Nicholas, LEAD ATTORNEY, Nicholas and Tomasevic, San Diego, CA; Dennis James Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA; Kirk B Hulett, LEAD ATTORNEY, Hulett Harper Stewart, San Diego, CA.

For Michael Buff, an individual; and all others similarly **[**10]** situated, Plaintiff: Alex M Tomasevic, LEAD ATTORNEY, Nicholas and Tomasevic LLP, San Diego, CA; Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Craig McKenzie Nicholas, LEAD ATTORNEY, Nicholas and Tomasevic, San Diego, CA; Dennis James Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold, Critchlow and Spector, Miami, FL; Kirk B Hulett, LEAD ATTORNEY, Hulett Harper Stewart, San Diego, CA.

For Kathy Durand Gore, on behalf of herself and all others similarly situated, Plaintiff: Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Kimberly A. Kralowec, LEAD ATTORNEY, Kralowec Law, P.C., San Francisco, CA.

For Thomas E. Willoughby III, on behalf of himself and all others similarly situated, Plaintiff: Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Theodore **[**11]** Bell, LEAD ATTORNEY, Skokie, IL; Thomas James McKenna, LEAD ATTORNEY, Gainey McKenna & Egleston, New York, NY.

For Robert Fragoso, on Behalf of Themselves and All Others Similarly Situated, Samuel Seidenburg, on Behalf of Themselves and All Others Similarly Situated, Michael Coffey, on Behalf of Themselves and All Others Similarly Situated, Jason Wilson, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs: Timothy G. Blood, LEAD ATTORNEY, Blood Hurst & O'Reardon, LLP, San Diego, CA.

For Janelle Albarello, on Behalf of Themselves and All Others Similarly Situated, Plaintiff: Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold, Critchlow and Spector, Miami, FL; Timothy G. Blood, LEAD ATTORNEY, Blood Hurst & O'Reardon, LLP, San Diego, CA.

For Jade Canterbury, on behalf of herself and all others similarly situated, Plaintiff: Alyson Louise Oliver, LEAD ATTORNEY, PRO HAC VICE, Oliver Law Group P.C., Troy, MI; Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein **[**12]** Adler Freeman & Herz LLC, Chicago, IL; Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Nay Alidad, on behalf of herself and all others similarly situated, Plaintiff: Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Dennis James Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL.

For Galyna Andrusyshyn, on behalf of herself and all others similarly situated, Plaintiff: Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Dennis James Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL.

For Robert Benjamin, on behalf of himself and all others similarly situated, **[**13]** Barbara Buenning, on behalf of herself and all others similarly situated, Plaintiffs: Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Dennis James Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL.

For Danielle Greenberg, on behalf of herself and all others similarly situated, Sheryl Haley, on behalf of herself and all others similarly situated, Plaintiffs: Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, PRO HAC

VICE, Gustafson Gluek PLLC, Minneapolis, MN; Dennis James Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA.

For Lisa Hall, on behalf of herself and all others similarly situated, Tya Hughes, on behalf of herself and all others similarly situated, Marissa Jacobus, on behalf of herself and all others similarly situated, Plaintiffs: Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, **[**14]** Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Dennis James Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA.

For Gabrielle Kurdt, on behalf of herself and all others similarly situated, Erica Pruess, on behalf of herself and all others similarly situated, Seth Salenger, on behalf of himself and all others similarly situated, Harold Stafford, on behalf of himseslf and all others similarly situated, Plaintiff: Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Dennis James Stewart, Hulett Harper Stewart LLP, San Diego, CA.

For Carl Lesher, on behalf of themselves and all others similarly situated, Sarah Metivier Schadt, on behalf of themselves and all others similarly situated, Karren Fabian, on behalf of themselves and all others similarly situated, Plaintiffs: Stuart George Gross, LEAD ATTORNEY, Gross & Klein, LLP, San Francisco, CA.

For Greg Stearns, on behalf of themselves and all others similarly situated, Plaintiff: Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler **[**15]** Freeman and Herz, San Diego, CA; Stuart George Gross, LEAD ATTORNEY, Gross & Klein, LLP, San Francisco, CA.

For Melissa Bowman, on behalf of herself and all others similarly situated, Plaintiff: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Francis A. Bottini, LEAD ATTORNEY, Bottini & Bottini, Inc., La Jolla, CA; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Jayne Arnold Goldstein, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Fort Lauderdale, FL; Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Vivek Dravid, on behalf of himself and all others similarly situated, Plaintiff: Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Francis A. Bottini, LEAD ATTORNEY, Bottini & Bottini, Inc., La Jolla, CA; Jayne Arnold Goldstein, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Fort Lauderdale, FL; Rachele R Byrd, Betsy Carol Manifold, LEAD ATTORNEYS, **[**16]** Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Jody Cooper, on behalf of himself and all others similarly situated, Danielle Johnson, on behalf of herself and all others similarly situated, Herbert H. Kliegerman, on behalf of himself and all others similarly situated, Plaintiffs: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Francis A. Bottini, LEAD ATTORNEY, Bottini & Bottini, Inc., La Jolla, CA; Jayne Arnold Goldstein (See above for address) LEAD ATTORNEY ATTORNEY TO BE NOTICED Jayne Arnold Goldstein, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Fort Lauderdale, FL.

For Beth Milliner, on behalf of herself and all others similarly situated, Liza Milliner, on behalf of herself and all others similarly situated, Plaintiffs: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Francis A. Bottini, LEAD ATTORNEY, Bottini & Bottini, Inc., **[**17]** La Jolla, CA; Jayne Arnold Goldstein, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Fort Lauderdale, FL; Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Jeffrey Potvin, on Behalf of Himself and All Others Similarly Situated, Plaintiff: Paula R. Brown, Thomas Joseph O'Reardon, II, Timothy G. Blood, LEAD ATTORNEYS, Blood Hurst & O'Reardon, LLP, San Diego, CA; Peter G. Safirstein, LEAD ATTORNEY, PRO HAC VICE, Morgan & Morgan, New York, NY; Roger Sachar, LEAD ATTORNEY, Morgan & Morgan, P.C., New York, NY.

For Stephanie Gipson, on Behalf of Herself and All Others Similarly Situated, Plaintiff: Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Paula R. Brown, Thomas Joseph O'Reardon, II, Timothy G. Blood, LEAD ATTORNEYS, Blood Hurst & O'Reardon, LLP, San Diego, CA; Peter G. Safirstein, LEAD ATTORNEY, PRO HAC VICE, Morgan & Morgan, New York, NY; Roger Sachar, LEAD ATTORNEY, Morgan & Morgan, P.C., New York, NY.

For Barbara Lybarger, on behalf of herself and all others similarly situated, Plaintiff: Betsy Carol Manifold, Brittany Nicole DeJong, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, **[**18]** CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Elizabeth C Pritzker, Shiho Yamamoto, LEAD ATTORNEYS, Pritzker Levine LLP, Oakland, CA; Fred Taylor Isquith, Sr., LEAD ATTORNEY, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY; Marisa C Livesay, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA; Theodore Bell, LEAD ATTORNEY, Skokie, IL; Thomas H. Burt, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, New york, NY.

For Scott Caldwell, on behalf of himself and all others similarly situated, Plaintiff: Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Christopher T. Micheletti, Jiangxiao Athena Hou, Judith A. Zahid, LEAD ATTORNEYS, Zelle LLP, San Francisco, CA; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL.

For Ramon Ruiz, On Behalf Of Himself and All Others Similarly Situated, Plaintiff: Dennis James Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA.

For Thyme Cafe & Market, Inc., **[**19]** on behalf of itself and all others similarly situated, Plaintiff: Alec Blaine Finley, Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC; Christian Hudson, Peter Gil-Montllor, LEAD ATTORNEYS, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY; John H Donboli, LEAD ATTORNEY, Donboli Law Group, APC, San Diego, CA; Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ.

For Harvesterxe:counsel>For Harvesters Enterprises, LLC, on behalf of itself and all others similarly situated, Plaintiff: Alec Blaine Finley, Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC; Christian Hudson, Peter Gil-Montllor, LEAD ATTORNEYS, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY; David Malcolm McMullan, Jr, John W. Barrett, Katherine Barrett Riley, LEAD ATTORNEYS, BARRETT LAW GROUP, PA - Lexington, Lexington, MS; Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ.

For Affiliated Foods, Inc., Plaintiff: Elana Katcher, LEAD ATTORNEY, Kaplan Fox Kilsheimer, New York, NY; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Gregory K Arenson, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, New York, NY; **[**20]** Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Johnny K Merritt, LEAD ATTORNEY, Mullin Hoard and Brown, Amarillo, TX; Justin B Farar, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, Los Angeles, CA; Laurence D King, Mario Man-Lung Choi, LEAD ATTORNEYS, Kaplan Fox and Kilsheimer, San Francisco, CA; Lawrence Kill, LEAD ATTORNEY, PRO HAC VICE, Anderson Kill P.C., New York, NY; Richard Lyle Coffman, LEAD ATTORNEY, PRO HAC VICE, The Coffman Law Firm, Beaumont, TX; Richard J Kilsheimer, LEAD ATTORNEY, Law Offices of Richard J Kilsheimer, New York, NY; Robert N Kaplan, LEAD ATTORNEY, PRO HAC VICE, Kaplan Kilsheimer and Fox, New York, NY; Timothy Clark Williams, LEAD ATTORNEY, Sprouse Shrader Smith PLLC, Amarillo, TX.

For Piggly Wiggly Alabama, Distributing Co., Inc. on Behalf of Itself and All Others Similarly Situated, Plaintiff: Bonny E Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Louis Kessler, LEAD ATTORNEY, Kaplan Fox and Kilsteimer, San Francisco, CA; Solomon B Cera, Thomas C Bright, LEAD ATTORNEYS, Cera LLP, San Francisco, CA.

For Elizabeth Twitchell, on behalf of herself and all others similarly situated, Tina **[**21]** Grant, on behalf of herself and all others similarly situated, John Trent, on behalf of himself and all others similarly situated, Brian Levy, on behalf of himself and all others similarly situated, Plaintiffs: Betsy Carol Manifold, Brittany Nicole DeJong, Rachele

R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred Taylor Isquith, Sr., PRO HAC VICE, Marisa C Livesay, Thomas H. Burt, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY; Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Louise Adams, on behalf of herself and all others similarly situated, Plaintiff: Betsy Carol Manifold, Brittany Nicole DeJong, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred Taylor Isquith, Sr., PRO HAC VICE, Marisa C Livesay, Thomas H. Burt, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, **[**22]** Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Marc Blumstein, on behalf of himself and all others similarly situated, Jessica Breitbach, on behalf of herself and all others similarly situated, Paul Berger, on behalf of himself and all others similarly situated, Plaintiffs: Betsy Carol Manifold, Brittany Nicole DeJong, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred Taylor Isquith, Sr., LEAD ATTORNEY, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Marisa C Livesay, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA; Theodore Bell, LEAD ATTORNEY, Skokie, IL; Thomas H. Burt, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, New york, NY.

For Sally Crnkovich, on behalf of herself and all others similarly situated, Sterling King, on behalf of himself and **[**23]** all others similarly situated, Plaintiffs: Betsy Carol Manifold, Brittany Nicole DeJong, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred Taylor Isquith, Sr., LEAD ATTORNEY, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY; Marisa C Livesay, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA; Theodore Bell, LEAD ATTORNEY, Skokie, IL; Thomas H. Burt, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, New york, NY.

For Evelyn Olive, on behalf of herself and all others similarly situated, Plaintiff: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Brittany Nicole DeJong, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred Taylor Isquith, Sr., LEAD ATTORNEY, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY; Marisa C Livesay, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA; Theodore Bell, LEAD ATTORNEY, **[**24]** Skokie, IL; Thomas H. Burt, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, New york, NY.

For Barbara Blumstein, on behalf of herself and all others similarly situated, Plaintiff: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Mary Hudson, on behalf of herself and all others similarly situated, Plaintiff: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Brittany Nicole DeJong, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz, San Diego, CA; Heidi Silton, LEAD ATTORNEY, PRO HAC VICE, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Marisa C Livesay, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA.

For Diana Mey, on behalf of herself and all others similarly situated, Plaintiff: Betsy Carol Manifold, LEAD **[**25]** ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Christopher T. Micheletti, LEAD ATTORNEY, Zelle LLP, San Francisco, CA; Eric B. Snyder, LEAD ATTORNEY, Bailey and Glasser LLP, Charleston, WV; Jiangxiao Athena Hou, Judith Zahid, Michael S. Christian, LEAD ATTORNEYS, ZELLE HOFMANN VOELBEL & MASON LLP, San Francisco, CA; Katherine E. Charonk, LEAD ATTORNEY, PRO HAC VICE, Bailey Glasser LLP, Charleston, WV.

For Associated Grocers of New England, Inc., Associated Food Stores, Inc., Plaintiffs: Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, San Francisco, CA; Mario Man-Lung Choi, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP, San Francisco, CA.

For North Central Distributors, LLC, Cash-Wa Distributing Co. of Kearney, Inc., URM Stores, Inc., Western Family Foods, Inc., Plaintiffs: Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, San Francisco, CA; Mario Man-Lung Choi, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP, San Francisco, CA.

For Giant Eagle, **[**26]** Inc., Plaintiff: Bernard Marcus, Brian Hill, Erin Gibson Allen, LEAD ATTORNEYS, Moira Cain-Mannix, LEAD ATTORNEY, PRO HAC VICE, Marcus & Shapira LLP, Pittsburgh, PA; Johnny K Merritt, LEAD ATTORNEY, Mullin Hoard and Brown, Amarillo, TX; Justin B Farar, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, Los Angeles, CA; Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, San Francisco, CA; Lawrence Kill, LEAD ATTORNEY, PRO HAC VICE, Anderson Kill P.C., New York, NY; Mario Man-Lung Choi, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP, San Francisco, CA; Matthew P McCahill, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, New York, NY; Richard Lyle Coffman, LEAD ATTORNEY, PRO HAC VICE, The Coffman Law Firm, Beaumont, TX; Robert N Kaplan, LEAD ATTORNEY, PRO HAC VICE, Kaplan Kilsheimer and Fox, New York, NY.

For McLane Company, Inc., Meadowbrook Meat Company, Inc., Plaintiffs: Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, San Francisco, CA; Mario Man-Lung Choi, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP, San Francisco, CA.

For Associated Grocers, Inc., Plaintiff: Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO **[**27]** HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, San Francisco, CA; Mario Man-Lung Choi, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP, San Francisco, CA.

For Bi-Lo Holding, LLC, Plaintiff: Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Harold Timothy Gillis, Nancy A. Johnson, LEAD ATTORNEYS, Gillis Way & Campbell, LLP, Jacksonville, FL; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Patrick J. Ahern, LEAD ATTORNEY, Ahern and Associates, P.C., Chicago, IL.

For Winn-Dixie Stores, Inc, Plaintiff: Harold Timothy Gillis, Nancy A. Johnson, LEAD ATTORNEYS, Gillis Way & Campbell, LLP, Jacksonville, FL; Patrick J. Ahern, LEAD ATTORNEY, Ahern and Associates, P.C., Chicago, IL.

For Janet Machin, On Behalf of Herself and All Others Similarly Situated, Plaintiff: Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ; Marcus Neil Bozeman, Thomas P Thrash, LEAD ATTORNEYS, Thrash Law Firm, Little Rock, AR; Peter Gil-Montllor, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY. **[**28]**

For Debra L. Damske, Plaintiff: Andrew Szot, LEAD ATTORNEY, PRO HAC VICE, Marvin Alan Miller, Matthew E Van Tine, LEAD ATTORNEYS, Miller Law LLC, Chicago, IL; Stephen Ademi, LEAD ATTORNEY, Ademi & O'Reilly, LLP, Cudahy, WI.

For Ken Dunlap, Barbara E. Olson, on behalf of themselves and all others similarly situated, Barbara E. Olson, on behalf of themselves and all others similarly situated, Casey Christensen, on behalf of himself and all others similarly situated, Brian Depperschmidt, on behalf of himself and all others similarly situated, Plaintiffs: Andrew Szot, LEAD ATTORNEY, PRO HAC VICE, Miller Law LLC, Chicago, IL; Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA.; Marvin Alan Miller, Matthew E Van Tine, LEAD ATTORNEYS, Miller Law LLC, Chicago, IL; Stephen Ademi, LEAD ATTORNEY, Ademi & O'Reilly, LLP, Cudahy, WI.

For John Peychal, Virginia Rakipi, Scott Dennis, on behalf of himself and all others similarly situated, Plaintiff: Andrew Szot, LEAD ATTORNEY, PRO HAC VICE, Miller Law LLC, Chicago, IL; Marvin Alan Miller, Matthew E Van Tine, LEAD ATTORNEYS, Miller Law LLC, Chicago, IL; Stephen Ademi, LEAD ATTORNEY, Ademi & O'Reilly, **[**29]** LLP, Cudahy, WI.

For Adam Buehrens, on behalf of himself and all others similarly situated, Plaintiff: Andrew Szot, LEAD ATTORNEY, PRO HAC VICE, Miller Law LLC, Chicago, IL; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold, Miami, FL; Marvin Alan Miller, Matthew E Van Tine, LEAD ATTORNEYS, Miller Law LLC, Chicago, IL; Stephen Ademi, LEAD ATTORNEY, Ademi & O'Reilly, LLP, Cudahy, WI.

For Amy E Waterman, Plaintiff: Andrew Szot, LEAD ATTORNEY, PRO HAC VICE, Miller Law LLC, Chicago, IL; Marvin Alan Miller, Matthew E Van Tine, LEAD ATTORNEYS, Miller Law LLC, Chicago, IL.

For Central Grocers, Inc., on Behalf of Itself and All Others Similarly Situated, Plaintiff: Bonny E Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Louis Kessler, LEAD ATTORNEY, Kaplan Fox and Kilsteimer, San Francisco, CA; Solomon B Cera, Thomas C Bright, LEAD ATTORNEYS, Cera LLP, San Francisco, CA.

For Associated Grocers of Florida, Inc., Plaintiff: Bonny E Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; David Germaine, LEAD ATTORNEY, Vanek, Vickers & Masini, P.C., Chicago, IL; Frederick William **[**30]** Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL.

For Benjamin Foods LLC, on behalf of itself and all others similarly situated, Plaintiff: Bonny E Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Dana Statsky Smith, LEAD ATTORNEY, Bernstein Liebhard LLP, New York, NY; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL. Joseph N Kiefer, Sami H Rashid, Stephen Randall Neuwirth, LEAD ATTORNEYS, Quinn Emanuel Urqhart Sullivan LLP, New York, NY.

For Albertsons Companies, LLC, Plaintiff: Alan Arnold, LEAD ATTORNEY, Law Offices of Alan Arnold, Woodland Hills, CA; Brandon S Floch, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL; Douglas H Patton, Jalaine Garcia, Samuel J Randall, William Jay Blechman, LEAD ATTORNEYS, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Frederick William Kosmo, Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; Kevin Murray, LEAD ATTORNEY, Kenny Nachwalter **[**31]** Seymour Arnold Critchlow and Spector, Miami, FL.

For H.E. Butt Grocery Company, Hy-Vee, Inc., The Kroger Co., Plaintiffs: Brandon S Floch, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL; Douglas H Patton, Jalaine Garcia, Samuel J Randall, William Jay Blechman, LEAD ATTORNEYS, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Kevin Murray, LEAD ATTORNEY, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Richard Alan Arnold, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold, Miami, FL.

For Lesgo Personal Chef LLC, Plaintiff: Alec Blaine Finley, Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC; Christian Hudson, Peter Gil-Montllor, LEAD ATTORNEYS, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY; Dewitt M. Lovelace, LEAD ATTORNEY, PRO HAC VICE, Lovelace Law Firm, P.A., Miramar Beach, FL; Gary McKay Yarborough, Jr., LEAD ATTORNEY, PRO HAC VICE, Yarborough Law Firm, Bay Saint Louis, MS; John H Donboli, LEAD ATTORNEY, Donboli Law Group, APC, San Diego, CA; Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ.

For Kathy Vangemert, on behalf of herself and all others similarly situated, Plaintiff: **[**32]** Francis Onofrei Scarpulla, LEAD ATTORNEY, Patrick Bradford Clayton, Law Offices of Francis O. Scarpulla, San Francisco, CA; Amelia F. Burroughs, Janssen Malloy LLP, Eureka, CA; W Timothy Needham, Janssen Malloy Needham Morrison and Koshkin, Eureka, CA.

For Edy Yee, on behalf of herself and all others similarly situated, Plaintiff: Gerald Maltz, LEAD ATTORNEY, Haralson, Miller, Pitt, Feldman & McAnally, P.L.C., Tucson, AZ; Francis Onofrei Scarpulla, LEAD ATTORNEY, Patrick Bradford Clayton, Law Offices of Francis O. Scarpulla, San Francisco, CA.

For Sunde Daniels, on behalf of themselves and all others similarly situated, Plaintiff: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Brittany Nicole DeJong, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred Taylor Isquith, Sr., LEAD ATTORNEY, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY; Marisa C Livesay, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA; Theodore Bell, LEAD ATTORNEY, Skokie, IL; Thomas H. Burt, LEAD ATTORNEY, **[**33]** Wolf Haldenstein Adler Freeman and Herz, New york, NY.

For Christopher Todd, on behalf of themselves and all others similarly situated, Plaintiff: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Brittany Nicole DeJong, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz, San Diego, CA; Carl Malmstrom, Marisa C Livesay, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred Taylor Isquith, Sr., LEAD ATTORNEY, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY; Theodore Bell, LEAD ATTORNEY, Skokie, IL; Thomas C Bright, LEAD ATTORNEY, Cera LLP, San Francisco, CA.

For Publix Super Markets, Inc., Plaintiff: Alberto Rodriguez, David Germaine, Joseph Michael Vanek, LEAD ATTORNEYS, Vanek, Vickers & Masini, P.C., Chicago, IL; Eric G. Osborne, Phillip Frederick Cramer, LEAD ATTORNEYS, Sherrard Roe Voigt & Harbison PLC, Nashville, TN; Paul Ethan Slater, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL.

For Wakefern Food Corp., Plaintiff: Alberto Rodriguez, David Germaine, Joseph Michael Vanek, LEAD ATTORNEYS, Vanek, Vickers & Masini, P.C., Chicago, IL; Eric G. Osborne, Phillip Frederick Cramer, **[**34]** LEAD ATTORNEYS, Sherrard Roe Voigt & Harbison PLC, Nashville, TN.

For Jade Canterbury, Plaintiff: Alyson Louise Oliver, LEAD ATTORNEY, PRO HAC VICE, Oliver Law Group P.C., Troy, MI; Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Laura Childs, Elizabeth Davis-Berg, Plaintiffs: Rachele R Byrd, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA.

For Jody Cooper, Plaintiff: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Francis A. Bottini, LEAD ATTORNEY, Bottini & Bottini, Inc., La Jolla, CA; Jayne Arnold Goldstein, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Fort Lauderdale, FL; Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Sunde Daniels, Plaintiff: Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Rachele R Byrd, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; **[**35]** Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Vivek Dravid, Plaintiff: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Francis A. Bottini, LEAD ATTORNEY, Bottini & Bottini, Inc., La Jolla, CA; Jayne Arnold Goldstein, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Fort Lauderdale, FL; Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Mary Hudson, Christopher Todd, Plaintiffs: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Nancy Stiller, Bonnie Vanderlaan, Plaintiffs: Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA.

For Wegmans Food Markets, Inc., Plaintiffs: Linda Phyllis Nussbaum, Susan Rogers Schwaiger, LEAD ATTORNEYS, Nussbaum Law Group, P.C., New York, NY.

For Meijer Distribution, Inc., Meijer, Inc., Plaintiffs: Alberto Rodriguez, David Germaine, Joseph Michael Vanek, LEAD ATTORNEYS, **[**36]** Vanek, Vickers & Masini, P.C., Chicago, IL; Eric G. Osborne, Phillip Frederick Cramer, LEAD ATTORNEYS, Sherrard Roe Voigt & Harbison PLC, Nashville, TN.

For John Gross & Company, on behalf of itself and all others similarly situated, Plaintiff: Allan Steyer, Donald Scott Macrae, Jill M. Manning, LEAD ATTORNEYS, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Bonny E Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Robert Gerard, LEAD ATTORNEY, Gerard and Associates, San Diego, CA; Sumee Oh, LEAD ATTORNEY, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.

For W Lee Flowers & Co Inc, Plaintiff: Elizabeth Halligan Black, Manton McCutchen Grier, Robert Y. Knowlton, LEAD ATTORNEYS, Haynsworth Sinkler Boyd, Columbia, SC; Mary Cothonneau Eldridge, LEAD ATTORNEY, PRO HAC VICE, Haynsworth Sinkler Boyd, Columbia, SC.

For Amy Jackson, Katherine McMahon, Joelyna A. San Agustin, Rebecca Lee Simoens, Plaintiffs: Betsy Carol Manifold, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA.

For David Ton, Plaintiff: Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA.

For Affiliated Foods Midwest, Cooperative, **[**37]** Inc., Brookshire Brothers, Inc., Brookshire Grocery Company, Certco, Inc., Plaintiffs: Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, San Francisco, CA.

For Unified Grocers, Inc., Plaintiff: David Germaine, LEAD ATTORNEY, Vanek, Vickers & Masini, P.C., Chicago, IL; Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, San Francisco, CA.

For SIMON-HINDI, LLC, Plaintiff: Alec Blaine Finley, Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC; John H Donboli, LEAD ATTORNEY, Donboli Law Group, APC, San Diego, CA; Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ; Peter Gil-Montllor, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY.

For FAREWAY STORES, INC., Plaintiff: Justin B Farar, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, Los Angeles, CA; Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, San Francisco, CA; Lawrence Kill, LEAD ATTORNEY, PRO HAC VICE, Anderson Kill P.C., New York, NY; Thomas D. Mauriello, LEAD ATTORNEY, Mauriello Law Firm APC, San Clemente, CA; Bernard Marcus, Erin Gibson Allen, Marcus & Shapira LLP, Pittsburgh, PA; Elana Katcher, Kaplan Fox Kilsheimer, New York, NY; Gregory K Arenson, **[**38]** Matthew P McCahill, Kaplan Fox and Kilsheimer LLP, New York, NY; Johnny K Merritt, Mullin Hoard and Brown, Amarillo, TX; Mario Man-Lung Choi, Kaplan Fox & Kilsheimer, LLP, San Francisco, CA; Moira Cain-Mannix, PRO HAC VICE, Marcus & Shapira LLP, Pittsburgh, PA; Richard Lyle Coffman, PRO HAC VICE, The Coffman Law Firm, Beaumont, TX; Richard J Kilsheimer, Law Offices of Richard J Kilsheimer, New York, NY; Robert N Kaplan, PRO HAC VICE, Kaplan Kilsheimer and Fox, New York, NY.

For WOODMAN'S FOOD MARKET, INC., Plaintiff: Justin B Farar, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, Los Angeles, CA; Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, San Francisco, CA; Lawrence Kill, LEAD ATTORNEY, PRO HAC VICE, Anderson Kill P.C., New York, NY; Mario Man-Lung Choi, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP, San Francisco, CA; Thomas D. Mauriello, LEAD ATTORNEY, Mauriello Law Firm APC, San Clemente, CA; Bernard Marcus, Erin Gibson Allen, Marcus & Shapira LLP, Pittsburgh, PA; Elana Katcher, Kaplan Fox Kilsheimer, New York, NY; Gregory K Arenson, Matthew P McCahill, Kaplan Fox and Kilsheimer LLP, New York, NY; Johnny K Merritt, Mullin Hoard and Brown, Amarillo, TX; Moira Cain-Mannix, **[**39]** PRO HAC VICE, Marcus & Shapira LLP, Pittsburgh, PA; Richard Lyle Coffman, PRO HAC VICE, The Coffman Law Firm, Beaumont, TX; Richard J Kilsheimer, Law Offices of Richard J Kilsheimer, New York, NY; Robert N Kaplan, PRO HAC VICE, Kaplan Kilsheimer and Fox, New York, NY.

For Sam's East, Inc., Sam's West, Inc., Wal-Mart Stores East, LLC, Wal-Mart Stores East, LP, Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc., Plaintiffs: Andrew King, Jess L. Askew, III, LEAD ATTORNEYS, Kutak Rock LLP, Little Rock, AR; Catriona M. Lavery, Marc M. Seltzer, LEAD ATTORNEYS, Susman Godfrey, Los Angeles, CA; Neal S. Manne, LEAD ATTORNEY, Susman Godfrey L.L.P., Houston, TX.

For Jessica Bartling, Gay Birnbaum, Sally Bredberg, Kim Craig, Brian Depperschmidt, Gloria Emery, Ana Gabriela Felix Garcia, John Frick, Kathleen Garner, Andrew Gorman, Edgardo Gutierrez, Zenda Johnston, Steven Kratky, Kathy Lingnofski, Laura Montoya, Kirsten Peck, John Pels, Valerie Peters, Elizabeth Perron, Audra Rickman, Erica C Rodriguez, Amber Sartori, Robert Skaff, Julie Wiese, Daniel Zwirlein, Plaintiffs: Betsy Carol Manifold, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA.

For SuperValu Inc., Super Store Industries, **[**40]** Plaintiffs: David Germaine, LEAD ATTORNEY, Vanek, Vickers & Masini, P.C., Chicago, IL; Eric G. Osborne, Phillip Frederick Cramer, LEAD ATTORNEYS, Sherrard Roe Voigt & Harbison PLC, Nashville, TN.

Family Dollar Services LLC, Plaintiff, Pro se.

Family Dollar Stores, Inc., Plaintiff, Pro se.

Dollar Tree Distribution, Inc., Plaintiff, Pro se.

Greenbrier International, Inc., Plaintiff, Pro se.

Alex Lee, Inc., Plaintiff, Pro se.

Big Y Foods, Inc., Plaintiff, Pro se.

K-VA-T Food Stores, Inc., doing business as Food City, Plaintiff, Pro se.

Merchants Distributors, LLC, Plaintiff, Pro se.

Schnuck Markets, Inc., Plaintiff, Pro se.

Kmart Corporation, Plaintiff, Pro se.

For Rushin Gold, LLC, doing business as, The Gold Rush, Plaintiff: Alec Blaine Finley , Jr, Christian Hudson, LEAD ATTORNEYS, Cuneo Gilbert & LaDuca LLP, Washington, DC; Charles F Barrett, LEAD ATTORNEY, Neal & Harwell, PLC, Nashville, TN; Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ.

For Target Corporation, Plaintiff: Andrew Z. Michaelson, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, New York, NY; Craig S Coleman, LEAD ATTORNEY, Faegre Baker Daniels LLP, Mpls, MN; David L. Zifkin, LEAD **[**41]** ATTORNEY, Boies, Schiller and Flexner LLP, Santa Monica, CA; Nathan Andrew Holcomb, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Armonk, NY; Scott E. Gant, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC.

For Moran Foods, LLC, doing business as, Save-A-Lot, Plaintiff: David Germaine, Alberto Rodriguez, LEAD ATTORNEYS, Vanek, Vickers & Masini, P.C., Chicago, IL.

For Dollar General Corporation, Dolgencorp, LLC, Plaintiffs: David Germaine, Alberto Rodriguez, LEAD ATTORNEYS, Vanek, Vickers & Masini, P.C., Chicago, IL; Eric G. Osborne, Phillip Frederick Cramer, LEAD ATTORNEYS, Sherrard Roe Voigt & Harbison PLC, Nashville, TN.

For Krasdale Foods, Inc., Plaintiff: Linda Phyllis Nussbaum, LEAD ATTORNEY, Nussbaum Law Group, P.C., New York, NY.

For Grand Supercenter Inc., Plaintiff: Andrew John Dressel, Paul Brian Maslo, Salvatore Charles Badala, LEAD ATTORNEYS, PRO HAC VICE, Napoli Shkolnik PLLC, New York, NY; Jennifer R. Liakos, LEAD ATTORNEY, Napoli Shkolnick & Associates PLLC, El Segundo, CA.

For Grand Supercenter Inc., Plaintiff: Andrew John Dressel, Paul Brian Maslo, Salvatore Charles Badala, LEAD ATTORNEYS, PRO HAC VICE, Napoli Shkolnik PLLC, New York, NY; **[**42]** Jennifer R. Liakos, Jennifer R. Liakos, Napoli Shkolnick & Associates PLLC, El Segundo, CA.

For CVS Pharmacy, Inc., Plaintiff: Brian Parker Miller, James Cash, Michael H. Shanlever, Valarie C. Williams, LEAD ATTORNEYS, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Lisa L Garcia, LEAD ATTORNEY, Alston & Bird LLP, Los Angeles, CA.

For Cherokee Nation, The, Plaintiff: Don Francis Livornese, LEAD ATTORNEY, Ruyak Cherian LLP, El Segundo, CA; Rebecca Anzidei, Robert Francis Ruyak, LEAD ATTORNEYS, PRO HAC VICE, RuyakCherian LLP, Washington, DC.

For Bashas' Inc., Marc Glassman, Inc., 99 Cents Only Stores LLC, Plaintiffs: Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, San Francisco, CA.

For US Foods, Inc., Plaintiff: Daryl M. Schumacher, LEAD ATTORNEY, Kopecky Schumacher Rosenburg PC, Chicago, IL; Scott E. Gant, LEAD ATTORNEY, Boies Schiller Flexner LLP, Washington, DC.

For Sysco Corporation, Plaintiff: Scott E. Gant, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC.

For Ahold U.S.A., Inc., Delhaize America, LLC, Plaintiffs: Brandon S Floch, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL; William Jay Blechman, LEAD ATTORNEYS, PRO HAC VICE, Kenny Nachwalter Seymour **[**43]** Arnold Critchlow and Spector, Miami, FL; Samuel J Randall, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL.

For Associated Wholesale Grocers, Inc., Plaintiff: Christopher Curtis Shank, Patrick J. Stueve, Stephen N. Six, LEAD ATTORNEYS, Stueve Siegel Hanson LLP - KC, Kansas City, MO.

For Maquoketa Care Center, Plaintiff: Alec Blaine Finley, Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC; Christian Hudson, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY.

For Francis T Enterprises, Erbert & Gerbert's, Inc., Janet Machen, Painted Plate Catering, GlowFisch Hospitality, Plaintiffs: Alec Blaine Finley, Jr, Christian Hudson, LEAD ATTORNEYS, Cuneo Gilbert & LaDuca LLP, Washington, DC.

For Robert Etten, Plaintiff: Betsy Carol Manifold, Carl Malmstrom, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA; Francis A. Bottini, LEAD ATTORNEY, Bottini & Bottini, Inc., La Jolla, CA; Jayne Arnold Goldstein, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Fort Lauderdale, FL; Theodore Bell, LEAD ATTORNEY, Skokie, IL.

For Groucho's Deli of Five Points, LLC, Groucho's Deli of Raleigh, Sandee's Catering, Confetti's Ice Cream Shoppe, **[**44]** Plaintiffs: Alec Blaine Finley, Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC.

For Affiliated Foods Plaintiffs, Consol Plaintiff: Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, San Francisco, CA.

For United States Department of Justice, Intervenor Plaintiff: Leslie A. Wulff, Micah L. Rubbo, LEAD ATTORNEYS, U.S. Deparment of Justice, Antitrust Division, San Francisco, CA; Manish Kumar, LEAD ATTORNEY, U.S. Department of Justice, San Francisco, CA.

For Bumble Bee Foods LLC, Defendant: Craig A. Benson, Heather Colleen Milligan, Joseph J. Bial, Kenneth A. Gallo, Michelle Parikh, LEAD ATTORNEYS, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; William Baly Michael, LEAD ATTORNEY, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY.

For Tri-Union Seafoods LLC, Defendant: Erik Raven-Hansen, John Roberti, LEAD ATTORNEY, PRO HAC VICE, Allen & Overy LLP, Washington, DC; John Terzaken, LEAD ATTORNEY, PRO HAC VICE, Simpson Thacher & Bartlett LLP, Washington, DC; Keith R Solar, LEAD ATTORNEY, Buchanan Ingersoll & Rooney LLP, San Diego, CA. William E White, III, LEAD ATTORNEY, Allen & Overy LLP, Washington, DC; Robert J Parks, Parks & Solar LLP, San Diego, **[**45]** CA.

For Starkist Company, Defendant: Alfred Carroll Pfeiffer, Jr., LEAD ATTORNEY, Latham & Watkins LLP, San Francisco, CA; Ashley M. Bauer, LEAD ATTORNEY, Latham & Watkins, San Francisco, CA; Belinda S Lee, Christopher S Yates, LEAD ATTORNEYS, Latham and Watkins, San Francisco, CA; Niall E. Lynch, LEAD ATTORNEY, Latham & Watkins, San Francisco, CA; Jeffrey Michael Goldman, Pepper Hamilton LLP, Irvine, CA.

For Tri Marine International, Inc., Defendant: Shylah Renee Alfonso, LEAD ATTORNEY, PRO HAC VICE, Perkins Coie LLP, Seattle, WA.

For King Oscar, Inc., Defendant: Erik Raven-Hansen, John Roberti, LEAD ATTORNEY, PRO HAC VICE, Allen & Overy LLP, Washington, DC; John Terzaken, LEAD ATTORNEY, PRO HAC VICE, Simpson Thacher & Bartlett LLP, Washington, DC; Keith R Solar, LEAD ATTORNEY, Buchanan Ingersoll & Rooney LLP, San Diego, CA. William E White, III, LEAD ATTORNEY, Allen & Overy LLP, Washington, DC; Robert J Parks, Parks & Solar LLP, San Diego, CA.

For Dongwon Industries Co., Ltd., Defendant: Alfred Carroll Pfeiffer, Jr., LEAD ATTORNEY, Latham & Watkins LLP, San Francisco, CA; Ashley M. Bauer, LEAD ATTORNEY, Latham & Watkins, San Francisco, CA; Belinda S Lee, Christopher S Yates, LEAD ATTORNEYS, **[**46]** Latham and Watkins, San Francisco, CA; Niall E. Lynch, LEAD ATTORNEY, Latham & Watkins, San Francisco, CA; Jeffrey Michael Goldman, Pepper Hamilton LLP, Irvine, CA.

For Del Monte Foods Company, Defendant: Barak Bassman, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA; Barbara Sicalides, LEAD ATTORNEY, PRO HAC VICE, Pepper Hamilton LLP, Philadelphia, PA; Jeffrey Michael Goldman, LEAD ATTORNEY, Pepper Hamilton LLP, Irvine, CA.

For Thai Union Group Public Company, Thai Union Group Public Company, Ltd., Defendants: Robert J Parks, LEAD ATTORNEY, Parks & Solar LLP, San Diego, CA.

For Thai Union Group Public Company, Ltd., Defendant: Robert J Parks, LEAD ATTORNEY, Parks & Solar LLP, San Diego, CA; John Roberti, Allen & Overy LLP, Washington, DC.

For Del Monte Corporation, Defendant: Benjamin Jesse Eichel, Megan Morley, LEAD ATTORNEYS, Pepper Hamilton LLP, Philadelphia, PA; Jeffrey Michael Goldman, LEAD ATTORNEY, Pepper Hamilton LLP, Irvine, CA; Barbara Sicalides, LEAD ATTORNEY, PRO HAC VICE, Pepper Hamilton LLP, Philadelphia, PA.

For Tri-Union Seafoods LLC, doing business as Chicken of the Sea International, Inc., Defendant: John Roberti, LEAD ATTORNEY, Allen & Overy LLP, Washington, DC; Jonathan **[**47]** Riley Myers, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Washington, DC.

For Thai Union Group PCL, Defendant: Brian Thomas Fitzpatrick, LEAD ATTORNEY, Allen & Overy LLP, New York, NY; Erik Raven-Hansen, LEAD ATTORNEY, PRO HAC VICE, Allen & Overy LLP, Allen & Overy LLP; Jana Steenholdt, Kelse Hillery Moen, LEAD ATTORNEYS, Allen & Overy LLP, Washington, DC; John Roberti, LEAD ATTORNEY, PRO HAC VICE, Allen & Overy LLP, Washington, DC; Jonathan Riley Myers, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Washington, DC.

For Christopher D. Lischewski, Defendant: Benedict Yung Hur, LEAD ATTORNEY, Keker, Van Nest & Peters LLP, San Francisco, CA; Elizabeth McCloskey, LEAD ATTORNEY, Keker and Van Nest LLP, San Francisco, CA.

For Lion Capital LLP, Lion Capital (Americas), Inc., Big Catch Cayman LP, Defendants: Adam S Paris, LEAD ATTORNEY, Sullivan and Cromwell LLP, Los Angeles, CA.

For Tri-Union Seafoods LLC, doing business as Chicken of the Sea International, Inc., Defendant: Brian Thomas Fitzpatrick, LEAD ATTORNEY, Allen & Overy LLP, New York, NY; Jana Steenholdt, Kelse Hillery Moen, LEAD ATTORNEYS, Allen & Overy LLP, Washington, DC.

For Francis T Enterprises, Defendant: Alec Blaine Finley , **[**48]** Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC; Christian Hudson, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY.

For GlowFisch Hospitality, Defendant: Christian Hudson, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY.

For Lion Capital LLP, Miscellaneous Party: Adam S Paris, LEAD ATTORNEY, Sullivan and Cromwell LLP, Los Angeles, CA.

Judges: Hon. Janis Lynn Sammartino, United States District Judge.

Opinion by: Janis Lynn Sammartino

Opinion

[*1086] ORDER GRANTING MOTION TO DISMISS

(ECF No. 983)

Presently before the Court is Defendants StarKist Co., Dongwon Industries, Co., Bumble Bee Foods LLC, Del Monte Corporation, Tri-Union Seafoods LLC d/b/a Chicken of the Sea International Inc., and Thai Union Group PCL's ("Defendants") Joint Motion to Dismiss, ("MTD," ECF No. 983). Also before the Court are Plaintiff the Cherokee Nation's Opposition to, ("Opp'n," ECF No. 1267), and Defendants' Reply in Support of, ("Reply," ECF No. 1284), the Motion. The Court heard oral argument on July 30, 2018. Having considered the parties' arguments and the law, the Court rules as follows.

BACKGROUND

This case concerns an alleged conspiracy to fix the prices of packaged seafood throughout the United States. Plaintiff the **[**49]** Cherokee Nation is a federally recognized sovereign Indian nation and brings this action in its proprietary capacity and under its *parens patriae* authority against Defendants as part of a broader multi-district litigation ("MDL") currently pending before this Court. (First Am. Compl. ("FAC"), ECF No. 823, ¶¶ 11-12.)[1] This particular aspect of the MDL concerns whether the Court has subject matter jurisdiction over Plaintiff's claims.

In 2015, various plaintiffs across the country brought civil suits concerning defendants StarKist, Chicken of the Sea, and Bumble Bee's conduct. The several civil actions relating to this alleged conspiracy were consolidated in an MDL and the judicial panel on MDLs centralized pretrial proceedings to this Court on December 9, 2015, (*see* Transfer Order, ECF No. 1). The Cherokee Nation was a latecomer to this litigation and filed suit on November 16, 2017, (*see* No. 17-CV-2332, ECF No. 1), which was then consolidated with the MDL. Plaintiff originally requested the Court create a track solely for itself, (ECF No. 751-1, at 3), but later amended its motion to request placement in the indirect End Purchaser Payer ("EPP") track, while also maintaining its own complaint, **[**50]** (ECF No. 798-1, at 2). On February 5, 2018, Plaintiff filed a First Amended Complaint, (ECF No. 823), and on February 23, 2018, the Court granted Plaintiff's amended motion **[*1087]** and assigned Plaintiff to the EPP track, (ECF No. 859).

Plaintiff's amended Complaint sets forth detailed allegations concerning alleged price-fixing schemes in the packaged seafood industry, which has resulted in a Department of Justice investigation into Defendants' activities and guilty pleas by several packaged seafood executives. (FAC ¶¶ 213, 221-28.) Defendants are major producers of packaged seafood. The complaint presents allegations of increased packaged seafood prices resulting from anticompetitive behavior on the part of Defendants. (*See id.* ¶¶ 205, 208-10.) Plaintiff's citizens, members of the Cherokee Nation, are indirect purchasers of packaged tuna. (*Id.* ¶ 10.) Plaintiff alleges that Defendants' anticompetitive behavior has resulted in fixed or higher prices of packaged seafood, that indirect purchasers of packaged seafood have been deprived of free and open competition, and that indirect purchasers paid artificially inflated prices. (*Id.* ¶ 229.)

Plaintiff's amended Complaint brings the following claims. **[**51]** First, Plaintiff asserts a cause of action under *section 1 of the Sherman Act, 15 U.S.C. § 1*, which is Plaintiff's only federal cause of action. Second, Plaintiff asserts causes of action for violation of State law; specifically, California, Kansas, Arizona, Colorado, New Mexico, Oklahoma, and Florida. Third, Plaintiff brings two causes of action under Cherokee Nation law—Unfair and Deceptive Practices Act ("CNUDPA"), 12 CNCA § 21 *et seq.*, and unjust enrichment. (*See generally* FAC.) Defendants have filed the present joint motion to dismiss, (ECF No. 983), challenging this Court's jurisdiction to

[1] The sealed version of The Cherokee Nation's First Amended Complaint is located at ECF No. 825.

hear Plaintiff's claims under *Rule 12(b)(1)* and asserting, in the alternative, that the amended Complaint fails to state a claim under *Rule 12(b)(6)*.

LEGAL STANDARD

I. *Rule 12(b)(1)*

HN1[] A motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(1)* challenges a court's subject matter jurisdiction. Federal district courts are courts of limited jurisdiction that "may not grant relief absent a constitutional or valid statutory grant of jurisdiction" and are "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *A-Z Int'l v. Phillips, 323 F.3d 1141, 1145 (9th Cir. 2003)* (internal quotations and citations omitted). The plaintiff bears the burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391*; *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 538 F.3d 1107, 1110 (9th Cir. 2008)*.

HN2[] *Rule 12(b)(1)* motions may challenge jurisdiction facially **[**52]** or factually. *Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)*. "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* To adjudicate the factual challenge, the Court may review evidence beyond the complaint without converting the *Rule 12(b)(1)* motion into one for summary judgment. *Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cnty., 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)*; *David v. Giurbino, 488 F. Supp. 2d 1048, 1054 (S.D. Cal. 2007)*. Once the moving party makes a factual challenge by bringing evidence before the Court, the opposing party must furnish its own affidavits or other evidence to establish subject matter jurisdiction. *Safe Air, 373 F.3d at 1039*; **[*1088]** *Savage, 343 F.3d at 1039 n.2*. Without assuming the truth of the complaint's factual allegations, the Court nonetheless resolves factual disputes in favor of the non-moving party. *Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1996)*; *Farrah v. Monterey Transfer & Storage, Inc., 555 F. Supp. 2d 1066, 1067-68 (N.D. Cal. 2008)*.

Alternatively, in a facial challenge, the defendant asserts the insufficiency of the complaint's allegations to invoke federal jurisdiction as a matter of law. *Whisnant v. United States, 400 F.3d 1177, 1179 (9th Cir. 2005)*; *Cross v. Pac. Coast Plaza Invs., L.P., No. 6 CV 2543 JM (RBB), 2007 U.S. Dist. LEXIS 16138, 2007 WL 951772, at *1 (S.D. Cal. Mar. 6, 2007)*. To adjudicate the facial challenge, the Court assumes the truth of the allegations in the complaint and draws all reasonable inferences in favor of the plaintiff. **[**53]** *Whisnant, 400 F.3d at 1177*; *Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004)*.

II. *Rule 12(b)(6)*

HN3[] *Federal Rule of Civil Procedure 12(b)(6)* permits a party to raise by motion the defense that the complaint "fail[s] to state a claim upon which relief can be granted," generally referred to as a motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and sufficient facts in light of *Federal Rule of Civil Procedure 8(a)*, which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Although *Rule 8* "does not require 'detailed factual allegations,' . . . it [does] demand more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. In other words, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*. A complaint will not suffice "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal, 556 U.S. at 677* (citing *Twombly, 550 U.S. at 557*).

HN4[] In order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting Twombly, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts pled "allow the court to draw the reasonable **[**54]** inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 677 (citing Twombly, 550 U.S. at 556). That is not to say that the claim must be probable, but there must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Facts "'merely consistent with' a defendant's liability" fall short of a plausible entitlement to relief. *Id.* (quoting Twombly, 550 U.S. at 557). Further, the Court need not accept as true "legal conclusions" contained in the complaint. *Id.* This review requires context-specific analysis involving the Court's "judicial experience and common sense." Id. at 678 (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.*

Where a complaint does not survive 12(b)(6) analysis, the Court will grant leave to amend unless it determines that no modified contention "consistent with the **[*1089]** challenged pleading . . . [will] cure the deficiency." DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)).

ANALYSIS

I. The Cherokee Nation's Standing to Bring a *Parens Patriae* Action

Plaintiff brings its claims as *parens patriae* on behalf of its citizens harmed by Defendants' alleged conduct. Defendants **[**55]** challenge Plaintiff's standing to bring a *parens patriae* civil action. HN5[] Article III of the Constitution vests federal courts with the authority to hear "Cases" and "Controversies." U.S. Const., art. III, § 2. "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016), *as revised* (May 24, 2016). "The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Id.* (citations omitted). "[S]tanding jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing,[2] which embodies judicially self-imposed limits on the exercise of federal jurisdiction." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004) (citation omitted), *abrogated on other grounds by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014).

HN6[] One particular aspect of the standing doctrine is *parens patriae*[3] standing. States or Indian nations asserting *parens patriae* standing must establish Article III standing and meet the "unique requirements" of the *parens patriae* doctrine. Missouri ex rel. Koster v. Harris, 847 F.3d 646, 651 (9th Cir. 2017) (citing Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc., 256 F.3d 879, 885 (9th Cir. 2001)). Generally, there are two elements to establish standing to bring a *parens patriae* claim. First, "the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be **[**56]** more than a nominal party." Id. (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995

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[2] Prudential standing is not derived from Article III and encompasses at least three broad principles: "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 S. Ct. 1377, 1386, 188 L. Ed. 2d 392 (2014) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004)).

[3] "*Parens patriae* means literally 'parent of the country.'" Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 600, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982) (footnote omitted).

(1982) ("*Snapp*")). Second, "[t]he State must express a quasisovereign interest." *Id.* (alteration in original) (quoting Snapp, 458 U.S. at 607).

A. Parties' Arguments

Defendants advance three arguments why Plaintiff does not have *parens patriae* standing.[4] First, the Cherokee **[*1090]** Nation does not have a quasi-sovereign interest because the alleged price fixing at issue in this case does not have anything to do with the health, safety, or welfare of the Cherokee Nation, nor is there sufficient allegations concerning protecting the Cherokee Nation's economy. (*See* MTD 15-16.)[5] Second, Defendants contend that the Cherokee Nation cannot assert *parens patriae* claims under the law of other states because it cannot bring claims under those states' laws. (*See id.* at 17.) Third, the Cherokee Nation has not alleged injury to a substantial segment of their population. (*See id.* at 17-18.)

Plaintiff contends that it does not need to meet the two requirements—interest apart from private parties and quasi-sovereign interest—for *parens patriae* standing. (Opp'n 17.) Instead, Plaintiff argues that the Cherokee Constitution and Cherokee Code creates **[**57]** the requisite *parens patriae* standing. (*Id.* (citing 51 CNCA § 105.B.14 (2015); 12 CNCA § 13); and *Washington v. Chimei Innolux Corp., 659 F.3d 842, 847 (9th Cir. 2011))*.) Plaintiff also contends that the Clayton Act provides statutory *parens patriae* authority and therefore does not require it to assert "quasi-sovereign or proprietary interests." (*Id.* at 19 (quoting *Pennsylvania v. Mid-Atl. Toyota Distribs., Inc., 704 F.2d 125, 129-30, 132 (4th Cir. 1983))*.) Instead, Plaintiff cites *Burch v. Goodyear Tire & Rubber Co., 554 F.2d 633, 635 (4th Cir. 1977)*, for the proposition that its Attorney General has authority to bring a *parens patriae* claim under federal ***antitrust law*** for non-monetary relief. (Opp'n 18.)

In the alternative, Plaintiff states that it has alleged the requisite harm to its population, as well as expressed a quasi-sovereign interest in the economic well-being of its citizens. (*Id. at 18* (citing FAC ¶¶ 10, 340, 350, 355, 360, 365, 370, 376; and *New York ex rel. Spitzer v. Saint Francis Hosp., 94 F. Supp. 2d 399, 420 (S.D.N.Y. 2000))*.)

In reply, Defendants argue Plaintiff confuses Article III standing with statutory standing. (Reply 5.) Defendants assert that *Snapp*'s *parens patriae* requirements reflect Article III standing requirements, rather than requirements that can be replaced by Congress. (*Id.*) They would distinguish Plaintiff's cases; *Chimei Innolux* required a quasisovereign interest, despite Plaintiff's characterization of *Chimei Innolux* as relieving Plaintiff of such a requirement. (*See id.* at 5-6.) Next, *Burch* only stands for **[**58]** the proposition that state attorneys general have authority to proceed *parens patriae* in suits for injunctive relief under *section 16 of the Clayton Act*, but does not relieve them of the *parens* ***[*1091]*** *patriae* requirements. (*Id.* at 6.) Finally, Defendants contend that *Mid-Atlantic Toyota* is distinguishable solely because it is a 35-year-old out-of-circuit case that is contrary to binding authority. (*Id.*) Defendants reiterate their earlier position that *Snapp* applies and Plaintiff cannot meet the *Snapp* requirements. (*See id.* at 6-7.)

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[4] Defendants also contend that Plaintiff fails to meet the Article III standing requirements to the extent that the Cherokee Nation purchased tuna in its proprietary capacity. (MTD 18-19.) Plaintiff's Opposition brief does not discuss proprietary standing. (*See generally* Opp'n.) At oral argument, Plaintiff cited paragraphs 339, 344, 354, 364, 369, and 376 of its amended Complaint, which address the purported harm to Cherokee businesses. (*See* ECF No. 1321, at 18.) These paragraphs state the following allegation: "Plaintiff purchased Packaged Tuna within the State of California," (FAC ¶ 339), but change each state in each cause of action, e.g., "Plaintiff purchased Packaged Tuna within the State of Kansas," (id. ¶ 344). These allegations provide no factual detail beyond such conclusory and vague statements. Furthermore, proprietary standing is appropriate when a state itself has proprietary interests, such as "own[ing] land or participat[ing] in a business venture." *Snapp, 458 U.S. at 602*. Plaintiff has not alleged any facts that, for example, the Cherokee Nation itself participated in any business venture harmed by Defendants' conduct. Therefore, Plaintiff's proprietary claims must fail. To the extent Plaintiff's vague allegations constitute proprietary causes of action the Court **GRANTS IN PART** Defendants' motion and **DISMISSES WITHOUT PREJUDICE** those claims.

[5] Pin citations to docketed material refer to the CM/ECF page numbers electronically stamped at the top of each page.

A. Parens Patriae *Standing Under the Antitrust Improvements Act*

The parties differ sharply on whether Plaintiff's *parens patriae* standing requirements are constitutional or prudential. ***HN7***[] If the requirements are prudential then Congress generally can expand standing to reach the full limits of Article III. *See Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 100, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979)* (citing *Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975))*. Thus, if Congress has modified the standing requirements then Plaintiff would no longer need to meet the *parens patriae* standing test articulated by the Supreme Court in *Snapp*. For reasons discussed in more depth below the line,[6] the Court assumes without deciding that *parens patriae* standing is prudential and not constitutional. The Court makes this assumption because, as will **[**59]** be seen, Plaintiff cannot meet the applicable prudential standing requirements for the various causes of action alleged. Plaintiff argues two sources of authority extend its standing to the fullest extent of Article III: the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* and Cherokee Nation law. The Court discusses each in turn.

In 1976, Congress passed and President Ford signed into law the Hart-Scott-Rodino Antitrust Improvements Act, 90 Stat. 1394, *15 U.S.C. § 15c et seq.* ***HN9***[] The Act created a new right of action for States under existing federal ***antitrust law***. *Mid-Atl. Toyota Distribs., 704 F.2d at 128* (citing *Reiter v. Sonotone Corp., 442 U.S. 330, 344 n.7, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979))*. The Act provides that an "attorney general of a State[7] may bring a

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[6] ***HN8***[] Article III and prudential standing are distinct concepts; prudential standing is a judicially crafted doctrine and does not derive from Article III. *See Lexmark Int'l, 134 S. Ct. at 1386* (discussing prudential standing doctrine). Some courts have determined that the *parens patriae* standing requirements are prudential and not rooted in Article III. *See Massachusetts v. EPA, 549 U.S. 497, 540 n.1, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)* (Roberts, C.J., dissenting); *In re Elec. Books Antitrust Litig., 14 F. Supp. 3d 525, 535 (S.D.N.Y. 2014)* ("[S]o long as [the States] have shown they have standing under Article III, the standing inquiry is at an end."); *New York v. Microsoft Corp., 209 F. Supp. 2d 132, 149 (D.D.C. 2002)*.

On the other hand, Defendants direct the Court to dicta in *Snapp* where the Supreme Court stated, "[f]ormulated so broadly, the concept [of quasi-sovereign interest] risks being too vague to survive the standing requirements of Art. III: A quasi sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." *458 U.S. at 602*. This might suggest that *parens patriae* is rooted in Article III, but the language does not clearly hold that *parens patriae* is a constitutional consideration. Given the Supreme Court's language and this Court's finding that Plaintiff is not bringing a claim under the statutory *parens patriae* section, *15 U.S.C. § 15c*, it is sufficient to assume without deciding that *parens patriae* standing is prudential, not constitutional in nature.

[7] One issue mentioned in the parties' footnotes is whether the Nation's Attorney General falls within the definition of State attorney general for purposes of *§ 15c*. The definition section, *15 U.S.C. § 15g*, defines "State attorney general" as the "chief legal officer of a State." *§ 15g(1)*. The statute then defines "State" as a "State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States." *§ 15g(2)*. The statute does not explicitly mention Indian nations. Plaintiff directs the Court to an unreported district court opinion for the proposition that the United States holds title to the land in trust on behalf of the Cherokee Nation and therefore the Nation should be considered a possession of the United States. (Opp'n 18 n.9 (citing *Buzzard v. Okla. Tax Comm'n, 1992 U.S. Dist. LEXIS 22864, at *7-8 (N.D. Okla. Mar. 3, 1992))*.)

The Court is not persuaded that holding title to land translates to the Cherokee Nation being a possession under the federal antitrust statute. In *Wilson v. Marchington*, the Ninth Circuit discussed two Supreme Court decisions relating to whether Indian nations are territories or possession—the cases have diverging conclusions. *See 127 F.3d 805 (9th Cir. 1997)*. In *United States ex rel. Mackey v. Coxe, 59 U.S. (18 How.) 100, 103-04, 15 L. Ed. 299 (1855)*, the Supreme Court "held the Cherokee nation was a territory as that term was used in a federal letters of administration statute." *Wilson, 127 F.3d at 808*. By contrast, in *New York ex rel. Kopel v. Bingham, 211 U.S. 468, 474-75, 29 S. Ct. 190, 53 L. Ed. 286 (1909)*, the Court cited with approval a district court opinion that held the Cherokee Nation was not a "territory" under the federal extradition statute. *Wilson, 127 F.3d at 808*. In *Wilson*, the Ninth Circuit declined to extend full faith and credit to tribal court decisions because the court construed the term "territory or possession of the United States" in *28 U.S.C. § 1738* to not include Indian tribes. *Id. at 809*. At oral argument, Plaintiff maintained that *Coxe* is on point for the issue whether the Cherokee Nation is a territory or possession. (ECF No. 1321, civil **[*1092]** action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure *monetary relief* as provided in this section for injury sustained by such natural persons to their property by reason of any violation of *sections 1 to 7* of this title." *15 U.S.C. § 15c(a)(1)* (emphasis added).

HN10[] Thus, Congress has expressly authorized state attorneys general to bring suit under **[**60]** the Antitrust Improvements Act and Plaintiff need not demonstrate prudential standing, so long as it brings a claim for monetary relief under *§ 15c*. But here is the critical point: Plaintiff does not bring an action under *§ 15c*. Its amended Complaint clearly states that it only seeks injunctive relief under the Sherman Act, (FAC ¶ 252); *§ 15c* only allows monetary relief. To the extent it seeks monetary relief, Plaintiff does so under Cherokee Nation law. (*Id.*, Prayer for Relief, ¶ b.) Logically, Plaintiff cannot rely on *§ 15c* to provide standing when it has no claim under that section.

Nonetheless, the Nation argues that the Antitrust Improvements Act, codified in *§ 15c*, provides standing to bring a non-monetary, i.e., injunctive, relief claim. (*See* Opp'n 18-19.) Plaintiff's reading of the law in incorrect. ***HN11***[] The Antitrust Improvements Act did not amend *section 16 of the Clayton Act*, codified at *15 U.S.C. § 26*, which provides a private cause of action for injunctive relief. The plain language of the *§ 15c* only mentions monetary—not injunctive—relief. *Section 15c* only created a new procedural means—the *parens patriae* civil action—through which a State could enforce already existing rights of recovery under *section 4* of the Clayton Act. *See Ill. Brick v. Illinois, 431 U.S. 720, 733 n.14, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*.

Plaintiff cites dicta **[**61]** in *Burch*, where the Fourth Circuit said that "the congressional intent regarding the Hart-Scott-Rodino Antitrust Improvements Act of 1976 disclosed congressional recognition that state attorneys general suing as parens patriae clearly have standing to seek injunctive relief under *Section 16* of the Clayton Act." *554 F.2d at 635* (citations omitted). The **[*1093]** *Burch* court's statement did not hold that *§ 15c* extends to injunctive relief, but merely recognized that the Supreme Court already allowed *parens patriae* actions for injunctive relief under *section 16*, *id. at 635 n.3* (citing *Georgia v. Pennsylvania R. Co., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945))*, and the Act did not disturb the Supreme Court's holding. Thus, the Antitrust Improvement Act, *15 U.S.C. § 15c*, does not supply the requisite standing for Plaintiff to request injunctive relief.

B. Parens Patriae *Standing Under Cherokee Nation Law*

The Cherokee Nation advances a second ground by which it has standing to assert a *parens patriae* action under both federal and state law without meeting the *Snapp* test. It argues that the Nation's Attorney General has authority to initiate a civil action on behalf of the citizens of the Cherokee Nation under 51 CNCA § 105.B.2[8] and under the Cherokee Constitution, Article VII, § 13, which authorizes the Attorney General to represent the Nation in all civil actions "wherein the Cherokee **[**62]** Nation is named as a party." (Opp'n 17.) Plaintiff also argues the Cherokee Nation Attorney General has standing to bring a *parens patriae* civil action under the laws of other states. (*Id.* at 31.) ***HN12***[] To that end, recently enacted Cherokee Nation law provides that:

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at 14.) *Coxe*'s applicability to the federal antitrust statute is far from certain, especially in light of the reasoning in *Bingham* and *Wilson*.

The Court notes that should Plaintiff amend its complaint to rely on *15 U.S.C. § 15c* it will likely need to more thoroughly discuss this issue. Because Plaintiff does not explicitly rely on *§ 15c*, the Court will proceed with its analysis, assuming that Plaintiff could eventually demonstrate it has standing under *§ 15c*.

[8] Plaintiff's Opposition brief cites to 12 CNCA § 13 and 51 CNCA § 105.B.14 as providing the requisite statutory standing. These citations to the Cherokee Nation Code do not appear to be correct. For example, 12 CNCA § 13 concerns the tolling of the limitations period for minors or incompetents. 51 CNCA § 105.B.14 provides the Attorney General with authorization to prosecute all civil and criminal actions against or within the jurisdiction of the Cherokee Nation. The Court believes title 51, section 105.B.2 is the appropriate citation, which authorizes the Attorney General to "initiate or appear . . . in any action in which the interests of the Nation or the People of the Nation are at issue." If Plaintiff cites Cherokee Nation Code going forward in this litigation, it should provide a copy of the relevant section, either by reference or judicial notice, for the Court. The Code is not available on the commercial reporters and the Cherokee Nation's website only contains a copy of the Code from 2015.

> The Cherokee Nation Attorney General acting as parens patriae, may bring a civil cause of action in any district court of the United States . . . having jurisdiction over a defendant, to secure monetary or injunctive relief based on any *applicable* federal statute, common law, or the laws of any state.

12 CNCA § 7 (2018) (emphasis added). Similarly, 51 CNCA § 105.B.2 authorizes the Attorney General to "initiate or appear . . . in any action in which the interests of the Nation or the People of the Nation are at issue." Thus, the issue is whether these constitutional and statutory sections allow the Cherokee Nation to displace the general rule articulated in *Snapp*.

The Court reads the foregoing Cherokee Nation provisions as authorizing the Attorney General to bring a suit under *applicable* substantive law, whether federal or state. That is half the equation; the other half is what constitutes "applicable" law. Can the Cherokee Nation Attorney General bring suit **[**63]** as if he is the Kansas attorney general simply because Cherokee Nation law authorizes parens patriae but the Kansas legislature does not explicitly do so? Plaintiff cites no authority for such a proposition. The proper inquiry is whether the Nation's Attorney General is within the scope of the cause of action authorized by Congress or a state legislature. *See D.R. Ward Constr. Co. v. Rohm & Haas Co., 470 F. Supp. 2d 485, 495 (E.D. Pa. 2006)* (noting that ***HN13***[] "the concept of prudential standing in the antitrust context is intertwined with the substantive content of and **[*1094]** intent behind the particular statute authorizing the cause of action").

In sum, it is not enough that Cherokee Nation law authorizes the Attorney General to bring suit; the Nation must also demonstrate that it meets the prudential standing requirements of the state or federal substantive law in question, i.e., that it is within the class of persons who can sue under a statute. The Court will shortly discuss Plaintiff's standing under *section 16* of the Clayton Act, *see infra* section I.C, to request declaratory relief, *see infra* section I.D, and standing under various state substantive law, *see infra* section II.

C. Parens Patriae *Standing Under Section 16 of the Clayton Act*

Plaintiff's amended Complaint seeks injunctive relief **[**64]** for violation of *section 1* of the Sherman Act. (FAC ¶ 252.) ***HN14***[] Injunctive relief is governed by *section 16* of the Clayton Act, which provides "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*.

1. The Parties' Arguments

Defendants state that Plaintiff's only federal claim is for an injunction under the Sherman Act. (MTD 22 (citing FAC Prayer for Relief, ¶ d; *id.* ¶¶ 247-52).) Defendants contend that Plaintiff has failed to state a claim such that the Court does not have subject matter jurisdiction. Defendants also point out that this Court previously dismissed identical claims made by other plaintiffs in this MDL for failing to "plead facts that plausibly establish the continuing risk of threatened injury." (*Id.* (citing *In re Packaged Seafood Prods. Antitrust Litig., No. 15-2670, 2017 U.S. Dist. LEXIS 1279, 2017 WL 35571, at *12 (S.D. Cal. Jan. 3, 2017)*; and *In re Packaged Seafood Prods. Antitrust Litig., 277 F. Supp. 3d 1167, 1176 (S.D. Cal. 2017))*.) They argue that Plaintiff, like the plaintiffs in the previous orders, have pleaded no facts supporting an ongoing conspiracy and to the extent Plaintiff has pleaded facts, the facts are inconsistent with an ongoing conspiracy or any real or immediate threat of harm in the future. (*Id.* at 11-12 (citing **[**65]** FAC ¶¶ 2, 252).) Defendants conclude that Plaintiff's sole federal claim is defective and urge the Court to dismiss the entire complaint for lack of subject matter jurisdiction. (*Id.* at 12.)

HN15[] Plaintiff argues that jurisdictional dismissal is warranted only "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." (Opp'n 12 (quoting *Bell v. Hood, 327 U.S. 678, 682-83, 66 S. Ct. 773, 90 L. Ed. 939 (1946))*.) Plaintiff would apply *Hood* in this case because the Court's prior rulings determined that claims similar to Plaintiff's claims were not frivolous. (*Id. at 13* (citing ECF Nos. 283, 295, 492).) Plaintiff advances a second argument; that injunctive relief is appropriate to eliminate the "lingering effects" of illegal conduct. (*Id.* (quoting *In re Multidistrict Vehicle Air Pollution, 538 F.2d at 234*).) Plaintiff avers that this Court's previous rulings should not apply here because Plaintiff has plausibly alleged lingering effects from which Defendants continue to benefit. (*Id.* (citing FAC ¶¶ 131-33).)

Defendants respond that they only seek dismissal of Plaintiff's injunctive relief claim because the Nation fails to plead facts to support a claim. (Reply 2.) That is, they **[*1095]** do **[**66]** not seek dismissal on jurisdictional grounds; thus *Bell v. Hood* and its progeny are inapplicable. (*Id.*)

2. Parens Patriae *Standing for Injunctive Relief*

Thus far in the analysis, Plaintiff's federal antitrust claim has not cleared the first hurdle—standing. Is *§ 15c* sufficient to confer standing for injunctive relief? The answer is no. Does Cherokee Nation law confer standing: yes, but only if the substantive law in question, state or federal, allows standing by a *parens patriae* plaintiff. This section deals with the question of whether Plaintiff may proceed with a federal antitrust injunctive relief claim under *parens patriae* standing.

HN16[] The Supreme Court's decisions, in particular *Georgia v. Pennsylvania Railroad* and *Snapp*, demonstrate that a *parens patriae* plaintiff must meet the two-part test outlined in *Snapp*. In *Pennsylvania Railroad*, the state of Georgia alleged that twenty railroad companies conspired to fix freight rates in violation of federal antitrust laws. *See 324 U.S. at 443-44*. Georgia brought suit in its capacity as quasi-sovereign, i.e., *parens patriae*, and in its proprietary capacity seeking both damages and injunctive relief. *Id. at 443*. The Supreme Court surveyed the relevant authority to determine **[**67]** whether Georgia could maintain the action under the Court's original jurisdiction. *See id. at 447-50* (citing, e.g., *Pennsylvania v. West Virginia, 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117, 1 Ohio Law Abs. 627 (1923)*; *Georgia v. Tenn. Copper Co., 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907)*; and *Kansas v. Colorado, 206 U.S. 46, 27 S. Ct. 655, 51 L. Ed. 956 (1907))*. The Court held that "Georgia may maintain this suit as parens patriae acting on behalf of her citizens." *Id. at 450*. And, the Court also determined that Georgia stated a claim for injunctive relief under *section 16* of the Clayton Act. *See id. at 460-62*.

More than thirty years later, the Court revisited the requirements for *parens patriae* in *Snapp*. The question presented was whether Puerto Rico could maintain a *parens patriae* action seeking injunctive and declaratory relief based on harm to migrant workers who had been recruited to work an apple harvest in the continental United States. *See Snapp, 458 U.S. at 597-99*. The Court again reviewed the line of cases permitting a *parens patriae* action, focusing on the same authorities discussed in *Pennsylvania Railroad*, as well as the holding of *Pennsylvania Railroad* itself. *See id. at 600-06*. The conclusion is worth quoting:

> ***HN17***[] This summary of the case law involving *parens patriae* actions leads to the following conclusions. In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. **[**68]** The State must express a quasi-sovereign interest.

Id. at 607. The upshot of *Pennsylvania Railroad, Snapp*, and similar cases is clear; where a sovereign seeks to maintain a *parens patriae* action under *section 16* of the Clayton Act, it must meet the requirements outlined in *Snapp*.

This view was implicitly recognized by a district court considering similar issues in *New York v. Microsoft Corp., 209 F. Supp. 2d 132 (D.D.C. 2002)*. There, the United States and several individual States filed suit against Microsoft alleging antitrust violations. *Id. at 136*. Microsoft argued that the States did not meet the standing requirements under *section 16* of the Clayton Act to bring a *parens patriae* action. *Id. at 150*. In making this argument, Microsoft proposed a rule that a **[*1096]** state alleging a *parens patriae* action must establish it is seeking to remedy some state-specific injury and must distinguish the injury to its citizenry from the injury shared in common by all citizens of the United States. *Id. at 151*. The court rejected this proposed rule relying on *Snapp* and *Pennsylvania Railroad. Id.*

Instead, the court found the plaintiff States had standing because they had proven a significant harm to their citizens:

> It cannot, therefore, be said that this is a case where the "primary thrust of an alleged wrong is injury to a **[**69]** narrowly limited class of individuals, and the harm to the economy as a whole is insignificant by comparison." At a minimum, this is a case where "the direct impact of the alleged wrong [is] felt by a substantial majority, though less than all, of the state's citizens, so that the suit can be said to be for the benefit of the public."

Id. at 152 (alteration in original) (quoting *Pennsylvania ex rel. Shapp v. Kleppe, 533 F.2d 668, 675, 174 U.S. App. D.C. 441 (D.C. Cir. 1976))*.

This Court sees no reason to depart from the general rule articulated in *Snapp*. ***HN18***[] Plaintiff must demonstrate the *parens patriae* standing requirements outlined in *Snapp* to bring a *section 16* claim.

3. Applying Snapp's *Framework to Plaintiff's Amended Complaint*

HN19[] Because *section 16* does not explicitly confer Plaintiff standing to bring an injunctive relief claim, Plaintiff must demonstrate it meets the standing requirements outlined by the Supreme Court in *Snapp. See 458 U.S. at 607*. Defendants argue that the Cherokee Nation has not alleged injury to a sufficiently substantial segment of its population. (MTD 17.) Plaintiff argues that it has sufficiently alleged a quasi-sovereign interest in the economic well-being of its citizens and has alleged such harm to its population. (Opp'n 18.)

HN20[] The Court agrees with Defendants. While the Supreme Court "has not attempted **[**70]** to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior," the Court does require that "more must be alleged than injury to an identifiable group of individual residents." *Snapp, 458 U.S. at 607*. Plaintiff's amended Complaint alleges that its citizens, "indirect purchasers of Packaged Tuna, have overpaid for Packaged Tuna as a direct result of Defendants' conspiracy and conduct." (FAC ¶ 10; *see also id.* ¶ 340 ("Defendants unlawfully overcharged end payers, who made purchases of Defendants' Packaged Tuna in California at prices that were more than they would have been but for Defendants' actions); ¶¶ 345, 350, 355, 365, 370, 376 (copying allegation in paragraph 340 and changing the name of the relevant state).) The allegations do not describe in any further depth the proportion or magnitude of the injury to the Cherokee Nation.

One could imagine a case where the line between a significant proportion and an insignificant proportion of a population is a close call. This is not one of those cases. The Court cannot adjudicate whether Plaintiff has alleged injury to a *significant* proportion of its population because Plaintiff has **[**71]** not alleged facts about *any* proportion of its population. Rather, Plaintiff states, in conclusory fashion, that its citizens "have overpaid for Packaged Tuna." (*Id.* ¶ 10.) In an effort to fend off this conclusion, Plaintiff argues that it cannot allege with more specificity the magnitude of the injury or the number of citizens injured because of Defendants' fraudulent concealment of their anticompetitive scheme. (Opp'n 18 n.8 (citing FAC ¶¶ 231-46).) Those fraudulent concealment allegations concern actions by Defendants to conceal their own activities; such activities **[*1097]** do not prevent Plaintiff from gathering and alleging information about its own population. If Plaintiff cannot explain how Defendants have injured a significant portion of the Cherokee Nation then perhaps the proper recourse is for individual consumers to join putative class actions against Defendants or bring their own claims.

By way of comparison, in the *Microsoft* case, the district court found that "millions of citizens of, and hundreds, if not thousands, of enterprises in each of the United States and the District of Columbia utilize PCs running on Microsoft software." *209 F. Supp. 2d at 152* (quoting *United States v. Microsoft Corp., 87 F. Supp. 2d 30, 55 (D.D.C. 2000))*. The court went on to state, "[a]t **[**72]** a minimum, this is a case where 'the direct impact of the alleged wrong [is] felt by a substantial majority, though less than all, of the state's citizens, so that the suit can be said to be for the benefit of the public.'" *Id.* (second alteration in original) (quoting *Kleppe, 533 F.2d at 675*). Here, we do not have similar information that would demonstrate injury to the Cherokee Nation's citizens.

The Court does not determine whether Plaintiff has a quasi-sovereign interest because Plaintiff's amended Complaint fails the first element of the *Snapp* standing test. The Court finds Plaintiff fails to meet its burden to demonstrate it has standing to bring an injunctive relief claim under federal ***antitrust law***.

D*. Parens Patriae *Standing Under the Declaratory Relief Act

Plaintiff also contends that this Court has jurisdiction to hear its claims under the Sherman Act because it seeks declaratory relief. (Opp'n 13 (citing FAC Prayer for Relief ¶ a).) To that end, Plaintiff cites several cases where courts have held that a declaratory relief action under the Sherman Act is sufficient to provide federal question jurisdiction. (*Id.* at 14 (citing, e.g., *S. Side Theatres, Inc. v. United W. Coast Theatres Corp., 178 F.2d 648, 651 (9th Cir. 1949)*).) Plaintiff urges the Court to find subject matter jurisdiction based on **[**73]** its declaratory relief claim.

Defendants respond that a declaratory relief claim must satisfy Article III's standing requirements. (Reply 2 (citing, e.g., *Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000)* (en banc)).) They assert Plaintiff does not meet the requirement because Plaintiff fails to plead an ongoing conspiracy and the cases Plaintiff cites all involved a party to an ongoing agreement. (*Id.* at 2-3.) Defendants also contend that Article III requires ripeness and a declaratory action must raise "a substantial controversy, ... of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." (*Id.* at 3 (emphasis omitted) (quoting *In re Coleman, 560 F.3d 1000, 1005 (9th Cir. 2009)*).) Defendants argue that Plaintiff has not plead immediacy here because the amended Complaint does not plausibly plead an ongoing conspiracy. (*See id.*)

HN21[] A court may grant declaratory relief "[i]n a case of actual controversy within its jurisdiction." *28 U.S.C. § 2201(a)*. Accordingly, a district court must determine at the outset whether the parties have presented an actual case or controversy within the court's jurisdiction. *Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005)*. The Declaratory Judgment Act is a "procedural device only; it does not confer an independent basis of jurisdiction on the federal court." *Guaranty Nat'l Ins. Co. v. Gates, 916 F.2d 508, 511 (9th Cir. 1990)* (citing, e.g., *Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72, 70 S. Ct. 876, 94 L. Ed. 1194 (1950)*). "A declaratory judgment action **[**74]** may be entertained in federal court only if **[*1098]** the coercive action that would have been necessary, absent the declaratory judgment procedure, could have been heard in a federal court." *Id.*; *see also Morongo Band of Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376 1382-83 (9th Cir. 1988)* ("The *Declaratory Judgment Act* merely creates a remedy in cases otherwise within the court's jurisdiction; it does not constitute an independent basis for jurisdiction." (citing *Fiedler v. Clark, 714 F.2d 77, 79 (9th Cir. 1983)* (per curiam)).

HN22[] Declaratory relief is a remedy and does not modify standing requirements. In order for Plaintiff to seek declaratory relief, it must still meet the *parens patriae* requirements outlined in *Snapp*. Indeed, the respondent in *Snapp* "sought declaratory relief with respect to the past practices of petitioners" and the Court applied the two-part test to the declaratory relief claim. *458 U.S. at 598-99*. As previously discussed, Plaintiff has not alleged an interest apart from the interest of private parties. *See id. at 607*; *supra* section I.C.3. Thus, Plaintiff does not have standing under the Sherman and Clayton Acts, as currently pled.

The Court finds that Plaintiff does not have standing to seek declaratory relief. Plaintiff has no basis for standing under the Sherman Act. Accordingly, the Court **GRANTS IN PART** Defendants' Motion and **[**75] DISMISSES WITHOUT PREJUDICE** Plaintiff's first cause of action under the Sherman Act.

E*. Parens Patriae *Standing Under Laws of Other States

Plaintiff brings substantive claims not just under *15 U.S.C. § 1*, but also under the laws of several states, including California, Kansas, Arizona, Colorado, New Mexico, Oklahoma, Florida and the Cherokee Nation's own laws. This raises, as previously discussed, the issue of whether the Cherokee Nation's Attorney General needs authorization to bring a *parens patriae* claim under the laws of other states. The Court briefly discusses the relevance of this section; Plaintiff's sole federal question claim has been dismissed. Therefore, the Court must determine whether to exercise supplemental jurisdiction over Plaintiff's remaining State and Indian law claims. Before doing so, the Court analyzes whether Plaintiff can bring any claim under State law.

Defendants argue that California, Oklahoma, Colorado, and Florida law only allow *parens patriae* actions pursuant to statutory grants of authority and the relevant authority in each state only allows that state's attorney general to bring a claim under state law. (MTD 17.) As to the remaining states—Kansas, Arizona, and New **[**76]** Mexico—Defendants cite *California v. Infineon Technologies AG, 531 F. Supp. 2d 1124, 1165-66 (N.D. Cal. 2007)*, for the proposition that courts dismiss claims under state law when the plaintiff cannot supply state authority that "expressly authorizes" a state attorney general to bring a *parens patriae* claim. (MTD 17.) Defendants contend that the Cherokee Nation cannot point to any such authority. (*Id.*)

As discussed, Plaintiff argues that the Cherokee Nation's Attorney General has statutory authority to bring a *parens patriae* action on behalf of all Nation citizens. (Opp'n 19.) It acknowledges that the Nation does not seek to represent its citizens of other states, but the Nation would represent citizens who reside in other states and hold dual citizenship with both the Cherokee Nation and the state in which they reside. (*Id.* at 20.) Plaintiff advances two arguments concerning *Infineon*. ***HN23***[] First, *Infineon* held that if there is legal authority in a state that expressly authorized a *parens patriae* action, then courts presume **[*1099]** the existence of such authority, and, here, the Cherokee Nation Attorney General has such authorization under Cherokee Nation law. (*Id.* (citing *Infineon, 531 F. Supp. 2d at 1165*); *see also id.* at 31 (citing 12 CNCA § 7).) Second, at oral argument, Plaintiff maintained that *Infineon* does not apply because it was **[**77]** generally discussing *California's Cartwright Act*. (ECF No. 1321, at 16.)

Defendants respond by arguing Plaintiff ignores *Infineon*'s reasoning that prohibits foreign attorneys general from bringing claims under the laws of states that limit parens patriae authority to their own attorneys general. (Reply 5 (citing *Infineon, 531 F. Supp. 2d at 1133, 1140)*.)

1. California

Plaintiff's second cause of action is for violation of the California Cartwright Act, which is the State's antitrust statute. (FAC ¶ 254.) ***HN24***[] The Act specifically authorizes the California Attorney General to bring suit on behalf of the people of California. *See* *Cal. Bus. & Prof. Code § 16760(a)(1)* ("The Attorney General may bring a civil action in the name of the people of the State of California, as parens patriae on behalf of natural persons residing in the state, ..."). As the *Infineon* court observed,

> This provision could not be plainer: where the Attorney General is empowered to bring a damages action seeking relief for violation(s) of the Cartwright Act, it is only the *California* Attorney General who is so empowered, and on behalf of *California* residents only. The out-of-state Attorneys General therefore have no parens patriae authority under the Act.

531 F. Supp. 2d at 1133.

HN25[] The Court agrees with the *Infineon* court; **[**78]** the plain language of the Cartwright Act belies no statutory authorization for a foreign attorney general to bring a *parens patriae* suit under California ***antitrust law***. The plain language of the statute only discusses a singular attorney general, i.e., *the* attorney general. This is different from statutory language that authorizes multiple attorneys general. *Cf*. *15 U.S.C. § 15c* ("Any attorney general of a State . . . ."). Thus, only the California Attorney General can bring suit under *section 16760*.

Plaintiff argues that it is not bringing a claim under *California Business and Profession Code § 16760*, but is instead bringing a claim under *§ 16750(a)*, which supplies a cause of action to "any person" who is injured. (Opp'n 30.) Thus, the Cherokee Nation seeks to represent those persons, living in California, but having dual citizenship with the Cherokee Nation, who would have a cause of action under *§ 16750(a)*.

This is an interesting argument considering dicta in the Supreme Court's opinion in *Standard Oil*, states: "Hawaii plainly qualifies as a person under both sections [4 and 16] of the [Clayton Act], whether it sues in its proprietary capacity or as parens patriae." *405 U.S. at 261* (citing *Pa. R.R., 324 U.S. at 447*). The issue then becomes, does this reasoning extend to California law? The *Infineon* court said no. There, the court **[**79]** reasoned that the California legislature provided a *parens patriae* cause of action in *§ 16760*, which only authorized the California attorney general to bring such a claim. *531 F. Supp. 2d at 1132-33*. This Court thinks such reasoning sound. The California legislature clearly provided a *parens patriae* cause of action under *§ 16760*. It would not make sense for it to create the same cause of action, *sub silentio*, in § 16570. Or, at least, the Court cannot assume the legislature did so without **[*1100]** some authority saying as much, which Plaintiff has not provided. Accordingly, the Court finds Plaintiff has no standing to bring a *parens patriae claim* for violation of the California Cartwright Act.

Plaintiff also brings a cause of action under California's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200, et seq.* (FAC ¶ 260.) ***HN26***[] Like the Cartwright Act, the Unfair Competition Law authorizes damages "which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General." *Cal. Bus. & Prof. Code § 17206(a)*; *see also* *Cal. Bus. & Prof. Code § 17204* ("Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General . . . in the name of the people of the State of California . . . ."). For the same reasons **[**80]** as discussed in the Cartwright Act analysis, the Unfair Competition Law does not authorize foreign attorneys general to bring a *parens patriae* suit. Thus, the Court finds Plaintiff has no standing to bring a *parens patriae* claim for violation of the California Unfair Competition law.

Finally, Plaintiff brings a cause of action under California law for "unjust enrichment." (*See* FAC ¶¶ 338-42.) ***HN27***[] "[I]n California, there is not a standalone cause of action for 'unjust enrichment,' which is synonymous with 'restitution.'" *Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 762 (9th Cir. 2015)* (citing *Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 108 Cal. Rptr. 3d 682, 699 (Ct. App. 2010)*; and *Jogani v. Superior Court, 165 Cal. App. 4th 901, 81 Cal. Rptr. 3d 503, 511 (Ct. App. 2008))*. "Rather, [California courts] describe the theory underlying a claim that a defendant has been unjustly conferred a benefit 'through mistake, fraud, coercion, or request.'" *Id.* (citing 55 Cal. Jur. 3d Restitution § 2). A court may construe an unjust enrichment claim as a quasi-contract claim seeking restitution. *Id.* (citing *Rutherford Holdings, LLC v. Plaza Del Rey, 223 Cal. App. 4th 221, 166 Cal. Rptr. 3d 864, 872 (Ct. App. 2014))*.

HN28[] Because no statute authorizes standing to bring an unjust enrichment claim, Plaintiff must demonstrate it meets the prudential standing requirements outlined by the Supreme Court in *Snapp. See* *458 U.S. at 607* ("[T]he State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party."). **[**81]** The Court previously determined Plaintiff fails to do so and reiterates prior finding here. *See supra* section I.C.3. Accordingly, the Court finds Plaintiff does not have standing to bring a *parens patriae* claim for unjust enrichment under California law.

2. Kansas

Plaintiff's fourth cause of action is for violation of the *Kansas Restraint of Trade Act, Kan. Stat. Ann. § 50-101, et seq.* (FAC ¶ 271.) ***HN29***[] The Act authorizes "[t]he attorney general" to bring an action. *Kan. Stat. Ann. § 50-103(a)*; *see also* *§ 50-109* ("The attorney general shall: (a) Enforce this act throughout the state; . . . ."). The statute does not explicitly authorize a foreign attorney general as evidenced by the use of the term "[t]he attorney general" rather than "an" or "any" attorney general. Plaintiff directs the court to a district court opinion that characterizes *section 50-103* as the "functional equivalent of *parens patriae*." *In re Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369, 386 (D.D.C. 2002)*. Even assuming the district court's characterization of the statute was correct, it provides no help to Plaintiff. In that case, the State of Kansas was a party to the litigation and Kansas law conferred authority on the Kansas attorney general **[*1101]** to bring an action—the opinion did not discuss authorizing a foreign attorney general to bring an action under Kansas law. *See* ***[**82]*** *id.* Thus, the Court finds Plaintiff does not have standing to bring a *parens patriae* claim for violation of the Kansas Restraint of Trade Act.

Plaintiff also argues that Cherokee Nation citizens are persons as defined by the Act, (Opp'n 33 (citing Kan. Stat. Ann. § 50-148)), and its Attorney General can bring suit on their behalf, (*id.* (citing Kan. Stat. Ann. § 50-161(b)). Defendants argue that section 50-148 does not explicitly reference attorneys general and a *parens patriae* action must have some sort of affirmative statutory authorization. (Reply 4-5.)

HN30[] The Court agrees with Defendants. Kansas law allows the Kansas attorney general to bring a representative action. Kan. Stat. Ann. § 50-103. It also allows private parties to assert a private cause of action. § 50-148. It does not follow, however, that a private cause of action allows a foreign attorney general, suing on behalf of a different sovereign, to vindicate the public rights of the Cherokee Nation. *See* Infineon, 531 F. Supp. 2d at 1133 ("[A] parens patriae action is expressly defined as a means for a state to seek redress for wrongs affecting the *public* at large, while a class action is generally a means by which individual *private* rights may be collectively enforced." (citing Standard Oil, 405 U.S. at 257-58)).[9] The Court does not doubt that individual private citizens, residing in Kansas **[**83]** and holding dual Cherokee-Kansan citizenship, could bring an action, but the Court will not bootstrap the statutory language to presume a sovereign entity could bring a public action under the same private provision without express authorization.

Finally, Plaintiff points to a harmonization provision in Kansas law that requires the Act to be "construed in harmony with ruling judicial interpretations of federal **antitrust law** by the United States supreme court." Kan. Stat. Ann. § 50-163(b). Plaintiff argues that although Kansas law does not explicitly contain the words "*parens patriae*" it is appropriate, using the harmonization provision, to allow all types of actions permitted by the Sherman Act. (Opp'n 34 (citing 15 U.S.C. § 15c).) This argument is unpersuasive. Section 15c is a statutory provision, not a "judicial interpretation of federal **antitrust law**." Kan. Stat. Ann. § 50-163(b).

Plaintiff's thirteenth cause of action is for unjust enrichment under Kansas law. (FAC ¶¶ 343-47.) **HN31**[] In Kansas, unjust enrichment is an equitable doctrine, a "modern designation for the older doctrine of quasi-contracts." Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd., 259 Kan. 166, 176, 910 P.2d 839 (1996) (citing Peterson v. Midland Nat'l Bank, 242 Kan. 266, 275, 747 P.2d 159 (1987)). Because unjust enrichment is not statutory, Snapp applies. For reasons stated above, *see supra* section I.C.3, the Court **[**84]** finds Plaintiff cannot meet the prudential *parens patriae* standing requirements for a Kansas unjust enrichment claim.

3. Arizona

Plaintiff's fifth cause of action is for violation of the Arizona Uniform State **[*1102]** Antitrust Act. (FAC ¶ 277.) **HN32**[] The Arizona Uniform State Antitrust Act, Ariz. Rev. Stat. § 44-1401, et seq., provides that "[t]he attorney general . . . may bring an action for appropriate injunctive or other equitable relief and civil penalties . . . in the name of the state for a violation of this article." Ariz. Rev. Stat. § 44-1407. The plain language of the statute references *the* attorney general and authorizes the attorney general to bring suit in the name of *the* state. As with other statutes previously discussed, Arizona law does not authorize a foreign attorney general to bring a *parens patriae* action under Arizona law.

Plaintiff also argues that it could bring a cause of action under section 44-1408, which provides a cause of action to any "person threatened with injury or injured" by a violation of the Act. (Opp'n 36 (quoting Ariz. Rev. Stat. § 44-1408(B)).) The Act elsewhere defines person as "an individual, corporation, business trust, partnership, association or any other legal entity." Ariz. Rev. Stat. § 44-1401. Plaintiff is thus arguing that the Attorney General is bringing a *parens patriae* claim **[**85]** on behalf of those persons who were allegedly harmed. The plain language does not authorize such representative actions. The structure of the statute confirms the plain language. **HN33**[] Section 44-1408(A) allows "[t]he state" to bring an action for appropriate relief and, as previously discussed, section 44-

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[9] Plaintiff argues that *Infineon* does not address Kansas law and, presumably, is inapplicable. (Opp'n 34 n.21.) Simply because the *Infineon* court did not apply Kansas law does not also mean its reasoning is inapplicable. The fundamental issue at the core of all Plaintiff's state law claims is whether a foreign attorney general can bring a *parens patriae* suit under the law of a state other than the one he represents. Infineon dealt directly with that issue and the Court finds its reasoning sound.

1407 authorizes the Arizona attorney general to bring an action. Thus, the statute provides for public causes of action in *sections 44-1408(A)* and *44-1407* and a private cause of action in *section 44-1408(B)*. Because the structure distinguishes the causes of action, the Arizona legislature likely did not intend to allow a representative type action in a private cause of action. Or, at least, the Court does not make such a finding without authority saying so.

Thus, the Arizona Uniform State Antitrust Act provides no authorization for a foreign attorney general to bring a *parens patriae* suit and the Court finds Plaintiff cannot bring a *parens patriae* claim for violation of the Arizona Uniform State Antitrust Act.

Plaintiff also alleges a cause of action for unjust enrichment under Arizona law. (FAC ¶¶ 348-52.) ***HN34***[] In Arizona, unjust enrichment is a form of restitution to enforce contract rights when there exists no valid contract. *See Murdock-Bryant Constr. v. Pearson, 146 Ariz. 48, 52-53, 703 P.2d 1197 (1985)*. For reasons previously discussed, **[**86]** the Court finds Plaintiff has not alleged sufficient facts for *parens patriae* standing, *see supra* section I.C.3.

4. Colorado

Plaintiff's sixth cause of action is for violation of *section 6-4-104* of the Colorado Antitrust Act of 1992. (FAC ¶ 283.) ***HN35***[] Colorado law explicitly authorizes a *parens patriae* civil action, but only "[t]he attorney general may bring" such an action. *Colo. Rev. Stat. Ann. § 6-4-111(3)(a)*. As was true with the statutes previously discussed, the reference to "[t]he attorney general" means the Colorado attorney general, not foreign attorneys general. Plaintiff contends that Cherokee Nation law authorizes the Cherokee Nation Attorney General to bring an action under Colorado law and the right of the Colorado attorney general should be extended to the Nation's Attorney General. (Opp'n 35.) It is not enough that Cherokee Nation law authorizes the Nation's Attorney General to bring an action under Colorado law; Colorado law must also authorize such a suit. The plain language of the statute does not authorize such an action. The Court finds Plaintiff cannot bring a *parens patriae* action under Colorado ***antitrust law***.

[*1103] Plaintiff's fifteenth cause of action is for unjust enrichment under Colorado law. (FAC ¶¶ 353-57.) ***HN36***[] Unjust enrichment **[**87]** is a judicially-created remedy under Colorado law. *Lewis v. Lewis, 189 P.3d 1134, 1141 (Colo. 2008)*, *as modified on denial of reh'g* (Aug. 18, 2008) (citing *Salzman v. Bachrach, 996 P.2d 1263, 1265 (Colo. 2000))*. Thus, the Court finds Plaintiff has not alleged sufficient facts for *parens patriae* standing, *see supra* section I.C.3.

5. New Mexico

Plaintiff's seventh cause of action is for violation of *section 57-1-1 of the New Mexico Antitrust Act*. (FAC ¶ 289.) ***HN37***[] The Act states "[t]he attorney general may bring an action in the name of the state against any person." *N.M. Stat. Ann. § 57-1-8*. Like the statutes previously discussed, the reference to "[t]he attorney general" means the New Mexico attorney general, not foreign attorneys general. Plaintiff also argues that it can bring a claim on behalf of persons threatened with injury under the New Mexico Antitrust Act. (Opp'n 37 (citing *N.M. Stat. Ann. § 57-1-3(A)*).) Further, *section 57-1-1.2* includes "any governmental or other legal entity with the exception of the state" within its definition of a person. Plaintiff contends that it is a governmental or other legal entity and thus the statute can encompass the Nation's Attorney General. (*Id.* at 37-38.)

This is a novel argument based on the unique language in the New Mexico statute; indeed, no other statute examined in this order mentions any governmental entity. However, **[**88]** a critical distinction should not be overlooked. The Nation's Attorney General, who would qualify as the "governmental entity," is not the party who was injured. It is his fellow Cherokee citizens who are injured and are the "persons" as defined by the Act. Those persons have a cause of action under *section 57-1-3*; the New Mexico attorney general has a cause of action under *section 57-1-8*. No provision or authority demonstrates that a foreign attorney general may use either cause of action. Accordingly, the Court finds Plaintiff cannot bring a *parens patriae* action under the New Mexico Antitrust Act.

Plaintiff's sixteenth cause of action is for unjust enrichment under New Mexico law. (FAC ¶¶ 358-62.) **HN38**[] Under New Mexico law, unjust enrichment is a form of restitution cutting across contract and tort law. *See Hydro Conduit Corp. v. Kemble, 1990- NMSC 061, 110 N.M. 173, 178, 793 P.2d 855 (1990)*. Thus, the Court finds Plaintiff has not alleged sufficient facts for *parens patriae* standing, *see supra* section I.C.3.

6. Oklahoma

Plaintiff's ninth cause of action is for violation of the *Oklahoma Consumer Protection Act*. (FAC ¶ 302.) In its Opposition brief, Plaintiff states that it agrees to withdraw its ninth cause of action. (Opp'n 35.) **HN39**[] Even if the Court were to consider, the Consumer Protection Act, it **[**89]** states "[t]he attorney general or a district attorney may bring an action." *Okla. Stat. Ann. tit. 15, § 756.1(A)*. As with the statutes previously discussed, the reference to "[t]he attorney general" means the Oklahoma attorney general, not foreign attorneys general. The Court finds Plaintiff cannot bring a *parens patriae* action under the Oklahoma Consumer Protection Act.

Plaintiff's eighteenth cause of action is for unjust enrichment under Oklahoma law. (FAC ¶¶ 368-73.) **HN40**[] Oklahoma treats unjust enrichment as an equitable remedy, not based in statute. *See French Energy, Inc. v. Alexander, 1991 OK 106, 818 P.2d 1234, 1237 (Ok. 1991)*. For reasons discussed above, the Court finds Plaintiff has not alleged sufficient facts for *parens patriae* standing, *see supra* section I.C.3.

[*1104] *7. Florida*

Plaintiff's tenth cause of action is for violation of the Florida Deceptive and Unfair Trade Practices Act. (FAC ¶ 314.) **HN41**[] Unlike other states, *Florida's Deceptive and Unfair Trade Practices Act* does not empower the state attorney general; instead, the Act authorizes "[t]he enforcing authority" to bring various remedies. *See Fla. Stat. Ann. § 501.207(1)*. The Act defines "enforcing authority" as either the office of the state attorney or the Department of Legal Affairs depending on the type of violation. *§ 501.203(2)*. Neither of these entities is a government entity **[**90]** outside Florida and the law does not reference language indicative of a *parens patriae* action.

Plaintiff argues, however, that it is availing itself of the section of the Act whereby "anyone aggrieved by a violation of this part may bring an action." (Opp'n 33 (quoting *Fla. Stat. Ann. § 501.211(1)*, *(2)*).) The Nation's Attorney General is not a person who was aggrieved; the individual and private citizens of the Nation, residing in Florida, are the aggrieved persons. As is the theme throughout these state law claims, Plaintiff conflates a *public* action—*parens patriae*—with the *private* causes of action created under state law. Accordingly, the Court finds Plaintiff cannot bring a *parens patriae* action under Florida's unfair trade practices law.

Plaintiff's seventeenth cause of action is for unjust enrichment under Florida law. (FAC ¶¶ 363-67.) **HN42**[] As with other states, Florida treats unjust enrichment as an equitable remedy. *See Henry M. Butler, Inc. v. Trizec Props., Inc., 524 So. 2d 710, 711-12 (Fla. Ct. App. 1988)*. Thus, the Court finds Plaintiff has not alleged sufficient facts for *parens patriae* standing, *see supra* section I.C.3.

F. Standing Conclusion

HN43[] In sum, injunctive relief under federal ***antitrust law*** requires a quasi-sovereign interest and an interest apart from the interests of particular private parties. **[**91]** Plaintiff does not meet this requirement and has no standing under federal law. With respect to Plaintiff's state statutory causes of action, no State explicitly authorizes an out-of-state attorney general to bring an action in a federal court pursuant to out-of-state law. This same observation was made by the court in *Infineon* and Judge Hamilton's reasoning is worth noting:

> Not a single source relied on by plaintiffs expressly provides or even implies that a representative action by an Attorney General may be brought pursuant to *another* state's laws, ... [E]ven the most expansive of the general empowerment statutes relied on by plaintiffs, while recognizing the Attorney General's ability to bring actions in out-of-state courts, stops short of actually authorizing the Attorney General to bring actions in out-of-state jurisdictions *pursuant to* out-of-state laws.

531 F. Supp. 2d at 1139. The same reasoning applies here. Plaintiff's Attorney General does not have *parens patriae* standing to bring claims based on the laws of other states. Simply because citizens of the Cherokee Nation live in other states, the Nation's Attorney General cannot borrow other sovereign State's laws. The Court **GRANTS IN PART** Defendants' **[**92]** Motion and **DISMISSES WITH PREJUDICE** Plaintiff's claims to the extent Plaintiff seeks to bring a *parens patriae* claim under other State's statutory law. The Court **DISMISSES WITHOUT PREJUDICE** Plaintiff's unjust enrichment claims because Plaintiff has not demonstrated prudential standing, but perhaps could amend **[*1105]** its complaint to meet the standing requirements.

II. Supplemental Jurisdiction

The only remaining claims are Plaintiff's eighth and eleventh causes of action for a violation of the Cherokee Nation's Unfair and Deceptive Practices Act, 12 CNCA § 21 *et seq.* and its nineteenth cause of action for unjust enrichment under Cherokee Nation law. (*See* FAC ¶¶ 296, 328, 375.) Neither cause of action arises under federal law. Further, Plaintiff has confirmed that it is not bringing a class action and it has not argued this Court's diversity jurisdiction applies. (Opp'n 15 n.4.) Thus, the only remaining basis for jurisdiction is under the Court's supplemental jurisdiction, *28 U.S.C. § 1367*.

Defendants contend that the Court should decline to exercise supplemental jurisdiction over Plaintiff's pendent claims. (MTD 13.) They cite cases where other courts have declined to exercise supplemental jurisdiction in similar factual **[**93]** situations. (*Id.* (citing, e.g., *Bass v. Cty. of San Diego, No. 08-cv-2135-MMA (NLS), 2009 U.S. Dist. LEXIS 136987, 2009 WL 10671992, at * 5 (S.D. Cal. Aug. 25, 2009))*; Reply 3 n.2 (citing, e.g., *Empagran, S.A. v. F. Hoffman-La Roche Ltd., 453 F. Supp. 2d 1, 9, 13 (D.D.C. 2006))*.)

Plaintiff argues that Court should retain supplemental jurisdiction even if it dismisses Plaintiff's Sherman Act claims. (Opp'n 15.) Plaintiff argues that the pendency of this case, the Court's familiarity with the issues, the overlap between Plaintiff's federal and non-federal claims, and judicial economy all weigh in favor of retaining pendent jurisdiction over Plaintiff's non-federal claims. (*See id.* at 16.) According to Plaintiff, if the Court were to dismiss its non-federal claims, then such a dismissal would lead to a duplicative action in state court. (*See id.* at 16-17.)

HN44[] *28 U.S.C. § 1367* allows a federal district court to hear all state law claims as long as there is an independent basis for jurisdiction. Under *section 1367*, a district court "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *§ 1367(a)*. The Supreme Court has held that supplemental jurisdiction "may be exercised when federal and state claims have a 'common nucleus of operative fact' and would 'ordinarily be expected to **[**94]** [be tried] all in one judicial proceeding.'" *Osborn v. Haley, 549 U.S. 225, 245, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007)* (alteration in original) (quoting *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966))*. However, a Court may decline to exercise supplemental jurisdiction over any state claim if (1) "the claim raises a novel or complex issue of State law," (2) "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction," (3) "the district court has dismissed all claims over which it has original jurisdiction," or (4) "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." *28 U.S.C. § 1367(c)(1)-(4)*.

HN45[] "In *Gibbs*, the [Supreme] Court stated that "if federal claims are dismissed before trial . . . the state claims should be dismissed as well." *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)* (second alteration in original) (quoting *Gibbs, 383 U.S. at 726*). In *Carnegie-Mellon*, the Court clarified that this was not a mandatory rule, but rather "simply recognizes that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered **[*1106]** under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state law claims." *Id.* This is the most logical approach here for **[**95]** three reasons. First, the federal claims have been dismissed for lack of standing and, thus, *Gibbs*' general proposition applies. Second, Plaintiff's antitrust claim has been dismissed without prejudice and the Court will grant leave to amend. Third, there does not appear to be any reason why individual citizens of the Cherokee Nation could not join in the putative class actions, if a class is certified and, if they are not certified, could bring individual claims.

In light of the foregoing, the Court **DECLINES** to exercise its discretion to retain jurisdiction over the supplemental claims and **DISMISSES WITHOUT PREJUDICE** Plaintiff's eighth, eleventh, and nineteenth causes of action.

III. Leave to Amend

HN46[] Pursuant to *Federal Rule of Civil Procedure 15(a)*, a plaintiff may amend its complaint once as a matter of course within specified time limits. *Fed. R. Civ. P. 15(a)(1)*. "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." *Fed. R. Civ. P. 15 (a)(2)*.

HN47[] While courts exercise broad discretion in deciding whether to allow amendment, they have generally adopted a liberal policy. *See United States ex rel. Ehmcke Sheet Metal Works v. Wausau Ins. Cos., 755 F. Supp. 906, 908 (E.D. Cal. 1991)* (citing *Jordan v. Cnty. of Los Angeles, 669 F.2d 1311, 1324 (9th Cir.)*, *rev'd on other grounds*, *459 U.S. 810, 103 S. Ct. 35, 74 L. Ed. 2d 48 (1982))*. Accordingly, leave is generally granted unless **[**96]** the court harbors concerns "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*. "Amendments seeking to add claims are to be granted more freely than amendments adding parties." *Union P. R. Co. v. Nevada Power Co., 950 F.2d 1429, 1432 (9th Cir. 1991)* (citing *Martell v. Trilogy Ltd., 872 F.2d 322, 324 (9th Cir. 1989))*. Additionally, "the party opposing amendment has the burden of showing that amendment is not warranted." *Wizards of the Coast LLC v. Cryptozoic Entm't LLC, 309 F.R.D. 645, 649-50 (W.D. Wash. 2015)* (citing, e.g., *DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987))*.

Here, the Court **GRANTS** Plaintiff leave to amend its federal antitrust causes of action and its state unjust enrichment causes of action. However, the Court finds that Plaintiff cannot amend its complaint with regard to state statutory causes of action—Plaintiff's attorney general does not have authority under foreign state law to assert a *parens patriae* cause of action. This is a legal issue that cannot be cured by additional factual allegations. The only remaining question is whether the Court should permit amendment to Plaintiff's claims based on Cherokee Nation law.

Generally "a proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings **[**97]** that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988)*. Courts ordinarily do not consider the validity of a proposed amended pleading in deciding whether to grant leave to amend, and instead defer consideration of **[*1107]** challenges to the merits of a proposed amendment until after leave to amend is granted and the amended pleadings are filed. *Netbula, LLC v. Distinct Corp., 212 F.R.D. 534, 539 (N.D. Cal. 2003)* (citation omitted); *accord Green Valley Corp. v. Caldo Oil Co., No. 09cv4028-LHK, 2011 U.S. Dist. LEXIS 44540, 2011 WL 1465883, at *6 (N.D. Cal. Apr. 18, 2011)* (noting "the general preference against denying a motion for leave to amend based on futility"). Arguments concerning the sufficiency of the proposed pleadings, even if meritorious, are better left for briefing on a motion to dismiss. *Lillis v. Apria Healthcare, No. 12cv52-IEG (KSC), 2012 U.S. Dist. LEXIS 144775, 2012 WL 4760908, at * 1 (S.D. Cal. Oct. 5, 2012)*.

Here, the Court acknowledges that Defendants raise challenges to the retroactivity and legislative jurisdiction of Cherokee Nation law. At this stage, it is not clear that the Cherokee Nation Code causes of action are futile such that no set of facts could constitute a valid cause of action. Because the Court will allow amendment of the

Cherokee Nation's complaint, the factual allegations regarding the Cherokee Nation Code may shift and is better suited to a briefing on a future motion to dismiss. **[**98]** Accordingly, the Court **GRANTS** leave to amend the Cherokee Nation causes of action.

CONCLUSION

In light of the foregoing, the Court **GRANTS** Defendants' Motion, (ECF No. 983), and **DISMISSES WITHOUT PREJUDICE** Plaintiff's First Amended Complaint, except to the extent that Plaintiff seeks to bring *parens patriae* claims under state law, such claims are **DISMISSED WITH PREJUDICE**. The Court **GRANTS LEAVE TO AMEND** Plaintiff's Complaint; Plaintiff **MAY FILE** an amended Complaint within thirty (30) days of the date on which this Order is electronically docketed**.**

IT IS SO ORDERED.

Dated: September 5, 2018

/s/ Janis L. Sammartino

Hon. Janis L. Sammartino

United States District Judge

In re Zetia Ezetimibe Antitrust Litig.

United States District Court for the Eastern District of Virginia, Norfolk Division

September 6, 2018, Decided; September 6, 2018, Filed

MDL NO. 2:18md2836; 2:18cv23; 2:18cv39; 2:18cv71

Reporter
2018 U.S. Dist. LEXIS 218116 *

In re: ZETIA (EZETIMIBE) ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: 2:18cv23; 2:18cv39; and 2:18cv71

Subsequent History: Motion granted by, Findings of fact/conclusions of law at *In re Zetia (Ezetimibe) Antitrust Litig., 2018 U.S. Dist. LEXIS 224642 (E.D. Va., Oct. 17, 2018)*

Motion granted by *In re Zetia (Ezetimibe) Antitrust Litig., 2018 U.S. Dist. LEXIS 224619, 2018 WL 6795835 (E.D. Va., Nov. 1, 2018)*

Motion dismissed by, Without prejudice *In re Zetia Ezetimibe Antitrust Litig. This Document Relates To: 2:18cv266, 2018 U.S. Dist. LEXIS 224641 (E.D. Va., Nov. 1, 2018)*

Adopted by, Objection overruled by, Motion denied by *In re Zetia Ezetimibe Antitrust Litig., 2018 U.S. Dist. LEXIS 223609 (E.D. Va., Dec. 6, 2018)*

Magistrate's recommendation at *In re Zetia Ezetimibe Antitrust Litig., 2019 U.S. Dist. LEXIS 59469, 2019 WL 1397228 (E.D. Va., Feb. 6, 2019)*

Prior History: *In re Zetia (Ezetimibe) Antitrust Litig., 325 F. Supp. 3d 1369, 2018 U.S. Dist. LEXIS 101060 (J.P.M.L., June 8, 2018)*

Core Terms

arbitrator, delegation, damages, arbitration agreement, arbitration clause, treble damages, questions, parties, provisions, compensatory damages, challenges, invalid, preliminary question, recommends, parenthetical, antitrust, disputes, arbitration provision, statutory right, sever, unenforceable, terms, compel arbitration, parties' agreement, statutory remedy, antitrust claim, attorney's fees, unmistakable, remedies, patent

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For UFCW Local 1500 Welfare Fund, on behalf of itself and all others similarly situated, Plaintiff (2:18-md-02836-RBS-DEM): Susan Rebbeca Podolsky, LEAD ATTORNEY, The Law Offices of Susan R Podolsky, Alexandria, VA; Gregory Scott Asciolla, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Robin Ann van der Meulen, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; James Arthur Cales, III, Furniss Davis Rashkind & Saunders PC, Norfolk, VA.

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For Merck & Co., Inc., Merck Sharp & Dohme Corp., Schering-Plough Corp., Schering Corp., MSP Singapore Co. LLC, Defendants: Stephen Edward Noona, LEAD ATTORNEY, Kaufman & Canoles, P.C., Norfolk, VA; Christopher Dean Dusseault, PRO HAC VICE, Gibson Dunn & Crutcher LLP (CA-NA), Los Angeles, CA; **[*18]** Jennifer Laura Greenblatt, PRO HAC VICE, Goldman Ismail Tomaselli Breenan & Baum LLP, Chicago, IL; Samuel Grant Liversidge, PRO HAC VICE, Gibson, Dunn & Crutcher LLP (CA-NA), Los Angeles, CA; Tarek Ismail, Goldman Ismail Tomaselli Breenan & Baum LLP, Chicago, IL; Veronica Smith Lewis, PRO HAC VICE, Gibson Dunn & Crutcher LLP (TX-NA), Dallas, TX.

For Glenmark Pharmaceuticals Ltd., Glenmark Generics Inc., U.S.A., Defendants: James Kevin Fee, LEAD ATTORNEY, Morgan Lewis Bockius LLP (DC), Washington, DC; Jessica Johnston Taticchi, PRO HAC VICE, Morgan Lewis & Bockius LLP (PA-NA), Philadelphia, PA; Richard Brendan Fee, PRO HAC VICE, Morgan Lewis & Bockius LLP (PA-NA), Philadelphia, PA; Stacey Anne Mahoney, PRO HAC VICE, Morgan Lewis & Bockius LLP (NY-NA), New York, NY; Steven Andrew Reed, PRO HAC VICE, Morgan Lewis & Bockius LLP (PA-NA), Philadelphia, PA; Teri Josie Diaz, Morgan Lewis Bockius LLP (DC), Washington, DC.

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Judges: DOUGLAS E. MILLER, UNITED STATES MAGISTRATE JUDGE.

Opinion by: DOUGLAS E. MILLER

Opinion

REPORT AND RECOMMENDATION

In this antitrust action Plaintiffs' claims arise from Defendant Merck's alleged efforts to delay generic competition for its cholesterol drug Zetia. Merck has moved to compel certain Plaintiffs to arbitrate the claims under the terms of a written Distributorship Agreement. The arbitration clause in the agreement does not unambiguously delegate preliminary questions of enforceability to the arbitrator. It also contains a clear, prospective waiver of certain statutory remedies, including Plaintiffs' claims for treble damages and attorney's fees under Section Four of the Clayton Act. *15 U.S.C. § 15(a)*. Because federal law directs the court to determine this preliminary issue, and the waivers render the clause unenforceable as to Plaintiffs' antitrust claims, this report recommends that the court deny Merck's Motion to Compel Arbitration. **[*20]**

I. FACTUAL AND PROCEDURAL HISTORY

The three named Plaintiffs presently before the court, FWK Holdings, LLC, Cesar Castillo, Inc., and Rochester Drug Cooperative, Inc., are drug wholesalers which directly purchased Zetia from Merck[1] during the period 2006 to 2016

[1] The complaints name five related Merck entities, collectively referred to in this Report as Merck.

("Direct Purchasers" or "Plaintiffs"). Zetia, generically known as ezetimibe, is a cholesterol-lowering medication formerly subject to patent protection. For purposes of the present motion, it is sufficient to summarize Plaintiffs' 90-page Complaint as alleging a scheme by Merck to extend patent protection for Zetia by obtaining a reissued patent, Patent No. RE 37,721 ("RE '721 patent") for compounds which were "inherent metabolites" of compounds disclosed in earlier patents. Compl. ¶ 153 (ECF No. 1 at 43-44).[2] Plaintiffs allege this inherency rendered the RE '721 patent invalid as anticipated by the earlier patents. Id. They also allege Merck withheld references during the reissue prosecution, amounting to inequitable conduct which would also void the RE '721 patent. Compl. ¶¶ 156-58 (ECF No. 1 at 45-47).

Co-Defendant Glenmark, a generic drug maker, challenged the reissued patent and first filed an Abbreviated New Drug Application (ANDA) **[*21]** asserting rights to market a generic version of the drug in 2006. Compl. ¶ 144 (ECF No. 1 at 41). Merck sued Glenmark, alleging infringement of the RE '721 patent, and Glenmark counterclaimed alleging the patent was invalid under several theories. Plaintiffs allege that Glenmark's challenges to the RE '721 patent's validity for inequitable conduct and, as anticipated by Merck's prior patents, were clearly meritorious. Compl. ¶ 176 (ECF No. 1 at 50). But instead of pursuing them to finally obtain a declaration of invalidity, Glenmark settled with Merck, agreeing to drop its claims in exchange for Merck's promise not to compete with Glenmark, by refraining from producing its own authorized generic version of the drug during Glenmark's 180-day period of exclusivity after it entered the market. Compl. ¶ 181 (ECF No. 1 at 51). Plaintiffs allege this *quid pro quo* agreement not to compete amounted to an improper reverse payment to delay generic entry of the type proscribed under federal ***antitrust law*** as interpreted by the Supreme Court. *F.T.C. v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*.

The three named Direct Purchasers before the court on these motions each brought putative class action complaints seeking to recover from Merck and Glenmark for overcharges they **[*22]** claim to have paid during the delay in generic competition and during the period after Glenmark entered the market when Merck agreed not to compete with its own generic version of the drug. All three complaints were subject to a Transfer Order by the Judicial Panel on Multidistrict Litigation (JPML) consolidating these cases for all pretrial purposes in this MDL proceeding. Transfer Order, MDL No. 2836 (ECF No. 123). In addition to these Plaintiffs, the MDL includes putative class action claims by End Payor Plaintiffs as well as individual claims filed by various large Retailer Plaintiffs, including Walgreens, Rite Aid and CVS. All of the consolidated claims allege antitrust or anticompetitive injuries arising from the same course of conduct and all name Merck and Glenmark as Defendants.[3]

The Merck Defendants filed motions to dismiss, or in the alternative to stay the cases filed by the Direct Purchasers pending arbitration. Merck alleges that all three named Direct Purchasers, as well as the other putative Direct Purchaser class members, were parties to Merck's Authorized Distributorship (MAD) Agreement governing the terms of their relationship. The MAD Agreements for the three named **[*23]** Direct Purchaser parties are nearly identical and define the parties' obligations with respect to the purchase of Merck products. For example, the MAD Agreements require that distributors purchase Merck products only from Merck; not resell Merck products in foreign markets; and abide by certain credit and charge-back policies. Decl. of Jennifer L. Greenblatt, Ex. A ("MAD Agmt.") (ECF No. 96-1). The MAD Agreements contain no pricing or product information, nor do they obligate any party to purchase or sell any particular quantity of Merck product. Instead, they specify certain terms under which such sales would, and apparently did, take place. Id.

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[2] ECF numbers referenced in this Report and Recommendation correspond to case number 2:18cv23, FWK Holdings, LLC v. Merck & Co., Inc. et al. Merck filed substantially identical motions prior to consolidation of the direct purchaser actions in MDL No. 2836. See Mots., Case Nos. 2:18cv23 (ECF No. 92); 2:18cv39 (ECF No. 69); and 2:18cv71 (ECF No. 80). As stated in this court's August 15, 2018 order, the motions and responsive briefing are construed to apply to the forthcoming Direct Purchasers' consolidated complaint in Case No. 2:18md2836, presently due no later than September 13, 2018. Pretrial Order No. 4, at 2 n.1 (ECF No. 141 at 2).

[3] The MDL presently consists of 18 cases, including five cases transferred here from three other jurisdictions.

Executed in 2012, the MAD Agreements presently before the court contain identical language reflecting the parties' agreement to arbitrate.[4] The relevant paragraph provides:

> Arbitration. Any controversy, claim or dispute ("Dispute") that may arise out of or be related to the performance, construction, interpretation or enforcement of this Agreement (including disputes as to the scope, applicability and meaning of this arbitration clause) shall be submitted to mandatory, binding, confidential arbitration pursuant to the Federal Arbitration Act, **[*24]** *9 U.S.C. § 1 et seq.*, under the auspices and Commercial Rules of the American Arbitration Association.
>
> . . .
>
> The arbitrator(s) is empowered to award equitable relief but not empowered to award damages in excess of compensatory damages and each Party hereby irrevocably waives any right to recover such damages with respect to any dispute within the scope of this clause. Each party shall pay for all attorney's fees and costs it incurs in connection with the arbitration.

Id. ¶ 7(A) (ECF No. 96-1 at 4-5).

Merck argues that the clause requires all the Direct Purchasers to arbitrate their claims. Its motion seeks to dismiss the Direct Purchasers' claims, or alternatively to stay them until the arbitration proceedings are concluded. Plaintiffs disagree, and assert several challenges to arbitrability. Specifically, Plaintiffs claim the clause does not apply to their antitrust claims because those claims do not relate to the performance or enforcement of the MAD Agreements. They note that the Agreements impose no obligation on either party to buy or sell Merck products, and that the antitrust damages they allege flow, not from any contractual duty, but from a market allocation scheme that increased prices by keeping **[*25]** competitors — including Glenmark and various non-parties — from selling generic ezetimibe. The Direct Purchasers also raise administrative challenges to the clause, noting that only one of the Merck entities is a signatory and that the arbitration language appeared in the Agreements only in 2012, two years after the conduct underlying the antitrust claims occurred. Finally, the Plaintiffs claim the clause is invalid as it contains prospective waivers of statutory antitrust remedies which Congress deemed nonwaivable.

Merck contends that all of these arbitrability challenges are reserved to the arbitrator to decide under the language of the parties' agreement. However, to the extent the court undertakes to decide them, Merck argues that none are sufficient to preclude arbitration.

For the reasons set forth in greater detail below, the undersigned agrees with the Direct Purchasers that the prospective waiver of statutory remedies contained in the arbitration clause renders it unenforceable. Because the parties' agreement did not delegate this preliminary question of arbitrability to the arbitrator to decide, the court retains jurisdiction to resolve it. Accordingly, this report recommends **[*26]** that the court deny Merck's Motions to Dismiss or Compel Arbitration (2:18cv23, ECF No. 92; 2:18cv39, ECF No. 69; 2:18cv71, ECF No. 80).

II. ANALYSIS

The *Federal Arbitration Act* (FAA) reflects the "overarching principle that arbitration is a matter of contract." *Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 232, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013)*. It is a congressional command that courts "vigorously enforce" arbitration agreements, including those which may require arbitration of claims arising under federal law. *In re Cotton Yarn Antitrust Litigation, 505 F.3d 274, 282 (4th Cir.*

[4] The operative agreements for two named Plaintiffs were signed in 2012. Earlier agreements covering the same subject matter did not contain arbitration clauses. The Plaintiffs have argued that the 2012 agreements do not have retroactive effect, as the events giving rise to their claims occurred almost entirely before 2012. In light of the recommendation set forth in this report, the undersigned does not reach the issue of whether the arbitration language is sufficiently broad to be given retroactive effect. See *Wachovia Bank, Nat'l Ass'n v. Schmidt, 445 F.3d 762, 767 (4th Cir. 2006)* (observing that arbitration clause encompassing claims relating to "any aspect of the relationship between the parties" is far broader than one encompassing those relating to the agreement itself).

2007). The FAA explicitly provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract." 9 U.S.C. § 2. State law contract defenses which do not "rely on the uniqueness of an agreement to arbitrate" may still prevent enforcement of the agreement to arbitrate. Dillon v. BMO Harris Bank, N.A., 856 F.3d 330, 334 (4th Cir. 2017) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)).

Among these contract defenses, an arbitration agreement may be invalid as against public policy where it contains a "prospective waiver of a party's right to pursue statutory remedies." Id. (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). Thus, even when an arbitration clause is sufficiently broad to encompass antitrust claims, "arbitration of the claim will not be compelled if the prospective litigant cannot effectively vindicate statutory rights **[*27]** in the arbitral form." Cotton Yarn, 505 F.3d at 282 (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)).

The Plaintiffs raise a number of challenges to Merck's claim that this dispute is subject to arbitration under the arbitration clause in the MAD Agreements. Such "question[s] of arbitrability" are in the normal course "undeniably an issue for judicial determination." Hayes v. Delbert Servs. Corp., 811 F.3d 666, 671 (4th Cir. 2016) (quoting Peabody Holding Co. v. United Mine Workers of Am., Int'l Union, 665 F.3d 96, 102 (4th Cir. 2012)). The parties may, however, agree to assign questions of arbitrability to the arbitrator to decide. Because such delegation would depart from the norm, a court must find the assignment in "clear and unmistakable" evidence of the parties' agreement. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69 n.1, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010).

This court's contract interpretation function encompasses the initial inquiry into whether the parties agreed to arbitrate the particular arbitrability questions raised. See Peabody Holding Co., 665 F.3d at 101. The interpretative rule, which presumes that the parties intended for such gateway questions of arbitrability to be decided by the court, does not apply to every type of objection to arbitration which might be raised. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002). Instead the presumption applies to certain gateway matters, such as whether the parties have a valid arbitration agreement at all, or whether a concededly binding arbitration clause applies to a certain type of controversy. **[*28]** Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003). Other arbitrability challenges are not subject to the presumption of judicial resolution, as they involve questions of arbitration procedure better left to the arbitrator to decide. Howsam, 537 U.S. at 84. And consistent with its contractual nature, an arbitration agreement may expressly assign responsibility for resolving gateway arbitrability challenges. Simply Wireless, Inc. v. T-Mobile US, Inc., 877 F.3d 522, 526 (4th Cir. 2017).

Thus, the question of which decisionmaker — court or arbitrator — resolves a particular challenge to arbitrability depends upon the nature of the challenge presented, whether the interpretive rule presuming judicial resolution applies, and finally whether the parties have obviated the need for an interpretive rule by clearly and unmistakably delegating authority to decide the preliminary question to the arbitrator. See Kristian v. Comcast Corp., 446 F.3d 25, 39-48 (1st Cir. 2006) (applying a "trilogy" of Supreme Court precedent to assess whether the court or an arbitrator should decide enforceability of an arbitration clause containing a prospective waiver of antitrust remedies). Applying that analysis to the Direct Purchasers' claims, the undersigned concludes that the MAD Agreement did not clearly and unmistakably delegate to the arbitrator resolution of all preliminary questions of arbitrability. Under established **[*29]** Fourth Circuit precedent, questions regarding the enforceability of clauses purporting to limit Plaintiffs' claims to vindicate statutory protections are for the court to determine. Finally, because the clause in this case contains an unenforceable prospective waiver of important antitrust safeguards, the court should deny Merck's Motion to Compel Arbitration.

A. The enforceability challenge raised by the Arbitration Agreement's prospective waiver of statutory rights should be decided by this court.

Merck's first argument is that all matters related to the arbitrability of the Direct Purchasers' claims must be decided in the first instance by the arbitrator. The company points to parenthetical language delegating certain jurisdictional questions to the arbitrator, and to the Agreement's incorporation of the Commercial Rules of the American Arbitration Association. It contends these terms comprise the parties' agreement to delegate all questions of arbitrability to the arbitrator.

But as the Direct Purchasers point out, the word "arbitrability" does not appear in the parenthetical language Merck relies upon. The word also did not appear in the Commercial Rules until 2012, after two of **[*30]** the operative MAD Agreements in this case were executed. And the language the parties did use in the MAD Agreement's delegation clause does not clearly and unmistakably encompass the type of challenge to arbitrability posed by the prospective waiver of statutory rights.

As noted, under the FAA, certain preliminary questions of arbitrability are ordinarily for the court to determine, absent "clear and unmistakable" evidence that the parties intended for an arbitrator to resolve them. *Simply Wireless, Inc., 877 F.3d at 526*. "The 'clear and unmistakable' standard is exacting, and the presence of an expansive arbitration clause, without more, will not suffice." *Peabody Holding Co., 665 F.3d at 102*. As a result, the language of the MAD Agreement vesting the arbitrator with the power to resolve disputes "related to the performance, construction, interpretation or enforcement of [the] Agreement" is insufficient to delegate arbitrability questions to the arbitrator. See id.; *Carson v. Giant Food, Inc., 175 F.3d 325, 330 (4th Cir. 1999)*.

Recognizing this, Merck mainly relies on the much narrower parenthetical language in the clause, identifying a subset of disputes also reserved to the arbitrator. The MAD Agreement describes this as "including disputes as to the scope, applicability and meaning of this arbitration clause." MAD **[*31]** Agmt. ¶ 7(A) (ECF No. 96-1). This parenthetical delegation, Merck argues, is sufficient to meet the clear and unmistakable evidence standard and requires that this court defer to the arbitrator resolution of all the Direct Purchasers' preliminary challenges.

The Direct Purchasers attack the parenthetical delegation clause on multiple fronts. They first argue that the parenthetical, which begins with the word "including," indicates that the clause is nothing more than a subset of the broad arbitration language rejected as an insufficient delegation under Carson and Peabody. But such a reading would render the parenthetical clause meaningless, which the Pennsylvania law of contract construction seeks to avoid. *Friestad v. Travelers Indemnity Co., 260 Pa. Super. 178, 393 A.2d 1212, 1217 (Pa. Super. Ct. 1978)*.[5]

Plaintiffs next argue that, considering the parenthetical language as a separate delegation of gateway questions to the arbitrator, it is clear the delegation does not encompass every arbitrability challenge the Direct Purchasers raise. They note that the word "arbitrability" does not appear in the clause. Instead, the delegation is limited to questions regarding the "scope, applicability and meaning" of the arbitration language. MAD Agmt. ¶ 7(A) (ECF No. 96-1 at 4). While the **[*32]** use of the exact word "arbitrability" is not required to delegate preliminary questions to the arbitrator, the language used in the parenthetical delegation is significantly narrower than Merck claims.

Some of the challenges raised by the present motion likely fall within this delegation and would be for the arbitrator to decide. For example, Direct Purchasers' arguments regarding whether the antitrust claims alleged are sufficiently related to the performance or enforcement of the MAD Agreement relate to the scope and applicability of the arbitration clause. These would be for the arbitrator to determine under the parties' agreement.

But the delegation clause does not encompass Plaintiffs' claim that prospective waivers of certain statutory remedies render the clause invalid or unenforceable. This is especially so given the presumption that such questions are for the court to resolve, and the unambiguous nature of the statutory rights waiver in the clause.

The Fourth Circuit has twice examined similar waivers and concluded that the enforceability questions they presented required judicial resolution. See *Dillon, 856 F.3d at 334-35*; *Hayes, 811 F.3d at 671* n.l. Both cases involved choice of law provisions which purported to limit or **[*33]** prohibit the enforcement of federal statutory protections. In refusing to compel arbitration of the disputes, the court noted that where there is uncertainty regarding the terms of the agreement and whether those terms would preclude enforcement of statutory claims, the

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[5] The MAD Agreement provides that it is to be construed under Pennsylvania law. MAD Agmt. ¶ 7(Q) (ECF No. 96-1 at 8).

arbitrator should determine in the first instance whether those terms would deprive a party of those remedies. *Dillon, 856 F.3d at 334*. But where clear language takes the "plainly forbidden step" of prospectively waiving federal rights, the court may conclude that it is unenforceable as a matter of law. *Hayes, 811 F.3d at 675*.

Both *Hayes* and *Dillon* are consistent with the United States Supreme Court's view. In *PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401, 123 S. Ct. 1531, 155 L. Ed. 2d 578 (2003)*, the Court considered an arbitration provision with "too much legal ambiguity" for the court to determine whether the challenge presented a question of arbitrability for the court to decide. See *Kristian, 446 F.3d at 40* (citing *PacifiCare, 538 U.S. at 407*). Because the Court did "not know how the arbitrator [would] construe the remedial limitations, the question whether they rendered the parties' agreements unenforceable and whether it [was] for courts or arbitrators to decide in the first instance [were] unusually abstract." *PacifiCare, 538 U.S. at 407*. As a result, the Court directed arbitration to resolve those ambiguities, and **[*34]** answer "the preliminary question whether the remedial limitations at issue [] prohibit an award of RICO treble damages." *Id. at 407 n.2*.

Merck argues that PacifiCare is directly analogous to matters pending in this court and that this court should likewise defer the enforceability challenge posed by the waiver to the arbitrator to decide. But as the First Circuit has noted, in an even more closely analogous case, where the statutory waivers are clear, the questions posed by the enforceability challenge are for the court to resolve. See *Kristian, 446 F.3d at 46*. In that case, the court also interpreted an arbitration clause purporting to bar antitrust remedies, including treble damages. In deciding the preliminary question of whether the court or an arbitrator should address such claims, the court conducted a detailed analysis of Supreme Court precedent and concluded that PacifiCare teaches such matters are for the court to decide, absent ambiguous language. Summarizing its conclusion, the court wrote:

> Implicit in the PacifiCare analysis is the proposition that if the remedies limitation in the arbitration agreement posed a clear conflict with the remedies available in the RICO statute, that clear conflict would pose a question **[*35]** of arbitrability. In other words, in the face of a vindication of statutory rights claim based on such a clear conflict, the court would decide the question of the enforceability of the arbitration clause in the first instance.

Id. at 46.

Thus, at a minimum, this court must examine the prospective waiver to determine whether it is ambiguous, or whether it clearly takes the "plainly forbidden" step of precluding substantive remedies. *Hayes, 811 F.3d at 675*.

Nothing in the MAD Agreement's parenthetical delegation suggests the parties agreed to modify this presumptive rule. Certain preliminary questions of arbitrability - namely scope questions related to the applicability of the clause - were delegated to the arbitrator under the language of the parties' contract. But that language says nothing about challenges to the validity or enforceability of the arbitration clause. This omission is particularly significant in light of the broader language concerning the types of contract disputes subject to arbitration under the clause. It is also significant that the arbitration clause expressly incorporates the FAA, under which such enforceability challenges are decided by the court. See *Simply Wireless, 877 F.3d at 530* (Floyd, J., dissenting) (noting arbitration **[*36]** agreement's incorporation of FAA, which contemplates judicial resolution of arbitrability disputes).

Likewise, the clause's incorporation of the AAA Commercial Rules does not clearly and unmistakably demonstrate that the parties intended for the arbitrator to resolve the enforceability challenge posed by the prospective waiver. This is primarily because the delegation clause in the parenthetical specifically addresses a narrower set of gateway questions than the Commercial Rules purport to address. When two provisions of a contract purport to address the same subject matter, the more specific language controls. *Trombetta v. Raymond James Fin. Servs., Inc., 2006 PA Super 229, 907 A.2d 550, 560 (Pa. Super. Ct. 2006)* ("[t]he specific controls the general when interpreting a contract."). Moreover, the Commercial Rules in effect at the time the 2012 MAD Agreements were executed did not use the term "arbitrability," and even after that word was added in 2013, the provision merely confers power on the arbitrator to resolve such disputes, but does not expressly direct that she do so. See Commercial Arbitration Rules and Mediation Procedures R.7 (Am. Arbitration Ass'n 2013) (adding arbitrability language to 2009 rules, available at www.adr.org/ArchiveRules).

In *Simply Wireless*, the Fourth Circuit **[*37]** ruled that incorporation of the JAMS Comprehensive Rules and Procedures in the parties' arbitration clause was sufficient to delegate preliminary questions of arbitrability to the arbitrator. *877 F.3d at 528*. The case is distinguishable on two fronts. First, the arbitration agreement in *Simply Wireless* did not contain a more specific and limited delegation of preliminary questions. *Id. at 525*. Second, the JAMS Rules then in effect phrased the delegation in mandatory terms, specifically providing that "jurisdictional and arbitrability disputes ... shall be submitted to and ruled on by the Arbitrator." JAMS Comprehensive Arbitration Rules and Procedures R. 11(b) (July 2014) (emphasis added). By contrast, the MAD Agreement contains an express delegation of only a subset of arbitrability challenges to the arbitrator. And *Rule 7* of the AAA Commercial Rules incorporated in the MAD Agreements is permissive, not mandatory, providing "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections to the existence, scope, or validity of the arbitration agreement." Commercial Rules, supra. Although the jurisdictional clause in the Commercial Rules was extended to disputes regarding "the arbitrability of any claim **[*38]** or counterclaim" in 2014, the language of *Rule 7* is still permissive, conferring jurisdiction on the arbitrator, but not requiring submission of such disputes by the parties. Id. As a result, even considering the incorporation of the Commercial Rules, the parties' explicit language delegating only scope and meaning questions to the arbitrator is not superseded by their incorporation. Therefore, the court should enforce the parties' express delegation, and defer arbitrability challenges involving the scope of the clause, but examine the Direct Purchasers' enforceability challenge based on the prospective waiver of statutory rights.

B. The unambiguous prospective waiver of statutory rights in the Arbitration Agreement would prevent Direct Purchasers from effectively vindicating their claims in the arbitral forum.

The FAA requires the court enforce an agreement to arbitrate "save upon such grounds as exist at law or in equity for the revocation of any contract." *9 U.S.C. § 2*. A court will not compel arbitration "if the prospective litigant cannot effectively vindicate his statutory rights in the arbitral forum." *Cotton Yarn, 505 F.3d at 282*. This so-called "effective vindication" exception can arise where an arbitration agreement is **[*39]** alleged to "operate[] . . . as a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi Motors Corp., 473 U.S. at 637 n.19*. The Supreme Court has acknowledged that restrictive arbitration provisions could trigger this exception. See *Italian Colors, 570 U.S. at 236* (stating the exception "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights").

Because the text of the antitrust laws speaks in mandatory terms, the Supreme Court has implied, and the lower courts have routinely held, that the prescribed statutory remedies are nonwaivable. See, e.g., *Mitsubishi Motors Corp., 473 U.S. at 637 n.19*; *Kristian, 446 F.3d at 48*. Therefore, if an arbitration agreement operates to preclude assertion of those remedies, courts will refuse to enforce it as against public policy.[6] See, e.g., *Dillon, 856 F.3d at 334*; *Hayes, 811 F.3d at 674-75*; *Gaines v. Carrollton Tobacco Bd. of Trade, Inc., 386 F.2d 757, 759 (3d Cir. 1967)* ("[I]t seems clear as a matter of law that such an agreement, if executed in a fashion calculated to waive damages arising from future violations of the antitrust laws, would be invalid on public policy grounds."). For present purposes, this means that if the arbitration provisions of the MAD Agreement operate as a prospective waiver of the right to assert an antitrust claim for treble damages and/or attorney's fees in the arbitral forum, those provisions may not be **[*40]** enforced.

The operative language of the arbitration provision states:

> The arbitrator(s) is empowered to award equitable relief but not empowered to award damages in excess of compensatory damages and each Party hereby irrevocably waives any right to recover such damages with respect to any dispute within the scope of this clause. Each party shall pay for all attorney fees it incurs in

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[6] In his Italian Colors opinion for the majority, Justice Scalia characterized the effective vindication exception as a "judge-made exception to the FAA." *570 U.S. at 235*. Though judges undoubtedly apply the exception, it should fairly be noted that it exists solely to vindicate those explicit policies which Congress saw fit to place beyond the reach of private contract. The Court itself has emphasized the importance of Congress's chosen remedies in the antitrust laws. See, e.g., *Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*.

connection with the arbitration. The costs of the arbitration proceeding shall be shared equally between the Parties.

MAD Agmt. ¶ 7(A) (ECF No. 96-1 at 4-5.). Thus, the first issue is whether antitrust treble damages under *15 U.S.C. § 15(a)* constitute damages "in excess of compensatory damages." Merck argues that they may not, and urges the court to defer to the arbitrator to resolve this preliminary question. The undersigned concludes that treble damages are unambiguously "in excess of compensatory damages" and that by requiring the Direct Purchasers to "irrevocably waive any right to recover such damages" the arbitration provision would operate to preclude such an award. Furthermore, the MAD Agreement precludes a recovery of attorney's fees, another mandatory remedy under *§ 15(a)*, by a successful plaintiff **[*41]** seeking antitrust damages. Those provisions therefore constitute unenforceable prospective waivers of statutory rights.

The Supreme Court has not been perfectly clear as to the exact nature of statutory treble damages, but its cases at minimum demonstrate that such damages are something "in excess of" compensatory damages. In *Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981)*, the Court noted that "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct." In *Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 784, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000)*, the Court described the treble damages provision in the False Claims Act as "essentially punitive in nature." Regardless of the intent for which a statute prescribes them, "it is important to realize that treble damages have a compensatory side . . . in addition to punitive objectives." *Cook County, Ill. v. United States ex rel. Chandler, 538 U.S. 119, 130, 123 S. Ct. 1239, 155 L. Ed. 2d 247 (2003)*; see also *Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 427, 75 S. Ct. 473, 99 L. Ed. 483, 1955-1 C.B. 207 (1955)* (recognizing "the punitive two-thirds portion of a treble-damage antitrust recovery"). Thus, while the Clayton Act's treble damages provision may indeed serve a partially remedial function, there is no doubt the provision's full measure of damages is "in excess of compensatory damages." See, e.g., *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 300 (3d Cir. 2012)* ("[I]n the antitrust context, a damages award not only benefits the plaintiff, it also fosters competition and furthers the interests of **[*42]** the public by imposing a severe penalty (treble damages) for violation of the antitrust laws.").

Despite this authority, Merck claims that an arbitrator might construe the term "compensatory damages" as used in the MAD Agreement as co-extensive with treble damages under the Clayton Act. But the plain language of *§ 15(a)* mandates recovery by a successful plaintiff of "threefold the damages by him sustained." Using the ordinary definition of compensatory damages, the damages provision in *§ 15(a)* could be translated as "three times compensatory damages." See Compensatory Damages, Black's Law Dictionary (10th ed. 2014) ("Damages sufficient in amount to indemnify the injured person for the loss suffered."). However, if "compensatory damages" might also *include* treble damages, as Merck contends, then *§ 15(a)* would seemingly permit trebling a second time. Continually substituting the ordinary meaning of compensatory damages with that offered by Merck would result in successive threefold multipliers *ad infinitum*. A common sense reading of *§ 15*, whereby a plaintiff establishes its damages and then recovers three times that fixed amount, avoids this problem.

Merck primarily relies on *PacifiCare, 538 U.S. 401, 123 S. Ct. 1531, 155 L. Ed. 2d 578*, which refused to invalidate arbitration **[*43]** agreements that imposed a limitation on damages in the context of alleged violations of the RICO statute. It bears mention that the Supreme Court did not determine that the arbitration clause in PacifiCare was enforceable. Instead it remanded for the arbitrator to determine questions of arbitrability which were "unusually abstract." *Id. at 407*. Moreover, the contract provisions considered in *PacifiCare* are distinguishable. The four agreements under review in that case variously prohibited an arbitrator from awarding "punitive," "exemplary," or "extra contractual damages."[7] *Id. at 405*. The lower courts had refused to compel arbitration, holding that the damages restriction precluded an award of treble damages under RICO. *Id. at 403*. The Supreme Court reversed, citing uncertainty about whether an arbitrator would in fact construe the various contracts to preclude a treble

[7] Only one of the four agreements used the term "extra-contractual damages," and the context in which it was used suggests it may have been interpreted to exclude only punitive, exemplary or mental-anguish damages. See *PacifiCare, 538 U.S. at 407 n.2*.

damages award. *Id. at 406-07*. That uncertainty made it "premature" for the Court to address the question of enforceability, and therefore "the proper course [was] to compel arbitration" under the contract. *Id. at 404, 407*.

No such uncertainty exists in this case. The MAD Agreement does not *exclude* a specific type of damages. Rather, it permits only one type of damages, and **[*44]** prevents Direct Purchasers from even asserting their rights under federal law. In so doing it prevents the arbitrator from awarding *any* damages *except* compensatory damages.[8] MAD Agmt. ¶ 7(A) (ECF No. 96-1 at 4.). Invalidating the contract in PacifiCare would have required finding that statutory treble damages *are* punitive damages; by contrast, invalidating the provision here requires finding only that such damages *are not* purely compensatory.[9] No ambiguity prevents the latter conclusion. See *Kristian, 446 F.3d at 44-47* (concluding that PacifiCare impliedly recognized that a clear conflict between an arbitration provision and a statutory remedy would raise a question of arbitrability for the court).

The attorney fees prohibition in the arbitration agreement is plainer still. If the court enforced this provision and compelled arbitration, the Direct Purchasers would be precluded from recovering attorney's fees even if they succeeded on their antitrust claims, contravening a key purpose of *§ 15*. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)* (offering ***antitrust law*** as a "prime example" of Congress's policy of incentivizing private enforcement by means of fee-shifting). Merck suggests that the provision, on its face, simply prohibits fee shifting **[*45]** "in connection with the arbitration," MAD Agmt. ¶ 7(A) (ECF No. 96-1 at 5), and therefore does not interfere with a litigant's "right to pursue statutory remedies" in the courts. See *Italian Colors, 570 U.S. at 235*. But Merck may not avoid the question of the arbitration provision's enforceability by pointing to the remedies that would be available if the provision was not enforced. Nor will the court read any saving exception into the parties' contract language. See *Whitman v. Legal Helpers Debt Resolution, LLC, No. 4:12-cv-00144-RBH, 2012 U.S. Dist. LEXIS 176480, 2012 WL 6210591, at *4 (D.S.C. Dec. 13, 2012)* (refusing to interpret a contract provision prohibiting fee-shifting by an arbitrator as including an exception for statutory claims providing for an award of fees).

Having concluded that the remedy limitations in the MAD Agreement arbitration provisions are unenforceable, the court must decide "whether severance of the [limiting] provisions, rather than invalidation of the arbitration agreements, would be the appropriate remedy." *Cotton Yarn, 505 F.3d at 292*. Because the challenged provisions are central elements of the arbitration agreement as a whole, and because the MAD Agreement itself does not provide for severability, the undersigned recommends invalidation of the entire arbitration agreement.

"[W]hether an **[*46]** enforceable arbitration agreement exists . . . is a matter of contract interpretation governed by state law." *Rota-McLarty v. Santander Consumer USA, Inc., 700 F.3d 690, 699 (4th Cir. 2012)*. The MAD Agreement contains a choice-of-law clause dictating that Pennsylvania law shall apply, MAD Agmt. ¶ 7(Q) (ECF No. 96-1 at 8), to which Virginia law gives effect, *Colgan Air, Inc. v. Raytheon Aircraft Co., 507 F.3d 270, 275 (4th Cir. 2007)*. Unlawful contract provisions may not be severed if the provision is "central or essential to the parties' agreement." *Dillon, 856 F.3d at 336*; see also *Huber v. Huber, 323 Pa. Super. 530, 470 A.2d 1385, 1389 (Pa. Super. Ct. 1984)* (reciting same principle).

In Hayes, the court refused to sever choice-of-law provisions in an agreement that would have entirely displaced the application of state and federal law to a dispute over a payday loan, concluding that they went "to the core of the arbitration agreement." *811 F.3d at 675-76*. In a subsequent case examining nearly identical provisions, the

[8] In light of the above discussion, it is clear that the MAD Agreement must permit recovery of antitrust treble damages to be enforceable. It is perhaps telling, then, that counsel for Merck was reluctant to concede at argument that the Direct Purchasers would be entitled to treble damages if successful, regardless of the forum.

[9] PacifiCare uses the terms "remedial" and "compensatory" somewhat interchangeably, but never suggests that statutory treble damages are purely either. See *538 U.S. at 405-06*. Suffice it to say that the Court's treatment of these terms permits a conclusion that treble damages could be entirely remedial but only partially compensatory, a conclusion that would still run aground of the MAD Agreement's arbitration provision.

court again rejected a proposal to sever the offending provisions and allow arbitration under other contract language. See *Dillon, 856 F.3d at 336*.

Although the arbitration provisions in the MAD Agreement are not as extreme as those in *Hayes* and *Dillon*, their limitations represent central components of the overall arbitration scheme. The provisions purport to completely immunize Merck from the majority of any potential liability under the antitrust laws and **[*47]** numerous other federal statutes which impose penalties for noncompliance, or damages beyond those actually incurred by the injured party.[10] In this way, the arbitration agreement, as applied to Plaintiffs' antitrust claims, resembles "an attempt by [Merck] to achieve through arbitration what Congress has expressly forbidden." *Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1249 (9th Cir. 1994)*. As Hayes and Dillon make clear, an arbitration agreement's "central" or "essential" terms can encompass more than simply the agreement to arbitrate itself. Moreover, consistently severing unenforceable provisions while leaving the base agreement intact "creates an incentive to get away with as many 'bad' arbitration provisions as possible, knowing that the worst case scenario is a court sending the case to arbitration with some of them stripped out." *Winston v. Academi Training Ctr., Inc., No. 1:12-cv-767, 2013 U.S. Dist. LEXIS 34850, 2013 WL 989999, at *3 (E.D. Va. Mar. 13, 2013)*; see also *Murray v. UFCW Int'l, Local 400, 289 F.3d 297, 304 (4th Cir. 2002)* (refusing to allow union to rewrite arbitration clause "on a case-by-case basis in order to claim that it is an acceptable one").

The structure of the MAD Agreement reinforces the conclusion that severability is not the appropriate remedy in this case. The arbitration agreement falls under a single heading and contains just six sentences, **[*48]** half of which would be excised by Merck's proposed severance. See *Carll v. Terminix Int'l Co., 2002 PA Super 44, 793 A.2d 921, 925-26 (Pa. Super. Ct. 2002)* (refusing to sever damages limitation from an arbitration provision, because "[t]he same contractual provision that directs arbitration limits the authority of the individual conducting that arbitration"; cf. *Fellerman v. PECO Energy Co., 2017 PA Super 86, 159 A.3d 22, 29 (Pa. Super. Ct. 2017)* (distinguishing Carll and allowing severance of a damage limitation in part because it was "separate and distinct" from arbitration clause, "both location-wise and functionally"). In addition, the MAD Agreement lacks a severability clause and contains an express integration clause. See MAD Agmt. (ECF No. 96-1.); cf. *Kristian, 446 F.3d at 53* (relying on savings clause in contract to sever limitation on recovery of attorney's fees in arbitration agreement). Because the offending provisions are central to the arbitration agreement, and because the MAD Agreement itself does not suggest severance is appropriate, the undersigned recommends the court invalidate the entire arbitration agreement and deny Merck's motion.

III. RECOMMENDATION

For the foregoing reasons the undersigned recommends that Merck's Motions to Dismiss or Compel Arbitration (2:18cv23, ECF No. 92; 2:18cv39, ECF No. 69; 2:18cv71, ECF No. 80) be DENIED.

IV. REVIEW PROCEDURE

By copy **[*49]** of this report and recommendation, the parties are notified that pursuant to *28 U.S.C. § 636(b) (1)(C)*:

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within fourteen (14) days from the date of mailing of this report to the objecting party, see *28 U.S.C. § 636(b) (1)*, computed pursuant to *Rule 6(a) of the Federal Rules of Civil Procedure*. *Rule 6(d) of the Federal Rules of Civil Procedure* permits an extra three (3) days, if service occurs by mail. A party may respond to

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[10] See, e.g., *15 U.S.C. § 1117* (statutory and treble damages provisions of *Lanham Act*); *15 U.S.C. § 1681n* (punitive damages provision of Fair Credit Reporting Act); *18 U.S.C. § 1964(c)* (treble damages provision of RICO statute); *35 U.S.C. § 284* (treble damages provision of Patent Act); *31 U.S.C. § 3729(a)(1)* (civil penalty provision of False Claims Act).

any other party's objections within fourteen (14) days after being served with a copy thereof. See *Fed. R. Civ. P. 72(b) (2)* (also computed pursuant to *Rule 6(a)* and *(d) of the Federal Rules of Civil Procedure*).

2. A district judge shall make a de novo determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in a waiver of appeal from a judgment of this Court based on such findings and recommendations. *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Carr v. Hutto, 737 F.2d 433 (4th Cir. 1984)*; *United States v. Schronce, 727 F.2d 91 (4th Cir. 1984)*.

/s/ Douglas E. Miller

DOUGLAS E. MILLER

UNITED STATES MAGISTRATE JUDGE

September 6, 2018

End of Document

Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc.

United States Court of Appeals for the Seventh Circuit

February 16, 2018, Argued; September 6, 2018, Decided

No. 17-2910

Reporter

902 F.3d 735 *; 2018 U.S. App. LEXIS 25261 **; 2018-2 Trade Cas. (CCH) P80,502

SUPREME AUTO TRANSPORT, LLC, et al., Plaintiffs-Appellants, v. ARCELOR MITTAL USA, INC., et al., Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 08 C 5468—Manish S. Shah, Judge.

Supreme Auto Transp. LLC v. Mittal, 238 F. Supp. 3d 1032, 2017 U.S. Dist. LEXIS 30762 (N.D. Ill., Mar. 3, 2017)

Core Terms

steel, steel products, amended complaint, products, percent, original complaint, antitrust, direct-purchaser, plaintiffs', consumer, output, proximate causation, district court, manufactured, domestic, injuries, prices, sheets, raw, purchasers, producers, tubing, suits, cuts, anti trust law, allegations, conspiracy, words

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

HN1[] **Amendment of Pleadings, Relation Back**

An amended pleading relates back to the original if the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading. *Fed. R. Civ. P. 15(c)(1)(B)*. The central inquiry under *Rule 15(c)* is whether the original complaint gave the defendant enough notice of the nature and scope of the plaintiff's claim that he shouldn't have been surprised by the amplification of the allegations of the original complaint in the amended one. Even significant changes to a complaint or to a class definition can relate back so long as the defendant had fair notice of the substance of the new allegations from the outset.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

HN2[] **Amendment of Pleadings, Relation Back**

Regarding the issue of relation back of an amended complaint, the purpose of illustrative lists is to indicate that a definition includes only those objects that are similar to the objects in the list. Under the interpretative canon ejusdem generis, where general words follow specific words in an enumeration, the general words are limited to the shared characteristics of the specific words, even though the general words may ordinarily have a much broader meaning.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

HN3[] **Class Actions, Certification of Classes**

Upon denial of certification, a putative class member may not commence a new class action beyond the time allowed by the applicable statute of limitations.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Torts > ... > Elements > Causation > Proximate Cause

HN4[] **Standing, Requirements**

Proximate causation is an essential element that plaintiffs must prove in order to succeed on antitrust or tort law claims. The purpose of the proximate causation requirement—in both antitrust and tort law—is to avoid speculative recovery by requiring a direct relation between the plaintiff's injury and the defendant's behavior. In the antitrust context, the proximate causation requirement in the past has been termed "antitrust standing," even though it has nothing to do with a plaintiff's standing to sue under U.S. Const. art. III (which requires only but-for causation, an injury-in-fact, and redressability). In the context of the *Lanham Act*, the considerations often referred under the rubric of "prudential standing" are nothing more or less than substantive questions about the coverage of a statute.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN5[] **Purchasers, Direct Purchasers**

In states that have enacted statutes that do not incorporate Illinois Brick's strict direct-purchaser requirement, downstream purchasers who pay inflated prices for consumer goods are not automatically barred from bringing antitrust suits against upstream price fixers.

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Judges: Before WOOD, Chief Judge, and KANNE and ROVNER, Circuit Judges.

Opinion by: WOOD

Opinion

[*737] WOOD, *Chief Judge*. This putative class action rests on allegations of a massive antitrust conspiracy within the domestic steel industry. Plaintiffs, indirect purchasers of steel, assert that **[**3]** eight U.S. steel producers colluded to slash output in an effort to drive up the price of steel nationwide. Years after their initial complaint, however, the plaintiffs transformed their theory of liability. The original complaint, filed in 2008, charged that plaintiffs overpaid for steel sheets, rods, and tubing manufactured by the defendants at their steel mills. Eight years later, the plaintiffs amended their complaint, asserting instead that they overpaid for end-use consumer goods, such as vehicles, washing machines, and refrigerators, that were manufactured by third parties using steel. This new product definition greatly expanded the potential scope of the class.

The district court dismissed the suit for two reasons. First, it determined that plaintiffs' amended complaint is time-barred because it redefines "steel products" in a way that gives rise to an entirely different, and exponentially larger, universe of plaintiffs. Second, in the alternative, the court held that the amended complaint does not plausibly plead a causal connection between the alleged antitrust conspiracy and plaintiffs' own injuries. **[*738]** Plaintiffs now appeal both rulings. We affirm.

I

According to the allegations **[**4]** in plaintiffs' amended complaint, which we accept as true for the purposes of this appeal, defendant Arcelor Mittal is the largest integrated producer of steel in the United States, controlling 20-25 percent of total domestic raw steel capacity. Defendant U.S. Steel is the second largest integrated producer, controlling about 16 percent of total domestic raw steel capacity. Defendant Nuncor is the nation's largest mini-mill producer, controlling 21 percent of total domestic raw steel capacity. Other major domestic steel producers include defendants Gerdau Ameristeel (10 percent), AK Steel (5 percent), Steel Dynamics (4 percent), IPSCO (2.5 percent), and Commercial Metals (2 percent). The remaining 15-20 percent of the steel market is controlled by firms that are not named defendants and are not alleged to have engaged in any anticompetitive behavior.

It can be difficult to organize and maintain a price-fixing cartel in a market with many competitors—including firms that are not party to the conspiracy—but that is what plaintiffs allege happened here. They theorize that sometime in early 2005, Arcelor Mittal organized a scheme to "improve industry discipline" by cutting raw steel output **[**5]** in order to drive up prices and reap supracompetitive profits. They point to a statement by a Mittal executive at an industry meeting in March 2005 criticizing the industry's traditional business model on the grounds that it "ensured that most producers would cut price before reducing volume." The executive then called on his competitors to coordinate supply cuts: he asked them directly to "respond to market fluctuations" by cutting production at "marginal facilities" to avoid a "race to the bottom" in steel prices. A series of industry meetings followed in early-to-mid 2005; at those meetings, multiple defendants allegedly cautioned the industry against oversupplying the market and urged everyone to "adjust ... operating levels" to preserve high prices.

According to plaintiffs, the result of all this "urging" and "cautioning" was a series of major production cuts in mid-2005. Arcelor Mittal closed five of its twelve U.S. integrated blast furnaces and reduced production at U.S. mills to 55 per-cent of total capacity. U.S. Steel reduced output from 90 percent capacity in the first quarter of 2005 to 75 percent capacity in the second quarter, and closed at least two of its twelve domestic **[**6]** blast furnaces. Nuncor similarly reduced its output from 96 percent of capacity in 2004 to 79 percent capacity in the second quarter of 2005. The smaller defendants took comparable measures. After these cuts took effect, the price of a steel sheet increased by about 25 percent. The supply cuts allegedly remained in effect until mid-to-late 2007.

Plaintiffs insist that there is no procompetitive explanation for this huge reduction in output. They allege that from early 2005 to late 2007, "annual domestic demand for steel far exceeded the United States production capacity of Defendants and other domestic producers," and that as a result, "there was a shortage of steel in the United States market" throughout the relevant period. (We can assume that there was such a shortage. We observe, however, that neither the original nor amended complaint discusses input or energy costs, or what effect these costs might have had on steel prices. This is a troubling omission, especially given the fact that a separate section of plaintiffs' complaint admits that the cost of energy, inputs, and many other commodities—including "aluminum, copper, precious metals, resins, ... plastic, ... zinc and nickel"—increased **[**7]** substantially during the class period. The rising **[*739]** cost of inputs would provide an obvious innocent explanation for the increase in steel prices*. Cf.* *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. We will not address this possibility because the defendants did not raise it on appeal. Nor will we address the impact of steel imports on the market—an issue that also has not been discussed by the parties and that would take us down a deep rabbit-hole.)

In the end, the 2005 production cuts and subsequent increases in steel price led to two major antitrust class actions. The first suit, which we call the "direct-purchaser" suit, was filed in early September 2008, with Standard Iron Works as the lead plaintiff. Standard Iron filed that suit on behalf of a putative class. See Complaint at 1, 6, *Standard Iron Works v. Arcelor Mittal*, No. 08-cv-5214 (N.D. Ill. Sept. 12, 2008), ECF No. 1. The complaint defined class members as those who purchased "steel products" directly from the defendants. In turn, it defined "steel products" as:

> [A]ll products derived from raw steel ... including, but not limited to, steel sheet and coil products; galvanized sheet and other galvanized and/or coated steel products; tin mill products; steel slabs and plates; **[**8]** steel beams, blooms, rails, and other structural shapes; steel billets, bars, and rods; steel pipe and other tubular products; and all other products derived from raw steel.

Id. at 6.

The second suit, which we call the "indirect-purchaser" suit, is the one that gave rise to this appeal. It was brought by Supreme Auto in late September 2008, just weeks after the direct-purchaser action. The original complaint did not include a formal class definition. It simply alleged that Supreme Auto was injured when it "purchased several items of steel tubing [at an inflated price] indirectly from one or more of the defendants ... for end use" and indicated that Supreme Auto was bringing suit on behalf of "all others similarly situated." Supreme Auto's original complaint included a definition of the types of steel products at issue. Its description mirrored the language from the direct-purchaser suit:

> "Steel products" means any consumer steel product including but not limited to produced flat steel sheets and coils; galvanized steel products; tin mill products; steel plates; steel beams, rails and other structural shapes; steel bars and rods; steel wire and wire rod; steel pipes and other tubular products; **[**9]** and a variety of other products derived from raw steel.

Supreme Auto stated that it was seeking relief under federal ***antitrust law***, as well as under the antitrust, consumer protection, and unjust enrichment laws of 28 states. The district court deferred proceedings on class certification in the indirect-purchaser suit until the court in the direct-purchaser suit decided whether to certify a class.

After several years of delay, in September 2015 the district court certified a class in the direct-purchaser case for the sole purpose of determining whether defendants engaged in a conspiracy in violation of federal antitrust laws. See *Standard Iron Works, 2015 U.S. Dist. LEXIS 119652, 2015 WL 5304629, at *12 (Sept. 9, 2015)*. The court denied certification on the issues of impact and damages, holding that common questions there would not predominate over individual ones. *Id.* The direct-purchaser suit was settled shortly thereafter.

In March 2016, defendants moved to dismiss the indirect-purchaser complaint. They argued that Supreme Auto failed to allege any injuries outside of its home state (Michigan), that it failed to allege that the steel it purchased was manufactured by any one of the named defendants, **[*740]** and that Supreme Auto's complaint therefore failed to state a plausible **[**10]** claim for relief.

Supreme Auto did not respond to defendants' motion to dismiss. Instead, Supreme Auto—which was, at the time, the only named plaintiff—filed an amended complaint adding 15 new plaintiffs from 11 states[1] who purchased "one or more steel products containing steel purchased from one or more of the Defendants during the Class period." Relying on jurisdiction pursuant to the *Class Action Fairness Act*, *28 U.S.C. § 1332(d)(2)*, which requires only minimal diversity and an amount in excess of $5 million (both satisfied here), the amended complaint dropped the federal antitrust claims and alleged only state-law antitrust injuries in 21 states,[2] consumer-protection injuries in 19 states,[3] and unjust enrichment injuries in 48 states and the District of Columbia. It also changed the definition of "steel products" from the definition that appeared in the original complaint to the following:

> "Steel products" means any consumer steel product for end use and not for resale, including clothes washers, clothes dryers, refrigerators, freezers, dishwashers, microwave ovens[,] regular ovens, automobiles, semi-tractor trailers, farm and construction equipment, room air conditioner units, hot water heaters, snow blowers, **[**11]** barbeque grills, lawn mowers, and reinforcing bars used in patios, driveways, swimming pools and sidewalks.

Supreme Auto further announced that it was abandoning claims related to its initial injury, which arose out of its purchase of $171 worth of steel tubing. Going forward, the firm proclaimed, it would be claiming injury solely based on its purchase of two semi-truck trailers, each priced at over $115,000.

Defendants again moved to dismiss the complaint, repeating their earlier argument that plaintiffs' injuries were too remote to establish a right to recover under either federal or state antitrust laws. They also argued that the claims set forth in the amended complaint were time-barred because they alleged a new set of injuries. The district court agreed with defendants in both respects and granted the motion to dismiss with prejudice. Plaintiffs then appealed.

II

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[1] Arizona, California, Florida, Iowa, Kansas, Michigan, Montana, New York, North Carolina, South Dakota, and Tennessee.

[2] Arizona, California, District of Columbia, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin.

[3] Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Idaho, Maine, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Vermont, and Wisconsin.

We begin by addressing the statute of limitations. Plaintiffs concede that their amended complaint, filed in April 2016, falls outside all relevant limitations periods. The longest period for any of plaintiffs' claims is six years, meaning that their claims expired, at the latest, sometime in the late summer of 2014—six **[**12]** years after the alleged conspiracy ended, and a year and a half before plaintiffs filed their amended complaint. Thus, the amended complaint is untimely unless the plaintiffs can show that their claims were tolled or that the amendments to their new complaint relate back to the original one.

[*741] ***HN1***[] An amended pleading relates back to the original if "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." *Fed. R. Civ. P. 15(c)(1)(B)*. The central inquiry under *Rule 15(c)* is whether the original complaint "gave the defendant enough notice of the nature and scope of the plaintiff's claim that he shouldn't have been surprised by the amplification of the allegations of the original complaint in the amended one." *Santamarina v. Sears, Roebuck & Co., 466 F.3d 570, 573 (7th Cir. 2006)* (citing *Tiller v. Atlantic Coast Line R.R. Co., 323 U.S. 574, 581, 65 S. Ct. 421, 89 L. Ed. 465 (1945))*. Even "significant" changes to a complaint or to a class definition can relate back so long as the defendant had fair notice of the substance of the new allegations from the outset. See *Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805, 806 (7th Cir. 2005)*.

The district court held that the plaintiffs' amended complaint did not satisfy the fair-notice standard, because the transactions at issue in the first complaint (the indirect purchase of steel pipes, tubing, and sheets) were **[**13]** wholly distinct from the transactions at issue in the amended complaint (the purchase of washing machines, cars, swimming pools, and the like). We agree. The original complaint defined "steel products" by illustrating the meaning of that term through a list of examples, such as steel sheets, rods, and tubing. All of the examples listed in plaintiffs' definition are mill output—that is to say, they are steel products manufactured at steel plants. No reasonable defendant, upon reading the original definition, would have imagined that plaintiffs were in fact suing over the thousands of end-use household and commercial goods manufactured by third parties—a reading so broad that it would transform nearly every person in the country into a potential class member.

Plaintiffs fight this conclusion by emphasizing that the original definition of steel products included "any" product "derived from raw steel." They also insist that the list was in-tended to be "illustrative, not exhaustive." These points do not save the day. The word "derived," as used in the context of product manufacturing, is susceptible to multiple interpretations. To say that a product is derived from steel could mean simply **[**14]** that the product has some steel ingredients. It could just as easily mean that the product is "formed" in its entirety out of steel. See OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/view/Entry/50613?redirectedFrom=derive#eid (last visited Sept. 5, 2018). And while we do not doubt that the list in the original complaint was intended to be illustrative rather than exhaustive, we must ask ourselves what general category the list was designed to illustrate. Here, the items that appeared in the original complaint—steel sheets, tubes, pipes, and rods—illustrate a category along the lines of "steel products manufactured at steel mills." It cannot fairly be read as illustrating the much broader category of "all consumer goods that include any steel component." As the Supreme Court often reminds us, ***HN2***[] the purpose of illustrative lists is to indicate that a definition includes only those objects that are similar to the objects in the list. See *Begay v. United States, 553 U.S. 137, 142, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2015)*. No object in Supreme Auto's original list bore any resemblance to the end-use consumer goods listed in the amended complaint. If the original definition of steel products was intended to be all-encompassing, as plaintiffs now argue, then "it is **[**15]** hard to see why [the complaint] would have needed to include the examples at all." *Id.; cf. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)* (explaining that, under the interpretative **[*742]** canon *ejusdem generis*, where general words follow specific words in an enumeration, the general words are limited to the shared characteristics of the specific words, even though the general words may ordinarily have a much broader meaning).

What's more, Supreme Auto gave no indication during the first seven years of litigation that its suit included any products other than mill output. Not only did its complaint and other filings refer only to mill output, but the definition of "steel products" in plaintiffs' complaint appears to be lifted in large part from the complaint in the direct-purchasers' suit, which had been filed less than a month earlier. All parties knew that the direct-purchaser litigation was exclusively about mill output, and so the definitional similarity between the two complaints further buttressed the already-intuitive inference that Supreme Auto's suit was also about products made by the defendants at their steel mills.

The first hint of a shift in Supreme Auto's litigation strategy did not come until late 2015, when Supreme Auto **[**16]** sent subpoenas to third-party retailers such as Whirlpool and John Deere asking about their use of steel in washing machines and lawnmowers. Defendants complained about this expansive discovery tactic when they moved to dismiss the original complaint. They protested that plaintiffs' suit now purported to encompass "not only tubes but 'any consumer steel product,' from refrigerators to washing machines to other consumer products made of steel among other constituent materials." On appeal, plaintiffs assert that this statement—which defendants wrote in 2016—constitutes an "admission" that defendants knew *all along* that the suit was really about this vast array of products with some steel in their makeup. We are not persuaded. Our review of the record, as well as our interrogation of both parties during oral argument, reveals no indication that defendants had notice of plaintiffs' new claims at any time before the expiration of the limitations period. Because the original complaint did not give defendants fair notice of the nature and scope of the claims set out in the amended complaint, the amendments do not relate back under *Rule 15(c)*.

We also see no basis for tolling the statute of limitations. **[**17]** Tolling is not available under *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*, which suspends the applicable statute of limitations in class action suits to all members of the purported class, because the plaintiffs named in the amended complaint were not "asserted members of the class" defined in the original complaint and their claims were not encompassed by the original suit. See *id. at 553*. If there were any doubt about this (and we have none), the Supreme Court's recent decision in *China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 201 L. Ed. 2d 123 (2018)*—to the effect that ***HN3***[] upon denial of certification, a putative class member may not commence a new class action beyond the time allowed by the applicable statute of limitations—also supports our reasoning. The substantial prejudice to defendants—who had no reason to think in 2008 that they should preserve evidence relating to the gargantuan number of consumer products now at issue—further counsels against applying any form of equitable tolling.

III

Given that plaintiffs' amended complaint is time-barred, we could end our analysis now without reaching the proximate causation issue. But since the district court ruled in the alternative, and we recognize that we do not necessarily have the last word, we think it prudent also to say a **[*743]** word about this basis for the **[**18]** district court's decision.

HN4[] Proximate causation is an essential element that plaintiffs must prove in order to succeed on any of their claims. The purpose of the proximate causation requirement—in both antitrust and tort law—is to avoid speculative recovery by requiring a direct relation between the plaintiff's injury and the defendant's behavior. *Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*.

In the antitrust context, the proximate causation requirement in the past has been termed "antitrust standing," even though it has nothing to do with a plaintiff's standing to sue under Article III of the U.S. Constitution (which requires only but-for causation, an injury-in-fact, and redressability). *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 & n.7 (7th Cir. 1993)*; see also *Associated Gen. Contractors of Cal. Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535-43, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (providing a six-factor test for determining whether the requirements of proximate causation are satisfied in an antitrust case). The Supreme Court clarified in *Lexmark International, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*, in the context of the *Lanham Act*, that the considerations often referred under the rubric of "prudential standing" are nothing more or less than substantive questions about the coverage of a statute. *Id. at 127-28*. We will thus similarly eschew the term "antitrust standing" and speak only of the requirements to bring a case under the particular statutes involved.

Along with the ordinary requirement of proximate causation, **[**19]** federal ***antitrust law*** imposes additional limits on recovery in suits for treble damages under the *Clayton Act*, *15 U.S.C. § 15*. One of the most significant is the direct-purchaser requirement announced in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 729-30, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, which held that only direct purchasers of a product can sue the supplier for damages. Allowing private suits by purchasers further down the supply chain, the Court held, would risk duplicative awards.

But Supreme Auto and its co-plaintiffs are not suing under the *Clayton Act* or any other federal statute (at least, not any more); rather, they are suing under the antitrust laws of nearly two dozen states. While most states model their antitrust statutes and jurisprudence on federal law, they are under no obligation to do so. *California v. ARC Am. Corp., 490 U.S. 93, 102, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. Relevant to this appeal, ***HN5***[] 21 of the states where plaintiffs claim injuries have enacted statutes that do not incorporate *Illinois Brick*'s strict direct-purchaser requirement.[4] In these states, downstream purchasers who pay inflated prices for consumer goods are not automatically barred from bringing antitrust suits against upstream price fixers.

And there's more, plaintiffs say. They argue that the so-called "*Illinois-Brick* repealer states" have replaced one *per se* **[*744]** rule with **[**20]** another and now allow *all* indirect-purchaser suits to go forward, no matter how far removed the purchasers are from the production process and no matter how speculative the damages award would be. We do not read these state laws so expansively. It is one thing to say that a state is willing to allow someone other than a direct purchaser to have the opportunity to shoulder the burden of showing proximate causation; it is quite another thing to say that the state has thrown both the direct-purchaser rule *and* proximate causation out the window.

There are many suits that satisfy ordinary principles of proximate causation but nevertheless would be barred under federal law by *Illinois Brick*'s direct-purchaser requirement. This very case provides an example: many if not all *Illinois-Brick* repealer states would have allowed Supreme Auto's *original* complaint to go forward. That first complaint alleged injury based on the purchase of steel rods and similar items from distributors who, in turn, had purchased those same items from the defendants. The original complaint involves an indirect purchase (and so would be barred by *Illinois Brick* at the federal level) where the alleged injury is still **[**21]** fairly traceable to the defendant steel manufacturers.

The amended complaint is a different story. It alleges that plaintiffs purchased steel only insofar as it was one among many components of other more complex products, all of which have gone through numerous manufacturing alterations and lines of distribution. In many of these products, steel is not even a primary or necessary ingredient. We cannot imagine—and plaintiffs have not told us—how one might tackle the task of tracing the effect of an alleged overcharge on steel through the complex supply and production chains that gave rise to the consumer products at issue here. The district court thus appropriately ruled that the claims asserted here were too remote to support a claim under the different state laws plaintiffs invoked.

IV

We express no opinion here on the ultimate question whether these defendants violated the federal antitrust laws. Plaintiffs cite many statements by steel-industry executives that sound suspiciously like invitations to fix prices and out-puts. Price-fixing agreements are *per se* illegal under the *Sher-man Act*. Both direct purchasers and the federal government are authorized to sue when they believe they **[**22]** have found such an agreement. See, *e.g.*, *15 U.S.C. §§ 4* (government civil suits), 15 (private treble damage actions). But, to repeat, we do not have a federal

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[4] See *Ariz. Rev. Stat. Ann. §§ 44-1401*, *-1408*; *Cal. Bus. & Prof. Code § 16750(a)*; *D.C. Code Ann. § 28-4509*; *Iowa Code §§ 553.12*, *.4*; *Kan. Stat. Ann. § 50-161(b)*; *Me. Rev. Stat. Ann. 10 § 1104(1)*; *Mich. Compiled Laws § 445.778(2)*; *Minn. Stat. § 325D.57*; *Miss. Code Ann. § 75-21-9*; *Neb. Rev. Stat. Ann § 59-821*; *Nev. Rev. Stat. Ann. § 598A.210*; *N.M. Stat. Ann. § 57-1-3(A)*, *(C)*; *New York Gen. Bus. Law § 340(6)*; *N.C. Gen. Stat. § 75-16*; *N.D. Cent. Code § 51-08.1-08(3)*; *S.D. Codified Laws Ann. §§ 37-1-14.3*, *-33*; *Tenn. Code Ann. § 47-25-106*; *Utah Code Ann. § 76-10-3109(1)(a)*; *Vt. Stat. Ann. tit. 9 § 2465(b)*; *W. Va. Code R. § 142-9-2*; *Wis. Stat. § 133.18(1)(a)*.

case before us. Plaintiffs have pared their action down to a case asserting violations of state laws, and we have concluded that the district court correctly decided that they have not shown how their alleged injury could be traced to defendants' conduct—a requirement that is just as essential under the state laws as it is under federal law. Also, and more straightforwardly, they failed to raise their current claims within the relevant limitations periods. For both these reasons, we AFFIRM the judgment of the district court.

Githieya v. Tel

United States District Court for the Northern District of Georgia, Atlanta Division

September 7, 2018, Decided; September 7, 2018, Filed

CIVIL ACTION NO. 1:15-CV-986-AT

Reporter

2018 U.S. Dist. LEXIS 245566 *; 2018 WL 11395476

BENSON GITHIEYA, KATE BOCCIA, DARLENE BYERS, and NELLIE LOCKETT, Plaintiffs, v. GLOBAL TEL*LINK CORP., Defendant.

Core Terms

Plaintiffs', interstate, customers, inactivity, funds, rates, filed-rate, charges, prepaid, inmate, intrastate, motion to dismiss, regulations, Sur-Reply, ancillary, tariffs, argues, courts, unjust, common carrier, district court, practices, carrier, doctrine of primary jurisdiction, second amended complaint, plaintiff's claim, communications, retroactively, unjust enrichment, file a tariff

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Judges: Amy Totenberg, United States District Judge.

Opinion by: Amy Totenberg

Opinion

ORDER

This matter is before the Court on Defendant Global Tel*Link Corporation's ("GTL") Motion to Dismiss Plaintiffs' Second Amended Complaint [Doc. 79]. This is a proposed class action suit. GTL is a communications company that provides inmate calling services around the United States. Plaintiffs are friends and family members of inmates who set up prepaid accounts with GTL to facilitate telephone communication with their incarcerated loved ones. Plaintiffs specifically challenge GTL's "inactivity policy" (which is described below) and bring state-law claims of breach of contract and unjust enrichment as well as violations of the *Federal Communications Act ("FCA"), 47 U.S.C. § 201 et seq.*

I. PROCEDURAL BACKGROUND

Plaintiff Benson Githieya, the sole plaintiff at the time, filed the initial proposed class action complaint in this case on April 3, 2015. (Doc. 1.) The Court then stayed and administratively closed the case on January 25, 2016 upon granting Defendant's motion to compel arbitration. (Doc. 23.) On March 16, 2017, the case was **[*4]** reopened after the arbitrator found that the case was not subject to mandatory arbitration. (Doc. 28.)

Plaintiffs filed the Second Amended Complaint on October 23, 2017 (Doc. 72), which added three named plaintiffs, and Defendant filed the instant Motion to Dismiss on November 22, 2017. Plaintiffs filed a Motion for Leave to File a Sur-Reply in Opposition to Defendant's Motion to Dismiss [Doc. 102] and a Motion for Leave to Supplement the Record, or, in the Alternative, to Amend Their Complaint [Doc. 105], and both sides have filed related motions to seal. On June 25, 2018, Plaintiffs filed a Motion to Certify Class [Doc. 122].

The Court addresses Defendant's Motion to Dismiss and all related filings in this Order. The Court will address Plaintiffs' Motion to Certify Class in a separate order.

II. FACTUAL BACKGROUND[1]

GTL is a Delaware corporation that, through its wholly owned subsidiaries, provides inmate calling services throughout the United States. (Second Am. Compl., Doc. 72 ¶¶ 17-18.) GTL and its subsidiaries serve over 2,200 correctional facilities in the United States in 48 states. (*Id.* ¶ 19.) Plaintiffs bring this case as a proposed class action based on their calling service **[*5]** accounts with GTL. The Plaintiffs — Benson Githieya, Kate Boccia, Darlene Byers, and Nellie Lockett — are individuals who opened "AdvancePay" accounts with GTL between 2009 and 2014 to facilitate communication with their incarcerated family members and friends. (*Id.* ¶¶ 1-16.)

GTL's AdvancePay Accounts

Plaintiffs allege that they suffered losses when GTL applied its "inactivity policy" to their AdvancePay accounts. (*Id.* ¶¶ 1-16.) GTL's AdvancePay account system allows a customer to deposit funds into a prepaid account for the

[1] The Court derives the factual background herein from Plaintiffs' Second Amended Complaint, which the Court presumes true for purposes of resolving Defendant's Motion to Dismiss. *See Duke v. Cleland*, 5 F.3d, 1399, 1402 (11th Cir. 1993).

purpose of receiving calls from inmates at correctional facilities that contract with GTL. (*Id.* ¶ 36.) GTL then holds the funds in the account in order to pay for calls that a customer receives from an inmate. (*Id.* ¶ 38.) Thus, when an incarcerated individual calls a customer, funds are deducted from the prepaid account.

Each Plaintiff here deposited money into an AdvancePay account by entering his or her credit card information over the phone into the interactive-voice-response ("IVR") system. (*Id.* ¶ 34.) The IVR system is automated and offers customers the option to deposit $25 or $50 into their accounts.[2] (*Id.* ¶ 37.) Plaintiffs allege that the IVR's automated voice **[*6]** "may have referred to 'terms of use,' but did not state the 'terms of use.'" (*Id.* ¶ 40.) The automated system did not require Plaintiffs to affirmatively accept any terms of use prior to establishing an account, either vocally or by pressing a button. (*Id.* ¶¶ 41-42.) During the time Plaintiffs maintained their AdvancePay accounts, GTL was the exclusive provider of inmate calling services for thousands of correctional facilities in the country. (*Id.* ¶ 83.)

GTL's "Inactivity Policy"

If a GTL AdvancePay account does not see any activity for a period of 90 or 180 days,[3] GTL classifies the account as "inactive," reduces any outstanding balance to $0.00, and converts these unused funds to revenue for GTL.[4] (*Id.* ¶¶ 45-46.) Plaintiffs claim that GTL never informed them that it would reduce their account balances to $0.00 after a period of inactivity when they first established AdvancePay accounts. (*Id.* ¶¶ 79, 81.) Further, the published webpage "terms of use" contained no notice that a customer's funds would be reduced to $0.00 after an inactivity period. (*Id.* ¶ 82.) Thus, Plaintiffs allege that this "inactivity policy" constituted a taking of their funds that they were never informed of and never **[*7]** agreed to. (*Id.* ¶¶ 80-81.)

Plaintiffs' Claims

Plaintiffs bring claims for breach of contract (Count I), unjust enrichment (Count II), and violations of the *Federal Communications Act ("FCA"), 47 U.S.C. § 201, et seq.* (Count III).

In their Count I contract claim, Plaintiffs allege that GTL entered into contracts with the them and that these contracts were formed as a result of Plaintiffs' use of GTL's automated IVR system when establishing their AdvancePay accounts. (*Id.* ¶¶ 101-102.) Specifically, Plaintiffs assert that GTL expressly or implicitly agrees to hold a customer's funds until they are needed to pay for a call with an inmate. (*Id.* ¶ 105.) Each Plaintiff opened and funded a prepaid account in exchange for such a service. (*Id.* ¶ 106.) These alleged contracts, between Plaintiffs and GTL, included no express or implicit terms that permit GTL to take a customer's prepaid funds and treat such funds as revenue (a practice Plaintiffs refer to as "breakage") after a 90-or 180-day period of inactivity. (*Id.* ¶ 107.) Plaintiffs further allege that, even if there was a "term" allowing GTL to take prepaid funds, it would be unenforceable as a matter of law as an unlawful penalty. (*Id.* ¶ 108.) Consequently, Plaintiffs allege they suffered damages **[*8]** from GTL's breach of these express or implied contracts. (*Id.* ¶¶ 109-110.)

In the alternative to their contract claim, Plaintiffs bring a claim of unjust enrichment. (*Id.* ¶ 112.) Plaintiffs allege that they conferred a substantial benefit on GTL in the form of prepaid amounts deposited with, and later taken by, GTL. (*Id.* ¶ 113.) Plaintiffs further allege that GTL "deliberately sought to prevent Plaintiffs and the Class members from discovering the policy and practice." (*Id.* ¶ 117.) Plaintiffs seek disgorgement and restitution of amounts wrongfully obtained pursuant to this "unjust policy and practice." (*Id.* ¶ 119.)

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[2] Account holders can also deposit "additional amounts during certain time periods." (Second Am. Compl., Doc. 72 ¶ 37.)

[3] It is unclear at this stage why GTL would classify an account as inactive at *either* 90 days or 180 days, but this is how Plaintiffs allege GTL applied its inactivity policy in the Second Amended Complaint.

[4] Plaintiffs' allegations are discussed in the present tense, as they allege that GTL's inactivity policy is ongoing. (*Id.* ¶¶ 45, 78, 125.)

Next and finally, Plaintiffs assert a claim for violations of the FCA. Plaintiffs allege that GTL (a common carrier engaged in interstate commerce) violated the FCA's requirement that all "charges, practices, classifications, and regulations" be just and reasonable. (*Id.* ¶¶ 20, 121, 122) (citing *47 U.S.C. § 201(b)*.) Any such "charge, practice, classification or regulation" that is unjust or unreasonable is declared unlawful. (*Id.*) GTL's "inactivity policy," according to Plaintiffs, is unjust and unreasonable — and thus unlawful. (*Id.* ¶ 123.) Noting that the FCA allows an individual to *either* ***[*9]*** make a complaint to the Federal Communications Commission ("FCC") *or* bring suit in district court, Plaintiffs assert that because none of them has made a complaint to the FCC, they have standing to bring an FCA claim in district court. (*Id.* ¶¶ 125-126) (citing *47 U.S.C. § 207*) (emphasis in Complaint.) Plaintiffs ask the Court to permanently enjoin GTL from continuing its "inactivity policy" and to award damages to Plaintiffs for the amounts removed from their accounts, as well as reasonable attorney's fees and further relief deemed necessary. (*Id.* ¶ 129.)

III. STANDARD FOR MOTION TO DISMISS

A complaint should be dismissed under *Rule 12(b)(6)* only where it appears that the facts alleged fail to state a "plausible" claim for relief. *Bell Atlantic v. Twombly, 550 U.S. 544, 555-556 (2007)*; *Fed. R. Civ. P. 12(b)(6)*. The plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *See Erickson v. Pardus, 551 U.S. 89, 93 (2007)* (citing *Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007)*); *Fed. R. Civ. P. 8(a)*. In ruling on a motion to dismiss, the court must accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *See Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003)*.

A claim is plausible where the plaintiff alleges factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)*. A **[*10]** plaintiff is not required to provide "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555*. The plausibility standard requires that a plaintiff allege sufficient facts "to raise a reasonable expectation that discovery will reveal evidence" that supports the plaintiff's claim. *Id. at 556*. A complaint may survive a motion to dismiss for failure to state a claim even if it is "improbable" that a plaintiff would be able to prove those facts and even if the possibility of recovery is extremely "remote and unlikely." *Id.*

IV. ANALYSIS

As an initial matter, Plaintiffs argue that GTL's Motion to Dismiss should be denied as procedurally improper because GTL answered Plaintiffs' First Amended Complaint and because GTL's motion "strays well beyond the pleadings." (Pl. Resp., Doc. 91 at 7-9.) The Court finds that GTL's instant Motion to Dismiss is procedurally proper. As a matter of law, an amended complaint supersedes the former pleadings; the original pleadings are abandoned by the amendment. *Hoefling v. City of Miami, 811 F.3d 1271, 1271 (11th Cir. 2016)*. Here, upon Plaintiffs' **[*11]** filing of their Second Amended Complaint, the First Amended Complaint became a legal nullity, mooting GTL's initial Answer. *Id. at 1277*; *see also SMH Int'l Corp. v. Guangdong Chant Grp., Inc., 2016 WL 4204553 at *4 (N.D. Ga. June 29, 2016)* (finding defendant's motion to dismiss second amended complaint procedurally proper where defendant had filed Answers to complaint and amended complaint).

The Court further notes that both parties have included information in their briefs outside the scope of the pleadings.[5] This reality does not necessarily make GTL's motion improper. At the motion to dismiss stage, the Court will look beyond the pleadings to consider matters of public record, for example. *Trustmark Ins. Co. v. ESLU, Inc., 153 F. Supp. 2d 1322, 1325 (M.D. Fla. 2011)*, *aff'd*, *299 F.3d 1265 (11th Cir. 2002)*. As such, the Court has

[5] Plaintiffs argue that GTL "makes much of its purported (unwritten) refund practice, even though the practice does not appear in the complaint." (Pl. Resp., Doc. 91 at 9.) GTL argues that Plaintiffs rely on extra-pleading materials as their brief is "littered with references to deposition testimony." (Def. Reply, Doc. 101 at 5.)

considered GTL's filed tariffs (Def. Mot. to Dismiss, Doc. 79, Ex. 2) and the FCC's *Second Report and Order and Third Further Notice of Proposed Rulemaking* ("2015 FCC Order," Doc. 91-1, Ex. 1),[6] in making its determination.

As another preliminary matter, the Court addresses Plaintiffs' Motion for Leave to File a Sur-Reply [Doc. 102]. Plaintiffs argue that GTL's Reply brief raises new arguments concerning the validity and contents of the above-referenced 2015 FCC Order, which GTL did not discuss in its Motion to Dismiss. (FCC Order, Doc. 91-1.) In their proposed Sur-Reply, **[*12]** Plaintiffs only address these new arguments related to GTL's interpretation of the 2015 FCC Order. In opposition, Defendant argues that no sur-reply is warranted because GTL raised no new arguments in its Reply; it simply responded to arguments in Plaintiffs' response brief. (Def. Resp. to Mot. for Sur-Reply, Doc. 104 at 2) (citing *Roelle v. Cobb County Sch. Dist., 2014 WL 4457235 at *9 (N.D. Ga. Sept. 10, 2014)*.)

Upon review, the Court **GRANTS** Plaintiffs' Motion to File a Sur-Reply [Doc. 102]. It is true that GTL's Reply raises new arguments regarding the 2015 FCC Order. Plaintiffs should have the opportunity to respond to these new arguments. *Atlanta Fiberglass USA, LLC v. KPI, Co., 911 F. Supp. 2d 1247, 1262 (N.D. Ga. 2012)* (Story, J.) (stating that sur-replies will generally be permitted where a movant raises new arguments or facts in a reply brief). Furthermore, the 2015 FCC Order is much debated between the parties, and its contents and procedural posture are relevant to multiple issues presently before the Court. Allowing the parties to more fully brief the issues involving the 2015 FCC Order only aids the Court's analysis of GTL's Motion to Dismiss. The Court therefore considers Plaintiffs' Sur-Reply in ruling on the Motion to Dismiss.

The Court now turns to the multiple substantive issues of the instant Motion to Dismiss.

A. Plaintiffs' [*13] FCA Claim (Count III)

1. Private Right of Action: Alleging Interstate Communication

Plaintiffs claim that Defendant's inactivity policy violates the FCA because it is unjust and unreasonable.

The relevant portion of the FCA states:

> (a) It shall be the duty of every common carrier *engaged in interstate or foreign communication* by wire or radio to furnish such communication service upon reasonable request therefore . . . .
> (b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . .

47 U.S.C. § 201 (emphasis added). In essence, Plaintiffs here challenge a "practice" under *Section 201(b)* that is allegedly connected to "interstate [] communication" as stated under *Section 201(a)*. The practice at issue is GTL "unilaterally taking money" from the prepaid accounts it provides to customers. (Pl. Resp., Doc. 91 at 29.) The "communication" (which that practice is connected to) is any calls that did take place, and would have taken place, between the individual Plaintiffs and inmates based on available funds in the accounts.

Defendant **[*14]** argues that Plaintiffs' FCA claim fails because Plaintiffs do not specifically allege that any calls they received (or could not receive) were "*inter*state, rather than *intra*state, in nature." (Def. Mot. to Dismiss, Doc. 79 at 19.) Because all Plaintiffs reside in Georgia and Plaintiffs "seem to suggest" they were only communicating with inmates housed in Georgia, Defendant argues that the FCA does not apply here. (*Id.* at 20.)

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[6] *In the Matter of Rates for Interstate Inmate Calling Services, 30 FCC Rcd. 12763, 12775-76, 12838-62* (November 5, 2015), *80 Fed. Reg. 79136-01 (Dec. 18, 2015)*.

In their Response, Plaintiffs argue that they are not required to plead specific interstate calls and that they have sufficiently alleged that a common carrier imposed unjust or unreasonable charges, as required by the statute. Plaintiffs also emphasize that their claims are not about specific calls; rather, they are challenging GTL's practice of taking funds from prepaid accounts that are capable of receiving both interstate and intrastate calls.

The FCA defines "interstate communication" as a "communication or transmission . . . from any State . . . to any other State . . . ." *47 U.S.C. § 153(h)(22)*. The FCA does not govern purely intrastate communications. *47 U.S.C. § 152(b)* ("Nothing in this chapter shall be construed to apply to or to give the Commission jurisdiction with respect to (1) charges, **[*15]** classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."); *see also* *MetroPCS Cal., LLC v. FCC, 644 F.3d 410, 413 (D.C. Cir. 2011)* (holding that the FCA "grants the FCC authority over interstate communications but reserves wholly intrastate matters for the states"); *Global Tel*Link v. FCC, 866 F.3d 397, 415 (D.C. Cir. 2017)* (stating that although the FCC has plenary authority to regulate interstate rates and practices, it does not have authority to regulate intrastate rates and practices); *In the Matter of Vonage Holdings Corp., 19 F.C.C. Rcd. 22404, 22413 ¶ 17 (2004)* ("Section 2(b) of the Act reserves to the states jurisdiction with respect to intrastate communication service . . . of any carrier.") (internal quotations omitted).

Courts (as well as the FCC) have applied an "end-to-end jurisdictional analysis" to determine whether the communication at issue is interstate, as opposed to intrastate, and therefore falls within the FCA's scope. The analysis "focuses on the 'end points' of a telephone call and considers the continuous path of communications beginning with the end point at the inception of a communication to the end point at its completion." *McClure Tel. Co. v. AT & T Commc'ns of Ohio, Inc., 650 F. Supp. 2d 699, 705 (N.D. Ohio 2009)* (citing *Nat'l Assoc. of Regulatory Utility Commissioners v. Federal Comm's Commission, 746 F.2d 1492, 1498-99 (D.C. Cir. 1984)*). Put differently, if a call originates in one state and is ultimately received in another state, the call is considered interstate **[*16]** communication.

Here, only one "end point" is identifiable based on the Second Amended Complaint — the individual Plaintiffs residing in Georgia. The other end point is unknown. The Second Amended Complaint does not specify that Plaintiffs' account money had been used to pay for actual calls to inmates housed outside of Georgia, nor does it specify that Plaintiffs intended to use their account money (before it was withdrawn by GTL) to receive calls from inmates housed outside of Georgia. Without more, the current allegations do not appear to show that Plaintiffs' FCA claim involves "interstate communication."

Plaintiffs emphasize that their FCA claim is about prepaid accounts, not individual calls, and that the accounts are capable of receiving both interstate and intrastate calls. While this is true, *47 U.S.C. § 201* suggests that Plaintiffs must still allege that these prepaid accounts were serviced "in connection with" interstate communication to state a claim. The question is whether Plaintiffs have sufficiently pled that the "calls in question" in this case (i.e., actual or intended calls between the individual Plaintiffs and inmates) include interstate calls. *McClure, 650 F. Supp. 2d at 707*. Several courts assessing this same **[*17]** sort of jurisdictional question have focused the end-to-end analysis on the specifically alleged calls - "to determine whether *particular* traffic is interstate." *Bell Atlantic Telephone Companies v. F.C.C., 206 F.3d 1, 4 (D.C. Cir. 2000)* (emphasis added); *see also* *Norris v. Glob. Tel Link Corp., No. 16-CV-11323-LTS, 2018 WL 1318922, at *2 (D. Mass. Mar. 14, 2018)* ("Norris therefore has no legal basis under the FCA to challenge GTL's rates and fees for calls that Norris made from Massachusetts to persons in Massachusetts. Norris has not alleged any calls to persons outside of Massachusetts."); *Jacobs v. Glob. Tel*Link Corp.*, No. 5:15-CV-5136, 2016 WL 5953128, at *2 (W.D. Ark. May 17, 2016) ("Plaintiffs contend that Defendant has charged them unjust and unreasonable rates for intrastate inmate calling services in violation of the FCA . . . . The Court is persuaded that the plain language of the FCA does not, of its own force, prohibit common carriers from charging exploitative rates to end users of inmate calling services for purely intrastate calls.") Even in the case cited by Plaintiffs, there was no question that the telephone communications at issue were interstate in nature. *National Ass'n of Regulatory Utility Com'rs v. FCC, 746 F.2d 1492, 1500 (D.C. Cir. 1984)* ("[I]t is undisputed that the intrastate WATS connections sought here would be used to terminate communications which originate in other states.") (internal quotations omitted). Put differently, Plaintiffs have alleged that GTL is a common carrier, operating in 48 states to **[*18]** provide inmate calling services, and that GTL is engaged in interstate commerce, but it remains unclear whether Plaintiffs have alleged that the calls (or thwarted calls) in this case involve communication that crossed state lines.

At this point, the Court need not resolve as a matter of law the specific pleading requirements to satisfy the interstate jurisdictional question under the FCA. Rather, the Court simply finds that, based on the current pleadings, Plaintiffs have not alleged sufficient facts showing "interstate communication" to state a claim under the FCA. The Court further notes that Plaintiffs represent in their briefing that they stand ready to allege that "certain Plaintiffs did, in fact, actually receive [(or] intend to receive) interstate calls before their money was taken." (Pl. Resp., Doc. 91 at 31.) The Court has no reason to doubt the veracity of Plaintiffs' representation on this point. Thus, out of an abundance of caution, the Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs' FCA claim and **GRANTS LEAVE TO AMEND** this claim. Specifically, Plaintiffs have leave to add allegations regarding the interstate nature of communications involving Plaintiffs' prepaid accounts. **[*19]** Should Plaintiffs wish to pursue their FCA claim, the Court **DIRECTS** Plaintiffs to amend their Complaint no later than September 28, 2018 in accordance with this Order.[7]

2. Other Issues Affecting a Potential FCA Claim

Though the Court has dismissed without prejudice Plaintiffs' FCA claim at this juncture, the Court suspects that Plaintiffs will be able to remedy this defect based on their above-discussed representations. Therefore, the Court now considers Defendant's additional arguments pertaining to Plaintiffs' FCA claim. The Court does so to head off

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[7] In addition to briefing this issue, Plaintiffs filed a Motion for Leave to Supplement the Record or, In the Alternative, to Amend Their Complaint [Doc. 105]. In part, Plaintiffs seek to include the deposition of GTL's corporate designee, Christopher McNitt, whose testimony shows the geographic journey a particular GTL call takes when an inmate places a call to an AdvancePay account holder — a journey involving data transmission across state lines, even if the recipient of the call is in the same state as the inmate.

Defendant correctly argues in response that the "end-to-end" analysis under the FCA focuses on the beginning and end point of a call and does not divide communications at intermediate points of switching. *Bell Atlantic Telephone Companies v. F.C.C., 206 F.3d 1, 4 (D.C. Cir. 2000)*; *McClure Tel. Co. v. AT&T Commc'ns of Ohio, Inc., 650 F. Supp. 2d 699, 705-06 (N.D. Ohio 2009)*. Thus, if a call both originates and ends in the same state — regardless of whether the communication traveled across state lines to connect those two end points — the call is considered to be intrastate. The Court therefore finds Plaintiffs' Motion to be extraneous and an incorrect application of the law with respect to Mr. McNitt's testimony about the interstate journey of GTL calls.

However, Plaintiffs also request to amend their pleadings to add allegations that individual Plaintiffs opened GTL prepaid accounts "with the intention to receive interstate calls." (Pl. Mot. to Supp., Doc. 105 at 6.) As discussed in this section, the Court has decided to permit such amendment. The Court also notes that Plaintiffs represent some of them were unable to receive calls from inmates before GTL withdrew the funds from their prepaid accounts under the inactivity policy. Given this situation, the Court understands that individual Plaintiffs may not be able to allege that they actually received interstate calls but that they *intended* to receive interstate calls — based on their particular friend or relative being incarcerated in another state — before their accounts were emptied. Moreover, upon amending the pleadings, Plaintiffs should include particularized information as to the facility location of the incarcerated friend or relative.

Accordingly, Plaintiffs' Motion to Supplement or Amend [Doc. 105] is **GRANTED IN PART** and **DENIED IN PART**.

Additionally, as part of their Motion to Supplement or Amend, Plaintiffs asked the Court to lift the seal on excerpts of Mr. McNitt's deposition testimony referenced in the Motion. Defendant opposed lifting the seal, arguing that Mr. McNitt's testimony contained proprietary and sensitive information and trade secrets. Upon review of the deposition excerpts, the Court finds that Defendant has not sufficiently shown how the information in Mr. McNitt's deposition warrants protection from public view. Mr. McNitt simply discusses how GTL facilitates calls made from inmates (in public facilities) to individuals on the outside. Defendant has not shown how this information reveals trade secrets or particularly sensitive information that is not already known in the industry or accessible to the public. The Court therefore **GRANTS** Plaintiffs' Motion to Lift the Seal [Doc. 106] and **DENIES** Defendant's Motion to File a Response Under Seal [Doc. 110].

unnecessary motion practice in the event that Plaintiffs amend with allegations plausibly indicating that interstate end-to-end calls were indeed received (or intended to be received) by one or more of the Plaintiffs.

a. Primary Jurisdiction Doctrine

The Court turns to GTL's argument that the case should be referred to the FCC under the primary jurisdiction doctrine.[8] This doctrine applies when a claim that originates in the courts requires the resolution of issues which have been placed within the special competence of an administrative agency. *Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976)*. Courts have discretion in deciding whether or **[*20]** not to exercise jurisdiction under the doctrine. Indeed, the primary jurisdiction doctrine is "a flexible concept" with the purpose of "integrat[ing] the regulatory functions of agencies into the judicial decision making process . . . ." *Columbia Gas Transmission Corp. v. Allied Chem. Corp. 652 F.2d 503, 519 n. 14 (5th Cir. 1981)*. The doctrine "does not require that all claims within an agency's purview be decided by the agency. Nor is it intended to 'secure expert advice' for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit." *Brown v. MCI WorldCom Network Services, Inc., 277 F.3d 1166, 1172 (9th Cir. 2002)*.

Defendant GTL argues that this case should be sent to the FCC because (1) the question of whether the inactivity policy is unreasonable is one for telecommunications regulators and (2) allowing suit instead of referring the case to the FCC raises the danger of inconsistent adjudications.

Plaintiffs, on the other hand, argue against a referral to the FCC because (1) the FCC has already spoken on this issue and outlawed GTL's inactivity policy; (2) the challenged practice does not require the expertise of the FCC; and (3) GTL has substantially delayed in seeking referral.

The Court first addresses the issue of whether the FCC has spoken on this issue. While GTL argues that the FCC has **[*21]** not indicated disapproval of their breakage practice, the Court agrees with Plaintiffs that the 2015 FCC Order says otherwise. The 2015 FCC Order — which specifically pertains to inmate calling services ("ICS") - unequivocally bans all ancillary charges not enumerated in the Order. (FCC Order, Doc. 91-1 ¶¶ 161-63, 173-74.) The Order states in relevant part:

> After careful consideration of the record, including analysis of the Mandatory Data Collection, we conclude that reform is necessary to address ever-increasing fees that are unchecked by competitive forces and unrelated to costs. ICS providers, which typically have exclusive contracts to serve a facility, have the incentive and ability to continue to extract unjust and unreasonable ancillary service charges. As a result, we conclude it is necessary to reform the ancillary service charge structure imposed on consumers by ICS providers, as shown in Table Four below. *All other ancillary service charges not specifically included in Table Four are prohibited*. . . .

Table Four

Permitted Ancillary Service Charges and Taxes	**Monetary Cap Per Use /Instruction**
Applicable taxes and regulatory fees	Provider shall pass these charges through to consumers **[*22]** directly with no markup
Automated payment fees	$3.00
Fees for single-call and related services, e.g., direct bill to mobile phone without	Provider shall directly pass through third-party financial

[8] The Court notes (as did Plaintiffs) the tension in GTL arguing, on one hand, that this case is not within the purview of the FCC because it does not involve interstate communication, and on the other hand, arguing that this case should be sent to the FCC under the primary jurisdiction doctrine.

Permitted Ancillary Service Charges and Taxes	Monetary Cap Per Use /Instruction
setting up an account	transaction fees with no markup, plus adopted, per-minute rate
Live agent fee, i.e., phone payment or account set up	$5.95
Paper bill/statement fees (no charge permitted for electronic bills/statements)	$2.00
Prepaid account funding minimums and maximums	Prohibit prepaid account funding minimums and prohibit prepaid account funding maximums under
Third-party financial transaction fees, e.g., MoneyGram, Western Union, credit card processing fees and transfers from third-party commissary accounts	$50 Provider shall pass this charge through to end user directly, with no markup

(*Id.* ¶¶ 161, 163) (emphasis added.) In effect, this is a "prohibition by omission" ruling; the Order prohibits ancillary charges not otherwise listed in Table Four. The Order further explains that, by limiting ancillary charges in this way, the FCC seeks to "resolve other problems presented in the record" - at which point the Order cites to a comment that raises the very practice that Plaintiffs challenge here. (*Id.* ¶ 174.) The **[*23]** comment states: "In some cases, telecoms are actually taking prepaid moneys from prisoner accounts if for whatever reason the account is 'inactive.'" (*Id.* ¶ 174 n. 627.) Based on this language, the Court finds that the 2015 FCC Order addresses the sort of inactivity policy at issue in this case and prohibits it.[9]

GTL also argues that, because the 2015 FCC Order has been vacated and remanded by the D.C. Circuit, it should have no influence on the Court. *See* *Global Tel*Link v. FCC, 866 F.3d 397 (D.C. Cir. 2017)*. But the D.C. Circuit only vacated and remanded certain portions of the 2015 FCC Order. In relevant part, the D.C. Circuit examined whether the Order's imposition of caps on ancillary fees for inmate calling services was justified. The D.C. Circuit held that the FCC has plenary power to regulate *interstate* rates and practices connected with interstate calls, whereas the FCC does not have such authority over *intrastate* rates and practices. The D.C. Circuit also found that it could not discern from the record "whether ancillary fees can be segregated between interstate and intrastate calls." *Id. at 415*. Thus, the D.C. Circuit remanded to the FCC "to determine whether it can segregate proposed caps on interstate calls (which are permissible) **[*24]** and the proposed caps on intrastate calls (which are impermissible)." *Id. at 402*. In other words, the D.C. Circuit did not disturb the Order's determination that ancillary charges not enumerated in the Order — such as taking prepaid money in inactive accounts — are prohibited.

As noted above, the Court finds that Plaintiffs' Second Amended Complaint does not adequately allege that the challenged practice (with respect to the particular Plaintiffs here) involves interstate communication. However, if Plaintiffs properly amend their FCA claim and make a sufficient showing that some calls were (or would have been) interstate calls, the conduct at issue in this litigation would be covered — and prohibited — by the 2015 FCC order. A referral to the FCC based on primary jurisdiction would be inappropriate under these circumstances. *Fontan-de-Maldonado v. Lineas Aereas Constarricenses, S.A., 936 F.2d 630, 631 (1st Cir. 1991)* ("Of course, if the agency

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[9] Though GTL highlights the distinction between prisoner accounts and the accounts of their family members (at issue here), the condemned conduct is essentially the same. This distinction is not a meaningful one in light of the 2015 FCC Order's broad language.

GTL also argues that Plaintiffs' citation to a passage in the FCC's Further Notice of Proposed Rulemaking — which specifically raised GTL's inactivity or breakage practices — does not constitute a final rule prohibiting such practices. This may be so. However, the 2015 FCC Order *does* specifically identify the inactivity policy and characterize it as a "problem" that the Order is meant to resolve. (FCC Order, Doc. 91-1 ¶ 174 n. 627.)

has already announced its views, there is no need to apply the [primary jurisdiction] doctrine."); *see also In re Global Tel*Link Corp. ICS Litigation*, No. 5:14-CV-5275-TLB (W.D. Ark. Jan. 29, 2015) (Doc. 29) (finding that a referral to the FCC was unnecessary where the FCC had already made available a good deal of expertise).

Another reason not **[*25]** to send the case to the FCC — should the Court conclude that the challenged conduct involves interstate communication — is that it would result in unnecessary delay. As Plaintiffs argue, courts may weigh the likelihood of delay and the timeliness of the assertion of the primary jurisdiction doctrine in deciding whether to invoke the doctrine. *Mississippi Power & Light Co. v. United Gas Pipeline Co., 532 F.2d 412, 419 (5th Cir. 1976)* (stating that "courts should be reluctant to invoke the doctrine of primary jurisdiction, which often, but not always, results in added expense and delay to the litigants"); *Morsey v. Chevron USA, Inc., 779 F. Supp. 150, 153 (D. Kan. 1991)* (declining to refer the case to the FCC where defendant waited nearly two years from the time it removed the case to assert primary jurisdiction); *In re Global Tel*Link Corp. ICS Litigation*, No. 5:14-CV-5275-TLB (W.D. Ark. Jan. 29, 2015) (Doc. 29) (declining to refer the case to the FCC because a referral risked delaying plaintiffs' day in court for many years longer). Here, the fact that GTL waited more than two years to seek referral to the FCC (after a motion to dismiss, an arbitration, discovery exchange, and depositions) weighs against referral to the FCC.[10]

For the foregoing reasons, the Court likely would not find it appropriate to refer this case to the FCC under the **[*26]** primary jurisdiction doctrine.

b. Requirement of a Prior Determination by the FCC

The Court now turns to GTL's final argument affecting Plaintiffs' potential FCA claim. GTL contends that Plaintiffs' claim further fails because private litigants are not authorized to sue for purported FCA violations without the FCC first determining that the practice in question is unreasonable. As with its argument regarding the primary jurisdiction doctrine, GTL asserts that the FCC has never found GTL's inactivity policy to be unjust or unreasonable and so Plaintiffs cannot challenge it in district court.

Plaintiffs contend that their claims do not require a prior determination by the FCC. Even so, they contend that there has already been such a determination in the 2015 FCC Order. (Pl. Resp., Doc. 91 at 24.)

The plain text of *47 U.S.C. § 207* reads as follows:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may **either** make complaint to the Commission as hereinafter provided for, **or** may bring suit for the recovery of the damages for which such a common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; **[*27]** but such person **shall not have the right to pursue both** such remedies.

(emphasis added). The statute expressly allows a plaintiff alternative options in how she seeks relief. *Mexiport Inc. v. Frontier Commc'ns Servs., Inc., 253 F.3d 573, 575 (11th Cir. 2001)* ("We . . . find that the language of *47 U.S.C. § 207* is unambiguous. The statute allows a complainant to file a complaint with the FCC *or* in federal district court but not both.") (emphasis in original)[11] ; *Digitel, Inc. v. MCI Worldcom, Inc., 239 F.3d 187, 190 (2d Cir. 2001)*

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[10] Moreover, the potential for delay upon referral to the FCC is a real one, as the proceedings that led to the issuance of the 2015 FCC Order lasted an incredible twelve years. (FCC Order, Doc. 91-1 ¶ 1.)

[11] The fact pattern in *Mexiport* was slightly different, as the Eleventh Circuit had to determine whether the plaintiff's filing of an informal (as opposed to a formal) complaint with the FCC precluded the plaintiff from filing an action in district court. The Eleventh Circuit reasoned that the FCA does not distinguish between informal and formal complaints, and therefore the plaintiff's decision to file an informal complaint with the FCC still barred filing in district court. Despite the factual differences with the instant case, the Court finds the *Mexiport* decision to be instructive in its analysis of *Section 207*. Notably, the Eleventh Circuit in

("There can be no doubt that § 207 permits an injured party to seek relief either in federal court or before the FCC, but not in both."); Kimber Baldwin Designs, LLC v. Sily Communications, Inc. 225 F. Supp. 3d 670 (S.D. Ohio 2016) (finding that Congressional intent to provide a private right of action was clear, as evidenced by the text of the statute allowing one claiming to be damaged to bring suit in district court).

Despite this seemingly clear language, some courts have held that a prior determination by the FCC is necessary to file a Section 207 claim in district court. *See* Havens v. Mobex Network Servs., LLC, 820 F.3d 80, 89 (3d Cir. 2016); N. Cnty. Commc'ns v. Cal. Catalog & Tech., 594 F.3d 1149, 1160 (9th Cir. 2010). In particular, the Havens court concluded that the "FCC must first determine that a particular type of practice constitutes an 'unjust or unreasonable' practice . . . before a plaintiff may bring a cause of action . . . [based on] that conduct." Havens, 820 F.3d at 90.

The Eleventh Circuit has not directly addressed the "prior determination" ruling in Havens. If anything, the Eleventh **[*28]** Circuit's Mexiport decision seems to point in the other direction. Whether some version of Havens or Mexiport governs, however, there has already been a prior determination regarding the practice at issue: the 2015 FCC Order. As the Court concluded above, the 2015 FCC Order disallows practices and charges by which prison communications carriers take funds from accounts after a period of inactivity. (FCC Order, Doc. 91-1 ¶¶ 161, 173 n. 627.) That other portions of the Order have been vacated or remanded for further review does not change the FCC's disapproval of this particular practice. Thus, the Court's decision here does not run counter to the decision in Havens.

GTL next argues that if the FCC Order did condemn their inactivity policy practice, it should not be applied retroactively to the time before the issuance of the FCC Order on November 5, 2015.

But the Court agrees with Plaintiffs that the FCC Order does apply retroactively, based on the specific situation at hand. *See* Qwest Servs. Corp. v. FCC, 509 F.3d 531, 539-540 (D.C. Cir. 2007) (reversing FCC's decision not to give retroactive application to its interpretation regarding prepaid calling markets, noting the presumption of retroactivity where agency decisions do not substitute new law for old but rather are new **[*29]** applications of existing law, clarifications, and additions); AT&T v. FCC, 454 F.3d 329, 333 (D.C. Cir 2006) (stating that where a regulated entity cannot point to a previously settled rule, retroactivity is the norm; finding that an order on fees applicable to prepaid calling cards had retroactive effect). As AT&T v. FCC further discusses, where a party affected has known of the likelihood of the new policy for many years, "it assumed the risk of an adverse Commission decision." AT&T v. FCC, 454 F.3d at 334. Here, the litigation that culminated in the 2015 FCC Order, banning the breakage practice, lasted for 12 years and involved ICS issues closely related to this case.[12] (*See* FCC Order, Doc. 91-1 ¶ 1). GTL could certainly be tasked, then, with assuming the risk of an adverse decision.

Finally, the Court notes that regardless of the retroactivity of the order, Plaintiffs allege that some of them were subject to GTL's inactivity policy after the issuance of the 2015 FCC Order. (Pl. Mot. for Sur-Reply, Doc. 102 at 3, 10.) In addition, Plaintiffs argue that GTL continues to engage in this practice today. (*Id.*) In light of Plaintiffs' representations and the reasons stated above, the Court would likely find that Defendant's prior determination argument does not dispose of **[*30]** Plaintiffs' potential FCA claim.

B. Plaintiffs' State-Law Claims (Counts I and II)

1. The Filed-Rate Doctrine

Mexiport never mentioned a "prior determination" requirement before the plaintiff could file in district court; the Eleventh Circuit simply stated that a plaintiff could file a complaint with the FCC or in district court.

[12] The case before the FCC began when an individual petitioned the agency for relief from "exorbitant phone rates charged by inmate calling service (ICS) providers, so that she might afford telephone contact with her incarcerated grandson." (FCC Order, Doc. 91-1 ¶ 1.)

The Court next considers GTL's argument that all of Plaintiffs' claims are barred by the filed-rate doctrine.[13] Under the FCA, every common carrier is required to file with the FCC "schedules" (i.e., tariffs) showing all charges and showing the classification, practices, and regulations affecting such charges. *American Tel. & Tel. Co. v. Central Office Telephone, Inc., 524 U.S. 214 (1998)*; *47 U.S.C. § 203(a)*. The filed-rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal [or state] regulatory authority." *Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577 (1981)*.[14] "[T]he rates a carrier charges its customers, once filed with and approved by the FCC, become 'the law' and exclusively govern the rights and liabilities of the carrier to the customer." *Hill v. Bellsouth Telecommunications, Inc., 364 F.3d 1308, 1315 (11th Cir. 2004)*.

The provisions that ground this filed-rate doctrine are modeled after similar provisions of the Interstate Commerce Act ("ICA") and "share its goal of preventing unreasonable and discriminatory charges." *Central Office, 524 U.S. at 222*. Accordingly, this doctrine is based on two core principles: nondiscrimination and nonjusticiability. *Hill, 364 F.3d at 1316*. The nondiscrimination principle stands for the proposition that similarly situated customers should pay the same rates for the same **[*31]** services. *Central Office, 524 U.S. 214 at 223*. The nonjusticiability principle seeks to ensure that regulators, rather than the courts, employ their expertise to determine the reasonableness of proposed rates. *Ark. La. Gas, 453 U.S. at 577*.

It is not disputed that GTL has tariffs on file with the FCC and Georgia's Public Service Commission ("PSC"). The relevant portion of GTL's filed tariffs states:

> The Customer may close the Advance Pay Account at any time. At the written request of the Customer (usually upon release of an inmate from an institution), any remaining balance in the Account will be refunded to the Customer after deducting any call charges, applicable taxes and transaction fees incurred during the billing cycle. **Advance Pay Accounts will be automatically dissolved following three months of zero activity (i.e., no calls placed, no account replenishment, no customer service inquiries)**.

(Def. Mot. to Dismiss, Doc. 79, Ex. 1) (emphasis added.) Essentially, GTL argues that because its inactivity policy practice was disclosed with the proper agencies, the filed-rate doctrine bars Plaintiffs' claims. (Def. Mot. to Dismiss, Doc. 79 at 11-12.)

Plaintiffs provide three reasons why their claims are not barred by the filed-rate doctrine: (1) Plaintiffs **[*32]** are not challenging GTL's rates or the services provided for those rates, but rather they are challenging a practice by GTL; (2) GTL does not actually fully disclose the "inactivity policy" in its tariffs; and (3) the FCC and Georgia's PSC have prohibited GTL's practice.

The Court concludes that Plaintiffs' claims are not barred by the filed-rate doctrine. First, the Court is persuaded that the practice Plaintiffs challenge is neither (1) a filed rate nor (2) a service or privilege provided by GTL in exchange for payment of a rate. What Plaintiffs challenge is "GTL's practice of taking Plaintiffs' money at a point when [] GTL is *not* providing services to Plaintiffs." (Pl. Resp., Doc. 91 at 11.) The filed-rate doctrine does not extend to cover a defendant's conduct that is not related to a particular rate or service associated with a rate. *See Brown v. MCI WorldCom Network Services, Inc., 277 F.3d 1166 (9th Cir. 2002)* (finding that filed-rate doctrine did not apply where plaintiff alleged that defendant created extraneous accounts and charged him unauthorized $10 monthly fee for no services rendered, as opposed to challenging the monthly fee itself as unreasonable or invalid).

GTL argues that the fact that Plaintiffs "challenge the *inactivity policy* or *classification* ***[*33]*** , rather than the rates themselves, is beside the point." (Def. Mot. to Dismiss, Doc. 79 at 13) (emphasis in original.) The Court finds otherwise. It is true that "rates do not exist in isolation," and that the Supreme Court has articulated that "[a]ny claim

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[13] GTL's argument regarding the filed-rate doctrine is relevant to all three of Plaintiffs' claims. Thus, the discussion herein — pertaining to the filed-rate doctrine — also applies to Plaintiffs' FCA claim should the Court find, upon amendment, that it survives.

[14] Additionally, it is unlawful for a carrier to "employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." *47 U.S.C. § 203(c)*.

for excessive rates can be couched as a claim for inadequate services and vice versa. . . . An unreasonable 'discrimination in charges' [] can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price." *Central Office, 524 U.S. at 233*. But unlike in *Central Office* or other cases GTL relies upon, Plaintiffs here do not allege that a service was inadequate or that they were excessively charged. Plaintiffs allege that they received no service at all for the funds taken.

The Court's finding is further supported by the principles of nondiscrimination and nonjusticiability underlying the filed-rate doctrine. With respect to nondiscrimination, this is not a situation where GTL is seeking to apply the same rate for the same services provided. Rather, when Plaintiffs' accounts were closed, the amount of funds withdrawn by GTL was arbitrarily dependent upon how much money was in the accounts at the time. GTL did not withdraw **[*34]** any specified "rate" in exchange for a service. *In re Universal Serv. Fund Tel. Billing Practice Litig., 619 F.3d 1188, 1192 (10th Cir. 2010)* (emphasizing congressional intent under the FCA that customers receive uniform rates, terms, and conditions of service). With respect to nonjusticiability, it is not at issue here. Plaintiffs are not asking the Court to weigh in on the appropriate rates for services rendered. *Qwest Commc'ns Co. v. Aventure Commc'ns Tech., 86 F. Supp. 3d 933, 998 (S.D. Iowa 2015)* (finding that filed-rate doctrine did not apply where plaintiff did not ask the court to determine a reasonable value for services rendered).

Turning to Plaintiffs' second argument, even if the inactivity policy which Plaintiffs challenge were to be deemed a "rate" or associated service under the filed-rate doctrine, their claims still would not be barred. The actual practice at issue is not properly disclosed in the filed tariffs. As represented above, GTL's filed tariff states:

> The Customer may close the Advance Pay Account at any time. At the written request of the Customer (usually upon release of an inmate from an institutuion), any remaining balance in the Account will be refunded to the Customer after deducting any call charges, applicable taxes and transaction fees incurred during the billing cycle. **Advance Pay Accounts will be automatically dissolved following [*35] three months of zero activity (i.e., no calls placed, no account replenishment, no customer service inquiries)**.

(Def. Mot. to Dismiss, Doc. 79, Ex. 1) (emphasis added.) Contrary to GTL's assertion that the filed tariff "could not be clearer" about what happens to any remaining money in the accounts, the Court concludes that the text of the tariff does not indicate that a customer's funds will be forfeited and converted to GTL revenue. As Plaintiffs argue, the money could be returned to the customer, could be sent to a third party, could be subject to state law dealing with unclaimed property or, as was done here, could be converted to revenue. Without a more complete disclosure, customers cannot be charged with being on notice of the breakage practice, the regulatory agencies cannot be said to have approved of the practice, and GTL cannot contend that the policy Plaintiffs challenge is a tariffed practice. *Qwest, 86 F. Supp. 3d at 998* (finding that filed-rate doctrine did not apply where plaintiff (long distance phone company) alleged that defendants (local exchange carriers) wrongfully obtained funds for services not tariffed); *In re Blue Cross Blue Shield Antitrust Litig., 238 F. Supp. 3d 1313, 1332 (N.D. Ala. 2017)* (finding that filed-rate doctrine did not bar claims of particular plaintiffs since **[*36]** "no rates were filed with respect to those groups").

GTL's reliance on *Hill v. Bellsouth Telecommunications, Inc.* is also not persuasive. In *Hill*, the plaintiff challenged the particular rate she was charged by Bellsouth. *Hill, 364 F.3d at 1312*. Under the FCA, Bellsouth (like other telecommunications providers) was required to contribute a percentage of its revenue to a "Universal Service Fund" ("USF") designed to provide affordable telecommunications services to rural and low-income areas. *Id.* To comply with this requirement, Bellsouth imposed a separate itemized charge of $0.53 on each customer's monthly bill listed as the "Federal Universal Service Charge" ("FUSC"). *Id.* Both Bellsouth's total required contribution to the USF and the $0.53 amount levied on customers was included and explained in the tariffs Bellsouth filed with the FCC. *Id. at 1311-1312*. The plaintiff argued that Bellsouth misrepresented the amount it was required to contribute to the USF and overcharged customers under the FUSC charge. *Id. at 1315*. The court in *Hill* concluded that the plaintiff's claims were barred by the filed-rate doctrine because the USF and the FUSC charges were in fact filed with the regulatory agency, and allowing the plaintiff to recover would retroactively reduce her rate (as compared **[*37]** to other customers), violating the nondiscrimination principle. *Id. at 1316*.

Here, Plaintiffs challenge a practice of taking consumer funds (for no service) that is not clearly disclosed in the listed tariffs. Plaintiffs further argue that they do not seek a reduction of rates, but the return of funds improperly taken. Simply put, *Hill* is too factually distinct to be persuasive on the issue of the filed-rate doctrine.

Furthermore, as a general matter, the Eleventh Circuit has described the limited scope of the filed-rate doctrine. The Eleventh Circuit notes that this doctrine should "preclude damage claims only where there are validly filed rates." *Fla. Mun. Power Agency v. Fla Power & Light Co., 64 F.3d 614, 616 (11th Cir. 1995)* (citing *Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 216 (1966)*).

In *Florida Municipal*, the plaintiff Florida Municipal Power Network alleged that the defendant Florida Power & Light refused to sell it network transmission service, thereby breaching the contract and violating ***antitrust law***. *Fla. Mun., 64 F.3d at 615*.[15] In turn, the defendant argued that the plaintiff's claims were barred by the filed-rate doctrine, and the district court agreed. *Id.* The district court found that the defendant's filed rate for "point-to-point service" applied to bar the plaintiff's claims regarding "network transmission" service. The Eleventh Circuit, **[*38]** however, held that there was a genuine issue of material fact as to whether point-to-point service was distinct from network transmission service. If the "two services are distinct and there is no filed network rate," the Eleventh Circuit reasoned, "then it is clear the doctrine would not confer immunity." *Id. at 616*. In reaching this conclusion, the Eleventh Circuit emphasized that "[t]he characterization of the plaintiff's claim is therefore critical to whether the filed rate doctrine will apply." *Id.* Furthermore, the Eleventh Circuit noted that a carrier cannot rely on the filed-rate doctrine when the filed tariff lacks an "essential element" and thus the carrier "in effect has no rates on file." *Id. at 616* (citing *Security Services v. Kmart Corp., 511 U.S. 431 (1994)* (finding that carrier's filed rate which specified rates to be charged per mile of carriage was "lacking an essential element" when it did not include a list of distances or a map on which a shipper could rely in calculating charges for a given shipment)). The Eleventh Circuit thus vacated and remanded the district court's grant of summary judgment in favor of the defendant. *Id. at 617*.

Here, the filed-rate doctrine does not bar Plaintiffs' claims as characterized in the Second Amended **[*39]** Complaint. Plaintiffs do not challenge, for example, the long-distance rates charged for certain calls and explicitly published in GTL's tariffs. Such a claim would presumably be barred. Rather, Plaintiffs challenge a practice not fully set forth or explained in the tariffs. In this way, the tariffs could be considered to lack an essential element. Like the failure to include a list of distances or a map in *Kmart*, GTL's failure to include that customers' funds would be forfeited and converted to GTL revenue renders the tariff incomplete for the issue at hand. *See* *511 U.S. at 433*.

Finally, revisiting the purpose of the filed-rate doctrine is instructive. Courts explain the doctrine as working "to prevent unreasonable and discriminatory charges," where the "filing requirement render[s] rates definite and certain, and [] prevent[s] discrimination and other abuses." *Brown, 277 F.3d at 1170* (internal quotations omitted). "The Filed Rate Doctrine is not some sort of panacea for any ills [d]efendants may (or may not) have." *In re Blue Cross Blue Shield, 238 F. Supp. 3d 1313, 1332 (N.D. Ala. 2017)*. And further, it does not govern the entirety of the relationship between the common carrier and its customers, and it does not affect whatever duties state law might impose on defendants. *Central Office, 524 U.S. at 230* ("[The filed-rate doctrine] **[*40]** does not serve as a shield against all actions based in state law.") (Rehnquist, J.) (concurring). In light of courts' discussion and application of the doctrine, it becomes apparent that GTL is trying to stretch the filed-rate doctrine beyond its intended purpose. For the reasons discussed above, the Court finds that the filed-rate doctrine does not bar Plaintiffs' claims in this case, at least on the record at this stage of the proceeding.

2. The Voluntary Payment Doctrine

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[15] While *Florida Municipal* did not involve the FCA, the filed-rate doctrine "is applicable any time a regulated company has a rate for a service on file with the applicable regulatory agency." *Fla. Mun., 64 F.3d at 614*. The analysis of the doctrine is therefore instructive.

The Court next considers GTL's argument that Plaintiffs' contract and unjust enrichment claims are barred by the voluntary payment doctrine. (Def. Mot. to Dismiss, Doc. 79 at 22-23.) The relevant statutory language states:

> Payments of claims made through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party are deemed voluntary and cannot be recovered unless made under an urgent and immediate necessity therefore or to release person or property from detention or to prevent an immediate seize or person or property...

O.C.G.A. § 13-1-13. GTL argues that because Plaintiffs had constructive knowledge of the inactivity policy (given **[*41]** the filed tariff), and because they don't allege fraud or deception, Counts I and II fail.

The Court determines that GTL's voluntary payment doctrine argument is premature. As an affirmative defense, the voluntary payment doctrine "often entails a fact-based inquiry and is not suited for resolution at the dismissal stage." *Cableview Comm'ns of Jacksonville, Inc. v. Time Warner Cable SE LLC, 2014 WL 1268584 at *20 (M.D. Fla. March 27, 2014)*. The doctrine "can justify a complaint's dismissal under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* only if the complaint shows on its face that the defense applies." *Twin City Fire Insurance Co. v. Hartman, Simons & Wood, LLP, 609 F. App'x 972, 978 (11th Cir. 2015)*.

Plaintiffs argue that GTL's practice involved a taking of deposits — an allegedly *involuntary* payment — and that they did not have constructive knowledge of this practice. At this stage, a court accepts the facts in a plaintiff's complaint as true. *Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir. 1993)*. As the resolution of this issue requires a more "fact-based inquiry," GTL may renew this issue at the summary judgment stage or at trial. *Cableview, 2014 WL 1268584 at *20*.

3. Plaintiffs' Unjust Enrichment Claim (Count II)

The Court considers GTL's final argument — that Plaintiffs' unjust enrichment claim fails because they already have an adequate available legal remedy in their contract claim. Regardless of whether Count II is pled in the alternative, GTL contends that Plaintiffs' claim cannot stand because both parties admit **[*42]** that a valid contract exists. *Goldstein v. Home Depot USA, Inc., 609 F. Supp. 2d 1340, 1347 (N.D. Ga. 2009)* (holding that a party may plead in the alternative only if one or more of the parties contests the existence of an express contract governing the subject of the dispute).

But Plaintiffs dispute whether GTL has, in fact, admitted to the existence of a contract here. Plaintiffs further argue that they are permitted to proceed to trial on alternate theories of recovery.

The Court agrees with Plaintiffs. At this early stage, it is not clear that GTL has admitted to a contract and, if so, with which Plaintiffs. (*See* GTL's Responses to Plaintiffs' Fourth Set of Interrogatories, Doc. 91-5.) Moreover, the parties appear to dispute the material terms of the agreement, and the knowledge and expectations of the parties regarding the prepaid accounts is also at odds. Under these circumstances, as alleged, a factfinder could determine that there was no "meeting of the minds." *Wingate Land & Dev., LLC v. Robert C. Walker, Inc., 558 S.E.2d 13, 15-16 (Ga. Ct. App. 2001)* (finding that, where a decision maker could conclude that there was no "meeting of the minds," a party should be able to proceed on alternate theories of recovery).

The Court therefore determines that Plaintiffs' unjust enrichment claim may proceed as an alternative to the breach of contract claim. **[*43]** If this case proceeds through discovery, Defendant may once again raise this argument if the evidence shows that a contract did, in fact, exist between individual Plaintiffs and GTL.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendant's Motion to Dismiss [Doc. 79]. Additionally, the Court **GRANTS** Plaintiffs' Motion for Leave to File a Sur-Reply [Doc. 102]; **GRANTS IN PART** and **DENIES IN PART**

Plaintiffs' Motion to Supplement or Amend [Doc. 105]; and **GRANTS** Plaintiffs' Motion to Lift the Seal [Doc. 106] and **DENIES** Defendant's Motion to File a Response Under Seal [Doc. 110].

IT IS SO ORDERED this 7th day of September, 2018.

/s/ Amy Totenberg

Amy Totenberg

United States District Judge

LexisNexis

VBS Distrib. v. Nutrivita Labs., Inc.

United States District Court for the Central District of California, Southern Division

September 10, 2018, Decided; September 10, 2018, Filed

Case No.: SACV 16-01553-CJC(DFM)

Reporter

2018 U.S. Dist. LEXIS 239015 *

VBS DISTRIBUTION, INC., and VBS TELEVISION, INC., Plaintiffs, v. NUTRIVITA LABORATORIES, INC., NUTRIVITA, INC., US DOCTORS' CLINICAL, INC., ROBINSON PHARMA, INC., KVLA, INC., TUONG NGUYEN, TRAM HO, and JENNY DO a/k/a NGOC NU, Defendants.

Prior History: *VBS Distrib., Inc. v. Nutivita Labs., Inc., 2016 U.S. Dist. LEXIS 189601, 2016 WL 9024809 (C.D. Cal., Dec. 1, 2016)*

Core Terms

Television, trade secret, vendor, trade dress, advertisement, jewelry, confidential, fiduciary duty, misappropriation, employees, contractual relationship, summary judgment, nonfunctional, bottles, infringement, antitrust, no evidence, deposition, false advertising, pleadings, products, clinically, auction, summary judgment motion, interfered, contracts, diamond, package, sales, dietary supplement

Counsel: **[*1]** For VBS Distribution Inc., a California corporation, also known as VBS Home Shopping, VBS Television, a California corporation, Plaintiffs: Jason Kelly Smith, Mark T Kearney, LEAD ATTORNEYS, MK Smith APC, Irvine, CA; Daniel Walter Chudleigh, Chudleigh Law PC, Laguna Beach, CA.

For Nutrivita Laboratories Inc, a California corporation, Nutrivita, Inc, a California corporation, US Doctors Clinical, Inc., a California corporation (or dba), Robinson Pharma, Inc., a California corporation, KVLA, Inc., a California corporation, Tuong Nguyen, an individual domiciled in California, Tram Ho, an individual domiciled in California, Jenny Do, an individual domiciled in California, also known as Ngoc Nu, Defendants: Daniel D Do-Khanh, LEAD ATTORNEY, Ng Do-Khanh PC, Costa Mesa, CA; R Joseph Trojan, LEAD ATTORNEY, Trojan Law Offices, Beverly Hills, CA; Anthony B Cartee, Cartee LC, Orange, CA.

For Does, 1-10 Inclusive, Reverend Joseph C Nguyen, Defendants: R Joseph Trojan, Trojan Law Offices, Beverly Hills, CA.

For Paul D Supnik, Mediator (ADR Panel): Paul D Supnik, Law Office of Paul D Supnik, Beverly Hills, CA.

For Tram Ho, an individual domiciled in California, Counter Claimant: Daniel D Do-Khanh, LEAD **[*2]** ATTORNEY, Ng Do-Khanh PC, Costa Mesa, CA; R Joseph Trojan, LEAD ATTORNEY, Trojan Law Offices, Beverly Hills, CA; Anthony B Cartee, Cartee LC, Orange, CA.

For VBS Distribution Inc., a California corporation, VBS Television, a California corporation, Counter Defendants: Mark T Kearney, LEAD ATTORNEY, MK Smith APC, Irvine, CA.

Judges: CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE.

Opinion by: CORMAC J. CARNEY

Opinion

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING APPLICATIONS TO FILE UNDER SEAL

I. INTRODUCTION

Plaintiffs VBS Distribution, Inc. ("VBS Distribution") and VBS Television, Inc. ("VBS Television") brought this case against Defendants Nutrivita Laboratories, Inc., Nutrivita, Inc., US Doctors' Clinical, Inc., Robinson Pharma, Inc., KVLA, Inc., Tuong Nguyen, Tram Ho, and Jenny Do a/k/a Ngoc Nu. (Dkt. 229 [Third Amended Complaint, hereinafter "TAC"].) The parties' dispute arises out of their competing nutritional supplements and television programs.

Plaintiffs allege the following thirteen causes of action: (1) unfair competition under the Lanham Act, (*id.* ¶¶ 119-23), (2) false advertising under the *Lanham Act*, (*id.* ¶¶ 124-28), (3) unfair competition, false advertising, and deceptive trade practices **[*3]** under California common law and false advertising under *California Business & Professions Code §§ 17500*, (*id.* ¶¶ 129-30), (4) theft of trade secrets under the federal Defend Trade Secrets Act, (*id.* ¶¶ 131-32), (5) theft of trade secrets under the California Uniform Trade Secrets Act, (*id.* ¶¶ 133-35), (6) trade dress infringement under the Lanham Act, (*id.* ¶¶ 136-37), (7) trade dress infringement under California common law, (*id.* ¶¶ 138-41), (8) antitrust under *sections 1* and *2* of the Sherman Act, (*id.* ¶¶ 142-43), (9) antitrust under the California Cartwright Act, (*id.* ¶¶ 144-45), (10) interference with contractual relationships under California law, (*id.* ¶¶ 146-47), (11) interference with prospective economic advantage under California law, (*id.* ¶¶ 148-49), (12) civil conspiracy under California law, (*id.* ¶¶ 150-51), and (13) breach of fiduciary duties under California law, (*id.* ¶¶ 152-53).

Now before the Court is Defendants' motion for judgment on the pleadings, (Dkt. 239), and Defendants' motion for summary judgment, (Dkt. 240). For the following reasons, the motion for judgment on the pleadings is converted to a motion for summary judgment, and that converted motion as well as Defendants' motion for summary judgment are **GRANTED**.

II. FACTUAL [*4] ALLEGATIONS

Plaintiffs VBS Distribution and VBS Television are two corporations with the same Chief Executive Officer and Chairman, Joseph Nguyen. (TAC ¶ 25.) Plaintiffs generally allege that Defendants are engaged in two unlawful schemes. The first scheme involves the false advertising of a dietary supplement. Defendants Nutrivita Laboratories, Inc., US Doctors' Clinical, Inc., Robinson Pharma, Inc., Tuong Nguyen, and Jenny Do (collectively, "Supplement Defendants") manufacture and sell "Arthro-7," a dietary supplement for joint relief. (*Id.* ¶ 22.) Plaintiff VBS Distribution manufactures and sells a competing dietary supplement called JN-7 Best. (*Id.*) Plaintiffs allege that "[t]he general marketplace for the parties' products is the elderly population in the United States," along with persons of Vietnamese descent living in the United States. (*Id.*) Plaintiffs allege that Arthro-7 has 60% of the market and JN-7 Best has 10% of the market. (*Id.*)

Plaintiffs allege that Supplement Defendants have committed several wrongful acts "solely or primarily" to drive JN-7 Best out of the market. (*Id.*) Supplement Defendants purportedly make a number of false statements in advertising Arthro-7. (***[*5]*** *Id.* ¶ 44.) For example, Supplement Defendants claim that Arthro-7 is "100% natural herbal," that over 8 million bottles have been sold, and that Arthro-7 has been "clinically tested" and is "Doctor Recommended." (*Id.* ¶¶ 44-51.) Plaintiffs claim that all of these statements are false. (*Id.*) Plaintiffs also claim that Supplement Defendants wrongfully filed a lawsuit against Plaintiff VBS Distribution in 2013, alleging various causes of action regarding the sale of JN-7 Best, including copyright and trademark infringement. (*Id.* ¶¶ 88-103.) The lawsuit settled in 2015, and Plaintiffs now claim that it was a baseless lawsuit brought to drive JN-7 Best out of the market. (*Id.*)

The second general scheme at issue involves the parties' respective television shows. Plaintiff VBS Television is a television broadcast company "primarily aimed at the Vietnamese community and is broadcast primarily in the Vietnamese language." (*Id.* ¶ 24.) VBS Television produces a show named "DAU GIA TREN TRUYEN HINH" ("Fight Price on Television"). (*Id.* ¶ 27.) The show is a live auction program which primarily auctions diamonds. (*Id.*) The show was created in 2011, and in April 2012, Defendant Tram Ho became a host **[*6]** of the show. (*Id.* ¶ 60.) When she was hired by VBS Television, Ho allegedly signed a confidentiality agreement agreeing "to preserve and protect the confidentiality of [VBS Television's] proprietary information." (*Id.* ¶ 62.) Ho also allegedly signed an employment agreement agreeing to be exclusively employed by VBS Television. (*Id.* ¶ 64.)

Plaintiffs allege that in the spring of 2016, they discovered that Ho was appearing on a rival television show called "Diamond at a Surprise Low Price," which is produced by Defendant KVLA, a rival television station. (*Id.* ¶ 67.) Plaintiffs also allege that at that time, Ho was still an employee of VBS Television. (*Id.*) Defendants KVLA and Jenny Do (with Tram Ho collectively, "Show Defendants") produce the show, and Plaintiffs claim it is essentially identical to VBS Television's show. (*Id.* ¶ 71.) For example, Plaintiffs claim that the two shows have the same hostess, some of the same vendors, the same technician, the same time slot of 5:00 p.m. to 7:00 p.m., "the least to most expensive format," "the same auctioning of approximately 30 items each show," and the same product price range from $300 to $3,000. (*Id.* ¶ 72.) Plaintiffs also claim that Show **[*7]** Defendants, through Tram Ho, have stolen VBS Television's employees, customer information, and other trade secrets. (*Id.* ¶¶ 77-84.)

III. MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment on Plaintiffs' claims for trade dress infringement, trade secret misappropriation, interference with contractual relationships, interference with prospective economic advantage, antitrust, false advertising, and unfair competition. (Dkt. 240.)

The Court may grant summary judgment on "each claim or defense—or the part of each claim or defense—on which summary judgment is sought." *Fed. R. Civ. P. 56(a)*. Summary judgment is proper where the pleadings, the discovery and disclosure materials on file, and any affidavits show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.; see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp., 477 U.S. at 325*. A factual issue is "genuine" when there is sufficient evidence such that a reasonable trier of fact could resolve the issue in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A fact is "material" when its resolution might affect the outcome of the suit under **[*8]** the governing law, and is determined by looking to the substantive law. *Id.* "Factual disputes that are irrelevant or unnecessary will not be counted." *Id. at 249*.

Where the movant will bear the burden of proof on an issue at trial, the movant "must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007)*. In contrast, where the nonmovant will have the burden of proof on an issue at trial, the moving party may discharge its burden of production by either (1) negating an essential element of the opposing party's claim or defense, *Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-60, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*, or (2) showing that there is an absence of evidence to support the nonmoving party's case, *Celotex Corp., 477 U.S. at 325*. Once this burden is met, the party resisting the motion must set forth, by affidavit, or as otherwise provided under *Rule 56*, "specific facts showing that there is a genuine issue for trial." *Anderson, 477 U.S. at 256*. The court must examine all the evidence in the light most favorable to the nonmoving party, and draw all justifiable inferences in its favor. *Id.; United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)*; *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987)*. The court does not make credibility determinations, nor does it weigh conflicting evidence. *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 456, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. But conclusory and speculative testimony in affidavits and moving papers is insufficient to raise triable **[*9]** issues of fact and defeat summary judgment. *Thornhill Pub. Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979)*.

A. Trade Dress Infringement

Plaintiffs bring two claims for trade dress infringement: claim 6 for trade dress infringement under the *Lanham Act*, (TAC ¶¶ 136-37), and claim 7 for trade dress infringement under California common law, (*id.* ¶¶ 138-41). Plaintiffs allege that the trade dress of the "Fight Price on Television" Show is comprised of:

> a) the unique style and format of the show, b) its time slot and date selection, each week on alternate weekdays, from 5 to 7 p.m., on Tuesdays and Thursdays, c) the price range for its auctioned items, ranging from about $300 to $3000, d) its "least to most expensive" format in which the least expensive items are sold first, ascending to the most expensive items at the end of the show, e) the length of the show, 2 hours, f) its focus on live TV auctions of jewelry, particularly diamonds, g) its carefully selected vendors, who appear on the show with the show's host, h) unique and proprietary camera angle and special lighting techniques developed by Plaintiffs using an Apple ipad tablet, i) the number and selection of items sold, usually about 30 items.

(*Id.* ¶ 27.)

"Trade dress refers generally to the total **[*10]** image, design, and appearance of a product and may include features such as size, shape, color, color combinations, texture or graphics." *Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1257 (9th Cir. 2001)* (citation and quotations omitted). To prove a trade dress claim, the plaintiff must show "(1) that its claimed dress is nonfunctional; (2) that its claimed dress serves a source-identifying role either because it is inherently distinctive or has acquired secondary meaning; and (3) that the defendant's product or service creates a likelihood of consumer confusion." *Id. at 1258*. "[A] product feature is functional . . . if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage." *Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 165, 115 S. Ct. 1300, 131 L. Ed. 2d 248 (1995)*. If features of a claimed trade dress are all functional, the plaintiff must show that the features are combined together in a nonfunctional way to avoid a finding of functionality. *HWE, Inc. v. JB Research, Inc., 993 F.2d 694, 696 (9th Cir. 1993)*. Although functionality is a question of fact, summary judgment is appropriate if the plaintiff "ma[kes] no showing that its [product] had non-functional features or a non-functional arrangement." *Id.* (affirming the district court's finding that the plaintiff's product, a massage table, was functional and granting summary judgment in the defendant's favor). **[*11]**

Here, Plaintiffs make no showing that the alleged trade dress has nonfunctional features or a nonfunctional arrangement. The elements of the claimed trade dress, individually and in combination, are functional. As Joseph Nguyen, Plaintiffs' own CEO and Chairman, explained in his deposition, the lighting techniques and camera angles function to make the diamonds on the television show "sparkle" and appear brighter. (*See* Dkt. 243-9 [Deposition of Joseph Nguyen, hereinafter "Nguyen Depo."] at 133:2-22.) Nguyen also explained that the lighting techniques are common in jewelry stores, which demonstrates that the techniques are intrinsic to the sale of jewelry. (*Id.* at 133:9-15.) With respect to the time and date of the show, Nguyen testified that they were chosen as times that would maximize viewership and auction purchases. (*Id.* at 116:13-117:7.) Specifically, Nguyen chose the time slot between 5 p.m. and 7 p.m. because it is the time when most people are with their family and can watch the show together. (*Id.* at 119:1-10, 121:16-122:3.) Nguyen also testified that the show sells thirty products per episode because it is the optimal amount to sell during a two-hour long show, and the products **[*12]** are priced between $300 to $3000 because the range is what the average target consumer can afford. (*Id.* at 122:5-124:6.) Finally, Nguyen testified that the products are shown in the order of lowest price to highest price to maximize the likelihood that the products will be sold, because more viewers tune in towards the end of the show. (*Id.* at 124:7-20.) In sum, Plaintiffs' CEO's own explanations regarding each element of the alleged trade dress indicate that the elements are functional. They serve to maximize the number of viewers and the likelihood that the viewers will purchase the auction items. To find that these elements are nonfunctional would "put competitors at a significant non-reputation-related disadvantage." *Qualitex Co., 514 U.S. at 165*.

Importantly, Plaintiffs submit no evidence indicating that the elements of its claimed trade dress, individually or taken as a whole, operate in any nonfunctional manner. Plaintiffs submit no survey indicating that consumers associate the alleged trade dress with Plaintiffs. Plaintiffs do submit a declaration from one of VBS Television's vendors, Aleksei Lam, who states that Plaintiffs' show "is unique and source identifying, with an unusual, arbitrary format and **[*13]** screen appearance which is strongly and uniquely associated by customers, viewers, and those in the industry, with VBS." (Dkt. 270 ¶ 16.) Lam further states that "the VBS show has a unique format and overall appearance, a 'look and feel,' including how the screens on the Show appear, its time slot, duration, and many other features which are not dictated by the nature of the products shown on the Show." (*Id.*) However, this declaration is not evidence that Plaintiffs' trade dress is nonfunctional. While Lam repeatedly refers to the show as "unique," Lam fails to describe what exactly is unique about the show, the visual impression she gets from the show, or any nonfunctional aspect of the show. In other words, Lam draws a conclusion that the show is nonfunctional, but provides no support for that conclusion.

Surprisingly, Plaintiffs did not even provide the Court with a copy or clip of their television show to demonstrate that it is nonfunctional. Plaintiffs only submitted the following three snapshots, which are still images from their television show:

(Dkt. 268 Ex. 10.) These snapshots do not show how Plaintiffs' alleged trade dress, comprising of elements like the lighting technique, **[*14]** the time and date the show airs, the length of the show, and the prices of the products, operate together in some nonfunctional manner. These snapshots cannot even demonstrate how things like the length and the time of the show operate in a way that renders the purported trade dress unique.[1]

Because Plaintiffs fail to provide any evidence of the nonfunctionality of their trade dress, summary judgment in favor of Defendants on Plaintiffs' claims for trade dress infringement is appropriate.

B. False Advertising

Plaintiffs assert a claim for false advertising in violation of the federal *Lanham Act*, *15 U.S.C. § 1125*. (TAC ¶¶ 124-28.) The elements of a Lanham Act false advertising claim are:

> (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself **[*15]** to defendant or by a lessening of the goodwill associated with its products.

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997).

In support of their claim, Plaintiffs allege Defendants make the following false statements regarding Arthro-7: (1) "100% natural herbal," (TAC ¶¶ 44-45), (2) "Over 8 Million Bottles Sold!" (*id.* ¶ 46), (3) the product is endorsed by a doctor and "Doctor Recommended," (*id.* ¶¶ 47-49), and (4) the product is clinically tested and "[p]ositive results utilizing Arthro-7 have been supported by a UCLA researcher," (*id.* ¶¶ 48, 56). Plaintiffs also complain that Defendants fail to disclose that individuals who "use or handle" Arthro-7 are exposed to lead and other dangerous materials. (*Id.* ¶ 55.) The Court considers each alleged false statement in turn.

1. "100% natural herbal"

Plaintiffs allege it is false to advertise Arthro-7 as "100% natural herbal" because the product contains animal products. (TAC ¶ 44.) Plaintiffs refer specifically to an advertisement that Defendants ran in a newspaper in 2013, which contains the following phrase in Vietnamese: "100% tu duoc thao thien nhien." (*Id.* Ex. 3.) Plaintiffs claim that this phrase translates to "100% natural herbal." (TAC ¶ 44.)

Defendants argue that Plaintiffs' translation **[*16]** of the phrase is incorrect. Defendants argue that "duoc thao," means "dietary supplement," not "herbal." (Dkt. 240-2 at 22.) In support, Defendants provide the deposition testimony of Joseph Nguyen, who testified that "duoc thao" means "dietary supplement." (Nguyen Depo. at 241:11-23.) However, Nguyen has also submitted a declaration stating that the full phrase, "100% tu duoc thao thien nhien" means "100% from natural herb." (Dkt. 268 Ex. 29 ¶ 51.) There is therefore a disputed issue of fact as to the translation of Defendants' advertisement, and whether it is false.

Nevertheless, summary judgment for Defendants is still appropriate because there is no evidence that Plaintiffs were in any way harmed by this limited advertisement. Plaintiffs "ordinarily must show economic or reputational

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[1] Plaintiffs argue that the Ninth Circuit has held that the "overall combination" of Plaintiffs' trade dress is non-functional. (Dkt. 249 at 20.) Plaintiffs refer to an order from the Ninth Circuit issued on September 15, 2017, which reversed and remanded the Court's order denying Plaintiffs' motion for a preliminary injunction. (Dkt. 83.) Plaintiffs' argument is without merit, and overstates the Ninth Circuit's ruling. The Ninth Circuit did not hold that Plaintiffs' television show was nonfunctional, but rather clarified that Plaintiffs *may* have a protectable trade dress in the overall "look and feel" of the show, even if the individual elements of the show are functional. (*Id.* at 2.)

injury flowing directly from the deception wrought by [Defendants'] advertising; and that that occurs when deception of consumers causes them to withhold trade from [Plaintiffs]." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*. Here, there is no evidence that Plaintiffs suffered any economic or reputational injury from the "100% natural herbal" advertisement. In fact, Defendants present evidence that Plaintiffs suffered no lost profits between **[*17]** 2013 and 2014, when the advertisement ran in the newspaper, because Plaintiffs' sales of JN-7 Best actually increased in that time period. Specifically, Defendants submit Plaintiffs' detailed sales records of JN-7 Best from April 2012 to March 2017. (Dkts. 243-19-243-23.)

Plaintiffs do not dispute the authenticity or accuracy of these sales records. Moreover, Plaintiffs provide no other evidence from which any reasonable trier of fact could conclude Plaintiffs were injured or likely to be injured in any way by Defendants' advertisement. Plaintiffs only submit a statement from an expert indicating that "various statements on the Arthro-7 package are misleading and have a positive impact on a consumer's likelihood of purchasing Arthro-7." (*See* Dkt. 249-1 [Pls.' Response to Defs.' Statement of Undisputed Facts, hereinafter "SUF"] ¶ 93.) This expert opinion goes to whether the advertisement is misleading, but does not explain how Plaintiffs have been injured or are likely to be injured from any of the purportedly misleading statements.

2. "Over 8 Million Bottles Sold!"

Defendants' advertisement indicating that they have sold over 8 million bottles of Arthro-7 is not false. Defendants submit **[*18]** a summary chart of all the sales of Arthro-7 beginning in 1998 and ending in 2017. (Dkt. 160-25.) This chart shows that 8,842,335 bottles of Arthro-7 were sold in that time period. (*Id.*) Alberto Miranda, an employee of Defendant US Doctors' Clinical who manages the database of sales for Arthro-7, testified in his deposition that Defendants produced in discovery over 40,000 pages of detailed sales records beginning in 1998 to show how many bottles have been sold. (Dkt. 241-28 [Deposition of Alberto Miranda] at 12:10-19, 48:3-14.) Miranda confirmed that the database reflected total sales of 8,842,335 bottles from July 7, 1998 to October 10, 2017. (*Id.* at 70:23-71:22.)

Plaintiffs argue that Defendants' sales records are unreliable because Defendants' employees have testified that they do not know how many bottles of Arthro-7 have been sold. For example, Plaintiffs point to deposition testimony from Defendant Tuong Nguyen, the owner of Nutrivita Laboratories. (Dkt. 268 Ex. 14 at 57:22-58:17.)[2] When Tuong Nguyen was asked how many bottles of Arthro-7 have been sold, he said that he did not remember and could not provide an estimate. (*Id.*) This testimony does not create a disputed issue of **[*19]** fact as to whether 8 million bottles of Arthro-7 have been sold. Tuong Nguyen's testimony does not contradict the 40,000 pages of sales records provided by Miranda, the custodian of those records, which show over 8 million bottles have been sold. Tuong Nguyen only testified that he did not know how many bottles had been sold—he did not testify that less than 8 million bottles had been sold.

3 & 4. "Doctor Recommended" and tested by a "UCLA Researcher"

Plaintiffs claim that Arthro-7's packaging contains several false statements. The package states that Arthro-7 is "clinically tested" and "Doctor Recommended," and that "Positive results utilizing Arthro-7 have been supported by a UCLA researcher." (TAC Ex. 5.) The packaging also has a picture of a man in a doctor's coat, identified as "Dr. John E. Hahn, Board certified foot surgeon." (*Id.*) Plaintiffs argue that the picture and description of Dr. Hahn is misleading because Dr. Hahn is a Doctor of Podiatric Medicine, and not a Medical Doctor.

Defendants submit evidence showing that each of the statements on the package are true. Defendants submit a March 27, 2013, article published in a journal called Nutrition and Dietary Supplements. (Dkt. **[*20]** 240-8.) The article publishes the results of a 12-week clinical study conducted in Shanghai, China. (*Id.*) Four of the ten authors of the article are from the Department of Pathology and Laboratory Medicine at the David Geffen School of

[2] This deposition was taken in the prior case between the parties, which was filed in 2013.

Medicine at the University of California at Los Angeles. (*Id.*) The article provides evidence that Arthro-7 is clinically tested, and positive results from Arthro-7 are supported by the research of researchers at UCLA. (*Id.*) Plaintiffs nevertheless argue that the statements that Arthro-7 is "clinically tested" and "supported by a UCLA researcher" are false or misleading, because the studies took place in China. (Dkt. 249 at 13.) Plaintiffs' argument is without merit. Nothing on the Arthro-7 package denies that the studies took place in China.

The parties do not dispute that Dr. Hahn is a Board-certified podiatrist. Plaintiffs claim that describing him as a "doctor" is false, however, because Dr. Hahn's podiatry license has expired and he is not a medical doctor. But a podiatrist is a doctor of podiatric medicine who is qualified by education and training to diagnose and treat conditions affecting the foot, ankle, and related structures of the leg. Plaintiffs **[*21]** provide no admissible evidence showing that "doctor" necessarily means one who is currently licensed or one who has a medical degree. Plaintiffs instead simply refer to hearsay opinions, including the opinion of the "Attorney General of the state of California that podiatrists are not physicians," and a segment from the television show, *Seinfeld*, for the proposition that "people do not think podiatrists are doctors." (SUF ¶ 88.) This evidence is clearly inadmissible hearsay and insufficient to defeat summary judgment.

5. Exposed to Lead and Other Statements

Plaintiffs also complain about a number of other statements claiming that Arthro-7 is safe. Plaintiffs claim that Defendants fail to disclose, for example, that there are "toxic lead levels" in Arthro-7. Plaintiffs also claim that Defendants falsely represent that Arthro-7 contains no heavy metals and is "GMP Compliant." (Dkt. 249 at 13-14.) As an initial matter, Defendants did not address these alleged false advertisements because most of them are not included in the Plaintiffs' TAC. In any event, Plaintiffs offer no admissible evidence that these alleged false advertisements are in fact false or misleading. Plaintiffs only cite **[*22]** to allegations in other lawsuits involving Arthro-7. (Dkt. 249 at 13 n.13, 14 n.15.) These allegations are not evidence—they are merely inadmissible hearsay allegations. Without more, Plaintiffs have failed to present any evidence to support their claim that these advertisements are false.

C. Trade Secrets Misappropriation

Plaintiffs bring two claims for trade secrets misappropriation: claim 4 for theft of trade secrets under the federal *Defend Trade Secrets Act*, (TAC ¶¶ 131-32), and claim 5 for theft of trade secrets under the *California Uniform Trade Secrets Act*, (*id.* ¶¶ 133-35). Plaintiffs identify four categories of purported trade secrets: Plaintiffs' customer lists, employee information, vendor information, and "jewelry photographic technique." (SUF ¶ 36.)

To prevail on their trade secrets misappropriation claims, Plaintiffs must show they have a legally protectable trade secret that has been misappropriated by Defendants. *See* *Cal. Civ. Code § 3426.1(b)*; *18 U.S.C. § 1832*. To prove that information constitutes a legally protectable trade secret, Plaintiffs must first demonstrate that they took reasonable steps to keep the information confidential. *See* *Cal. Civ. Code § 3426.1(d)*; *18 U.S.C. § 1839(3)*. To prove misappropriation of that trade secret, Plaintiffs must show **[*23]** that Defendants acquired the trade secret by improper means, or disclosed or used the trade secret without consent. *See* *Cal. Civ. Code § 3426.1(b)*; *18 U.S.C. § 1839(5)*.

Plaintiffs have failed to show that Defendants misappropriated the four alleged trade secrets. First, Plaintiffs offer no evidence that their customer lists were kept confidential. VBS Television's CEO, Joseph Nguyen, admitted and Defendant Tram Ho confirmed that VBS Television provided its customer lists to its vendors, who then delivered products to the Show's customers. (Nguyen Depo. 184:19-185:13; Dkt. 256 Ex. 170 [Deposition of Tram Ho, hereinafter "Ho Depo."] at 180:24-181:2.) For this claim, Plaintiffs rely on the conclusory declaration of Aleksei Lam, with whom Plaintiffs had a vendor agreement. (SUF ¶ 3 [citing Dkt. 256 Ex. 160].) Lam states that VBS Television has "always" had a contractual understanding, whether written or oral, with its vendors to "protect the confidentiality . . . of VBS' customers' [sic] lists and customer information." (Dkt. 256 Ex. 160 ¶¶ 6-7.) However, Lam's declaration is hearsay with respect to his statements about agreements between VBS Television and other vendors, and his own vendor agreement contains no confidentiality agreement. **[*24]** (*See* Dkt. 256 Ex. 162 at 17.) The other vendor agreements cited by Plaintiffs likewise contain no confidentiality provisions. (Dkt. 256 Ex. 162 at 33-69.) Because Plaintiffs have failed to show that the customer lists were kept secret, the customer lists cannot constitute a protectable trade secret. *See* *Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984)* (stating that "[i]f an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished") (internal citations omitted).

As for VBS Television's employee information, Plaintiffs have failed to show what specific employee information was confidential or how it was allegedly misappropriated. Plaintiffs argue that Defendant Tram Ho was "[a]rmed with VBS' confidential employee information," which she used to "poach[]" VBS employees through promises of higher compensation. (Dkt. 249 at 25-26.) In response to this claim, Show Defendants produced their database of employee files so that Plaintiffs could cross-check the information with Plaintiffs' own employee database. (SUF ¶ 51.) However, Plaintiffs have still made no showing that Show Defendants possess **[*25]** any information on Plaintiffs' employees, much less confidential information. Employees are allowed to share their salary with competitors and negotiate better compensation packages. Plaintiffs have failed to show that their employee compensation information is a legally protectable trade secret, let alone that Defendants acquired any information through improper means.

Plaintiffs have also failed to show that Defendants misappropriated any confidential vendor information. Plaintiffs allege that vendor information such as "vendor names, personal contact information such as email address[es] and cell phone numbers, and individual contacts at vendor companies," among other things, constitute trade secrets. (*Id.* ¶ 36.) However, anyone watching the Fight Price Show can see the vendor's name and find its contact information. (*See* Dkt. 268 Ex. 10.) Plaintiffs also cite a series of documents that Defendant Tram Ho produced to Plaintiffs that contain vendors' ad revenue, advertising contracts, and sales reports. (Dkt. 249 at 26 [citing Dkt. 256 Exs. 161-66].) However, Plaintiffs fail to show that these documents were kept secret, or that Defendants disclosed the documents or acquired them through **[*26]** improper means. Three of the cited documents are spreadsheets of vendor sales and revenue from 2014 to 2015. (*See* Dkt. 256 Exs. 161, 164, 165.) Tram Ho testified that she was required to take daily notes on vendor sales and revenue while working at VBS. (Ho. Depo. 253:21-254:20.) On a monthly basis, she would then type those notes into a single spreadsheet and throw the handwritten notes away. (*See id.*) Plaintiffs fail to present any evidence of how Tram Ho acquired this information, the product of her daily notes at VBS, through improper means. Nor do Plaintiffs show that Defendants or Tram Ho used or disclosed this information. Tram Ho produced the information in response to Plaintiffs' requests because it was already on her computer. (*See id.*) No evidence was presented that she improperly took the information home with her when she left VBS to misappropriate it. The other vendor document found in Tram Ho's possession was a sales commission report for December 2014 to July 2015, (Dkt. 256 Ex. 163), which Tram Ho testified was given to her by a VBS employee so she could "calculate her pay amount," (Ho Depo. 251:20-252:7). The last vendor document Plaintiffs cite is a series of VBS **[*27]** advertising contracts from 2014. (Dkt. 256 Ex. 162.) Although these documents were created by VBS, Plaintiffs fail to show how they were kept confidential. Plaintiffs also fail to present any evidence that Tram Ho used the documents or acquired them through improper means. Plaintiffs' conclusory and unsupported allegation that the contracts were "acquired through improper means," (Dkt. 249 at 26), is not evidence of trade secrets misappropriation.[3]

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[3] Given the weakness of their trade secrets misappropriation claims, Plaintiffs resort to unsubstantiated character attacks on Defendant Tram Ho. (*See* Dkt. 249 at 25 ["Tram Ho is a proven pathological liar" whose "lies do not provide a basis for summary adjudication."].) Plaintiffs cite to Tram Ho's purported "admission" of "getting caught in lie after lie" when, in her deposition, she acknowledged she might have made a mistake in entering information on her LinkedIn profile. (Dkt. 250 Ex. 170 at 65-68.) Plaintiffs then cite to Tram Ho's "deposition in full" as evidence of her "lies." (Dkt. 249 at 25.) The Court does not make credibility determinations, nor weigh conflicting evidence at the summary judgment stage. *Eastman Kodak Co., 504 U.S. at 456*. Further, such conclusory and speculative allegations in moving papers are insufficient to defeat summary judgment. *See* *Thornhill, 594 F.2d at 738*.

Finally, Plaintiffs fail to show that their "jewelry photographic technique" constitutes a protectable trade secret. (*See* TAC ¶ 36.) As evidence of VBS' "unique technique to display and photograph the jewelry," Plaintiffs cite Aleksei Lam's declaration. (SUF ¶ 56 [citing Dkt. 256 Ex. 160 ¶ 16].) However, the Lam declaration does not mention lighting technique or camera angles. (*See* Dkt. 256 Ex. 160 ¶ 16.) Plaintiffs also cite deposition testimony of Joseph Nguyen in which he states that the "technique when you use [sic] iPad or iPhone and you light it up and then shoot it into the diamond, they will make into [sic] different light." (SUF ¶ 56 [citing Nguyen Depo. 133:2-8].) However, Nguyen admits, moments later, that if "you go to the **[*28]** jewelry store, they have the same concept. They have the light, you know, shining down on the diamond." (Nguyen Depo. 133:9-15.) In other words, the Show Defendants employ conventional lighting techniques used across the industry and in jewelry stores. The lighting technique is not a secret, and the Plaintiffs have failed to show they took any steps to keep it confidential.

D. Interference with Contractual Relationships & Economic Advantage

Plaintiffs bring two interference claims: claim 10 for interference with contractual relationships under California law, (TAC ¶¶ 146-47), and claim 11 for interference with prospective economic advantage under California law, (*id.* ¶¶ 148-49). In support of claim 10, Plaintiffs allege that Defendant KVLA lured Tram Ho from the Fight Price on Television Show to host the Diamond Show in breach of her contract. (*Id.* ¶¶ 67, 147.) For claims 10 and 11, Plaintiffs further allege that Show Defendants interfered with Plaintiffs' relationships with certain employees and their vendor, Kim Cuong Jewelry. (*Id.* ¶¶ 147, 149.)

To prove a claim of intentional interference with contractual relationships, a plaintiff must show (1) a valid contract between plaintiff and **[*29]** a third party, (2) defendant's knowledge of this contract, (3) defendant's intentional acts designed to induce breach or disruption of the contractual relationship, (4) actual breach or disruption of that relationship, and (5) damages. *Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (1990)*.

Plaintiffs have failed to show that Defendant KVLA interfered with Tram Ho's contractual relationship with VBS Television. The parties do dispute whether Tram Ho was under an employment contract at the time she left VBS Television in March 2016. (SUF ¶¶ 57-58, 60.) Defendants cite deposition testimony of Thu Thi Nguyen, the president of VBS Television, in which he states that Tram Ho's contract with the company ended on March 31, 2016. (Dkt. 241 Ex. 3 at 83:18-25; 89:13-22.) Plaintiffs cite a signed agreement between VBS Television and Tram Ho dated July 15, 2015 that provides for a one-year employment term ending on July 30, 2016. (TAC Ex. 13.) However, Plaintiffs also allege in their TAC that at some point in 2016, "VBS agreed to re-negotiate Tram's compensation package after a review period of six months. But when that time came, Tram just walked away" from VBS Television. (TAC ¶ 66.)

Regardless of whether Tram Ho's employment contract was still in **[*30]** effect when she left in March 2016, Plaintiffs' interference claim with respect to Tram Ho nevertheless fails because Plaintiffs have offered no evidence that Defendants intentionally induced breach of any purported contract between Tram Ho and Plaintiffs. Tram Ho did not quit (and allegedly breach her contract) because Defendant KVLA "poached" her or otherwise interfered with her relationship with Plaintiffs. (*See* FAC ¶ 147.) Tram Ho testified in her deposition that she left VBS Television because she was being sexually harassed by Joseph Nguyen, the Chief Executive Officer and Chairman of VBS and then-Catholic priest. Tram Ho said that Nguyen "grabbed [her] boobs, put his hands on [her] butt and then put his hands into [her] groin area." (Ho Depo. at 71:17-21.) Because she "could not stand" his offensive and illicit conduct, she "had to quit" her position at VBS Television. (*See id.*) Indeed, Nguyen admitted in his deposition that he was forced to leave his parish and the priesthood because of this conduct. (Nguyen Depo. 19:20-21:25.) Plaintiffs submit no evidence showing that Defendant KVLA induced Tram Ho to leave VBS. The only evidence before the Court indicates that she left of **[*31]** her own volition to escape sexual harassment at the hands of VBS' Chief Executive Officer and Chairman, Joseph Nguyen.

Plaintiffs have also failed to present any evidence that Show Defendants interfered with other employee contracts. Plaintiffs allege that Show Defendants interfered with contractual relationships with other VBS Television employees, including Cuong Nguyen, Thang Nguyen, and Tran Van Chi. (SUF ¶ 65.) However, Plaintiffs have provided no evidence of employment contracts with these individuals. Nguyen even testified that some of these individuals were contractors and not employees. (Nguyen Depo. 407:11-12.) Without employment contracts, the employees who left VBS Television were at will and could leave whenever they chose. Even if there were any verbal contracts with these employees, which Plaintiffs have not shown, there is no evidence that Show Defendants had knowledge of them or induced their breach. (SUF ¶ 67.) Further, Nguyen testified that Cuong Nguyen left VBS Television to return to Vietnam, (Nguyen Depo. 382:10-14), Thang Nguyen left because he asked for a raise but was turned down, (*id.* 384:9-15), and Tran Van Chi left to help his son open an office in San Francisco, **[*32]** (*id.* 390:16-20). Plaintiffs have failed to show that they had contracts with these employees, let alone that Show Defendants interfered with those contracts and lured the employees away.

Finally, Plaintiffs have not offered evidence that Show Defendants interfered with a contractual relationship with Plaintiffs' vendor, Kim Cuong Jewelry. Nguyen admitted that VBS Television did not have any exclusive agreement with Kim Cuong Jewelry under which Kim Cuong Jewelry would supply jewelry only to VBS Television. (Nguyen 410:20-411:2.) Although Kim Cuong Jewelry entered into advertising agreements with Plaintiffs, it was free to provide its merchandise to other shows. (*See id*; Dkt. 250 Ex. 38 [advertising agreements].) In contracting with Kim Cuong Jewelry, Show Defendants did not interfere with or induce a breach of any agreement between Kim Cuong Jewelry and Plaintiffs. Plaintiffs presented no evidence to suggest otherwise.

Plaintiffs also allege that Show Defendants interfered with their economic advantage by disrupting Plaintiffs' relationships with certain employees and their vendor, Kim Cuong Jewelry. (*Id.* ¶¶ 147, 149.) In order to prevail on a claim for intentional interference with **[*33]** prospective economic advantage, a plaintiff must prove (1) an economic relationship between the plaintiff and some third party with the probability of future economic benefit, (2) defendant's knowledge of the relationship, (3) intentional acts, apart from the interference itself, by defendant designed to disrupt the relationship, (4) actual disruption of the relationship, and (5) economic harm to the plaintiff. *CRST Van Expedited, Inc. v. Werner Enters., 479 F.3d 1099, 1108 (9th Cir. 2007)*. In California, the primary difference between a claim for interference with contractual relationships and a claim for interference with economic advantage is that under the latter, a plaintiff must also "allege an act that is wrongful independent of the interference itself." *Id. at 1108*. An act is independently wrongful if it is unlawful under "some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id. at 1109*.

Plaintiffs have failed to show that Show Defendants engaged in any independently unlawful acts to disrupt Plaintiffs' relationships with its vendors or employees. To prevail on this claim, Plaintiffs must prove that the Defendants committed "intentional acts, *apart from the interference itself*." *See id. at 1108* (emphasis added). However, Plaintiffs have failed **[*34]** to allege that Defendants committed any illegal acts other than Plaintiffs' conclusory and unsubstantiated claims that Defendants stole trade secret information. (Dkt. 249 at 29.) Since Plaintiffs failed to present any evidence of trade secrets misappropriation under California and federal law, any claims for interference with prospective economic advantage based on trade secrets misappropriation likewise fail. *See First Advantage Background Servs. Corp. v. Private Eyes, Inc., 569 F. Supp. 2d 929, 936 (N.D. Cal. 2008)*.

E. Antitrust

Plaintiffs bring two antitrust claims: claim 8 for antitrust violations under *sections 1* and *2 of the Sherman Act*, (TAC ¶¶ 142-43), and claim 9 for antitrust violations under the California Cartwright Act, (*id.* ¶¶ 144-45). In support of these claims, Plaintiffs allege that Defendants conspired to take away VBS' employees, illegally restrain trade in the Vietnamese and general market place by attempting to eliminate JN-7 Best as a competitor to Anthro-7, file a "sham litigation" against VBS in this Court, and unlawfully promote Anthro-7 through deceptive false advertising and price-fixing. (*Id.* ¶¶ 4-12.)

To prevail on a claim for a *Sherman Act section 1* violation, a plaintiff must show that (1) there was an agreement, conspiracy, or combination between two or more entities, (2) the **[*35]** agreement was an unreasonable restraint of trade, and (3) the restraint affected interstate commerce. *Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 784 (9th Cir. 1996)*. To establish a Sherman Act *section 2* violation for attempted monopolization, a plaintiff must demonstrate (1) specific intent to control prices or destroy competition, (2) predatory or anticompetitive conduct directed at accomplishing that purpose, (3) a dangerous probability of achieving "monopoly power," and (4) causal antitrust injury. *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988)*. The California Cartwright Act is the primary state ***antitrust law*** and mirrors the Sherman Act. *See* *Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 925, 130 Cal. Rptr. 1, 549 P.2d 833 (1976)* ("A long line of California cases has concluded that the Cartwright Act is patterned after the Sherman Act," and "federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.").

To the extent that Plaintiffs' antitrust claims are based on Defendants' alleged trade secrets misappropriation, trade dress infringement, and false advertising, the antitrust claim fails for the same reasons stated above. This leaves Plaintiffs' assertion that the Defendants' prior lawsuit was a "sham litigation" intended to put VBS out of business. (TAC ¶¶ 5, 22, 88-103.) In the prior lawsuit, Defendant Nutrivita Laboratories alleged that **[*36]** the JN-7 dietary supplement infringed the Anthro-7's trade dress and other intellectual property. *Nutrivita Labs., Inc. v. VBS Distribution, Inc., et al., 160 F. Supp. 3d 1184 (C.D. Cal. 2016)*. However, this Court already expressly rejected VBS' claim that the litigation was baseless. (*See* Dkt. 136-2 at 14:6-7 ["[T]here is no reason to believe that the lawsuit was frivolous or the filings improper."].) On appeal, the Ninth Circuit affirmed this Court's finding, noting "there was no evidence in the record to support a finding of bad faith, and Nutrivita's complaint as a whole was meritorious." (Dkt. 136-3 at 3.) Plaintiffs have already attempted this argument and failed. It does not resurrect their antitrust claims here.

F. Unfair Competition

Plaintiffs bring two unfair competition claims: claim 1 for unfair competition under the Lanham Act, (TAC ¶¶ 119-23), and claim 3 for unfair competition under California common law, (*id.* ¶¶ 129-30.) Plaintiffs do not allege any separate facts in support of these claims. They appear to be catch-all claims dependent on Plaintiffs' claims for trade dress infringement. These claims fail for the same reasons Plaintiffs' others claims fail.

G. Breach of Fiduciary Duty

Plaintiffs assert a claim for breach of fiduciary duty under California law against **[*37]** Defendant Tram Ho. (TAC ¶¶ 152-53.) Specifically, Plaintiffs allege that Tram Ho breached her "fiduciary duty of trust, confidence, and loyalty owed to Plaintiffs." (*Id.*) Defendants did not move for summary judgment on this claim or on the claim for civil conspiracy, discussed below. Instead, Defendants moved for judgment on the pleadings pursuant to *Federal Rule of Civil Procedure 12(c)*. (Dkt. 239.)

On a motion for judgment on the pleadings, the Court is limited to material included in the pleadings. *See Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health, 654 F.3d 919, 925 n.6 (9th Cir. 2011)*. Where the Court exercises its discretion to consider material outside of the pleadings, it must convert the motion for judgment on the pleadings to a motion for summary judgment. *Fed. R. Civ. P. 12(d)* ("If, on a motion under *Rule 12(b)(6)* or *(12)(c)*, matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment."). Plaintiffs' claims for breach of fiduciary duty and civil conspiracy are entirely premised on the conduct alleged in Plaintiffs' claims for trade secrets misappropriation and interference with contractual relationships. The parties have had multiple opportunities to brief and develop the evidentiary record regarding the conduct underlying those claims. The Court exercises its **[*38]** discretion to consider that evidence here, and converts Defendants' motion for judgment on the pleadings into a motion for summary judgment.[4]

[4] *Rule 12(d)* requires that the parties have "a reasonable opportunity to present all the material that is pertinent" to the converted motion for summary judgment. *Fed. R. Civ. P. 12(d)*. The material pertinent to the converted motion for summary judgment on the breach of fiduciary duty and civil conspiracy claims is the material allegedly underlying Plaintiffs' misappropriation and interference claims. In light of the three rounds of briefing and hundreds of exhibits submitted on motions for summary judgment

To prove a claim for breach of fiduciary duty under California law, a plaintiff must show (1) existence of a fiduciary duty, (2) breach of the duty, and (3) resulting damages. *Pellegrini v. Weiss, 165 Cal. App. 4th 515, 524, 81 Cal. Rptr. 3d 387 (2008)*; *Mattel, Inc. v. MGA Entm't, Inc., 782 F. Supp. 2d 911, 988 (C.D. Cal. 2011)*. "While breach of fiduciary duty is a question of fact, the existence of [a] legal duty in the first instance and its scope are questions of law." *Kirschner Brothers Oil, Inc. v. Natomas Co., 185 Cal. App. 3d 784, 790, 229 Cal. Rptr. 899 (1986)* (internal citation omitted). "[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." *City of Hope Nat'l Med. Ctr. v. Genentech, Inc., 43 Cal. 4th 375, 386, 75 Cal. Rptr. 3d 333, 181 P.3d 142 (2008)*.

The Court takes pause before addressing whether Tram Ho, the victim of sexual harassment at the hands of VBS' CEO and Chairman, owed VBS any fiduciary duties of "trust, confidence, and loyalty" in return. (*See* TAC ¶¶ 152-53.) Plaintiffs claim that Tram Ho's employment contract purportedly in effect when she left VBS Television showed that she was "not a mere employee," but rather a manager of VBS Television. (Dkt. 245 at 17 [citing TAC ¶ 64, Ex. 13 ¶ 3].) The cited **[*39]** portion of the employment agreement describes Tram Ho's five duties as (1) "[p]romoter and coordinator of diamond and jewelry auction programs broadcasting on Tuesdays and Thursdays each week," (2) "[s]olicitor of advertisements and sponsorship from businesses," (3) "[a]nchorwoman for news broadcasting when needed," (4) "[p]roducer of 'Hue Thuong' show," and (5) "[a]ssisting to produce the ads when needed." (*Id.* ¶ 3.)[5]

Plaintiffs have failed to show that Tram Ho had a fiduciary relationship with Plaintiffs as a matter of law. Relationships imposing a fiduciary duty as a matter of law are those between principal and agent, joint venturers, attorney and client, and corporate officers and their corporation. *Blatty v. Warner Bros., 2011 U.S. Dist. LEXIS 164838, 2011 WL 13217379, at *8 (Apr. 21, 2011)* (quoting *Oakland Raiders v. Nat'l Football League, 131 Cal. App. 4th 621, 632, 32 Cal. Rptr. 3d 266 (2005))*. Plaintiffs rely on one California state appellate case for the assertion that an employee also owes its employer a fiduciary duty where the employee "participat[es] in management." (Dkt. 245 at 16 [citing *Gab Bus. Servs. v. Lindsey & Newsom Claim Servs., 83 Cal. App. 4th 409, 422, 99 Cal. Rptr. 2d 665 (2000)]*.) However, Plaintiffs at no point show that Tram Ho managed VBS Television. Tram Ho's detailed employment agreement, even if it was in effect at the time she left VBS Television, described Tram Ho as an "employee," not a director, manager, or officer. (TAC Ex. 13.) Tram **[*40]** Ho's specifically outlined duties, such as soliciting advertisements and promoting jewelry auction programs, do not include high-level management of the company. (*See id.*) Tram Ho did not have a fiduciary relationship with VBS Television as a matter of law.

Plaintiffs next argue that the confidentiality provisions in Tram Ho's employment agreement, which required her to "retain the confidentiality of, and not disclose, valuable trade secret information," effectively imposed a fiduciary duty. (TAC ¶ 61.) However, receipt of confidential information, without more, does not compel the imposition of a fiduciary duty. *City of Hope, 43 Cal. 4th at 391-94*; *see Goodworth Holdings Inc. v. Suh, 239 F. Supp. 2d 947, 960 (N.D. Cal. 2002)* ("A confidentiality agreement does not give rise to a fiduciary relationship unless it does so expressly."). Plaintiffs also allege that "VBS gave Tram Ho discretion in how she exercised her job duties" and relied on her "to competently perform her duties." (TAC ¶ 65.) Plaintiffs argue that because VBS "placed great trust and confidence" in Tram Ho, Tram Ho owed them a fiduciary duty of trust and confidence in return. (Dkt. 245 at 16-17; *see* TAC ¶ 61.) Plaintiffs fail to explain how these vague allegations show that Tram Ho owed a fiduciary duty to Plaintiffs. If granting **[*41]** an employee discretion to do a job and relying on the employee to competently perform that job were sufficient, every employee would owe their employer a fiduciary duty. *See Goodworth Holdings Inc. v. Suh, 239 F. Supp. 2d 947, 960 (N.D. Cal. 2002)* ("A fiduciary relationship . . . does not arise simply because parties repose trust and confidence in each other."); *Worldvision Enters., Inc. v. Am. Broadcasting Cos., 142 Cal. App. 3d*

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on those other claims, (Dkts. 174, 216, 249), Plaintiffs have been given ample opportunity to present evidence on the conduct underlying the breach of fiduciary duty and civil conspiracy claims.

[5] Plaintiffs also argue in their opposition to Defendants' motion for judgment on the pleadings that Tram Ho was the "Vice President of Marketing (an officer) at VBS." (Dkt. 245 at17.) However, Plaintiffs never made that allegation in the operative TAC or exhibits attached thereto, and they fail to cite any other evidence in their opposition. Further, Tram Ho's employment contract explicitly characterizes Tram Ho as an "employee," not a director, officer, or executive of VBS Television. (*See* TAC Ex. 13.)

589, 595, 191 Cal. Rptr. 148 (1983). Because Plaintiffs fail to show the existence of a fiduciary duty in the first instance, they cannot prevail on a claim for breach of fiduciary duty.

But putting aside the issue of whether Tram Ho owed Plaintiffs a fiduciary duty as an employee of VBS Television, Plaintiffs' breach of fiduciary duty claim nevertheless fails because Plaintiffs have not shown that Tram Ho engaged in any conduct that would constitute a breach of any duty. Plaintiffs' claim for breach of fiduciary duty rests entirely on the misconduct alleged in Plaintiffs' claims for misappropriation of trade secrets and interference with contractual relationships. Plaintiffs have had multiple opportunities to present evidence and brief the purported misconduct that forms the basis of those claims. Yet Plaintiffs failed to present any evidence of trade secrets misappropriation or interference with contractual relationships.[6] Accordingly, **[*42]** Plaintiffs' derivative claim for breach of fiduciary duty must also fail.

H. Civil Conspiracy

Plaintiffs assert a claim for civil conspiracy under California law. (TAC ¶ 151.) Civil conspiracy is not an independent cause of action, but rather a theory of vicarious liability under which certain defendants may be held liable for torts committed by others. *Lauter v. Anoufrieva, 642 F. Supp. 2d 1060, 1097 (C.D. Cal. 2009)*. In order to invoke vicarious liability, a plaintiff must allege the formation of a conspiracy to commit wrongful acts, the commission of the wrong acts, and the damage resulting from such acts. *Id.* (citing *State ex rel. Metz v. CCC Info. Servs., Inc., 149 Cal. App. 4th 402, 419, 57 Cal. Rptr. 3d 156 (2007))*. Because all of Plaintiffs' independent causes of action fail, the vicarious claim for civil conspiracy also fails.

IV. CONCLUSION

Simply put, Plaintiffs' opposition is one complete failure of proof. It is nothing more than conclusory and unsupported allegations of wrongdoing on Defendants' part. That is not enough to raise a genuine issue of material fact. Accordingly, Defendants' motion and converted motion for summary judgment are **GRANTED**.[7]

DATED: September 10, 2018

/s/ Cormac J. Carney

CORMAC J. CARNEY

UNITED STATES DISTRICT JUDGE

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[6] Further, to the extent that Plaintiffs' breach of fiduciary duty claim turns on Plaintiffs' trade secrets misappropriation allegations, the claim is preempted by the California Uniform Trade Secrets Act. *See* First Advantage, 569 F. Supp. 2d at 936 (citing cases holding that common law claims based on misappropriation of trade secrets are preempted by the California Uniform Trade Secrets Act).

[7] Both parties filed applications to file under seal certain documents in relation to Defendants' motion for summary judgment. (Dkts. 242, 248, 265.) The only reason cited by the parties to justify their applications to seal is the parties' protective order. As the Court has already explained in length, a mere citation to the protective order is not sufficient to warrant sealing documents from the public docket. (Dkt. 227 at 6-7.) The parties' applications are therefore **DENIED**.

Breiding v. Eversource Energy

United States District Court for the District of Massachusetts

September 11, 2018, Decided; September 11, 2018, Filed

Civil Action No. 17-12274

Reporter

344 F. Supp. 3d 433 *; 2018 U.S. Dist. LEXIS 154610 **; 2018-2 Trade Cas. (CCH) P80,511; 2018 WL 4344996

SCOTT BREIDING, AMY POLLUTRO MIKAELA ORSTEIN-OTERO, BENJAMIN ROSE, MARGARET LEWIS AND RICHARD LEWIS, ERIC LONG, PETER STEERS, ERIK ALLEN, BRADFORD KEITH, JOHN ODUM, DAVID LEIGHTON, DONNA CORDEIRO, JANICE ANGELILLO, ANNA MARIA FORNINO, MICHELE CASETTA, JUDY CENNAMI, JANICE BRADY, OPAL ASH, MARK LEJEUNE, AND ROBERTO PRATS, on behalf of themselves and others similarly situated, Plaintiffs, v. EVERSOURCE ENERGY and AVANGRID, INC., Defendants.

Subsequent History: Affirmed by *Breiding v. Eversource Energy, 2019 U.S. App. LEXIS 28036 (1st Cir. Mass., Sept. 18, 2019)*

Core Terms

electricity, natural gas, wholesale, Defendants', retail, filed rate doctrine, transmission, Plaintiffs', rates, consumers, antitrust, prices, tariffs, reservations, contracts, generators, pipeline, courts, anticompetitive conduct, antitrust claim, monopolization, auction, no-notice, purchaser, damages, artificially, spot market, markets, ISO-NE, energy

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

In considering a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to *Fed. R. Civ. P. 12(b)(6)*, the appellate court will dismiss a pleading that fails to allege plausible claims. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. This standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. A claim must contain sufficient factual matter that, accepted as true, would allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

HN2[] **Motions to Dismiss, Failure to State Claim**

There is no special pleading requirement for motions to dismiss in the context of an antitrust action. Nevertheless, it is not enough merely to allege an antitrust violation in conclusory terms. Instead, the complaint must make out the rudiments of a valid claim. Therefore, when the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint. With that said, a complaint should be dismissed only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Business & Corporate Compliance > ... > Electric Power Industry > Federal Power Act > Federal Rate Regulation

Business & Corporate Compliance > ... > Electric Power Industry > State Regulation > Rate Setting & Tariffs

HN3[] **Federal Power Act, Federal Rate Regulation**

The Federal Power Act (FPA), *16 U.S.C.S. § 791a et seq.*, authorizes FERC to regulate the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce, *16 U.S.C.S. § 824(b)(1)*. In particular, the FPA obligates FERC to oversee all prices for those interstate transactions and all rules and practices affecting such prices. However, FPA places beyond FERC's 's power, leaving to the states alone, the regulation of any other electricity sale, including the retail sale of electricity.

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

HN4[] **Electric Power Rates, Filed Rate Doctrine**

The filed rate doctrine revolves around the notion that under statutes like the Federal Power Act, utility filings with a federal agency prevail over other claims seeking different rates or terms than those reflected in the filings with the agency. It has its origins in Supreme Court cases interpreting the Interstate Commerce Act and has been extended across the spectrum of regulated utilities. The filed rate doctrine is a form of deference and preemption, which precludes interference with the rate setting authority of an administrative agency. Accordingly, strict application of the rule is necessary to promote the congressional policy of preventing unjust discrimination in rates.

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

HN5[] **Electric Power Rates, Filed Rate Doctrine**

Under the filed rate doctrine, where FERC determines that a rate is just and reasonable, courts cannot approve a departure from that rate. Moreover, the filed rate doctrine applies even where, FERC determines that certain wholesale rates are to be set by market forces. Accordingly, courts are not the forum to adjudicate claims based on the propriety of regulated rates. Accordingly, courts are not the forum to adjudicate claims based on the propriety of regulated rates. Due to the preclusive effect of the filed rate doctrine, federal and state antitrust claims, as well as state tort actions, that require courts to set aside or second guess rates approved by FERC must fail as a matter of law. The question, then whether Plaintiffs can establish a pertinent limitation on or exception to the filed rate doctrine.

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

HN6[] Electric Power Rates, Filed Rate Doctrine

The U.S. Supreme Court has recognized a limited exception to the filed rate doctrine for injunctive relief.

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

HN7[] Electric Power Rates, Filed Rate Doctrine

The focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determines.

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

HN8[] Electric Power Rates, Filed Rate Doctrine

Although it is true that retail consumers do not have standing to file complaints with FERC, courts have consistently held that lack of a remedy does not create an exception to the filed rate doctrine.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN9[] Standing, Elements

Federal courts are constitutionally limited to deciding cases or controversies. Accordingly, a plaintiff must establish that it has standing in federal court by demonstrating that her complaint alleges a case or controversy recognized under Article III of the Constitution. To do so, a plaintiff must establish injury, causation, and redressability. At the pleading stage, an antitrust plaintiff must show both constitutional standing and antitrust standing. To determine whether a plaintiff has standing to bring an antitrust cause of action, the court conducts an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws. The Court considers: (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex apportionment of damages. Although courts weigh each of the six factors, lack of injury, in particular, will generally defeat standing.

Antitrust & Trade Law > Procedural Matters

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN10[] Antitrust & Trade Law, Procedural Matters

The U.S. Supreme Court has defined antitrust injury as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. To establish antitrust injury, a proper plaintiff must prove more than injury causally linked to an illegal presence in the market. The First Circuit has explained that competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury.

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

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN11[] **Actual Monopolization, Claims**

Section 2 of the Sherman Act makes it illegal to monopolize, or attempt to monopolize any part of the trade or commerce among several states, 15 U.S.C.S. § 2. To prove a violation of this statute, a plaintiff must demonstrate (1) that the defendant possesses monopoly power in the relevant market and (2) that the defendant has acquired or maintained that power by improper means. To prove attempted monopolization, a plaintiff must demonstrate (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

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

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

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

HN12[] **Actual Monopolization, Claims**

The plaintiff carries the burden of describing a well-defined relevant market, both geographically and by product, which the defendants monopolized. Although the question of market definition is usually one of fact for the jury, a plaintiff must present sufficient evidence from which a reasonable jury could find the existence of the proposed relevant market. The relevant geographic market consists of the geographic area in which the defendant faces competition and to which consumers can practically turn for alternative sources of the product.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > Actual Monopolization

HN13[] **Monopolies & Monopolization, Actual Monopolization**

Courts define monopoly power as the power to raise prices and exclude competition. Market power can be shown through two types of proof, either through direct evidence of market power, such as actual supracompetitive prices and restricted output, or circumstantial evidence of market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN14[] **Actual Monopolization, Monopoly Power**

At bottom, a claim for monopolization requires that Plaintiffs allege facts sufficient to establish that Defendants separately possessed monopoly power in the relevant market. Accordingly, courts in the First Circuit and elsewhere have rejected monopolization claims based on a shared monopoly theory of liability.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN15[] **Deceptive & Unfair Trade Practices, State Regulation**

State consumer protection and unfair competition statutes each require allegations regarding (1) an unfair or deceptive act or practice on the part of the defendant; (2) an injury or loss suffered by the consumer; and (3) a causal connection between the wrongful conduct and the consumer's injury.

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Judges: Denise J. Casper, United States District Judge.

Opinion by: Denise J. Casper

Opinion

[*437] **MEMORANDUM AND ORDER**

CASPER, J.

I. Introduction

A putative class of retail electricity consumers residing in New England (collectively, "Plaintiffs") have filed this lawsuit against Eversource Energy ("Eversource") and Avangrid, Inc. ("Avangrid") (collectively, "Defendants"), alleging violations of the *Sherman Act*, *15 U.S.C. § 2*, and various state consumer protection and antitrust laws. D. 33. Plaintiffs assert that Defendants restricted New England's supply of natural gas, a key component in the generation of over half the electricity in New England, and, as a result, caused New Englanders to pay nearly $3.6 billion dollars more for retail electricity. D. 33 ¶¶ 1-2. Plaintiffs seek damages and injunctive relief, including under the *Clayton Act*, *15 U.S.C. § 26*. Defendants have moved to dismiss the amended complaint. D. 41; D. 42. For the reasons set forth below, **[**3]** the Court ALLOWS Defendants' motions to dismiss.

II. Standard of Review

HN1[] In considering a motion to dismiss for failure to state a claim upon which relief **[*438]** can be granted pursuant to *Fed. R. Civ. P. 12(b)(6)*, the Court will dismiss a pleading that fails to allege plausible claims. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "This standard is 'not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.'" *Saldivar v. Racine, 818 F.3d 14, 18 (1st Cir. 2016)* (quoting *Iqbal, 556 U.S. at 678*). A claim must contain sufficient factual matter that, accepted as true, would allow the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 557*).

HN2[] There is no special pleading requirement for motions to dismiss in the context of an antitrust action. *In re Carbon Black Antitrust Litig., No. CIV.A.03-10191-DPW, 2005 U.S. Dist. LEXIS 660, 2005 WL 102966, at *5 (D. Mass. Jan. 18, 2005)*. Nevertheless, "it is not enough merely to allege a[n] [antitrust] violation in conclusory terms." *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc., 357 F.3d 1, 9 (1st Cir. 2004)*. Instead, the "complaint must make out the rudiments of a valid claim." Id. Therefore, "[w]hen the requisite elements are lacking, the costs **[**4]** of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *In re Carbon Black Antitrust Litig., 2005 U.S. Dist. LEXIS 660, 2005 WL 102966, at *5* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*. "With that said, a complaint should be dismissed only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (internal quotation marks and citations omitted).

III. Factual Background

Unless otherwise noted, the following facts are drawn from the amended complaint, D. 33, and are accepted as true for the consideration of the Defendants' motions to dismiss.

A. Regulatory Framework for the Interstate Transmission and Sale of Natural Gas and Electricity

1. FERC's Authority to Regulate the Transmission and Price of Natural Gas

Between the 1950s through the 1970s, the Federal Power Commission ("FPC") strictly regulated both the wellhead price[1] of natural gas and the interstate transmission of natural gas pursuant to the *Natural Gas Act*. D. 33 ¶ 72; see *E. & J. Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1036 (9th Cir. 2007)* ("Gallo II"). Beginning in 1978, however, Congress enacted legislation to reduce regulatory **[**5]** oversight of the price of natural gas. Id. ¶ 74. Congress further deregulated the price of natural gas through the enactment of the Natural Gas Wellhead Decontrol Act of 1989, which prohibited FPC's successor, the Federal Energy Regulatory Commission ("FERC"), from imposing any price regulations on "first sales" of natural gas at the **[*439]** wellhead. Id. ¶¶ 74-75. "First sales" include sales by a natural gas producer to a pipeline or a direct purchaser. Id. ¶ 75. In 1992, FERC issued Order No. 636, which permanently severed the sale of natural gas as a commodity from the sale of natural gas transmission as a service. Id. ¶ 76. Following Order 636, FERC allowed "natural-gas companies subject to [its] jurisdiction to charge rates for gas determined by market demand." *Gallo II, 503 F.3d at 1038*. In short, FERC replaced regulated rates for natural gas with market-based rates. *Id. at 1039*.

[1] The "wellhead" price is simply the price that gas producers charge for natural gas at the wellhead. Id. ¶ 72. Previously, the FPC imposed a "cost-plus" ratemaking system that allowed gas producers to factor the cost of natural gas production and a "fair" profit into the wellhead price. Id. The FPC determined what was considered "fair." Id.

FERC still retained authority to oversee rates charged for the transmission of natural gas. Id. ¶¶ 77, 80, 85. Because natural gas transmission is often a "natural monopoly," (*i.e.*, where a single pipeline infrastructure is the only source of natural gas transportation in a given area), FERC is charged with ensuring that the transmission **[**6]** monopoly is not abused and that prices are "just and reasonable." Id. ¶¶ 80, 85. FERC does not regulate the local, retail sale of natural gas after it leaves interstate pipelines. See id. ¶ 54.

1. FERC's Authority to Regulate the Transmission and Price of Electricity

HN3[] The *Federal Power Act ("FPA"), 16 U.S.C. § 791a et seq.*, authorizes FERC to regulate the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." Id. ¶ 49 (quoting *16 U.S.C. § 824(b)(1)*). In particular, the FPA obligates FERC to "oversee all prices for those interstate transactions and all rules and practices affecting such prices." *F.E.R.C. v. Elec. Power Supply Ass'n, U.S. , 136 S. Ct. 760, 782, 193 L. Ed. 2d 661 (2016)*. However, FPA places beyond FERC's power, leaving to the states alone, the regulation of any other electricity sale, including the retail sale of electricity. D. 33 ¶ 49 (citing *Elec. Power Supply Ass'n., 136 S. Ct. at 768*).

B. Natural Gas and Electricity Markets

Plaintiffs allege that Defendants' anticompetitive conduct in the natural gas transmission market artificially inflated the commodity market price of natural gas and the wholesale price of electricity, resulting in higher retail electricity prices for New Englanders. See, e.g., D. 33 ¶ 165. Defendants' conduct in the upstream natural gas transmission market **[**7]** allegedly impacted downstream retail electricity prices due to the relationship and connection between the markets at issue in this litigation. For example, Plaintiffs assert that the price of natural gas is the most significant factor in determining the price of wholesale electricity because natural gas-fired power plants are the primary generators of electricity in New England. Id. ¶ 68. An increase in the price of natural gas due to a shortage in natural gas supply, therefore, will directly impact the price of wholesale electricity. Id. ¶ 121. In that same vein, artificially inflated wholesale electricity prices result in artificially inflated retail electricity prices. Id. ¶ 63. Accordingly, where, as alleged here, Defendants restricted the natural gas supply to New England, Defendants allegedly caused the market price of natural gas to increase, resulting in an increase in wholesale and retail electricity prices. Id.

With the regulatory framework and Plaintiffs' allegations in mind, the Court now turns to the New England energy markets at issue in this litigation: (1) the commodity market for natural gas, (2) the natural gas transmission market, (3) the wholesale electricity market **[**8]** and (4) the retail electricity market.

[*440] *1. Natural Gas Commodity Market*

The natural gas market encompasses two transactions: (1) the purchase of natural gas; and (2) the transmission of natural gas from seller to purchaser. Id. ¶ 76. With respect to sales of the commodity itself, natural gas is sold to consumers either directly from gas producers via contracts called "gas futures" or through the "spot market." Id. ¶ 86. Futures contracts allow gas producers to sell a specific quantify of gas at some predetermined future time. Id. ¶ 87. Purchasers with a steady natural gas demand, such as load distribution companies ("LDCs"), which distribute gas to retail customers, typically utilize futures contracts. Id. ¶¶ 84, 87. By contrast, entities with variable or less predictable natural gas demand, including natural gas-fired electricity generators, purchase gas on the "spot" market. Id. ¶ 88. The spot market allows LDCs and other direct purchasers to resell excess amounts of natural gas to which they hold title. Id. ¶ 89. According to Plaintiffs, the spot market price of natural gas is not regulated by FERC and is, instead, determined by supply and demand. Id. ¶ 90. Accordingly, the spot market **[**9]** price of natural gas increases when the amount of available natural gas decreases. Id.

2. Natural Gas Transmission Market

In addition to purchasing natural gas directly from gas producers or indirectly via the spot market, gas purchasers must also pay for the transmission (or transportation) of natural gas to its final destination. Id. ¶ 78. In New England, a network of pipelines facilitates the transmission of natural gas from the wellhead to the purchaser (or a destination determined by the purchaser). Id. As mentioned, as compared to the price of the commodity itself, which is determined by contract or by the market, FERC oversees the rates charged for transmission capacity. Id. ¶ 79.

The process for reserving pipeline transmission capacity in New England differs depending on the purchaser. See id. ¶ 99. LDCs have the option to enter "no-notice" contracts, which give them the power to reserve transmission capacity on a pipeline for a given day and time, and to adjust that reservation "upward or downward" at any time without penalty. Id. By contrast, other purchasers may be penalized if they do not use the full capacity reserved on a given day or if they have to reserve additional transmission **[**10]** capacity. Id.

Transmission capacity reservations play an important role in determining the supply of natural gas available to gas purchasers in New England because there is a fixed amount of pipeline capacity on any given day. Id. ¶ 107. In other words, the transmission capacity reserved by one purchaser limits how much capacity is available for other purchasers' natural gas needs. Id. Even when LDCs adjust their capacity reservations downward or cancel a reservation, that capacity is not automatically released for others to use. Id. ¶ 108. For example, assume an LDC called Firm X reserved enough capacity on a pipeline to move a total of 2400 cubic feet of natural gas through a pipeline at a steady rate over the course of a 24-hour period (*i.e.*, 100 cubic feet per hour). Id. ¶ 109. If Firm X cancelled 20 hours of that reservation and did not affirmatively release the excess capacity it reserved, then the pipeline would, for 20 hours out of the day, flow at 100 cubic feet per hour under capacity. Id. In that example, other purchasers would not be able to take advantage of the excess units of natural gas capacity caused by Firm X's downward adjustment of its capacity reservation. Id.

***[**11]** 3. Wholesale Electricity Market*

Wholesale electricity is typically sold by electricity generators or power plants to load serving entities ("LSEs"), which then **[*441]** deliver electricity to retail consumers. Id. ¶ 52. Some wholesale electricity is purchased via contracts pursuant to which LSEs agree to purchase a certain amount of electricity at a certain rate over a certain period of time. Id. ¶ 53. These fixed-rate, bilateral contracts are regulated by FERC, which may review the agreed-upon rate for reasonableness. Id. More often, however, wholesale electricity is purchased through auctions between electricity generators and LSEs. Id. ¶ 54. The auctions are administered and overseen by intermediaries called Independent System Operators ("ISOs") or Regional Transmission Organizations ("RTOs"), which are independent non-profit organizations that FERC has charged with facilitating an efficient market for wholesale electricity while also ensuring reliability for electricity consumers. Id. As part of their auction-related responsibilities, ISOs and RTOs must file with FERC a tariff that describes in detail the procedures for a given auction. Id. FERC may review or approve the auction procedures. **[**12]** Id. In New England, auctions are conducted in accordance with the ISO New England Inc. Transmission, Markets, and Services Tariff ("ISO-NE Tariff"), which was approved by FERC and describes the rules that govern ISO-NE's facilitation of auctions for wholesale electricity in the region. Id. ¶ 61 (citing ISO-NE, Day-Ahead and Real-Time Energy Markets, https://www.iso-ne.com/marketsoperations/markets/da-rt-energy-markets (last visited Sept. 10, 2018)).

There are two types of auctions: (1) "same-day" auctions for immediate delivery of wholesale electricity to LSEs experiencing a spike in demand for retail electricity, and (2) "next-day" auctions to satisfy expected demand the following day. Id. ¶ 54. In both instances, the auction process is as follows. First, an ISO (or RTO) obtains orders from LSEs indicating how much electric energy is needed over a given period of time. Id. ¶ 55. Second, the ISO obtains bids from electricity generators specifying how much electricity can be produced during the relevant time period and how much they propose to charge for it. Id. Finally, the ISO accepts the generators' bids in order of price (from lowest to highest) until the total LSE demand is satisfied. **[**13]** Id. The price of the last unit of electricity purchased is then paid to all generators whose bids were accepted, even if their offer was lower. Id.

For example, suppose that LSEs inform their ISO that they require 275 units of electricity for the day. Id. ¶ 56. Also assume the ISO receives the following bids from electricity generators: Generator A offers 100 units of electricity for

$10/unit; Generator B offers 100 units of electricity for $20/unit; Generator C offers 100 units of electricity for $30/unit; and Generator D offers 100 units of electricity for $40/unit. Id. The ISO will accept Generator A's $10/unit bid (and all 100 units offered); then Generator B's $20/unit bid (and all 100 units offered); and then Generator C's $30/unit bid (but only the first 75 units offered). Id. Given that the wholesale demand from the LSEs was satisfied after the ISO accepted part of Generator C's bid, Generators A, B, and C will all be paid at a rate of $30/unit. Id. The total cost of the 275 units of electricity will be split proportionally amongst the LSEs, according to the units of electricity ordered by each. Id.

4. Retail Electricity Market

The wholesale electricity prices paid by LSEs are **[**14]** passed on to retail customers. Id. ¶ 63. Accordingly, the price of wholesale electricity influences the cost of retail electricity. Id. ¶ 60.

C. Alleged Anticompetitive Conduct

1. Defendants' Alleged Market Power

Plaintiffs allege a monopolization scheme in which Eversource and Avangrid **[*442]** each allegedly abused their power over the retail electricity market in New England through anticompetitive conduct in the upstream natural gas transmission market. Id. ¶¶ 5-8; D. 48 at 39. Plaintiffs contend that Defendants possess the power to raise the price of electricity in New England because they can restrict the amount of natural gas flowing into the region and, therefore, the amount of natural gas available to fuel natural-gas-fired electricity generators. D. 33 ¶ 94. Plaintiffs point to several aspects of Defendants' energy businesses to suggest that Defendants controlled New England's natural gas supply and, therefore, the price of retail electricity. For example, New England's principal natural gas pipeline, the Algonquin Gas Transmission Pipeline, is owned, in part, by Defendant Eversource. Id. ¶ 95. Both Eversource and Avangrid also own and operate, through their subsidiaries, substantial **[**15]** "natural gas utilities" known as LDCs—which purchase natural gas directly from gas producers and, in turn, distribute natural gas to retail consumers. Id. ¶ 97. Of the eight largest LDCs in New England, half are owned by Eversource or Avangrid.[2] Id. As a result of their LDC operations, Eversource and Avangrid possess a large number of "no-notice" contracts for natural gas transmission capacity along the Algonquin Pipeline.[3] Id. ¶ 99. As mentioned, no-notice contracts allow LDCs to adjust their transmission capacity reservations upward or downward at any time and without penalty. Id.

In addition to their natural gas businesses, Defendants Eversource and Avangrid, through their respective subsidiaries, operate retail electric utilities or LSEs, which provide electricity to millions of residential, commercial and industrial customers in New England. Id. ¶ 101. The price of electricity sold by Defendants' retail utilities is driven, in large part, by the market-wide wholesale price of electricity established within the ISO-NE market. Id. ¶ 104. When the price of wholesale electricity established within the ISO-NE market increases the price of electricity sold by Eversource and Avangrid **[**16]** to their respective retail customers similarly increases. Id.

Eversource and Avangrid also own and operate renewable electricity resources such as hydroelectric, wind and solar generating facilities. Id. ¶ 105. Plaintiffs allege that these facilities have low variable operating costs and, as a result, are more competitive than natural gas-fired electricity generators when the price of natural gas increases. Id.

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[2] Eversource owns NSTAR Gas Co. and Yankee Gas Co. and Avangrid owns Connecticut Natural Gas Co. and Southern Connecticut Gas Co. Id. ¶ 97.

[3] As previously explained, the sale of natural gas is separate from the sale of transmission capacity. Id. ¶ 77. Transmission capacity is necessary to transport natural gas from seller to purchaser via a pipeline.

2. Defendants' Alleged Monopolization Scheme

As previously explained, the New England electricity market sets a single price for wholesale electricity sold in a given auction. Id. ¶ 165. That price is determined by the highest accepted bid in the auction. Id. Plaintiffs allege that Defendants, by artificially restricting natural gas supply, raised wholesale natural gas prices on the spot market, which (in turn) raised the bids in electricity auctions, including the highest accepted bid. Id. Higher overall accepted bids resulted in an increase in the cost of wholesale electricity. And, finally, since increases in wholesale electricity prices are passed on to retail electricity consumers, Defendants' conduct caused the retail price of electricity to increase throughout New England. **[**17]** Id.

[*443] Defendants' purported systematic abuse of no-notice contracts for natural gas transmission capacity provided the catalyst for the alleged scheme. See, e.g., id. ¶ 107. No-notice contracts allow LDCs to reserve natural gas transmission capacity on the Algonquin Pipeline and to adjust such reservations at any time without penalty. Id. ¶ 99. Because there is a fixed amount of pipeline capacity on a given day, the volume reserved by LDCs, including those owned by Defendants, affects the transmission capacity available to meet the needs of other consumers, including natural gas-fired electricity generators. Id. ¶ 107. Moreover, to the extent Defendants adjust their capacity reservations downward "at the last minute," that capacity is not automatically released for use by other actors in the natural gas market. Id. ¶ 108. Accordingly, the nature and timing of Defendants' adjustments to their capacity reservations may prevent their previously reserved supply of natural gas from being released and used by others to satisfy demand in the natural gas market. Id. ¶ 110.

Plaintiffs assert that Defendants' conduct was unique. Id. ¶¶ 122-126. For example, industry research shows that, as compared **[**18]** to the utility company with the next highest "last-minute" cancellations, Eversource and Avangrid cancelled their natural gas capacity on approximately 40 and 184 more occasions, respectively. Id. ¶ 122. In addition, Defendants' "clear pattern of large downward adjustments at the very end of the gas day . . . is very different than the pattern" of their top competitors. Id. ¶ 125. Defendants also failed to take advantage of the "capacity release" mechanism authorized by FERC. Id. ¶ 128. The "capacity release" mechanism allows holders of no-notice contracts to release excess capacity directly to the relevant pipeline, which then sells that capacity. Id. ¶ 145. Capacity release can occur on a seasonal, monthly and even intra-day basis. Id. ¶ 141. Accordingly, Defendants could have—but did not—release their excess capacity to be sold to other actors in the market. Id. ¶ 147.

3. Market Advantages Stemming from Defendants' Alleged Anticompetitive Conduct

Plaintiffs allege that Defendants benefitted from artificially inflating natural gas and electricity prices in at least two ways. First, by increasing the spot market price for natural gas and/or restricting available natural gas supplies, **[**19]** Defendants artificially increased demand for value attributed to and prices paid to non-natural gas-fired power plants, including power plants owned by Defendants. Id. ¶¶ 152, 156-60. Second, as a result of the artificially depressed natural gas supply and inflated electricity prices caused by Defendants, Defendants were able to advocate for the construction of "other multi-billion-dollar energy infrastructure." Id. ¶¶ 161-63.

4. Plaintiffs' Alleged Injury

Plaintiffs allege that Eversource and Avangrid consistently cancelled substantial volumes of transmission capacity in the last three hours of the day every day during the class period.[4] Id. ¶ 119. In so doing, they reduced the Algonquin Pipeline's daily effective capacity by 14% on average. Id. ¶ 118. The reduced gas supply caused by Defendants resulted in natural gas prices on the spot market that were, on average, 38% higher than they would

[4] The class period began no later than August 1, 2013, continued through at least July 31, 2016 and ended or will end on the date the effects of the Defendants' anticompetitive conduct end. Id. ¶ 15.

otherwise have been. Id. ¶ 120. The increase in spot market natural gas prices impacted the wholesale price of electricity and, in turn, increased retail electricity **[*444]** prices by 20%. Id. ¶ 121. Plaintiffs estimate that over the course of at least three years, Defendants allegedly caused New Englanders **[**20]** to overpay for retail electricity by at least $3.6 billion. Id. ¶ 121.

D. Class Definitions

Plaintiffs assert state and federal law claims on behalf of themselves and similarly situated classes of persons pursuant to *Fed. R. Civ. P. 23*. Id. ¶ 194.

1. Eversource Unified State Law Class

Plaintiffs assert claims for damages and other relief under Massachusetts law against Eversource, on behalf of themselves and a class of similarly situated electricity consumers throughout New England (the "Unified State Law Class"). Id. ¶ 195. The Unified State Law Class is defined as "all consumers who purchased electricity during the class period, for their own use and not for resale, in the six-state ISO-NE market territory of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont." Id. ¶¶ 195, 197-203.

2. Eversource Separate State Law Classes

To the extent the Court does not apply Massachusetts law to the state law claims of all members of the Unified State Law Class, regardless of where they reside, Plaintiffs alternatively bring state law claims against Eversource on behalf of themselves and state-specific subclasses, under the relevant laws of Connecticut, Maine, Massachusetts, New Hampshire and **[**21]** Vermont ("Eversource Separate State Law Classes"). Id. ¶¶ 196-203.

3. Avangrid State Law Classes

Plaintiffs bring claims for damages and other relief against Avangrid, on behalf of themselves and state-specific subclasses, under the relevant laws of Connecticut, Maine, Massachusetts, New Hampshire, and Vermont ("Avangrid Separate State Law Classes"). Id. ¶¶ 204-11.

4. Eversource and Avangrid Federal Law Classes

Eversource Plaintiffs and Avangrid Plaintiffs separately bring claims for damages and other relief under federal ***antitrust law*** against Eversource and Avangrid, respectively, on behalf of themselves and a class of similarly situated electricity consumers in New England ("Eversource Federal Law Class" and "Avangrid Federal Law Class," respectively). Id. ¶¶ 212-27.

The Eversource Federal Law Class is defined as "all consumers who purchased electricity in the ISO-NE market territory from Eversource and/or its subsidiaries or affiliates, during the class period, for their own use and not for resale." Id. ¶ 212.

The Avangrid Federal Law Class is defined as "all consumers who purchased electricity in the ISO-NE market territory from Avangrid and/or its subsidiaries or affiliates, during **[**22]** the class period, for their own use and not for resale." Id. ¶ 220.

5. Federal Law Injunctive Relief Class

Plaintiffs bring claims for injunctive relief under federal ***antitrust law*** against defendants, on behalf of themselves and a class of all electricity consumers in New England ("Federal Law Injunctive Class"). The Federal Law Injunctive Class is defined as "all consumers who purchased electricity in the ISO-NE market territory of New England, during the class period, for their own use and not for resale." Id. ¶ 228.

IV. Procedural History

On November 16, 2017, named Plaintiffs instituted this action against Defendants. D. 1. Shortly thereafter, a related class action complaint was filed against Defendants on February 6, 2018 and assigned to this Court. D. 32 at 2. On February 21, 2018, the Court consolidated the actions. D. 32 at 3. Plaintiffs subsequently filed a **[*445]** consolidated amended complaint. D. 33. Defendants have now moved to dismiss. D. 41; D. 42. The Court heard the parties on the pending motions on August 1, 2018 and took these matters under advisement. D. 57.

V. Discussion

A. The Filed Rate Doctrine Bars Plaintiffs Here from Seeking Damages for Purported Violations of Federal [**23] and State Law

Defendants contend that Plaintiffs' federal and state law claims are foreclosed by the filed rate doctrine. ***HN4***[] The filed rate doctrine "revolve[s] around the notion that under statutes like the *Federal Power Act*, utility filings with [a federal agency] prevail over . . . other claims seeking different rates or terms than those reflected in the filings with the agency." *Town of Norwood, Mass. v. F.E.R.C., 217 F.3d 24, 28 (1st Cir. 2000)*. It "has its origins in [Supreme Court cases] interpreting the Interstate Commerce Act . . . and has been extended across the spectrum of regulated utilities." *Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981)* ("Arkla") (internal citations omitted). The filed rate doctrine is a "form of deference and preemption, which precludes interference with the rate setting authority of an administrative agency." *Wah Chang v. Duke Energy Trading & Mktg., LLC, 507 F.3d 1222, 1225 (9th Cir. 2007)*. Accordingly, "strict application of the rule is necessary to promote the congressional policy of preventing unjust discrimination in rates." *Town of Norwood v. New England Power Co., 23 F. Supp. 2d 109, 115-16 (D. Mass. 1998)*, aff'd in part, remanded in part sub nom., *Town of Norwood, Mass. v. New England Power Co., 202 F.3d 408 (1st Cir. 2000)* (internal quotation marks and citation omitted).

HN5[] Under the filed rate doctrine, where FERC determines that a rate is "just and reasonable," courts cannot approve a departure from that rate. See *id. at 116* (indicating that "FERC's authority to determine whether wholesale rates filed by **[**24]** utilities are just and reasonable is exclusive") (internal quotation marks omitted); see also *Arkla, 453 U.S. at 577-78* (stating that "[n]o court may substitute its own judgment on reasonableness for the judgment of [FERC]" nor can courts "impose a different rate than the one approved by [FERC]"). Moreover, the filed rate doctrine applies even where, as here, FERC determines that certain wholesale rates are to be set by market forces. *Town of Norwood, 202 F.3d at 419* (holding that the filed rate doctrine barred antitrust claims challenging wholesale electricity rates and rejecting the argument that the "filed rate doctrine should not apply where the 'regulated' rates have been left to the free market"). Accordingly, courts are not the forum to adjudicate claims based on the propriety of regulated rates. See, e.g., *Arkla, 453 U.S. at 584* (explaining that "[p]ermitting the state court to award what amounts to a retroactive right to collect a rate in excess of the filed rate 'only accentuates the danger of conflict'"). Due to the preclusive effect of the filed rate doctrine, federal and state antitrust claims, as well as state tort actions, that require courts to set aside or second guess rates approved by FERC must fail as a matter of law. *Wah Chang, 507 F.3d at 1225* (citation omitted); **[**25]** *Town of Norwood, 202 F.3d at 418*. "The question, then, is whether [Plaintiffs] can establish a pertinent limitation on or exception to the filed rate doctrine." *Town of Norwood, 202 F.3d at 418*.

1. The Filed Rate Doctrine Prohibits the Court from Determining the Reasonableness of Rates or Tariffs Approved by FERC

Plaintiffs first argue that the filed rate doctrine does not apply to their claims **[*446]** because they do not seek to alter the terms of tariffs or rates approved by FERC. D. 48 at 25-32. Instead, Plaintiffs allegedly seek relief in accord with FERC's tariffs and only challenge Defendants' purported manipulation of retail natural gas and electricity rates outside of FERC's jurisdiction. Id. Defendants, on the other hand, assert that the filed rate doctrine applies because Plaintiffs cannot escape the fact that their claims challenge the propriety of wholesale electricity rates approved by FERC and that Plaintiffs' requested relief requires the Court to set such rates aside. D. 43 at 19; D. 52 at 7; D. 55 at 6. Thus, the threshold question before this Court is whether Plaintiffs' claims depend upon the Court's determination that tariffs or rates approved by FERC are unjust or unreasonable. See *Arkla, 453 U.S. at 577-78*.

Here, Plaintiffs allege that Defendants restricted **[**26]** New England's natural gas supply and artificially inflated wholesale natural gas prices, which increased the price of wholesale and retail electricity in New England. See, e.g., D. 33 ¶ 165. Although the parties disagree as to whether FERC regulates sales of natural gas on the spot market, there is no dispute that (pursuant to the ISO-NE Tariff) FERC exclusively regulates the region's wholesale electricity market, including ISO-NE's wholesale electricity auctions and the resulting prices.[5] Id. ¶¶ 49-51, 54; see D. 43 at 10; D. 52 at 3; D. 55 at 1. The parties also agree that the "price of natural gas is the single most significant factor in determining wholesale electricity prices," D. 33 ¶ 68 and, in turn, the price of wholesale electricity is the "largest factor in determining the overall electricity price paid by consumers throughout the ISO-NE regional electricity market," id. ¶ 66. Given the relationship between the markets at issue in this case, the Court cannot determine Defendants' liability for alleged retail electricity market manipulation without first deciding the reasonableness of wholesale electricity rates approved by FERC as part of the ISO-NE Tariff and auction process. **[**27]** [6]

In cases spawned by the California energy crisis between 2000 and 2001, the Ninth Circuit dismissed claims requiring the court to evaluate the reasonableness of rates squarely within FERC's jurisdiction. See, e.g., *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Dynegy Power Mktg., Inc., 384 F.3d 756, 761 (9th Cir. 2004)* ("Snohomish"). In Snohomish, for example, the Ninth Circuit considered whether the filed rate doctrine barred state antitrust and consumer protection claims alleging that actors in the wholesale electricity market "manipulated the market and restricted **[*447]** electricity supplies in order to cause artificially high prices." *Id. at 758*. Similar to Plaintiffs here, Snohomish alleged that "the defendants withheld supply, waited until . . . prices rose, and then offered their supply at the higher prices." *Id. at 759*. The plaintiff there also argued that the defendants' anticompetitive conduct in the wholesale electricity market "caused [the plaintiff] to pay prices for electricity in excess of rates that would have been achieved in a competitive market." Id. (internal quotation marks omitted). According to the Ninth Circuit, the plaintiff's requested relief would require the court to determine a "fair price" for wholesale electricity **[**28]** absent the defendants' conduct. *Id. at 761*. The Ninth Circuit, therefore, held that the filed rate doctrine barred Snohomish's claims to the extent they would require the court to "interfere with FERC's exclusive jurisdiction to set wholesale rates." Id. A few years later, in Gallo II, the Ninth Circuit applied similar reasoning in dismissing claims challenging

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[5] In Town of Norwood, the First Circuit held that the filed rate doctrine applied with equal force to market-based wholesale electricity rates. *Town of Norwood, 202 F.3d at 419* (explaining that "FERC is still responsible for ensuring 'just and reasonable' rates and, to that end, wholesale power rates continue to be filed and subject to agency review, *16 U.S.C. § 824d*"). As a result, the Court does not distinguish between market-based rates and rates formally filed with FERC for the purpose of determining whether the filed rate doctrine bars Plaintiffs' claims.

[6] In support of the argument that Plaintiffs only challenge conduct outside of FERC's jurisdiction, Plaintiffs rely on cases that are inapposite here, including *F.E.R.C. v. Elec. Power Supply Ass'n, __ U.S. __, 136 S. Ct. 760, 193 L. Ed. 2d 661 (2016)*, as revised (Jan. 28, 2016) ("E.P.S.A."). See, e.g., D. 48 at 28. In E.P.S.A., the Supreme Court did not consider whether the filed rate doctrine bars claims challenging retail rates that would require courts to determine the reasonableness of wholesale rates filed with FERC. Rather, the court held that that FERC may regulate "what takes place on the wholesale market," even if such regulations influence retail rates. *E.P.S.A., __ U.S. __, 136 S. Ct. at 776*.

the propriety of wholesale natural gas rates approved by FERC. *Gallo II, 503 F.3d at 1039 n.11*. In that case, the Ninth Circuit determined that the filed rate doctrine prohibits courts from considering whether "FERC-authorized rates are just and reasonable." Id. "Rather, under the principles of the [f]iled [r]ate [d]octrine, they are just and reasonable as a matter of law," even where the rates at issue are "market-based." Id. Most recently, the Ninth Circuit considered whether the filed rate doctrine barred a retail electricity consumer's antitrust claims alleging that local electricity utilities "artificially increased" the price of wholesale electricity "through their anticompetitive and fraudulent manipulation of the wholesale markets." *Wah Chang, 507 F.3d at 1224*. There, the Ninth Circuit held that the filed rate doctrine barred any claims that require "the courts [to] determine what rates **[**29]** [utility companies] should have charged instead of the rates they did charge." *Id. at 1226*. As was the case in the aforementioned disputes, Plaintiffs' theory of liability requires the Court to determine the reasonableness of wholesale electricity prices exclusively regulated by FERC.[7]

Moreover, to award monetary relief to retail electricity consumers, the Court would be required to determine the difference between wholesale electricity rates during the class period and hypothetical rates that would have been charged but for Defendants' purported anticompetitive conduct. This is exactly the analysis the filed rate doctrine prohibits. See *Wah Chang, 507 F.3d at 1226* (holding that the filed rate doctrine "turns away attempts [like plaintiff's] . . . which necessarily hinge on a claim that the FERC approved rate was too high and would, therefore, undermine FERC's tariff authority through the medium of direct court actions"); see also *Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 930 (9th Cir. 2002)* (noting that courts may not "assum[e] a hypothetical rate different from that actually set by FERC"); *Cnty. of Stanislaus v. Pac. Gas & Elec.* ***[*448]*** *Co., 114 F.3d 858, 863 (9th Cir. 1997)* (quoting *Cost Mgmt. Servs. V. Wash. Natural Gas Co., 99 F.3d 937, 944 (9th Cir. 1996)* (explaining that an antitrust "claim for damages based on a filed rate would be too speculative, because it: 'would require a showing that a hypothetical lower rate should **[**30]** and would have been adopted by [FERC],'" which is a question "best left to the agency itself, rather than the courts")).

HN6[] The Supreme Court has recognized a limited exception to the filed rate doctrine for injunctive relief. See *State of Georgia v. Pa. Ry. Co., 324 U.S. 439, 454-62, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)* (holding that plaintiff could bring antitrust action to enjoin alleged "coercive and collusive influences" in rate-marking); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 422 n. 28, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1922)* (explaining that the filed rate doctrine does not preclude injunctive antitrust actions). In Town of Norwood, for example, the First Circuit considered whether Georgia and Square D Co. required the court to allow the plaintiff's claims seeking injunctive relief where the court had dismissed similar claims for damages. *Town of Norwood, 202 F.3d at 419-20*. In affirming the district court's dismissal of the antitrust claims at issue, the First Circuit cautioned that the filed rate doctrine prohibits an injunction where "any meaningful relief . . . would require the *alteration* of tariffs." *Town of Norwood, 202 F.3d at 420* (emphasis in the original).[8] Although the amended complaint in the instant dispute does not specify what exactly Plaintiffs seek to enjoin Defendants from doing, the Court concludes that any meaningful relief would, at a minimum, require the Court to enjoin conduct authorized by the tariff **[**31]** governing Defendants' no-notice contracts. Specifically, Plaintiffs assert that Defendants' anticompetitive conduct began in the upstream natural gas transmission market pursuant to which Defendants allegedly manipulated or abused provisions of no-notice contracts that allow their subsidiaries to adjust natural gas capacity reservations along the Algonquin Pipeline

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[7] Plaintiffs rely on *Verizon Del., Inc. v. Covad Commc'ns Co., 377 F.3d 1081 (9th Cir. 2004)* for the proposition that the filed rate doctrine does not bar claims that "seek[] repayment in accord with the criteria in the filed rate[]" doctrine. *Verizon, 377 F.3d at 1090*; see D. 48 at 25. That case is inapplicable. There, the court determined that the plaintiff was entitled to recoup funds the defendant would have owed the plaintiff pursuant to filed rates but for defendant's alleged anticompetitive scheme to reduce its service costs. See *Verizon, 377 F.3d at 1090* (stating that the plaintiff may "recoup overpayments . . . to enforce the filed rates"). Where, as here, the plaintiff also sought damages in excess of filed rates, the Ninth Circuit concluded that the filed rate doctrine bars such recovery. Id. (explaining that the plaintiff may not, however collect overpayments that "would be in addition to the filed rate").

[8] By contrast to the relief sought in Town of Norwood, "Georgia and Square D Co. . . . concerned . . . possible price-fixing conspiracies that conceivably could have been enjoined without tampering with the tariffed rates themselves." *Town of Norwood, 202 F.3d at 419-20*.

at any time without penalty. D. 33 ¶ 8. Plaintiffs concede that FERC maintains authority to regulate the interstate transmission of natural gas, id. ¶ 77, and approved the no-notice contracts at issue. D. 48 at 34. In addition, Plaintiffs cannot dispute that the filed rate doctrine protects not only agency authority over tariffed rates but also "ancillary conditions and terms included in the tariff," including, for example, no-notice contracts and relevant provisions allowing LDCs to cancel capacity reservations at any time without penalty. *Town Norwood, 202 F.3d at 416*; see D. 48 at 16 (acknowledging that FERC granted LDCs authority to enter no-notice contracts and adjust capacity reservations pursuant to a tariff governing interstate transportation of natural gas along the Algonquin Pipeline). Accordingly, to the extent Plaintiffs seek to enjoin Defendants **[**32]** from exercising rights pursuant to contracts subject to a filed tariff, Plaintiffs ask the Court do exactly what the First Circuit has declared it cannot, *i.e.*, to alter the terms of tariffs approved by FERC. See *Town of Norwood, 202 F.3d at 420*.

2. *Plaintiffs Have Not Established an Applicable Exception to the Filed Rate Doctrine*

Alternatively, Plaintiffs argue that, "even if the filed rate doctrine could be assumed to apply here as a general matter, **[*449]** courts have consistently carved out an exception to the filed rate doctrine where plaintiffs challenge conduct not required by the regulations." D. 48 at 32. Plaintiffs contend that such an exception is appropriate here because Plaintiffs are not challenging tariffs or rates filed with FERC; rather, they are only challenging Defendants' "business choices" with respect to no-notice contracts. Id. Even if this argument was not rendered moot by the Court's conclusion that Plaintiffs' requested damages and injunctive relief run afoul of the filed rate doctrine, the Court nonetheless concludes that any such exception is inapplicable here.

Plaintiffs claim that Defendants' artificial restriction of natural gas through the alleged abuse of **[**33]** no-notice contracts constitutes an improper business decision that "will not be 'immunized from antitrust liability.'" Id. at 35 (quoting *City of Mishawaka, Ind. v. Ind. & Mich. Elec. Co., 560 F.2d 1314, 1320 (7th Cir. 1977))*. For support, Plaintiffs primarily rely upon *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*, *Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992)* and *Composite Co., Inc. v. Am. Int'l Grp., Inc., 988 F. Supp. 2d 61 (D. Mass. 2013)*. Having reviewed these cases, the Court concludes that they are readily distinguishable from the instant case.

First, Otter Tail neither concerns the filed rate doctrine's preclusive effect on antitrust challenges to tariffed rates or ancillary matters exclusively governed by a federal regulatory agency nor supports the purported exception to the filed rate doctrine that Plaintiffs suggest is applicable in this case. See *Otter Tail, 410 U.S. at 373-77*. Otter Tail involved an electric company's refusal to wheel electric power over its transmissions lines to municipal consumers as part of an alleged monopolization scheme. *Id. at 373*. In Otter Tail, the government brought an action to enjoin the electric company's anticompetitive conduct, and the Supreme Court concluded that Congress did not displace the applicability of federal ***antitrust law*** to the conduct at issue so there was no conflict between ***antitrust law*** and the FPC's "limited authority" to order interconnection of transmission lines. *Otter Tail, 410 U.S. at 373-77*. As other courts have recognized, however, there is **[**34]** a critical distinction between Otter Tail and cases concerning anticompetitive conduct in markets that Congress entrusted exclusively to FERC. See *In re Enron Corp., 326 B.R. 257, 264 (Bankr. S.D.N.Y. 2005)* (distinguishing Otter Tail in holding that the filed rate doctrine precluded federal and state antitrust claims alleging that wholesale energy suppliers manipulated energy markets and overcharged for energy through anticompetitive acts during California's energy crisis); see also *California ex rel. Lockyer v. Dynegy, Inc., 375 F. 3d 831, 852 (9th Cir. 2004)* (noting FERC's exclusive authority "both to enforce and to seek remedy" regarding violation of tariff provisions); *AEP Tex. N. Co. v. Tex. Indus. Energy Consumers, 473 F.3d 581, 585 (5th Cir. 2006)* (FERC "is the appropriate arbiter of any disputes involving a tariff's interpretation"); *Town of Norwood, 202 F.3d at 420* (explaining that "the rationale for the filed rate doctrine is to protect the exclusive authority of the agency to accept or challenge [its] tariffs") (citing *Arkla, 453 U.S. at 571, 577 78)*.

Second, *Brown* is an outlier case that various courts, including the First Circuit, have declined to extend to cases concerning the filed rate doctrine's protection of rates and tariffs approved by federal agencies. See, e.g., *McCray v. Fid. Nat'l Title Ins. Co., 636 F. Supp. 2d 322, 329 (D. Del. 2009)* (explaining that "[o]ther than the Ninth Circuit in Brown, no other court has taken such a narrow view of the applicability **[*450]** of the filed rate doctrine"). In Brown, the Ninth Circuit **[**35]** held that the filed rate doctrine did not apply to title insurance rates submitted to state insurance agencies that were not subjected to "meaningful review by the state." *Brown, 982 F.2d at 394*. However, the Supreme Court "has never indicated that the filed rate doctrine requires a certain type of agency approval or level of regulatory review" to preclude challenges to filed rates or tariffs. *McCray v. Fid. Nat. Title Ins. Co., 682 F.3d 229, 238 (3d Cir. 2012)*. In Square D Co., the Supreme Court held that the filed rate doctrine applied to rates that were filed with but never "investigated and approved by the ICC." *Square D. Co., 476 U.S. at 417 n.19*. The First Circuit has similarly rejected the notion that rates or tariffs approved by FERC must receive a "meaningful review" before the filed rate doctrine can apply. See *Town of Norwood, 202 F. 3d at 419* (holding that "[i]t is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine") (emphasis in the original). Moreover, even the Ninth Circuit has acknowledged that Brown does not make "meaningful review a *sine qua non* for the applicability of the filed rate doctrine." *Carlin v. DairyAmerica, Inc., 705 F.3d 856, 871-72 (9th Cir. 2013)* (noting the filed rate doctrine applies to FERC-approved rates); see *Wah Chang, 507 F.3d at 1227* (stating that although "Wah Chang ululates about FERC's lax oversight . . . laxness **[**36]** does not indicate, much less establish, that Wah Chang can turn directly to the courts for rate relief").

Finally, Plaintiffs' reliance on Composite Co. to carve out an exception to the filed rate doctrine is also inapposite because, as the court makes clear, that decision did not concern a filed rate. *Composite Co., 988 F. Supp. 2d at 77* (holding that the filed rate doctrine did not apply because "the experience-modifier at issue in this case is not a filed rate"). ***HN7***[] The court explained that the "focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determines." *Id. at 78* (quoting *H.J., Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 489 (8th Cir. 1992))* (internal quotation marks omitted). Pursuant to this reasoning, the court in Composite Co. held that the filed rate doctrine did not bar plaintiff's claims because a "decision in favor of plaintiff would not discredit any decision of an administrative agency." Id. The same cannot be said for Plaintiffs' requested relief which, even when packaged as a request to enjoin or award damages for anticompetitive business choices, requires the Court to determine the reasonableness of rates and tariffs approved by FERC.[9]

In sum, the cases Plaintiffs cite in support of **[**37]** the purported exception to the filed rate doctrine for alleged anticompetitive business decisions are inapplicable here. In lieu of an applicable exception, Plaintiffs cannot escape the fact that FERC authorized the business choices that allegedly caused Plaintiffs' injury. See D. 33 ¶ 99 (explaining that "no-notice contracts, which are only available to LDCs, give them power to reserve space, or transmission capacity on the pipeline for a given day and time, then adjust that reservation upward or downward at the last minute without **[*451]** penalty"); see id. ¶ 110 (noting that "capacity cancellations under no-notice contracts do not allow the pipeline to release that capacity to other buyers and sellers wishing to fulfill demand in the market"). Because Plaintiffs' requested relief would require the Court to determine the reasonableness of rates and tariffs approved by FERC and because Plaintiffs have failed to "establish a pertinent limitation on or exception to the filed rate doctrine," the Court holds that the doctrine bars the federal and state law claims in the amended complaint.[10]

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[9] Plaintiffs' reliance on *City of Kirkwood v. Union Elec. Co., 671 F.2d 1173 (8th Cir. 1982)* and *Mishawaka v. Ind. & Mich. Elec. Co., 560 F.2d 1314 (7th Cir. 1977)* to carve out an exception to the filed rate doctrine is similarly unpersuasive. See, e.g., D. 48 at 30. The holdings of these cases turn on the analysis of price squeeze claims that are irrelevant here. Moreover, in the context of price squeeze claims, the First Circuit has declined to follow the reasoning in these cases. See *Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 28-29 (1st Cir. 1990)*.

[10] Plaintiffs also allege that if they cannot pursue their claims in this Court, they lack an adequate remedy. D. 59 at 50-51. ***HN8***[] Although it is true that retail consumers do not have standing to file complaints with FERC, id., courts have consistently held that lack of a remedy does not create an exception to the filed rate doctrine. D. 44 at 26 (citing *Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 128, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990)* (explaining that "[d]espite the harsh effects of the filed rate doctrine, we have consistently adhered to it")); see *Wah Chang, 507 F.3d at 1226-27* (observing that Plaintiff "will not have a separate right of action for damages if it does not have this one, but lack of a damage remedy is not determinative"); *Marcus v. AT&T Corp., 138 F.3d 46, 58 (2d Cir. 1998)* (concluding that "[a]pplication of the filed rate doctrine in any particular case is not determined by . . . the possibility of inequitable results")). Nonetheless, even if Plaintiffs' claims were not barred by the filed rate doctrine, they would still fail for the reasons mentioned herein.

B. Plaintiffs Have Not Stated a Cognizable Antitrust Claim

Even if the filed rate doctrine did not bar **[**38]** Plaintiffs' antitrust claims, those claims would not survive Defendants' motions to dismiss because Plaintiffs lack standing to bring their claims and for the additional reason that Plaintiffs have failed to state a cognizable antitrust monopolization claim.

1. Plaintiffs Lack Antitrust Standing

As an initial matter, Defendants contend that Plaintiffs do not have standing to bring their antitrust claims. D. 43 at 27; D. 44 at 28. ***HN9***[] Federal courts are constitutionally limited to deciding cases or controversies. *Merrimon v. Unum Life Ins. Co. of Am., 758 F.3d 46, 52 (1st Cir. 2014)*. Accordingly, a plaintiff must establish that it has standing in federal court by demonstrating that her complaint alleges a case or controversy recognized under Article III of the Constitution. See *Katz v. Pershing, LLC, 672 F.3d 64, 71 (1st Cir. 2012)*. To do so, "a plaintiff must establish . . . injury, causation, and redressability." *Id.* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. At the pleading stage, "[a]n antitrust plaintiff must show both constitutional standing and antitrust standing." *In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 157 (2d Cir. 2016)*. To determine whether a plaintiff has standing to bring an antitrust cause of action, the Court conducts "an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." *RSA Media, Inc. v. AK Media Grp., Inc., 260 F.3d 10, 13 (1st Cir. 2001)* (quoting *Serpa Corp. v. McWane, Inc., 199 F.3d 6, 9-10 (1st Cir. 1999))* (internal quotation marks omitted). The Court considers:

> (1) the causal connection **[**39]** between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws . . . ; (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) **[*452]** the risk of duplicative recovery or complex apportionment of damages.

Id. at 14 (citation omitted). Although courts weigh each of the six factors, lack of injury, in particular, will generally defeat standing. See *Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 121 (1st Cir. 2011)*. The Court will, therefore, address Defendants' arguments with respect to antitrust injury first.

HN10[] "The Supreme Court has defined 'antitrust injury' as an 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Serpa Corp.,199 F.3d at10* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. To establish antitrust injury, a "proper plaintiff 'must prove more than injury causally linked to an illegal presence in the market.'" *Serpa, 199 F.3d at 10* (quoting *Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. The First Circuit has explained that "[c]ompetitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust **[**40]** injury." *Serpa, 199 F.3d at 10-11*.

Defendants assert that Plaintiffs, who are retail electricity consumers, cannot establish "antitrust injury" because they are not competitors or customers in the natural gas transmission market allegedly restrained by Defendants' anticompetitive conduct. D. 43 at 28-20; D. 44 at 28 30. Specifically, Defendants argue that Plaintiffs have alleged that market manipulation occurred in the natural gas transmission market through Defendants' alleged suppression of New England's natural gas supply, while Plaintiffs' alleged injury occurred in the retail electricity market. According to Defendants, it is not enough that Plaintiffs participated in the retail electricity market, which was indirectly affected by Defendants' antitrust conduct; rather, Plaintiffs must have directly participated in the market in which Defendants' alleged anticompetitive conduct occurred to have standing. D. 44 at 29. Defendants cite Aluminum Warehousing for the proposition that a "putative plaintiff must be a participant in the very market that is directly restrained" to suffer antitrust injury. *Aluminum Warehousing, 833 F.3d at 161*. In Aluminum Warehousing, aluminum purchasers alleged that futures traders and aluminum warehouse owners conspired **[**41]** to artificially inflate the price of storing aluminum in London Metal Exchange ("LME") Warehouses. *Id. at 155*. The plaintiffs in that case were not participants in any of the markets in which the defendants operated, however, they alleged that they suffered antitrust injury because their role in the physical aluminum market was "inextricably intertwined" with the defendants' alleged anticompetitive scheme in the aluminum storage market. *Id. at 162*. The plaintiffs in Aluminum Warehousing asserted that the increase in storage costs caused by the defendants' anticompetitive conduct also increased the price the plaintiffs' paid for aluminum. *Id. at 156*. The Second Circuit nevertheless held there was no cognizable antitrust injury because "the injury [the plaintiffs] claim was suffered down the distribution chain of a separate market, and was a purely incidental byproduct of the alleged scheme." *Id. at 162*. Consistent with the Second Circuit's decision in Aluminum Warehousing, Defendants here urge the Court to dismiss Plaintiffs' claims because they similarly do not participate in the market in which Defendants' alleged unlawful conduct occurred. D. 44 at 29.

By contrast to the plaintiffs in *Aluminum Warehousing*, Plaintiffs do **[**42]** not affirmatively allege that they are "proper" **[*453]** plaintiffs for the purpose of establishing antitrust injury. D. 48 at 42-44. Instead, Plaintiffs argue that standing is appropriate where, as here, there is "no one else 'with the incentive or ability to sue.'" D. 48 at 42 (quoting *SAS of P.R., Inc. v. P.R. Tel. Co., 48 F.3d 39, 45 (1st Cir. 1995))*. In SAS, the First Circuit explained that "[t]he most obvious reason for conferring standing on a second-best plaintiff is that, in some general category of cases, there may be no first best with the incentive or ability to sue." *SAS, 48 F.3d at 45* (denying standing where actors directly threatened by the market had "ample incentive and ability" to challenge antitrust violations); cf. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 542, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (concluding that the "existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party" to exercise standing). In the instant litigation, Plaintiffs assert that actors in the natural gas transmission market, including Defendants' subsidiaries and competitors, are unlikely to bring suit given that they benefited from Defendants' anticompetitive conduct in the form of inflated prices for natural gas **[**43]** on the spot market. However, Plaintiffs' pleadings undermine the persuasiveness of their argument. The amended complaint alleges that Defendants, through their manipulation of no-notice contracts, did not release their excess natural gas capacity so that other actors in the market could use that capacity. D. 33 ¶ 147. If Defendants had released excess capacity, other companies—such as generators looking to jump into the real-time auction at the last minute—could have purchased it. Id. Surely, at least one gas seller or purchaser that was consistently deprived the benefits of excess natural gas transmission capacity due to Defendants' alleged anticompetitive conduct possessed the requisite incentive or ability to sue Defendants for direct injury in the natural gas transmission market.[11]

Plaintiffs also attempt to invoke the Supreme Court's decision in *Blue Shield of Va. v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*, which allowed antitrust claims to proceed where the plaintiff's injury was "inextricably intertwined" with the injury the defendant's conduct sought to inflict upon the relevant market or participants. D. 44 at 21. In McCready, the Supreme Court considered whether a plaintiff, who received health care coverage under a Blue Shield of **[**44]** Virginia ("Blue Shield") health plan, could sue under antitrust laws for an alleged conspiracy between Blue Shield and Virginia psychiatrists to exclude psychologists from the market by refusing to reimburse health plan subscribers like the plaintiff for their services. *McCready, 457 U.S. at 467-68*. Although the plaintiff in McCready was not a psychologist (and therefore not the immediate target of the alleged conspiracy), the Supreme Court allowed the plaintiff's claims to proceed because her injury "was inextricably **[*454]** intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Id. at 484*. The court explained further that McCready's injury was a "necessary step in effecting the ends of the alleged illegal conspiracy" and "the very means by which it is alleged that [the defendants] sought to achieve its

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[11] Plaintiffs' argument that Defendants' competitors in the natural gas transmission market have no incentive to sue Defendants does not require the Court to reach a different result. D. 48 at 42. Plaintiffs rely on a paragraph of their amended complaint regarding the wholesale and retail electricity markets in New England. D. 33 ¶ 164. In addition, Plaintiffs have not alleged that every competitor and customer in the natural gas transmission market benefited from Defendants' alleged anticompetitive conduct such that there is not a direct market actor with the incentive or capacity to sue Defendants, as required to satisfy the exceptional circumstances under which courts confer standing on a "second-best plaintiff." See *SAS, 48 F.3d at 45*.

illegal ends." Id. at 479. The First Circuit has explained that McCready "may be an instance in which standing was extended to a plaintiff who was only derivatively injured" or it "can also be read as a case in which the plaintiff was a purchaser in the very market directly distorted by the antitrust violation." SAS, 48 F.3d at 45-46. The First Circuit also cast doubt on whether "this [inextricably intertwined] **[**45]** language—if taken as physical image—was ever intended as a legal test of standing." Id. at 46. Accordingly, employing a narrow reading of McCready based on the facts at issue in that case, the Court concludes that Plaintiffs have not established antitrust standing. See Winters v. Ocean Spray Cranberries, Inc., 296 F. Supp. 3d 311, 320 (D. Mass. 2017), reconsideration denied, motion to certify appeal granted, No. CV 12-12016-RWZ, 2018 U.S. Dist. LEXIS 63036, 2018 WL 1627442 (D. Mass. Jan. 2, 2018) (applying McCready to antitrust claims in view of the First Circuit's analysis in SAS). The objective of the alleged anticompetitive scheme in McCready was to exclude psychologists from Virginia's market for psychotherapy, and the mechanism by which that scheme was accomplished required plaintiff and others similarly situated to pay out of pocket for psychologists' services, which were not reimbursable under the Blue Shield plan at issue. McCready, 457 U.S. at 467-68. As such, the plaintiff's injury was integral to the injury the conspirators sought to inflict upon psychologists. Id. at 484. Plaintiffs here allege that Defendants sought to increase the profits of their natural-gas generated electricity plants and the value of their non-natural gas electricity generating assets by suppressing natural gas supply and, in turn, artificially inflating the wholesale price of electricity paid to **[**46]** power generators in New England. D. 33 ¶¶ 150-163. By contrast to the plaintiffs in McCready, the increased cost of retail electricity borne by Plaintiffs here was merely incidental even to Defendants' scheme, as alleged by Plaintiffs. That is, Plaintiffs' injury was not the "very means" by which Defendants sought to achieve their "illegal ends." McCready, 457 U.S. at 479. The Court, therefore, concludes that Plaintiffs have not suffered an antitrust injury. See SAS, 48 F.3d at 43 (explaining that "even where a violation exists and a plaintiff has been damaged by it, the courts—for reasons of prudence—have sought to limit the right of private parties to sue for damages or injunctions").

Assuming *arguendo* that Plaintiffs did in fact suffer an antitrust injury, the Court would still have to determine whether Plaintiffs' injury is sufficiently connected to Defendants' alleged anticompetitive conduct. See Winters, 296 F. Supp. 3d at 322. This task is guided by the first and fourth factors of the standing analysis, which require examination of the "causal connection between the alleged antitrust violation and harm to the plaintiff" and "the directness with which the alleged market restraint caused the asserted injury." RSA, 260 F.3d at 14 (citation omitted). The causal **[**47]** connection between Defendants' alleged suppression of the supply of natural gas and Plaintiffs' injury as retail electricity consumers is attenuated at best. Plaintiffs' injury allegedly stems from Defendants' anticompetitive conduct in the natural gas transmission market, which is at least three markets removed from the retail electricity market. See, e.g., D. 33 ¶ 8. Accordingly, for Plaintiffs to suffer **[*455]** any injury, the anticompetitive effect of Defendants' conduct must pass through the natural gas supply transmission market, to the spot market for consumers with "variable and less predictable" natural gas needs, id. ¶ 88, to the wholesale electricity auction, which involves a complicated bidding process designed to discourage competitors from offering prices well above the competition, id. ¶ 57, and finally to retail electricity consumers. In addition, the lack of directness between the alleged restraint and injury counsels in favor of dismissal because Plaintiffs' injury was merely an offshoot of the injuries suffered by buyers in the spot market for natural gas and the wholesale electricity market. See Associated Gen., 459 U.S. at 540-41 (concluding that the plaintiff lacked antitrust standing where "the chain **[**48]** of causation between [the plaintiff's] injury and the alleged restraint . . . contains several somewhat vaguely defined links" and where "[i]t is obvious that any such injuries were only an indirect result of whatever harm may have been suffered" by more immediate victims); see also Sullivan v. Tagliabue, 828 F. Supp. 114, 118 (D. Mass. 1993), aff'd, 25 F.3d 43 (1st Cir. 1994) (dismissing one plaintiff's antitrust claims for lack of standing where "[i]t is obvious that any injury suffered . . . was only an indirect result of the alleged injury inflicted" upon another plaintiff). For similar reasons, a district court in this Circuit dismissed antitrust claims involving an alleged restraint in one market that impacted prices in a second market. Winters, 296 F. Supp. 3d at 322 (dismissing antitrust claims where "the harm [plaintiffs'] allege is indirect" given that defendant Ocean Spray "first influences independent handlers, who in turn, lower the prices they pay independent growers"). The Court concludes that Plaintiffs' injury is indirect and only remotely connected to Defendants' alleged anticompetitive conduct.

Further, even as alleged, the nature of any damages is attenuated and the risk of duplicative recovery is real. As Defendant Eversource indicates, determining damages in this case would require **[**49]** speculation. D. 43 at 29. For example, for each day during the class period, the factfinder would first be required to determine whether

Defendants adjusted their natural gas capacity reservations. Then, the factfinder would have to distinguish between the anticompetitive suppression of natural gas supply and Defendants' legitimate need to adjust reservation capacity for the benefit of natural gas customers. Subsequently, the factfinder would need to determine whether Defendants' alleged suppression of New England's natural gas supply impacted the market price of natural gas in the spot market that day, whether the clearing price for wholesale electricity was artificially inflated because of the price of natural gas that same day and, finally, the extent to which the resulting artificial inflation of wholesale electricity prices was passed on to retail electricity consumers. In other words, to determine Plaintiffs' damages based upon Plaintiffs' allegations, the factfinder would be required to engage in an analysis of how multiple markets functioned on a given day, including evaluation of the inputs and outputs for each market, factors that influenced prices offered and accepted by **[**50]** actors in each market and the effectiveness of an auction process regulated by FERC. There is a risk that resulting damages calculations (if they could be fairly determined) would be speculative and would present significant concerns regarding apportionment of damages and the risk of duplicative recovery. Any damages award would need to be correctly apportioned amongst hundreds of thousands of retail electricity customers of Avangrid and Eversource's subsidiaries. In addition, allowing the Plaintiffs, as retail electricity consumers, **[*456]** to move forward with their claims, opens the door for duplicative recovery in contravention of well settled ***antitrust law*** since Plaintiffs' injuries are the indirect result of harm allegedly suffered by actors in the spot market for natural gas or the wholesale electricity market. See *Associated Gen., 459 U.S. at 545* (reversing lower court's holding in favor of antitrust plaintiffs where "the [d]istrict [c]ourt would face problems of identifying damages and apportioning them among directly victimized . . . and indirectly affected . . . entities"); *Ill. Brick Co. v. State of Illinois, 431 U.S. 720, 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* (stating that "[p]ermitting the use of pass-on theories . . . would transform treble-damages actions into massive efforts to apportion the **[**51]** recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers").

Although Plaintiffs allege that Defendants maintained an improper motive for artificially restricting New England's natural gas supply, the Court concludes that Plaintiffs' allegations are insufficient as a matter of law. The remaining factors for antitrust standing—including the nature of Plaintiffs' injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and Plaintiffs' injury and the potential for duplicative recovery or complex apportionment of damages—weigh heavily against judicial enforcement of Plaintiffs' antitrust claims.

2. Plaintiffs Have Not Sufficiently Alleged Monopoly Power

Even if Plaintiffs' federal antitrust claims were not barred by the filed rate doctrine or foreclosed by Plaintiffs' lack of antitrust standing, the Court would conclude that they do not state plausible antitrust claims. ***HN11***[] *Section 2 of the Sherman Act* makes it illegal to "monopolize, or attempt to monopolize . . . any part of the trade or commerce" among several states. *Díaz Aviation Corp. v. Airport Aviation Servs., 716 F.3d 256, 265 (1st Cir. 2013)* (quoting *15 U.S.C. § 2*) (internal quotation marks omitted). **[**52]** "To prove a violation of this statute, a plaintiff must demonstrate (1) that the defendant possesses 'monopoly power in the relevant market' and (2) that the defendant has acquired or maintained that power by improper means." *Town of Concord, Mass. v. Bos. Edison Co., 915 F.2d 17, 21 (1st Cir. 1990)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. To prove attempted monopolization, a plaintiff must demonstrate "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

The thrust of Defendants' arguments on the plausibility of Plaintiffs' claims concern the first prong of the monopolization analysis, *i.e.*, whether Defendants possess monopoly power in the relevant market. As an initial matter, Defendant Avangrid contends that Plaintiffs have failed to allege a relevant geographic market. See *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 197 (1st Cir. 1996)* (explaining that "[b]efore determining market share, however, the relevant geographic market must be defined"). ***HN12***[] "The plaintiff carries the burden of describing a well-defined relevant market, both geographically and by product, which the defendants monopolized." Id. (quoting *H.J., Inc. v. Int'l Tel. & Tel. Corp., 867 F.2d 1531, 1537 (8th Cir. 1989))*.

Although the question of market definition is usually one of fact for the jury, "a plaintiff must present sufficient **[**53]** evidence from **[*457]** which a reasonable jury could find the existence of the proposed relevant market." *Coastal Fuels, 79 F.3d at 197*. Defendant Avangrid alleges that "New England" is not a plausible relevant geographic market because Plaintiffs have not "pled facts to support the notion that a residential retail electricity consumer in one town, county, city or state in New England can turn to supplies in any other town, county, city or state." D. 44 at 33. This is not the test for determining whether a relevant geographic market has been defined. To the contrary, the First Circuit has determined that the relevant geographic market consists of "the geographic area in which the defendant faces competition and to which consumers can practically turn for alternative sources of the product." *Coastal Fuels, 79 F.3d at 196*. Plaintiffs have sufficiently alleged that the six states that constitute New England are organized into a single electricity market in which Defendants participate, D. 33 ¶¶ 59, 102-3, and alternatives to Defendants' retail electricity companies exist in that geographic market.

Defendants also contend that the amended complaint fails to establish either through direct or circumstantial evidence that their respective shares of the retail **[**54]** electricity market are substantial enough to infer market power for a monopolization claim. ***HN13***[] Courts define "[m]onopoly power . . . as 'the power to raise prices and exclude competition.'" *Hewlett-Packard Co. v. Bos. Sci. Corp., 77 F. Supp. 2d 189, 195 (D. Mass. 1999)* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. "Market power can be shown through two types of proof," either through "direct evidence of market power," such as "actual supracompetitive prices and restricted output," or "circumstantial evidence of market power." *Coastal Fuels, 79 F.3d at 196-97*. The amended complaint asserts that Eversource, through subsidiaries that provide retail electricity to residents in Massachusetts, Connecticut and New Hampshire, services more than 3.1 million electricity customers in 500 New England communities. D. 33 ¶ 102. Avangrid also owns subsidiaries that provide retail electricity to more than 950,000 electricity customers located in Connecticut and Maine. D. 33 ¶ 103. The amended complaint does not, however, provide details regarding Eversource's or Avangrid's alleged share of the retail electricity market. Defendants claim this omission is fatal to Plaintiffs' complaint. See D. 43 at 31 n.19. Moreover, Defendant Avangrid argues that even assuming that only Eversource and Avangrid provide retail electricity in New England, Plaintiffs' **[**55]** allegations indicate that Avangrid has 23% share of the market, which is insufficient to support a monopolization claim. D. 44 at 31-32. By comparison, courts in the First Circuit determined that "[f]or pleading purposes, an allegation of market share of 70 percent has been held to be an adequate basis for an inference of power in a relevant market." *Cal. Ass'n of Realtors, Inc. v. PDFfiller, Inc., No. CV 16-11021-IT, 2018 U.S. Dist. LEXIS 45482, 2018 WL 1403330, at *10 (D. Mass. Mar. 2, 2018)*, report and recommendation adopted, *No. 16-CV-11021-IT, 2018 U.S. Dist. LEXIS 44674, 2018 WL 1399296 (D. Mass. Mar. 19, 2018)* (quoting *Hewlett-Packard, 77 F.2d at 195-96*).

In response, Plaintiffs contend that they have sufficiently alleged direct evidence of monopoly power by pointing to Defendants' collective control over other markets, other than the retail electricity market, that allegedly determine retail electricity prices. See, e.g., D. 33 ¶ 94, 99, 113, 118; see also D. 48 at 39. Specifically, Plaintiffs allege that Defendant Eversource partially owns New England's principal natural gas pipeline. D. 33 ¶ 95. Both Eversource and Avangrid own and operate multiple LDCs. Id. ¶ 97. Of the **[*458]** eight largest LDCs in New England, half are owned by Eversource or Avangrid. Id. As a result of their LDC operations, Eversource and Avangrid possess a large number of "no-notice" contracts **[**56]** for natural gas transmission capacity, which allow Defendants' LDCs to reserve large quantities of natural gas transmission capacity. Id. ¶ 127. In addition, LDCs can adjust their transmission capacity reservations upward or downward at any time and without penalty and, as a result, LDCs control the supply of natural gas transmitted to New England. Id. ¶ 99. Finally, Defendants' combined ability to suppress natural gas supply grants them control over the price of wholesale electricity, which, in turn, impacts the price of retail electricity for the reasons previously explained. Nonetheless, as Defendants correctly note, Plaintiffs have failed to allege any facts indicating that Avangrid and Eversource each separately have the power to control or raise prices of any product in any market. ***HN14***[] At bottom, a claim for monopolization requires that Plaintiffs allege facts sufficient to establish that Defendants separately possessed monopoly power in the relevant market. Accordingly, courts in the First Circuit and elsewhere have rejected monopolization claims based on a "shared monopoly" theory of liability. See *PSW, Inc. v. VISA U.S.A., Inc., No. C.A. 04-347T, 2006 U.S. Dist. LEXIS 12157, 2006 WL 519670, at *11 (D.R.I. Feb. 28, 2006)* (explaining that "to state any **[**57]** claim under Section Two's actual or attempted monopoly clauses, a claimant is required to assert that the *individual* market power of a defendant is sufficient to constitute a monopoly, in this analysis, the combined monopoly power of competitors is irrelevant and insufficient") (emphasis in the original); see also *RxUSA Wholesale, Inc. v. Alcon Labs., Inc., 661 F. Supp. 2d 218, 235 (E.D.N.Y. 2009)*, aff'd sub nom. *RxUSA Wholesale Inc. v. Alcon Labs., 391 F. App'x 59 (2d Cir. 2010)* (explaining that courts in the Second Circuit "have uniformly held or approved the view that allegations of a 'shared monopoly' do not state a claim under *section 2 of the Sherman Act*") (internal citations and quotation marks omitted); *Sun Dun, Inc. of Wash. v. Coca-Cola Co., 740 F. Supp. 381, 391 (D. Md. 1990)* (dismissing monopolization and attempted monopolization claims alleging a shared monopoly theory of liability). Where the allegations here do not allege Defendants' individual capacity to control the retail electricity market, the Plaintiffs have not met their burden under the elements of either monopolization or attempted monopolization. Accordingly, the Plaintiffs have not stated cognizable antitrust claims.[12]

C. State Law Claims

Plaintiffs bring claims for damages and injunctive relief under various state antitrust, consumer protection and unfair trade statutes. Although the filed rate doctrine applies with equal force to Plaintiffs' **[**58]** state law claims, see *Snohomish, 384 F.3d at 761* (explaining that the filed rate doctrine preempted antitrust and unfair competition claims grounded in state law where such claims required the court to determine rates that "would have been achieved in a competitive market") (internal quotation marks omitted), the Court concludes that Plaintiffs' state law claims also fail for the reasons stated below.

[*459] First, Plaintiffs' inability to demonstrate antirust standing, as discussed above, forecloses Plaintiffs' state antitrust claims under Maine's antitrust laws, *10 Me. Rev. Stat. Ann. §§ 1101 et seq.* See *Knowles v. Visa U.S.A. Inc., No. CIV.A. CV-03-707, 2004 Me. Super. LEXIS 227, 2004 WL 2475284, at *3-9 (Me. Super. Oct. 20, 2004)* (applying the factors for determining federal antitrust standing in evaluating claims brought under Maine's antitrust statute). Second, Plaintiffs fail to state a claim under ***HN15***[] state consumer protection and unfair competition statutes, which each require allegations regarding (1) an unfair or deceptive act or practice on the part of the defendant; (2) an injury or loss suffered by the consumer; and (3) a causal connection between the wrongful conduct and the consumer's injury. See *Shaulis v. Nordstrom, Inc., 865 F.3d 1, 6 (1st Cir. 2017)* (explaining that "[t]o state a viable claim [under the *Massachusetts Consumer Protection Act*], the plaintiff must allege **[**59]** that she has suffered an 'identifiable harm' caused by the unfair or deceptive act that is separate from the violation itself") (quoting *Tyler v. Michaels Stores, Inc., 464 Mass. 492, 503, 984 N.E.2d 737 (2013))*; *Edwards v. N. Am. Power & Gas, LLC, 120 F. Supp. 3d 132, 141 (D. Conn. 2015)* (outlining requirements for violation of Conn. Gen. Stat. § 42-110 *et seq.*); *McKinnon v. Honeywell Int'l, Inc., 2009 ME 69, 977 A.2d 420, 427 (Me. 2009)* (explaining that establishing a violation of *Maine's Unfair Trade Practices Act* requires, at a minimum, that plaintiff show a loss of money or property and substantial injury caused by the alleged deceptive or unfair practice); *State v. Moran, 151 N.H. 450, 452, 861 A.2d 763 (2004)* (explaining that courts should consider whether defendant's conduct caused "substantial injury to consumers" in determining whether such conduct constitutes a violation of the *New Hampshire Consumer Protection Act*); *Carter v. Gugliuzzi, 168 Vt. 48, 716 A.2d 17, 21 (Vt. 1998)* (explaining that the *Vermont Consumer Fraud Act* "provides a remedy for any consumer who contracts for goods or services and, in reliance upon false or fraudulent representations or promises, sustains damages or injury" caused by the defendant).

For the reasons previously stated, *supra* at 31-32, the Court concludes that Plaintiffs' injury is too remote to satisfy the causation prongs of the various state law claims. See, e.g., *Empire Today, LLC v. Nat'l Floors Direct, Inc., 788 F. Supp. 2d 7, 30 (D. Mass. 2011)* (explaining that the relationship between defendant's allegedly unlawful conduct and plaintiff's injury "only proves a correlation, not a causation"); *In re Hannaford Bros. Co. Customer Data Sec.*

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[12] Because Plaintiffs have not stated cognizable antitrust claims for monopolization, the Court does not reach Defendant Avangrid's argument that Plaintiffs' antitrust claims are grounded in a "refusal to deal" theory of antitrust liability that runs afoul of well-settled Supreme Court precedent. D. 43 at 25 (citing *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)* and *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004))*.

Breach Litig., 660 F. Supp. 2d 94, 100 (D. Me. 2009) (explaining **[**60]** that under Maine law it is well settled that "a plaintiff may not recover damages if the causal relation between a defendant's tortious act . . . and the harm suffered is 'too attenuated'") (quoting *Stubbs v. Bartlett, 478 A.2d 690, 693 (Me. 1984))*; *Vacco v. Microsoft Corp., 260 Conn. 59, 793 A.2d 1048, 1050 (Conn. 2002)* (concluding that "plaintiff's claimed injuries are too indirect and remote with respect to the defendant's allegedly anticompetitive conduct for the plaintiff to recover under *CUTPA*"). Nevertheless, the Court, for the reasons previously mentioned, has dismissed all of Plaintiffs' federal claims and declines to exercise jurisdiction over the remaining state law claims. See *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726-27, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* (explaining that if the "federal claims are dismissed before trial . . . the state claims should be dismissed as well" and "if it appears that the state issues substantially predominate . . . the state claims may be dismissed . . . and left for resolution to state tribunals").

[*460] VI. Conclusion

For the foregoing reasons, the Court ALLOWS Defendants' motions to dismiss, D. 41; D. 42.

So Ordered.

/s/ Denise J. Casper

United States District Judge

End of Document

[FTC v. Tronox Ltd.](#)

United States District Court for the District of Columbia

September 12, 2018, Decided

Case No. 1:18-cv-01622 (TNM)

Reporter

332 F. Supp. 3d 187 *; 2018 U.S. Dist. LEXIS 155127 **; 2018-2 Trade Cas. (CCH) P80,510

FEDERAL TRADE COMMISSION, Plaintiff, v. TRONOX LIMITED et al., Defendants.

Prior History: *In re Tronox Ltd., 2018 FTC LEXIS 14 (F.T.C., Feb. 2, 2018)*

Core Terms

chloride, merger, prices, REDACTED, producers, customers, sulfate, titanium dioxide, chloride-process, firms, plant, paint, preliminary injunction, regions, concentrated, effects, output, hypothetical, global, anticompetitive, monopolist, withholding, products, markets, sales, consumers, antitrust, pigment, costs, proposed transaction

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

HN1[] **US Federal Trade Commission Actions, Judicial Review**

An administrative law judge's ruling on the legality of a proposed transaction is reviewable by the Commissioners of the Federal Trade Commission, and a federal appeals court may in turn review the agency's final decision.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

HN2[] **Remedial Powers, Federal Trade Commission Act**

Clayton Act § 7 (*15 U.S.C.S. § 18*) prohibits acquisitions the effect of which may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce or in any activity affecting commerce in any section of the country. If the Federal Trade Commission has reason to believe that a corporation is violating, or is about to violate, § 7, it may seek a preliminary injunction to prevent a merger pending the Commission's administrative adjudication of the merger's legality. Federal Trade Commission Act § 13(b) (*15 U.S.C.S. § 53(b)*) authorizes district courts to grant a preliminary injunction where such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

HN3[] **Remedial Powers, Federal Trade Commission Act**

For relief under Federal Trade Commission Act § 13(b) (*15 U.S.C.S. § 53(b)*), the Federal Trade Commission (FTC) must establish that there is a reasonable probability that the challenged transaction will substantially impair competition. Congress intended this standard to depart from what it regarded as the then-traditional equity standard, which it characterized as requiring the plaintiff to show: (1) irreparable damage, (2) probability of success on the merits and (3) a balance of equities favoring the plaintiff. The FTC is not held to the high thresholds applicable where private parties seek interim restraining orders, and § 13(b) instead creates a unique public interest standard rather than the more stringent, traditional equity standard for injunctive relief.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

HN4[] **Remedial Powers, Federal Trade Commission Act**

The public interest standard under Federal Trade Commission Act § 13(b) (*15 U.S.C.S. § 53(b)*) requires courts to measure the probability that, after an administrative hearing on the merits, the Federal Trade Commission (FTC) will succeed in proving that the effect of the proposed transaction may be substantially to lessen competition in violation of the Clayton Act. The Commission meets this standard if it has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the court of appeals.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

HN5[] **Remedial Powers, Federal Trade Commission Act**

To determine the likelihood of success on the merits in a Federal Trade Commission (FTC) action challenging a merger, a court applies a burden-shifting framework. First, the FTC must show that the merger will lead to undue concentration in the market for a particular product in a particular geographic area. The Commission thus bears the initial burden of (1) defining the appropriate product market, (2) defining the appropriate geographic market, and (3) showing that the merger will lead to undue concentration in the relevant product and geographic market. Such a showing establishes a presumption that the merger will substantially lessen competition. The defendants can rebut this presumption by showing that the Commission's prima facie case inaccurately predicts the merger's probable effect on future competition. If the defendants make this showing, the burden of producing further evidence of anticompetitive effects shifts back to the government. The ultimate burden of persuasion remains with the government at all times. In evaluating either party's evidence, antitrust theory and speculation cannot trump facts.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

HN6[] **Remedial Powers, Federal Trade Commission Act**

In addition to evaluating the prima facie case made by the Federal Trade Commission (FTC) and any rebuttal evidence proffered by the defendant, a court must also weigh the equities involved. The public interest in effective enforcement of the antitrust laws is of primary importance, and a showing of likely success on the merits will presumptively warrant an injunction. If, on the other hand, the FTC cannot show a likelihood of success on the merits, equities alone will not justify an injunction.

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

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

A market's outer boundaries are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Within this market, however, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The appropriate submarket can be identified by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Evidence of industry or public recognition of the submarket as a separate economic unit matters because courts assume that economic actors usually have accurate perceptions of economic realities.

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

HN8[] **Relevant Market, Product Market Definition**

The mere fact that the prices of two goods move upward or downward together need not mean that they are substitutes. Rather than high cross-elasticity of demand, correlated price movements might reflect the similar responses of different markets to similar changes, as when all prices move up in response to changes in common costs.

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

HN9[] **Relevant Market, Product Market Definition**

For antitrust purposes, the relevant market analysis is based on the narrowest market principle. This principle holds that, because a relevant market cannot meaningfully encompass an infinite range of products, it must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn.

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

HN10[] Relevant Market, Product Market Definition

Whatever the market urged by the Federal Trade Commission, the other party can usually contend plausibly that something relevant was left out, that too much was included, or that dividing lines between inclusion and exclusion were arbitrary. There is some artificiality in any boundaries, but such fuzziness is inherent in bounding any market. Isolated examples of potential substitutability do not outweigh consistent testimony and representations of industry participants or empirical evidence.

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

HN11[] Relevant Market, Geographic Market Definition

Like the product market, the relevant geographic market must correspond to the commercial realities of the industry and be economically significant. It encompasses the area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition.

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

HN12[] Relevant Market, Geographic Market Definition

The hypothetical monopolist test seeks to determine whether a hypothetical company that is the only seller of the relevant product to customers in the relevant geography could profitably impose a small but significant and non-transitory increase in price (SSNIP). If this hypothetical monopolist can profit from imposing a SSNIP without losing a critical mass of customers, then a relevant antitrust market has been defined. If, on the other hand, customers can defeat the price increase by substitution away from the relevant product or by arbitrage, the market definition must be broadened.

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

HN13[] Relevant Market, Geographic Market Definition

When a hypothetical monopolist could discriminate based on customer location, the Federal Trade Commission may define geographic markets based on the locations of targeted customers. Geographic markets of this type encompass the region into which sales are made.

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN14[] Antitrust, Horizontal Mergers

The Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission have been repeatedly relied on by the courts. The Merger Guidelines are not binding, but the court of appeals and other courts have looked to them for guidance in merger cases.

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN15[] **Antitrust, Horizontal Mergers**

Market concentration is often one useful indicator of likely competitive effects of a merger. The Herfindahl-Hirschman Index (HHI) is a common economic measure of such concentration. The HHI is calculated by squaring the market share of each firm in the market and adding up these squares. Squaring the individual market shares allocates proportionately greater weight to firms with larger shares, reflecting the larger threat to competitive behavior they pose. For antitrust purposes, the Federal Trade Commission and the U.S. Department of Justice generally classify markets as unconcentrated, moderately concentrated, and highly concentrated. An unconcentrated market features an HHI of below 1,500. A moderately concentrated market has an HHI of between 1,500 and 2,500, while a highly concentrated market has an HHI that is greater than 2,500.

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN16[] **Presumptions, Particular Presumptions**

Economists calculate the Herfindahl-Hirschman Index (HHI) score of an industry before and after the proposed merger. Transactions that result in an HHI increase of fewer than 100 points are unlikely to have adverse competitive effects. In moderately concentrated markets, a transaction that increases the HHI by more than 100 points potentially raises significant competitive concerns and often warrants scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. This presumption of anticompetitive effects may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN17[] **Antitrust, Horizontal Mergers**

There is nothing improper about a firm making independent production decisions to maximize profits. But a core purpose of ***antitrust law*** is to scrutinize mergers that may make it easier for firms to collectively reduce output, and indeed, to prevent mergers that are likely to do so. Merger law rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels. Antitrust theory teaches that an acquisition which reduces the number of significant sellers in a market already highly concentrated and prone to collusion by reason of its history and circumstances is unlawful in the absence of special circumstances.

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

HN18[] **US Federal Trade Commission Actions, Judicial Review**

A reviewing court need not decisively sift through various models and theories. Courts hesitate to rely on an expert's precise calculations where such calculations are subject to valid criticism. The question is whether the Federal Trade Commission (FTC) has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the court of appeals.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN19[] **Antitrust Statutes, Clayton Act**

Defendants in a Federal Trade Commission (FTC) action challenging a merger can rebut the presumption that their merger will substantially lessen competition either by discrediting the data underlying the initial presumption in the government's favor or by affirmatively showing why the deal is unlikely to substantially lessen competition. Generally, the more compelling the FTC's prima facie case, the more evidence the defendants must present to rebut it successfully.

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

HN20[] **Market Definition, Relevant Market**

Entry or expansion into the relevant market by new competitors can mitigate the expected anticompetitive effects of a proposed transaction. This is because, in the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time. Companies that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a small but significant and non-transitory increase in price, without incurring significant sunk costs, are also considered market participants. Sunk costs include the entry or exit costs that cannot be recovered outside the relevant market.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

HN21[] **Remedial Powers, Federal Trade Commission Act**

When a court finds high market concentration levels, defendants must present proof of extraordinary efficiencies to rebut the government's prima facie case. Courts have rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies. To be able to offset a merger's likely anticompetitive effects, purported synergies and efficiencies must represent more than mere speculation and promises about post-merger behavior. They must be merger-specific, meaning that they cannot be achieved by either company alone. And they must be reasonably verifiable by an independent party.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

HN22[] **Remedial Powers, Federal Trade Commission Act**

Where the showing made by the Federal Trade Commission (FTC) creates a presumption in favor of a preliminary injunction, the court must still weigh the equities to determine whether this relief would be in the public interest. *15 U.S.C.S. § 53(b)*. The court must consider the interests of the public, either in having the merger go through or in preventing the merger, and the private equities, which include the corporate interests of the defendants.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

HN23[] **Remedial Powers, Federal Trade Commission Act**

Where the Federal Trade Commission (FTC) has shown a likelihood that the proposed transaction will substantially lessen competition, the public interest in effective enforcement of the ***antitrust law*** weighs in favor of granting an injunction. There is a strong public interest in the effective enforcement of the antitrust laws that weighs heavily in favor of an injunction in such a case. Also supporting an injunction is the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Federal Trade Commission Act > Remedies

HN24[] **Remedial Powers, Federal Trade Commission Act**

Federal Trade Commission Act § 13(b) (*15 U.S.C.S. § 53(b)*) embodies congressional recognition of the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case. Divestitures may not succeed at restoring competition to the post-merger market. For instance, it may be particularly difficult to restore the pre-merger state of competition if the merging parties have commingled, sold, or closed assets; integrated or dismissed employees or shared confidential information.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN25[] **Injunctions, Preliminary & Temporary Injunctions**

Preliminary injunctions are equitable remedies to be used sparingly and in exigent circumstances. The issuance of a preliminary injunction prior to a full trial on the merits is an extraordinary and drastic remedy.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

HN26[] Case & Controversy Requirements, Actual Controversy

Federal courts may adjudicate only actual, ongoing cases or controversies.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

HN27[] Remedial Powers, Federal Trade Commission Act

The harm to defendants from putative delays caused by the Federal Trade Commission (FTC) is at least somewhat mitigated when any injunctive relief imposed would be brief compared with a typical Federal Trade Commission Act § 13(b) (*15 U.S.C.S. § 53(b)*) action. In the ordinary case, an injunction means a merger cannot be consummated until the Commission completes its investigative and adjudicative activities. Where the FTC has already scrutinized the deal and held an administrative trial, the harm to the defendants from a preliminary injunction is lower than in the typical case, in which the administrative process would not yet have begun.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

HN28[] Remedial Powers, Federal Trade Commission Act

There are strong public interests in ensuring the effective enforcement of antitrust laws and in equipping the Federal Trade Commission with the ability to order appropriate remedies.

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Judges: TREVOR N. MCFADDEN, United States District Judge.

Opinion by: TREVOR N. MCFADDEN

Opinion

[*193] MEMORANDUM OPINION*

Last year, two of the world's largest titanium dioxide ("TiO2") producers announced their intent to merge. Tronox Limited agreed to acquire the National Titanium Dioxide Company's TiO2 business, known as "Cristal," for $1.67 billion in cash and a 24% equity stake in the combined firm. Believing that the acquisition would likely violate federal antitrust laws, the Federal Trade Commission issued an administrative complaint challenging the deal.

TiO2 is a pigment used to add whiteness, brightness, and opacity to products like paints, plastics, and paper. It is manufactured by subjecting raw titanium ores to either a chloride or a sulfate production **[**3]** process. Chloride-process TiO2 comprises nearly all the pigment sold in the United States and Canada. The FTC believes that the Tronox-Cristal merger will significantly reduce competition for chloride TiO2 in these two countries, a combined market referred to herein and by the parties as "North America."

[*194] Following discovery and briefing by the parties, the FTC's Administrative Law Judge ("ALJ") held a month-long trial to determine the legality of the proposed transaction. The trial recently concluded, and the ALJ will soon issue an initial decision. ***HN1***[] That ruling is reviewable by the FTC's Commissioners, and a federal appeals court may in turn review the agency's final decision.

The transaction has now received conditional or final approval from the FTC's counterparts in the European Union, China, Saudi Arabia, and elsewhere. The Commission therefore seeks a preliminary injunction under *Section 13(b) of the Federal Trade Commission Act* to prevent Tronox and Cristal from consummating the merger until the agency's review process and any later judicial proceedings have concluded.

The Court finds that the FTC has met its burden under *Section 13(b)*. It has shown a likelihood that the proposed transaction will substantially **[**4]** lessen competition for chloride-process TiO2 in North America, and it has shown that issuing a preliminary injunction is in the public interest. The Court will therefore grant the Commission's motion for preliminary injunctive relief.

I. BACKGROUND

A. The Titanium Dioxide Industry

Titanium dioxide is commercially available in two crystalline structures: anatase and rutile. Anatase is used in textiles, cosmetics, pharmaceuticals, and food, while rutile is typically used in architectural and industrial paints and

* The Memorandum Opinion was issued under seal on September 5, 2018. This version contains redactions of confidential and competitively sensitive information. The Court has also made minor modifications, citing to publicly available, rather than confidential, information where appropriate.

plastics. PX5000-013.[1] Cristal estimates that roughly 60% of all titanium dioxide produced worldwide is used in paints and coatings, while the rest is used in plastics, paper, and various other applications. *Id.* at 018. Rutile is thus the predominant form of TiO2; anatase accounts for only 10% of global production. *Id.* at 013.

The sulfate production process can create either anatase or rutile TiO2. PX5000-016. It involves dissolving naturally occurring titanium ores (the "feedstock") into sulfuric acid to separate the titanium from other impurities in the ore. *Id.* The sulfate process relies on simpler technology than the chloride process, requires less skilled labor, and, because it produces TiO2 in **[**5]** batches, does not require an uninterrupted power supply. *Id.* Roughly half of all TiO2 made globally is produced using the sulfate process. PX5000-017. China accounts for the largest single-nation share of sulfate-process TiO2, producing 1.67 million metric tons in 2016. *Id.*

The chloride production process can only create rutile TiO2, and it involves using chlorine gas to produce titanium tetrachloride, which is then oxidized to produce TiO2. PX5000-015. The chloride process is continuous, so it requires an uninterrupted power supply. PX3011-013. Compared to sulfate, chloride tends to produce a higher grade TiO2 pigment, features lower conversion and labor costs, and results in less waste. *Id.* The process requires a highly skilled labor force, and its "superior technology" is "closely guarded by Western producers." PX3011-019. In 2016, 99% of the TiO2 produced in the United States and Canada was made using the chloride process. PX5000-016. By contrast, in Europe, only 39% of all TiO2 manufactured was produced using chloride. *Id.*

Customers and suppliers generally agree that there are noticeable differences between chloride- and sulfate-process **[*195]** TiO2. A 2015 Tronox presentation notes, for **[**6]** example, that the chloride pigment is "bluer in tone than sulfate pigment," which has a "more yellow tone of white." PX1322-003. Dr. Paul Malichky, the Director of Raw Material Sourcing at PPG, a major multinational paints and coatings company, explained that while "both would appear white if you physically looked at them," in a final product (like a can of white paint) with "two colors, one with a chloride and one with a sulfate, the color would be different." Hr'g Tr. 100:6-13. *See also* PX7020-013 (George Young, a senior executive at Sherwin-Williams, another major paint company, stating that "sulfate grade is not as bright a white as a chloride. It doesn't deliver the same physical performance as a chloride.").

Chloride TiO2 can also be more durable than its sulfate counterpart. Sulfate has "impurities that come as part of the process; most specifically, iron . . . [which] decreases the durability." Hr'g Tr. 100:14-19. Chloride-process TiO2 products feature "better durability, scrubability, and various other performance characteristics." Hr'g Tr. 169:19. And, because of "the [consumer] preference for whiteness and durability, sulfate grades are not widely preferred for applications **[**7]** that have prolonged outdoor exposure." PX8005-002.

Titanium dioxide is generally sold to customers in two formulations: "dry" and "slurry." PX5000-017. Dry TiO2 is sold in a powdered form typically packaged in bags; slurry TiO2 is dry titanium dioxide combined with an aqueous solution. *Id.* While most TiO2 sold globally is dry, large North American paint companies prefer slurry. PX0001-030.

B. The Competitive Landscape

The titanium dioxide market has been described as an "oligopoly," as TiO2 is a "commodity-like product with no substitutes, the market is dominated by a handful of firms, and there are substantial barriers to entry." *Valspar Corp. v. E.I. Du Pont De Nemours and Co., 873 F.3d 185, 190 (3d Cir. 2017)*. Jeffry Quinn, the CEO of Tronox, explained that there are "dozens and dozens of competitors worldwide, but there are really six companies that often are referred to as sort of the global TiO2 producers or the global companies." Hr'g Tr. 585:9-11. These firms are Chemours, Tronox, Cristal, Kronos, Venator, and Lomon Billions. *Id.* at 585:13-586:2.

Of the six, the first five dominate the production of chloride TiO2. PX1532-051. In 2016, roughly 2.77 million metric tons of the pigment was produced globally. *Id.* Chemours, the world's largest TiO2 firm, accounted **[**8]** for about 37% of 2016 chloride production capacity. PX5000-021. With Chemours, Cristal (21%), Tronox (15%), Kronos

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[1] The FTC's exhibits are identified by a "PX" followed by the exhibit number and a page number. The Defendants' exhibits use "RX" followed by the exhibit and page numbers.

(13%), and Venator (7%), together accounted for 93% of total chloride production capacity. *Id.* Based on this data, the proposed transaction would result in two firms, Chemours and the Tronox-Cristal entity, that control nearly three-quarters of the global chloride TiO2 supply.

Chinese manufacturers control around 51% of global sulfate production capacity. *Id.* Sulfate production is more dispersed than chloride. Lomon Billions is China's largest TiO2 firm, and in 2016 it accounted for 13% of global supply. *Id.* A smattering of other Chinese firms had roughly 38%, while domestically, Venator (12%) and Kronos (4%) are also significant producers of sulfate TiO2. *Id.*

The paint and coatings industry is the largest overall consumer of titanium dioxide, and PPG, Sherwin-Williams, RPM, and Masco (Behr) are among the largest paint producers. *See* PX9020-009; PX5000 at 18, 044-045. Representatives from these firms, other paint and plastics manufacturers, and Chemours, Tronox, Cristal, Kronos, **[*196]** and Venator provided testimonial and documentary evidence about the TiO2 market during the administrative **[**9]** proceedings before the Commission. Additionally, Dr. Malichky (PPG), Mr. Christian (Kronos), Mr. Quinn (Tronox), and the parties' economic experts (Dr. Nicholas Hill for the Commission and Dr. Ramsey Shehadeh for the Defendants) testified about the market and the proposed merger during a three-day evidentiary hearing here.

C. History of Proceedings in This Case

On December 5, 2017, the Commissioners of the FTC voted 2-0 to authorize the filing of an administrative complaint to block the Tronox-Cristal transaction, as they found reason to believe that it would violate *Section 7 of the Clayton Act, 15 U.S.C. § 18*. The Commissioners' vote also authorized the FTC to seek a temporary restraining order ("TRO") and preliminary injunction against the merger in federal district court.

After several months of discovery, the ALJ held an administrative trial from May 18 to June 22, 2018. The parties filed post-trial briefs, proposed findings of fact, and proposed conclusions of law with the ALJ last month. They will offer closing statements to him once briefing has concluded. His resulting decision may be reviewed by the Commission and potentially, an appellate court.

On July 10, 2018, the FTC petitioned this Court for **[**10]** a TRO and a preliminary injunction to halt a potential closing of the deal. The Commission explained that "[a]bsent such provisional relief, Tronox and Cristal . . . will likely be free to consummate the merger as soon as July 16, 2018, the earliest date it appears the European Commission ("EC") is likely to complete its [antitrust regulatory review] process by approving" remedies to mitigate the deal's anticompetitive effects in Europe. Compl. 2. Approval from the EC was "the only remaining hurdle preventing Defendants from consummating the Acquisition." *Id.*

Three days later, the Court held a hearing on the Commission's TRO motion. Following that hearing, the parties stipulated that Tronox and Cristal would not seek to consummate the proposed transaction until four business days after the Court decided the Commission's request for a preliminary injunction. *See* Ex. A (Agreement Not to Close Transaction) 2, ECF No. 44-1.

On August 7, 2018, the Court began a three-day evidentiary hearing on the FTC's motion for injunctive relief. The Commission proposed that the hearing proceed with oral arguments based solely on the closed evidentiary record before the ALJ. *See* Pl.'s Proposed Hr'g Schedule **[**11]** 2, ECF No. 45. The Defendants objected, ultimately proposing that each side be allowed to present live testimony from two expert witnesses and a fact witness. *See* Defs.' Proposed Hr'g Schedule 4, ECF No. 47. The Court allowed each side to present live testimony from three witnesses of their choosing, and to present opening and closing arguments.[2] The parties also submitted briefs outlining their positions and the complete administrative record before the ALJ.

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[2] The Defendants ultimately elected to call only two witnesses, as they were running low on time under the parties' agreed-upon "chess clock" system. *See* Hr'g Tr. 581:3-9.

II. LEGAL STANDARDS

HN2[] *Section 7* of the Clayton Act prohibits acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or in any activity affecting commerce in any section of the country." *15 U.S.C. § 18*. If the FTC has **[*197]** reason to believe "that a corporation is violating, or is about to violate, *Section 7* of the Clayton Act, [it] may seek a preliminary injunction to prevent a merger pending the Commission's administrative adjudication of the merger's legality." *F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 714, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)*. *Section 13(b)* of the Federal Trade Commission Act authorizes district courts to grant a preliminary injunction where "such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's **[**12]** likelihood of success on the merits." *Id.*; *see* *15 U.S.C. § 53(b)*.

HN3[] For relief under *Section 13(b)*, the Commission must establish that "there is a reasonable probability that the challenged transaction will substantially impair competition." *F.T.C. v. Staples Inc., 190 F. Supp. 3d 100, 114 (D.D.C. 2016)*. Congress "intended this standard to depart from what it regarded as the then-traditional equity standard, which it characterized as requiring the plaintiff to show: (1) irreparable damage, (2) probability of success on the merits and (3) a balance of equities favoring the plaintiff." *Heinz, 246 F.3d at 714*. The FTC is "not held to the high thresholds applicable where private parties seek interim restraining orders," and *Section 13(b)* instead creates a "unique public interest standard . . . rather than the more stringent, traditional equity standard for injunctive relief." *Id.* (cleaned up).

HN4[] The public interest standard requires courts to "measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed transaction] may be substantially to lessen competition" in violation of the Clayton Act. *F.T.C. v. Sysco Corp., 113 F. Supp. 3d 1, 22 (D.D.C. 2015)*. The Commission meets this standard if it "has raised questions going to the merits so serious, substantial, difficult and doubtful as to make **[**13]** them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Id. at 23* (citing *Heinz, 246 F.3d at 714-15*).

HN5[] To determine the Commission's likelihood of success on the merits, the Court applies the burden-shifting framework established by *United States v. Baker Hughes, Inc., 908 F.2d 981, 982-83, 285 U.S. App. D.C. 222 (D.C. Cir. 1990)*. First, the FTC must show that the Tronox-Cristal merger will lead to "undue concentration in the market for a particular product in a particular geographic area." *Id. at 982*. The Commission thus bears the initial burden of (1) defining the appropriate product market, (2) defining the appropriate geographic market, and (3) showing that the merger will lead to undue concentration in the relevant product and geographic market. *See* *F.T.C. v. Arch Coal, Inc., 329 F. Supp. 2d 109, 117 (D.D.C. 2004)*. Such a showing establishes a presumption that the merger will substantially lessen competition. *Baker Hughes, 908 F.2d at 982*.

The Defendants can rebut this presumption by showing that the Commission's "prima facie case inaccurately predicts the [merger's] probable effect on future competition." *Id. at 991*. If the Defendants make this showing, the burden of producing further evidence of anticompetitive effects shifts back to the government. *Id. at 983*. The "ultimate burden of persuasion . . . remains with the government **[**14]** at all times." *Id.* In evaluating either party's evidence, "antitrust theory and speculation cannot trump facts." *Arch Coal, 329 F. Supp. 2d at 116*.

HN6[] In addition to evaluating the Commission's prima facie case and any rebuttal evidence proffered by the Defendants, the Court must also weigh the equities **[*198]** involved. The "public interest in effective enforcement of the antitrust laws is of primary importance," and "a showing of likely success on the merits will presumptively warrant an injunction." *Arch Coal, 329 F. Supp. 2d at 116*. If, on the other hand, the FTC cannot show a likelihood of success on the merits, "equities alone will not justify an injunction." *Id.*

III. ANALYSIS

A. The FTC has Established a Presumption of Anticompetitive Effects

The Commission has shown a likelihood that Tronox's acquisition of Cristal's titanium dioxide business will substantially impair market competition. It has demonstrated that the relevant market should be defined as the chloride-process TiO2 sold in North America. The FTC's evidence credibly suggests that the merger will greatly increase concentration in an already concentrated market, and that it will create incentives for the remaining industry participants to engage in strategic withholding of TiO2 supplies to maintain **[**15]** higher prices.

1. Chloride-Process Titanium Dioxide is the Relevant Product Market

HN7[] A market's "outer boundaries" are determined by the "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. Within this market, however, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Id.* The appropriate submarket can be identified "by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* "[E]vidence of industry or public recognition of the submarket as a separate economic unit matters because we assume that economic actors usually have accurate perceptions of economic realities." *United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 53 (D.D.C. 2011)*.

The Defendants contend that the market, properly defined, includes both chloride- and sulfate-process TiO2, but the Commission believes the correct market includes only the former. Both the economic realities of the industry, as described by TiO2 producers and consumers, **[**16]** and the evidence presented by the expert economists show that the FTC has carried its burden.

a. Producers and Consumers View Chloride TiO2 as a Separate Product, and the Expert Evidence Supports this View

Manufacturers of titanium dioxide consistently recognize the existence of a chloride TiO2 submarket in North America. In 2014, for example, Tronox's Content Communications Manager emailed then-CEO Tom Casey talking points ahead of a town hall meeting. PX1427. The talking points convey that, unlike sulfate, "[c]hloride process uses higher-quality feedstocks and makes better-quality TiO2" and that "[s]ubstitution in US/Europe not likely." *Id* at 003. A 2015 Tronox presentation notes that the "North American market is ~90% chloride. There is no sulfate production (except a small plant in Canada, Kronos). Limited imports." PX1322-003. At the evidentiary hearing, Tronox CEO Jeffry **[*199]** Quinn[3] conceded that "the way things have developed here in the U.S. is as a chloride market." Hr'g Tr. 641:17-19. He added that chloride TiO2 uses a different manufacturing process, is "viewed as more environmentally friendly, and it has — so I think it's a different product." Hr'g Tr. 648:18-21.

Mr. Christian,[4] from the **[**17]** Defendants' competitor Kronos, similarly testified that chloride TiO2's "brighter, more reflective white" and its "better durability, scrubability, and various other performance characteristics" when

[3] Mr. Quinn's testimony was credible, and he gave candid responses even when they were not necessarily helpful to the Defendants. Though he has been on Tronox's board of directors for several years, Mr. Quinn only became Tronox's CEO in December 2017. Because he was not actively involved in the daily management of Tronox before then, his capacity to offer insights into the TiO2 industry was somewhat limited.

[4] During the evidentiary hearing, Mr. Christian provided testimony on Kronos's TiO2 production and on his views about the TiO2 industry and competitive landscape. The Court credited his testimony; he gave thoughtful answers and did not appear to have a preferred outcome about the proposed transaction. He provided good perspectives and insights into an industry supplier's viewpoint, although his understanding of the customers' perspective was necessarily limited.

compared to sulfate TiO2 make it a "higher-quality product that [is] preferred, all things being equal, by the customers." Hr'g Tr. 169:10-20. Kronos's chloride TiO2 products "are more environmentally friendly . . . have a lower cost structure, and . . . command higher prices in the marketplace." Hr'g Tr. 174:18-21. Consistent with this view, other TiO2 suppliers distinguish between their chloride- and sulfate-process TiO2 products.[5]

Like suppliers, customers recognize a submarket for chloride-process TiO2, reflecting the product's particular traits and uses. Dr. Malichky[6] testified that chloride and sulfate TiO2 are "not substitutable on a color basis" and that if "you don't want [a paint product] to degrade or fade" the product would "require chloride." Hr'g Tr. 100:12-19. Masco, maker of Behr paints, adds that the "ultra pure white feature" of its paints is "[e]xtremely important" for the firm's brand, and that "to achieve that [feature], we need to use TiO2 produced based on **[**18]** the chloride process." Admin. Trial Tr. 972:16-973:20.[7]

In fact, customers do not substitute away from chloride TiO2 even when prices are "very high" or when sulfate prices have "been as much as [TEXT REDACTED BY THE COURT] cheaper than chloride TiO2." *See* PX8001-002; PX8003-003. [TEXT REDACTED BY THE COURT] reported that, "[e]xcept for our traffic marking paint, we have not used sulfate TiO2 in our products **[*200]** in North America even though sulfate grades generally are less expensive than chloride grades." PX8003-003. Switching from chloride to sulfate TiO2 involves "[t]housands of hours" of labor due to the complexities associated with color-matching and product reformulation (*i.e.*, ensuring that paint colors made with chloride TiO2 are not visibly different from the colors as made with sulfate TiO2). Hr'g Tr. 104:14-105:6.

The Defendants suggest that the market is not so black and white. "Chloride-process TiO2 *can* be used interchangeably with sulfate-process TiO2 in the vast majority of end-use applications," they argue, and consumers "regularly *try* to leverage sulfate-process TiO2 prices in negotiations with suppliers about chloride-process TiO2." Defs.' Redacted Opp. to Prelim. **[**19]** Inj. 11, ECF No. 70 (emphasis added). But the relevant question concerns not just the hypothetical possibility of substitution, but whether customers do in fact exhibit a willingness to substitute chloride- and sulfate-process TiO2. *See* *Arch Coal, 329 F. Supp. 2d at 119*.

Compare the market perspectives discussed above with those offered by the consumers in *Arch Coal*. There, the court considered how much utilities companies substitute between two types of coal — 8800 Btu and 8400 Btu. It found that "virtually all the utilities acknowledged that they can and do purchase and consume both 8800 and 8400 Btu coal, and that they actively solicit and consider both in their coal bidding procedures." *Id. at 121*. Customers testified that their facilities "were designed to burn, and have burned" both types of coal, that they "purchased both 8400 and 8800 coal in the past five years" and that managers "purchase 8400 to 8800 Btu coal depending on which coal has the best evaluated price." *Id. at 121-22*. The court thus concluded that the "evidence of significant interchangeability" between 8800 and 8400 Btu coal, combined with a "reluctance of [the FTC's] own expert to conclude that 8800 Btu coal is a separate relevant market," meant that the Commission **[**20]** failed to carry its burden of establishing its proffered product market. *Id. at 122-23*.

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[5] *See, e.g.*, PX5000-043 (describing a Cristal email stating that "[w]hat we really would like to avoid is to accept that T595 [a chloride pigment] could be compared to a low sulphate [sic] quality product."); PX9121 at 007 (Chemours 2017 10-K) ("Our portfolio of premium performance TiO2 pigment grades provides end-users with benefits beyond opacity, such as longer-lasting performance, brighter colors, and the brilliant whites achievable only through chloride-manufactured pigment.").

[6] During the evidentiary hearing, counsel for Tronox advised that the Court should be "wary of self-serving statements by customers." Hr'g Tr. 64:10-16. When Dr. Malichky made statements revealing self-serving interests, the Court weighed his assertions in that context. Generally, the Court credited Dr. Malichky's statements if they appeared to track the perspectives offered by other TiO2 consumers and industry participants, as evidenced by documents in the record.

[7] *See also* PX8001-002 (statement from [TEXT REDACTED BY THE COURT] noting that the firm "only uses chloride grade titanium dioxide. [TEXT REDACTED BY THE COURT]"); PX5000-045 (collecting similar statements from customers like [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT]).

Here, the Commission has sufficiently shown a relevant product market. The evidence from customers and suppliers suggests a lack of significant interchangeability between chloride and sulfate TiO2. And the report and testimony of the Commission's expert economist, Dr. Hill, bolster this evidence.[8]

Using producer invoices and data published by the International Trade Commission and the United Nations, Dr. Hill evaluated price trends for chloride and sulfate TiO2. He found that, from 2012 to 2017, "chloride titanium dioxide was on average $532 per ton, or 21 percent, more expensive than sulfate titanium dioxide." PX5000-046. Yet, despite this price premium for chloride TiO2, "the proportion of sales accounted for by chloride titanium dioxide has held steady [in North America]." *Id.* The existence of distinct prices and a consistent market share for chloride **[*201]** TiO2 are "not what one would expect if North American customers were willing and able to substitute one type of titanium dioxide for another in response to a change in their relative prices." *Id.*

b. The Defendants' Product Market Counterarguments are Unavailing

[21]** Dr. Shehadeh, the Defendants' expert, attacked Dr. Hill's findings, countering that "[e]conomically significant co-movement between prices for chloride-produced TiO2 and prices for sulfate-produced TiO2 establishes a single market" for the two products. RX0170.0143.[9] Using data from Cristal, Venator, and Kronos, Dr. Shehadeh showed "the correlation between and co-integration of monthly chloride and sulfate TiO2 prices for" the three firms from 2010 to 2017. *Id.* at 0144-46. This price correlation, according to Dr. Shehadeh, suggests that chloride and sulfate TiO2 are substitutable.

But ***HN8***[] the mere fact that the prices of two goods move upward or downward together need not mean that they are substitutes. As Dr. Hill explained during the evidentiary hearing, "If you think about the sale of hamburger buns and hot dog buns, their prices will be highly correlated. Their demands are both seasonal—high in the summer, low in other seasons—and they're made with the same ingredients. So their prices will be highly correlated. But they're not close substitutes for each other." Hr'g Tr. 407:24-408:4.

Price correlation between the two types of TiO2 may reflect changes in feedstock prices, or a correlation in the demand for different types of paints (like low-end traffic marking paint, which tends to use sulfate TiO2, and high-end exterior home paint, which uses the chloride pigment). In other words, "rather **[**22]** than high cross-elasticity of demand, correlated price movements might reflect the similar responses of different markets to similar changes, as when all prices move up in response to changes in common costs." 2B Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 534c (4th ed. 2014) ("Areeda & Hovenkamp").[10]

The Defendants raise two additional arguments. *First*, they note that "[a]pproximately 80% of TiO2 end-use products can be made with either sulfate- or chloride-process TiO2 [and] only 10% of products are more compatible

[8] Dr. Hill has a doctorate in economics from Johns Hopkins University, and serves as a partner at Bates White, an economic consulting firm. As one of the FTC's three witnesses during the evidentiary hearing, Dr. Hill provided his own analysis and opinions. He also served as a summary witness of sorts, enabling the Commission to highlight relevant aspects of the extensive administrative record. The Court found his testimony and report to be credible. But his models and the conclusions they suggest are susceptible to some valid critiques. So while the Court found them ultimately consistent with the other evidence presented, his analysis was not dispositive on either the relevant market or the likelihood that the merger will increase market concentration.

[9] Dr. Shehadeh has a PhD in economics from Cornell and is a managing director at NERA, an economic consulting firm. He too both summarized his modeling and synthesized his side's key evidence during the evidentiary hearing. The Court found Dr. Shehadeh's testimony and analysis to be entitled to some weight but ultimately unconvincing on several key points.

[10] Reflecting their limitations as an approach to defining markets, Dr. Jonathan Baker, a former director of the FTC's Bureau of Economics and Chief Economist at the Federal Communications Commission concluded that "price correlation tests contain little or no information relevant to the issue of antitrust market definition." Jonathan B. Baker, *Why Price Correlations Do Not Define Antitrust Markets* 7, Fed. Trade Comm'n Working Paper No. 149 (1987). *See also* Gregory J. Werden and Luke Froeb, *Correlation, Causality, and All that Jazz: The Inherent Shortcomings of Price Tests for Antitrust Market Delineation*, 8 Rev. of Indus. Org. 329, 332-338 (1993) (highlighting some problems with using price correlation to define antitrust markets).

with one process or the other." Defs.' Redacted Opp. To Prelim. Inj. 12. But ***HN9***[] for antitrust purposes, the "[r]elevant market analysis is based on the narrowest market principle." *Arch Coal, 329 F. Supp. 2d at 120*. This principle holds that, because "a relevant market cannot meaningfully encompass an infinite range of products," it must be "drawn narrowly to exclude any other **[*202]** product to which, within reasonable variations in price, only a limited number of buyers will turn." *Sysco, 113 F. Supp. 3d at 26*.

So, even if only 10% of the products that use **[**23]** titanium dioxide are more compatible with chloride-process TiO2 than the sulfate alternative, the firms manufacturing that 10% can constitute a relevant antitrust submarket. And here, the evidence suggests a much larger percentage of firms—at least in the relevant geographic market—cannot easily switch from chloride to sulfate. *See, e.g.*, PX5000 at 044-045 (collecting statements from many customers, who suggest, for instance, that for "over 90 percent [of applications] in the U.S., we can't switch between chloride and sulfate" and "[u]sing sulfate TiO2 would compromise our end products in North America, which is something we are not willing to do.").

Second, the Defendants identify two examples of individual chloride-process TiO2 products competing with sulfate-process products. *See* Defs.' Unredacted Opp. to Prelim. Inj. 13, ECF No. 68-3. They note that "[o]ne of Tronox's leading chloride-process grades, CR-828, competes directly with R-996, a sulfate-process grade of TiO2 manufactured by Chinese producer Lomon Billions," and that another Tronox product, "[TEXT REDACTED BY THE COURT], has lost business to sulfate-process TiO2 from Chinese producers." *Id.* These statements, however, provide **[**24]** no indication of sales volumes or the context or extent to which the two chloride-process products have competed with their sulfate alternatives.

HN10[] "Whatever the market urged by the [FTC], the other party can usually contend plausibly that something relevant was left out, that too much was included, or that dividing lines between inclusion and exclusion were arbitrary." Areeda & Hovenkamp at ¶ 530d. "The Supreme Court has wisely recognized there is 'some artificiality' in any boundaries, but that 'such fuzziness' is inherent in bounding any market." *Id.* (citing *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 359 n.36 & 360 n.37, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*). Isolated examples of potential substitutability simply do not outweigh the consistent testimony and representations of industry participants or the empirical evidence provided by Dr. Hill. Thus, for the purposes of a preliminary injunction, the FTC has shown that the relevant product market is limited to chloride-process titanium dioxide.

2. "North America" is the Relevant Geographic Market

a. Industry Participants Believe that Distinct Regional Markets Exist

HN11[] Like the product market, the relevant geographic market must "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe Co., 370 U.S. at 336*. It encompasses the **[**25]** "area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." *F.T.C. v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 49 (D.D.C. 1998)*. Recall that in defining a market for antitrust purposes, the narrowest market principle applies.[11] While the Defendants believe that the relevant market is global, the Commission contends that it should be limited to the United States and Canada.

Here too, the statements of titanium dioxide suppliers are instructive. On a **[*203]** 2014 earnings call, then-Tronox CEO Tom Casey asked, "are there different prices in the regional markets in which we do business? The answer to that question is yes. The European and Asian market prices and the Latin American market prices are relatively closely bunched, with the North American price being somewhat higher." PX9008-008. On another earnings call in 2016, Mr. Casey expressed Tronox's view "that prices in Europe and in Asia were lower than prices in the United States and in other North American — the other North American markets." PX9001-007. Ian Mouland, Tronox's vice president of sales for the Americas, suggested in an internal email that a customer "need[s] to stop being

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[11] The Defendants have not suggested that the relevant market should be any narrower than the FTC's proposal.

concerned about regional price differences **[**26]** and accept that regions are different . . . unless he is telling you that [he] sell[s] a can of paint in Mexico for the same price as in Germany?!" PX1085-001. Tronox acknowledged that TiO2 pricing "depends upon the region . . . [TEXT REDACTED BY THE COURT]." PX7001-032.

Like Tronox, the other major producers segment their customers by location. Kronos has "a European region . . . [a]nd then we have North America, which represents the United States and Canada. And then we have [LatAm], which is Latin America, Central America, the Caribbean, and South America. And then the export market, which is for us rest of world." Hr'g Tr. 167:22-168:7. [TEXT REDACTED BY THE COURT] "separates customer locations into five different regions: North America (United States and Canada); Europe, the Middle East, and Africa; Asia-Pacific excluding China; China; and Latin America (including Mexico)." PX8004-002. [TEXT REDACTED BY THE COURT] explained that "customers in the North American region generally have different requirements than in other regions." *Id. See also* PX5000-062 (featuring similar statements from Cristal representatives).

Titanium dioxide customers also acknowledge the existence of a distinct **[**27]** North American TiO2 markets. Sherwin-Williams paints "have different pallets in different regions of the world," and customer demands require that the company has "different performance standards around the world as well." PX7020-014. The firm has thus found that "sulfate has not been suitable for our formulations in North America [but in] other regions of the world with different quality standards, there has [sic] been levels of suitability." Admin Trial Tr. 642:25-643:3. Dr. Malichky testified that "[i]n PPG jargon, we would call [the North American market] USCA, U.S. and Canada, and Mexico is different. The suppliers consider Mexico different, as well." Hr'g Tr. 97:17-19. He added that, for the North American market, "[t]he vast majority [of TiO2 PPG uses] is chloride," but that "in Europe, we use more sulfate." Hr'g Tr. 101:16-18; 103:17-20.

b. Quantitative Evidence and the Hypothetical Monopolist Test Further Support Treating North America as a Separate Market

The available quantitative evidence also supports the existence of regional TiO2 markets. In a single, global market, sustained regional price variances are unlikely, as customers would engage in arbitrage—like importing TiO2 **[**28]** or purchasing it indirectly from other customers—that equalizes prices over time. *See* U.S. Dep't of Justice & F.T.C. Horizontal Merger Guidelines § 4.2.2 (2010) ("Merger Guidelines"). But by evaluating data from Tronox and Cristal, Dr. Hill showed that, from 2012 to 2017, the average difference in TiO2 prices between North America and the rest of the world ranged from $250 - $525 per metric ton. PX5000 at 063-064.

A recent TiO2 supply restriction in Europe provides more proof of regionalized markets. In January 2017, a fire at a large **[*204]** TiO2 plant in Pori, Finland, decreased the available titanium dioxide in Europe and caused a rapid and significant price increase. PX5004-039. Producer invoice data suggest that, before the fire, North American TiO2 prices were roughly $200 - $250 per metric ton higher than European prices. After the fire, however, European prices significantly exceeded those in North America. From January to October 2017, Cristal's and Tronox's European prices each rose by [TEXT REDACTED BY THE COURT] (compared to [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] increases in North America respectively). *Id.* The Pori fire thus shows a dramatic relative increase in **[**29]** European prices not "disciplined by customer arbitrage." *Id.*

Dr. Hill also conducted several iterations of the "hypothetical monopolist test" to prove that the relevant market consists of North American sales of chloride-process TiO2. ***HN12***[] The test seeks to determine whether a hypothetical company that is the only seller of the relevant product to customers in the relevant geography could profitably impose a "small but significant and non-transitory increase in price" ("SSNIP"). *See* Merger Guidelines §§ 4.1.1; 4.2.2. If this hypothetical monopolist can profit from imposing a SSNIP without losing a critical mass of customers, then a relevant antitrust market has been defined. If, on the other hand, customers can defeat the price increase "by substitution away from the relevant product or by arbitrage," the market definition must be broadened. *Id. See also* *Sysco, 113 F. Supp. 3d at 33-34*.

To run the test, Dr. Hill conducted a "critical loss analysis." PX5000-049. He began by calculating the "critical loss," which is the percentage of "lost unit sales that would leave profits unchanged" if a hypothetical monopolist imposed a SSNIP. Merger Guidelines § 4.1.3. Dr. Hill determined that, with an SSNIP of 10%, a hypothetical monopolist could lose up to 15.4% of its **[**30]** sales and still break even. PX5000-051. The critical loss threshold is thus 15.4%.

Next, Dr. Hill estimated the "predicted loss" that would be observed in the event of a SSNIP of 10%. If the predicted loss is less than the critical loss, imposing a SSNIP would be profitable for the hypothetical monopolist, and the relevant antitrust market has been correctly defined. Dr. Hill used three methods to calculate the predicted loss: the "price elasticity of demand" method, a "substitution components" method, and a "documentary evidence" method. Each showed that a hypothetical monopolist could profitably raise North American chloride TiO2 prices by 10%. *See* PX5000 at 051-057.

Price elasticity of demand measures the responsiveness of a product's sales to a 1% change in the product's price. PX5000-051. Demand for a product is "elastic" if a 1% price increase decreases demand by more than 1%. It is "inelastic" if a 1% price increase decreases demand by less than 1%. The more inelastic a product's demand, the less likely it is that the product has adequate substitutes. Dr. Hill found that the price elasticity of North American chloride TiO2 is -0.45% (*i.e.*, a 1% increase in price reduces sales **[**31]** by 0.45%). He multiplied this number and a 10% SSNIP to show that the predicted loss of sales, 4.5%, would be considerably lower than the critical loss of 15.4%. PX5000-052. In other words, estimates of price elasticity show that a hypothetical monopolist could profitably increase North American chloride TiO2 prices by 10%.

Dr. Hill's "substitution components method" used the Defendants' data to estimate the expected increase of TiO2 imports in response to a 10% SSNIP. The TiO2 that firms acquire from imports or from other producers repatriating their exports represents lost sales for a hypothetical **[*205]** monopolist. Dr. Hill found that a 10% SSNIP would lead to roughly 75,000 more metric tons of TiO2 being imported or repatriated, and another 3% decrease in the monopolist's sales of rutile TiO2. PX5000-054. Together, this represents roughly 12.6% of total North American chloride TiO2 sales. *Id.* As a 12.6% loss is lower than the critical loss threshold of 15.4%, the substitution components method predicts that the hypothetical monopolist could profitably raise prices.

Finally, Dr. Hill used data from Tronox documents. At some future point, Tronox contends, "Chinese sulfate could take up to **[**32]** 15 percent of [all TiO2] applications" in North America, thus "reducing the share of chloride titanium dioxide by at most five percent." PX5000-055. Dr. Hill assumed that such sulfate substitution would occur in response to a 10% SSNIP. He and calculated that the resulting loss of sales to the hypothetical monopolist would be about 8.7%, which again is lower than the critical loss threshold. PX5000-056. Based on these calculations and his other analyses, Dr. Hill concluded that the relevant market for evaluating the merger's potential anticompetitive effects consists of North American chloride TiO2 sales.

c. The Defendants Define the Market Too Broadly

The Defendants argue that the Commission's geographic market definition is impermissibly narrow, and they challenge many of Dr. Hill's calculations. The FTC's "claim that the relevant geographic market is limited to North America," they contend, "ignores that TiO2 is a globally-traded commodity." Defs.' Unredacted Opp. to Prelim. Inj. 8. If Dr. Hill's hypothetical monopolist "were to attempt to implement a SSNIP post-merger, the significant volume of TiO2 'on the water' that would be diverted to North America . . . would exceed the critical **[**33]** loss . . . within the FTC's candidate market." RX0170.0015. This is because global trade in TiO2 is "highly elastic." *Id.*

True, global trade flows of TiO2 are substantial. In 2016, 46% of the chloride TiO2 produced in North America was exported. PX5000-037. The largest producers of the chloride pigment in North America—Chemours, Tronox, and Cristal—are also its largest exporters. *Id.* at 38. Upon a price increase in North America, these producers could conceivably repatriate some of this exported TiO2 to increase their profit margins.

The Commission, however, provided plausible explanations for why sizeable repatriation of titanium dioxide would not occur. First, there has been no evidence of this behavior in the past. As mentioned earlier, Dr. Hill's analysis suggests a persistent variance in prices between North America and other regions. Regional price differences show that profiting from export repatriation is possible. But the persistence of these differences shows that nontrivial repatriation does not happen in practice.

One offered reason is that, in the TiO2 industry, "customer relationships" and "security of supply" are essential. Hr'g Tr. 399:15-22. TiO2 producers have large customers **[**34]** in export markets, and "alienating a customer base" could result in the long-term loss of business. *Id.* As revenues depend on both sales volume and product price, "making a large change invoking the ire of your customers for a short period is probably not worth it." Hr'g Tr. 399:25-400:2. *See also* PX8005-004 (Venator explaining that "[o]ur European business is stable, and our primary focus is on serving the established relationships we have built over time with large customers in Europe. Given the cost of shipping and duties, we are generally better off selling in Europe than exporting to North America. We have **[*206]** not seen a sustained gap between North American prices and European prices large enough over a long enough period that it would make sense for us to export more to North America.").

The North American preference for slurry rather than dry TiO2 presents another reason to question the extent to which export repatriation might defeat a price hike imposed by the hypothetical monopolist. The "North American market is almost exclusively slurry," and customers in this region have "some of the most strict" quality of product and service demands. Hr'g Tr. 177:21-22; 178:5-11. While all **[**35]** titanium dioxide trading is subject to logistical challenges, import duties, and shipping costs, slurry TiO2 requires at least some additional capital expenditure (such as physical locations at which the dry TiO2 is mixed with an aqueous solution and repackaged). These costs may make export repatriation even more unlikely absent a large and sustained regional price disparity. Together, the persistence of regionalized pricing, the lack of evidence of prior export repatriation, the incentives for maintaining customer relationships and supply security, and the domestic preference for slurry raise significant questions about whether customers could import enough TiO2 to offset a SSNIP.

Aside from ignoring global trade flows, the Defendants contend that the Commission's market definition is wrong because of the "flawed method with which" Dr. Hill implemented the hypothetical monopolist test. RX0170.0129. According to them, Dr. Hill wrongly "gives the hypothetical monopolist control over supply both inside and outside his hypothesized relevant market." *Id.* at 0130. This modeling decision means that "customers in North America could not get additional supply" from plants and producers in Europe or other **[**36]** regions. *Id.*

But an assumption that North American customers will not be able to secure meaningful increases in TiO2 from foreign sources appears to comport with the industry's economic realities as described above. Moreover, the Merger Guidelines suggest that ***HN13***[] "[w]hen the hypothetical monopolist could discriminate based on customer location, [the Commission] may define geographic markets based on the locations of targeted customers . . . . Geographic markets of this type encompass the region into which sales are made." Merger Guidelines § 4.2.2. Persistent regional pricing shows that TiO2 producers can discriminate based on customers' locations. And, as Dr. Shehadeh testified, the Merger Guidelines are "an excellent summary of a very broad set of tools that are used by economists" to engage in antitrust analysis. Hr'g Tr. 478:6-8. ***HN14***[] They have also been repeatedly relied on by the courts. *See, e.g., Sysco, 113 F. Supp. 3d at 38* ("The Merger Guidelines are not binding, but the Court of Appeals and other courts have looked to them for guidance in previous merger cases.") (citing *Heinz, 246 F.3d at 716*; *H & R Block, 833 F. Supp. 2d at 52 n. 10*). Thus, Dr. Hill's modeling assumptions seem reasonable given the nature of the TiO2 industry.

In summary, though the TiO2 market is characterized **[**37]** by considerable global trade, the Commission has credibly suggested that North American customers could not overcome a 10% SSNIP by increasing imports from foreign sources. It has also shown that customers cannot substitute away from chloride by using sulfate TiO2 in their coatings, paints, and plastics. The Court finds that the FTC has carried its burden, and that the market for chloride-process TiO2 in North America is the relevant market in which to assess the potential anticompetitive effects of Tronox's acquisition of Cristal.

[*207] 3. The Chloride-Process TiO2 Market in North America is Concentrated, and the Proposed Transaction Would Substantially Increase Concentration

Chemours, Cristal, Tronox, Kronos, and Venator dominate the market for chloride-process TiO2 in the United States and Canada. From producer invoices, customer data, and third-party cost studies, Dr. Hill estimates that roughly 831,000 metric tons of chloride TiO2 was sold in North America in 2016. Of this volume, Chemours accounted for [TEXT REDACTED BY THE COURT] of sales. Together, Tronox and Cristal accounted for [TEXT REDACTED BY THE COURT]. PX5000-068. Kronos accounted for [TEXT REDACTED BY THE COURT], and Venator **[**38]** for [TEXT REDACTED BY THE COURT], of 2016 sales. *Id.* Together, the five firms sold nearly 99.5% of total chloride TiO2 in 2016, and the proposed merger would create a market in which the top two companies control around 73% of total production capacity.

The Merger Guidelines explain that ***HN15***[] "[m]arket concentration is often one useful indicator of likely competitive effects of a merger," and that the Herfindahl-Hirschman Index ("HHI") is a common economic measure of such concentration. Merger Guidelines § 5.3. Courts agree. *See, e.g., Heinz, 246 F.3d at 716*.

The HHI is calculated by squaring the market share of each firm in the market and adding up these squares (so, if there are three firms with market shares of 50%, 30%, and 20%, the HHI would be $50^2 + 30^2 + 20^2 = 3{,}800$). Squaring the individual market shares allocates proportionately greater weight to firms with larger shares, reflecting the larger threat to competitive behavior they pose. *See* Merger Guidelines § 5.3. For antitrust purposes, the FTC and the U.S. Department of Justice generally classify markets as "unconcentrated," "moderately concentrated," and "highly concentrated." An unconcentrated market features an HHI of below 1,500. A moderately concentrated **[**39]** market has an HHI of between 1,500 and 2,500, while a highly concentrated market has an HHI that is greater than 2,500. *Id.*

HN16[] Economists calculate the HHI score of an industry before and after the proposed merger. Transactions that result in an HHI increase of fewer than 100 points "are unlikely to have adverse competitive effects." *Id.* In moderately concentrated markets, a transaction that increases the HHI by more than 100 points "potentially raise[s] significant competitive concerns and often warrant[s] scrutiny." *Id.* Mergers "resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." *Id.* This presumption of anticompetitive effects "may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power." *Id.*

The Defendants did not attack Dr. Hill's HHI analysis. He determined that the present-day North American chloride TiO2 market features an HHI score of 2,320, which suggests that the market is moderately concentrated. PX5000-068. Should Tronox and Cristal merge, the new four-firm market would feature an HHI of 3,046. The merger would thus increase the HHI **[**40]** by 726 points, resulting in a highly concentrated market. Because it would increase the HHI score by well over 200 points, and because it would result in a highly concentrated market, the proposed transaction is presumptively anticompetitive under the Merger Guidelines. *See also Heinz, 246 F.3d at 716* (noting that the proposed merger would "increase the HHI by 510," and that this "creates, by a wide margin, a presumption that the merger will lessen competition" in the relevant market).

[*208] 4. Post-Merger Strategic Output Withholding is Likely

Beyond its market-share analysis, the Commission's evidence suggests a reasonable probability that the proposed transaction will lead to anticompetitive behavior among the industry's remaining players. Although the Defendants offer nontrivial critiques of Dr. Hill's theoretical models suggesting this behavior, they cannot overcome the real-world proof of meaningful market incentives to manage prices by withholding TiO2 supply.

a. The Documentary and Testimonial Evidence Points to Incentives for and a History of Strategic Output Withholding

Statements from Tronox executives evince an understanding that TiO2 producers recognize the benefits of strategically withholding supply **[**41]** from consumers to maintain higher prices. In 2012, the firm's Chief Commercial Officer advised against aggressive competition with producers, as this would cause "price to deteriorate further and [Tronox does] not want to facilitate or fuel that process." PX5000-077. He instead suggested the company "slow down production so that we minimize or eliminate the inventory build that will occur if we continue running at the existing rates." *Id.* On a 2015 earnings call, Mr. Casey noted that Tronox was "addressing when the prices turn" by "managing our production so that inventories get reduced to normal or below normal levels. And when that happens, prices will rise." PX9005-010. On a 2016 earnings call, Mr. Casey explained that "a very disciplined approach to production, to managing supply relative to demand, is what has facilitated the recovery in our markets, and we intend to continue to be disciplined about that." PX9003-010. And on the February 2017 earnings call to announce and discuss the proposed merger with Cristal, Mr. Casey said, "we have tried to be economically rational over these last several years. If there was surplus supply in the market we slow down our production." PX9000-012. **[**42]**

Tronox documents suggest the firm has withheld TiO2 supply to shore up prices in the past and that avoiding price competition with fellow suppliers can be beneficial. In 2016, Arjen Duvekot, then a managing director, told a distributer that "to stop the price erosion in the market we reduced the production output in our pigment plants mid 2015 by 15%," adding that this withholding "presents a great opportunity to turn around the price trend of the last 4 years and improve the prices for Tronox TiO2 pigment in the market." PX5002-009. Similarly, in 2015, Mr. Duvekot told a colleague that offering a consumer a lower price "will cause a reaction from the competition, at this account or elsewhere in the market, which will just lead to more price erosion in the market. Tronox does not want to play this game (anymore)." PX1432-001.

Other TiO2 firms also acknowledge the benefits of strategic output withholding. *See* PX2022, PX2116, and PX2083 (statements in Cristal documents about idling production to raise prices); PX3000 at 003-004 ([TEXT REDACTED BY THE COURT] noting that "capacity rationalization" and an "increasingly structured and consolidated market (Tronox / Cristal)" mean that the "[s]ignificant **[**43]** recovery in TiO2 prices [is] expected to continue through 2017 and 2018"); PX5000-079 (describing plans by Chemours to "dial back production" at some plants in response to adding production capacity at a facility in Mexico).

HN17[↑] There is, of course, nothing improper about a firm making independent production decisions to maximize profits. But a core purpose of ***antitrust law*** is to scrutinize mergers that may make it easier **[*209]** for firms to collectively reduce output, and indeed, to prevent mergers that are likely to do so. *See* *Heinz, 345 U.S. App. D.C. at 371* ("Merger law rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels."); *F.T.C. v. Elders Grain, Inc., 868 F.2d 901, 906 (7th Cir. 1989)* (Posner, J.) (noting that antitrust theory "teaches that an acquisition which reduces the number of significant sellers in a market already highly concentrated and prone to collusion by reason of its history and circumstances is unlawful in the absence of special circumstances.").

A Tronox-Cristal merger will make TiO2 supply reductions easier to coordinate through implicit understanding and sheer market power, in a market where producers **[**44]** have already shown an awareness that implicit coordination would be beneficial.[12] The post-merger market would feature two firms that control roughly three quarters of all chloride TiO2 production — Chemours and the Tronox-Cristal entity. These firms could more easily "stop the price erosion in the market" and "slow down production" across the industry, as customers will often be left with no meaningful alternative sources of supply.

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[12] The Commission alleges a history of overt collusion in the TiO2 industry, pointing to recent price-fixing allegations and litigation. *See* *Valspar Corp. v. E.I. Du Pont De Nemours and Co., 873 F.3d 185 (3d Cir. 2017)*; *In re Titanium Dioxide Antitrust Litig., 959 F. Supp. 2d 799 (D. Md. 2013)*; Pl.'s Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. 3, ECF. No. 6 ("the TiO2 industry in North America has a long history of price-fixing litigation and subsequent court decisions outline pervasive anticompetitive conduct."). The Defendants vigorously contest these assertions. *See* Defs.' Redacted Opp. to Prelim. Inj. 28-29. That said, the Court need not decide the merits of these claims, as the proposed merger will increase the likelihood of collective output withholding without explicit agreements or attempted price-fixing.

Consider two examples. First, [TEXT REDACTED BY THE COURT] "spends about [TEXT REDACTED BY THE COURT] annually to buy a specialty chloride grade of titanium dioxide from Tronox." PX8001-001. [TEXT REDACTED BY THE COURT] While the firm "prefers to use Tronox's . . . titanium dioxide, it has purchased . . . from [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] in the past, and is willing to purchase it [from these Tronox rivals] in the future," based on product pricing and availability. *Id.*

Recently, Tronox offered [TEXT REDACTED BY THE COURT] a new "one-year contract at a significant price increase, about [TEXT REDACTED BY THE COURT] above" the firm's current contract price. *Id.* at 002. The company "reached out to [TEXT REDACTED BY THE COURT] and **[**45]** [TEXT REDACTED BY THE COURT], its two previous titanium dioxide suppliers," but "[TEXT REDACTED BY THE COURT] responded that they do not have supply to offer, and [TEXT REDACTED BY THE COURT] failed to respond at all." *Id.* Seeking to avoid paying Tronox's higher price, the company "anticipate[s] reaching out to Cristal in the near future" to see if Cristal would be willing to offer a supply proposal. *Id.*

Second, [TEXT REDACTED BY THE COURT] has a supply agreement with Tronox that [TEXT REDACTED BY THE COURT]. Seeking to test the TiO2 market for a better deal, [TEXT REDACTED BY THE COURT] "approached [TEXT REDACTED BY THE COURT], and they said [they have] no volume for 2018. They had none available to sell [TEXT REDACTED BY THE COURT]." Hr'g Tr. 276:16-17. When [TEXT REDACTED BY THE COURT] "first approached [TEXT REDACTED BY THE COURT], they gave us the same answer. [TEXT REDACTED BY THE COURT]" Hr'g Tr. 276:18-22. Thus, "if Tronox raised prices, by, say, 10 percent" under present market circumstances, "Cristal would be [the] one person [TEXT REDACTED BY THE COURT] could approach." Hr'g Tr. 277:2-5.

The experiences of [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] suggest **[**46]** that chloride TiO2 consumers in North America today face challenging but surmountable hurdles in their **[*210]** efforts to negotiate prices and ensure a consistent source of supply. In at least some cases, the threat of switching between Tronox and Cristal is the only leverage available to industry customers. In North America, for instance, [TEXT REDACTED BY THE COURT] purchases roughly [TEXT REDACTED BY THE COURT] of its TiO2 and [TEXT REDACTED BY THE COURT] of its slurry TiO2 from either Tronox or Cristal. Hr'g Tr. 282:18-21. More broadly, Chemours and the Tronox-Cristal entity would often be able to maintain price discipline and control supply in a post-merger market simply by competing less vigorously against each other for major accounts. As Mr. Christian testified, "more consolidation . . . leads to more power for the producers . . . [the proposed merger] gives us increased . . . bargaining power as an industry." Hr'g Tr. 270:5-10.

The available real-world evidence thus suggests that (1) to counter declining prices, chloride TiO2 producers have incentives and the means to withhold supply, and (2) the proposed transaction, which would create two firms with nearly three-quarters of the total **[**47]** market share, will likely increase these incentives and make implicit price coordination easier. The evidence, in other words, strengthens the Commission's assertion that the Tronox-Cristal merger raises serious and substantial questions about likely anticompetitive effects.

b. Dr. Hill's Capacity Closure and Cournot Models are Subject to Valid Critiques, but Their Conclusions Track Business Realities

Dr. Hill used two economic models to prove that the merger will increase incentives to withhold TiO2 supply. He first presented findings from a new analysis he calls the "Capacity Closure" model. PX5000-085. It seeks to quantify the costs and benefits to the Tronox-Cristal entity associated with output reductions. Generally, the cost of reducing production is the lost profit on each unit of TiO2 that is withheld, while the benefit is the higher profit margin, attributable to a higher market price, of each unit that is sold. *Id.* at 086. The model allows "imports of chloride titanium dioxide to be affected by changes in the price," but it does not "allow for an increase in North American domestic production of chloride titanium dioxide because of the current high operating rates in North America." **[**48]** *Id.* at 087.

The Capacity Closure model predicts that, "under current market conditions, the merged firm would have an incentive to withhold output by idling two production lines at [Tronox's] Hamilton plant [in Mississippi]." *Id.* at 087. Specifically, the "most profitable output withholding strategy is predicted to lead to a price increase of 23% and cause harm of $419 million per year." The model outlines many profitable withholding strategies that would result in price increases to consumers ranging from 8 - 38%. *Id.*

The Defendants present two criticisms of the Capacity Closure model that limit the persuasiveness of its conclusions. Dr. Shehadeh contends that the model is invalid as it "predicts that Chemours should supply less to North America under current competitive conditions than Chemours is actually supplying." RX0170.0038. Because the model's predictions are unreliable for "Chemours' actual conduct today," he argues, they are unreliable as they pertain to future conduct by the merged entity. *Id.*

Dr. Hill's rebuttal report does not respond directly to this allegation. *See* PX5004 at 041-045. During the evidentiary hearing, he explained that he did not try to address the issue, as he did not apply **[**49]** his model to Chemours. Hr'g Tr. 447:2-448:1. Instead, he claimed that he was unwilling to "rely on the data" used by Dr. Shehadeh, **[*211]** because "Chemours has a different production process than its rivals," and this makes "margin information" on the firm unreliable. *See id.* Dr. Hill did use this data, however, in conducting some of his hypothetical monopolist testing, as there he "was able to mitigate the concerns about the data." Hr'g Tr. 448:5-7. While it is true that data fit for one purpose may not be fit for another, Dr. Hill's response does not fully allay the concerns raised by Dr. Shehadeh, and there is reason to question the model's predictive power.

Dr. Shehadeh also questions the justification for the assumption that the "current high operating rates in North America" mean that producers cannot increase capacity at all. After all, high operating rates do not prevent firms from "engaging in [the type of] expansions that have been so evident in the industry." RX0170.0039. Dr. Hill's rebuttal focuses on statements made by Venator and Chemours executives, who predict sustained capacity constraints and suggest that the industry's high utilization rate is unlikely to change over the **[**50]** next few years. *See* PX5004 at 043-44. But these statements assume that the status quo will continue, and not that a new Tronox-Cristal entity will increase its output withholding. It therefore seems reasonable to expect *some* efforts by rivals to increase capacity if such efforts could be profitable.

Unlike the Capacity Closure model, the Cournot model is a "fundamental economic" tool used to analyze oligopolies. PX5000-090. Its "key insight is that firms in oligopoly markets will recognize their mutual interdependence and restrict output—thereby increasing the market price above the competitive level." *Id.* And unlike the Capacity Closure method, the Cournot model allows firms to adjust output, so that each firm can expand capacity if it so chooses. *Id.* Dr. Hill's Cournot analysis suggests that "the merger would lead to a higher chloride titanium dioxide price unless the merger were to generate a more than 74% reduction in the merged firm's marginal cost as compared to those of the stand-alone firms." *Id.* Unless the cost savings from the acquisition are so great as to reduce the price of producing a unit of TiO_2 pigment by 74%, the Cournot model suggests that the merged entity would **[**51]** gain more from raising prices than increasing supply.

Dr. Shehadeh contends that, in some circumstances, use of the Cournot model is not appropriate and leads to results that are inconsistent with market realities. RX0170.0044. Here, for instance, the Cournot model "significantly" understates the existing marginal costs of production. *Id.* at 0045. Chemours' marginal cost of producing TiO_2 is, according to the model, "more than [TEXT REDACTED BY THE COURT]" lower than the "actual" marginal cost as measured by Dr. Hill. *Id.* Because of this "glaring inconsistency with basic industry facts," the Cournot model cannot yield reliable conclusions about the market. *Id.*

The Defendants also highlight, and Dr. Hill confirms, that his "Cournot model predicts that in the North American chloride TiO_2 market the merger will be unprofitable with respect to variable costs." Hr'g Tr. 450:21-24. He added that he did not use the Cournot model to analyze the overall profitability of the merger, but that a "merger that generates significant fixed cost savings" would still be profitable on an overall basis. Hr'g Tr. 452:18-453:14.

Dr. Hill rejects the contention that these findings make the Cournot model inconsistent with **[**52]** market realities. He counters that Dr. Shehadeh "confused the total cost of production," which is used in the Capacity Closure model, with "the concept of marginal cost of production." PX5004-046. Using a corrected, apples-to-apples comparison, **[*212]** the data offers "striking support for the Cournot model's validity." *Id.* Dr. Hill also suggests that the purpose of the Cournot model is not to analyze merger profitability, but rather to test the effects of output withholding. Hr'g Tr. 467:15-24.

The Court finds that Dr. Hill's overall conclusions are more consistent with the business realities of the TiO2 industry than those proffered by Dr. Shehadeh, even if the Cournot and Capacity Closure models are subject to valid criticisms. Dr. Hill buttresses his modeling with several producer statements that support his findings. TiO2 producers are aware, for example, of their interdependence and the downsides of expanding output. *See* PX5000-093 (collecting Tronox executives' statements like, "we have not gained market share by trying to reduce price [and we] don't think that's the appropriate strategy going forward," and [TEXT REDACTED BY THE COURT]. These statements lend credibility to the models' **[**53]** conclusions, as they suggest that firms are generally unwilling to take actions that will lower industry-wide prices.

Ultimately, ***HN18***[] this Court need not decisively sift through various models and theories. *See* *Sysco, 113 F. Supp. 3d at 36-37* (noting that the court "hesitates to rely on" an expert's precise calculations where such calculations are subject to valid criticism, and concluding that "when evaluated against the record as a whole, [the expert's] conclusions are more consistent with the business realities" of the relevant market). Rather, the question here is whether the FTC "has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Heinz, 246 F.3d at 714-15* (internal quotation omitted).

The FTC clears this bar. It has established its prima facie case by proving that the Tronox-Cristal merger will likely result in undue concentration in the North American chloride-process TiO2 market. It has strengthened this case by showing that the merger will increase already prevalent incentives to engage in strategic output withholding. The Commission **[**54]** has therefore established a presumption that the proposed transaction will have anticompetitive effects in violation of the Clayton Act.

B. The Defendants' Rebuttal Evidence Does Not Overcome the Presumption of Anticompetitive Effects

HN19[] The Defendants can rebut the presumption that their merger will substantially lessen competition either by "discrediting the data underlying the initial presumption in the government's favor," or by "affirmatively showing why [the deal] is unlikely to substantially lessen competition." *Baker Hughes, 908 F.2d at 991*. Generally, "[t]he more compelling the [FTC's] prima facie case, the more evidence [the Defendants] must present to rebut it successfully." *Id.* As discussed above, the Defendants have not sufficiently discredited the Commission's data and evidence.

They marshal two additional arguments suggesting that the market will remain competitive post-acquisition. First, they contend that the current market is "fiercely competitive," and that the Defendants face increased pressure from "the rise of Chinese market entrants who are disrupting competition globally." Defs.' Unredacted Opp. to Prelim. Inj. 24, 29. Second, they assert that consumers will benefit from the transaction's output-enhancing **[**55]** synergies and efficiencies. Neither argument, alone nor in tandem, can overcome the Commission's strong presumption of anticompetitive effects.

[*213] 1. Chinese Producers are Not Yet Positioned to Replace the Competition That Would be Lost by a Tronox-Cristal Merger

HN20[] Entry or expansion into the relevant market by new competitors can mitigate the expected anticompetitive effects of a proposed transaction. *H & R Block, 833 F. Supp. 2d at 73*. This is because, "[i]n the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time." *Baker Hughes, 908 F.2d at 987*. The Merger Guidelines thus suggest that companies that are "not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP, without incurring significant sunk costs, are also considered market participants." Merger

Guidelines § 5.1. Sunk costs include the "entry or exit costs that cannot be recovered outside the relevant market." *Id.*

The Defendants contend that, in defining the market and assessing the deal's likely harm, the Commission "wrongly dismisses the importance of Chinese TiO2 producers, particularly Lomon Billions, the fourth largest TiO2 supplier **[**56]** in the world by capacity." Defs.' Unredacted Opp. to Prelim. Inj. 30. Lomon Billions "plans to expand its chloride capacity . . . by adding 200,000 tons per year during the year 2019 . . . and 300,000 tons per year sometime in the mid-2020s." *Id.* at 30-31. Based on 2016 data, this expansion would make Lomon Billions almost twice as large as the current market leader in chloride-process production (Chemours, with roughly 290,000 tons), and would expand the overall chloride market by nearly 60%. *See* PX5000-068. Lomon's bold growth plan is feasible, "real and unspeculative," the Defendants warn, because the firm "benefit[s] from low capital costs, support from the Chinese government, and from inherited intellectual property." Defs.' Unredacted Opp. to Prelim. Inj. 30-31.

It is no doubt possible, and perhaps inevitable, that competition from Lomon Billions and other Chinese TiO2 producers will someday redefine the North American market. But the pertinent question here is whether the emergence of Lomon Billions can be "rapid enough to make unprofitable overall the [predicted] actions" that otherwise lead to the Commission's concerns about anticompetitive effects. Merger Guidelines § 9.1. The evidence suggests **[**57]** that it cannot.

Currently, neither Lomon Billions nor any supplier other than Chemours, Tronox, Cristal, Kronos, or Venator account for even 1% of North American chloride-process TiO2 supply. PX5000-068. Lomon Billions, like other Chinese firms, is "predominantly" a sulfate-process TiO2 producer. Hr'g Tr. 184:9-11. Tronox documents from 2016 suggest that "China has built multiple chloride plants but struggles to commission them," and that "almost no commercial grade [chloride] pigment is produced today." PX5000-113.

Major TiO2 manufacturers do not appear to be worried about the prospect of a near-term increase in Chinese chloride production. In a 2015 email, then-Tronox CEO Mr. Casey said, "I think it is a very remote prospect that China will be producing chloride capacity of any magnitude in the next 3-5 years. The only facility is a 30,000 ton plant being built by Billions, which they cannot get to work." PX1065-001.

Similarly, from Kronos's perspective, Lomon Billions is "just not a material threat today . . . . We've been thinking [about] this for a while, [and] we just don't see a lots [sic] of Chinese [chloride-process] products in the markets in which we compete." Hr'g Tr. 183:24-184:8. **[**58]** Kronos **[*214]** does not see its "customers . . . switching from our [chloride-process] products to Lomon Billions." Hr'g Tr. 184:16-17. As Mr. Christian persuasively explained, Chinese companies' typical advantages are low labor costs and a relaxed environmental regulatory regime. Hr'g Tr. 186:11-25. These advantages are of little help in the chloride-process business. *Id.*

Indeed, the experiences of Chinese TiO2 manufacturers confirm the existence of two substantial barriers rendering rapid entry into the North American market unlikely: capital costs and technology constraints. Tronox estimates that "on average, the greenfield cost per ton of TiO2 is between $5,000-$6,000 for chloride pigment plants." PX003-013. The construction of a new 200,000-ton plant would therefore cost between $1-$1.2 billion. *See also* PX5000-110 (noting similar estimates from Cristal and Kronos).

In addition to high entry costs, chloride-process TiO2 requires advanced technology and intellectual property that is "closely guarded by Western producers." PX3011-019. Lomon Billions has "struggled with the technology. They don't produce utilization rates anywhere near their . . . nameplate capacity [and] they've had to lower **[**59]** the nameplate capacity of their plant." Hr'g Tr. 184:23-185:3. *See also* PX5000-113 ("[TEXT REDACTED BY THE COURT] deemed efforts by the largest Chinese producer, Lomon Billions, to produce chloride titanium dioxide a 'technology failure."); PX1000-018 (Tronox presentation noting that the "[l]egitimacy of [Chinese] base technology [is] questionable," and that Chinese firms have "[n]o know-how/experience of running CP plant").

Customers, like TiO2 producers, believe that technology and quality constraints preclude Chinese manufacturers from meaningful participation in the chloride market. [TEXT REDACTED BY THE COURT] has tested Lomon

Billions' chloride TiO2 but found it lacking. PX5000-114. [TEXT REDACTED BY THE COURT] has an established supply relationship with Lomon Billions, but they "weren't able to deliver the material that we ordered when we wanted it." [TEXT REDACTED BY THE COURT] *See also* Admin. Trial Tr. 1094:21-1095:9 (North American customer noting that buying "titanium dioxide from China" would "really be a last resort for us.").

Finally, even if Chinese producers can radically increase their chloride TiO2 production over the next few years, recent trends show that much of **[**60]** this supply may be consumed by their domestic demand. China is currently a net importer of chloride TiO2. PX5000-115. As its economy grows and per capita incomes increase, demand for household paints and other products using TiO2 is expected to rise. An industry study, for example, estimates that China's share of TiO2 demand will "expand[] from 4% of global demand in 2005 to an anticipated share of 27% in 2020." PX5000-115. [TEXT REDACTED BY THE COURT] *See also* PX3032 at 001 ("Chinese TiO2 growth is primarily feeding local and Asian demand."). Reflecting these trends, Mr. Casey estimated that China's "first production [of chloride TiO2] will go into the domestic market so the export market impact will be quite a while." PX1065-001.

The limited presence of Lomon Billions in the North American chloride market today, the substantial barriers to entry, and China's internal TiO2 demand trends do not paint a picture of rapid entrants ready to replace the loss of Cristal as a source of competition. Rather, the emerging threat from Chinese producers here is like the prospective competition from Amazon that the court considered in *Staples, 190 F. Supp. 3d at 133-136*. Evaluating a proposed merger between Staples and Office Depot, **[**61]** the court there found that the Commission had established its prima facie **[*215]** case. *See id. at 131*. The *Staples* defendants responded by suggesting that competition from "Amazon Business" would nullify any suggested anticompetitive effects. *Id. at 133*. They asserted that Amazon "wants to take over the office supply industry," and that the firm would "eventually transform the [business-to-business] office supply space." *Id.*

The court was unconvinced. It found "significant institutional and structural challenges" that prevented Amazon from being "in a position to restore [lost] competition." *Id. at 134*. The court found that "customers still do not view Amazon Business as a viable alternative," and that Amazon had "yet to successfully bid to be a large [business-to-business] customer's primary vendor." *Id.* Amazon, in other words, would "not be in a position to compete" in the relevant market "with the proposed merged entity within three years." *Id. at 136*. So too here. Lomon Billions is not yet positioned to compete meaningfully with the producers that would remain in a post-merger North American chloride TiO2 market.

2. The Transaction's Purported Synergies and Efficiencies do not Rebut the Commission's Prima Facie Case

HN21[] When a court **[**62]** "finds high market concentration levels, defendants must present proof of extraordinary efficiencies to rebut the government's prima facie case." *Sysco, 113 F. Supp. 3d at 81*. Courts have "rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies." *Id. at 82* (quoting *F.T.C. v. CCC Holdings, Inc., 605 F. Supp. 2d. 26, 72 (D.D.C. 2009))*. To be able to offset a merger's likely anticompetitive effects, purported synergies and efficiencies must "represent more than mere speculation and promises about post-merger behavior." *Heinz, 246 F.3d at 721*. They must be "merger-specific," meaning that they "cannot be achieved by either company alone." *Id. at 721-722*. And they must be "reasonably verifiable by an independent party." *H & R Block, 833 F. Supp. 2d at 89*. The Defendants have identified several merger-specific, but ultimately unverifiable, synergies and efficiencies.

The Tronox-Cristal merger, they argue, will increase global production of TiO2 for three reasons. First, "Tronox produces more TiO2 feedstock than its TiO2 pigment plants can consume, while Cristal's TiO2 production exceeds its feedstock production." Defs.' Unredacted Opp. to Prelim. Inj. 24. The merger would thus allow "greater vertical integration" leading to expanded TiO2 output. *Id.* Second, Tronox believes that Cristal is not producing as much TiO2 as it could, **[**63]** in part because of the "extremely subpar" performance of its titanium dioxide plant in Yanbu, Saudi Arabia. *Id.* at 27. Kerr McGee, Tronox's predecessor firm, "built Yanbu with its *own* technology," and

Tronox believes it has a "unique skill set" and expertise that will allow it to boost production at the plant. *Id.* (emphasis in original). Third, Tronox believes that it can "repair and restart" the "Jazan slagger," a currently non-operational feedstock-producing facility in Saudi Arabia that is owned by Cristal. *Id.* Such repairs would increase the available feedstock for TiO2, thereby increasing the pigment's production. And an increase in global TiO2 production will, all else equal, benefit consumers by lowering prices.

Although the Court does not doubt their desire to operationalize these efficiency-improving plans, the Defendants have not shown that the merger will necessarily increase overall output. As discussed above, the titanium dioxide industry features significant incentives, depending on **[*216]** prices, to withhold or manage output to maximize profits. The Defendants contend that the "great opportunity costs" associated with reducing TiO2 production mean that "TiO2 manufacturers, when they **[**64]** have their facility, they run it flat out, they run it all out, they try to gain . . . 100 percent realization." Hr'g Tr. 40:25-41:3. But this assertion is belied by the observable economic reality of the industry: to prevent falling prices, firms can and do find it profitable to reduce output.

Still more, the success of Tronox's planned improvements to the Yanbu plant and Jazan slagger cannot be reasonably verified before such improvements occur. TiO2 plants, Tronox CEO Jeffry Quinn explained, are "like living organisms. You make mistakes. You do things, and sometimes it doesn't work." Hr'g Tr. 603:13-15. He added that the Jazan slagger has "had several failed start-ups in the past." Hr'g Tr. 618:21.

Reflecting this uncertainty, Tronox signed an Option Agreement with Cristal related to the slagger. The Option Agreement "obligated [Tronox] to make financial investments to help fix the Jazan facility," and "if certain performance metrics are met," Tronox is "obligated to purchase [the slagger] in the future." Hr'g Tr. 619:8-19. But if these performance metrics are not met, then "the $120 million that we are advancing, gets converted to a loan, either we get paid back or that we get it **[**65]** paid back in terms of a reduced price for buying feedstocks to come out of the furnace." Hr'g Tr. 620:5-12. Tronox, in other words, has taken understandable precautions in case the planned output-enhancing improvements cannot be actualized.

The Defendants also suggest that the merger will result in "sizeable cost savings synergies" stemming from the "reduction in personnel" and "supply chain synergies, including volume purchase discounts." Defs.' Unredacted Opp. to Prelim. Inj. 28-29. The Defendants hired KPMG, a professional services company, "to verify the synergy estimates." *Id.* at 29. After "performing [an] extensive review of the Tronox and Cristal transaction, with access to the 'entire data room' in this matter," KPMG submitted a report showing that they "had assessed and validated" the deal's cost savings. *Id.*

Again, while the Court credits the intent to achieve these cost savings, it is difficult to independently verify the scale or likely success of the deal's synergies. In measuring the general administrative cost savings of the deal, for instance, KPMG's "synergy tracking model" relied in part on revised estimates of operational synergies "that the business had identified." PX7045-013. **[**66]** KPMG's conclusions on cost savings were thus partially based on estimates and assumptions made by the Defendants' internal business teams.

Nor did Defendants hire KPMG to identify "merger-specific" cost savings for antitrust purposes, but to "provide consulting support" for the "sign-to-close period" of the deal. *Id.* at 012. It is thus difficult to evaluate and compare the deal's synergies to the dollar amount of cost savings that may have been achievable by either Tronox or Cristal absent a merger. *See* *Sysco, 113 F. Supp. 3d at 83* ("Sysco did not hire McKinsey to identify merger-specific savings for antitrust purposes . . . . McKinsey was not given instructions on identifying merger-specific savings." As a result, "Defendants have not shown that [the cost savings] could not be achieved independently of the merger.")

In sum, neither emerging competition from Chinese producers nor the transaction's purported synergies and efficiencies sufficiently prove that the Tronox-Cristal merger will in fact be pro-competitive. The Court finds that the FTC has met its **[*217]** burden by raising "questions going to the merits so serious, substantial, difficult and doubtful" as to warrant further proceedings by the FTC and, potentially, the Court **[**67]** of Appeals. *Heinz, 246 F.3d at 714-715*.

C. The Equities Favor Granting the Commission a Preliminary Injunction

HN22[] Although the FTC's showing creates a presumption in favor of a preliminary injunction, the Court must still weigh the equities to determine whether this relief would be in the public interest. *15 U.S.C. § 53(b)*. The Court must consider the interests of the public, "either in having the merger go through or in preventing the merger," and the private equities, which "include the corporate interests" of the Defendants. *F.T.C. v. Swedish Match, 131 F. Supp. 2d 151, 172 (D.D.C. 2000)*. Here, effective enforcement of federal antitrust laws and the need to preserve the Commission's capacity to order meaningful relief require granting the FTC the injunction it seeks.

1. The Public Equities Support Injunctive Relief

HN23[] As the FTC has shown a likelihood that the proposed transaction will substantially lessen competition, the "public interest in effective enforcement of the ***antitrust law***" weighs in favor of granting an injunction. *Heinz, 246 F.3d at 726*. *See also* *Swedish Match, 131 F. Supp. 2d at 173* ("There is a strong public interest in the effective enforcement of the antitrust laws that weighs heavily in favor of an injunction in this case.").

Also supporting an injunction is the "public interest in ensuring that the FTC has the ability to order effective **[**68]** relief if it succeeds at the merits trial." *Sysco, 113 F. Supp. 3d at 86*. The Defendants contend that a post-merger divesture of two Cristal plants in Ashtabula, Ohio, would sufficiently alleviate any anticompetitive concerns the Commission has. Defs.' Unredacted Opp. to Prelim. Inj. 40. They are incorrect. ***HN24***[] "*Section 13(b)* [of the FTC Act] itself embodies congressional recognition of the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case." *Heinz, 246 F.3d at 726*. *See also* *F.T.C. v. Dean Foods Co., 384 U.S. 597, 606 n. 5, 86 S. Ct. 1738, 16 L. Ed. 2d 802 (1966)* ("Administrative experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture."). The FTC explained that "divestitures are really hard to do, particularly post-consummation divestitures" and that they can take up to "seven years to sort out." Hr'g Tr. 770:10-21.

Divestitures may not succeed at restoring competition to the post-merger market. A recent FTC study, for instance, notes that "[i]t may be particularly difficult to restore the pre-merger state of competition if the merging parties have commingled, sold, or closed assets; integrated or dismissed employees . . . or shared confidential information." Fed. Trade Comm'n, *The FTC's Merger Remedies 2006-2012* 18 (2017). **[**69]** In fact, for consummated mergers from 2006 - 2012, only about 25% of the remedies that the Commission ordered were considered "a success." *Id.* Thus, the public interest in ensuring the FTC can order a practicable remedy to preserve market competition supports granting a preliminary injunction.

Pointing to *F.T.C. v. Weyerhaeuser Corp., 665 F.2d 1072, 214 U.S. App. D.C. 254 (D.C. Cir. 1981)*, the Defendants suggest that "[i]f strong equities favor consummation of the transaction, a hold separate order [rather than an injunction] will check interim competitive harm, and such an order will permit adequate **[*218]** ultimate relief." Hr'g Tr. 826:5-8. In *Weyerhaeuser*, the district court permitted a proposed merger to proceed, but it required the defendants "to hold separate a portion of the assets" during the FTC proceedings. *665 F.2d at 1074*. Tronox asks the Court to issue a similar order here.

Putting aside the fact that this 1981 case appears to be the last time the D.C. Circuit blessed such an arrangement, the proposed merger is different in several crucial respects to the *Weyerhaeuser* merger. There, the FTC challenged only part of the deal, the firm being acquired was "a privately held family corporation with about ninety shareholders," and the court found that the merger would result in an "almost **[**70]** certain" increase in product supply. *Id. at 1074-75*. The court also determined that a post-merger divesture of the asset in question, a corrugating medium mill, would be a "feasible remedy." *Id. at 1075*. Cristal is not a small, privately held family corporation, it is possible that the proposed transaction will create incentives to decrease—rather than increase—

TiO2 supply, and the Ashtabula plants are not small assets that can be summarily divested.[13] Thus, a hold-separate order will not suffice.

2. The Private Equities do not Outweigh the Public Equities

The Defendants strenuously argue that the Commission has proceeded in bad faith. They contend that "[t]he FTC has unreasonably delayed its request for a preliminary injunction." Defs.' Unredacted Opp. to Prelim. Inj. 34-35. The Commission, they allege, used "its regulatory processes to increase the costs and burdens of moving forward with the transaction instead of seeking a fair and expeditious resolution of the legal issues." *Id.* at 38. To keep the deal alive, Tronox has "had to agree to more than $130 million in additional consideration that **[**71]** it would not have had to pay if the FTC had promptly sought injunctive relief months ago." *Id.* at 39.

To be sure, the posture of this case is unique as, typically, the FTC seeks injunctive relief before an administrative trial has occurred. *See* Admin. Trial Hr'g Tr. 11:25-12:4, ECF No. 70-6 (ALJ noting that "this is the first case I'm aware of, in a nonconsummated merger, where we're in this position, going to trial, where the Government has not moved for a preliminary injunction. It's never happened as far as I know."). Thus, the Defendants have borne additional costs by presenting their arguments both here and before the Commission's ALJ, and they have devoted additional time and resources to the proposed transaction. This is unfortunate.

The Court is not, however, persuaded by the Defendants' gloss on the FTC's motives. ***HN25***[] Preliminary injunctions are equitable remedies to be used sparingly and in exigent circumstances. *See Sysco, 113 F. Supp. 3d at 23* ("The issuance of a preliminary injunction prior to a full trial on the merits is an extraordinary and drastic remedy.") (cleaned up). Until foreign regulators approved the proposed merger, there was no imminent threat to competition, so a request for injunctive relief would **[**72]** have likely been unripe. *See Lewis v. Continental Bank Corp., 494 U.S. 472, 477, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990)* (***HN26***[] "[F]ederal courts may adjudicate **[*219]** only actual, ongoing cases or controversies.").

And it is far from clear that, but for the injunction request, the Defendants would have consummated the merger without having to negotiate an extended closing deadline. The Defendants went through a lengthy regulatory review process in the European Union. European regulators conditioned their approval of the merger upon a partial divestiture of assets from a Tronox facility in the Netherlands (the "Botlek plant"). Mr. Quinn claimed that Tronox "could have any point just agreed to sell the Botlek plant and, you know, been assured of a resolution in Europe." Hr'g Tr. 609:2-4. Selling the plant would have removed this roadblock, forcing the FTC to file an injunction sooner. Indeed, the FTC filed this action because approval from European regulators was "the only remaining hurdle preventing Defendants from consummating the Acquisition." Compl. 2.

But Tronox did not sell the Botlek plant to hasten resolution of the regulatory process, as the firm believed that "a divestiture of a whole plant . . . was completely disproportionate to any theories of harm that the EU was asserting." **[**73]** Hr'g Tr. 640:6-8. Thus, the Defendants had discussions with the European Commission "for a number of months," presented evidence at a formal hearing process, and negotiated approval based on a narrower divestiture. Hr'g Tr. 609:11-610:15. While the Defendants had every right to press their case with the EC, they—not the FTC—painted themselves into this corner. The EC announced its approval of the merger on July 4, 2018,[14] and the FTC filed its Motion for Preliminary Injunction less than a week later.

Finally, ***HN27***[] the harm to the Defendants from putative delays caused by the FTC is at least somewhat mitigated by the fact that any injunctive relief imposed here would be brief compared with a typical *Section 13(b)*

[13] *See Tronox Submits Definitive Agreement to the European Commission Required for Approval of Cristal Acquisition, available at* https://www.tronox.com/tronox-submits-definitive-agreement-to-the-european-commission-required-for-approval-of-cristal-acquisition/ (last accessed August 28, 2018) (valuing the Ashtabula plants at between $900 million and $1.1 billion).

[14] *See Commission Approves Tronox's Acquisition of Cristal, Subject to Conditions, available at* http://europa.eu/rapid/press-release_IP-18-4361_en.htm (last accessed August 28, 2018).

action. In the ordinary case, an injunction means a merger cannot be consummated until the Commission completes its investigative and adjudicative activities. Here, the FTC has already scrutinized the deal and held an administrative trial. The ALJ will likely issue his initial decision before the end of the year, allowing the parties to obtain a decision on the merits within a matter of months. Thus, the **[**74]** harm to the Defendants from a preliminary injunction is lower than in the typical case, in which the administrative process would not yet have begun.

The equities weigh in favor of granting the Commission a preliminary injunction. ***HN28***[] There are strong public interests in ensuring the effective enforcement of antitrust laws and in equipping the FTC with the ability to order appropriate remedies. These interests cannot be overcome by the private equities proffered by the Defendants.

IV. CONCLUSION

The Commission has successfully shown that, in evaluating the proposed merger between Tronox and Cristal, the relevant antitrust market comprises sales of chloride-process titanium dioxide in the United States and Canada. It has raised serious, substantial, and difficult questions about the merger's possible anticompetitive effects. It has presented credible evidence that the merger will create a highly concentrated market in which producers face greater incentives to engage in strategic output withholding. Because of these showings, and because the equities favor injunctive **[*220]** relief, the Court will grant the FTC's Motion for Preliminary Injunction. A separate order will issue.

Dated: September 12, 2018 **[**75]**

/s/ Trevor N. McFadden

TREVOR N. MCFADDEN, U.S.D.J.

ORDER

Upon consideration of the Plaintiff's Motion for Preliminary Injunction, the pleadings, relevant law, evidence, administrative record, and related legal memoranda and oral arguments in opposition and in support, for the reasons set forth in the accompanying Memorandum Opinion, the Court finds as follows:

1. The Court has jurisdiction over the parties and subject matter of this case, and venue and service of process are proper;
2. The Commission has made a sufficient showing of its likelihood of success on the merits to warrant preliminarily enjoining the proposed merger between the Defendants; and
3. Weighing the equities, issuing an injunction is in the public interest. Therefore, it is hereby

ORDERED that the Plaintiff's Motion for Preliminary Injunction is GRANTED; and it is further

ORDERED that the Defendants are hereby enjoined, pursuant to *Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. §53(b)*, from consummating the proposed merger, or otherwise effecting any combination of Tronox Limited and the National Titanium Dioxide Company Limited, the National Industrialization Company, or Cristal USA, Incorporated, until the Commission's administrative **[**76]** complaint is dismissed by the Commission, set aside by an appeals court on review, or the Commission has issued a final order pursuant to *15 U.S.C. §45*; and it is further

ORDERED that the Defendants shall take all necessary steps to prevent any of their officers, directors, domestic or foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures from consummating, directly or indirectly, any such merger, or otherwise effecting any combination between the Defendants; and it is further

ORDERED that the Defendants shall maintain the status quo until a further order from this Court, or until the Commission's administrative complaint is dismissed by the Commission, set aside by an appeals court on review, or the Commission has issued a final order pursuant to *15 U.S.C. §45*.

The Memorandum Opinion has been docketed under seal at this time due to the amount of sealed information it contains. The Court will issue a separate, redacted version of the Memorandum Opinion on the public docket shortly.

SO ORDERED.

This is a final, appealable Order.

Dated: September 5, 2018

/s/ Trevor N. McFadden

TREVOR N. MCFADDEN

United States District Judge

In re Effexor Antitrust Litig.

United States District Court for the District of New Jersey

September 18, 2018, Filed

Civil Action No. 3:11-cv-5661 (PGS)(LHG)

Reporter
357 F. Supp. 3d 363 *; 2018 U.S. Dist. LEXIS 158904 **; 2018-2 Trade Cas. (CCH) P80,529; 2018 WL 6003893

In re EFFEXOR ANTITRUST LITIGATION

Prior History: In re Effexor XR Antitrust Litig., 2012 U.S. Dist. LEXIS 199529 (D.N.J., Oct. 23, 2012)
In re Effexor Antitrust Litig., 337 F. Supp. 3d 435, 2018 U.S. Dist. LEXIS 225197 (D.N.J., Sept. 18, 2018)

Core Terms

patent, Defendants', generic, Antitrust, unfair, consumer protection, antitrust claim, allegations, consumers, class action, federal patent law, venlafaxine, purchasers, preempted, Pleadings, courts, motion for judgment, Pharmaceuticals, settlement agreement, patent law, Plaintiffs', federal court, manufacturers, indirect, trade practice, state law, notice provision, federal law, deceptive trade practices, attorney general

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(c) permits a party to dismiss a suit after the pleadings are closed but early enough not to delay trial. A Rule 12(c) motion for judgment on the pleadings is treated like a motion to dismiss under Rule 12(b)(6). Under either rule, the court must accept all well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party. For a complaint to survive dismissal, it must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. As such, a complaint should not be dismissed unless it appears beyond doubt that the facts alleged in the complaint, even if true, fail to support the claim.

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction

HN2[] **Jurisdiction & Review, Subject Matter Jurisdiction**

Federal patent law preempts state law claims to the extent that state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the patent laws. Notably, district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No state court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights. *28 U.S.C.S. § 1338(a)*. Under *§ 1338(a)*, then, jurisdiction extends only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims. As such, the court is tasked with determining whether the plaintiff's claims "arise under" patent law. If on the face of a well-pleaded complaint there are reasons completely unrelated to the provisions and purposes of the patent laws why the plaintiff may or may not be entitled to the relief it seeks, then the claims do not "arise under" patent law.

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction

HN3[] **Jurisdiction & Review, Subject Matter Jurisdiction**

Although a resolution of a substantial question of federal patent law is necessary for a fraudulent patent claim, that alone is not sufficient to establish that the United States Court of Appeals for the Federal Circuit has jurisdiction. Unless every theory of the claim requires resolution of a substantial question of federal law, it does not "arise under" federal patent law. The United States Court of Appeals for the Third Circuit interpreted "arises under" to mean that every theory of the claim requires the resolution of a substantial question of federal law, if it does not, federal patent law will not preempt.

Patent Law > Remedies

HN4[] **Patent Law, Remedies**

Federal patent law does not preempt a state law claim in which a patent law issue is implicated if the state law cause of action (i) includes additional elements not found in the federal patent law cause of action and (ii) is not an impermissible attempt to offer patent-like protection to subject matter addressed by federal law.

Patent Law > Remedies

HN5[] **Patent Law, Remedies**

There are three objectives for patent law: (1) to provide an incentive to invent; (2) to promote the full disclosure of inventions; and (3) to ensure that which is in the public domain cannot be removed therefrom by action of the states. When the state law cause of action includes additional elements not found in the federal patent law and state law is not an obstacle to the objectives of federal patent law, it is not preempted even if patent law is implicated.

Patent Law > Remedies

HN6[] **Patent Law, Remedies**

Even if a state court must adjudicate a question of federal patent law, it is not preempted if it includes additional elements not part of a federal cause of action.

Governments > Legislation > Statute of Limitations > Time Limitations

HN7[] **Statute of Limitations, Time Limitations**

Under the continuing-violation doctrine, when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period.

Antitrust & Trade Law > Procedural Matters

Governments > Legislation > Statute of Limitations > Time Limitations

HN8[] **Antitrust & Trade Law, Procedural Matters**

Antitrust law provides that, in the case of a "continuing violation," say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times. As such, to the extent plaintiffs continue to purchase a good at a supracompetitive price, it constitutes a continuing violation. In fact, almost every court to have considered this issue in the pay-for-delay context has held that a new cause of action accrues to purchasers upon each overpriced sale of the drug.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN9[] **Deceptive & Unfair Trade Practices, State Regulation**

The statutory notice requirement of *Mass. Gen. Laws ch. 93A, § 9(3)* is not merely a procedural nicety, but, rather, a prerequisite to suit.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN10[] **Deceptive & Unfair Trade Practices, State Regulation**

The West Virginia Consumer Credit Protection Act provides consumers who are victims to unfair, deceptive, and fraudulent business practices with a cause of action. *W. Va. Code § 46A-6-106(a)*. However, prior to initiating suit, a consumer must first inform the seller, in writing, of the alleged violation. *§ 46A-6-106(b)*. Courts have interpreted this statute as a mandatory prerequisite to commencing a consumer protection claim under the act.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN11[] **Deceptive & Unfair Trade Practices, State Regulation**

While Maine's Unfair Trade Practices Act does include a pre-filing notice provision, the Maine Supreme Court has held that the notice requirements of *Me. Rev. Stat. Ann. tit. 5, § 213(1-A)* are not jurisdictional. Therefore, courts have permitted plaintiffs to maintain their Maine Unfair Trade Practices Act claims, despite failing to send an adequate pre-litigation demand letter.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN12[] **Federal & State Interrelationships, Erie Doctrine**

Federal courts sitting in diversity jurisdiction must utilize federal procedural law and state substantive law. However, there is no bright line between procedural and substantive law and, thus, the distinction is difficult to determine, especially since these two categories are not mutually exclusive.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN13[] **Federal & State Interrelationships, Erie Doctrine**

In interpreting Erie, the United States Supreme Court explained that a federal law will only be procedural and, thus, applicable, if the case's outcome would be the same in both federal and state courts. This is consistent with Erie's twin aims to avoid forum shopping and the inequitable administration of law. The Supreme Court further elaborated that before a court can consider Erie's outcome determinative test, it must first determine whether there is a direct conflict between the federal and state laws in question. If there is a conflict, the federal law must be used, unless it is deemed unconstitutional or outside the scope of the Rules Enabling Act, *28 U.S.C.S. § 2072(b)*, which prohibits the use of federal laws if they abridge, enlarge, or modify any state substantive right. If there is not a conflict, the outcome determinative test is utilized to determine the whether to apply state or federal law. This test has been refined as an inquiry into whether the scope of the federal rule is sufficiently broad to control the issue before the court. Only if the federal law is sufficiently broad, will the court then continue with the Hanna analysis.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN14[] **Federal & State Interrelationships, Erie Doctrine**

Courts presented with the issue of whether state laws are procedural or substantive have framed the inquiry as whether the state statute provides a procedure that is so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy. If the answer is in the affirmative, the federal rule must yield to the state law, since it would effectively abridge, enlarge, or modify a state-created right or remedy.

Civil Procedure > Special Proceedings > Class Actions

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN15[] **Special Proceedings, Class Actions**

U.S. Const. art. III standing is a threshold inquiry in every case and one in which the party invoking federal jurisdiction bears the burden of proof. To establish Article III standing, a plaintiff must demonstrate: (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. In a putative class action, standing must be analyzed on a claim-by claim basis, with the plaintiff bearing the burden of demonstrating standing for each claim he seeks to prove, the court does not exercise jurisdiction over one claim simply because it arose from the same nucleus of operative fact as another claim.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

HN16[] **Deceptive & Unfair Trade Practices, State Regulation**

Under Rhode Island law, statutes cannot be applied retroactively, unless clearly stated. The Rhode Island Supreme Court has held that statutes and their amendments are construed to operate prospectively unless a specific contrary intent is expressed by the legislature, or retroactivity must necessarily be inferred from the language employed by the law makers. Additionally, courts have consistently held that *R.I. Gen. Laws § 6-36-7(d)* applies prospectively.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN17[] **Deceptive & Unfair Trade Practices, State Regulation**

The majority of courts that have been presented with *Utah Code Ann. § 76-10-3109(1)(a)* require that at least one Utah citizen or resident be a named plaintiff.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN18[] **Deceptive & Unfair Trade Practices, State Regulation**

The Kansas Monopolies and Unfair Trade Act proscribes all arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition and those designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles. *Kan. Stat. Ann. § 50-112*. The Act defines a "trust" as a "combination of capital, skill, or acts, by two or more persons" and prohibits conspiracy or combination with any other persons for the purpose of monopolizing any line of business. *Kan. Stat. Ann. §§ 50-101*, *50-132*. While there is scant case law interpreting the Kansas Monopolies and Unfair Trade Act, the Kansas Court of Appeals has held that since the act emphasizes agreements between two or more individuals, the legislature intended for the Act to require more than unilateral conduct.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN19[] **Deceptive & Unfair Trade Practices, State Regulation**

In New York, an antitrust claim under the Donnelly Act must allege both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market. However, the United States District Court for the Northern District of New York has held that allegations of monopolistic activities, based on conspiring with other individuals, suffices to state a claim under the Donnelly Act.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN20[] **Deceptive & Unfair Trade Practices, State Regulation**

The Tennessee Trade Practices Act proscribes all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer. *Tenn. Code Ann. § 47-25-101*. Despite limited case law interpreting the statute, several district courts have held that the absence of an arrangement or conspiracy between two actors is a bar to a claim under the Tennessee statute.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN21[] **Deceptive & Unfair Trade Practices, State Regulation**

The case law as well as the plain language of the Kansas, New York, and Tennessee antitrust statutes require concerted action between two parties.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN22[] **Deceptive & Unfair Trade Practices, State Regulation**

The Unfair Competition Law proscribes any unlawful, unfair or fraudulent business act or practice. *Cal. Bus. & Prof Code § 17200*. As such, courts have understood *§ 17200* to provide relief for three varieties of unfair competition: practices which are unlawful, unfair, or fraudulent. However, reliance is only required when an Unfair Competition Law claim is premised on allegations that the defendants engaged in fraudulent business practices.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN23[] **Deceptive & Unfair Trade Practices, State Regulation**

The Illinois state legislature did not intend for the Illinois Consumer Fraud and Deceptive Business Practices Act to serve as an additional antitrust enforcement mechanism. As such, if the plaintiff fails to plead an antitrust claim under the Illinois Antitrust Act, those same allegations of anticompetitive conduct cannot give rise to a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN24[] **Deceptive & Unfair Trade Practices, State Regulation**

Plaintiffs may not assert what are essentially antitrust claims in the guise of a claim under the Illinois Consumer Protection Act.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN25[] **Deceptive & Unfair Trade Practices, State Regulation**

The Maine Unfair Trade Practices Act proscribes unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. *Me. Rev. Stat. tit. 5, § 207*. A business practice is "unfair" if the injury it produces is (1) substantial, (2) not outweighed by any countervailing benefits to consumers or competition that the practice produces, and (3) not reasonably avoidable by consumers. In pricing cases, the allegedly unfair practice must also induce the consumer to acquire something that he or she would not otherwise have purchased.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN26[] **Deceptive & Unfair Trade Practices, State Regulation**

Any person who is a victim of a deceptive trade practice as defined in the Nevada Deceptive Trade Practices Act may bring an action thereunder. *Nev. Rev. Stat. § 41.600*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN27[] **Deceptive & Unfair Trade Practices, State Regulation**

Under *Nev. Rev. Stat. § 598.0923(3)*, the Nevada Deceptive Trade Practices Act does not require the plaintiff to plead reliance.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN28[] **Deceptive & Unfair Trade Practices, State Regulation**

Anticompetitive conduct is considered prohibited acts under *Nev. Rev. Stat. § 598A.060(a)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > Legislation > Interpretation

HN29[] **Deceptive & Unfair Trade Practices, State Regulation**

The New Mexico Unfair Practices Act prohibits unfair, deceptive, and unconscionable trade practices. N.M. Rev. Stat. § 57-12-2. Given the remedial nature of the act, courts construe its provisions broadly to facilitate this purpose.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN30[] **Deceptive & Unfair Trade Practices, State Regulation**

Federal courts generally permit New Mexico Unfair Practices Act actions in price-fixing cases provided that the plaintiff alleges a gross disparity between the price paid for a product and the value received.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN31[] **Deceptive & Unfair Trade Practices, State Regulation**

N.Y. Gen. Bus. Law § 349 is directed at wrongs against the consuming public. In order to state a claim under *§ 349*, the plaintiff must prove three elements: (1) the challenged act or practice was consumer-oriented; (2) it was misleading in a material way; and (3) the plaintiff suffered injury as a result of the deceptive act. To satisfy the consumer-oriented prong, plaintiffs need only allege consumer-oriented conduct that implicates the public interest in New York.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices

HN32[] Consumer Protection, Deceptive & Unfair Trade Practices

Courts routinely treat antitrust violations as deceptive acts.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN33[] Deceptive & Unfair Trade Practices, State Regulation

N.C. Gen. Stat. §§ 75-1.1, part of the North Carolina Unfair and Deceptive Trade Practices Act, proscribes unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce and provides any person or business of any person, firm or corporation the right to sue for injuries arising from unfair business practices *N.C. Gen. Stat. §§ 75-1.1*; 75-1.16. Federal courts interpreting the North Carolina Unfair and Deceptive Trade Practices Act have allowed claims asserted by businesses against one another as long as the challenged practices affect commerce or the marketplace.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN34[] Deceptive & Unfair Trade Practices, State Regulation

The Rhode Island Unfair Trade Practices and Consumer Protection Act proscribes unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. *R.I. Gen. Laws § 6-13.1-2*. The act goes on to list twenty acts or practices that are considered unfair or deceptive competition. *R.I. Gen. Laws § 6-13.1-1(6)(i)-(xx)*. In determining whether a practice is "unfair" under the act, courts must consider: (1) whether the practice affronts public policy, as delineated by the common law, statutes, and other established concepts of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers (or competitors or other businessmen). The majority of courts that have been presented with this issue have held that the three-prong Ames standard encompasses price-fixing injuries, and therefore consumers subject to collusive pricing possess a cognizable claim under the act.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN35[] Deceptive & Unfair Trade Practices, State Regulation

The Rhode Island Unfair Trade Practices and Consumer Protection Act limits claims to any person who purchases or leases goods or services primarily for personal, family, or household purposes. *R.I. Gen. Laws § 6-13.1-5.2(a)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN36[] Deceptive & Unfair Trade Practices, State Regulation

The Rhode Island Supreme Court has construed the Rhode Island Unfair Trade Practices and Consumer Protection Act to require that only natural persons are permitted to bring private rights of actions under the statute. However, there may be unusual circumstances under which a business entity may be able to allege that its purchases were primarily for personal, family or household purposes.

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Judges: PETER G. SHERIDAN, UNITED STATES DISTRICT JUDGE.

Opinion by: PETER G. SHERIDAN

Opinion

[*374] MEMORANDUM AND ORDER

SHERIDAN, U.S.D.J.

Presently before the Court is Defendants Wyeth Inc., Wyeth Manufacturing Limited, Wyeth Ireland Pharmaceutical Products (collectively, "Wyeth"), Teva Pharmaceuticals USA, Inc. and Teva Pharmaceuticals Industries Limited's (collectively, "Teva") Motion for Judgment on the Pleadings pursuant *Federal Rule of Civil Procedure 12(c)*, regarding End-Payer Plaintiffs' Third Amended Consolidated Complaint. (ECF No. 165). **[**4]** [1] This case arises from allegations that two drug companies, Wyeth and Teva, engaged in an anticompetitive scheme that prevented the generic drug of Effexor XR from entering the market. Plaintiffs are end-payor purchasers (hereinafter "EPP") who claim to have paid inflated costs for the brand-named drug, Effexor XR, due to, among other things, a delayed entry provision included in Wyeth and Teva's settlement agreement. Unlike the Direct Purchaser Plaintiffs, who assert claims under the *Sherman Act*, the EPPs base their claims on their respective state's antitrust and consumer protection acts.

BACKGROUND

I. Parties

Plaintiffs are a collection of organizations including insurance carriers, Taft-Hartley funds, municipalities, and individuals, who have been indirectly affected by Defendants' alleged schemes. For example, jointly administered Taft-Hartley fund and employee welfare benefit plaintiffs include: A.F.L.-A.G.C. Building Trades Welfare Plan and IBEW-NECA 505 Health & Welfare Plan, both of which are self-insured health and welfare benefit plans in Alabama and Florida, and Alabama, respectively (*Id.* at ¶¶ 20-21); Painters District Council No. 30 Health and Welfare Fund, a self-insured **[**5]** health and welfare benefit plan located in Illinois (*Id.* at ¶ 24); New Mexico United Food and Commercial Workers Union's and Employers' Health and Welfare Trust Fund and Plumbers and Pipefitters Local 572 Health and Welfare Fund, Taft-Hartley funds from New Mexico and Tennessee, respectively (*Id.* at ¶¶ 23, 25); Sergeants Benevolent Association Health and Welfare Fund, a New York health and welfare fund (*Id.* at ¶ 27). Health insurance carrier plaintiffs include Louisiana Health Services Indemnity Company d/b/a Bluecross/Blueshield of Louisiana, a corporation licensed to conduct business in Louisiana that provides health benefits to covered members. (*Id.* at ¶ 22). Municipality plaintiffs include the **[*375]** City of Providence, Rhode Island, a municipal corporation that operates a self-insured health and welfare benefit plan. (*Id.* at ¶ 26). Finally, there is one named individual Plaintiff, Patricia Sutter, who is a Maine citizen. (*Id.* at ¶ 28). All Plaintiffs purchased, paid, and/or provided reimbursement for Effexor XR or its generic equivalent. (*Id.* at ¶¶ 20-28). Plaintiffs contend that they were all injured as a result of Defendants' anticompetitive schemes, since they paid a premium for **[**6]** the medication. (*Id.*).

Defendants in this case are Wyeth and Teva. (*Id.* at ¶¶ 29-38). Wyeth Inc., Wyeth Pharmaceuticals, Inc., Wyeth-Whitehall, and Wyeth Pharmaceuticals Company are referred to collectively as Wyeth. (*Id.* at ¶ 33). Wyeth is a wholly owned subsidiary of Pfizer with its principal place of business in New Jersey. (*Id.* at ¶ 29). Wyeth wholly owns Wyeth Pharmaceuticals, Inc., which is located in Pennsylvania. (*Id.* at ¶ 30). Wyeth-Whitehall Pharmaceuticals and Wyeth Pharmaceuticals Company are Puerto Rican corporations that are subsidiaries of Wyeth. (*Id.* at ¶¶ 31-32). The Complaint also identifies "Wyeth applicants," who are inventors and prosecuting

[1] Initially, Defendants also sought dismissal of opt-out indirect purchaser plaintiffs' complaint. However, being that both opt-out plaintiffs have since voluntarily dismissed their actions, these arguments are not considered. *See* Docket No. 1 l-cv-5590 (ECF Nos. 148, 158).

attorneys that were responsible for purportedly fraudulently obtaining patents. (*Id.* at ¶ 34). Teva Pharmaceutical Industries Limited and Teva Pharmaceuticals USA, Inc. are referred to collectively as Teva. (*Id.* at ¶ 37). Teva Limited is an Israeli corporation that develops, manufactures, markets, and distributes pharmaceutical goods. (*Id.* at ¶ 36). Teva USA is a wholly owned subsidiary of Teva Limited that is located in Pennsylvania, which focuses its efforts primarily on the generic pharmaceuticals business. (*Id.*).

II. Facts [7]**

In the Complaint, EPPs identify several anticompetitive schemes that purportedly give rise to the present lawsuit. Specifically, Plaintiffs allege that Defendants fraudulently obtained three separate, but related patents, from the United States Patent and Trademark Office (PTO); listed these patents in the book of Approved Drug Products with Therapeutic Equivalence Evaluations (the "Orange Book"); engaged in sham litigation relating to these patents; entered into an unlawful reverse payment agreement with Teva; and manipulated the 180 day first-to-file period[2] to sustain Wyeth's and Teva's exclusivity and collectively prevent other generic companies from entering the market. The Court discusses each allegation in turn.

1. Walker Process and Fraudulent Procurement

EPPs first present a *Walker Process*[3] claim against Wyeth, based on Wyeth's fraudulent procurement and enforcement of three separate patents. By way of background, in 1985, Wyeth -- then operating as American Home Products -- acquired a patent for the compound venlafaxine hydrochloride (venlafaxine), commonly referred to as the Husbands patent. (*Id.* at ¶ 70). Five years later, December 1993, Wyeth received FDA approval of its New **[**8]** Drug Application for Effexor, an antidepressant drug whose active pharmaceutical ingredient is venlafaxine. (*Id.* at ¶ 71). This initial patent was for an "instant release" formulation; that is, the tablet "dissolves rapidly, resulting in a rapid increase in blood plasma levels of venlafaxine shortly after administration." (*Id.*). According to the Complaint, the Husbands patent protected any type of venlafaxine-based product **[*376]** that Wyeth created from generic competition before June 13, 2008.[4] (*Id.* at ¶ 72). As such, Wyeth had market exclusivity for venlafaxine products for 14 1/2 years. (*Id.* at ¶ 73).

However, Effexor's instant release formulation had several significant drawbacks. First, the spike of venlafaxine into the patient's blood plasma levels could cause nausea and vomiting. (*Id.* at ¶ 75). Second, because the drug was rapidly absorbed into the body, patients were required to take the medication several times a day. (*Id.*). In response, Wyeth sought to develop an extended release formulation of Effexor to address these drawbacks. (*Id.*). According to the Complaint, "[b]y the early 1990s, methods for achieving sustained or extended release of the active ingredient in pharmaceuticals **[**9]** were well known in the drug industry." (*Id.* at ¶ 77). To create an extended release form of venlafaxine, Wyeth took two approaches: (1) they worked in-house and (2) entered into a business venture agreement with ALZA Corporation, a pharmaceutical formulation company that specialized in extended release technology. (*Id. at 179*).

Wyeth's in-house development team used a coated spheroid approach to create its extended release version of Effexor, which had been previously utilized in another patented drug, Inderal LA. (*Id.* at ¶ 80). The coated spheroid approach used in Inderal LA was previously patented in the late 1970s and received Patent No. 7,138,475 ('475 Patent). (*Id.* at ¶ 82). As a result, Plaintiffs contend that Wyeth's approach to extending the release of Effexor was

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[2] *21 U.S.C. § 355(j)(5)(B)(iv)*.

[3] *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*.

[4] According to the Complaint, "[t]he patent would have expired much earlier than 2008, but Wyeth received a significant extension to reflect the time it took the FDA to approve its NDA for Effexor." (*Id.*).

already considered a prior art, despite their subsequent effort to seek additional patent protections of the same. (*Id.* at ¶ 82).

Meanwhile, ALZA used its osmotic-controlled release oral delivery system (hereinafter, "OROS") to create an extended release version of Effexor. (*Id.* at ¶¶ 86-88). As such, by 1993, Wyeth had two formulations of extended release venlafaxine and ultimately chose to focus on developing its own encapsulated spheroid version of Effexor. **[**10]** (*Id.* at ¶¶ 89-90). According to the Complaint, clinical studies "failed to establish any statistically significant improvement of the extended release over the instant release with respect to side effects such as nausea." (*Id.* at ¶ 90). As such, Plaintiffs aver that "Wyeth could not truthfully claim there was any valid scientific basis for claiming that the extended release version reduced side effects when compared to the instant release." (*Id.*).

In any event, in June 1993, Wyeth made its first attempt to receive additional patent protections for venlafaxine. (*Id.* at 191). The 1993 application sought a method-of-use patent for using venlafaxine for various medical conditions, including obesity, anxiety, and post-traumatic stress disorder, just to name a few. (*Id.*). However, this application did not specify any particular venlafaxine formulation and was later abandoned. (*Id.* at ¶¶ 91-92). Less than two years later, January 1995, Wyeth sought another method-of-use patent for using venlafaxine to treat hypothalamic menopause in non-depressed women. (*Id.* at ¶ 94). Again, they did not identify a particular formulation for approval, but did mention a sustained release composition. (*Id.* at ¶¶ 94-95). **[**11]** The following year, April 1996, Wyeth received FDA approval of this composition and Patent No. 5,506,270 ('270 Patent). (*Id.*).

[*377] As previously mentioned, ALZA had also developed an extended release formulation for venlafaxine, using its OROS technology; as such, in May 1993, ALZA also sought to secure patent protection for its formulation, which received FDA approval in August 2002 as Patent No. 6,440,457. (*Id.* at ¶ 96). In addition, the World Intellectual Property Organization published a patent application ('589 PCT application) that was assigned to ALZA in 1994, which claims priority to ALZA's patent application. (*Id.* at ¶ 97). The '589 patent specifies the extended release osmotic formulation that ALZA developed and explained that an extended release formulation in general reduces negative side effects because these side effects result from spikes in blood plasma levels that occur when taking medication multiple times a day. (*Id.* at ¶¶ 98, 101).

According to the Complaint, beginning in 1996, Wyeth made several attempts to receive additional patent protections for Effexor XR. (*Id.* at ¶ 103). By this time, Wyeth had already obtained a method-of-use patent for using venlafaxine to treat hypothalamic menopause in non-depressed women and ALZA's '589 patent had **[**12]** been published. (*Id.*). This being said, according to the Complaint, "Wyeth submitted six sequential applications that led to three patents, the '171, '958, and '120 patents, each of which contained ostensibly independent method-of-use claims." (*Id.* at ¶ 104). Plaintiffs aver that Wyeth defrauded the PTO in obtaining these patents and, as a result, prevented generic extended release venlafaxine formulations from entering the market until June 2008. (*Id.*).

In March 1996, Wyeth applied for a provisional utility patent[5] ('006 application) for extended release venlafaxine. The '006 application described the proposed patent as "an extended release (ER), encapsulated formulation containing venlafaxine hydrochloride." (*Id.* at ¶ 120). According to Plaintiffs, the phrase "encapsulated extended release formulation" had two very distinct interpretations. One interpretation could indicate that '006 application concerned the coated spheroid formulation that Wyeth had previously developed, which would limit the patent protection to only this specific formulation design — thereby enabling competing companies to enter the market utilizing a different design that would not violate Wyeth's patent. (*Id.* at ¶ 123). (*Id.*). Alternatively, **[**13]** the phrase could be understood to encompass every formulation of venlafaxine; however, such an overly broad interpretation would render the patent invalid and unenforceable, since it was already disclosed in the '270 Patent and the '589 application submitted by ALZA. (*Id.* at ¶ 124).

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[5] A utility patent application seeks to protect a new, useful, or nonobvious process or composition and a provisional application only requires a brief written description of the subject matter that is sought to be protected. Essentially, a provisional application "allows an inventor to establish a date of invention one full year before the inventor actually submits evidence of [the] invention's patentability." (*Id.* at ¶ 108).

The following year, March 1997, Wyeth filed a non-provisional application (the '137 application) that was almost identical to the '006 application. (*Id.* at ¶ 108). In its application, Wyeth did not disclose the existence of the '270 Patent or the '589 PCT Application. (*Id.*). However, the PTO Examiner discovered both and informed Wyeth that its claims about nausea and the spikes in blood plasma were not patentable as independent claims. (*Id.* at ¶ 136). Moreover, the Examiner noted that the '137 application could only be enforceable if Wyeth narrowed the description of the invention to the specific formulation **[*378]** that it created. (*Id.*). Eventually, Wyeth abandoned the '137 application and, in November 1997, filed a continuation-in-part application (the '328 application), which included additional information not mentioned in the '006 and '137 applications. (*Id.* at ¶¶ 109-10). Plaintiffs contend the '328 application was identical **[**14]** to the '137 application; however, despite having an obligation to disclose the claims that were previously rejected, Wyeth failed to do so in hopes that another PTO Examiner would overlook the ambiguous language. (*Id.* at ¶¶ 143, 147). This being said, Wyeth eventually abandoned this application as well. (*Id.* at ¶ 152).

Shortly after abandoning the '328 application, Wyeth filed another continuation-in-part application (the '629 application), which claimed priority over all three previous applications. (*Id.* at ¶ 111). The '629 application eventually led to the issuance of Patent No. 6,274,171 (the '171 Patent) in August 2001. (*Id.* at ¶ 112). The '171 Patent was comprised of 25 claims, which included the extended release encapsulated spheroid version of venlafaxine. (*Id.* at ¶ 112). It also claimed to reduce the drug's concentration in patient's blood plasma and incidents of nausea and vomiting. (*Id.*). Again, Plaintiffs contend Defendants did not disclose the rejection of the similar claims in the '137 application examined by the PTO Examiner. (*Id.* at ¶ 157). By failing to disclose the PTO's prior rejection and explain the meaning of the '270 Patent, Plaintiffs aver that Wyeth committed fraud on the PTO in obtaining the '171 Patent. (*Id.* at ¶¶ 157-58).

Two **[**15]** months before the '171 Patent was issued, Wyeth filed a divisional application in June 2001 (the '412 application), which sought another method-of-use patent based on reducing incidents of nausea and vomiting, the drug's concentrations in the patient's blood plasma, and daily drug use. (*Id.* at ¶ 165). According to Plaintiffs, "[t]he specifications and claims of the '412 application were identical to those in the '629 application." (*Id.* ¶ 161). However, unlike the other applications, the '412 referred to the formulation as "an extended release formulation" rather than "an encapsulated extended release formulation" as in the previous applications. (*Id.* at ¶¶ 161-62). Defendants again did not disclose that the '270 Patent "identified the existence of an extended release formulation of venlafaxine hydrochloride that rendered their method-of-use claims unpatentable." (*Id.* at ¶ 162). By failing to provide this information to the PTO Examiner, the '412 application eventually resulted in the issuance of the Patent No. 6,419,958 (the '958 Patent) in July 2002. (*Id.* at ¶ 164). However, as noted above, the '270 Patent previously procured included a once a day venlafaxine formulation that spread its dosage over time, so Wyeth filed a provisional application, including **[**16]** claims for nausea and vomiting, to avoid being precluded by the '270 Patent. (*Id.* at If 117-18).

Finally, in September 2001, Wyeth filed the '965 application, another continuation in part application, that contained similar claims as the '412 application. (*Id.* at ¶ 166-67). By not disclosing the rejection of the prior applications, the '965 application resulted in the issuance of Patent No. 6,403,120 in June 2002 (the '120 Patent). (*Id.* at ¶ 170).

According to the Complaint, "Wyeth's repeated pattern of nondisclosure and withholding highly material information in serial patent applications for virtually identical claims" evinces its intent to deceive the PTO. (*Id.* at ¶ 184). As such, "[b]ut for this fraud on the PTO," Plaintiffs aver that the '171, '120, and '958 Patents would never have been issued. (*Id.* at If 185).

[*379] *2. Wrongful Orange Book Listing and Sham Litigation*

After procuring the '171, '120, and '958 Patents, Wyeth then listed all three in the Orange Book; all three patents expired on March 20, 2017. (*Id.* at ¶¶ 14, 112, 114 116). Thereafter, Plaintiffs claim that Wyeth engaged in sham litigation against seventeen generic manufacturers. (*Id.* at ¶ 262). Plaintiffs claim that at least seventeen generic manufacturers sent Wyeth certifications informing it that they **[**17]** intended to manufacture generic versions of Effexor XR, which would not infringe Wyeth's patents. (*Id.* at ¶ 265). In response, Wyeth sued each generic for infringing on the '171, '120, and '958 Patents. (*Id.* at ¶ 266). According to the Complaint, Wyeth was aware that its method-of-use patents were invalid or unenforceable; yet, nevertheless chose to seek its enforceability against generic manufacturers. (*Id.* at 11267). The purposes of these "sham patent suits was to prevent, delay, and/or minimize the success of the entry of generic competitors, which would have sold generic equivalents of Effexor XR in the United States at prices significantly below Wyeth's prices ... and therefore would have taken most of Wyeth's market share." (*Id.* at ¶ 270). As such, by blocking the market entry of generic Effexor XR, Wyeth prevented the average market price of its brand name drug from declining dramatically. (*Id.*).

3. Reverse Settlement Allegations

Finally, Plaintiffs challenge the validity of a reverse settlement agreement made between Wyeth and Teva, after Wyeth initially sued Teva for patent infringement of its three patents. (*Id.* at ¶¶ 272-304). On March 24, 2003, Wyeth sued Teva for infringing on its '171, '120, and '958 patent in the District **[**18]** of New Jersey. (*Id.* at ¶ 275). One of the key issues before the court was whether the term "extended release formulation" was to be construed broadly or limited to the spheroid formulation developed by Wyeth, which — as discussed above — would enable generic manufactures to design a different formulation that would not infringe on Wyeth's patents. (*Id.* at '11276). At the *Markman* hearing, the court ultimately interpreted the phrase to mean the latter, explaining that "one of ordinary skill in the art would construe [extended release formulation] to include specific ingredients." (*Id.*). According to the Complaint, such a finding was fatal to Wyeth's case; as such, Wyeth sought to settle the matter with Teva and, as a result, avoid other generic companies challenging Wyeth's patent. (*Id.*).

On November 2, 2005, the two signed a joint settlement and release agreement. (*Id.* at ¶ 279). As part of the settlement, the parties agreed that the district court's prior *Markman* ruling would be vacated, thereby requiring other generic companies to relitigate the "extended release formulation" issue that the court had previously found in Teva's favor. (*Id.* at ¶ 280). As it pertained to instant release **[**19]** Effexor, Wyeth allowed Teva to sell its generic version prior to the expiration of the patent in June 2008; in addition, Wyeth agreed not to compete with Teva by releasing its own authorized generic during that same period. (*Id.* at ¶ 281). As a result, Teva had at least a year and a half market exclusivity of generic instant release Effexor. (*Id.* at ¶ 283). The agreement also included a delayed entry provision, wherein Teva agreed to delay market entry for its generic extended release Effexor until as late as July 2010. (*Id.* at ¶ 284). In return, "Wyeth promised Teva that Wyeth would not market an authorized generic version of extended release venlafaxine during at least Teva's six-month 'exclusivity' and possibly longer." (*Id.*). According to the Complaint, by effectively **[*380]** blocking any other competing generic manufactures from entering the market, "the Wyeth-Teva agreement worked a huge, and devastating, impact on competition in the market for extended release venlafaxine." (*Id.* at ¶ 286).

Plaintiffs bring this case on behalf of themselves and all End-Payor class members to recover damages, calculated by the increased price they had to pay due to Wyeth's conduct in delaying the market **[**20]** entry of generic Effexor XR. (*Id.* at ¶ 411). The class contains individuals or entities who purchased or paid for Effexor XR and/or its generic version for consumption by themselves, their families, or members, employees, insureds, participants, or beneficiaries in Arizona, California, Florida, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, and the District of Columbia. The Class sues for overage damages occurred from June 14, 2008 until the effects of Defendants' conduct cease. (*Id.*).

The Complaint outlines four different claims for relief in the class action. The first is for monopolization under state law against Wyeth. (*Id.* atilt 421). The conduct giving rise to this claim is the fraudulent obtainment of the '171, '958, and '120 Patents, its listing in the Orange Book, its sham litigation, and the unlawful reverse settlement agreement with Teva. (*Id.* at ¶ 424). The same factual allegations and theories asserted in Count I 'are again alleged in Count II against all Defendants. (*Id.* at ¶ 439). In Count III, Plaintiffs allege conspiracy **[**21]** to restrain of trade against all Defendants. (*Id.* at ¶¶ 448). Finally, Plaintiffs allege a claim unfair or deceptive trade practices against all Defendants. (*Id.* at 11456). Plaintiffs contend that as a result of Wyeth's anticompetitive acts or practices, Plaintiffs and the Class were deprived of the opportunity to obtain a less expensive, generic equivalent to Effexor XR. As such, Plaintiffs seek compensation from Defendants in the form of damages.

LEGAL STANDARD

HN1[] Federal Rule of Civil Procedure 12(c) permits a party to dismiss a suit "[a]fter the pleadings are closed ... but early enough not to delay trial." Fed. R. Civ. P. 12(c). "A Rule 12(c) motion for judgment on the pleadings is treated like a motion to dismiss under Rule 12(b)(6)." Syncsort Inc. v. Sequential Software, Inc., 50 F. Supp. 2d 318, 324 (D.N.J. 1999). Under either rule, the Court must accept all well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party. *Id.* For a complaint to survive dismissal, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Wireless Media Innovations, LLC v. Maher Terminals, LLC, 100 F. Supp. 3d 405, 407 (D.N.J. 2015) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). As such, "[a] complaint should not be dismissed unless it appears beyond doubt that 'the facts alleged in the complaint, even if true, fail to support the claim.'" Syncsort Inc., 50 F. Supp. 2d at 325.

ANALYSIS

Defendants presently challenge **[**22]** EPPs' Complaint on five separate bases. First, Defendants contend that EPPs' Complaint should be dismissed in its entirety based on federal preemption principles. Second, Defendants argue that several state law claims are time-barred. Third, Defendants contend that certain states require pre-filing notices, which Plaintiffs failed to comply with, and proscribe class actions **[*381]** under their respective consumer protection statutes. Fourth, Defendants aver that EPPs' state antitrust claims fail because they lack standing and fail to plead a concerted act. Finally, Defendants challenge EPPs' consumer protection claims for failing to comply with various state consumer protection law requirements. The Court addresses each challenge in turn.

I. Federal Law Preemption

Defendants first seek dismissal of Plaintiffs' state law claims in its entirety, since their state law claims are preempted by federal law. Plaintiffs respond, contending that because their claims are based on antitrust and consumer fraud theories, preemption is inapplicable.

HN2[] "Federal patent law preempts state law claims to the extent that state law 'stands as an obstacle to the accomplishment and execution of the full purposes and **[**23]** objectives of Congress' in enacting the patent laws." Wawrzynski v. H.J. Heinz Co., 574 Fed. Appx. 99, 102 (3d Cir. 2014) (quoting Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262, 99 S. Ct. 1096, 59 L. Ed. 2d 296 (1979)). Notably, "district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights." 28 U.S.C. § 1338(a). "Under § 1338(a), then, jurisdiction extends 'only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.'" In re Lipitor Antitrust Litig., 855 F.3d 126, 143 (3d Cir. 2017) (quoting Christianson v. Colt Industr. Operating Corp., 486 U.S. 800, 809, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1986)). As such, the Court is tasked with determining whether the plaintiff's claims "arise under" patent law. Id. at 144. "[I]f on the face of a well-pleaded complaint there are reasons completely unrelated to the provisions and purposes of the patent laws why the plaintiff may or may not be entitled to the relief it seeks," then the claims do not "arise under" patent law. *Id.* (internal quotation marks and citations omitted). **[**24]**

Defendants present two theories supporting their position that Plaintiffs' state law claims are preempted. First, because Plaintiffs' claims are based on the purportedly fraudulent procurement and enforcement of the '171, '958, and '120 Patents, they must demonstrate that the patent is invalid or unenforceable, which is preempted under federal patent law. Second, to the extent that Plaintiffs' antitrust claims are based on the reverse settlement agreement, they are preempted since they must demonstrate the validity of the generic patents, which necessarily implicates patent law.

1. Fraudulent Patent Procurement and Enforcement

Turning first to Defendants' federal patent preemption argument, Defendants argue that Plaintiffs' state law claims require them to plead and prove that the patent is invalid or unenforceable under federal patent law. According to Defendants, the allegations in Plaintiffs' complaint that trigger federal patent law include: (1) the fraudulent procurement of the '171, '958, and '120 Patents; (2) the fraudulent patent listing of the '171, '958, and '120 Patents in the FDA's Orange Book; and (3) the "sham" litigation against seventeen generic manufacturers, **[*382]** seeking to enforce the '171, '958, and '120 Patents. Defendants contend that these allegations **[**25]** require first knowing whether the patent at issue is invalid or unenforceable. If the patent was valid, then the obtainment and enforcement of same would be lawful. As such, Defendants argue that because federal patent law is necessary to support these theories, they are preempted by federal law.

However, Defendants' arguments are in direct contravention with the Third Circuit's recent holding in *Lipitor, 855 F.3d at 126*. In *Lipitor*, the Third Circuit explicitly held that the present matter does not "arise under" federal patent law. The Third Circuit held that ***HN3***[] although a resolution of a substantial question of federal patent law is necessary for a fraudulent patent claim, that alone is not sufficient to establish that the Federal Circuit has jurisdiction. *Id. at 143*. The court explained that unless every theory of the claim requires resolution of a substantial question of federal law, it does not "arise under" federal patent law and, therefore, the Third Circuit has jurisdiction. *Id.* The court interpreted "arises under" to mean that every theory of the claim requires the resolution of a substantial question of federal law, if it does not, federal patent law will not preempt. *Id.* Here, even if the allegations in the **[**26]** Complaint present substantial questions of patent law, because the antitrust allegations and litigation do not, this case does not arise under federal patent law for purposes of federal patent preemption. *Id.* (quoting *Christianson, 486 U.S. at 812*).

Moreover, ***HN4***[] federal patent law does not preempt a state law claim in which a patent law issue is implicated if "the state law cause of action [i.] includes additional elements not found in the federal patent law cause of action and [ii.] is not an impermissible attempt to offer patent-like protection to subject matter addressed by federal law." *Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470, 1473 (Fed. Cir. 1998)*. In *Dow*, the defendant was issued a patent that disclosed certain wire and cable devices manufactured using a particular insulating polymer. *Id. at 1471*. At about the same time, the plaintiff introduced its own line of polymer products and filed a complaint contending that its polymer did not infringe on the defendants' patent since the defendants' patent was invalid and unenforceable. *Id. at 1471-72*. In addition, the plaintiff asserted a state-law unfair competition claim, alleging that the defendant obtained its patent through inequitable conduct before the PTO. *Id.*

Finding patent preemption inapplicable, the Federal Circuit explained that ***HN5***[] there are **[**27]** three objectives for patent law: (1) to provide an incentive to invent; (2) to promote the full disclosure of inventions; and (3) to ensure "that which is in the public domain cannot be removed therefrom by action of the states." *Id. at 1474* (quoting *Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480-81, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (1974))*. With these objectives in mind, the *Dow* court held that when the state law cause of action includes additional elements not found in the federal patent law and state law is not an obstacle to the objectives of federal patent law, it is not preempted even if patent law is implicated. *Id. at 1473*. As such, the Federal Circuit held that because the state law unfair competition claim included additional elements not found in federal patent law and did not otherwise conflict with the objectives of federal patent law, its claims were not preempted. *Id. at 1478-79*.

Here, as in *Dow*, the EPPs state antitrust and consumer protection claims require proof of elements not found in a patent cause of action. As discussed earlier, the purpose for patent protection is to **[*383]** provide an incentive to invent, to promote the full disclosure of inventions and to ensure "that which is in the public domain cannot be removed therefrom by action of the states." Antitrust and consumer protection law protect **[**28]** consumers from being overcharged for products, which is a wholly different goal than patent law.

This is also consistent with the Court's decision in *In re Thalomid and Revlimid Antitrust Litig., No. 14-6997, 2015 U.S. Dist. LEXIS 177541 (D.N.J. Oct. 29, 2015)*, where the court held that **HN6**[] even if a state court must adjudicate a question of federal patent law, it is not preempted if it includes additional elements not part of a federal cause of action. *Id. at *61-63*. In *Thalomid*, the plaintiffs, who were indirect purchasers, alleged that the defendants created an antitrust scheme by obtaining patents through fraud on the PTO and bringing sham lawsuits to delay generic brands from entering the market. *Id. at *4-5*. As is the case here, the defendants argued that the plaintiffs' antitrust claims should be preempted by federal patent law since they alleged that they obtained the patents through unjust conduct with the PTO. *Id. at *61-62*. Relying on *Dow*, the court held that even if a question of federal patent law must be adjudicated, the state law claim is not preempted, as long as it contains additional elements not part of a federal patent cause of action. *Id.* Finding the allegations were also premised on bad faith in the marketplace (an element not required in patent law) the Court reasoned that federal patent preemption was not warranted. **[**29]**

Here, similar to *Thalomid*, the EPPs allege that the patents were obtained through fraud on the PTO, Wyeth improperly listed the '171, '958, and '120 Patents in the Orange Book, the generic drug was delayed entry because of sham litigation, and a reverse payment settlement agreement was negotiated to prolong a monopoly. As such, because EPPs claims are predicated on claims wholly separate from the federal patent law, they are not preempted.

2. Antitrust Allegations

Defendants next argue that because Plaintiffs' antitrust claims arise from the reverse settlement agreement, it implicates federal patent law and, therefore, must be preempted. Defendants rely principally on the Third Circuit's decision in *In re Wellbutrin XL Antitrust Litig., 868 F.3d 132 (3d Cir. 2017)* for support. In *Wellbutrin*, the Third Circuit held that in order to allege an antitrust injury, based on the reverse settlement agreement between pharmaceutical companies, it is the plaintiffs' burden to demonstrate that "but for" this agreement, the generic drug would have entered the market sooner. *Id. at 164-65*. As such, if a regulatory scheme or patent law would otherwise prevent the generic drug from market entry, there can be no antitrust injury. *Id.* Here, Defendants argue that because Plaintiffs must demonstrate that **[**30]** the generic patents would have entered the market, but for the settlement, this necessarily implicates patent law.

In *Wellbutrin* the defendant obtained FDA approval for bupropion-hydrochloride, which was marketed as "Wellbutrin." *Id. at 145*. Between September 2004 and May 2005, four generic manufacturers filed ANDAs, requesting authorization to market generic versions of Wellbutrin. *Id.* On February 9, 2007, the parties entered into a settlement agreement, which included a pay-for-delay scheme, wherein the defendants agreed to not launch their own authorized generic version of the drug for **[*384]** 180 days and, in return, the generic manufacturer would not launch a low dosage generic version of the drug until an agreed triggering event. *Id. at 146, 162*. In May 2008, the plaintiffs filed suit, alleging that the defendants conspired with generic manufacturers to prevent a generic version of the drug from entering the market. *Id. at 146*. The Third Circuit held that because there was a patent blocking the generic versions' launch, the settlement agreement did not cause the injury. *Id. at 165*. Put differently, the Third Circuit explained that the plaintiffs were unable to prove that "but for" the defendants' settlement agreement, the generic **[**31]** drug would have entered the market, since a patent blocking the generic versions would have nevertheless created the same effect. *Id.*

The Court rejects Defendants' expansive reading of *Wellbutrin* to hold that antitrust claims, based on reverse settlement agreements, are preempted by federal patent law. *Wellbutrin* simply sets forth considerations to be made when presented with an issue of antitrust standing, based on reverse settlement agreements. At no point in its decision did the Third Circuit mention that such an issue would trigger federal patent preemption. *See Wellbutrin, 868 F.3d at 163-70*. As such, while an antitrust claim may relate to patent issues, it is not always the case that it is necessary to explore its validity. Secondly, as noted above in *Lipitor*, the Third Circuit has already held that this case was not preempted by federal law, since Plaintiffs' claims are predicated on theories of antitrust, not patent law. *Lipitor, 855 F.3d at 146*. As such, because Plaintiffs' antitrust claims do not implicate federal patent law, the Court will not dismiss these claims based on preemption. Finally, *Wellbutrin* was decided at summary judgment, where the district court had before it a full and complete record and was, therefore, capable **[**32]** of making determinations not presently available at the pleading stage. For these reasons, the Court finds Defendants' arguments, relying on *Wellbutrin*, premature.

In sum, the Court denies Defendants' motion for judgment based on preemption principles.

II. Statute of Limitations

Defendants argue that EPPs' antitrust claims in Kansas, Mississippi, Montana, and Tennessee, and consumer protection claims in Illinois, New York, and Tennessee should be dismissed since these statutes impose a statute of limitations of four years or less. Relying on the continuing-violation doctrine, EPPs contend that their claims are timely. The Court agrees.

HN7[] "Under the continuing-violation doctrine, 'when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period.'" *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 746 (E.D. Pa. 2014)* (quoting *Cowell v. Palmer Twp., 263 F.3d 286, 292 (3d Cir. 2001))*. Indeed, the Supreme Court has considered this doctrine in the antitrust context:

> ***HN8***[] ***Antitrust law*** provides that, in the case of a "continuing violation," say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the **[**33]** plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.

Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997) (internal quotation marks and citations omitted). As such, to the extent Plaintiffs continue to purchase a good "at a supracompetitive **[*385]** price [it] constitute[s] a continuing violation." *Niaspan, 42 F. Supp. 3d at 746*. In fact, almost "[e]very court to have considered this issue in the pay-for-delay context has held that a new cause of action accrues to purchasers upon each overpriced sale of the drug." *Id. at 746-47*; *see* *In re Nexium (Esomeprazole) Antitrust Litig., 777 F.3d 9, 27 (1st Cir. 2015)*; *In re Epipen Epinephrine Injection, No. 17-2785, 336 F. Supp. 3d 1256, 2018 U.S. Dist. LEXIS 140323, at *152-61 (D. Kan. Aug. 20, 2018)*; *In re Aggrenox Antitrust Litig. ("Aggrenox I")*, *94 F. Supp. 3d 224, 248 (D. Conn. 2015)*; *In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 551 (D.N.J. 2004)*. As such, consistent with the majority of federal courts to consider this issue, the Court finds the continuing-violation doctrine applicable.

Here, Plaintiffs claim to have been overcharged for Effexor XR, as a result of Defendants' settlement agreement. Specifically, from June 2008 through July 2010, Defendants blocked generic extended release venlafaxine from entering the market, which forced consumers to pay a premium for the brand-named drug; thereby, constituting a continuing violation through July 2010. *See* *Niaspan, 42 F. Supp. 3d at 746*. As such, because EPPs filed their complaints the following year, September **[**34]** 2011, the Court finds EPPs' claims are timely, under the continuing-violation doctrine, and, therefore, denies Defendants' motion as it pertains to these claims.

III. Notice Challenges and Permissibility of Pursuing Class Claims

Defendants next make several challenges to EPPs' state antitrust and consumer protection claims. First, Defendants contend that EPPs failed to satisfy the pre-filing notice requirements mandated in states that require same. Second, Defendants argue that Illinois and Tennessee consumer protection statutes explicitly prohibit the use of class actions to enforce the rights created therein. The Court discusses each challenge in turn.

1. Pre-Filing Notice Requirements

Because the Arizona, Nevada, and Utah antitrust laws have notice requirements, Defendants contend that EPPs' antitrust claims in these states must be dismissed since EPPs failed to give proper notice. Defendants' argument is based on the language of the respective state statutes, requiring any antitrust plaintiff to serve that state attorney general a copy of the complaint. *See* *Ariz. Rev. Stat. § 44-1415*; *Nev. Rev. Stat. Ann. § 598A.210(3)*; *Utah Code Ann. § 76-10-3109(9)*. Similarly, because the consumer protection statutes in Maine, Massachusetts, and West Virginia contain pre-notice provisions, **[**35]** Defendants contend these claims fail as well, since Plaintiffs failed to comply.

The *Arizona Uniform Antitrust Act* states that "[a] person filing a complaint, counterclaim or answer for any violation of the provisions of this article shall simultaneously with the filing of the pleading in the superior court or, in the case of pendent state law claims in the federal court, serve a copy of the complaint, counterclaim or answer on the attorney general. Proof of service on the attorney general shall be filed with the court." *Ariz. Rev. Stat. § 44-1415(A)*. Similarly, *Nevada's Unfair Trade Practices Act* states "[a]ny person commencing an action for any violation of the provisions of this chapter shall, simultaneously with the filing of the complaint with the court, mail a copy of the complaint to the Attorney General." *Nev. Rev. Stat. Ann. § 598A.210(3)*. Lastly, the Utah Antitrust Act also requires notice be made to its attorney general. Specifically, the Act states, "[t]he attorney general shall be notified by the plaintiff about the filing of any class action involving antitrust violations that includes plaintiffs from this **[*386]** state. The attorney general shall receive a copy of each filing from each plaintiff. The attorney general may, in his or her discretion, **[**36]** intervene or file amicus briefs in the case, and may be heard on the question of the fairness or appropriateness of any proposed settlement agreement." *Utah Code Ann. § 76-10-3109(9)*.

Finally, Maine, Massachusetts, and West Virginia's consumer protection statutes all include pre-fling notice provisions. Specifically, the *Massachusetts Consumer Protection Act* requires that "[a]t least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent." *Mass. Gen. Laws. Ch. 93A, § 9(3)*. Courts have recognized that ***HN9***[] "[t]he statutory notice requirement is not merely a procedural nicety, but, rather, 'a prerequisite to suit.'" *Rodi v. S. New Eng. Sch. of Law, 389 F.3d 5, 19 (1st Cir. 2004)* (quoting *Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812, 333 N.E.2d 202, 204 (Mass. 1975))*. Similarly, ***HN10***[] the *West Virginia Consumer Credit Protection Act* provides consumers who are victims to unfair, deceptive, and fraudulent business practices with a cause of action. *W. Va. Code § 46A-6-106(a)*. However, prior to initiating suit, a consumer must first inform the seller, in writing, of the alleged violation. *W. Va. Code § 46A-6-106(b)*. Like the Massachusetts statute, courts have interpreted this statute as a "mandatory prerequisite[]" to commencing a consumer protection **[**37]** claim under the Act. *Harrison v. Porsche Cars N. Am., Inc., No. 15-0381, 2016 W. Va. LEXIS 245, at *5 (W.Va. 2016)*; *see also* *Stanley v. Huntington Nat'l Bank, No.11-54, 2012 U.S. Dist. LEXIS 9448, at *20-21 (N.D.W.Va. Jan. 27, 2012)*.

Unlike Massachusetts and West Virginia, ***HN11***[] while *Maine's Unfair Trade Practices Act* does include a pre-filing notice provision, the Maine Supreme Court has held that "the notice requirements of *section 213(1-A)* are not jurisdictional." *Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree Doors, 659 A.2d 267, 273 (Me. 1995)* (citing *Me. Rev. Stat. Ann. tit. 5, § 213(1-A)*). Therefore, courts have permitted plaintiffs to maintain their Maine Unfair Trade Practices Act claims, despite failing to "send an adequate pre-litigation demand letter." *Chavez v. Wal-Mart Stores, Inc., No. 13-6429, 2014 U.S. Dist. LEXIS 194351, at *8 (C.D. Cal. June 2, 2014)* (distinguishing Massachusetts' and West Virginia's notice requirements from Maine's). As such, because failure to comply with Maine's pre-filing notice does not preclude a plaintiff from perusing his or her claims under the Act, to the extent Defendants seek judgment under this statute, it is denied.

2. State Consumer Protection Class Bar

Defendants next contend that EPPs' Tennessee[6] consumer fraud claims must be dismissed, since Tennessee prohibits class actions. Tennessee's Consumer Protection Act states, "[a]ny person who suffers an ascertainable loss . . . as a result of . . . an unfair or deceptive act or practice . . . may bring an action individually to recover actual damages." Tenn. Code Ann. § 47-18-109(a)(1). Here, EPPs do not contest **[*387]** the meaning of the above-mentioned statutory provisions; **[**38]** instead, relying on Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393, 408, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010), EPPs contend these statutory provisions are preempted by Federal Rule of Civil Procedure 23, since "federal procedural rules control over conflicting state rules."

3. The Shady Grove Decision

To properly analyze Defendants' motion, the Court must determine whether the discussed notice requirements and class action bars are procedural or substantive. It is blackletter law that that **HN12**[] federal courts sitting in diversity jurisdiction must utilize federal procedural law and state substantive law. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Therefore, if these states' notice requirements and class action bars are substantive in nature, they apply and must be followed in federal court. *See* Shady Grove, 559 U.S. at 410. However, there is no bright line between procedural and substantive law and, thus, the distinction is difficult to determine, especially since these two categories are not mutually exclusive. Godin v. Schencks, 629 F.3d 79, 86 (1st Cir. 2010).

HN13[] In interpreting *Erie*, the Supreme Court explained that a federal law will only be procedural and, thus, applicable, if the case's outcome would be the same in both federal and state courts. Guaranty Trust Co. v. York, 326 U.S. 99, 109, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). This is consistent with *Erie*'s "twin aims" to avoid forum shopping and the inequitable administration of law. Id. at 111-12. The Supreme Court further elaborated that before a court can consider **[**39]** *Erie*'s outcome determinative test, it must first determine whether there is a direct conflict between the federal and state laws in question. *See* Hanna v. Plumer, 380 U.S. 460, 470-74, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965). If there is a conflict, the federal law must be used, unless it is deemed unconstitutional or outside the scope of the Rules Enabling Act, 28 U.S.C. § 2072(b), which prohibits the use of federal laws if they "abridge, enlarge, or modify any [state] substantive right." *Id.* If there is not a conflict, the outcome determinative test is utilized to determine the whether to apply state or federal law. *Id.* This test has been refined as an inquiry into "whether the scope of the Federal Rule . . . is sufficiently broad to control the issue before the court." Walker v. Armco Steel Corp., 446 U.S. 740, 749-50, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980). Only if the federal law is sufficiently broad, will the court then continue with the *Hanna* analysis.

Most recently, the Supreme Court was presented with a similar issue that is before the Court. In *Shady Grove*, the Supreme Court was tasked with determining whether Federal Rule of Civil Procedure 23 or a New York law controlled if a class action may proceed in federal court. 559 U.S. at 396. The New York law at issue prohibited the use of class actions to recover a "penalty" or statutory minimum damages. N.Y. Civ. Prac. Law Ann. (CPLR) § 901(b). In *Shady Grove*, the **[**40]** class members met the prerequisites of Rule 23, but sued under Section 901(b) to recover unpaid interest from Allstate, which was classified as a "penalty" and, therefore, not permitted under the New York law. Id. at 397. In determining which of the two rules applied, the Supreme Court had to answer two related questions: first, whether the New York rule and Rule 23 addressed the same issue; and, if so, whether Rule 23 was within its statutory authority under the Rules Enabling Act. Id. at 398 (citing Burlington N R. Co. v. **[*388]** Woods, 480 U.S. 1, 4-5, 107 S. Ct. 967, 94 L. Ed. 2d 1 (1987); Hanna, 380 U.S. at 463-64). In doing so, a majority of the Court concluded that Rule 23's conflict with the New York law was "unavoidable" and could not fairly be read to not "control the issue." Id. at 406 n.8. As such, because the New York rule attempted to answer the same question, the Court held "it cannot apply in diversity suits unless Rule 23 is ultra vires." Id. at 398-99. Turning to the

[6] Defendants also make a similar argument for Plaintiff's Illinois consumer protection claims; however, being that the Illinois Consumer Fraud & Deceptive Business Practice Act does not explicitly bar class actions, the Court finds it more appropriate to consider the substantive arguments Defendants present later.

second inquiry, however, no majority was able to come to an agreed standard. Writing for three justices, Justice Scalia explained that "it is not the substantive or procedural nature of the affected state law that matters, but the substantive or procedural nature of the Federal Rule." *Id. at 410*. As such, the validity of a Federal Rule turns on whether it regulates procedure, if it does, it is lawfully authorized by the **[**41]** Rules Enabling Act. *Id.*

However, in his concurring opinion, Justice Stevens criticized the plurality's categorical approach, at step two, that any federal rule that "really regulates procedure" is a sufficient basis for preempting a conflicting state law. *Id. at 421-29* (Stevens, J., concurring in part and concurring in judgment). Instead, in Justice Stevens' view, the inquiry should "not necessarily turn on whether the state law at issue takes the form of what is traditionally described as substantive or procedural. Rather, it turns on whether the state law actually is part of a State's framework of substantive rights or remedies." *Id. at 419*. This is because there may be state procedural rules that "become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy" and, therefore, "make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim." *Id. at 420*.

Although the Third Circuit has yet to decide whether Justice Stevens' concurrence controls, the Court is persuaded by the majority of district and circuit courts that have done so.[7] *Greene v. Gerber Prods. Co., 262 F. Supp. 3d 38, 60 (E.D.N.Y. 2017)* (collecting cases). In doing so, ***HN14***[] courts presented with the same issue presently **[**42]** before the Court have framed the inquiry as whether the state statute "provides a procedure that is 'so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." *In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 416 (S.D.N.Y. 2011)* (quoting *Shady Grove, 559 U.S. at 420* (Stevens, J. concurring in part and concurring in judgment)); *In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 409 (D. Mass. 2013)*. If the answer is in the affirmative, the federal rule must yield to the state law, since it would "effectively abridge[], enlarge[], or modif[y] a state-created right or remedy." *Shady Grove, 559 U.S. at 422* (Stevens, J. concurring in part and concurring in judgment).

4. Application

Against this legal backdrop, the Court finds that *Rule 23* is not "sufficiently broad" to cover the state statutory notice provisions. First, the conflicting rules do not attempt to answer the same question or subject. *See Shady Grove, 559 U.S. at 399*. Here, the state laws in question address notice provisions for antitrust and consumer protection-related lawsuits; *Rule 23*, on the other hand, **[*389]** is a general federal procedural rule governing class actions. Second, contrary to *Erie*'s twin aims, to decline to apply state statutory notice provisions "in federal court would encourage forum shopping and the inequitable administration of laws." *In re Asacol Antitrust Litig., No. 15-12730, 2016 U.S. Dist. LEXIS 94605, at *48 (D. Mass. July 20, 2016)*. This is also consistent with the majority of district **[**43]** courts that have been presented with the same issue, and have concluded that state statutory notice provisions control in federal court. *See Asacol, 2016 U.S. Dist. LEXIS 94605, at *48* (statutory notice provisions in Arizona, Hawaii, Nevada, and Utah apply in federal court); *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1158 (N.D. Cal. 2009)*; *see also Chavez, 2014 U.S. Dist. LEXIS 194351, at *8* (dismissing Massachusetts and West Virginia consumer protection claims for failing to comply with pre-litigation demand requirements). Accordingly, because EPPs failed to comply with the notice provisions under Arizona's Uniform Antitrust Act, Nevada's Unfair Trade Practices Act, and Utah's Antitrust Act, as well as Massachusetts's Consumer Protection Act and West Virginia's Consumer Credit Protection Act, EPPs' class claims under these statutes are dismissed without prejudice. However, as noted above, because Maine's pre-filing notice requirement is not jurisdictional in nature, Defendants' motion for judgment as to this statute is denied.

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[7] From the Court's perspective, in agreement with Justice Stevens, the state statutes at issue focus on various forms of deceptive practices. *Rule 23* is more generic and applies to all class actions. As such, the narrower and more focused approach of the state should apply.

For these same reasons, the Court also finds that the class action bar incorporated in Tennessee's consumer protection law is not preempted by *Rule 23*. Here, EPPs deviate from the majority of district and circuits, which have followed Justice Steven's concurrence in *Shady Grove*, and, instead, endorse the approach **[**44]** taken in *Lisk v. Lumber One Wood Preserving, LLC, 792 F.3d 1331, 1335 (11th Cir. 2015)*. In *Lisk*, the Eleventh Circuit held that there was "no relevant, meaningful distinction between" the New York law in *Shady Grove* and the Alabama Deceptive Trade Practices Act, which also bars class actions. In doing so, the court, echoing Justice Scalia's plurality decision, explained, "the question whether a federal rule abridges, enlarges, or modifies a substantive right turns on matters of substance—not on the placement of a statute within a state code." *Id. at 1336*. However, "[t]he decision in *Lisk* has not been widely followed outside of the Eleventh Circuit." *Delgado v. Ocwen Loan Servicing, LLC, No. 13-4427, 2017 U.S. Dist. LEXIS 186408, at *23 (E.D.N.Y. Nov. 8, 2017)*. Instead, "most courts outside of that circuit implicitly or explicitly disagree[] with its interpretation of *Shady Grove* and its determination that there was no 'meaningful distinction' between the New York law in *Shady Grove* and the Alabama class action bar. *Id.* (collecting cases). As such, consistent with the courts to have considered this issue, the Court finds that the class action bar in Tennessee controls in federal court. *Id. at *23-24*. Moreover, in *Delgado*, the court explained, "the specific inclusion of the class action bar within the Alabama, Tennessee, and Georgia consumer protection statutes. . . evinces a desire by the state **[**45]** legislature to limit not only the form of the action but also the remedies available, placing those bars squarely within Justice Stevens' concurrence." *Id.*;[8] *Fejzulai v. Sam's **[*390]** West, Inc., 205 F. Supp. 3d 723, 728-29 (D.S.C. 2016)*. That same reasoning holds here.

In sum, the Court finds that the three notice provisions under Arizona, Nevada, and Utah antitrust laws are applicable here and Plaintiffs failed to comply. Likewise, the notice provisions under Massachusetts and West Virginia's consumer protection laws control. As such, EPPs' claims under these five statutes are dismissed without prejudice; Plaintiffs may file an amended complaint that specifically pleads compliance with each state's notice requirement. Similarly, EPPs' class claims under Tennessee's consumer protection statute are dismissed without prejudice; Plaintiffs may amend their complaint to include only claims in their *individual* capacities. Lastly, because the failure to provide pre-file notice under Maine's Unfair Trade Practices Act does not bar pursuing a claim under the Act, Defendants' motion for judgment as it relates to this statute is denied.

IV. State Antitrust Claims

1. Article III Standing

Defendants first challenge EPPs' antitrust claims under the laws of the District of Columbia, **[**46]** since they lack Article **III** standing. Plaintiffs do not dispute the fact that the Complaint does not name a plaintiff that resides in the District of Columbia or that any named plaintiff made a purchase or reimbursement for Effexor XR; instead, they contend that since named plaintiffs have Article **III** standing to pursue their own antitrust claims, they have Article III standing to assert claims under the laws of the District of Columbia. The Court disagrees.

HN15[] Article III standing is a threshold inquiry in every case and one in which "[t]he party invoking federal jurisdiction bears the burden of [proof]." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. To establish Article **III** standing, a plaintiff must demonstrate: "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision." *Neale v. Volvo Cars of N Am., LLC, 794 F.3d 353, 359 (3d Cir. 2015)* (quoting *Susan B. Anthony List v. Driehaus, 573 U.S. 149, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014))*. In a putative class action, standing must be analyzed on a claim-by claim basis, with the plaintiff bearing the burden of

[8] Both Alabama and Georgia's consumer protection statutes contain similar language to Tennessee, which prohibit the use of class actions to enforce the rights created therein. *Ala. Code Ann. § 8-19-10(f)* ("A consumer or other person bringing an action under this chapter may not bring an action on behalf of a class"); *Ga. Code Ann. § 10-1-399(a)* ("Any person who suffers injury or damages . . . as a result of consumer acts or practices in violation of this part . . . may bring an action individually, but not in a representative capacity").

demonstrating standing for each claim he seeks to prove, "we do not exercise jurisdiction over one claim simply because it arose 'from the same 'nucleus of operative fact' as another claim." **[**47]** *Id.* (quoting *DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2015))*. Put differently, "the named plaintiffs may bring suit only under the laws of states in which they reside or in which they either purchased or made reimbursements for [brand-named drug]." *Niaspan, 42 F. Supp. 3d at 758* (citing *In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 533 (E.D. Pa. 2010))*.

Here, EPPs Complaint fails to allege that any named plaintiff either resides in or made purchases and/or reimbursement for Effexor XR in the District of Columbia. Moreover, the Court is unpersuaded by EPPs' proposition that because they have Article III standing in some **[*391]** states, they can assert claims in any state; since this would effectively render the Article III inquiry obsolete. As such, because EPPs lack Article III standing to assert claims in the District of Columbia, the Court grants Defendants' motion as it pertains to this claim without prejudice. *See Niaspan, 42 F. Supp. 3d at 758*; *Wellbutrin XL, 260 F.R.D. at 157-58*.

2. Illinois Brick Challenges

Defendants next seek dismissal of EPP's Illinois, Rhode Island, and Utah state antitrust claims, since these states lack standing under *Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-47, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. In *Illinois Brick*, the Supreme Court held that indirect purchasers lacked Article III standing to assert federal antitrust claims against manufacturers since their injury was likely only a small portion of the injury caused by the defendants' alleged **[**48]** conduct. *Id. at 725-26*.

a. Illinois Antitrust Act

Relying on *Illinois Brick*, Defendants contend that EPPs' Illinois antitrust claim fails, since they lack standing. The plain language of the *Illinois Antitrust Act* ("IAA") states "no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General, who may maintain an action parens patriae." *740 Ill. Comp. Stat. § 10/7(2)*. EPPs respond, contending that under *Shady Grove*, the Court should treat the Illinois Antitrust Act as a procedural law and, therefore, follow *Rule 23*.

District courts are divided on whether the Illinois Antitrust Act precludes indirect purchasers from filing class actions. However, a majority of courts have held that the Act is distinguishable from the New York law in *Shady Grove* and that it prohibits indirect purchaser class actions. *See, e.g., In re Opana Er Antritrust Litig., 162 F. Supp. 3d 704, 723 (N.D. Ill. 2016)*; *United Food & Commer. Workers Local 1776 & Participating Employers Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F. Supp. 3d 1052, 1083-84 (N.D. Cal. 2014)*; *Digital Music, 812 F. Supp. 2d at 415-16*; *Wellbutrin XL, 756 F. Supp. 2d at 677*. As discussed above, the New York law at issue in *Shady Grove* involved a general procedural rule that conflicted with *Rule 23*; here, however, **[**49]** the limitation prescribed in the IAA is "in the same paragraph of the same statute that creates the underlying substantive right." *Digital Music, 812 F. Supp. 2d at 416*; *see also Wellbutrin XL, 756 F. Supp. 2d at 677*. Further, the restrictions in the Illinois Antitrust Act appear to reflect a policy decision regarding the feasibility of duplicative recovery, which is explicitly entrusted to the attorney general, not indirect purchasers. *Wellbutrin XL, 756 F. Supp. 2d at 677* (citing *Illinois ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F. 2d 1469, 1480 (7th Cir. 1991))*. In finding that the Act bars indirect purchaser antitrust class actions, courts have explained "[t]he Illinois restrictions on indirect purchaser actions are intertwined with Illinois substantive rights and remedies . . . [such that] application of *Rule 23* would 'abridge, enlarge or modify' Illinois' substantive rights, and therefore Illinois' restrictions on indirect purchaser actions must be applied in federal court." *Id.; see also Nexium, 968 F. Supp. 2d at 408-09*; *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-2503, 2015 U.S. Dist. LEXIS 125999, at *66 (D. Mass. Aug. 14, 2015)* (holding that it would be inconsistent with *Shady Grove* to conclude that *Rule 23* **[*392]** preempts the ban on class actions contained within Illinois ***Antitrust Law***).

Several district courts have taken a less restrictive interpretation of the Illinois Antitrust Act and have allowed indirect purchasers to bring class actions under the Act. *See, e.g., In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 817-18 (N.D. Ill. 2017)*; *In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712, 729 (S.D.N.Y 2017)*; *In re Aggrenox Antitrust Litig. (Aggrenox II), No. 14-2516, 2016 U.S. Dist. LEXIS 104647, at *23-28 (D. Conn. Aug. 9, 2016)*. In *Broiler Chicken*, the Northern District of Illinois **[**50]** held that *Rule 23* applies in federal court, despite the state law's requirement that the attorney general bring class actions, since the Act does not hinder the class's substantive rights. *Broiler Chicken, 290 F. Supp. 3d at 818*. This is "because any indirect purchaser procedurally blocked from participation in a class action would still have the same remedy in an individual action." *Aggrenox II, 2016 U.S. Dist. LEXIS 104647, at *28*. As such, these courts view the Illinois Antitrust Act as a procedural conflict with *Rule 23*, rather than substantive, and, therefore, apply *Rule 23* to permit indirect purchasers to file class actions under the Act, so long as they satisfy its prerequisites. *See, e.g., Propranolol., 249 F. Supp. 3d at 728*.

Although district courts have taken different approaches in interpreting the Illinois Antitrust Act, the Court finds the rationale of *Digital Music* persuasive. The language of the Act presents a substantive conflict with *Rule 23*; as such, since the Illinois Antitrust Act controls, the Court finds that EPPs lack standing to assert claims under the Act and, therefore, dismisses this claim with prejudice.

b. Rhode Island Antitrust Act

Defendants next move for dismissal of EPPs Rhode Island antitrust claims since they, too, lack standing to bring an antitrust claim under *Illinois Brick*. Since the Supreme Court's **[**51]** decision, multiple states have enacted *Illinois Brick* repealer statutes that allow indirect purchasers to recover under their state law. On July 15, 2013, Rhode Island passed such a repealer, which states "[t]he fact that a person or public body has not dealt directly with the defendant shall not bar or otherwise limit recovery." *R.I. Gen. Laws § 6-36-7(d)*. As such, Plaintiffs argue the statute should be applied retroactively and, even if it cannot be applied retroactively, they nevertheless fall within the repealer's protection since Plaintiffs suffered damages past July 15, 2013.

Here, Defendants argue that the activity alleged in this claim predated July 15, 2013, since the alleged anticompetitive conduct that prevented the generic brands from entering the market occurred prior to July 2010. As such, since the conduct giving rise to the present cause of action occurred prior to the passing of Rhode Island's repealer, Defendants contend it does not apply and, under *Illinois Brick*, must be dismissed. In addition, Defendants aver that the statute cannot be applied retroactively.

HN16[] Under Rhode Island law, it is well established that statutes cannot be applied retroactively, unless clearly stated. The Rhode Island **[**52]** Supreme Court has held that, "statutes and their amendments are construed to operate prospectively unless a specific contrary intent is expressed by the Legislature, or retroactivity must necessarily be inferred from the language employed by the law makers." *State v. Jennings, 944 A.2d 171, 173 (R.I. 2008)*; *see also Rodrigues v. State, 985 A.2d 311, 318 (R.I. 2009)*; *Wilkinson v. State Crime Lab.* ***[*393]*** *Comm'n, 788 A.2d 1129, 1140-41 (R.I. 2002)*; *Hydro-Manufacturing v. Kayser-Roth Corp., 640 A.2d 950, 954-55 (R.I. 1994)*. Additionally, courts have consistently held that the Rhode Island repealer applies prospectively. *See, e.g., Aggrenox I, 94 F. Supp. 3d at 252-53*; *In re Cast Iron Soil Pipe & Fittings Antitrust Litig., No. 14-2508, 2015 U.S. Dist. LEXIS 121620, at *63, (E.D. Tenn. July 24, 2015)*; *Niaspan, 42 F. Supp. 3d at 759*. Finally, Plaintiffs' contention that Defendants' conduct has continued past July 15, 2013, thereby placing it within the repealer's protection, is belied by the explicit allegations set forth in their Complaint, which focus solely on Defendants' actions made prior to July 2010. As such, because Rhode Island's repealer does not apply retroactively and none of the activity giving rise to their claims occurred after the date of enactment (July 15, 2013), EPPs' Rhode Island antitrust claims are dismissed with prejudice.

c. Utah Antitrust Act

Lastly, in addition to failing to provide notice, Defendants contend that EPPs' Utah antitrust claims fail, since none of the named Plaintiffs are Utah residents, as required under Utah law. As such, Defendants contend that EPPs lack standing to assert claims under the **[**53]** Utah Antitrust Act. *See* Niaspan, 42 F. Supp. 3d at 759-60. Plaintiffs respond that dismissal is not warranted, since only a member of a putative class must be from Utah. *See* In re Liquid Aluminum Sulfate Antitrust Litig., No. 16-2687, 2017 U.S. Dist. Lexis 115294, at *112-13 (D.N.J. July 20, 2017).

Under the Utah Antitrust Act, "[a] person who is a *citizen* of this state or a *resident* of this state" can bring a claim. Utah Code Ann. § 76-10-3109(1)(a) (emphasis added). ***HN17***[] The majority of courts that have been presented with this statute require at least one Utah citizen or resident be a named plaintiff *See* Opana Er, 162 F. Supp. 3d at 725; Aggrenox I., 94 F. Supp. 3d at 251-52; Niaspan, 42 F. Supp. 3d at 759-60; Nexium, 968 F. Supp. 2d at 410; In Re Magnesium Oxide Antitrust Litig., No. 10-5943, 2011 U.S. Dist. LEXIS 121373, at *30 n.10 (D.N.J. Oct. 20, 2011). Here, neither party disputes that none of the named Plaintiffs are Utah residents or citizens. As such, guided by the majority of courts to address this issue, because there must be at least one named plaintiff who is a Utah citizen or resident in order to establish standing for the putative class, EPPs' claims under the Utah Antitrust Act are dismissed without prejudice.

In sum, EPPs' antitrust claims under Illinois and Rhode Island are dismissed and there is no right to amend due to futility. Under Utah, the claim is dismissed without prejudice; but Plaintiff may amend to name such plaintiff within thirty days.

3. States Requiring Concerted Action

Defendants next seek dismissal of Count I of EPPs' Kansas, New York, and Tennessee antitrust claims, which asserts **[**54]** a single claim of monopolization against Wyeth, based on committing fraud before the PTO and commencing baseless patent litigation. (TAC ¶¶ 420-37). Specifically, Defendants argue that because Kansas, New York, and Tennessee require unlawful behavior between two or more individuals, Count I must be dismissed since it alleges unilateral conduct by Wyeth.

It is clear from the Complaint that the allegations concerning Wyeth's conduct before the PTO, as well as its sham litigation, are unilateral. As such, since these allegations describe unilateral conduct, Defendants contend that Count I fails in Kansas, New York and Tennessee. *See* Kan. Stat. Ann. §§ 50-101, **[*394]** -112, -132; N.Y. Gen. Bus. Law § 340(1); Tenn. Code Ann. §§ 47-25-101, -102.

HN18[] The Kansas Monopolies and Unfair Trade Act proscribes "all arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition" and those "designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles." Kan. Stat. Ann. § 50-112. The Act defines a "trust" as a "combination of capital, skill, or acts, by two or more persons" and prohibits conspiracy or combination "with any other persons. . . for the purpose **[**55]** of monopolizing any line of business." Kan. Stat. Ann. §§ 50-101, -132. While there is scant case law interpreting the Kansas Monopolies and Unfair Trade Act, the Kansas Court of Appeals has held that since the Act emphasizes agreements between two or more individuals, the legislature intended for the Act to require more than unilateral conduct. Smith v. Philip Morris Cos., 50 Kan. App. 2d 535, 335 P.3d 644, 662-67 (Kan. Ct. App. 2014); *see also* In re Relafen Antitrust Litig., 221 F.R.D. 260, 283 (D. Mass. 2004).

Like Kansas, the New York Donnelly Act defines an antitrust violation as "every contract, agreement, arrangement, or combination whereby a monopoly in the conduct of any business, trade, or commerce . . . may be established or maintained, or whereby competition or the free exercise of any activity in the conduct of any business, trade, or commerce . . . is or may be restrained." N.Y. Gen. Bus. Law § 340(1). As such, ***HN19***[] in New York "[a]n antitrust claim under the Donnelly Act...must allege both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market." Global Reins. Corp.-US. Branch v. Equitas Ltd, 18 N.Y.3d 722, 969 N.E. 2d 187, 192, 946 N.Y.S.2d 71 (N.Y. 2012); *see also* In re Aluminum Warehousing Antitrust Litig. No. 13-2481, 2014 U.S. Dist. LEXIS 140765, at *23 (S.D.N.Y. Sept. 14, 2014). However, the Northern District of New

York has held that allegations of monopolistic activities, based on conspiring with other individuals, suffices to state a claim under the Donnelly Act. *See* N. Cnty. Communs. Corp. v. Verizon N.Y. Inc., 233 F. Supp. 2d 381, 385 (N.D.N.Y. 2002). **[**56]**

Finally, like Kansas and New York, **HN20**[] the Tennessee Trade Practices Act proscribes "[a]ll arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition . . . and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer." *Tenn. Code Ann. § 47-25-101*. Despite limited case law interpreting the statute, several district courts have held that "the absence of an arrangement or conspiracy between two actors is a bar" to a claim under the Tennessee statute. *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 445-46 (E.D. Pa. 2010)*; *see also* In re Ditropan XL Antitrust Litig., 529 F. Supp. 2d 1098, 1108-09 (N.D. Cal. 2007); Relafen, 221 F.R.D. at 284.

As established above, **HN21**[] the case law as well as the plain language of the Kansas, New York, and Tennessee antitrust statutes require concerted action between two parties. As such, allegations relating to Wyeth's unilateral conduct fails to state a claim under these statutes. The Court is not persuaded by Plaintiffs' argument **[*395]** that all alleged conduct falls within a single cause of action. Therefore, Defendants' motion as it relates to Kansas, New York, and **[**57]** Tennessee are granted in part and denied in part. To the extent Count I is based on Wyeth committing fraud before the PTO and commencing baseless patent litigation, Defendants' motion is granted, since the conduct is unilateral. However, the Court denies Defendants' motion to the extent that they seek dismissal of Count I based on the reverse settlement agreement with Teva.

V. State Law Consumer Protection Claims

Defendants next challenge the sufficiency of EPPs' state consumer protection claims. The Court discusses each state individually.[9]

1 California

Defendants first seek dismissal of EPPs' claims under the California Unfair Competition Law, since EPPs failed to plead reliance. **HN22**[] The Unfair Competition Law proscribes "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof Code § 17200*. As such, courts have understood *Section 17200* to provide relief for three varieties of unfair competition: "practices which are unlawful, unfair, or fraudulent." *Ditropan XL, 529 F. Supp. 2d at 1105*. However, contrary to Defendants' assertion, reliance is only required "when a[n] [Unfair Competition Law] claim is premised on allegations that the Defendants engaged in fraudulent business practices." *Id. at 1106*. Here, EPPs claims are predicated on unlawful and unfair **[**58]** business practices engaged by defendants. Specifically, Plaintiffs challenge, among other things, Defendants' sham litigation, fraudulent procurement of the PTO, and reverse settlement agreement. As such, "at the very least, [EPPs] allege a claim premised on the unfair prong." *Id.; see also* Wellbutrin, 260 F.R.D. at 160. Therefore, because EPPs allege sufficient facts to sustain an Unfair Competition Law claim based on unfair business practices, Defendants' motion for judgment on the pleadings with respect to this claim is denied.[10]

2. Illinois

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[9] Because the Court has already dismissed EPPs' claims under Massachusetts, Tennessee and West Virginia's consumer protection statutes, it does not address the remaining arguments pertaining to these states.

[10] Moreover, it should be noted that, at the pleading stage it is difficult to determine whether Plaintiff's claims under California law are even based on fraudulent conduct; as such, the Court also finds Defendants' motion to be premature.

Defendants next seek dismissal of EPPs' claims under the Illinois Consumer Fraud and Deceptive Business Practices Act since: (1) the Act does not provide additional relief beyond antitrust claims; (2) EPPs failed to plead deception or reliance; and (3) EPPs fail to demonstrate that the alleged conduct was consumer-oriented or had a consumer nexus. The Illinois Consumer Fraud and Deceptive Business Practices Act states that "[u]nfair methods of competition and unfair or deceptive acts or practices . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby." *815 Ill. Comp. Stat. Ann. 505/2*. However, ***HN23***[] the state legislature **[**59]** did not intend for the Act to serve as an "additional antitrust enforcement mechanism." *Laughlin v. Evanston Hosp., 133 Ill. 2d 374, 550 N.E.2d 986, 993, 140 Ill. Dec. 861 (Ill. 1990)* (consumer fraud statutes cannot be used when conduct is not actionable **[*396]** under the state ***antitrust law***); *Siegel v. Shell Oil Co., 480 F. Supp. 2d 1034, 1046-48 (N.D. Ill. 2007)* (consumers can bring a consumer fraud claim when conduct is actionable under the Illinois Antitrust Act). As such, if the plaintiff fails to plead an antitrust claim under the Illinois Antitrust Act, those same allegations of anticompetitive conduct cannot give rise to a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act. *Id.; Siegel, 480 F. Supp. 2d at 1034*; *Wellbutrin XL, 260 F.R.D. at 162*.

As discussed above, the Illinois Antitrust Act prohibits indirect purchaser class actions. Moreover, when reviewing the Complaint, EPPs' claims are primarily focused on anticompetitive conduct and its "allegations of consumer fraud overlap entirely with the allegations of anticompetitive conduct." *Wellbutrin XL, 260 F.R.D. at 162* (quoting *Gaebler v. New Mexico Potash Corp., 285 Ill. App. 3d 542, 676 N.E.2d 228, 230, 221 Ill. Dec. 707 (Ill. App. Ct. 1996))*. Simply put, ***HN24***[] "plaintiffs may not assert what are essentially antitrust claims in the guise of a claim under [the Illinois Consumer Protection Act]." *Id.* Since any amendment would be futile, judgment on the pleadings is granted without leave to amend.

3. Maine

Defendants next seek dismissal of EPPs' claims under the Maine Unfair Trade Practices **[**60]** Act, since EPPs failed to allege deception and, alternatively, EPPs are not considered "consumers" under the Act. ***HN25***[] The Act proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Me. Rev. Stat. tit. 5 § 207*. "A business practice is 'unfair' if the injury it produces is (1) 'substantial,' (2) not 'outweighed by any countervailing benefits to consumers or competition that the practice produces,' and (3) not reasonably avoidable by consumers." *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 584 (M.D. Pa. 2009)* (quoting *Tungate v. MacLean-Stevens Studios, Inc., 1998 ME 162, 714 A.2d 792, 797 (Me. 1998))*. "In pricing cases, the allegedly unfair practice must also induce the consumer to acquire something that he or she would not otherwise have purchased." *Id.* However, whereas here, the purported conduct resulted in higher prices, the Maine Unfair Trade Practices Act provides no such relief, since higher prices do not induce a consumer to make purchases. *In re Graphics Processing Units (GPU) Antitrust Litig., 527 F. Supp. 2d 1011, 1031 (N.D. Cal. 2007)*. As such, since any amendment to EPPs' claims under the Maine Consumer Protection Act would be futile, judgment on the pleadings is granted without leave to amend. *See Chocolate Confectionary, 602 F. Supp. 2d at 585*.

It is worth briefly noting that the court is unpersuaded by Plaintiff's reliance on *In re Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160 (D. Me. 2004)*, which held that deception or reliance only applies to "unfair or deceptive acts," not "unfair **[**61]** methods of competition." *Id. at 186-87*. First, federal courts have criticized the rationale in *In re Motor Vehicles*, concluding that its "crabbed reading of *Tungate*" is incongruent with the Maine Supreme Court's holding since "[t]he Maine Supreme Court [did] not qualify its pronouncement as applicable to only 'unfair or deceptive acts.'" *In re Polyurethane Foam Antitrust Litig., 799 F. Supp. 2d 777, 787 (N.D. Ohio 2011)* (quoting *Flash Memory, 643 F. Supp. 2d at 1159*); *see also Chocolate Confectionary, 602 F. Supp. 2d at 584-85*; *In re TFT-LCD Ant trust Litig., 586 F. Supp. 2d 1109, 1126-27 (N.D. Cal. 2008)*. Second, the allegations in that case concerned group boycotts, not price fixing or reverse settlements, which **[*397]** the *In re Motor Vehicles* court reasoned would nevertheless support an unfair method of competition claim.

4. Nevada

Defendants argue that EPPs claims under the Nevada Deceptive Trade Practices Act should be dismissed, since EPPs failed to allege consumer reliance. Under *Section 41.600 of Nevada's Revised Statutes*, ***HN26***[] "any person who is a victim of . . . [a] deceptive trade practice as defined in [the Nevada Deceptive Trade Practices Act]" may a bring an action thereunder. *Nev. Rev. Stat. § 41.600*. Some courts have held that when a plaintiff seeks relief based on prohibited acts listed under *Section 598.0915*, the plaintiff is required to demonstrate deception or reliance. *See, e.g., Picus v. Wal-Mart Stores, Inc., 256 F.R.D. 651, 657 (D. Nev. 2009)*; *Sheet Metal Workers, 737 F. Supp. 2d at 417*. However, contrary to Defendants' contention, EPPs' claims do not arise under *Section 598.0915*; instead, EPPs' claims appear **[**62]** to be predicated on *Section 598.0923(3)*, which states that "[a] person engages in a 'deceptive trade practice' when in the course of his or her business or occupation he or she knowingly . . . violates state or federal statute or regulation relating to the sale or lease of goods or service." *Nev. Rev. Stat. § 598.0923(3)*.

HN27[] Under *Section 598.0923(3)*, the Nevada Deceptive Trade Practices Act does not require the plaintiff to plead reliance, nor do Defendants identify any case-law that would otherwise support this contention. *See In re Pharm. Indus. Average Wholesale Price Litig., 252 F.R.D. 83, 98 (D. Mass. 2008)* (parties agreeing that the Nevada Deceptive Trade Practices Act does not require proof of reliance); *see also In re Packaged Seafood Prods. Antitrust Litig., 242 F. Supp. 3d 1033, 1080-81 (S.D. Cal. 2017)* (rejecting the defendant's motion to dismiss the end purchaser plaintiff's Nevada Deceptive Trade Practices Act claims, arising from an alleged antitrust conspiracy regarding packaged seafood products). As such, since EPPs' claims are predicated on allegations of ***HN28***[] anticompetitive conduct, which are considered prohibited acts under *Nev. Rev. Stat. § 598A.060(a)*, the Court denies Defendants' motion for judgment on the pleadings.

6. New Mexico

Defendants next challenge EPPs' claims under the New Mexico Unfair Practices Act, since the Act does not provide relief for price fixing and, in any event, they fail to plead unconscionable conduct. ***HN29***[] The New Mexico **[**63]** Unfair Practices Act prohibits unfair, deceptive, and unconscionable trade practices. *N.M. Rev. Stat. § 57-12-2*. Given the remedial nature of the Act, "courts construe its provisions broadly to facilitate this purpose." *Chocolate Confectionary, 602 F. Supp. 2d at 585* (citing *State ex rel. Stratton v. Gurley Motor Co., 1987- NMCA 063, 105 N.M. 803, 737 P.2d 1180, 1185 (N.M. 1987))*. The Act defines "unconscionable trade practice" as "an act or practice in connection with the sale . . . of any goods or services . . . that to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid." *N.M. Stat. Ann. § 57-12-2(E)*.

HN30[] "Federal courts generally permit [New Mexico Unfair Practices Act] actions in price-fixing cases provided that the plaintiff alleges a 'gross disparity' between the price paid for a product and the value received." *Chocolate Confectionary, 602 F. Supp. 2d at 585* (collecting cases); *see also Flash Memory, 643 F. Supp. 2d at 1159-60*; *Liquid Aluminum Sulfate,* ***[*398]*** *2017 U.S. Dist. LEXIS 115294, at *108-09*; *In re Aftermarket Filters Antitrust Litig., No. 08-4883, 2009 U.S. Dist. LEXIS 104114, at *37 (N.D. Ill. Nov. 5, 2009)*. Unlike *GPU, 527 F. Supp. 2d at 1029-30*, where the court dismissed the plaintiffs' New Mexico Unfair Practices Act for failing to plead unequal bargaining power, the Court is satisfied that, at this juncture, that EPPs have sufficiently pled enough facts to state a claim under the New Mexico statute. EPPs Complaint is replete with allegations of price fixing and anticompetitive **[**64]** schemes, and it is beyond cavil that these schemes resulted in consumers paying a substantial premium for goods beyond what they would have otherwise paid. *See TFT-LCD, 586 F. Supp. 2d at 1127* (allegations of price fixing and "gross disparity" between the value of products received and amount paid sufficient to state a claim under the New Mexico Unfair Practices Act). As such, the Court denies Defendants' motion for judgment on the pleadings as to EPPs' New Mexico Unfair Practices Act claims.

7. New York

Defendants next challenge EPPs' claims under the New York Consumer Protection from Deceptive Acts and Practices Act, since EPPs fail to allege particular conduct directed specifically at them and, in the alternative, fail to allege consumer reliance. *Section 349 of New York's Business Law* states, "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." *N.Y. Gen. Bus. Law § 349(a)*. ***HN31***[] "*[S]ection 349* is directed at wrongs against the consuming public." *In re Rezulin Prods. Liab. Litig., 392 F. Supp. 2d 597, 613 (S.D.N.Y. 2005)* (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 647 N.E.2d 741, 744, 623 N.Y.S.2d 529 (N.Y. 1995))*. In order to state a claim under *Section 349*, the plaintiff must prove three elements: (1) "the challenged act or practice was consumer-oriented;" (2) "it was misleading in a material way;" and (3) "the plaintiff suffered injury as **[**65]** a result of the deceptive act." *Flash Memory, 643 F. Supp. 2d at 1160* (quoting *Stutman v. Chem. Bank, 95 N.Y.2d 24, 731 N.E.2d 608, 611, 709 N.Y.S.2d 892 (N.Y. 2000))*. "To satisfy the consumer-oriented prong, plaintiffs need only allege consumer-oriented conduct that implicates the public interest in New York." *In re Dynamic Random Access Memory Antitrust (DRAM II) Litig., 536 F. Supp. 2d 1129, 1144-45 (N.D. Cal. 2008))*.

Here, contrary to Defendants' assertion, the Court is satisfied that EPPs have alleged sufficient facts to sustain a claim under *Section 349*. As discussed above, EPPs' claims focus on the anticompetitive conduct of Defendants, which prevented the earlier market entry of generic Effexor XR and, as a result, caused individuals to pay a premium. *See MacQuarie Grp. Ltd. v. Pac. Corporate Grp., LLC, No. 08-cv-2113, 2009 U.S. Dist. LEXIS 16554, at *23-25 (S.D. Cal. Mar. 2, 2009)* (recognizing that ***HN32***[] "courts routinely treat[] antitrust violations as deceptive acts"); *see also* *New York v. Feldman, 210 F. Supp. 2d 294, 302 (S.D.N.Y. 2002))*. In fact, similar allegations were made in both *TFT-LCD, 586 F. Supp. 2d at 1128-29*, and *DRAM II, 536 F. Supp. 2d at 1143-44*, where the district courts denied the defendants' motions to dismiss, finding the plaintiffs alleged sufficient facts to state a claim. As such, for these reasons, the Court denies Defendants' motion as to EPPs' *Section 349* claims.

8. North Carolina

Defendants next contend that EPPs lack standing to assert claims under **[*399]** North Carolina's Unfair and Deceptive Trade Practices Act, since Plaintiffs are neither competitors nor in commercial dealings with Defendants. ***HN33***[] *Section 75-1.1* of **[**66]** the Act proscribes "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" and provides "any person" or "business of any person, firm or corporation" the right to sue for injuries arising from unfair business practices. *N.C. Gen. Stat. §§ 75-1.1*; -16. "Federal courts interpreting the [North Carolina's Unfair and Deceptive Trade Practices Act] have allowed claims asserted by businesses against one another as long as the challenged practices affect commerce or the marketplace." *Sheet Metal Workers, 737 F. Supp. 2d at 419*. Here, as discussed, EPPs claim that Defendants engaged in anticompetitive schemes, which ultimately resulted in consumers purchasing Effexor XR at inflated prices. This suffices, under the Act, to confer EPPs with standing; as such, Defendants' motion for judgment on the pleadings is denied. *See id.* The Court only adds that Defendants' reliance on *Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 519-20 (4th Cir. 1999)* is of no moment. In *Food Lion*, the Fourth Circuit held that the plaintiffs could not bring a claim against the defendant under the Act, despite engaging in deceptive conduct, since the conduct "did not harm the consuming public." *Id. at 520*. Here, unlike *Food Lion*, EPPs' allegations that Defendants' anticompetitive scheme resulted **[**67]** in consumers paying inflated costs for Effexor XR demonstrates a harm to the "consuming public."

9. Rhode Island

Finally, Defendants challenge EPPs' claims under the Rhode Island Unfair Trade Practices and Consumer Protection Act, since: (1) the misconduct alleged in the Complaint is not prohibited under the Act and (2) EPPs are not "consumers" as defined under the Act. ***HN34***[] The Rhode Island Unfair Trade Practices and Consumer Protection Act proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *R.I. Gen. Laws § 6-13.1-2*. The Act goes on to list twenty "acts or practices" that are considered unfair or deceptive competition. *R.I. Gen. Laws § 6-13.1-1(6)(i)-(xx)*. In determining whether a practice is "unfair" under the Act, courts must consider: "(1) whether the practice affronts public policy, as delineated by the common law, statutes, and 'other established concept[s] of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers (or competitors or other businessmen).'" *Chocolate Confectionary, 602 F. Supp. 2d at 587* (quoting *Ames v. Oceanside Welding and Towing Co., Inc., 767 A.2d 677, 681 (R.I. 2001))*.

The Court finds Defendants' first argument unconvincing. The majority of courts that have been presented with this issue **[**68]** have held that the three prong *Ames* standard "encompass price-fixing injuries, and [therefore] consumers subject to collusive pricing possess a cognizable claim under the [Act]." *Chocolate Confectionary, 602 F. Supp. 2d at 587*; *TFT-LCD, 586 F. Supp. 2d at 1129-30*; *DRAM II, 536 F. Supp. 2d at 1144-45*. As such, since EPPs allege anticompetitive conduct, which resulted in consumers purchasing Effexor XR at a premium rate, EPPs have sufficiently alleged unfair conduct under the Rhode Island Unfair Trade Practices and Consumer Protection Act. *See* *DRAM II, 536 F. Supp. 2d at 1145* (allegations that the defendants engaged price fixing "offend[s] public policy as has been established by statute and/or common law").

[*400] Alternatively, Defendants seek dismissal of EPPs' Rhode Island Unfair Trade Practices and Consumer Protection Act claims since they are not "consumers" within the meaning of the Act. ***HN35***[] The Act limits claims to "[a]ny person who purchases or leases goods or services primarily for personal, family, or household purposes." *R.I. Gen. Laws § 6-13.1-5.2(a)*. Citing no supporting case law, EPPs contend that the Act defines "person" to include entities such as corporations, trusts, and associations. However, contrary to EPPs' assertion, ***HN36***[] "the Rhode Island Supreme Court has construed the [Rhode Island Unfair Trade Practices and Consumer Protection Act]to require that only **[**69]** natural persons are permitted to bring private rights of actions under the statute." *In re Dynamic Random Access Memory (DRAM I) Antitrust Litig., 516 F. Supp. 2d 1072, 1117 (N.D. Cal. 2007)* (citing *ERI Max Entm't, Inc. v. Streisand, 690 A.2d 1351, 1354 (R.I. 1997))*; *see also* *TFT-LCD, 586 F. Supp. 2d at 1130* (same); *Sheet Metal Workers, 737 F. Supp. 2d at 423* (same). As such, Defendants' motion for judgment on the pleadings is granted. "However, because there may be unusual circumstances under which a business entity may be able to allege that its purchases were primarily for personal, family or household purposes, the Court will not preclude plaintiffs from amending the complaint to allege such a claim on behalf of business entities." *TFT-LCD, 586 F. Supp. 2d at 1130*.

To sum up, the Court declines to grant judgment as to EPPs' consumer protection claims in California, Nebraska, New Mexico, New York, and North Carolina. However, the Court grants Defendants' motion, without leave to amend as to EPPs' Illinois and Maine consumer protection claims; and *with* leave to amend with regards to EPPs' Rhode Island consumer protection claims.

ORDER

IT IS on this 18th day of September, 2018,

ORDERED that Defendants' Motion for Judgment on the Pleadings (ECF No. 755) is **GRANTED IN PART** and **DENIED IN PART** as follows:

- Defendants' Motion for Judgment on the Pleadings based on preemption principles is **DENIED**;

- Defendants' Motion for Judgment on the Pleadings based on statute **[**70]** of limitations is **DENIED**;

- Defendants' Motion for Judgment on the Pleadings as to EPPs' state consumer protection claims in California, Nevada, New Mexico, New York, and North Carolina is **DENIED**.

- Defendants' Motion for Judgment on the Pleadings as it pertains to EPPs' Arizona, Nevada, and Utah antitrust claims is **GRANTED WITHOUT PREJUDICE**; EPPs are granted leave to amend their Complaint to plead compliance with these notice provisions and, with regards to Utah, include a named plaintiff from Utah;

• Defendants' Motion for Judgment on the Pleadings as it pertains to EPPs' antitrust claims under the laws of the District of Columbia is **GRANTED WITHOUT PREJUDICE**;

• Defendants' Motion for Judgment on the Pleadings as it pertains to EPPs' Massachusetts, West Virginia, Rhode Island, and Tennessee consumer protection claims is **GRANTED WITHOUT PREJUDICE**; EPPs are granted leave to amend their Complaint to plead compliance with Massachusetts and West Virginia's notice provisions, individual claims in Tennessee, **[*401]** and consumer claims under Rhode Island;

• Defendants' Motion for Judgment on the Pleadings as it pertains to EPPs' Illinois and Rhode Island antitrust claims, and EPPs' Illinois and Maine **[**71]** consumer protection claims is **GRANTED WITH PREJUDICE**;

• Defendants' Motion for Judgment on the Pleadings as to Count I of EPPs' Complaint under Kansas, New York, and Tennessee is **GRANTED** to the extent these claims are predicated on unilateral activity by Wyeth.

• EPPs have thirty (30) days from the filing of this Memorandum and Order to file an Amended Complaint, consistent with this Memorandum.

/s/ Peter G. Sheridan

PETER G. SHERIDAN, U.S.D.J.

Beyer v. Symantec Corp.

United States District Court for the Northern District of California

September 21, 2018, Decided; September 21, 2018, Filed

Case No. 18-cv-02006-EMC

Reporter

333 F. Supp. 3d 966 *; 2018 U.S. Dist. LEXIS 162166 **

MONTGOMERY BEYER, Plaintiff, v. SYMANTEC CORPORATION, Defendant.

Subsequent History: Dismissed without prejudice by *Beyer v. Symantec Corp., 2019 U.S. Dist. LEXIS 30625 (N.D. Cal., Feb. 26, 2019)*

Core Terms

Software, products, alleges, consumer, defects, misleading, prong, AntiVirus, omission, misrepresentations, fraudulent, puffery, Engine, argues, unfair, unjust enrichment, representations, vulnerabilities, Enterprise, laptops, source code, advertising, purchasers, disclose, safety hazard, Decomposer, survive, files, taxi, motion to dismiss

LexisNexis® Headnotes

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN1[] **Standing, Elements**

To satisfy U.S. Const. art. III's case or controversy requirement, a plaintiff must demonstrate that he or she has suffered an injury in fact, that the injury is traceable to the defendant's conduct, and that the injury can be redressed by a favorable decision.

Constitutional Law > The Judiciary > Case or Controversy > Standing

HN2[] **Case or Controversy, Standing**

For purposes of U.S. Const. art. III standing, a plaintiff may proceed on class claims against unpurchased products if they are substantially similar to products he has purchased.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN3[] **Trade Practices & Unfair Competition, State Regulation**

The False Advertising Law (FAL), *Cal. Bus. & Prof. Code §§ 17500, et seq.*, prohibits businesses from disseminating statements that are untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. *Cal. Bus. & Prof. Code § 17500*. The Consumer Legal Remedies Act (CLRA), *Cal. Civ. Code §§ 1750, et seq.* prohibits unfair methods of competition and unfair or deceptive acts or practices in transactions for the sale or lease of goods to consumers. *Cal. Civ. Code. § 1770(a)*. The standards for determining whether a representation is misleading under the FAL apply equally to claims under the CLRA. The Unfair Competition Law (UCL),*Cal. Bus. & Prof. Code §§ 17200, et seq.* prohibits any fraudulent business act or practice, as well as any unfair, deceptive, untrue or misleading advertising or any violation of the FAL. *Cal. Bus. & Prof. Code § 17200*.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN4[] **Heightened Pleading Requirements, Fraud Claims**

Under *Fed. R. Civ. P. 9(b)*, the plaintiff must plead the who, what, when, where, and how of the alleged misconduct. This requires the plaintiff to allege an account of the time, place, and specific content of the false or misleading statements. In addition, the plaintiff must set forth what is false or misleading about a statement, and why.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN5[] **False Advertising, State Regulation**

A misrepresentation must be a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact. Generalized, vague, and unspecified assertions constitute mere puffery upon which a reasonable consumer cannot rely, and hence are not actionable. Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim. Thus, a statement that is quantifiable, that makes a claim as to the specific or absolute characteristics of a product, may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN6[] **Deceptive & Unfair Trade Practices, State Regulation**

An omission is actionable if the omitted fact is (1) contrary to a material representation actually made by the defendant or (2) is a fact the defendant was obliged to disclose. The omitted fact must also be material. A statement is material if a reasonable consumer would deem it important in determining how to act in the transaction at issue. Materiality usually is a question of fact that should be left to the jury unless the statement at issue is obviously unimportant.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN7[] **Deceptive & Unfair Trade Practices, State Regulation**

The second prong of omission to be actionable regards the duty to disclose even in the absence of a particular representation. Traditionally under California law, to state a claim for failing to disclose a defect, a party must allege (1) the existence of a design defect; (2) the existence of an unreasonable safety hazard; (3) a causal connection between the alleged defect and the alleged safety hazard; and that the manufacturer knew of the defect at the time a sale was made.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN8[] **Deceptive & Unfair Trade Practices, State Regulation**

The liability for non-disclosure extends beyond safety hazards by sanctioning a Unfair Competition Law (UCL) omission claim when the plaintiff alleges that the omission was material; second, the plaintiff must plead that the defect was central to the product's function; and third, the plaintiff must allege one of the four LiMandri factors. The LiMandri factors are: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. Importantly, the defect must not only be central to the product's function; it must also be physical.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN9[] **Deceptive & Unfair Trade Practices, State Regulation**

In the context of a Unfair Competition Law (UCL) claim, computer software may be characterized as tangible property because the software is recorded in a physical form which has physical existence, takes up space on the tape, disc, or hard drive, makes physical things happen, and can be perceived by the senses. Software is a certain arrangement of matter, which is physically recorded on some tangible medium and constitutes a corporeal body.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Constitutional Law > The Judiciary > Case or Controversy > Standing

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN10[] **Deceptive & Unfair Trade Practices, State Regulation**

Reliance is required to achieve standing under the Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code §§ 17200, et seq.*, False Advertising Law (FAL), *Cal. Bus. & Prof. Code §§ 17500, et seq.*, and Consumer Legal Remedies Act (CLRA), *Cal. Civ. Code §§ 1750, et seq. Cal. Bus. & Prof. Code §§ 17204 (UCL)*, *17535 (FAL)*; *Cal. Civ. Code. § 1780(a)* (CLRA). Reliance is alleged where the misrepresentation or nondisclosure was an immediate cause of the plaintiff's injury-producing conduct, such as where the plaintiff in all reasonable probability would not have engaged in that conduct in the absence of the fraud. A presumption, or at least an inference, of reliance arises where there is a showing that a misrepresentation was material.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN11[] **Deceptive & Unfair Trade Practices, State Regulation**

Knowledge of an undisclosed defect is required for a claim of misrepresentation to lie under the Consumer Legal Remedies Act (CLRA), *Cal. Civ. Code §§ 1750, et seq.* A claim under the False Advertising Law (FAL), *Cal. Bus. & Prof. Code §§ 17500, et seq.*, requires that the defendant have known or reasonably should have known that the statement in question was misleading. *Cal. Bus. & Prof. Code § 17500*. However, knowledge is not required under the Unfair Competition Law (UCL's) fraudulent prong. A claim under the UCL's fraudulent prong, in order to fulfill its purpose of protecting the public, does not require that the deception be known to be false to the perpetrator.

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Implied Warranty of Merchantability

HN12[] **Warranties, Implied Warranty of Merchantability**

Under the Song-Beverly Act, every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and retail seller's implied warranty that the goods are merchantable, unless such warranty is properly disclaimed. *Cal. Civ. Code § 1792*. Consumer goods are those that are primarily for personal, family, or household purposes, except for clothing and consumables. *Cal. Civ. Code § 1791(a)*. The warranty means that the goods: (1) Pass without objection in the trade under the contract description; (2) Are fit for the ordinary purposes for which such goods are used; (3) Are adequately contained, packaged, and labeled; (4) Conform to the promises or affirmations of fact made on the container or label. *Cal. Civ. Code § 1791.1(a)*.

Business & Corporate Compliance > ... > Sales of Goods > Title, Creditors & Good Faith Purchasers > Passing of Titles

HN13[] **Title, Creditors & Good Faith Purchasers, Passing of Titles**

Under California law, title passes at the time and place that the seller completes his performance with reference to the physical delivery of the goods. *Cal. Comm. Code § 2401(2)*. Where the contract does not require the seller to deliver the goods to the buyer, title passes to the buyer at the time and place of shipment. *Cal. Comm. Code § 2401(2)(a)*.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Restitution

HN14[] **Types of Contracts, Quasi Contracts**

Courts may construe an unjust enrichment claim as a quasi-contract claim seeking restitution. The doctrine of unjust enrichment applies where plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on defendant which defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value.

Counsel: **[**1]** For Montgomery Beyer, Individually and on behalf of All Others Similarly Situated, Plaintiff: Cassidy Kim, Noah M. Schubert, Robert C. Schubert, Willem F. Jonckheer, LEAD ATTORNEYS, Schubert Jonckheer & Kolbe LLP, San Francisco, CA.

For Symantec Corporation, Defendant: Laurence F. Pulgram, LEAD ATTORNEY, Ciara Nicole McHale, Tyler Griffin Newby, Fenwick & West LLP, San Francisco, CA; Molly Roberta Melcher, Fenwick and West LLP, Mountain View, CA.

Judges: EDWARD M. CHEN, United States District Judge.

Opinion by: EDWARD M. CHEN

Opinion

[*970] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

Docket No. 17

[*971] I. INTRODUCTION

Plaintiff Montgomery Beyer (hereafter "Beyer") brings the instant action alleging that certain network security software products sold by Defendant Symantec Corporation (hereafter "Symantec"), specifically network security software products sold or licensed to consumers under the Norton brand ("Norton Products") and to businesses under the Symantec brand ("Enterprise Products," and together with the Norton Products, the "Affected Products"), contained critical defects. *See* Docket No. 1 ("Compl.") ¶¶ 1-2. Beyer's allegations arise out of a report by Google Inc.'s team of expert cybersecurity **[**2]** analysts, Project Zero, which detail alleged vulnerabilities in a component of Symantec's software, the AntiVirus Decomposer Engine. *Id.* ¶¶ 2, 25. Beyer argues that Symantec advertises that the Affected Products "protects against the latest online threats" or "protects against viruses, spyware, hackers, rootkits, identity theft, phishing scams, and fraudulent Web sites" while knowing that its products suffered from a core decomposer engine defect that exposed entire computer operating systems to various security vulnerabilities. *Id.* ¶¶ 20-24. Beyer further argues that Symantec failed to disclose that it did not implement patches for third-party source code that it used throughout its product line, and various Symantec misrepresentations and omissions form the basis for his causes of action. *Id.*

Beyer asserts five causes of action, namely (i) a California Consumer Legal Remedies Act ("CLRA") claim, *Cal. Civ. Code §§ 1750, et seq.*, (ii) a California Song-Beverly Consumer Warranty Act claim, *Cal. Civ. Code §§ 1790, et seq.*, (iii) a California False Advertising Law ("FAL") claim, *Cal. Bus. & Prof. Code §§ 17500, et seq.*, (iv) a California Unfair Competition Law ("UCL") claim, *Cal. Bus. & Prof. Code §§ 17200, et seq.*, and (v) a claim for "Quasi-Contract/Unjust Enrichment." *Id.* ¶¶ 51-96. Beyer purports to represent a nationwide class **[**3]** combining persons who purchased and/or licensed an Affected Product between December 21, 2005 and September 19, 2016. *Id.* ¶¶ 1, 42-50. Beyer further asserts a consumer subclass for purposes of the claims under the CLRA and the Song-Beverly Act. *Id.* ¶ 43.

Symantec has moved to dismiss for (i) failure to plead the facts and circumstances of the alleged fraud with particularity under *Fed. R. Civ. P. 9(b)*, (ii) failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, and (iii) lack of Article III standing under *Fed. R. Civ. P. 12(b)(1)*. For the following reasons, the Court **DISMISSES** without prejudice the CLRA, FAL, UCL, and unjust enrichment claims as to the Third Software. The Court also **DISMISSES** Beyer's Song-Beverly Act claim without prejudice. The Court otherwise **DENIES** the motion to dismiss. The motion to strike is also **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

The complaint alleges the following:

Symantec produces and sells security software under the Symantec and Norton brands. Both the Symantec and Norton products contain a key component called the AntiVirus Decomposer Engine. This component unpacks compressed executable files so that they can be scanned for malicious code. *Id.* ¶ 2. On June 28, 2016, Google's Project Zero team released a report on alleged **[**4]** vulnerabilities in the AntiVirus Decomposer Engine. *Id.* ¶¶ 2, 25. **[*972]** Beyer alleges that Project Zero discovered that the AntiVirus Decomposer Engine was defectively designed so that it unpacked files in the computer operating system's privileged core, which lies at the core of the computing environment and has unrestricted access to and writing permissions for the computer's files ("High Privilege Defect"). *Id.* ¶ 25. Specifically, Beyer alleges this Engine scanned for malicious files by unpacking and examining compressed executable files within the kernel or the root, which resulted from Symantec unnecessarily assigning the highest privilege levels to the file scanning and analysis function. *Id.* The exposure of potentially malicious files in this high-privilege environment opened the operating systems up to corruption. *Id.* ¶ 3. As such, Beyer suggests that Symantec violated a key cybersecurity best practice, the principle of least privilege, which states that software should operate using the least amount of privilege necessary to complete the task. *Id.* ¶ 26; *see also id.* ¶ 35-36 (it appears that Symantec also prescribes the best practice of "run[ning] the principle of least privilege **[**5]** where possible to limit the impact of exploit by threats" as far back as 2007.). Beyer further alleges that Symantec exposed users' computers to a "critical vulnerability" by failing to implement industry-standard security measures such as "sandboxing," *i.e.*, opening files in an isolated virtual environment separate from critical processes and programs. *Id.* ¶ 27. Beyer also alleges that Symantec relied on third party open source code to design this Engine but had failed to update the open source code for at least seven years, resulting in vulnerabilities that caused "total information disclosure" and "total compromise of system integrity" ("Outdated Source Code Defect"). *Id.* ¶¶ 29-30. As a result, Beyer alleges that Symantec sold software that did not conform to cybersecurity best practices, did not reasonably protect users' computer systems against online threats, and made users' computer systems more susceptible to cyberattacks than they would have otherwise been without the software. *Id.* ¶ 7.

Beyer alleges he purchased five Norton Products containing these defects. *See* Compl. ¶¶ 10, 20-24. He seeks recovery for the second and third purchases only. *See* Docket No. 22 ("Opp"), at 8 **[**6]** n.3. Beyer made his second purchase "in March 2009," when he bought Norton 360 Premier, v. 2.0 ("Second Software"). *Id.* ¶ 21. Beyer alleges that prior to making his purchase he reviewed the product page on Symantec's website, which represented that Norton 360 Premier, v. 2.0, "'defends you against a broad range of online threats' through key technologies, including antivirus, antispyware, rootkit detection, and automatic updates," and "provides 'enhanced protection' through 'industry leading virus, spyware and firewall protection.'" *Id.* He does not expressly allege that he relied on any of these statements. *Id.*

"That same year," Beyer purchased another Norton 360 Premier, v. 2.0, from Best Buy ("Third Software"). *Id.* ¶ 22. Prior to doing so, he "reviewed the relevant product page on Best Buy's website" and "relied on similar representations that the Third Software '[p]rotects against viruses, spyware, rootkits, identity theft, phishing scams, and fraudulent Web sites.'" *Id.* Beyer does not allege that Symantec was responsible for the publication of these representations as opposed to, *e.g.*, Best Buy. However, he does allege that, "[t]o the best of his knowledge, Mr. Beyer also reviewed **[**7]** and relied upon the various comparable representations and statements on the software's packaging and box in connection with the purchase." *Id.* Plaintiff also generally alleges that "Plaintiff and the Consumer Subclass relied to their detriment on Defendant's misrepresentations **[*973]** and omissions in purchasing and licensing the Norton Products." Compl. ¶ 62.

III. DISCUSSION

A. Article III Standing as to the Enterprise Products

HN1[↑] To satisfy Article III's case or controversy requirement, a plaintiff must demonstrate that he or she has suffered an injury in fact, that the injury is traceable to the defendant's conduct, and that the injury can be redressed by a favorable decision. *See Fortyune v. Am. Multi-Cinema, Inc., 364 F.3d 1075, 1081 (9th Cir. 2004)*. Here, Beyer purchased Norton Products and brings a putative class comprising anyone who purchased a Norton or Enterprise Product that contained critical defects. *See* Compl. ¶¶ 1-2, 42. Beyer alleges that both Norton Products and Enterprise Products incorporate the AntiVirus Decomposer Engine and were affected by the alleged security flaws. *Id.* ¶ 3. Symantec submits that Enterprise Products differ in that they permit the user to centrally manage the security and data on multiple machines. *See* Docket No. 17 ("Mot.") **[**8]** at 31 (citing Pulgram Decl., Ex. D). Symantec thus contends that there is no similarity in the potential injury, the essential element of the inquiry for Article III standing. *See id.*

However, this does not necessary deprive Beyer of standing to bring class allegations for purchasers of the Enterprise Products. The ability to centrally manage security data does not gainsay the fundamental defect in the way the Symantec products were designed. The same alleged defects exist in both lines of products. Compl. ¶ 3.

This Court, like others in the Northern District, has held that **HN2**[] a plaintiff may proceed on class claims against unpurchased products if they are "substantially similar" to products he has purchased. Swearingen v. Late July Snacks LLC, No. 13-cv-4324-EMC, 2017 U.S. Dist. LEXIS 170928, 2017 WL 4641896, at *5 (N.D. Cal. Oct. 16, 2017) (quoting Astiana v. Dreyer's Grand Ice Cream, Inc., No. C-11-2901 EMC, 2012 U.S. Dist. LEXIS 101371, 2012 WL 2990766 (N.D. Cal. July 20, 2012)).

In *Astiana*, the plaintiffs challenged food labels on Dreyer's ice cream products, some of which they had not purchased. In that case,

> Plaintiffs are challenging the same kind of food products (*i.e.*, ice cream) as well as the same labels for all of the products—*i.e.*, "All Natural Flavors" for the Dreyer's/Edy's products and "All Natural Ice Cream" for the Haagen-Dazs products. **[**9]** That the different ice creams may ultimately have different ingredients is not dispositive as Plaintiffs are challenging the same basic mislabeling practice across different product flavors. Indeed, many of the ingredients are the same . . . .

Astiana, 2012 U.S. Dist. LEXIS 101371, 2012 WL 2990766, at *13. As a result, the Court held that the plaintiffs had alleged sufficiently similarity to survive the pleading stage and that "material differences are better addressed at the class certification stage." *Id.*

Similarly, this Court held in *Swearingen* that the plaintiff had pleaded sufficient similarity between purchased and non-purchased cracker and snack chips, because "the non-purchased products are different flavors of the same Multigrain Snack Chips product purchased by Plaintiffs." Swearingen, 2017 U.S. Dist. LEXIS 170928, 2017 WL 4641896, at *5. "In addition, Plaintiffs have identified a common mislabeling practice across all products." *Id.* *Swearingen* distinguished Kane v. Chobani, No. 12-cv-2425-LHK, 2013 U.S. Dist. LEXIS 134385, 2013 WL 5289253 (N.D. Cal. Sept. 19, 2013), which Defendant in this case also raises. *See* Mot. at 32-33. The *Kane* plaintiffs brought claims regarding Chobani yogurts, some of which they had not purchased. The court there denied standing for the nonpurchased **[*974]** yogurts. But as noted in *Swearingen*, "the court did not hold that the different yogurt products were **[**10]** not substantially similar. Rather, the court found that plaintiffs' complaint contained insufficient information for it 'to discern . . . which products [p]laintiffs are contending contained each representation and for which products these representations were false.'" Swearingen, 2017 U.S. Dist. LEXIS 170928, 2017 WL 4641896, at *6 (quoting Kane, 2013 U.S. Dist. LEXIS 134385, 2013 WL 5289253, at *11).

This case is analogous to Astiana and Swearingen. As in *Astiana*, where the same kind of food product (ice cream) was at issue, the same kind of software product is in dispute here, namely antivirus software. And as in *Astiana*, where the different ingredients did not preclude standing because the plaintiff challenged "the same basic mislabeling practice," the fact that Enterprise Products have central management features does not preclude standing, because Plaintiff alleges the same security defects in the enterprise and consumer products.

Kane is distinguishable for the same reasons discussed in *Swearingen*: The *Kane* complaint failed to specify which products contained the flawed labels, while Plaintiff here has alleged that the AntiVirus Decomposer Engine is in both consumer and enterprise products. *See* Compl. ¶ 1. Defendant's citation of Romero v. HP, Inc., No. 16-cv-5415-LHK, 2017 U.S. Dist. LEXIS 11859, 2017 WL 386237 (N.D. Cal. Jan. 27, 2017), is distinguishable for the same **[**11]** reason. *See* Mot. at 23 (citing *Romero* for its holding that "plaintiff lacked standing for printers she did not purchaser where plaintiff did not plead facts that indicated what misrepresentations were made to each printer, and whether the misrepresentations were false").

Defendant raises a number of dissimilarities between the two product lines, *i.e.*, different purchasers (sophisticated business purchasers compared to lay consumer purchasers), different sales materials, and different marketing channels. *See* Mot. at 31. To Defendant, these dissimilarities would result in dissimilar injuries (though it does not explain how). *See id.* Such arguments can be addressed at a later stage. *See* Astiana, 2012 U.S. Dist. LEXIS 101371, 2012 WL 2990766, at *13. For purposes of the motion to dismiss for standing (not, *e.g.*, class certification), Plaintiff has alleged sufficient similarity between the enterprise and consumer products to proceed. The Court therefore **DENIES** Defendant's 12(b)(1) motion. For the same reasons, the class allegations are not "immaterial" or "impertinent," and the Court **DENIES** Defendant's 12(f) motion to strike those allegations. *See* Mot. at 33-34.

B. Beyer's Fraud Claims Under the UCL, FAL, and CLRA

Beyer alleges that Symantec's statements **[**12]** constitute misrepresentations about its products in violation of the CLRA, the FLA, and the UCL's fraudulent prong. Beyer also alleges that Symantec's failure to disclose the defects was an omission in violation of the same statutes.

HN3[] The FAL prohibits businesses from disseminating statements that are "untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Cal. Bus. & Prof. Code § 17500*. The CLRA prohibits "'unfair methods of competition and unfair or deceptive acts or practices' in transactions for the sale or lease of goods to consumers." *Daugherty v. Am. Honda Motor Co., 144 Cal. App. 4th 824, 833, 51 Cal. Rptr. 3d 118 (2006)* (quoting *Cal. Civ. Code. § 1770(a)*). "The standards for determining whether a representation is misleading under the False Advertising Law apply equally to claims under the CLRA." **[*975]** *Colgan v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 680, 38 Cal. Rptr. 3d 36 (2006)*. The UCL prohibits "any fraudulent business act or practice," as well as any "unfair, deceptive, untrue or misleading advertising" or any violation of the FAL. *Id. § 17200*. Beyer also alleges that the CLRA and FLA violations violated the UCL's unlawful prong.

Because Beyer's claims sound in fraud, the heightened pleading requirements of *Rule 9(b)* apply. *HN4*[] Under *Rule 9(b)*, the plaintiff must plead the "who, what, when, where, and how" of the alleged misconduct. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124-25 (9th Cir. 2009)*. This requires the plaintiff **[**13]** to allege "an account of the time, place, and specific content" of the false or misleading statements. *Swartz v. KPMG LLP, 476 F.3d 756, 759, 764 (9th Cir. 2007)* (per curiam) (internal quotation marks and citation omitted). In addition, the "plaintiff must set forth what is false or misleading about a statement, and why." *Vess v. Ciba-Geigy Corp. USA, 317 F. 3d 1097, 1106 (9th Cir. 2003)*.

1. Misrepresentation or Omission

Symantec contends that Beyer's claims must be dismissed because Symantec's statements about Norton 360, v. 2.0, are mere puffery and would therefore not mislead a "reasonable consumer," as required by the statutes at issue. *Consumer Advocates v. Echostar Satellite Corp., 113 Cal. App. 4th 1351, 1360, 8 Cal. Rptr. 3d 22 (2003)*; *Elias, 903 F. Supp. 2d at 854*. Furthermore, Symantec argues that even if the statements were not mere puffery, Beyer has failed to "set forth what is false or misleading about a statement, and why" as required under *Rule 9(b)*. *See Coleman-Anacleto v. Samsung Elecs. Am., Inc., No. 16-cv-02941-LHK, 2016 U.S. Dist. LEXIS 123455, 2016 WL 4729302, at *14 (N.D. Cal. Sept. 12, 2016)*.

a. Affirmative Statements

For the purposes of this motion, the Court only needs to consider whether the following representations are actionable[1] :

- The Second Software "defends you against a broad range of online threats through key technologies, including antivirus, antispyware, rootkit detection, and automatic updates." *See* Compl. ¶ 21.

- The Second Software provides "enhanced protection" through "industry leading virus, **[**14]** spyware and firewall protection." *Id.*

- The statement on Best Buy's website that the Third Software "[p]rotects against viruses, spyware, hackers, rootkits, identity theft, phishing scams, and fraudulent Web sites." *Id.* ¶ 22; *see* Docket No. 23-1.

- The "comparable statements and representations" on the Third Software's packaging and box. *Id.*

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[1] Representations cited in paragraph 18 and 19 in the Complaint are not actionable as they are all after Beyer's dates of purchase. *See* Compl. ¶¶ 18-19. Beyer's citation of these materials in his opposition to Symantec's motion to dismiss are thus irrelevant. *See* Docket No. 22, at 16-17.

As an initial matter, the statements regarding the Third Software cannot support Beyer's claims. The statement that the software protects against various digital maladies was on Best Buy's website; the FAC does not allege that this statement is attributable to Symantec. In the absence of allegations to the contrary, absent allegations that the statement is attributable to Symantec and not just Best Buy, no claim against Symantec is stated.

In contrast, the "comparable statements and representations" on the packaging and box, *id.*, are attributable to Symantec. However, that allegation runs afoul *Rule 9(b)*, which requires Beyer to identify the statements at issue with particularity. The mere allegation that the statements **[*976]** are "comparable" to those on Best Buy's website are insufficient.

The above claims regarding the Third Software are therefore **DISMISSED [**15]** . Because Beyer may be able to make additional allegations to cure these defects, the dismissal is without prejudice.

That leaves the statements regarding the Second Software. Symantec argues that these statements are puffery.

HN5[] A misrepresentation must be a "specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact." *Rasmussen, 27 F. Supp. 3d at 1039-40* (citing *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731 (9th Cir. 1999))*. "Generalized, vague, and unspecified assertions constitute 'mere puffery' upon which a reasonable consumer cannot rely, and hence are not actionable." *Annunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1139 (C.D. Cal. 2005)* (citing *Glen Hollywood Entm't, Inc. v. Tektronix, Inc., 343 F.3d 1000, 1005 (9th Cir. 2003))*; *accord* *Consumer Advocates, 113 Cal. App. 4th at 1361 n.3*. "Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim. . . . Thus, a statement that is quantifiable, that makes a claim as to the specific or absolute characteristics of a product, may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery." *Demetriades v. Yelp, Inc., 228 Cal. App. 4th 294, 311, 175 Cal. Rptr. 3d 131 (2014)* (quoting *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1053 (9th Cir. 2008))*.

For example, in *Consumer Advocates*, the plaintiffs brought a putative class action against a satellite television company under the UCL, FAL, and CLRA for false or misleading ads. The statements were that the service would provide **[**16]** "crystal clear digital video," "CD-quality" audio, an on-screen program guide showing the schedule "up to 7 days in advance," and 50 channels of content. *Consumer Advocates, 113 Cal. App. 4th at 1353*. The court held that the first two statements were "mere puffing," *id. at 1361 n.3*, and "all-but-meaningless superlatives," as opposed to "factual representations that a given standard is met." *Id. at 1361*. In contrast, the claims regarding 50 channels and 7 days were factual representations. *Id. at 1361-62*.

In *Elias*, a consumer brought a putative class action against Hewlett-Packard. He had purchased a laptop from the manufacturer, and he had selected a customization option for a graphics card that, unbeknownst to him, required a higher power supply than the laptop supplied. This allegedly causes computers to overheat, freeze, crash, and even catch fire. As a result, the plaintiff's laptop malfunctioned and was damaged beyond repair. The plaintiff brought, *inter alia*, claims under the CLRA, FAL, and the fraudulent prong of the UCL for the manufacturer's alleged misrepresentations in the laptop's capabilities. In purchasing the laptop, the plaintiff had relied on statements on the manufacturer's website advertising that the computers at issue had "ultra-reliable performance," **[**17]** "full power and performance," "versatile, reliable system[s]," and were "packed with power" and "delivers the power you need." *Elias, 903 F. Supp. 2d at 854*. The court held that these were "[g]eneralized advertisements" that "say nothing about the specific characteristics or components of the computer." *Id. at 855*. *See also* *Annunziato, 402 F. Supp. 2d at 1140* (statements that a line of laptops has the "latest technology" and "outstanding quality, reliability, and performance" are non-actionable puffery, where plaintiff alleged **[*977]** that the laptops contained a defect that caused them to overheat).

In *L.A. Taxi Cooperative, Inc. v. Uber Techs., Inc., 114 F. Supp. 3d 852, 861 (N.D. Cal. 2015)*, the court determined that some statements made by Uber were puffery while others were sufficiently specific to be actionable. The complaint alleged that Uber's advertising made false or misleading statements about the safety of its service compared to taxis. Of those statements, the court found that "GOING THE DISTANCE TO PUT PEOPLE FIRST" and "BACKGROUND CHECKS YOU CAN TRUST" were generalized, unmeasurable, and subjective claims amounting to puffery. *Id.* However, other statements were actionable non-puffery:

> For example, Uber claims that it is "setting the strictest safety standards possible," that its safety is "already best in class," and that its "three-step **[**18]** screening" background check procedure, which includes "county, federal and multi-state checks," adheres to a "comprehensive and new industry standard." Uber has historically described its background check procedures as "industry-leading." Uber's statements also explicitly compare the safety of its services with those offered by taxi cab companies. For example, a statement on Uber's blog describing its "rigorous" background check procedures reads, "Unlike the taxi industry, our background checking process and standards are consistent across the United States and often more rigorous than what is required to become a taxi driver."

Id. The court concluded that "[a] reasonable consumer reading these statements in the context of Uber's advertising campaign could conclude that an Uber ride is objectively and measurably safer than a ride provided by a taxi or other competitor service, i.e., it is statistically most likely to keep riders from harm." *Id.*

Symantec's statements about the Second Software while somewhat general are sufficiently specific so as to not constitute mere puffery at the pleading stage. This case is similar to *L.A. Taxi*, in which Uber's description of its background checks **[**19]** as "industry-leading" contributed to an actionable impression that an Uber ride is objectively safer. *See id.* Here, while the statement in this case does not contain something akin to the more explicit comparison to competitors, as in *L.A. Taxi*, Symantec's statement that its software is "industry leading" could lead a reasonable consumer to believe that Symantec software would adhere to industry best practices. That is a reasonable inference for purposes of the motion to dismiss. *Cf. L.A. Taxi* ("industry-leading" background checks implied degree of safety). Best practices may be sufficiently concrete to be provable. For instance, Symantec had best-practice guidelines which were violated by the High Privilege Defect and Outdated Source Code Defect. Compl. ¶ 35.

In contrast, Symantec's alleged statement that the software "defends you against a broad range of online threats through key technologies, including antivirus, antispyware, rootkit detection, and automatic updates," Compl. ¶ 21, is similar to the claims in *Elias* that the laptops have "ultra-reliable performance" and "full power and performance," *Elias, 903 F. Supp. 2d at 854*, and the claims in *Annunziato* that the laptops there had "outstanding quality, reliability, **[**20]** and performance." *Annunziato, 402 F. Supp. 2d at 1140*. Those general descriptions are non-actionable puffery.

As for the "industry leading" claim, its misleading nature is dependent on Symantec's failure to disclose the two Defects. The Court therefore turns to California law on misleading omissions.

[*978] b. Omissions

HN6[] An omission is actionable "if the omitted fact is (1) contrary to a [material] representation actually made by the defendant or (2) is a fact the defendant was obliged to disclose." *Gutierrez v. Carmax Auto Superstores Cal., 19 Cal. App. 5th 1234, 1258, 228 Cal. Rptr. 3d 699 (2018)* (alteration in original) (internal quotation marks omitted) (quoting *Daugherty, 144 Cal. App. 4th at 835*); *accord* *Hodsdon, 891 F.3d at 861*. The omitted fact must also be material. *See* *id. at 1256*. As for the first prong, the Defects' existence is contrary to Symantec's representation that its products are "industry leading," as discussed above. The question for the first prong, then, is whether that representation and the omitted fact are material. *See* *id. at 1256, 1258*. A statement is material "if a reasonable consumer would deem it important in determining how to act in the transaction at issue." *Gutierrez, 19 Cal. App. 5th at 1258*. "[M]ateriality usually is a question of fact" that should be left to the jury unless the statement at issue is "obviously unimportant." *Id. at 1262*. Symantec's representation that its products provide "enhanced protection" through **[**21]** "industry leading virus, spyware and firewall protection" is not obviously unimportant. Compl. ¶ 21. The question of materiality survives the motion to dismiss.

The Defects are also material. The complaint alleges that the High Privilege Defect opened up affected machines to "a wide variety of cyberattacks," some of which qualify as "critical" vulnerabilities and require "[v]ery little knowledge or skill" to exploit, according to a standard vulnerability scoring system. *Id.* ¶ 28 (alteration in original). Likewise, the Outdated Source Code Defect allegedly exposed affected machines to "[d]ozens of public vulnerabilities," including some that were publicly known. *Id.* ¶ 29. These vulnerabilities were also rated "critical" and required little knowledge to exploit. *Id.* ¶ 30. Symantec argues that there is no indication that the Defects were ever actually exploited and so they cannot be material. It is true that the complaint lacks any allegations of such exploits. However, Symantec's argument is factual in nature and is premature on a motion to dismiss. At the pleading stage, the court draws reasonable inferences in the plaintiff's favor. Given the allegations described above, it is reasonable **[**22]** to infer that the Defects are important and material, because they affect the effectiveness and function of Affected Products.

HN7[] The second prong of omission under *Gutierrez* regards the duty to disclose even in the absence of a particular representation. Traditionally under California law, "[t]o state a claim for failing to disclose a defect, a party must allege '(1) the existence of a design defect; (2) the existence of an unreasonable safety hazard; (3) a causal connection between the alleged defect and the alleged safety hazard; and that the manufacturer knew of the defect at the time a sale was made.'" *Williams v. Yamaha Motor Co. Ltd., 851 F.3d 1015, 1025 (9th Cir. 2017)* (quoting *Apodaca v. Whirlpool Corp., No. 13-0725 JVS (ANx), 2013 U.S. Dist. LEXIS 176363, 2013 WL 6477821, at *9 (C.D. Cal. Nov. 8, 2013))*.

The requirement in *Williams* that there be a safety hazard has been cast into doubt by recent California Court of Appeal opinions. *See* *Collins v. eMachines, Inc., 202 Cal. App. 4th 249, 134 Cal. Rptr. 3d 588 (2011)*; *Rutledge v. Hewlett-Packard-Co., 238 Cal. App. 4th 1164, 190 Cal. Rptr. 3d 411 (2015)*. These recent appellate decisions extend ***HN8***[] liability for non-disclosure to beyond safety hazards by "sanction[ing] a UCL omission claim when: the plaintiff alleges that the omission was material; **[*979]** second, the plaintiff must plead that the defect was central to the product's function; and third, the plaintiff must allege one of the four *LiMandri* factors." *Hodsdon v. Mars, Inc., 891 F.3d 857, 863 (9th Cir. 2018)* (citing *Collins, 134 Cal. Rptr. 3d at 593-95*). The *LiMandri* factors **[**23]** are: "(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts." *LiMandri v. Judkins, 52 Cal. App. 4th 326, 336, 60 Cal. Rptr. 2d 539 (1997)* (quoting *Heliotis v. Schuman, 181 Cal. App. 3d 646, 651, 226 Cal. Rptr. 509 (1986))*. Importantly, the defect must not only be central to the product's function; it must also be physical. *See* *Hodsdon, 891 F.3d at 864* (*Collins* and *Rutledge* require a "*physical* defect" and the alleged existence of slave labor in chocolate supply chain "is not a physical defect at all, much less one related to the chocolate's function as chocolate").

Although the *Williams* test was employed by the Ninth Circuit in *Wilson v. Hewlett-Packard Co., 668 F.3d 1136 (9th Cir. 2012)*, the California Court of Appeal's decision in *Rutledge* post-dated *Wilson*. And the Ninth Circuit's decision in *Hodsdon* considered whether *Collins* and *Rutledge* effectively overruled *Wilson*'s safety-hazard requirement. In that case, Hodsdon had sued the Mars chocolate manufacturer for failing to disclose that its suppliers used forced and child labor. The district court had dismissed under *12(b)(6)*, and the Ninth Circuit affirmed. In doing so, the court **[**24]** did not decide which of the two standards applied because the court found that the complaint would fail under either standard. *See* *Hodsdon, 891 F.3d at 864*. Nevertheless, it suggested that a non-disclosure claim may lie under either of the standards:

> The recent California cases show that *Wilson*'s safety hazard pleading requirement is not necessary in *all* omission cases, but that the requirement may remain applicable in some circumstances. In other words, *Collins* and *Rutledge* are not necessarily irreconcilable with *Wilson* because, where the challenged omission does not concern a central functional defect, the plaintiff may still have to plead a safety hazard to establish that the defendant had a duty to disclose. For example, . . . *Wilson* may still apply where the defect in question does not go to the central functionality of the product, but still creates a safety hazard.

Id. (footnote omitted).

Because the complaint in the instant case does not allege a safety hazard, the issue under Collins and Rutledge is whether the High Privilege Defect and Outdated Source Code Defect constitute "physical" defects that were "central" to the Affected Products' function.

These Defects may be considered "physical." As the California **[**25]** appellate court has noted in the very context, "**HN9**[] computer software . . . may be characterized as tangible property" because the software is "'recorded in a physical form which has physical existence, takes up space on the tape, disc, or hard drive, makes physical things happen, and can be perceived by the senses.'" *Microsoft Corp. v. Franchise Tax Bd., 212 Cal. App. 4th 78, 87, 150 Cal. Rptr. 3d 770 (2012)* (quoting *South Cent. Bell Tel. Co. v. Barthelemy, 643 So.2d 1240, 1246 (La. 1994))*. Software is "a certain arrangement of matter," which is "physically recorded on some tangible medium[] [and] constitutes a corporeal body." *Id.* (quoting *Barthelemy, 643 So.2d at 1246*). This is unlike the use of child **[*980]** labor in the production of a chocolate bar in *Hodson*, which is non-physical. *See* *Hodsdon, 891 F.3d at 864*.

The next question is whether under *Collins* and *Rutledge* these High Privilege Defect and Outdated Source Code Defect are central to the Affected Products' function. In *Collins* plaintiffs had complained that a computer chip in eMachine computers caused "critical data corruption" of the hard drive. *Id. at 862*. In *Rutledge*, the plaintiffs alleged that defective inverters in Hewlett Packard's laptops caused the screens to darken. These defects are "central to the product's function" because they "render[] those products incapable of use by any consumer." *Id. at 864* (emphasis omitted). In contrast, the *Hodsdon* plaintiff's **[**26]** opposition to the use of slave labor in producing chocolate is "based on subjective preferences" which some consumers do not share. *Id.*

Here, the complaint sufficiently alleges the Defects are central to the function of the Affected Products of safeguarding computers against online threats, virus, spyware, etc. The Defects allegedly open up the operating systems to corruption, create a "critical vulnerability" to online threats, and make computers more susceptible to cyberattacks than they would have otherwise been without the software. Compl. ¶¶ 3, 7, 29-30. Although the complaint does not identify specific instances of resulting damage to computers loaded with the Affected Products, *cf.* *Williams v. Yamaha Motor Co., Ltd., 851 F.3d 1015, 1028-29 (9th Cir. 2017)* (alleged risk of fire in defective motors was speculative where the complaint failed to allege that any customer experienced such a fire), that is not dispositive to a motion to dismiss where all reasonable inferences must be drawn in Plaintiff's favor.[2]

2. Reliance

HN10[] Reliance is required to achieve standing under the UCL, FAL, and CLRA. *See* Cal. Bus. & Prof. Code §§ 17204 (UCL), 17535 (FAL); *Cal. Civ. Code. § 1780(a)* (CLRA); *In re Tobacco II Cases, 46 Cal. 4th 298, 328, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)*. Reliance is alleged where the "misrepresentation or nondisclosure was 'an immediate cause' of the plaintiff's injury-producing conduct," **[**27]** such as where "the plaintiff 'in all reasonable probability' would not have engaged in [that] conduct" in the absence of the fraud. *Id. at 326* (quoting *Mirkin v. Wasserman, 5 Cal. 4th 1082, 1110-11, 23 Cal. Rptr. 2d 101, 858 P.2d 568 (1993)* (Kennard, J., concurring in part and dissenting in part)). "[A] presumption, or at least an inference, of reliance arises where there is a showing that a misrepresentation was material." *Id. at 327*. Materiality is sufficiently alleged, as discussed above.

Symantec argues, however, that Beyer's vague allegations of reliance fall short under Rule 9(b) because he fails to allege he actually read or relied on any representation. *See* Mot. at 18. It is true that Beyer only alleges that he "reviewed the product page" for the Second Software and does not explicitly allege that he saw the statement that the software was "industry leading." Compl. ¶ 21. Nevertheless, it is reasonable to infer for purposes of the motion to dismiss from the fact that he reviewed the product page that he saw the "industry leading" statement on the page.[3]

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[2] This conclusion is without prejudice to future motions, *e.g.*, for summary judgment or adjudication which take into accord the factual record of, *inter alia*, the frequency of harm suffered as a result of the defects.

[3] Again, this ruling is without prejudice to any future motions or adjudication should the factual record establish Plaintiff cannot meet his burden of proving, *e.g.*, that he saw and read the product statement.

[*981] 3. Knowledge of the Purported Defects at the Time of Sale

Symantec also argues that Beyer fails to sufficiently allege that it knew of the Defects at the time of sale. As an initial matter, Symantec fails to note differences amongst the three **[**28]** statutes as to the knowledge requirement. ***HN11***[] Knowledge of an undisclosed defect is required for a claim of misrepresentation to lie under the CLRA. *See Coleman-Anacleto v. Samsung Elecs. Am., Inc., No. 16-cv-2941-LHK, 2017 U.S. Dist. LEXIS 4314, 2017 WL 86033 (N.D. Cal. Jan. 10, 2017)* (citing *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1145 (9th Cir. 2012))*. A claim under the FAL requires that the defendant have known or reasonably should have known that the statement in question was misleading. *See Cal. Bus. & Prof. Code § 17500*. However, knowledge is not required under the UCL's fraudulent prong. *See In re Tobacco II Cases, 46 Cal. 4th at 312* (holding that a claim under the UCL's fraudulent prong, in order to fulfil its purpose of protecting the public, does not require that the deception be "known to be false to the perpetrator" (quoting *Day v. AT&T Corp., 63 Cal. App. 4th 325, 332, 74 Cal. Rptr. 2d 55 (1998))*. The UCL claim therefore survives irrespective of knowledge of falsity.

As for the other claims, Symantec argues that the complaint does not allege that it knew of the defects. It points out that the earliest specific allegation of knowledge is when Project Zero revealed the defects in 2016, seven years after Beyer's 2009 purchase of the Second Software. The allegations that it knew of the defects at the time of sale, Symantec argues, are conclusory. Symantec singles out ¶ 40 of the complaint, which alleges:

> As the proprietary owner and licensor of the Affected **[**29]** Products, Symantec knew, or was otherwise reckless or willfully blind in not knowing, that its AntiVirus Decomposer Engine suffered from extremely serious defects, i.e., the High Privilege Defect and the Outdated Source Code Defect. Furthermore, Symantec knew, or was otherwise reckless or willfully blind in not knowing, that its security practices diverged significantly from its own best practices recommendations.

Beyer's Opposition merely parrots this paragraph. *See* Docket No. 22 ("Opp.") at 16. Despite this, the complaint sufficiently alleges knowledge, because it alleges that Symantec designed and produced the software in question. It plausibly follows from this fact that Symantec knew how the Second Software functioned, including that the software unpacked potentially malicious files in a high-privilege environment. It also plausibly follows that Symantec knew it had used third-party code and knew it did not patch that code when updates were released by the third parties. Furthermore, as early as 2007, Symantec published best-practice guidelines advising readers to the principle of least privilege and to keep third-party code updated. *See* Compl. ¶ 21. Together, this suffices to **[**30]** establish knowledge, which need only be plead generally. *See Fed. R. Civ. P. 9(b)* ("Malice, intent, knowledge, and other conditions of a person's mind may be plead generally."). But the allegations suffice at the pleading stage. The CLRA and FAL claims therefore survive.

In sum, the Court **DISMISSES** without prejudice Beyer's fraud claims as to the Third Software. The motion is otherwise **DENIED**.

4. Song-Beverly Act Claim

HN12[] Under the Song-Beverly Act, "every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and retail seller's implied warranty that the goods are merchantable," **[*982]** unless such warranty is properly disclaimed. *Cal. Civ. Code § 1792*. Consumer goods are those that are "primarily for personal, family, or household purposes, except for clothing and consumables." *Id. § 1791(a)*. The warranty means that the goods:

> (1) Pass without objection in the trade under the contract description.
> (2) Are fit for the ordinary purposes for which such goods are used.
> (3) Are adequately contained, packaged, and labeled.
> (4) Conform to the promises or affirmations of fact made on the container or label.

Id. § 1791.1(a). Beyer alleges that Symantec's Second Software violated each of these four warranties. Compl. ¶ **[**31]** 72; *see* Opp. at 21.

Symantec argues that the Song-Beverly claim fails because Beyer failed to allege that the Second Software was "sold at retail in this state." It notes that Beyer is a resident of Michigan and that Beyer alleges only that he "purchased an upgrade to Norton 360 Premier, v. 2.0." Compl. ¶ 21. Beyer's responds that the Second Software's end user license agreement selects California law in its choice of law provision. *See id.* ¶ 11. And ***HN13***[] under California law, title passes at the time and place that "the seller completes his performance with reference to the physical delivery of the goods." *Cal. Comm. Code § 2401(2)*. Where the contract does not require the seller to deliver the goods to the buyer, "title passes to the buyer at the time and place of shipment." *Id.* *§ 2401(2)(a)*. Beyer states in his brief that he bought the Second Software on Symantec's website, and that Symantec "shipped" the product to him from California by electronic delivery, so that titled passed—and thus was "sold at retail"—in California. However, as Symantec correctly points out, these facts are missing from Beyer's complaint. Neither does he allege that the product was electronically delivered to him from California.[4] The Song-Beverly claim is **[**32]** therefore **DISMISSED** with leave to amend.

5. UCL Claim

Apart from the fraudulent and unlawful prongs of the UCL, Beyer also asserts claims under the unfair prong:

> 90. Defendant's actions as alleged in this Complaint constitute an "unfair" practice, because they offend established public policy and are immoral, unethical, oppressive, unscrupulous, and substantially injurious to Defendant's customers. The harm caused by Defendant's wrongful conduct outweighs any utility of such conduct and has caused substantial injury to Plaintiff and the Nationwide Class. Defendant could and should have chosen one of many reasonably available alternatives, including not selling antivirus products that contained fundamental defects with the core engine, disclosing the defects to prospective purchasers, and/or not representing that its products were suitable for ordinary consumer or business use. Additionally, Defendant's conduct was "unfair," because it violated the legislatively declared policies reflected by California's strong consumer protection and false advertising laws, including the CLRA, **[*983]** *CAL. CIV. CODE §§ 1750 et seq.* and the FAL, *CAL. BUS. & PROF. CODE §§ 17500 et seq.*

See Compl. ¶ 90.

As an initial matter, the Court **[**33]** agrees with Symantec that the "unfair" claim relies on the same factual allegations as those underlying the "unlawful" and "fraudulent" claims, meaning it sounds in fraud and *Rule 9(b)* applies. *See* *Kearns v. Ford Motor Co., 567 F.3d 1120, 1127 (9th Cir. 2009)*. Because the allegations regarding the Third Software are lacking under *Rule 9(b)* as discussed above, those claims under the unfairness prong are **DISMISSED** without prejudice. However, the allegations regarding the Second Software are sufficient in this regard.[5]

Symantec also argues that Beyer's unfairness claim fails the applicable substantive standard. Since *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*, the California Court of Appeal has been split on the appropriate standard to apply in a consumer action under the unfair prong of the UCL. In *Graham v. Bank of America, N.A., 226 Cal. App. 4th 594, 172 Cal. Rptr. 3d 218 (2014)*, the court described the three lines of cases on the issue post-*Cel-Tech*. While *Graham* endorsed a line of cases with a "more rigorous test" under which "a plaintiff . . . must show the 'defendant's conduct is tethered to an[] underlying constitutional, statutory, or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***.'" *Id. at 613* (quoting *Wilson v. Hynek, 207 Cal. App.*

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[4] Symantec also argues that the cases Beyer cites are inapposite because they pertain to conventional purchases not conducted online. *See* Docket No 24 (Reply) at 11. However, California case law supports Beyer's position that *§ 2401(2)(a)* applies to online purchases. *See* *Cal. State Elecs. Ass'n v. Zeos Int'l Ltd., 49 Cal. Rptr. 2d 127, 41 Cal. App. 4th 1270, 1275-77 (1996)*; *see also* *In re Seagate Tech. LLC Litig., No. 16-cv-0523-JCS, 2017 U.S. Dist. LEXIS 137270, 2017 WL 3670779, at *16 (N.D. Cal. Aug. 25, 2017)*.

[5] Symantec also argues that the unfairness claim should fail, because its factual basis overlaps entirely with the fraudulent and unlawful claims, which fail. Because the fraudulent and unlawful claims survive, this argument in inapposite.

4th 999, 1008, 144 Cal. Rptr. 3d 4 (2012)), it acknowledged other courts have applied a broader balancing test of unfairness, *e.g.* weighing **[**34]** the utility of the defendant's conduct against the gravity of the harm to the victim. *Id. at 612-613*.

Under either test, the complaint survives. Under the more rigorous test, Beyer has sufficiently identified a California public policy against misleading marketing statements, as embodied in the CLRA, FAL, and the UCL's fraudulent prong. Because Symantec's statements regarding the Second Software, as alleged, contravene this public policy, Beyer has made out a claim as to that product. *Cf. In re Carrier IQ, Inc., 78 F. Supp. 3d 1051, 1116, 1117 (N.D. Cal. 2015)*.

6. Quasi-Contract/Unjust Enrichment Claim

That leaves Beyer's claim for unjust enrichment. California courts have stated that***HN14***[] courts may construe an unjust enrichment claim "as a quasi-contract claim seeking restitution." *Rutherford Holdings, LLC v. Plaza Del Rey, 223 Cal. App. 4th 221, 231, 166 Cal. Rptr. 3d 864 (2014)*. "The doctrine (of unjust enrichment) applies where plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on defendant which defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value." *Hernandez v. Lopez, 180 Cal. App. 4th 932, 938, 103 Cal. Rptr. 3d 376 (2009)*. Symantec's only argument against the unjust enrichment claim is that it fails because Beyer's other claims fail. Because Beyer's other claims do survive as to the Second Software, the unjust **[**35]** enrichment claim also survives as to that software. The motion is **DENIED** to that extent. But because the claims as to the Third Software do not survive for lack of specificity under *Rule 9(b)*, the unjust **[*984]** enrichment claim is **DISMISSED** without prejudice as to the Third Software.

IV. CONCLUSION

For the foregoing reasons, the Court **DISMISSES** without prejudice the CLRA, FAL, UCL, and unjust enrichment claims as to the Third Software. The Court otherwise **DENIES** the motion to dismiss. The motion to strike is also **DENIED**.

This order disposes of Docket No. 17.

IT IS SO ORDERED.

Dated: September 21, 2018

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

Laboratoires Majorelle SAS v. Apricus Biosciences, Inc.

United States District Court for the Southern District of New York

September 21, 2018, Decided; September 21, 2018, Filed

17 Civ. 6625 (AT)

Reporter

2018 U.S. Dist. LEXIS 241158 *; 2018 WL 11222863

LABORATOIRES MAJORELLE SAS, and MAJORELLE INTERNATIONAL SARL (dba Majorelle Luxembourg), Plaintiffs, -against- APRICUS BIOSCIENCES, INC., NEXMED (U.S.A), INC., and FERRING INTERNATIONAL CENTER S.A. (dba Ferring Pharmaceuticals), Defendants.

Prior History: *Sas v. Apricus Biosciences, 2018 U.S. Dist. LEXIS 241160, 2018 WL 11222866 (S.D.N.Y., Mar. 8, 2018)*

Core Terms

generic, antitrust, products, Tablet, effects, Sherman Act, interchangeable, Defendants', dysfunction, erectile, antitrust claim, allegations, consumers, domestic, relevant market, markets, supplemental jurisdiction, cross-elasticity, pharmaceutical, preparedness, non-compete, commerce, substitutes, Courts, pharmaceutical product, motion to dismiss, anti trust law, foreign law, declining, import

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For Majorelle International SARL, Majorelle Luxembourg, Majorelle International SARL, doing business as, Laboratoires Majorelle SAS, Plaintiffs: Monte L. Falcoff, LEAD ATTORNEY, Harness Dickey & Pierce P.L.C, Troy, MI; Jewell N. Briggs, Harness Dickey & Pierce Plc, Troy, MI; Brian Andrew Katz, LEAD ATTORNEY, Olshan Frome Wolosky LLP, New York, NY; Glenn E. Forbis, LEAD ATTORNEY, PRO HAC VICE, Harness Dickey & Pierce Plc, Troy, MI.

For Ferring International Center S.A., doing business as, Ferring International Center S.A., Ferring Pharmaceuticals, Defendants: Gary John Mennitt, LEAD ATTORNEY, Daphne T Ha, Dechert LLP (NYC), New York, NY; Mariel Bronen, Dechert LLP, New York, NY; George G. Gordon, LEAD ATTORNEY, Dechert LLP (PHILADELPHIA), Philadelphia, PA.

Judges: ANALISA TORRES, United States District Judge.

Opinion by: ANALISA TORRES

Opinion

ORDER

ANALISA TORRES, District Judge:

On July **[*2]** 25, 2017, Plaintiffs, Laboratoires Majorelle SAS and Majorelle International SARL (d/b/a Majorelle Luxembourg) (collectively, "Majorelle"), brought this action against Defendants, Apricus Biosciences, Inc. andNexMed (U.S.A.), Inc. (collectively, "Apricus") and Fening International Center S.A. ("Fening"), in Supreme Court, New York County. Conipl., ECF No. 1-1. Plaintiffs allege violations of United States, French, and European Union antitrust laws, illegal restraint on trade, breach of contract, fraud, and unjust enrichment. Defendants removed the case to this Court on August 30, 2017. ECF No. 1. On October 16, 2017, Plaintiffs filed an amended complaint (the "complaint"). ECF No. 40. Defendants move to dismiss the complaint for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, ECF Nos. 55, 58, and move in the alternative to strike Plaintiffs' request for pimitive relief, ECF Nos. 56, 58.[1] For the reasons stated below, the motions to dismiss are GRANTED in pari, and the motions to strike are DENIED as moot.

BACKGROUND

The following facts are taken from Plaintiffs' complaint, which the Court accepts as true for purposes of this motion. *See Nielsen v. Rabin, 746 F.3d 58, 62 (2d Cir. 2014)*. Plaintiffs are French and Luxembourgian companies that **[*3]** develop and market pharmaceutical products in France. Am. Compl. ¶¶ 5-6, 11. Defendant Apricus is a San Diego-based pharmaceutical company that develops products in the areas of urology and rheumatology. *Id.* ¶¶ 7, 13. Plaintiffs' claims relate to a pharmaceutical product called Vitaros, a topically applied cream formulation of alprostadil that was developed by Apricus for the treatment of erectile dysfunction. *Id.* ¶¶ 14, 30, 40.

In November 2013, Plaintiffs entered into a License Agreement with Apricus which granted Plaintiffs exclusive rights to Vitaros patents and trademarks in France, Monaco, and French-speaking Africa. *Id.* ¶ 17. The License Agreement contains a non-compete clause in Section 6.1 that prohibits Plaintiffs, during the term of the License Agreement and for a period of three years thereafter, from "(i) Commercializ[ing] any product containing alprostadil in combination with DDAIP.HCL (other than the Licensed Product), (ii) Commercializ[ing] any product that is intended for use in the Field (other than the Licensed Product) or (iii) Commercializ[ing] any generic version of the Licensed Product." *Id.* ¶ 18. The License Agreement defines "Field" as "the treatment of human, male erectile **[*4]** dysfunction for authorized use only." *Id.* In September 2014, Plaintiffs and Apricus entered into a Manufacturing and Supply Agreement, which provided that Apricus and contract manufacturers would supply Vitaros product to Plaintiffs. *Id.* ¶ 22.

Plaintiffs allege that in the first quarter of 2017, they and Apricus reached an agreement in principle to modify the non-compete clause to allow Plaintiffs to sell generic erectile dysfunction pharmaceutical products in France. *Id.* ¶ 28. Pursuant to a contract executed in March 2017 (the "Purchase Agreement"), Apricus sold to Defendant Ferring its non-U.S. assets and rights related to the development and commercialization of Vitaros. *Id.* ¶ 30-31. Pursuant to the Purchase Agreement, Apricus assigned to Ferring its License Agreement with Plaintiffs. *Id.* Plaintiffs allege that, during the second quarter of 2017, they expressed to Ferring their desire to modify the non-compete clause of the License Agreement, but Ferring declined to do so. *Id.* ¶ 32. Instead, Ferring "threatened that Majorelle would be held in breach of the License Agreement if it sold generic erectile dysfunction pharmaceutical products in France during the term of the Agreement." **[*5]** *Id.*

DISCUSSION

I. Legal Standard

To survive a *Rule 12(b)(6)* motion to dismiss, a plaintiff must plead sufficient factual allegations in the complaint that, accepted as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167*

[1] Separate from Apricus. Ferring submits a motion to dismiss and motion to strike, but "[t]o avoid duplicative briefing . incorporates by reference" Apricus's memoranda of law in support of its motions. Ferr. Mem. at 1. ECF No. 61. The Court, therefore, adjudicates these motions together.

L. Ed. 2d 929 (2007)). A plaintiff is not required to provide "detailed factual allegations" in the complaint, but must assert "more than labels and conclusions[] and a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555. Ultimately, the facts pleaded in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* On a Rule 12(b)(6) motion, the court may consider only the complaint, documents attached to the complaint, matters of which a court can take judicial notice, or documents that the plaintiff knew about and relied upon. *See* Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002). The court must accept the allegations in the pleadings as true and draw all reasonable inferences in favor of the non-movant. *See* ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007).

II. Analysis

A. Antitrust Violations

1. Sherman Act

First, Defendants argue that Plaintiffs' antitrust claims under the Sherman Act must be dismissed because Plaintiffs do not establish antitrust standing or a violation of federal ***antitrust law***. Defs. Mem. at 9, ECF No. 66.

a. Antitrust Injury

An antitrust **[*6]** plaintiff must show antitrust standing, which is a "threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [a court] must dismiss it as a matter of law." Gatt Commc'ns, Inc. v. PMC Assocs. LLC, 711 F.3d 68, 75 (2d Cir. 2013) (affirming district court's dismissal of complaint for lack of antitrust standing pursuant to Rule 12(b)(6)). In order to demonstrate antitrust standing, a plaintiff must allege, among other things, that it suffered an antitrust injury. Id. at 76. In order to establish antitrust injury, "the plaintiff must demonstrate that its injury is of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 157 (2d Cir. 2016) (internal quotation marks and citation omitted).

Plaintiffs contend that their antitrust injury arises from the scope of the relevant non-compete provisions in the License Agreement, which they argue result in an "unreasonable restraint of trade or commerce." Am. Compl. ¶ 50. Plaintiffs allege that they want to "sell generic erectile dysfunction pharmaceutical products in France," but that Defendants refuse to allow them to do so. *Id.* ¶ 32. "[F]oreign injuries that occur[] in foreign markets," however, are "not the type of injury Congress intended to prevent **[*7]** through . . . the Sherman Act." In re Intel Microprocessor Litig., 452 F. Supp. 2d 555, 563 (D. Del. 2006). Plaintiffs do not argue that they currently participate, or have ever participated, in the U.S. market, Pls. Opp. at 8-15, ECF No. 77, alleging only that the non-compete clauses "prevent[] Plaintiffs from selling products in the [Generic Tablet Market and Generic Vitaros Market] in the United States." Am. Compl. ¶¶ 53, 58. Although a competitor "that has not yet entered a market may also suffer antitrust injury if it was illegally prevented from doing so," the "would-be competitor must demonstrate its 'intention and preparedness' to enter the relevant market." Biocad, JSC v. F. Hoffman-La-Roche, Ltd., No. 16 Civ. 4226, 2017 U.S. Dist. LEXIS 162398, 2017 WL 4402564, at *4 (S.D.N.Y. Sept. 30, 2017) (quoting Reaemco, Inc. v. Allegheny Airlines, 496 F. Supp. 546, 553 (S.D.N.Y. 1980)); *see also* Am. Banana Co. v. United Fruit Co., 166 F. 261, 264 (2d Cir. 1908) ("[I]t is necessary to state facts showing an intention and preparedness to engage in business.").

"In the context of claims involving entrance into the U.S. pharmaceutical market—a highly regulated industry—Plaintiffs alleging intention and preparedness must demonstrate a likelihood of FDA approval of the would-be competitive drug, since such approval is a prerequisite for any drug to enter the U.S. pharmaceutical market." Biocad, 2017 U.S. Dist. LEXIS 162398, 2017 WL 4402564, at *4. Courts, therefore, require plaintiffs to allege that FDA approval of the drug is at least "probable." *Id.; see also* In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 207 (E.D.N.Y. 2003) (finding no antitrust standing **[*8]** where the complaint "[did] not allege that [plaintiffs] filed an [Abbreviated New Drug Application] or that FDA approval was probable"). Plaintiffs alleging intent and preparedness to enter a pharmaceutical market "typically include facts regarding the stage of the FDA-approval process their product has reached or the steps the plaintiff has taken (or plans to take) to secure approval." Biocad, 2017 U.S. Dist. LEXIS 162398, 2017 WL 4402564, at *4.

Here, Plaintiffs have not merely failed to allege that they filed an Abbreviated New Drug Application or for FDA approval—they have failed to supply any facts whatsoever regarding the FDA approval process for its biosimilars. Plaintiffs vaguely allege that "[p]roducts in the Generic Tablet Market are expected to become commercially available in the United States in the future" and that "[t]here is no cream-based, transdermal medication for the treatment of human erectile dysfunction commercially available in the United States." Am. Compl. ¶¶ 39, 41. Similar to *Biocad*, Plaintiffs here

> provide[] no information about the expected timeline for approval, what clinical trials would be required, whether it has begun conducting clinical trials, its expected FDA application date, whether it has begun preparing **[*9]** an application, whether it has contacted the FDA, whether it has ever obtained approval for other biosimilar drugs from the FDA, or whether its contemplated approval would require a New Drug Application or an Abbreviated New Drug Application.

*2017 U.S. Dist. LEXIS 162398, 2017 WL 4402564, at *4*. Plaintiffs' only allegation regarding intent and preparedness is that they have "the future ability to directly or indirectly sell [generic erectile dysfunction products] in the United States such that the injury is not speculative." Am. Compl. ¶ 63. Plaintiffs, in short, have provided little information from which the Court "may assess the likelihood of approval of its biosimilars, and [have] thus failed to allege more than 'a hope or expectation' of engaging in the U.S. pharmaceutical market." *Biocad, 2017 U.S. Dist. LEXIS 162398, 2017 WL 4402564, at *4* (quoting *Reaemco, Inc., 496 F. Supp. at 554*). Plaintiffs do not dispute this point, arguing only that the fact that they have "not alleged imminent preparedness to enter the relevant market in the United States is irrelevant" because "[t]he locus of imminent harm is France."[2] Pls. Opp. at 14. Indeed, Plaintiffs' factual allegations relate exclusively to their harm in France, not efforts to enter the U.S. market, and "in fact underscore [their] lack of background and experience in the **[*10]** U.S. pharmaceutical market and the absence of contracts to enter the business of selling its biosimilars in the United States." *Biocad, 2017 U.S. Dist. LEXIS 162398, 2017 WL 4402564, at *4*.

For these reasons, the Court finds that Plaintiffs have failed to set forth facts demonstrating its intention and preparedness to engage the U.S. pharmaceutical market, and thus have failed to allege that they have suffered an antitrust injury.

b. Unreasonable Restraint of Trade

Even assuming, *arguendo*, that Plaintiffs allege antitrust injury, they fail to allege the elements of an unreasonable restraint of trade. *Section 1 of the Sherman Act* prohibits "only unreasonable restraints of trade." *In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 61 (2d Cir. 2012)*. Exclusive dealing arrangements, like the one Plaintiffs allege, "must be evaluated under the so-called 'rule of reason.'" *Mazda v. Carfax, Inc., No. 13 Civ. 2680, 2016 U.S. Dist. LEXIS 171418, 2016 WL 7231941, at *4 (S.D.N.Y. Dec. 9, 2016)* (quoting *MacDermid Printing Sols. LLC v. Cortron Corp., 833 F.3d 172, 181-82 (2d Cir. 2016))*. Under the rule of reason, a restraint is unreasonable if its "anticompetitive effects outweigh its procompetitive effects." *E & L Consulting, Ltd. v. Doman Indus. Ltd., 472 F.3d 23, 29 (2d Cir. 2006)* (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*. To reach that conclusion, courts engage in a three-step inquiry: first, "the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior had an actual adverse effect on competition as a whole in the

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[2] To the extent the complaint can be read to allege injuries in France, those injuries do not give rise to an antitrust injury for the reasons set forth in Part II.A.1.c of this opinion. *See, e.g., Biocad, 2017 U.S. Dist. LEXIS 162398, 2017 WL 4402564, at *4 n.5*; *Turicentro, S.A. v. Am. Airlines Inc., 303 F.3d 293, 307 (3d Cir. 2002)* ("Plaintiffs' injuries occurred exclusively in foreign markets. They are not of the type Congress intended to prevent through . . . the Sherman Act."). It does not matter that—as Plaintiffs argue—"the parties have contractually agreed that the License Agreement is to be governed by and construed in accordance with the laws of New York, including the Sherman Act, *regardless of where the harm occurs*." Pls. Opp. at 9 (emphasis in original). "The subject matter jurisdiction of the federal district courts is limited," *DiNapoli v. DiNapoli, No. 95 Civ. 7872, 1995 U.S. Dist. LEXIS 13522, 1995 WL 555740, at *1 (S.D.N.Y. Sept. 19, 1995)*, and "[a] forum selection clause . . . is not sufficient to confer subject matter jurisdiction on this Court." *Velasquez v. Parmalat SpA, No. 99 Civ. 9038, 2000 U.S. Dist. LEXIS 3376, 2000 WL 294840, at *2 (S.D.N.Y. Mar. 21, 2000)*; *see also* *Cable Television Ass'n v. Finneran, 954 F.2d 91, 94 (2d Cir. 1992)* ("[P]arties may not confer subject matter jurisdiction on the court by consent.").

relevant market." *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 506-07 (2d Cir. 2004)* (internal quotation **[*11]** marks, emphasis, and citation omitted). Second, "[i]f the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement." *Id. at 507*. And third, "[a]ssuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means." *Id.*

At the first step of this analysis, a plaintiff must first allege a relevant, plausible product market that bears a "rational relation to the methodology courts prescribe to define a market for antitrust purposes—analysis of the interchangeability of use or the cross-elasticity of demand." *Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001)* (internal quotation marks omitted). The relevant market must include all products that are "'reasonably interchangeable by consumers for the same purposes,' because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level." *City of New York v. Grp. Health Inc., 649 F.3d 151, 155 (2d Cir. 2011)* (citation omitted). "Absent an adequate market definition, it is impossible for a court to assess the anticompetitive effect of challenged practices." *Re-Alco Indus., Inc. v. Nat'l Ctr. for Health Educ., Inc., 812 F. Supp. 387, 392 (S.D.N.Y. 1993))*. A failure to include reasonably **[*12]** interchangeable products or to assess the cross-elasticity of demand, therefore, renders the market definition legally insufficient and is grounds for granting a motion to dismiss. *See* *Chapman v. N.Y. State Div. for Youth, 546 F.3d 230, 238 (2d Cir. 2008)*.

Plaintiffs allege that Section 6.1(ii) of the License Agreement restrains it in the "Generic Tablet Market," which it defines as "generic oral tablet medications used for the treatment of human, male erectile dysfunction." Am. Compl. ¶¶ 36-39. In describing the relevant market, Plaintiffs allege only that "[p]roducts in the Generic Tablet Market are generally not interchangeable with Vitaros®, and products in the Generic Tablet Market have a low cross-elasticity of demand with Vitaros®." *Id.* ¶ 42; *see also id.* ¶ 52 ("Section 6.1(ii) is unreasonably broad in scope because it prevents Plaintiffs from selling products in the Generic Tablet Market, which are not interchangeable with Vitaros®."). Plaintiffs argue that these facts are sufficient to establish a relevant market for "generic tablet erectile dysfunction medications," and that this market is "separate and distinct from the market for cream-based, topically applied" medications like Vitaros. Pls. Opp. at 12-13. Defendants contend that these allegations are insufficient because **[*13]** (1) they do not explain "why customers would not treat generic tablets, Vitaros, or any other erectile dysfunction treatment as interchangeable substitutes"; (2) they do not explain the product market with well-pled facts including those "regarding cross-elasticity of demand and interchangeable substitutes," and (3) they do not include allegations "about the size of the proposed market, the participants, their market shares, or any other information." Defs. Mem. at 13. The Court agrees.

Although Plaintiffs allege a broad "Generic Tablet Market," they offer no facts "regarding the size of this proposed market, market participants, market shares, or any other information to guide the Court in assessing its validity." *Planetarium Travel, Inc. v. Altour Int'l, Inc., 97 F. Supp. 3d 424, 430 (S.D.N.Y. 2015)*. Plaintiffs argue that *Planetarium* "did not hold that every sufficiently-pled antitrust claim must allege the size of the proposed market, market participants, and market shares," Pls. Opp. at 12, but even so, Plaintiffs still need to allege facts that allow the Court to perform an "analysis of the interchangeability of use or the cross-elasticity of demand for potential substitute products." *Gianna Enters. v. Miss World (Jersey) Ltd., 551 F. Supp. 1348, 1354 (S.D.N.Y. 1982)*. Here, Plaintiffs' allegations as to the relevant product market are limited, **[*14]** vague, and conclusory.[3] *See, e.g.,* *Am. Sales Co. v. AstraZeneca AB, No. 10 Civ. 6062, 2011 U.S. Dist. LEXIS 41182, 2011 WL 1465786, at *3 (S.D.N.Y. Apr. 14, 2011)* (holding that plaintiff's allegations did not plausibly allege a relevant market consisting solely of Prilosec OTC and its generic counterpart where he "failed to allege any product characteristics or evidence of

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[3] To the extent that Plaintiffs' brief in opposition attempts to defend the complaint's market definition, it sets forth factual representations beyond the four corners of the complaint. *See* Pls. Opp. at 12 n.4 (explaining that the market for Vitaros is distinct because "Vitaros is prescribed by doctors only as a second-line treatment, whereas Cialis® and Viagra® are first-line drugs," and unlike these two products, "Vitaros has virtually no delay and does not require sexual stimulation"). "[A] party is not entitled to amend its complaint through statements made in motion papers." *Wright v. Ernst & Young LLP, 152 F.3d 169, 178 (2d Cir. 1998)*. The Court, therefore, does not consider these assertions because "[n]ew facts and allegations, first raised in a Plaintiff's opposition papers, may not be considered in deciding a motion to dismiss." *Univ. Trading & Inv. Co., Inc. v. Tymoshenko, No. 11 Civ. 7877, 2012 U.S. Dist. LEXIS 176214, 2012 WL 6186471, at *1 (S.D.N.Y. Dec. 12, 2012)*.

consumer buying patterns that limit Prilosec OTC's interchangeability of use or the cross-elasticity of demand," including failure to allege "why a consumer would not view any other number of products as adequate substitutes for treatment of frequent heartburn"); *Gianna Enters., 551 F. Supp. at 1354* ("The Court cannot accept the market boundaries offered by plaintiff without at least a theoretically rational explanation for excluding [potential substitutes]."). The Generic Tablet Market, therefore, is legally insufficient under the Sherman Act. *See Bayer Schering Pharma AG v. Sandoz, Inc., 813 F. Supp. 2d 569, 578 (S.D.N.Y. 2011)* (dismissing *Section 1* claims where plaintiff did not "allege sufficient facts about other [drug] treatments to make its proposed product market plausible").

Plaintiffs also allege that Section 6(iii) of the License Agreement restrains them in the "Generic Vitaros Market," defined as "any generic version of Vitaros®." Am. Compl. ¶ 55. This market, however, is also legally insufficient, as Plaintiffs fail to allege any facts explaining why generic Vitaros **[*15]** is its own product market. *See generally id.* ¶¶ 55-59. Single-brand markets "sidestep[] the need to allege cross-elasticity of demand or any reasonably interchangeable substitutes." *Mooney v. AXA Advisors, LLC, 19 F. Supp. 3d 486, 500 (S.D.N.Y. 2014)*. The Supreme Court has also expressed skepticism for single-brand markets because "this power that . . . manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 392-93, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Courts, therefore, routinely reject markets defined by a single product or brand. *See, e.g., Planetarium Travel, 97 F. Supp. 3d at 429*; *Integrated Sys. & Power, Inc. v. Honeywell Int'l, Inc., 713 F. Supp. 2d 286, 298 (S.D.N.Y. 2010)* (collecting cases). Without alleging all reasonably interchangeable substitutes for generic Vitaros or a plausible explanation for why the Court should regard competition for generic Vitaros as a market unto itself, Plaintiffs have failed to adequately allege a relevant market, which is an essential element to stating a claim under the Sherman Act.

c. Other Deficiencies

Plaintiffs' antitrust claims under the Sherman Act are also deficient because, in order to state an antitrust claim under the rule of reason, Plaintiffs must allege that the alleged restraint "harmed competition in [the] proposed market." *Mooney, 19 F. Supp. 3d at 503*. Plaintiffs can satisfy **[*16]** this requirement by alleging facts that show "that the alleged restraint had 'an actual adverse effect on competition, such as reduced output,' or by demonstrating an adverse effect 'indirectly by establishing that [Defendants] had sufficient market power to cause an adverse effect on competition.'" *Id.* (quoting *Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 96 (2d Cir. 1998))*. The complaint does not allege that the market has been adversely affected as a result of the non-compete clauses; it alleges only that "[r]estriction of potential sellers of products in such markets has the effect of restricting supply and distribution, ultimately resulting in higher end prices for consumers." Am. Compl. ¶ 60. This is insufficient, however, to allege how either the Generic Tablet Market or the Generic Vitaros Market adversely affects competition or consumers—"*i.e.*, that it causes harm to competition, not just harm to [Plaintiffs]." Defs. Mem. at 14. Without more, this alleged injury does not constitute actionable harm, because "consumers' inability to buy the same product from a different seller only harms that seller, and does no cognizable harm to competition as a whole." *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc., 985 F. Supp. 2d 612, 620 (S.D.N.Y. 2013)*.

Moreover, as Defendants' argue, the *Foreign Trade Antitrust Improvements Act* ("FTAIA") **[*17]** bars Plaintiffs from relying on foreign conduct and injury to prove its Sherman Act claim. *15 U.S.C. § 6a*. Under the FTAIA, only two types of foreign commerce are subject to the Sherman Act: conduct involving import trade or import commerce, and "conduct involving nonimport trade or nonimport commerce when that conduct (1) has a direct, substantial, and foreseeable effect on import trade or import commerce, and (2) the Sherman Act claim arises out of that effect." *Biocad, 2017 U.S. Dist. LEXIS 162398, 2017 WL 4402564, at *7* (internal quotation marks and citation omitted). Courts refer to the first category as the "import exception" and the second as the "domestic effects exception." *Id.*

The allegations plainly do not fall within the first type of foreign commerce, as Plaintiffs do not allege any foreign anticompetitive conduct "with an immediate impact on U.S. markets."[4] *Maricultura Del Norte v. World Bus. Capital, Inc., 159 F. Supp. 3d 368, 383 (S.D.N.Y. 2015)*. Plaintiffs' claims similarly do not fall within the domestic effects exception. This exception requires two distinct inquiries: "one asking whether the defendants' foreign conduct caused a cognizable domestic effect, and the other asking whether that effect caused the plaintiff's injury." *Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 414 (2d Cir. 2014)*. In *Biocad*—a factually similar case—the plaintiff alleged that the defendants' foreign conduct prevented **[*18]** him from entering the U.S. market, which would have the "eventual domestic effect of driving up the price of the [d]rugs in the United States." *2017 U.S. Dist. LEXIS 162398, 2017 WL 4402564, at *10*. The *Biocad* Court held that this "attenuated chain of causation [was] insufficient to establish a 'direct, substantial, and reasonably foreseeable effect' under the FTAIA." *Id.* Here, Plaintiffs' allegation that "[r]estriction of potential sellers of products in such markets . . . ultimately result[s] in higher end prices for consumers" leads the Court to similarly conclude that Plaintiffs have not demonstrated either a direct, substantial, or reasonably foreseeable effect on U.S. commerce. Am. Compl. ¶ 60. Nor do Plaintiffs sufficiently allege that any such effect gives rise to a claim under the Sherman Act, instead alleging facts that suggest the opposite—that neither generic tablets nor generic Vitaros are currently available or FDA-approved in the United States—and thus that there is no effect. *Id.* ¶¶ 39, 41.

With respect to the injury suffered, Plaintiffs allege that the non-compete clauses prevent them from selling products in the Generic Tablet and Generic Vitaros Markets in the United States. *Id.* ¶¶ 53, 58. Plaintiffs allege, however, **[*19]** that while they are "ready to sell generic erectile dysfunction products in France," they only "[have] the future ability to directly or indirectly sell in the United States." *Id.* ¶ 63. Any alleged harm suffered by Plaintiffs, therefore, has been directly caused by the foreign effects of Defendants' alleged conduct, namely lost foreign sales in France. The FTAIA, however, requires a plaintiff to allege that its claims were directly caused by the *domestic effects* and not the foreign effects. *Compare* *In re Vitamin C Antitrust Litig., 904 F. Supp. 2d 310, 319 (E.D.N.Y. 2012)* (finding that domestic effects exception applied where defendants' agreement to restrain production and fix vitamin C prices increased prices of vitamin C to be delivered to the United States), *with In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 989 (9th Cir. 2009)* (domestic effects exception not satisfied where plaintiff was "a foreign consumer that made its purchases entirely outside of the United States"). Here, Plaintiffs' alleged injuries flow from Defendants' allegedly anticompetitive foreign conduct, not the domestic effects of that conduct. They are, therefore, the type of "independently caused foreign injur[ies]" that fall outside the reach of the domestic effects exception.[5] *Lotes, 753 F.3d at 414*.

Accordingly, Defendants' motion to dismiss Plaintiffs' antitrust **[*20]** claim under the *Sherman Act* (First Cause of Action) is GRANTED.

2. Foreign Laws

Plaintiffs also bring their antitrust claim against Defendants under French and European Union antitrust laws. Am. Compl. ¶¶ 35-66. Defendants argue that, upon dismissal of Plaintiffs' antitrust claim based on U.S. law, the Court should decline to exercise supplemental jurisdiction over those based on foreign law. Defs. Mem. at 19. The Court agrees that supplemental jurisdiction would not be properly exercised as to Plaintiffs' antitrust claims based on foreign law. Under *28 U.S.C. § 1367(c)(3)*, "district courts may decline to exercise supplemental jurisdiction over a

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[4] Indeed, Plaintiffs allege no facts suggesting any impact on U.S. markets, stating only that: (1) Plaintiffs are "ready to sell generic erectile dysfunction products in France"; (2) Plaintiffs have the "future ability to directly or indirectly sell same in the United States"; and (3) "[r]estriction of potential sellers of products in such markets has the effect of restricting supply and distribution, ultimately resulting in higher end prices for consumers." Am. Compl. ¶¶ 60, 63.

[5] Plaintiffs' failure to address this argument in their opposition brief, moreover, provides an independent basis to dismiss this claim. Pls. Opp. at 8-15. *See* *M.M. ex rel. J.M. v. New York City Dep't of Educ., No. 09 Civ. 5236, 2010 U.S. Dist. LEXIS 75127, 2010 WL 2985477, at *6 (S.D.N.Y. July 27, 2010)* (holding that plaintiffs' failure to respond to defendant's arguments constitutes an abandonment because "[b]y standing mute in the face of the [defendant's] jurisdictional challenge, Plaintiffs effectively concede that they cannot carry their burden and that the Court lacks subject matter jurisdiction over the claims against [defendant]").

claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." The factors relevant to this discretionary determination favor declining to exercise supplemental jurisdiction here, as antitrust is a novel, developing area of law, and the Court has no familiarity with France's or the European Union's antitrust laws. *See, e.g., Info. Res., Inc. v. Dun & Bradstreet Corp., 127 F. Supp. 2d 411, 418 (S.D.N.Y. 2000)* (declining to exercise supplemental jurisdiction because the antitrust claims "present[ed] sufficiently novel and complex issues of foreign law").

Accordingly, Plaintiffs' antitrust claim under foreign **[*21]** law (First Cause of Action) is DISMISSED without prejudice to renewal in state court.

B. State Law Claims

Plaintiffs also assert common law claims for illegal restraint on trade, breach of contract, unjust enrichment, and fraud. Am. Compl. ¶ 67-105. Having dismissed Plaintiffs' federal law claim, the Court declines to exercise supplemental jurisdiction over these state law claims pursuant to *28 U.S.C. § 1367(c)*. *See* *Pension Benefit Guar. Corp. ex rel. Saint Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 727 (2d Cir. 2013)* ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims.").

Accordingly, Plaintiffs' common law antitrust, breach of contract, unjust enrichment, and fraud claims (Second, Third, Fourth, and Fifth Causes of Action) are DISMISSED without prejudice to renewal in state court.

C. Motions to Strike

Defendants also move to strike Plaintiffs' request for punitive damages. ECF Nos. 56, 58. In light of the foregoing, these motions are moot.

CONCLUSION

For the reasons stated above, Defendants' motions to dismiss are GRANTED with respect to Plaintiffs' Sherman **[*22]** Act claim. Because the Court declines to exercise supplemental jurisdiction over Plaintiffs' foreign and state law claims, those claims are DISMISSED without prejudice to renewal in state court. Defendants' motions to strike Plaintiffs' request for punitive relief are DENIED as moot.

The Clerk of Court is directed to terminate the motions at ECF Nos. 55, 56, and 58, and to close the case.

SO ORDERED.

Dated: September 21, 2018

New York, New York

/s/ Analisa Torres

ANALISA TORRES

United States District Judge

DeSoto Cab Co. v. Uber Techs., Inc.

United States District Court for the Northern District of California

September 24, 2018, Decided; September 24, 2018, Filed

Case No. 16-cv-06385-JSW

Reporter

2018 U.S. Dist. LEXIS 226261 *; 2018 WL 10247483

DESOTO CAB COMPANY, INC., Plaintiff, v. UBER TECHNOLOGIES, INC., et al., Defendants.

Subsequent History: Motion granted by *Desoto Cab Co. v. Uber Techs., 2019 U.S. Dist. LEXIS 240643 (N.D. Cal., Aug. 13, 2019)*

Dismissed by, in part *Desoto Cab Co. v. Uber Techs., 2020 U.S. Dist. LEXIS 259450 (N.D. Cal., Mar. 25, 2020)*

Dismissed by, in part, Motion denied by, in part *Desoto Cab Co. v. Uber Techs., 2021 U.S. Dist. LEXIS 239006 (N.D. Cal., Nov. 18, 2021)*

Core Terms

drivers, alleges, prices, taxi, barrier, rates, ride-hail, Lanham Act, competitors, percent, ride, motion to dismiss, disruption, intentional interference, relevant market, transportation, consumers, entities, argues, misrepresentations, below-cost, passengers, customers, predatory, fares, statute of limitations, monopolization, contends, taxi company, antitrust

Counsel: **[*1]** For Desoto Cab Company, Inc., doing business as Flywheel Taxi, Plaintiff: Joseph Isaac Bautista, LEAD ATTORNEY, Shannon Michele Seibert, LEAD ATTORNEY, Nina Cristina Montoya Seibert Bautista Montoya, Oakland, CA USA.

For Uber Technologies, Inc., a Delaware corporation, Uber USA, Llc, a Delaware limited liability company, Rasier, Llc, a Delaware limited liability company, Rasier-Ca, Llc, a Delaware limited liability company, Defendants: Brian C. Rocca, LEAD ATTORNEY, Sujal Shah, Kent Michael Roger, Minna L Naranjo, Morgan, Lewis & Bockius LLP, San Francisco, CA USA; Theodore J. Boutrous, Jr. Gibson, Dunn & Crutcher LLP, Los Angeles, CA USA.

For Rasier-Dc, Llc, Rasier-Ny, Llc, Rasier-Pa, Llc, Defendant: Theodore J. Boutrous, Jr., Gibson, Dunn & Crutcher LLP, Los Angeles, CA USA.

For Sc Innovations, Inc., Miscellaneous: Ethan Glass, LEAD ATTORNEY, Quinn Emanuel Urquhart & Sullivan, LLP, Washington, DC USA.

Judges: JEFFREY S. WHITE, United States District Judge.

Opinion by: JEFFREY S. WHITE

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Re: Dkt. No. 22

Now before the Court is the motion to dismiss filed by Defendants Uber Technologies, Inc., Uber USA, LLC, RASIER, LLC, and RASIER-CA, LLC **[*2]** (collectively, "Defendants" or "Uber"). The Court has considered the parties' papers, relevant legal authority, and the record in this case, and it HEREBY GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss, but affords Plaintiff leave to amend.

BACKGROUND

Prior to July 2012, there were three types of private, for-hire ground transportation in San Francisco: (i) passenger stage corporations ("PSCs"), which are shuttles driven by commercially-licensed drivers; (ii) charter-party carriers ("TCPs"), which are limousines and luxury sedans driven by commercially-licensed drivers; and (iii) taxicabs or taxis, which are driven by specially-permitted drivers. (Dkt. No. 1 (Complaint) ¶ 17.) PSCs provide shuttle transportation service to the general public on fixed routes or otherwise scheduled service. (*Id.* ¶ 18.) Customers hire TCPs on a prearranged basis through a TCP-permitted company for the exclusive use of an individual or group. (*Id.*) The California Public Utilities Commission ("CPUC") regulates and licenses PSCs and TCPs. (*Id.*) There is no cap on the number of PSCs or TCPs that may operate in San Francisco and no cap on fees that PSCs or TCPs may charge passengers. (*Id.*)

The **[*3]** San Francisco Municipal Transportation Agency ("SFMTA") regulates and permits taxis. (*Id.* ¶ 19.) The taxi industry provides ride-hail ground transportation services originating in the City and County of San Francisco through smartphone applications, telephone dispatch, and street hails. (*Id.*) The SFMTA sets fare rates for taxis. (*Id.* ¶ 69.)

I. Uber's Business Model.

Plaintiff DeSoto Cab Company, Inc. d/b/a Flywheel Taxi ("Flywheel") is a San Francisco-based taxicab company that has been operating in the San Francisco "ride-hail" market since the 1930s. (*Id.* ¶¶ 2, 20.)

Uber currently operates in the San Francisco "ride-hail" market by allowing users/customers to use a smartphone application to request rides. (*Id.* ¶ 22.) Uber formed in 2009 with approximately $200,000 in seed funding. (*Id.* ¶ 33.) Since that time, Uber has raised more than $15 billion in private venture capital funding. (*Id.*) Uber has yet to turn a profit. (*Id.* ¶ 46.) Flywheel alleges that Uber's internal business policies, driver incentives, and its purportedly predatory pricing behavior in the market is designed to eliminate competition and result in an eventual monopoly. (*Id.* ¶¶ 46, 71, 72, 75.)

Uber generates revenue **[*4]** by taking a percentage of the money passengers pay for rides booked through the Uber smartphone application. (*Id.* ¶ 34.) At the end of each trip, Uber charges the passenger's credit card based on the time and distance of the trip, withholds its percentage as a commission, and deposits the remainder into each driver's bank account on a weekly basis. (*Id.* ¶¶ 34, 35.) As of the time of the writing of the Complaint, Uber's standard commission was twenty-five percent, but historically the commission has ranged from zero to thirty percent. (*Id.* ¶ 35.) In October 2011, Uber introduced "surge pricing," a system where ride price increases during increased demand. (*Id.* ¶ 36.)

Uber drivers provide their own personal vehicles (that comport with Uber's make-and-model requirements) and pay for their own personal liability insurance. (*Id.* ¶ 39.) Other costs that Uber drivers assume are maintenance, cleaning, and vehicle depreciation, as well as data usage for streaming music, ten dollars a week for use of an Uber iPhone containing the Uber application, toll charges, and tickets and citations. (*Id.* ¶¶ 41, 42.)

II. Uber Services and Pricing.

In the summer of 2010, Uber began operations as "UberCab," a **[*5]** service that dispatched TCP-licensed vehicles and commercially-licensed drivers. (*Id.* ¶ 26.) Sometime thereafter, Uber dropped the "Cab" from the company moniker and began providing its services as "UberBlack." (*Id.* ¶ 28.) On July 4, 2012, Uber introduced a service called "UberX," which Uber marketed as a lower cost alternative to UberBlack. (*Id.* ¶¶ 22, 29.) UberX dispatched transportation in the form of non-TCP-licensed vehicles and directly competed with taxi companies. (*Id.*) UberX rates were initially higher than taxi rates, but lower than UberBlack rates. (*Id.* ¶ 29.)

The same day that Uber rolled out UberX, it introduced UberSUV. (*Id.* ¶ 30.) UberSUV services were provided by commercially-licensed drivers in TCP-licensed luxury vehicles. (*Id.*) UberSUV rates were higher than UberBlack rates. (*Id.*) On October 17, 2012, Uber introduced UberTaxi, which allowed customers to request a traditional taxi through the Uber smartphone application. (*Id.* ¶ 31.) Uber charged taxi rates for this service, plus a nominal booking fee and a twenty percent gratuity. (*Id.*)

Finally, on May 12, 2014, Uber introduced "UberXL." (*Id.* ¶ 32.) UberXL drivers were not commercially-licensed, and UberXL vehicles **[*6]** were not TCP-licensed. (*Id.*) UberXL's rates were about half as expensive as UberSUV. (*Id.*)

Flywheel's predatory pricing allegations center upon UberX (non-TCP-licensed vehicles) and UberXL (non-commercially-licensed drivers and non-TCP-licensed vehicles) services. Flywheel alleges that Uber, beginning in June of 2013, began lowering its prices at semi-regular intervals, periodically making false claims about its prices relative to taxi prices, and ultimately lowering its prices so much that Uber lost money on each ride and was forced to subsidize driver income due to depressed fares.

Between July of 2012 (when UberX was launched) and June 2013, Uber increased the base rate, per-mile rate, and per-minute-idle-time rate for UberX services in San Francisco. (*Id.* ¶¶ 48, 49.) Then, in June of 2013, Uber significantly lowered its UberX rates. (*Id.* ¶ 51.) Though Uber advertised these new prices as "10 percent lower than taxi prices" and promoted UberX as offering "cheaper-than-taxi" pricing, UberX's June 2013 prices were similar to contemporary taxi rates. (*Id.* ¶¶ 50, 51.)

In January of 2014, Uber cut UberX rates again and claimed its fares were twenty-six percent cheaper than taxi fares. (***[*7]*** *Id.* ¶¶ 53, 54.) At the same time, Uber reduced its own commission on UberX rides by seventy-five percent (from twenty percent to five percent), which (at least partially) offset the drivers' income losses from the reduced fares. (*Id.* ¶ 55.)

In April of 2014, Uber restored its commission to twenty percent. (*Id.* ¶ 57.) Uber claimed the January 2014 rate cuts were temporary, but, as of the writing of the Complaint, UberX prices had not returned to pre-January 2014 levels. (*Id.*) In June of 2014, Uber reduced UberX rates again. (*Id.* ¶¶ 59, 63.) Uber emailed its San Francisco users that these new fares were "45 percent cheaper than a taxi" and that UberX was "the most affordable ride on the road." (*Id.*)

Uber subsidized UberX drivers' incomes to offset this latest price cut, paying drivers more than Uber was charging passengers. (*Id.* ¶ 61.) In January of 2016, UberX lowered its prices yet again. (*Id.* ¶ 64.) After this latest cut, UberX's rates were approximately a third of what they had been in June of 2013. Flywheel alleges UberX lost money on every UberX ride after June 2013. (*Id.* ¶ 52, 56, 64.) Likewise, Flywheel alleges that Uber lost money on each UberXL ride from May 2014 onward. (*Id.* **[*8]** ¶¶ 58, 65.)

In August of 2016, Uber instituted "Uber Plus." (*Id.* ¶ 66.) Uber Plus passengers in San Francisco pay thirty dollars per month in return for forty UberX rides per month. (*Id.*) Uber subsidized drivers' earnings on this flat rate, so that drivers receive the income they would on a normally-priced ride. (*Id.* ¶ 67.) Flywheel alleges that UberTaxi allows users to hail taxis at rates higher than the prevailing SFMTA-regulated taxi rate. (*Id.* ¶ 69.) Flywheel further alleges that UberTaxi "improperly inflated" taxi fares, further enabling Uber to undercut taxi pricing. (*Id.*)

Flywheel alleges that Uber's below-cost pricing for UberX, UberXL, and Uber Plus, subsidized by venture capital, is designed to drive taxi companies out of business. (*Id.* ¶¶ 71, 75.) Once taxi companies have been pushed out of the market, Flywheel alleges, Uber will recoup its losses by raising prices. (*Id.*)

Flywheel alleges that Uber's intent to monopolize is clear from the company's pricing behavior, advertising strategy, and the CEO's statements that he wishes to "destroy" competition using below-cost pricing. (*Id.* ¶¶ 72-74.) Flywheel alleges that Uber has captured more than seventy percent of what it calls **[*9]** the San Francisco Ride-Hail Market (ride-hail ground transportation service provided by private vehicles not licensed as "TCP" or "PSC," providing service in the City and County of San Francisco and the San Francisco International Airport). (*Id.* ¶¶ 15, 75.) Flywheel also alleges that from July of 2012 through the writing of the Complaint, taxi companies have experienced a sixty-five percent drop in ridership. (*Id.* ¶ 24.)

III. Uber Drivers.

Flywheel contends that Uber made multiple misrepresentations to its prospective and current UberX and UberXL drivers. Flywheel avers that, at each UberX price-cutting juncture (June 2013, January 2014, and June 2014), Uber represented to current and prospective UberX drivers that they would earn more money per hour due to Uber's price cuts. (*Id.* ¶¶ 76-78.) Flywheel alleges, however, that, despite working more, UberX drivers earned less each time Uber cut fares. (*Id.* ¶ 79.)

Flywheel also alleges that, beginning in May of 2014 and up through the present date, Uber misrepresented statistics regarding median driver earnings to current and prospective UberX drivers. (*Id.* ¶¶ 81, 82.) Flywheel further alleges that Uber misrepresented to current and potential **[*10]** UberX and UberXL drivers that they would keep eighty percent of their collected fares and that Uber would provide free smartphones. (*Id.* ¶¶ 84, 85.) Flywheel also alleges that Uber made misrepresentations to UberX and UberXL drivers about taxi drivers' income and costs. (*Id.* ¶¶ 87, 88.) Flywheel contends these misrepresentations lured drivers into working as UberX and UberXL drivers and away from driving taxis. (*Id.* ¶¶ 80, 83, 86, 89, 90.)

Flywheel alleges that Uber's vehicle-access programs trap its drivers into relationships with Uber. In November of 2013, Uber introduced the "Vehicles Solutions Program," a program that offered financing from subprime lenders to Uber drivers to facilitate the purchase of an Uber-approved vehicle. (*Id.* ¶ 43.) The Vehicle Solutions Program requires an initial cash deposit of approximately $2,000, and, once a driver is enrolled, Uber automatically deducts the driver's car payments from his or her weekly earnings until the loan is paid. (*Id.* ¶ 44.)

In July of 2015, Uber introduced "Xchange Leasing." (*Id.* ¶ 45.) Under this program, Uber offers subprime automobile leases to Uber drivers with low credit scores. (*Id.*) As with the Vehicle Solutions Program, **[*11]** Uber deducts lease payments from enrolled drivers' weekly earnings. (*Id.*) Flywheel has alleged that Uber's aim in offering both of these programs is to make it difficult for Uber drivers to stop driving for Uber. (*Id.* ¶¶ 44, 45.) Flywheel also contends that these programs have effectively deterred Uber drivers from working as taxi drivers. (*Id.* ¶¶ 80, 83, 86, 89, 90.)

Flywheel contends that from July of 2012 through the writing of the Complaint, taxi companies have lost more than thirty percent of their drivers. (*Id.* ¶ 24.)

IV. The Public.

Flywheel claims that Uber made multiple misrepresentations to prospective and current customers. Flywheel alleges that in June of 2013, January of 2014, and June of 2014, Uber made false representations to the public regarding UberX prices relative to the cost of taxi prices. (*Id.* ¶¶ 91-94.) Flywheel contends that, from June of 2013 through the writing of the Complaint, Uber occasionally charged UberX customers "surge" prices above advertised UberX prices. (*Id.* ¶¶95-100.) Flywheel further alleges that, beginning in November of 2011 and continuing through April of 2016, Uber misrepresented that fares charged through the smartphone application for UberX **[*12]** and UberXL services included tips. (*Id.* ¶¶ 101, 102.)

Flywheel further contends that Uber misrepresented the accuracy and reliability of its application feature that allows passengers to track UberX and UberXL vehicles. (*Id.* ¶¶ 104, 105.) Flywheel alleges that Uber misrepresented the quality of the background checks it conducted on its drivers relative to the background checks taxi companies conduct of taxi drivers. (*Id.* ¶¶ 107, 108.)

V. Violations of Federal, California, and Municipal Laws and Regulations.

Finally, Flywheel contends that Uber's policies and practices violate a host of federal, California, and municipal laws and regulations. Flywheel alleges that UBER discriminates against individuals with disabilities and non-white passengers by failing to comply with federal and California regulations. (*Id.* ¶¶ 110, 111.) Flywheel alleges that UBER violates California law by requiring drivers to maintain their own insurance policies, preventing drivers from registering UberX and UberXL vehicles as commercial vehicles, and failing to provide a driver training program for UberX and UberXL drivers. (*Id.* ¶¶ 112-114.) Flywheel alleges that Uber violates San Francisco municipal laws by failing **[*13]** to comply with laws regulating taxis, refusing to register applicable vehicles with San Francisco International Airport, failing to carry appropriate liability insurance, refusing to participate in the Paratransit program, charging more than SFMTA-approved meter rates during surge pricing, and charging drivers more than the daily lease fee authorized by the Transportation Code, among other things. (*Id.* ¶¶ 115-124.)

Flywheel brings seven causes of action against Uber: (i) monopolization and (ii) attempted monopolization under the Sherman Antitrust Act, (iii) violations of California's unfair practices act for sales below cost and (iv) loss leader practices, (v) violation of the federal Lanham Act, (vi) intentional interference with prospective economic advantage, and (vii) violation of California's unfair competition law.

ANALYSIS

I. Appropriate Legal Standard.

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. "[D]etailed factual allegations are not required" to survive a motion to dismiss if the complaint contains sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atl. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "Labels **[*14]** and conclusions[] and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 50 U.S. at 555*.

When evaluating a *Rule 12(b)(6)* motion to dismiss, a district court accepts as true all material facts alleged in the complaint and draws all reasonable inferences in favor of the plaintiff. *Faulkner v. ADT Servs., Inc., 706 F.3d 1017, 1019 (9th Cir. 2013)*. A district court should grant leave to amend unless the court determines the pleading could not "possibly be cured by the allegation of other facts." *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)*.

II. Sherman Act.

Protecting competition, not individual competitors, is at the heart of antitrust regulation. *See Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. Accordingly, antitrust laws target only behavior that tends to reduce (or actually reduces) competition. *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109-10, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* ("[I]t is inimical to the antitrust laws to award damages for losses stemming from continued competition." (citation and quotation omitted)).

To successfully plead monopolization under the *Sherman Act*, a plaintiff must allege: (i) a market participant has monopoly power in the relevant market and (ii) is willfully acquiring or maintaining monopoly power. *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 480-81, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. "[G]rowth or development as a consequence of a superior product, business acumen, or historic accident" is not prohibited behavior. *Id. at 481*. A private plaintiff must also plead the defendant's anticompetitive **[*15]** behavior has injured it. *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)*.

To successfully plead *attempted* monopolization under the Sherman Act, a private plaintiff must allege: (i) predatory or anticompetitive conduct (ii) pursued with the specific intent to control prices or destroy competition; (iii) a dangerous probability the defendant will achieve a monopoly or monopoly power; and (iv) injury stemming from the complained-of anticompetitive behavior. *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997)* (citations omitted).

Uber argues that Flywheel's monopolization and attempted monopolization claims are deficient for the same reasons.

A. Flywheel Sufficiently Alleges Relevant Market.

Uber first argues that Flywheel has incorrectly defined the appropriate product market.[1] In order to state a valid claim for monopolization or attempted monopolization, a plaintiff must allege that a "relevant market" exists and that the defendant has power within that market. *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1044 (9th Cir. 2008)*.[2] The sufficiency of allegations concerning the "relevant market" is a factual, rather than legal, question; therefore, a Sherman Act claim survives a *Rule 12(b)(6)* motion to dismiss unless the alleged market suffers from a fatal legal defect. *Id. at 1045*; *see High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993)* (market definition depends on "a factual inquiry into the 'commercial realities' faced by **[*16]** consumers") (citation omitted).

To avoid a fatal legal defect, the relevant market must be a "product market," rather than a market whose boundaries are delineated by consumers. *Id.* (citations omitted). A market must also encompass all economic substitutes for the product at issue. *Id.* The relevant market must include the group of service providers "who have [the] actual or potential ability to deprive each other of significant levels of business." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989)*.

A degree of fungibility demarcates the outer boundaries of a product market: the court must look to whether the market, as the plaintiff defined it, includes all reasonably interchangeable products and whether there is cross-elasticity of demand between the product and its substitutes. *Olin Corp. v. FTC, 986 F.2d 1295, 1298-99 (9th Cir. 1993)* (citation omitted). Practically, cross-elasticity means that if the price of one good increases, demand for the purportedly equivalent good will increase, as consumers substitute the equivalent good for their initial, now relatively expensive, choice: "[i]f consumers view the products as substitutes, the products are part of the same market." *Rebel Oil Co., 51 F.3d at 1435*.

Defining the appropriate product market is unquestionably one of the thorniest questions of anti-trust law. Flywheel **[*17]** defines the relevant product market as "ride-hail ground transportation service provided in private vehicles that are not licensed as 'TCP' or 'PSC.'" (Complaint ¶ 15.)[3] Uber contends this definition is improperly narrow, first, because it excludes TCPs and PSCs and, second, because it excludes public transportation, bicycling, private automobiles, car-sharing, pedicabs, and walking. The Court disagrees.

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[1] Uber does not argue that Flywheel's definition of the geographic market is deficient.

[2] This element of an antitrust claim need not be pled with specificity. *See Cost Mgmt. Servs., Inc. v. Washington Nat. Gas Co., 99 F.3d 937, 950 (9th Cir. 1996)* (complaint "need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws") (citation and quotation omitted).

[3] Flywheel also alleges that Uber controls approximately seventy percent of this market. (*Id.* ¶ 16.)

Flywheel's chosen product market includes ride-hail transportation but explicitly excludes two types of other for-hire modes of transportation: PSCs and TCPs. Based on the Complaint, PSC and TCP services are not reasonably interchangeable with ride-hail transportation.[4]

PSCs provide shuttle transportation service on "fixed routes" or through "scheduled service," and TCPs are hired on a "prearranged basis" for the "exclusive use of an individual or a group." (Complaint ¶ 18.) If ride-hailing services that UberX or UberXL offered became too expensive, consumers would turn (and have turned) to other, *more similar* services, either to "traditional" taxi services or services such as Lyft. A shuttle (sharing the majority of a journey with other passengers, with a shared proximate or actual **[*18]** destination that departs at assigned times) or a luxury vehicle (a prearranged booking with the supplemental features of optics and comfort) are not logical substitutes for ride-hailing services on-demand. These services lack the fundamental characteristics of a ride-hail service, which are non-premium accommodations (ordinary vehicles) and customizable pick-up and drop off points. Using common sense, and drawing inferences from the Complaint in Flywheel's favor, it is apparent that there is little cross-elasticity of demand between ride-hail services and services excluded from Flywheel's definition of the relevant product market; shuttles and luxury vehicles do not have the ability to deprive ride-hail services of "significant levels of business."[5]

Flywheel's chosen product market also excludes other discrete modes of transportation Uber contends should be included. Some of Uber's selected examples (such as Chariot) are more similar to TCPs and PSCs than to ride-hailing services and, therefore, are properly excluded from the relevant product market for the same reasons discussed immediately above. Uber's other examples (bike sharing, pedicabs, walking, personal vehicle use) **[*19]** are also properly excluded from the defined product market.

Consumers engage in multiple considerations when evaluating whether to substitute a bicycle, pedicab, public transportation, a personal vehicle, or their own two feet for a ride-hail service: efficiency of arrival at one's destination, exposure to the elements, cost and location of temporary storage (parking garages, risk of bicycle theft), the need to arrive at one's destination in a state of order, and novelty. In contrast, when considering which ride-hail service to utilize, a consumer will largely be focused on cost and reliability. *Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1163 (9th Cir. 2003)* ("For antitrust purposes, a market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use[,] and qualities considered.") (citation and quotations omitted). Bicycles, pedicabs, walking, and personal vehicle use are not capable of depriving ride-hailing services of "significant levels of business."[6]

As alleged, the relevant product market suffers no facial legal defect. Even if it did, the relevant product market meets the requirements for a submarket. *See* *Brown Shoe, 370 U.S. at 325* ("well-defined submarkets may exist which, in themselves, **[*20]** constitute product markets for antitrust purposes.").[7]

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[4] According to the Complaint, UberX and UberXL exist in the marketplace as direct competitors to taxis—not as direct competitors to commercially licensed transportation services. (*Id.* ¶¶ 22, 23, 37, 38, 50, 59, 60.)

[5] The Court disagrees with Uber's argument that the allegations in the Complaint are contradictory. (*See* Complaint ¶ 17.) The Complaint only describes three broad categories of private, for-hire transportation in San Francisco in the pre-2012 economy. The Complaint does not suggest that these three "types" of transportation were fungible or "reasonably interchangeable." Rather, the Complaint suggests that the three "types" of transportation served distinct market needs. (*See id.* ¶¶ 18-19.)

[6] The cases Uber cites in order to argue these methods of transportation are "interchangeable" are distinguishable. Two of these cases occur in the context of constitutional challenges to municipal ordinances, not in the context of analyzing a "relevant market" under the Sherman Act. *See* *Ill. Transp. Trade Assn. v. City of Chicago, 839 F.3d 594 (7th Cir. 2016)*; *Joe Sanfelippo Cabs, Inc. v. City of Milwaukee, 839 F.3d 613 (7th Cir. 2016)*. In a third case, *Lala v. Frampton, No. 07-cv-2144-MSK-CBS, 2008 U.S. Dist. LEXIS 66003, 2008 WL 4059874, at *4 (D. Colo. Aug. 28, 2008)*, the plaintiff provided only a perfunctory and "conclusory" market definition, and the complaint "did not plead facts that would explain why [alternate] services should not be considered part of the relevant market." Those deficits are not present here.

B. Flywheel Does Not Sufficiently Allege Barriers to Entry.

Having determined Flywheel adequately alleges a relevant market, the Court must next determine whether Flywheel has sufficiently alleged Uber's power to "control prices or exclude competition." *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. In evaluating whether an entity has monopoly power, "it is not market share that counts, but [an entity's] ability to *maintain* market share." *United States v. Syufy Enter., 903 F.2d 659, 666 (9th Cir. 1990)* (emphasis in original). A plaintiff must, therefore, show that new competitors are "barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price." *Rebel Oil Co., 51 F.3d at 1439* (citation omitted). If such barriers do not exist, nothing prevents a newcomer (or an existing competitor) from effectively challenging an emerging monopoly, thereby undercutting the would-be monopolist's ability to domineer the market and hinder competition. *See Syufy Enter., 903 F.2d at 664* (without barriers to entry, defendant with 100% share of market lacks market power: "any attempt to raise prices above competitive level will lure into the market new competitors . . .").

Here, the parties' primary disagreement on this subject is whether **[*21]** barriers to entry exist. Flywheel argues that Uber's $15 billion venture capital war chest constitutes a barrier to entry and that Uber's own history[8] illustrates the difficulty of breaking into the relevant market. Uber counters that its capital backing does not constitute a barrier to entry. Uber has the better argument.

A barrier to entry is either an "additional" long-run cost that incumbent firms did not incur, but "must" be incurred by new entrants, or a factor or factors in the market that deter entry "while permitting incumbent firms to earn monopoly returns." *Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427-28 (9th Cir. 1993)* (need for financing not barrier to entry because no evidence more difficult for new entrants to obtain financing) (citation omitted). Barriers to entry may include: (i) legal license requirements, (ii) control of an essential or superior resource, (iii) entrenched buyer preferences for established brands, (iv) capital market evaluations imposing higher capital costs on new entrants, and, occasionally, (v) economies of scale. *Rebel Oil Co., 51 F.3d at 1439* (citation omitted). The fact that entering a market requires a large capital investment, without more, does not constitute a barrier to entry: "a new [market] entrant is disadvantaged only to the **[*22]** extent that he must pay *more* to attract those funds *than would an established firm*." Areeda & Hovenkamp, ***Antitrust Law*** ¶ 409e at 303 (1992 Supp.) (emphasis added).

In *Los Angeles Land*, the plaintiff (a bowling center developer) argued that lenders' hesitancy to finance bowling equipment purchases constituted a barrier to entry because the difficulty of borrowing money to start a bowling alley made it difficult for would-be competitors to enter the market. *6 F.3d at 1427-28*. In an opinion reversing a hefty trial judgment, the Ninth Circuit disagreed, opining there was no evidence that lenders who *were* willing to finance bowling equipment imposed higher financing costs on new market participants than on firms already established. *Id.* This, the Ninth Circuit concluded, signified that difficulty obtaining financing, without more, was not a barrier to entry.

Uber's large venture capital backing is similarly not a barrier to entry.[9] First, the Complaint lacks allegations that enable the Court to infer that competitors are precluded from entering the market *unless* they obtain similar capital

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[7] In order to establish a submarket, a plaintiff must be able to show that the submarket is economically distinct from the general product market. *Newcal Indus., 513 F.3d at 1045*. "[I]ndustry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors" all are "practical indicia" of an economically distinct submarket. *Brown Shoe, 370 U.S. at 325*.

[8] According to the Complaint, Uber was founded in 2009 with $200,000 in "initial seed money," but started UberX and UberXL in 2012 and 2014, respectively. (Complaint ¶ 33.)

[9] Flywheel cites to *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919 (9th Cir. 1980)* for the proposition that an allegation of a specific market share is sufficient to withstand a motion to dismiss. There, the Ninth Circuit stated that it *could not*

backing. *See DocMagic, Inc. v. Ellie Mae, Inc., 745 F. Supp. 2d 1119, 1137 (N.D. Cal. 2010)* (barriers to entry sufficiently pled where difficult for customers to switch providers); *Catch Curve, Inc. v. Venali, Inc., 519 F. Supp. 2d 1028, 1035 (C.D. Cal. 2007)* (barriers to entry **[*23]** sufficiently pled where competitors' licensing strategy created additional capital costs for new market entrants).[10]

Further, Flywheel argues that Uber's taking several years to break into the relevant market underscores the difficulty of breaking into it. Flywheel's argument, however, presupposes that Uber's intention from the beginning (in 2009) was to break into the ride-hail market, but that it was unable to do so. Flywheel's allegations contradict this: Flywheel alleges that Uber initially marketed itself as a purveyor of luxury and luxury-adjacent ground transport. (*See, e.g.*, Complaint ¶¶ 17, 21.) There are no allegations that allow the Court to infer that Uber intended, but was unable, to compete in the relevant market before 2012.

The Complaint does not contain allegations sufficient to allow the Court to infer that the relevant market "requires onerous front-end investments" that might deter competition from all but the "hardiest and most financially secure investors;" is dependent upon a "scare commodity;" or is rife with "exclusive contracts or distribution arrangements designed to lock out potential competitors." *Syufy Enterp., 903 F.2d at 667*. "[E]fficient, **[*24]** aggressive competition," which Flywheel *does* allege, is not in itself a structural barrier to entry. *Id.*

C. Flywheel Alleges Below-Cost Pricing, But Not "Dangerous Probability" of Recoupment.

The parties next disagree over whether Flywheel has sufficiently alleged Uber's behavior constitutes predatory pricing. Price reductions that constitute a "legitimate, competitive response" to market conditions are, of course, "entirely proper." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1031 (9th Cir. 1981)*. In fact, lowering prices to attract sales is the "essence" of healthy competition. *Solyndra Residual Tr. v. Suntech Power Holdings Co., Ltd., 62 F. Supp. 3d 1027, 1041 (N.D. Cal. 2014)* (citation omitted). Accordingly, the circumstances under which a plaintiff may bring a predatory pricing claim are limited. To state such a claim under the Sherman Act, a plaintiff must allege that (i) the complained-of prices are below an appropriate measure of defendant's costs and (ii) there is a "dangerous probability" the defendant will recoup its losses for below-cost pricing by raising prices after the defendant achieves monopoly power. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (citations omitted).

Uber argues, first, that Flywheel has not adequately alleged below-cost pricing and, second, that Flywheel has not sufficiently alleged a dangerous probability of recouping losses because Flywheel does not sufficiently **[*25]** allege barriers to entry. Flywheel argues that its allegations that Uber lost money on each and every UberX and UberXL ride (in certain described timeframes) are sufficient.

As a preliminary matter, there appears to be some disagreement within the Ninth Circuit as to the appropriate measure of cost for predatory pricing claims. *See, e.g., Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 909-10 (9th Cir. 2008)* (the appropriate measure of cost is an "open question" in the Ninth Circuit); *Vesta Corp. v. Amdocs Mgmt. Ltd., 129 F. Supp. 3d 1012, 1030-31 (D. Or. 2015)* ("Neither the Supreme Court nor this Circuit has concluded what is the appropriate measure of cost in a predatory pricing case. However, it is generally agreed that the relation between the cost of producing a product and the price charged for it is the criterion for determining whether the price is predatory." (citation and quotation omitted)); *William Inglis, 668 F.2d at 1062 n.1* (recognizing

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say that allegations of a sixty-five percent market share (that was increasing) *could not* "under any market conditions" provide a basis for inferring the requisite market power. *Id. at 925*. This statement, of course, is not the same as declaring that an allegation of a certain threshold of market share is sufficient to plead monopolization. *Hunt-Wesson*, moreover, makes no mention of potential barriers to entry or the importance of such analysis, which innumerable, more recent cases have suggested is crucial. For these reasons, *Hunt-Wesson* is distinguishable.

[10] Given venture capital's known proclivity for funding subsequent iterations of a successful business model, Uber's market success (as alleged in the Complaint) very likely makes it easier, not harder, for newcomers to the relevant product market to procure capital backing.

acceptability of average variable cost as metric: "marginal cost is often impossible to determine"). Thankfully, the Court need not resolve this ambiguity.

In addition to alleging UberX and UberXL prices and relating those prices to taxi prices, Flywheel has alleged Uber "lost money on each and every" UberX and UberXL ride in the identified time frames. At the pleading stage, this level of detail is sufficient. *Compare* ***[*26]*** *Solyndra, 62 F. Supp. 3d at 1043* ("At [motion to dismiss stage], Plaintiff's allegation that Defendants priced their product below cost is sufficient to avoid dismissal."), *with* *Eastman v. Quest Diagnostics Inc., 108 F. Supp. 3d 827, 835 (N.D. Cal. 2015)* (dismissing predatory pricing Sherman Act claim where plaintiffs alleged only that defendant charged "monopoly prices" or "above-competitive prices" but did not allege defendant's prices or how those prices compared to competitors' prices).

Courts in the Ninth Circuit routinely hold that levels of detail similar to that provided in the Complaint sufficiently allege below-cost pricing. *See, e.g.,* *Momento, Inc. v. Seccion Amarilla USA, No. 09-cv-1223-SBA, 2009 U.S. Dist. LEXIS 85295, 2009 WL 10696217, at *5 (N.D. Cal. Sept. 17, 2009)* (allegations sufficient where plaintiff pled only that competitor sold product substantially below cost and identified the specific cost of the product, but not the market price); *Jensen Enters., Inc. v. Oldcastle, Inc., No. 06-cv-00247 SI, 2006 U.S. Dist. LEXIS 68262, 2006 WL 2583681, at *7 (N.D. Cal. Sept. 7, 2006)* (below-cost pricing sufficiently alleged where plaintiff alleged only that defendant charged "uneconomically low" prices); *Origami Owl LLC v. Mayo, No. 15-cv-00110-PHX-DGC, 2015 U.S. Dist. LEXIS 103755, 2015 WL 4747101, at *5-6 (D. Ariz. Aug. 7, 2015)* (below-cost pricing sufficiently alleged where plaintiff alleged eighty percent reduction from wholesale pricing). The Court has located, and Uber has provided, no case that stands for the proposition that **[*27]** allegations of below-cost pricing must be more detailed than what Flywheel has provided. *See* *Momento, 2009 U.S. Dist. LEXIS 85295, 2009 WL 10696217, at *1* (motions to dismiss disfavored in fact-intensive antitrust cases).[11]

However, Flywheel has not sufficiently alleged a dangerous probability of recoupment because, as discussed above, it has not sufficiently alleged that barriers to entry will prevent competitors from entering the market. *See* *In re Air Passenger Computer Reservations Sys. Antitrust Litig., 694 F. Supp. 1443, 1470 n.20 (C.D. Cal. 1988)* ("Predatory pricing can only be effective when there are significant barriers to entry which enable a monopolist to recoup short term losses through monopoly profits reaped after exclusion of a competitor from the market.")

For the reasons discussed above, Flywheel's Sherman Acts claims are dismissed.

III. California Unfair Practice Act.

Uber next argues that Flywheel failed to plead its *California Unfair Practices Act ("UPA")* claims. Under the UPA, it is unlawful to sell any article or product at below-cost "for the purpose of injuring competitors or destroying competition." *Cal. Bus. & Prof. Code §§ 17043*, *17044*; *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 171-72, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999)*.

California Business and Professions Code section 17024 carves out two exemptions to the UPA. The *UPA* does not apply:

> (1) To any service, article or product for which rates *are established* under the jurisdiction of the Public Utilities Commission of this State and sold or furnished by **[*28]** any public utility corporation, or installation and repair services rendered in connection with any services, articles or products.

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[11] The Court is not persuaded that Flywheel's surge pricing allegations undermine or contradict its allegations regarding below-cost pricing. Drawing all reasonable inferences from the Complaint, for example, it is reasonable to conclude that incidents of surge pricing occurred less frequently than incidents of below-cost pricing and in such margins and multiples as to only partially offset below-cost pricing. As such, it is entirely possible that the additional income generated by surge pricing was insufficient to overtake the losses incurred by the below-cost pricing.

(2) To any service, article or product sold or furnished by a publicly owned public utility and upon which the rates *would have been established under the jurisdiction* of the Public Utilities Commission of this State if such service, article or product had been sold or furnished by a public utility corporation, or installation and repair services rendered in connection with any services, articles or products.

Cal. Bus. & Prof. Code § 17024 (emphasis added).

Despite the plain language of *section 17024(1)*, California courts have determined that the *section 17024(1)* exception also applies where the CPUC has the jurisdiction to establish a utility's rates. *Hladek v. City of Merced, 69 Cal. App. 3d 585, 138 Cal. Rptr. 194 (Cal. Ct. App. 1977)*; (Dkt. No. 61). The section (1) exception, therefore, applies if Uber is a public utility. Flywheel is judicially estopped from arguing that Uber is not a public utility because Flywheel has conceded as much in prior judicial proceedings. *See Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 1000 (9th Cir. 2012)*. Therefore, the *section 17024(1)* exception precludes Flywheel from bring a UPA claim against Uber. Flywheel's UPA claims are dismissed.

IV. Lanham Act.

Flywheel's Lanham Act allegations concern allegedly false or misleading statements Uber made **[*29]** to drivers or to customers. Uber argues that Flywheel's allegations concerning these statements lack the requisite specificity, do not concern "material" deception of a "substantial segment" of the public, fail to show the statements were false when made, constitute non-actionable puffery, and/or are time-barred.

A. Flywheel's Allegations Meet Heightened Pleading Requirement.

Federal Rule of Civil Procedure 9(b) requires, when alleging fraud or mistake, that a party "state with particularity the circumstances constituting fraud or mistake." The Ninth Circuit has not definitively weighed in on whether *Rule 9(b)* applies to all Lanham Act claims, but many district courts in the Ninth Circuit have applied heightened pleading standards to Lanham Act claims grounded in misrepresentation. *See Kilopass Tech. Inc. v. Sidense Corp., No. 10-cv-02066 SI, 2010 U.S. Dist. LEXIS 136345, 2010 WL 5141843, at *7 (N.D. Cal. Dec. 13, 2010)* (collecting cases). To satisfy this heightened pleading standard, a plaintiff must include "the who, what, when, where, and how" of the misrepresentation. *TransFresh Corp. v. Ganzerla & Assoc., Inc., 862 F. Supp. 2d 1009, 1017 (N.D. Cal. 2012)* (citation omitted).

Flywheel alleges the statements' content[12] that Uber made each of the statements, and when Uber made the statements. Flywheel further alleges that Uber made each of the statements through its website and explains which statements **[*30]** were directed to taxi drivers and which statements were directed to the public (consumers). Finally, the Complaint alleges that each of the statements at issue were "in reality" untrue and explains the specific ways in which the statements were false. *See Newcal, 513 F.3d at 1053* (court limited to contents of complaint at motion to dismiss because question of statement's falsity is factual). To the extent a heightened pleading standard is required for *Lanham Act* claims, these allegations are sufficient to plead "the who, what, when, where, and how" of the misrepresentation.[13] *See Kilopass, 2010 U.S. Dist. LEXIS 136345, 2010 WL 5141843, at *7*.

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[12] Flywheel does not provide direct quotes of the statements in their entirety, but Uber has pointed to no case that stands for the proposition that Flywheel must do so.

[13] Flywheel is not required, even under a heightened pleading standard, to present the "context" of the purportedly misleading statements. The cases Uber cites for its argument are distinguishable. *Southland Sod Farms v. Stover Seed Co.* stands for the proposition that that the context of a statement may transform a statement from true or not "literally false" to false "by necessary implication." *108 F.3d 1134, 1137-39 (9th Cir. 1997)*. Meanwhile, *XYZ Two Way Radio Service, Inc. v. Uber Techs., Inc.* suggests that additional contextual information is necessary when such information could redeem the statements in the complaint. *214 F. Supp. 3d 179, 184 (E.D.N.Y. 2016)*. It is unclear to the Court, drawing all reasonable inferences in favor of the

Flywheel has also sufficiently alleged that the statements deceived their intended audience and that Flywheel was injured: Flywheel alleges that it lost customers and drivers due in part to the fact that customers and drivers relied upon Uber's respective statements directed to each group. The Court further concludes that the deceptions, which concerned pricing, efficiency, income, and safety were material: representations about each of these topics are likely to influence the purchasing decision of consumers.

B. Some Allegedly Misleading Statements [*31] Regarding Safety Constitute Non-Actionable Puffery.

A statement is considered puffery "if the claim is extremely unlikely to induce customer reliance." *Newcal, 513 F.3d at 1053*. Ultimately the difference between actionable statements and puffery is specificity, the idea being that general assertions are less likely to induce consumer reliance. *Id.* A general, subjective statement about a product is non-actionable puffing because such a statement would not contain "specific characteristics . . . that could be tested." *Autodesk, Inc. v. Dassault Systemes Solidworks Corp., No. 08-cv-4397-WHA, 2008 U.S. Dist. LEXIS 109800, 2008 WL 6742224, at *3 (N.D. Cal. Dec. 18, 2008)*.

In *L.A. Taxi Cooperative, Inc. v. Uber Techs., Inc.*, this Court found that specific statements comparing Uber's safety standards directly to taxi companies and describing its background check process as a "comprehensive and new industry standard" and "industry-leading" were actionable. *114 F. Supp. 3d 852, 861 (N.D. Cal. 2015)*. Here, Uber's statement that it conducted "rigorous" background checks that "set a new standard" to ensure passenger safety is nearly identical to the statement deemed actionable in *L.A. Taxi*.

Uber's statement that its drivers "provide[d] the safest ride on the road" and were the "gold standard" of safety practices is a different story. In *XYZ* ***[*32]*** *Two Way Radio Service*, the court observed that similar statements, though they concerned the service's safety, were "vague" and "hyperbolic:" "the challenged statements cannot reasonably be understood as specific representations of objective facts." *214 F. Supp. 3d at 184*. Here, what constitutes a "gold standard" and/or "the safest ride on the road" is in the eye of the beholder. It is unclear to the Court whether these statements pertain to the quality of background checks alone or whether they pertain, for example, to driver behavior on the road or the safety rating of the type of cars Uber accepts as part of its fleet. Without more, these statements are not specific enough to create consumer reliance and constitute non-actionable puffery.

C. Dismissing Lanham Act Claim As Time-Barred Is Premature.

When a federal statute, such as the Lanham Act, lacks a statute of limitations, courts presume that Congress intended to "borrow" the limitations period from the most "closely analogous" state law action. *Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 836-37 (9th Cir. 2002)* (citation omitted). Consistently, federal courts import the statute of limitations for a state's fraud action onto Lanham Act claims. *See, e.g., Au-Tomotive Gold Inc. v. Volkswagen of Am., Inc., 603 F.3d 1133, 1140 (9th Cir. 2010)* (applying three-year statute of limitations for Arizona fraud **[*33]** law to Lanham Act claim). California's statute of limitations for fraud is three years; therefore, the applicable statute of limitations for Flywheel's Lanham Act claims is three years. *See Karl Storz Endoscopy Am., Inc. v. Surgical Techs., Inc., 285 F.3d 848, 857 (9th Cir. 2002)* (applying three-year statute of limitations to Lanham Act claim) (citations omitted).

The clock on the limitations period for a Lanham Act claim begins when the plaintiff knew or should have known of the wrong. *See General Bedding Corp. v. Echevarria, 947 F.2d 1395, 1397 (9th Cir.1991)*. Generally, therefore, whether a claim is barred by the statute of limitations is a factual issue. *Akkerman v. Mecta Corp., 72 F. App'x 652, 654 (9th Cir. 2003)*; *Ranch Realty, Inc. v. DC Ranch Realty, LLC, 614 F. Supp. 2d 983, 989-90 (D. Ariz. 2007)* (". . . [T]he date on which a cause of action accrued is a factual question inappropriate to determine based on the

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Complaint, that additional contextual information contained elsewhere on the website would or could redeem the statements featured in the Complaint.

pleadings."). Where the applicability of a statute of limitations concerns a factual dispute, including the timing of the discovery of the wrong, it is inappropriate to resolve a statute of limitations issue at the motion to dismiss stage. *Id.*

In *ThermoLife Int'l, LLC v. Gaspari Nutrition, Inc.*, the court denied a motion to dismiss a Lanham Act claim based on the argument that the claim was time-barred. *871 F. Supp. 2d 905, 911 (D. Ariz. 2012)*. The court reasoned that, though the plaintiffs alleged the defendant made misrepresentations five years earlier (and therefore outside the three-year statute of limitations), **[*34]** there was nothing in the pleadings to suggest that the plaintiffs discovered the statements were false *at the same time* the statements were made. *Id.* "Rather," the court observed, "a plausible inference is that [the plaintiff] did not know of the falsity of [the defendant's] statements until [the defendant's] products began being recalled . . . and [the plaintiff] independently conducted tests of [the products] to determine whether the . . . advertising was false . . . ." *Id.*

Here, even assuming Flywheel discovered the statements the instant Uber posted them on its website, a plausible inference from the Complaint is that Flywheel did not adduce evidence to suggest the statements were untrue until it conducted some investigation. It is entirely possible that Uber will adduce evidence in discovery that demonstrates Flywheel knew or should have known that Uber's statements were misleading earlier than the Complaint suggests than Flywheel did. In that event, Uber may move for summary judgment on Flywheel's Lanham Act claim. However, at this juncture, given the allegations and drawing all reasonable inferences in favor of the Complaint, dismissal of the Lanham Act claims as time-barred **[*35]** is premature. *See Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir.1980)* ("When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.").

Accordingly, Flywheel's Lanham Act claims is dismissed only to the extent it included non-actionable puffery.

V. Intentional Interference with Prospective Economic Advantage.

Flywheel's intentional interference claim is premised on Uber's purported disruption of Flywheel's relationships with its drivers. Uber argues that Flywheel has not alleged independently wrongful acts, actual disruption to driver relationships, or that Uber acted with the requisite intent.

To successfully bring a claim for intentional interference with prospective economic advantage under California law, Flywheel must allege: (i) an economic relationship between itself and a third party, with the probability of future economic benefit to Flywheel; (ii) Uber's knowledge of the relationship; (iii) intentional acts by Uber designed to disrupt the relationship; (iv) actual disruption of the relationship; and (v) economic harm to Flywheel proximately caused **[*36]** by Uber's acts. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (Cal. 2003)* (citation omitted). The interfering conduct must be "wrongful by some legal measure other than the fact of the interference itself." *Id.* (citation omitted). An act is not independently wrongful merely because a defendant acts with an improper motive; rather, an act is independently wrongful if it is unlawful, "if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id. at 1158-59*. Moreover, "[t]he independently wrongful act must *be* the act of interference itself." *Crown Imports, LLC v. Superior Court, 223 Cal. App. 4th 1395, 1404, 168 Cal. Rptr. 3d 228 (Cal. Ct. App. 2014)* (emphasis added); *see Korea Supply, 29 Cal. 4th at 1159* (illegal acts of bribery and sexual favors interfered with plaintiff's efforts to obtain government contract).

To the extent Flywheel's intentional interference claim is based upon the "independently wrongful acts" of its Sherman Act or Unfair Practices Act claims, its claim for intentional interference is dismissed for the reasons discussed above. (*See* Complaint ¶ 185.) To the extent Flywheel's intentional interference claim is based upon the "independently wrongful acts" described in its Lanham Act claims, its interference claim is also dismissed, but only to the extent the claim included non-actionable puffery. (*See id.* ¶¶ 186, 187.) **[*37]**

With respect to the surviving portion of Flywheel's Lanham Act claim[14] the Court holds that Flywheel has sufficiently alleged the nexus between Uber's purported misrepresentations and a disruption in the relationship between Flywheel and its drivers. Flywheel has alleged that Uber misrepresented to drivers that they would earn more per hour and per year driving for Uber than for taxi companies. Flywheel further alleged that, "in reliance" upon these representations, taxi drivers opted instead to drive for Uber. This is sufficient to allege a nexus.

Flywheel also alleges a rather lengthy list of wrongful and unlawful conduct under federal, California, and municipal laws. (See *id.* ¶¶ 110-124.) Yet, Flywheel does not allege, beyond conclusory statements, how these myriad federal, state, and municipal infractions worked to disrupt the relationship between it and its drivers. As a matter of common sense, it is unclear to the Court how some of these violations *could* lure drivers away from Flywheel or otherwise meaningfully disrupt the relationship.[15] Therefore, Flywheel has failed to sufficiently allege the nexus between these independently wrongful acts and disruption in the relationship between **[*38]** Flywheel and its drivers.

The Court next considers, with respect to the wrongful acts for which Flywheel sufficiently alleged a nexus, whether Flywheel sufficiently alleged actual disruption in the relationships between Flywheel and drivers. For disruption to occur, the "relationship" that forms the basis of an intentional interference claim must have existed at the time of the allegedly tortious conduct. *O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989, 997-98 (N.D. Cal. 2014)* (collecting California state cases); *see* *Westside Ctr. Assocs v. Safeway Stores 23, Inc., 42 Cal.App.4th 507, 524, 49 Cal. Rptr. 2d 793 (1996)* (intentional interference with economic advantage tort protects "the expectation that the relationship will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will eventually arise.") To the extent, then, that Flywheel alleges that Uber's actions lured away drivers that were already driving for Flywheel, Flywheel has sufficiently alleged a disruption. *See* *Silicon Labs Integration, Inc. v. Melman, No. 08-cv-04030-RMW, 2010 U.S. Dist. LEXIS 20385, 2010 WL 890140, at *2 (N.D. Cal. Mar. 8, 2010)* (previous, discrete transaction sufficient to establish "existing" relationship; ongoing transaction not necessary).[16] To the extent, however, Flywheel alleges that Uber's actions prevented it from recruiting new drivers, Flywheel's intentional interference claim fails. **[*39]** (*See, e.g.*, Complaint ¶ 80: "In reliance on Uber's misrepresentations, thousands of *former and potential* San Francisco taxicab drivers have quit or foregone driving taxicabs . . . ." (emphasis added).)

Finally, Flywheel pleads only conclusory allegations that Uber intended to disrupt Flywheel's economic relationships with its drivers. *See* *Korea Supply, 29 Cal. 4th at 1154-57*. Flywheel suggests in its opposition brief that it is "aware" of numerous instances where Uber deliberately targeted Flywheel drivers, but that specificity does not appear in the Complaint. Accordingly, Flywheel did not sufficiently plead intent.

For the foregoing reasons, Flywheel's intentional interference claim is dismissed.

VI. Unfair Competition.

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[14] At this juncture, the Court declines to address whether Flywheel has sufficiently alleged a nexus between the wrongful conduct alleged in the Sherman Act or UPA claims as each have been substantively dismissed.

[15] In its opposition, Flywheel argues that each of these transgressions results in a "less regulated" driver experience, which makes Uber more attractive than Flywheel to drivers. This allegation, however, does not appear in the Complaint, and the Court is unable to infer as much from the allegations themselves. Further, many of the unlawful activities of which Uber stands accused, seem demonstrably unattractive to drivers: forcing them to carry their own insurance and refusing to allow drivers to register their vehicles as commercial vehicles, to name but two examples.

[16] The cases Uber cites do not stand for the proposition that Flywheel is required to allege the specific identities of individual drivers. Indeed, based on the Complaint, listing each individual driver of the "thousands" who departed Flywheel for Uber would be prohibitive. (*See, e.g.*, Complaint ¶ 80.)

Uber next argues that Flywheel's Unfair Competition Law ("UCL") claim should be dismissed solely because it is wholly derivative of Flywheel's Sherman Act, UPA, and Lanham Act claims. To the extent Flywheel's UCL claim is based upon Flywheel's Sherman Act, UPA claim, and non-actionable puffery, its UCL claim is dismissed for the reasons described above. To the extent Flywheel bases its UCL claim on the surviving portions of the Lanham Act claim or the allegations in Paragraphs 110-124, however, **[*40]** the UCL claim survives.

While it is indeed puzzling to the Court that Flywheel does not explicitly reference the litany of Uber's alleged violations of federal, state, and municipal law in its UCL claim, Paragraph 13 of the Complaint incorporates "into each clause of action" "[a]ll of the allegations in this Complaint" "to the extent necessary or useful to clarify and complete each stated cause of action." This is sufficient to "state a claim to relief that is plausible on its face." *Ashcroft, 556 U.S. at 678*.

The Court declines to address Uber's standing argument, because it was raised for the first time in Uber's reply brief. *Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007)* (court need not consider arguments raised for the first time in reply brief) (citations omitted); *MJG Enters. v. Cloyd, No. 10-cv-0086-PHX-MHM, 2010 U.S. Dist. LEXIS 102579, 2010 WL 3842222, at *6 n.1 (D. Ariz. Sept. 27, 2010)* (declining to consider standing argument when raised for first time in reply brief).

Flywheel's UCL claim, therefore, partially survives Uber's motion to dismiss.

VII. Collective Allegations.

Finally, Uber argues that Flywheel's allegations against the four Uber-related entities are deficient because the Complaint refers to these entities collectively as "Uber" and does not allege facts specific to any of the distinct entities.

To satisfy *Federal Rule of Civil Procedure 8(a)*, a complaint **[*41]** must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly, 550 U.S. at 555* (citation omitted). A complaint may fail to provide such "fair notice," however, where it does not differentiate between defendants. *See* *Corazon v. Aurora Loan Servs., LLC, No. 11-cv-00542-SC, 2011 U.S. Dist. LEXIS 52712, 2011 WL 1740099, at *4 (N.D. Cal. May 5, 2011)* ("In the few allegations where [plaintiff] alleges misconduct by a singular defendant, [plaintiff] fails to specify which one." (citations omitted)). Yet, so-called "group pleading" is not fatal as long as the complaint gives defendants fair notice of the claims against them. *See* *Frazier v. US Bank Nat'l Ass'n, No. 11-cv-8775, 2013 U.S. Dist. LEXIS 45330, 2013 WL 1337263 at *2-3 (N.D. Ill. Mar. 29, 2013)* (holding group pleading did not render complaint infirm where complaint provided fair notice of claims); *see also* *Sprint Solutions, Inc. v. Fils-Amie, 44 F. Supp. 3d 1224, 2014 WL 4494146, at *2 (S.D. Fla. 2014)* (rejecting defendants' contention that Sprint's use of the term "Defendants" in the amended complaint requires dismissal).

Flywheel refers collectively to the four target entities as Uber. (Complaint ¶ 7.) Flywheel alleges that the four entities acted in concert with and on behalf of each other. (*Id.* ¶ 9.) Flywheel also brings all of its causes of action against each **of** the four Uber-related entities. These facts **[*42]** are almost identical to those in *Tivoli LLC v. Targetti Sankey S. P. A., No. 14-cv-1285-DOC-JCG, 2015 U.S. Dist. LEXIS 189660, 2015 WL 12683801, at *3-4 (C.D. Cal. Feb. 3, 2015)*.

In *Tivoli*, the complaint referred collectively to four "target entities" and accused each of the four defendants of participating in the alleged wrongful conduct. *Id.* The plaintiff further alleged that the entities were corporate affiliates and agents/employees of each other. *Id.* The court deemed the complaint sufficient, observing that while "collective references" could cause confusion when a "large and diverse" group of defendants was at issue and "obscure[] which defendant is alleged to have committed which act," a small number of defendants presented no such risk. *Id.* Here, as in *Tivoli*, the Complaint fairly claims that each of the four Uber-related entities participated in the alleged wrongful conduct, even if the allegations are accomplished through group pleading.

CONCLUSION

For the foregoing reasons, and as described above, Uber's motion to dismiss is GRANED in part and DENIED in part, but Flywheel shall have leave to amend the deficient portions of the Complaint. The only portion of the Complaint dismissed without leave to amend are Flywheel's UPA claims. Flywheel shall file an amended complaint, if it chooses **[*43]** to do so, by November 21, 2018.

IT IS SO ORDERED.

Dated: September 24, 2018

/s/ Jeffrey S. White

JEFFREY S. WHITE

United States District Judge

Hansen v. Marin Gen. Hosp.

United States District Court for the Northern District of California

September 24, 2018, Decided; September 24, 2018, Filed

Case No. 17-cv-03473-WHO

Reporter

2018 U.S. Dist. LEXIS 163449 *; 2018 WL 4638606

GREGG HANSEN, Plaintiff, v. MARIN GENERAL HOSPITAL, et al., Defendants.

Prior History: Hansen v. Marin Gen. Hosp., 2017 U.S. Dist. LEXIS 211171 (N.D. Cal., Dec. 21, 2017)

Core Terms

dialysis, allegations, motion to dismiss, dog, dismissal with prejudice, transplant, breached, monopoly, kidney, medical malpractice claim, medical malpractice, leave to amend, antitrust, harassed, notice, breach of contract claim, declaration, complains, exhibits, malpractice claim, defendants', contracts, pleadings, rights, statute of limitations, kidney transplant, medical treatment, malpractice, asserting, default

Counsel: **[*1]** Gregg Hansen, Plaintiff, Pro se, Kentfield, CA.

For Marin General Hospital, Defendant: Michael J. Garvin, LEAD ATTORNEY, Sheuerman, Martini, Tabari, Zenere & Garvin, A Professional corporation, San Jose, CA.

For Sutter Health, Defendant: Warren Richmond Webster, LEAD ATTORNEY, Robert Stewart Willoughby, Hassard Bonnington LLP, San Francisco, CA.

For Medicare, Correct name: U.S. Centers for Medicare and Medicaid Services ("Medicare"), Defendant: Robin Michael Wall, U.S. Attorney's Office, Northern District of California, San Francisco, CA.

For Levy, Dr., Estillo, Dr., Marin Neuphreology, Defendants: Karen A. Braje, Reed Smith LLP, San Francisco, CA.

For Antheim Blue Cross, Defendant: Karen A. Braje, LEAD ATTORNEY, Reed Smith LLP, San Francisco, CA.

For Swedish Medical Center, Defendant: Matthew M. Grigg, Pamela Chung, LEAD ATTORNEYS, Law Offices of Matthew M. Grigg, Walnut Creek, CA.

Judges: William H. Orrick, United States District Judge.

Opinion by: William H. Orrick

Opinion

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS AND DENYING MOTIONS FOR ENTRY OF DEFAULT JUDGMENT AND FOR IN HOME DIALYSIS.

Re: Dkt. Nos. 90, 92, 93, 94, 95, 96, 97, 99, 114.

Plaintiff Gregg Hansen brings a host of claims against defendants **[*2]** Dr. Lawrence Levy, Dr. Genevieve Estilo, Marin Nephrology, Marin General Hospital ("MGH"), Anthem Blue Cross Life and Health Insurance Co. ("Anthem"), Sutter Health, Satellite Dialysis ("Satellite"), Centers for Medicare and Medicaid Services ("CMS"), and Swedish Medical Center ("Swedish"). These claims center on Hansen's need for dialysis and the mistreatment that he has allegedly suffered while trying to secure access to a workable dialysis option. His Third Amended Complaint ("TAC") represents his fourth attempt to bring a claim on which relief can be granted. Dkt. No. 89.

Hansen's motion for entry of default against Satellite is denied and Satellite's motion to dismiss for failure to timely serve is granted, but Hansen is given leave to personally serve Satellite. As to remaining motions to dismiss, at this juncture Hansen has adequately pleaded his claim for medical negligence against Drs. Levy and Estilo and MGH, but only for acts occurring on or after April 4, 2016. Hansen may be able to allege acts of medical malpractice against Satellite and Marin Nephrology, but again, only for acts that occurred on or after April 4, 2016. Hansen is giving one more attempt to amend his breach **[*3]** of contract claim against some of the defendants, so that he can identify the applicable contracts.

Hansen also appears to allege a claim for "discrimination" under the Americans with Disabilities Act, with respect to his attempts to seek medical treatment at MGH with his service dog, but the defendants against whom that claim may lie (namely MGH and Dr. Levy) have not had notice of it because of the confusing manner in which it was alleged; they will be given another chance to respond to it. However, Hansen's monopoly claim, as well as all claims asserted against Swedish and CMS must be dismissed with prejudice.

Finally, Hansen's motion for in home dialysis is DENIED, because it seeks relief without any identified authority for it. I will, instead, treat Hansen's request for in home dialysis as a ground for relief related to his surviving (for now) medical malpractice and breach of contract claims.

BACKGROUND

I. FACTUAL BACKGROUND

I accept Hansen's allegations as true. Hansen was hospitalized from April 2011 to January 2013 following a serious car accident. TAC ¶ 6. During that time, he received a liver and pancreas transplant at UCLA, and was put on dialysis until he could receive a kidney **[*4]** transplant. *Id.* ¶ 7. In January 2013, Hansen began dialysis treatments at defendant Satellite Dialysis, receiving dialysis 3 times a week, 3 hours per session. *Id.* ¶ 8. By 2014, Satellite Dialysis, under the direction of Dr. Levy and Dr. Estilo, increased the amount of dialysis to 3.5 hours per session, which was unbearable for Hansen and caused him to suffer side effects including insomnia and the shakes. *Id.* ¶ 11. Hansen complains that the dialysis he received at Satellite was not "customized" to fit his situation and was not sanitary because they reused filters. *Id.* ¶¶ 9, 12.

In 2014, he asked Dr. Levy to recommend an out-of-state transplant for him because the wait to get a transplant in California was between 8 and 9 years at that point, whereas Seattle, Washington only had a 2.5 year waiting list. *Id.* ¶ 14. Hansen had already been waiting for 2.5 years, so Dr. Levy recommended him for an out-of-state transplant. *Id.*

On July 22, 2014, Hansen went to defendant Swedish in Seattle with a caregiver for what was supposed to be a one-day meeting, with Hansen expecting Swedish to approve him for a kidney transplant if he passed some tests. *Id.* ¶ 15. Dr. Reddy at Swedish explained that **[*5]** he did not believe that Hansen would pass the tests, but would allow Hansen to attempt to do so because of Dr. Reddy's relationship with Dr. Levy. *Id.* Eight months later, in April 2015 Hansen passed all the medical tests and was told that he could receive a kidney as early as the following week. *Id.* ¶¶ 16-17.

After he passed the tests, a social worker then asked Hansen questions regarding who would care for him after the transplant and about his being repeatedly late to dialysis 9 months before. *Id.* ¶ 18. Hansen explained that the ambulance company he used for transport had been late due to circumstances out of his control. *Id.* The social worker requested to speak with Dr. Levy. *Id.* Hansen subsequently received a letter from Swedish that said he was "not compliant with UCLA," which meant he could not receive the transplant. *Id.* ¶¶ 18-19. Swedish claimed that it received information regarding Hansen's alleged non-compliance from Dr. Levy. *Id.* ¶ 19.

While trying to resolve the compliance issues, Hansen established that Dr. Levy was lying about Hansen's non-compliance; UCLA said that Hansen was 100% compliant. *Id.* ¶¶ 19-20. A social worker at Satellite Dialysis also confirmed Hansen's compliance. **[*6]** *Id.* ¶ 20. After Hansen proved that Dr. Levy lied regarding his compliance with UCLA, Dr. Levy decided to drop him as a patient and gave him 60 days to find a new doctor for dialysis but had "blackballed" Hansen, so Hansen could not secure dialysis from any provider in Marin County. *Id.* ¶ 21. All of the doctors on the referral list provided by Satellite refused to take Hansen as a patient. *Id.* ¶ 22. That left Hansen with one option, to receive dialysis on an emergency basis at the emergency room. *Id.*

Hansen contacted Anthem, his PPO, to find a doctor, but Anthem did not help because it viewed Medicare as Hansen's primary insurance and Anthem as secondary. *Id.* ¶ 23. Further, his primary doctor at Sutter Health would only refer him to Dr. Levy. *Id.*¶ 24.

Hansen ended up going to defendant MGH for emergency dialysis and was checked into MGH for 17 days. *Id.* ¶ 24. However, Dr. Levy runs the dialysis at MGH, which has led to Hansen being harassed at the hospital and being "turned away" and told to come back later because only Dr. Levy could decide when he received treatment. *Id.* ¶¶ 24-25. Hansen alleges that Dr. Levy had a conflict of interest after turning him away from Satellite and then **[*7]** regulating his receipt of dialysis at MGH. *Id.* ¶ 26. He complained about his mistreatment through his advocate at MGH and to the CEO of Satellite. *Id.* ¶ 27.

Hansen's ability to receive dialysis at MGH only on an emergency basis and often being turned away or accused by MGH personnel of "faking" his condition has led to a lack of adequate treatment and serious medical complications, including heart damage. *Id.* ¶¶ 28-30. He complains that Dr. Levy's lies about his status have prevented him from receiving a kidney transplant and prevented his recovery. *Id.* ¶ 33.

Hansen also alleges instances of harassment on the part of MGH related to his service dog. Specifically, the security guards harass him when he attempts to bring his service dog into the hospital during emergencies. The guards told Levy he needed to leave his dog in the car, but then the guards called the Humane Society to report the dog in the car. *Id.* ¶ 34. Hansen points to three specific visits. In June 2017, he left his service dog in his car with a water dish; the security guards called the Humane Society, which resulted in Hansen being harassed by the police and the Humane Society, as well as his car being towed. *Id.* ¶ 35. **[*8]** In July 2017, after giving his keys to security in order to move his car to covered parking, the security guards instead "smashed up" Hansen's car and again called the Humane Society to remove the dog. *Id.* ¶ 36. To get his dog back, Hansen had to sign a contract with the Humane Society that he would no longer leave the service dog in his car. *Id.*

The last incident that Hansen points to in his TAC occurred on September 9, 2017. After waking up with chest pains, Hansen drove himself to MGH, where he showed the security guards the contract with Humane Society. *Id.* ¶ 37. The security guard called the police, who, upon arrival, told Hansen that he must either, "1. Leave without getting medical attention. 2. Put the dog in the car. [or] 3. Get arrested and get medical." *Id.* A doctor informed the police officer that Hansen was too sick to go to jail and needed dialysis. *Id.* ¶ 38. After he received dialysis, Hansen was arrested and taken to jail; he was released because of his medical condition. *Id.* Hansen was transported back to MGH, where he underwent a psychological evaluation. *Id.* ¶ 39. Hansen was subsequently discharged and drove himself home. *Id.*

II. PROCEDURAL BACKGROUND

Hansen filed this **[*9]** action in the Superior Court of California, County of Marin on April 4, 2017, asserting five causes of action: (1) violation of California's Unfair Competition Law ("UCL"); (2) malpractice; (3) discrimination; (4) breach of contract; and (5) monopoly. Notice of Removal, Ex. A at 1 (Dkt. No. 1-1). In June 2017, the case was removed to this Court. After three sets of defendants filed motions to dismiss, Hansen filed a First Amended Complaint ("FAC") on July 5, 2017, asserting the same claims. Dkt. No. 17. The defendants subsequently moved to dismiss the FAC. At the hearing on these motions, Hansen informed me that he had filed a Second Amended Complaint ("SAC") the previous day. Given this, I granted the defendants' motion to dismiss, confirmed that Hansen knew of the assistance provided by the Court's Legal Help Center, and gave defendants 20 days to respond to the newly filed SAC. In October 2017, defendants moved to dismiss the claims contained in the SAC. After holding a hearing on the motions to dismiss in December 2017, I granted the motions and dismissed the SAC in its entirety. December Order, Dkt. No. 85.

I addressed each claim in turn and explained in detail what was either **[*10]** missing from Hansen's allegations or why the claims could not otherwise proceed. Concerning his malpractice claim, I explained that Hansen's SAC: (i) did not specifically identify how each of the defendants' had a duty to him that was breached by their conduct; (ii) Hansen needed to allege dates for each of the alleged acts of malpractice in order to fall within the applicable statute of limitations;[1] and (iii) with respect to CMS, he would need demonstrate the filing of an administrative tort claim of medical malpractice before a claim against CMS could go forward.

Regarding his discrimination claim, I noted that, from his allegations, I could not readily ascertain a plausible theory of discrimination. I explained that Hansen needed to allege that he received different treatment from the defendants on the basis of a protected classification (*e.g.*, race, disability status, gender). As to his breach of contract claim, I informed Hansen that a successful claim would need to allege the existence of a specific contract that each defendant had with him and how he, she, or it breached it.[2] For his monopoly claim, I explained that given the numerous antitrust laws, it was unclear what type of **[*11]** monopoly claim that Hansen sought to bring, but explained what he would need to allege in order to state a monopolization claim under the Sherman Act. Finally, regarding Hansen's UCL claim, I explained that Hansen did not "clearly identify an unlawful, unfair, or fraudulent business practice or act performed by any defendant" or allege sufficient facts that he suffered an economic loss caused by any of the defendants.

I granted Hansen leave to amend all of his claims, with the exception of the UCL and the breach of contract claims against CMS. Hanen subsequently filed his TAC, asserting the same five claims. Six groups of defendants again move to dismiss all claims against them for failure to state a claim (Dkt. Nos. 92, 93, 94, 95, 96, 97) and Satellite separately moves to dismiss for failure to timely serve. Dkt. No. 99.

III. ADDITIONAL PLEADINGS AND ALLEGATIONS

Since the motions to dismiss were filed, Hansen and the parties have submitted additional pleadings and notices. On April 5, 2018, Hansen filed a "motion for in home dialysis," arguing that he was entitled to less expensive and less painful in home dialysis, as opposed to the emergency dialysis he had been receiving for the **[*12]** past two years. Dkt. No. 114. Defendants generally oppose that "motion," pointing out that Hansen has not identified any legal requirement that would mandate in home dialysis, his existing claims do not seek and do not provide for this type of relief, and — for CMS — that Hansen has not exhausted the required administrative proceedings required under the Medicare Act. Dkt. Nos. 118 (Anthem), 119 (MGH), 120 (CMS), 121 (Levy, Estilo, Marin Nephrology), 122 (Swedish). In response, Hansen filed a number of declarations explaining his belief that in home dialysis would be cheaper and safer. Dkt. Nos. 123, 125. On June 11, 2018, Hansen filed a declaration in support of his oppositions, claiming he had been attacked by Dr. Levy while receiving dialysis at MGH, which is another reason he believes he should receive in home dialysis. Dkt. No. 126. On July 5, 2018, Hansen filed a declaration claiming that defendants are retaliating against him, including by refusing to prescribe his dialysis medications. Dkt. No. 127. In that same

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[1] I noted that the statute of limitations for medical malpractice is three years after the date of the injury or one year after the plaintiff discovers, or using reasonable diligence should have discovered, the injury. Cal. Code of Civ. Proc. § 340.5.

[2] I dismissed the breach of contract claim against CMS, as being within the exclusive jurisdiction of the United States Court of Federal Claims under the *Tucker Act, 28 U.S.C. § 1491(a)(1)*.

filing, Hansen filed a "motion" asking the Court to commit him to jail for two weeks, based on his belief that he would be able to secure better and more efficient **[*13]** dialysis if he were in jail. *Id.*

On May 15, 2018, defendants filed a notice of pendency of other action, identifying a case Hansen filed in Marin County Superior Court against defendants Levy, Estilo, Marin Nephrology, and MGH (as well as the Marin Sheriff's Department and towing companies) regarding Hansen's claims of "harassment," abuse of his service dog, and towing of his car when Hansen attempts to secure dialysis from MGH. Dkt. No. 124. In his pleadings here, Hansen complains about defendants' conduct in those state court cases, including defendants alleged failure to provide him notice of court hearings, failure to appear in state court, and defendants' efforts to have the state court declare Hansen a vexatious litigation. *See* Dkt. No. 127 at ECF pgs. 7-18.

On July 30, 2018, defendants filed a second notice of pendency of other action, noting that on June 25, 2018 Hansen had filed another lawsuit in Marin Superior Court against Levy, Estilo, Marin Nephrology, and MGH complaining about the care he was receiving at MGH and that Levy had improperly communicated with plaintiff directly, instead of having defense counsel communicate with Hansen. Dkt. No. 128.

On August 6, 2018, Hansen **[*14]** filed an opposition to defendants' notices of pendency, complaining again about the harassment of Hansen and his dog and the substandard care at MGH. Dkt. No. 129. On August 23, 2018, Hansen filed a declaration, asserting that defendants were unsuccessful in their attempts to get Hansen declared a vexatious litigant, and complained of more harassment and physical abuse of himself and his dog at MGH. Dkt. No. 131. On August 28, 2018, Hansen filed a declaration asking again for default to be entered against Satellite and for in home dialysis. Dkt. No. 132.

LEGAL STANDARD

Under *Rule 8(a)*, "[a] pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction . . .; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief." The short and plain statement requirement is not a heavy one, plaintiffs are not required to set out the facts supporting their claim in detail, but just a statement of the claim "'that will give the defendant fair notice of what the plaintiff's claim is and the grounds **[*15]** upon which it rests.'" *Lee v. City of Los Angeles, 250 F.3d 668, 679 (9th Cir. 2001)*.

That said, under *Federal Rule of Civil Procedure 12(b)(6)*, a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a *Rule 12(b)(6)* motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *See* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is facially plausible when the plaintiff pleads facts that "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See* *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citation omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *See* *Twombly, 550 U.S. at 555, 570*.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the Court accepts the plaintiff's allegations as true and draws all reasonable inferences in favor of the plaintiff. *See* *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *See* *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*.

Pro se pleadings must be held to a less stringent standard than those drafted by lawyers. **[*16]** *Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)*. Nevertheless, a complaint, or portion thereof, should be dismissed if it fails to set forth "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 554*. "[A] district court should not dismiss a pro se complaint without leave to amend unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012)* (quotations omitted).

DISCUSSION

I. HANSEN'S MOTION FOR DEFAULT AND SATELITTE'S MOTION TO DISMISS

As noted, on February 28, 2018, Hansen filed a motion for "default judgment" against Satellite, arguing that default judgment should be entered against Satellite because it did not respond to this case. Dkt. No. 90. Satellite separately moves to dismiss for failure to timely serve. Dkt. No. 99.

Entry of default judgment is not appropriate because Satellite has appeared, specifically to contest service. Even assuming that Satellite was properly served (which it was not, as addressed below) and assuming that Satellite did not respond within the appropriate time, default judgment will not be entered because default judgments "are generally disfavored" and "[w]henever it is reasonably possible, cases should be decided upon their merits." *Pena v. Seguros La Comercial, S.A., 770 F.2d 811, 814 (9th Cir. 1985)*. Hansen's **[*17]** motion for entry of default judgment is DENIED.

Satellite moves to dismiss because Hansen did not properly serve the initial complaint while the case was pending in Marin Superior Court; Hansen only attempted service by sending a copy by certified mail to the agent for service of process for Satellite Healthcare, Inc. Declaration of Susan Del Bene (Dkt. No. 100, ECF pgs. 7-8) ¶ 2. After the case was removed to this Court, Hansen filed the FAC which did not name Satellite Health, but instead named Satellite Dialysis as a defendant. Hansen sent a copy of the FAC by mail to Satellite Healthcare's San Jose corporate office, but Hansen never personally served a copy of the FAC on Satellite. *Id.* ¶¶ 3-5. Satellite informed Hansen by mail on August 27, 2017 and by follow up emails through February 2018 that Satellite's position is that it has not been properly served and that it does not consent to the jurisdiction of this Court. Dkt. No. 100 at ECF pgs. 17, 19-21, 28.

Hansen never served his SAC or his TAC on Satellite — either Satellite Healthcare, Inc. in San Jose or Satellite Dialysis in Greenbrae, California by any means. *See* Del Bene Decl. ¶¶ 3-5; Declaration of Nilda Flores (Dkt. No. **[*18]** 100 at ECF pgs. 23-23) ¶ 3.[3] Satellite argues that service by mail, without personal service, is not sufficient under *Federal Rule of Civil Procedure 4* or under California Code of Civil Procedure 416.10. Satellite also argues that, by the time it filed its motion to dismiss on March 14, 2018, the 90 day period for service provided by *Rule 4(m)* had passed and that this case be dismissed as to it because of the failure to timely serve. Dkt. No. 99.

Satellite is correct — both that service was not effective and that service was not timely — but its objections get it only so far. As for service, forcing a pro se litigant to go through the expense of personal service, in lieu of agreeing to accept service by mail and waiver, serves little obvious purpose except to force this case to continue. But that is Satellite's choice to make. Dismissal for failure to timely serve is not mandatory, and courts may grant additional time for service in their discretion. *Mann v. Am. Airlines, 324 F.3d 1088, 1091 (9th Cir. 2003)*. Additional time for service is appropriate in this case, especially because Satellite had actual notice of the lawsuit, there is no prejudice to Satellite, the delay by Hansen has not been excessive (because Hansen plausibly believed as a pro se litigant that service was accomplished), **[*19]** and not giving Hansen additional time to serve may result in statute of limitations issues for Hansen's claims against Satellite. *See* *Efaw v. Williams, 473 F.3d 1038, 1041 (9th Cir. 2007)*.

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[3] Hansen does not dispute this other than saying that he had Dr. Levy personally served at Satellite Dialysis in Greenbrae and "served" Satellite Healthcare via their agent for service of process. Dkt. No. 111. But the evidence Hansen submits shows that the original complaint was served on Satellite/Del Bene by certified mail and by personal service on Drs. Levy, Estilo and Marin Nephrology. Dkt. No. 112 at ECF pgs. 9-13.

Satellite's motion to dismiss for failure to personally serve process in this case is GRANTED. However, Hansen is given 60 days from the date of this Order to personally serve Satellite Dialysis. Hansen shall personally serve, meaning any person over the age of 18 hand deliver, a copy of his Third Amended Complaint along with a summons to Satellite Dialysis at 565 Sir Francis Drake Boulevard, Greenbrae, California.[4] That service, if accomplished, shall constitute valid service on defendant Satellite and allow this case to proceed against Satellite.

II. MERITS OF MOTIONS TO DISMISS

Turning to the merits of the other defendants' motions to dismiss, I address each claim in turn.

A. Malpractice

In order to sufficiently plead medical malpractice, a plaintiff must allege: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's **[*20]** negligence." *Jackson v. Johnson, 5 Cal. App. 4th 1350, 1355, 7 Cal. Rptr. 2d 482 (1992)*. For purposes of establishing breach of duty in a medical malpractice case, a plaintiff must show that the physician's performance fell before the "care ordinarily possessed and exercised by members of the medical profession under similar circumstances." *Avivi v. Centro Medico Urgente Med. Cntr., 159 Cal. App. 4th 463, 470, 71 Cal. Rptr. 3d 707 (2008)*.

1. Levy, Estilo, and MGH

Hansen alleges that Levy, Estilo, and MGH have not given him the medical attention that he needs. TAC ¶ 46. Specifically, he asserts that Levy refused to treat him and prevented his treatment by others while sabotaging Hansen's ability to get a transplant. Further, he contends that Levy decides when he receives dialysis at MGH. Concerning MGH, Hansen states that he was denied treatment on multiple occasions, resulting in heart damage. TAC ¶¶ 28-30, 37-38.[5]

As an initial matter, Hansen has a statute of limitations problem with respect to alleged acts of medical malpractice by the doctors or MGH. Any known alleged acts of malpractice related to his dialysis treatments (or refusal thereof) that occurred **prior to April 4, 2016** are barred.[6] However, as pleaded in his TAC, there are allegations with respect to Dr. Levy and MGH of incidents of deficient medical treatment occurring *after* April 4, 2016. TAC **[*21]** ¶¶ 21, 28-30.

There are very few mentions of what Dr. Estilo may have done with respect to Hansen and his treatment at either Satellite or MGH in the TAC. Specifically, Hansen alleges that Dr. Estilo, along with Dr. Levy, increased Hansen's dialysis time in 2014, causing Hansen to suffer. TAC ¶ 11. But that claim is barred by the statute of limitations.

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4 To the extent there is any ambiguity over whether Hansen intends to sue Satellite Dialysis, located in Greenbrae, California or the apparent corporate parent, Satellite Healthcare, Inc., any such ambiguity shall be resolved in Hansen's favor. "Satellite Dialysis" is listed in the TAC, has specially appeared in this action through counsel, and because Satellite Dialysis does not argue it is not the correct defendant (if properly served), I will consider Satellite Dialysis the appropriate defendant for Hansen's claims.

5 MGH contends that these allegations do not amount to specific allegations regarding a breach of the standard of care by any medical provider. MGH Mot. at 12. But Hansen alleges that on April 17, 2017 and September 4, 2017, healthcare providers at MGH turned him away without allowing him to receive dialysis, resulting in health complications and specific harms. Similarly, the allegations that Dr. Levy allegedly decides when Hansen receives dialysis and restricts his dialysis at MGH, construed broadly, also support a malpractice claim against Dr. Levy.

6 This case was filed in Marin County Superior Court on April 4, 2017. Dkt. No. 1 (Notice of Removal).

Hansen also generally alleges that Dr. Estilo, along with Dr. Levy and MGH, have not given him the medical attention he needs from 2013 through the present. *Id.* ¶ 46. That conclusory statement is too general keep Dr. Estilo in this case. Hansen needs to plead *facts* showing that Dr. Estilo has provided or supervised or otherwise impacted Hansen's access to or receipt of dialysis at some point on or after April 4, 2016. However, Dr. Estilo is mentioned in some of the summaries attached to Hansen's TAC as exhibits. *See, e.g.*, Dkt. No. 89 at ECF pg. 34 (detailing complaints made to Dr. Estilo by Hansen in October 2016 and Dr. Estilo's responses); ECF pg. 66 (detailing interaction with Dr. Estilo). Therefore, it appears that Hansen has (or at least intends to) complain of acts taken by Dr. Estilo with respect to his treatment at MGH. While **[*22]** a court is not required to plod through hundreds of pages of exhibits to ascertain whether a claim has been raised, the exhibits in this case do provide some clarity to support Hansen's medical malpractice claim against Dr. Estilo.

Reading the TAC generously, and as informed by the exhibits, Hansen has adequately alleged medical malpractice claims against Drs. Levy and Estilo and against MGH — but those claims are **limited** to events occurring **on or after April 4, 2016**. That means that Hansen cannot continue to pursue claims based on denials of treatment that occurred *prior* to April 4, 2016 because those claims are barred by the one year statute of limitations.

Dr. Levy, Dr. Estilo, and MGH's motion to dismiss the medical malpractice claim is DENIED with respect to claims arising on or after April 4, 2016.

2. Satellite and Marin Nephrology

Hansen alleges that Satellite did not give him customized dialysis, reused filters putting him in danger, and "blackballed" him from receiving treatment elsewhere. As an initial matter, it remains unclear when each of these acts occurred. It would appear that many, if not all of the actions by Satellite, fall outside the one year statute of limitations **[*23]** for medical malpractice claims because they occurred in 2014 and 2015. TAC ¶¶ 11-12. Hansen complains that he was receiving services from Satellite (as the "Dialysis center") as late as July 2016. TAC ¶¶ 21, 22, 28. But it is unclear why Hansen claims that Satellite breached its duty of care to him in terms of the medical services he was being provided by Satellite on or after April 4, 2016, or whether the only claim he has against Satellite is based on its refusal to treat him after July 2016. Hansen needs to allege specific facts about Satellite's acts on or after April 4, 2016 in order to maintain a medical malpractice claims against Satellite.

While Marin Nephrology is named as a defendant under each cause of action, Hansen alleges no facts about it. I cannot tell who that entity is or how it is related to the claims he alleges against the other defendants. Hansen's TAC sometimes refers to "The Dialysis Center." TAC ¶ 26. It is unclear which entity Hansen is referring to when he uses the phrase "The Dialysis Center," either Satellite or Marin Nephrology. If Hansen wants to proceed with claims against Marin Nephrology, he must identify facts explaining who Marin Nephrology is and **[*24]** what the entity or its employees did to him to make it liable for his claims.

This claim is DISMISSED with leave to amend as to Satellite and Marin Nephrology.

3. Swedish

Hansen alleges that Dr. Reddy at Swedish first believed Dr. Levy's information about Hansen's noncompliance in 2014, and then ignored his e-mails discrediting Dr. Levy's statements about Hansen's noncompliance, presumably because he was applying to work for Dr. Levy. *Id.* ¶ 48. The last mention of anything done by anyone at Swedish in Hansen's complaint was in July 2015; in the Exhibits to TAC, Hansen includes a March 17, 2016 letter from Swedish explaining that he was declined for a transfer because of certain criteria. ECF pg. 96. Even more significantly, Hansen's allegations establish that he knew the alleged reason why Swedish declined the transplant (Levy's lies and Reddy's connections to Levy) as far back as 2015 and that he had his social worker inform Swedish and its board of the same in February 2016. *Id.* ECF pg. 101; *see also id*. at ECF pg. 72 (plaintiff know of his theory prior to March 2016). Therefore, Hansen knew he would not receive a kidney back in 2015 and knew of the cause of any potential medical malpractice **[*25]** claim against Swedish no later than February or March 2016. Any malpractice claim against Swedish is barred by the one year statute of limitations.

This claim is DISMISED WITH PREJUDICE against Swedish.

4. Sutter Health & Anthem

The only specific allegations against Sutter Health and Anthem are that they would not refer him to any other doctors, presumably after he was cut off by Dr. Levy in July 2016. TAC ¶¶ 23-24, 44, 47. In his opposition brief regarding Sutter (Dkt. Nos. 105), Hansen complains about Sutter's failure of their duty to "provide a level of healthcare" by providing him with referrals. Dkt. No. 105.

Hansen's claim against Anthem is undermined by the allegation at paragraph 23 of the TAC that Anthem *did*, in fact, provide him with a list of 80 referrals. TAC ¶ 80. The larger problem for Hansen, however, is that there are no allegations in the TAC that a Sutter or Anthem doctor or other employee provided Hansen with inadequate medical *treatment*. A claim for medical malpractice depends upon the existence of a "physician/patient relationship" that creates a duty of care between the medical provider and the patient. *See, e.g.,* *Felton v. Schaeffer, 229 Cal. App. 3d 229, 234, 279 Cal. Rptr. 713 (1991)*. In none of Hansen's complaints or exhibits to date **[*26]** is there any indication that his claims are based on inadequate treatment provided by a Sutter or Anthem employee. Absent those types of allegations, and absent any case law providing that an insurer (as opposed to a medical practitioner employed by that insurer) can be liable for "medical malpractice," this claim is DISMISSED WITH PREJUDICE against Sutter and Anthem.

5. CMS

Hansen's only allegations regarding CMS are that CMS's regulations result in under-staffing at "dialysis centers" and that it has created a system where patients stay in dialysis instead of receiving transplants. TAC ¶ 49. He does not assert that any defendant accused of committing malpractice is a CMS employee. Absent evidence that an employee breached a duty of care in provision of medical services to Hansen, Hansen cannot state a medical malpractice claim against CMS.[7] In addition, even if he could amend to allege deficient medical treatment by an employee of CMS, Hansen has not alleged that he has exhausted his administrative remedies under the Federal Tort Claims Act ("FTCA"). As I explained in my prior Order, to seek damages against federal entity CMS for a malpractice claim, Hansen must have filed a claim under **[*27]** the FTCA. December Order at 5. Despite my directions, Hansen has not alleged he has filed a FTCA claim or otherwise exhausted his administrative remedies against CMS.

The malpractice claim against CMS is DISMISSED with prejudice.

6. Summary

Hansen's claims for medical malpractice may proceed against Dr. Levy, Dr. Estilo, and MGH, but those claims may only be based on acts that occurred on or after April 4, 2016. If Hansen can allege facts that a medical practitioner employed by Satellite or Marin Nephrology provided him deficient treatment on or after April 4, 2016, he is given leave to amend attempt to plead those facts in a Fourth Amended Complaint.

The medical malpractice claims against Swedish, Sutter, Anthem, and CMS are DISMISED WITH PREJUDICE.

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[7] As to CMS, Hansen alleges only that CMS has imposed regulations that encourage hospitals to fail to adequately treat patients. *Id.* ¶¶ 49, 50.

B. Discrimination

1. Generally

In my prior Order, I found that Hansen's allegations of "discrimination" were too vague to ascertain his theory of discrimination. December Order at 5. I advised him that one way in which he could state a claim for discrimination was to allege that he received different treatment from the defendants on an improper basis, such as his race, disability status, religion, or gender or some other qualifying reason, **[*28]** and how he was damaged by it. *Id.* In the TAC, Hansen adds some allegations, regarding the denial of the kidney transplant and being blackballed from medical treatment, but his amendments do not cure the deficiencies I identified for this type of discrimination claim. He does not claim and does not plead facts suggesting that he was discriminated against by any defendant, or provided unequal treatment by any defendant, based on a protected classification like race, religion, gender, etc. Therefore, his general allegations — that: (i) defendants denied him the medical attention he needed, and Dr. Levy blackballed him to deny him treatment; (ii) Dr. Levy and Dr. Reddy at Swedish denied him the transplant he needed; (iii) Dr. Levy, Satellite, and other dialysis centers discriminated against him and other patients, presumably by denying access to transplants, to make money; and (iv) Medicare failed to stand up to Dr. Levy — do not support a claim for "discrimination" under federal "civil rights" statutes. *See* TAC ¶¶ 52-59.[8]

2. ADA and Civil Rights

However, as added and somewhat clarified in the TAC, Hansen argues that he was discriminated against under the Americans with Disabilities Act because **[*29]** MGH barred his service dog and then harassed him and his dog by forcing him to leave his service dog in his car, leading to his inability to secure the medical treatment he needed and, in at least one set of events, his arrest. This conduct, according to Levy, violated the Americans with Disabilities Act ("ADA") and his "civil rights." *Id.* ¶¶ 34, 57.

Neither Dr. Levy nor MGH responded to the ADA and related discrimination allegations, in particular the allegations regarding Hansen's allegations regarding his apparent inability to bring his service dog with him for treatments. That failure, however, is due in part to the somewhat unclear nature of the allegations in the TAC and its reference to this claim as "discrimination" instead of a violation of the ADA. The defendants whose actions are implicated by Hansen's ADA/civil rights claim related to his service dog — namely Dr. Levy and MGH — will be given another attempt to respond to this claim now that it has been more clearly identified.

3. Dr. Estilo, Marin Nephrology, Satellite Dialysis, Anthem, Sutter, Swedish and CMS

As discussed above Hansen has not, despite being expressly advised to do so, alleged any facts suggesting that he **[*30]** was discriminated against based on a protected classification by any defendant. His remaining and now-clarified ADA/civil rights violation claims is related to his medical care at MGH and treatment of his service dog and is properly asserted only against MGH and by extension Dr. Levy through his work and "control" of dialysis at MGH.

Hansen's "discrimination" or ADA/civil rights claim, therefore, is DISMISSED WITH PREJUDICE against Dr. Estilo, Marin Nephrology, Satellite, Anthem, Sutter, Swedish, and CMS.

Because MGH and Dr. Levy have not had the opportunity to move to dismiss the ADA/civil rights claim related to Hansen's assertions that he was denied treatment with his service dog or retaliated against and harassed because of his service dog, they may separately challenge and move to dismiss this claim as discussed below.

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[8] The alleged fact that defendants "make more money" by providing dialysis rather than securing transplants for patients cannot, on its face and standing alone, support a discrimination or civil rights claim. TAC ¶¶ 54, 56.

C. Breach of Contract

As explained in my December Order, in order to plead a breach of contract, a plaintiff must allege: (1) the existence of a contract; (2) plaintiff's performance or excused non-performance; (3) defendant's breach; and (4) resulting harm to plaintiff. *Acoustics, Inc. v. Trepte Construction Co., 14 Cal. App. 3d 887, 913, 92 Cal. Rptr. 723 (1971)*. I explained to Hansen that in order to state his claim for breach of contract, he needed "to allege **[*31]** the contract that each defendant had with him and how he, she or it breached it." December Order at 6. Presumably in response to this, Hansen adds an allegation that he "entered into wri[t]ten agreements that change yearly due to their requirements." TAC ¶ 60. He does not identify which defendants he entered into these yearly contracts with, although he explains that their breaches "have cost me a kidney transplan[t], good health, and millions in lost wages, and pain and suffering to be proven." *Id.* He explains that "all" were "contracted to work together" to help him get a kidney while getting "quality health care" and they all fell short, and Hansen seeks a kidney as a form of relief. *Id.*, ¶¶ 61-62.

As to allegations regarding the kidney transplant, there are none showing that Swedish was bound by written contract to provide Hansen a kidney, and the exhibits Hansen includes in his TAC show that there was no written agreement to provide him a kidney. *See, e.g.*, TAC and exhibits at ECF pgs. 96, 101. This claim cannot proceed against Swedish.

More generally, Hansen has not alleged the existence of specific written contracts that would make any other defendant liable for failure to get **[*32]** him a kidney transplant. No facts in any of his complaints plausibly suggest that such a contract existed.

Nor are there are plausible allegations that either Dr. Levy and Dr. Estilo entered into a written contract with Hansen to provide him a kidney or a contract to provide medical services, much less how those particular contracts were breached. There is no allegation or plausible inference that Satellite, Marin Nephrology, or MGH entered into a contract with Hansen (as opposed to a contract with Hansen's insurance providers or Medicare) to provide him a kidney or medical services, much less how the specific contracts were breached.

Hansen does allege that he had secured insurance coverage through Sutter and Anthem. The existence of written contracts governing the provision of insurance benefits by those defendants to plaintiff are, therefore, plausibly suggested. But Hansen's theory of how Sutter or Anthem breached those plausible insurance contracts is not clear. If his theory is that they failed to provide him a kidney, that theory is simply not plausible. If his theory is that they failed to provide adequate access to health care under their insurance contracts, that, plausibly, **[*33]** might support a breach of contract claim.

Swedish and CMS are dismissed from this claim WITH PREJUDICE,[9] and the breach of contract claim is DISMISSED WITH LEAVE TO AMEND regarding the other parties. Hansen is given **one more chance** to identify the specific written contracts that he alleges have been breached with the following defendants: Dr. Levy, Dr. Estilo, Marin Nephrology, Satellite, Anthem and Sutter. Hansen must identify each contract with each defendant by name or subject matter, and then explain his theory as to why each defendant breached each identified contract.

D. Monopoly

In the December Order, I noted that it was unclear what type of monopoly claim and under what ***antitrust law*** Hansen was attempting to bring. December Order at 6. In the TAC, Hansen states that he is bringing his monopoly claim pursuant to *section 4 of the Clayton Act* as well as *sections 1* and *2 of the Sherman Act*. TAC ¶ 71. Even though Hansen has identified these particular laws, his claims are still deficient.

[9] In his TAC, Hansen realleges his breach of contract claim against CMS. This cause of action was dismissed with prejudice in the December Order.

To state a claim under both *section 1* (monopolization) and *section 2* (attempted monopolization) of the Sherman Act as well as *section 4* of the Clayton Act, a plaintiff must allege an antitrust injury. *See Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)* ("causal antitrust injury, is an element **[*34]** of all antitrust suits brought by private parties seeking damages under *Section 4 of the Clayton Act*"); *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir.1988)* (noting that both *sections 1* and *2 of the Sherman Act* requires allegation of antitrust injury).[10] For purposes of establishing "a causal antitrust injury," a plaintiff must demonstrate unlawful conduct that causes injury to the plaintiff and that the injury is the type of injury the law was intended to prevent and is the very reason the conduct is unlawful. *Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)*. "The alleged violation must cause injury to competition beyond the impact on the claimant under *section 1*, and must destroy competition and cause antitrust injury under *section 2*." *McGlinchy, 845 F.2d at 811*.

Hansen fails to demonstrate how his alleged injuries—loss of a kidney, loss of income, and a longer and healthier life— are antitrust injuries. Nothing in the facts alleged show that Hansen's alleged injury flows from any anti-competitive behavior that restrained competition in the dialysis market in Marin County or more broadly (or sought to restrain competition). Nor does he allege any facts showing an injury from the alleged agreement to restrict his dialysis treatment impacted anyone other than himself, as required to bring a monopoly claim. Given this, Hansen has not alleged a **[*35]** monopoly or attempted monopoly claim and cannot amend to plausibly do so. This claim is DISMISSED WITH PREJUDICE.[11]

E. California's Unfair Competition Law

Although Hansen's UCL claim is his first cause of action, I address it last because he must allege an unlawful, unfair, or fraudulent business act or practice. *Lippitt v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1043 (9th Cir.2003)*. Unlawful, unfair, and fraudulent are three separate prongs of the UCL. *Cel—Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. "Unlawful" practices are any practices forbidden by law. *People v. McKale, 25 Cal.3d 626, 632, 159 Cal. Rptr. 811, 602 P.2d 731 (1979)*. "Unfair" simply means any practice whose harm to the victim outweighs its benefits. *Motors, Inc. v. Times Mirror Co. 102 Cal. App. 3d 735, 740, 162 Cal. Rptr. 543 (1980)*. "Fraudulent," as used in the statute, does not refer to the common law tort of fraud but only requires a showing members of the public "are likely to be deceived." *Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1267, 10 Cal. Rptr. 2d 538, 833 P.2d 545 (1992)*.

As discussed, other than the medical malpractice claim against Dr. Levy, Dr. Estilo, and MGH, none of Hansen's other claims have been adequately alleged.[12] I am granting limited leave to amend with respect to the malpractice claim (against Marin Nephrology and Satellite), as well as the breach of contract claim (against Dr. Levy, Dr. Estilo, Marin Nephrology, Satellite, Anthem and Sutter). Accordingly, I will address whether Hansen has alleged enough to state a UCL claim against those defendants when **[*36]** considering his Fourth Amended Complaint.

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[10] In general: "To establish a *section 1* violation under the Sherman Act, a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., 'antitrust injury')." *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988)*. "To establish a *section 2* violation for an attempt to monopolize, a plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury." *Id.*

[11] I also note that Hansen fails to allege facts to plausibly support that defendants had an agreement to monopolize the dialysis market (or kidney transplant market) in Marin County or more broadly. Other than the specific allegations that he was blackballed by Dr. Levy from receiving dialysis (which cannot support antitrust injury and are contradicted by Hansen's own allegations that others can receive dialysis at Kaiser facilities, TAC ¶ 69) his other allegations (that defendants conspired to require more expensive dialysis instead of transplants for patients) are far too general to plausibly support this claim.

[12] As noted, I am not deciding at this time whether Hansen has adequately alleged or can allege his ADA/civil rights claim against Dr. Levy or MGH, and instead allowing those defendants to challenge that claim in a further motion to dismiss.

All claims against Swedish have been dismissed with prejudice. There are no separate or additional facts alleged against Swedish which could support a UCL claim against it. The UCL claim is likewise DISMISSED WITH PREJUDICE as to Swedish.[13]

III. MOTION FOR IN HOME DIALYSIS

Finally, Hansen's motion for in home dialysis is DENIED. In his motion, Hansen identifies no authority establishing his right to in home dialysis. However, I will treat Hansen's motion as a request for specific relief related to his surviving claims (for now, medical malpractice, ADA/civil rights, breach of contract, and UCL). I am not determining at this juncture whether that form of relief would be appropriate for any of the currently remaining causes of action.

CONCLUSION

For the reasons discussed above, Hansen's motion for entry of default judgment against Satellite is DENIED. Satellite's motion to dismiss for failure to personally serve process in this case is GRANTED. However, Hansen is given 60 days from the date of this Order to personally serve Satellite Dialysis with a summons and a copy of the most current complaint.

Defendants' motions to dismiss are GRANTED in part and **[*37]** DENIED in part.

All of the claims against CMS and Swedish are GRANTED WITH PREJUDICE. Those defendants are no longer in this case.

The medical malpractice claims against Swedish, Sutter, Anthem, and CMS are DISMISSED WITH PREJUDICE. The malpractice claims against Satellite and Marin Nephrology are DISMISSED WITH LEAVE TO AMEND. The malpractice claims arising on or after April 4, 2016 against Dr. Levy, Dr. Estilo, and MGH may proceed.

The ADA/discrimination claim is DISMISSED WITH PREJUDICE as to Dr. Estilo, Marin Nephrology, Satellite, Anthem, Sutter, Swedish, and CMS. Hansen's ADA/discrimination claim against Dr. Levy and MGH, as clarified, is allowed to proceed but those defendants may move to dismiss that claim after Hansen files his Fourth Amended Complaint, or if Hansen does not choose to file a Fourth Amended Complaint, within forty (40) days of the date of this Order.

The breach of contract claim is DISMISSED WITH LEAVE TO AMEND as to Dr. Levy, Dr. Estilo, Marin Nephrology, Satellite, Anthem and Sutter. It is DISMISSED WITH PREJUDICE as to Swedish.

The monopoly claim is DISMISSED WITH PREJUDICE as to all defendants.

The UCL claim is DISMISSED WITH PREJUDICE as to Swedish, but DISMISSED **[*38]** WITH LEAVE TO AMEND against Dr. Levy, Dr. Estilo, Marin Nephrology, Satellite, Anthem and Sutter.

If Hansen wishes to attempt to amend as allowed, his Fourth Amended Complaint must be filed within twenty one (21) days of the date of this Order.

IT IS SO ORDERED.

Dated: September 24, 2018

/s/ William H. Orrick

William H. Orrick

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[13] The UCL claim against CMS was dismissed with prejudice in the December Order.

United States District Judge

Northshore Sheet Metal, Inc. v. Sheet Metal Workers Int'l Ass'n, Local 66

United States District Court for the Western District of Washington

September 24, 2018, Decided; September 24, 2018, Filed

NO. 15-CV-1349 BJR

Reporter
2018 U.S. Dist. LEXIS 163327 *; 2018 WL 4566049

NORTHSHORE SHEET METAL, INC., and JEFFREY D. MEYER, an individual, Plaintiffs, v. SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 66, Defendant.

Prior History: *Northshore Sheet Metal, Inco v. Sheet Metal Workers Int'l Ass'n, Local 66, 2015 U.S. Dist. LEXIS 194912 (W.D. Wash., Sept. 4, 2015)*

Core Terms

allegations, general contractor, conspiracy, Sherman Act, exemption, bid, competitors, signatories, nonstatutory, targeting, motion to dismiss, antitrust, boycotts, direct competitor, employees, threats, picketing, projects, concerted, combine, compete, conspiracy to monopolize, antitrust liability, restraint of trade, cause of action, anti trust law, labor dispute, pleadings, entities, business relationship

Counsel: **[*1]** For Northshore Sheet Metal Inc., Plaintiff: Christopher L. Hilgenfeld, DAVIS GRIMM PAYNE & MARRA, SEATTLE, WA.

For Sheet Metal Workers International Association, Local 66, Defendant: Paul More, Richard G McCracken, LEAD ATTORNEYS, PRO HAC VICE, MCCRACKEN STEMERMAN & HOLSBERRY, LLP, SAN FRANCISCO, CA; Daniel Hutzenbiler, MCKANNA BISHOP JOFFE, LLP, PORTLAND, OR.

Judges: HONORABLE Barbara Jacobs Rothstein, United States District Judge.

Opinion by: Barbara Jacobs Rothstein

Opinion

ORDER ON MOTION TO DISMISS THIRD AMENDED COMPLAINT AND MOTION TO STRIKE

I. INTRODUCTION

This matter comes before the Court on the Motion to Dismiss Plaintiffs' Third Amended Complaint ("TAC") filed by Defendant Sheet Metal Workers International Association, Local 66 ("Local 66"). (Def's Mot. Dismiss, ECF No. 131). Local 66 seeks dismissal of the Second, Third, Fourth, and Fifth Claims for relief in the TAC. Local 66 also raises a constitutional challenge to the First Claim for Relief. The motion is opposed by Plaintiffs Northshore Sheet Metal, Inc. ("Northshore") and its President, Jeffrey D. Meyer ("Meyer").[1] Northshore combined its response with a motion to strike both the Declaration of Paul More and certain pages of Local 66's motion over the **[*2]** Court's 15-

[1] The Court refers to Plaintiffs Northshore and Meyer collectively as "Northshore" in this decision.

page limit. (Resp., ECF No. 141). Having considered the pleadings filed in support and in opposition to the motions, the Court rules as follows.

II. BACKGROUND

A. Preliminary Motion to Strike

Northshore requests that the Court strike the Declaration of Paul More and related attachments as an improper reference to material outside of the pleadings. (Resp. 2-3, ECF No. 141). Northshore also requests that the Court strike page 16 of the motion and the incorporation by reference of certain pages of a prior motion to dismiss as in violation of the Court's page limit requirement. (*Id.* at 3).

The court's determination of the sufficiency of a complaint under *Rule 12(b)(6)* is ordinarily limited to the complaint itself without reference to any evidence outside of the pleadings. *Cervantes v. City of San Diego, 5 F.3d 1273, 1274 (9th Cir. 1993)*. The court may not rely on materials outside of the pleadings or take judicial notice of disputed factual matters. *Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001)*. Despite the general rule, a court may consider materials properly attached to the complaint or matters of judicial notice. *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*.

Local 66 argues that the Court should consider the More Declaration and attached discovery requests because the authenticity of these documents is not in dispute. (Reply 3:17-19, ECF No. 143). **[*3]** This argument is unavailing. The purpose of a *Rule 12(b)(6)* motion is to test the sufficiency of a complaint, not to determine if the plaintiff has received enough discovery. Although the Court is not required to ignore the procedural posture of the case, whether Northshore has received some specific quantum of discovery is not relevant given the Court's legal conclusions as to the sufficiency of the claims in the TAC. It is not appropriate for the Court to consider the Declaration since it is not part of the TAC. The Court grants the motion to strike the More Declaration and the attached documents.

Although the Court will not consider the More Declaration, it will consider the additional text over the 15-page limit imposed by the Court's Standing Order for Civil Cases. (ECF No. 81). Northshore's own response totals some 38 pages. To Northshore's credit, it did request leave to file an overlength brief based on the "extraordinary complexity" of the issues presented in this case. (Mtn. for Leave, ECF No. 138). Ideally, Local 66 should have made a similar request prior to filing the motion to dismiss. In order to reach the merits of the motion and to avoid any unfairness in striking the last page **[*4]** of Local 66's motion while allowing some 23-pages of Northshore's response, the Court denies the request to strike the additional pages.

B. Factual Background

Local 66 is a labor union representing workers located in Western Washington. (TAC 2:17-21, ECF No. 128). Northshore is an Architectural Sheet Metal ("ASM") contractor doing business in Western Washington with Plaintiff Meyer serving as its president. (*Id.* at 2:9-16). Northshore provides fabrication and assembly of ASM on major construction and building products throughout Western Washington.[2] (*Id.* 3:3-7). To obtain work, Northshore bids on contracts offered by general contractors in the region and is in competition with a number of companies that currently have Collective Bargaining Agreements ("CBAs") with Local 66. (*Id.* at 8-9).

From June 1, 2009 through May 31, 2012, Local 66 had a CBA with Northshore. After the CBA expired, the parties sought to resolve issues arising from the expired CBA through settlement negotiations. (*Id.* 9:6-10). Northshore and Local 66 reached a settlement agreement on January 12, 2015. (*Id.* 9:11-14). The settlement agreement contained a binding arbitration clause and was intended to resolve the issues among Northshore, **[*5]** Local 66, and a trust fund associated with the union that administered a market recovery program ("Equity Fund"), which Northshore's employees had participated in previously. (*Id.* 9:18-22).

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[2] The TAC defines a "major construction and building project" as any job that is $250,000 or greater.

Following execution of the settlement agreement, Northshore and Local 66 became embroiled in a new dispute involving fringe benefits allegedly owed to Northshore's employees. (TAC 11:1-4, ECF No. 128). The TAC alleges that Local 66 and its members began picketing Northshore at various job sites where Northshore held contracts to perform work. Northshore alleges that the picketing was part of a campaign by Local 66 designed to force general contractors and owners of various projects to cease doing business with Northshore. (*Id.* 11:5-8). As the dispute grew, Northshore sought and obtained a temporary restraining order to prevent a strike of its workers called for by Local 66 related to the fringe benefits. (TRO, ECF No. 21). The restraining order did not cover other conduct, such as picketing.

On October 26, 2016, Northshore's employees voted to decertify Local 66 as their bargaining representative. Northshore subsequently entered into a CBA with the Pacific Northwest Regional Council of Carpenters **[*6]** ("Carpenters") and this new association currently represents Northshore's employees as well as those of other ASM companies in the region. (TAC 15:4-6, ECF No. 128).

As a result of the fringe benefit dispute and eventual decertification, Northshore alleges that Local 66 is attempting to drive it and other Carpenters' signatories from the ASM market through threats of picketing and economic boycotts conveyed to general contractors and owners of construction projects. (*Id.* 12:15-25). Northshore further avers that Local 66 conspired with certain Northshore competitors that were Local 66 signatories to share bid information on various jobs in order to prevent Northshore and other Carpenters' signatories from successfully obtaining ASM work. (*Id.* 17:9-15). In furtherance of this conspiracy, Northshore additionally alleges that Local 66 used its influence over a union Equity Fund to direct targeted job money designed to help Local 66 members compete against non-union labor in a manner designed to harm Northshore and in breach of the 2015 settlement agreement resolving issues between Northshore and the Equity Fund. (*Id.* 16:8-14). Based on the allegations, the TAC claims that Local 66's conduct **[*7]** violates *§ 303* of the *Labor Management Relations Act ("LMRA")*[3], *§§ 1* and *2* of the *Sherman Antitrust Act*[4], and that Local 66's actions constitute the torts of interference with a business relation and civil conspiracy under Washington State law.

III. Legal Standard

Local 66 requests dismissal of Northshore's Second, Third, Fourth, and Fifth Claims for relief with prejudice on the basis that Northshore has failed to state a claim upon which the court can grant relief pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. Local 66 also raises a constitutional challenge to the First Claim but does not specifically argue for dismissal for failure to state a claim. For the following reasons, the Court grants in part and denies in part the motion to dismiss.

A motion to dismiss for failure to state a claim may be granted only when there is no cognizable legal theory to support the claim or when the complaint lacks sufficient factual allegations to state a facially plausible claim for relief. *Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir. 2010)*. The complaint will survive a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is facially plausible if the plaintiff "pleads factual content that allows the court to draw the reasonable inference **[*8]** that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009)* (internal quotation omitted).

When deciding a motion to dismiss, the court must accept the factual allegations in the complaint as true and construe the pleadings in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co., 668 F.3d*

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[3] *29 U.S.C. § 187*

[4] *15 U.S.C. §§ 1* & *2*

1136, 1140 (9th Cir. 2012). In the context of conspiracy claims under the Sherman Act, a complaint relying on parallel conduct must allege more than "conspiracy," as this is the ultimate legal conclusion, and must provide some additional factual assertions of an illegal agreement to plausibly state a claim. *See* Twombly, 550 U.S. at 566. Though not subject to a heightened pleading standard, courts must remain cognizant of the significant legal expense accompanying an antitrust lawsuit. Twombly, 550 U.S. at 558.

IV. Discussion

A. Claims under § 1 of the Sherman Act for Group Boycott and Kickback Conspiracy.

Claims Two and Three of the TAC focus on violations of § 1 of the Sherman Act. The Sherman Act prohibits "any contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. To state a claim under **[*9]** § 1, the complaint must allege sufficient facts to plausibly suggest "(1) an agreement or conspiracy among two or more persons or distinct business entities, (2) by which the persons intend to harm or restrain competition, and (3) which actually injures competition." *Les Schockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507 (9th Cir. 1989)* (internal quotation omitted). Some agreements are subject to *per se* liability because they are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Nat'l Soc. of Prf'l Eng'rs v. United States, 435 U.S. 679, 692 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. In other circumstances, the court must evaluate a claim under the rule of reason, which requires a more searching analysis, with the court weighing "the anticompetitive effects and the procompetitive effects or business justification advanced for the challenged restraint to determine whether it is unreasonable." Les Schockley Racing, 884 F.2d at 507.

1. The Group Boycott Claim.

In large part, Local 66 focuses on perceived deficiencies in the claim based on its visualization of a "hub-and spoke" conspiracy because the TAC fails to allege coordinated efforts between parallel actors in order to form a "rim" to the conspiratorial wheel. *See In re Musical Instruments and Equip. Antitrust Litig., 798 F.3d 1186, 1192 (9th Cir. 2015)* (traditional hub-and-spoke conspiracy requires a hub, spokes, and a rim). Vertical agreements that restrain trade are evaluated **[*10]** under the rule of reason analysis while horizontal agreements are considered *per se* violations. *Id. at 1192 n. 3*. It is therefore favorable to a plaintiff to allege a *per se* restraint to avoid the more searching analysis and economic impact requirements of the rule of reason standard. The Court finds that the TAC meets the standard for a *per se* violation of the Sherman Act.

In the TAC, each "spoke" represents an agreement between Local 66 and one of the project owners or general contractors to not hire Northshore or to remove Northshore from jobs it had already bid on. The spokes are also comprised of direct competitors of Northshore. According to Local 66, even if the TAC contains sufficient allegations of vertical agreements, it fails to allege the necessary horizontal agreements in order to state a claim. The Court is not convinced.

Local 66's hyper-technical reading of the necessary elements of a § 1 claim based on *Musical Instruments* is not supported by the case law or by the *Musical Instruments* case itself. The Ninth Circuit Court of Appeals in *Musical Instruments* affirmed dismissal where a complaint failed to plausibly state that parallel action between certain manufacturers was anything more than **[*11]** similar responses to the same market pressure. *Musical Instruments, 798 F.3d at 1196*. The Ninth Circuit did not reject the whole notion of an antitrust violation based on a need to show a complete hub-and-spoke arrangement. To the contrary, the Ninth Circuit cautioned that "homespun metaphors for complex economic activities go only so far. Section 1 prohibits agreements that unreasonably restrain trade, no matter the configuration they take or the labels we give them." *Id. at 1192*. Even if an agreement is purely a collection of vertical agreements, that may result in a violation of the Sherman Act. *Musical Instruments, 798 F.3d at 1192 n. 3* (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 898-99, 127 S.Ct. 2705, 168 L. Ed. 2d 623 (2007)*). Where the complaint relies solely on circumstantial evidence, the plaintiff must provide enough additional information to exclude the possibility that the defendant acted independently of the other alleged co-conspirators through conduct that is merely permissible competitive conduct. To show conspiracy through circumstantial evidence, the complaint must allege "plus factors" such as "price parallelism, product uniformity, exchange of price information, and opportunity to meet to form anti-competitive policies." Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522, 525-26 (9th Cir. 1987). Bid rigging is a *per se* violation of the Sherman Act. United States v. Rose, 449 F.3d 627, 630 (5th Cir. 2006).

i. The TAC plausibly alleges a violation of the Sherman Act.

The TAC **[*12]** alleges that both prior to, and following termination of Local 66 as the exclusive collective bargaining representative for Northshore's employees, Local 66 engaged in a series of concerted actions designed to eliminate Northshore from the competitive market. In support of the conspiracy claim, the TAC includes various allegations that certain representatives of Local 66 conveyed threats to the City of Seattle, the Seattle Building and Trades Council ("Seattle BTC"), and a number of general contractors that employ or could employ Northshore on large regional projects. The TAC alleges that the goal of these threats was to further Local 66's attempts to eliminate the Northshore from the market. Local 66 posits that the complaint fails to allege a cognizable claim because any parallel action by the various owners and general contractors is "the rational business conduct of seeking to avoid a labor dispute on their jobsites . . . ." (Mtn. to Dismiss 5:23-24, ECF no. 131). The Court disagrees that this is sufficient to avoid the plausible allegations of a conspiracy to exclude Northshore in the TAC.

Although the TAC fails to allege any specific horizontal agreement between the owners or **[*13]** general contractors to exclude Northshore from the market, it does include sufficient allegations for the Court to conclude that a group of direct competitors comprising at least 70% of the ASM market worked with Local 66 and certain general contractors to exclude Northshore and other Carpenters' signatories from ASM jobs. For instance, the TAC alleges that Northshore was removed from the Pier 66 project after Local 66 and Seattle BTC worked together to pressure the Port of Seattle and its general contractor, Turner, to remove Northshore from the project and replace it with a direct competitor associated with Local 66. (TAC 22:8-21, ECF No. 128). Removal of Northshore would not provide an economic benefit for the general contractor because the new ASM contractor would not offer a better price under the project labor agreement. (*Id.* 22:1-7). The TAC also alleges that certain general contractors have refused to even provide Northshore and other Carpenters' signatories with bid opportunities, despite using these entities for work in the past. (TAC 24:4-9, ECF No. 128). Finally, the TAC includes numerous instances where Local 66 contacted general contractors (or used a Northshore competitor **[*14]** to make contact) demanding removal of Northshore from projects. Although the TAC does not indicate that the general contractors specifically understood that all of them were to exclude Northshore, it does plausibly allege that a considerable number of general contractors understood and agreed to not allow Northshore to compete.

Although most of the allegations focus on vertical agreements between Local 66 and individual general contractors to exclude Northshore from projects, the TAC also includes sufficient facts for the Court to determine that a horizontal agreement between Northshore's ASM competitors existed and that the owners and general contractors were used as part of the overall conspiracy. Even if the owners of general contractors participated unwillingly, or for different reasons than Local 66, that does not insulate the conduct from antitrust scrutiny and does not mean the plaintiff fails to state a claim if the complaint successfully alleges acquiescence in a scheme with the effect of restraining trade. *See* Dickson v. Microsoft Corp., 309 F.3d 193, 205 (4th Cir. 2002). The TAC plausibly alleges, through identity of parties, project, and date, that Northshore competitiors McKinstry, Architectural Sheet Metal, PSF Mechanical, Kenco **[*15]** Construction, and MD Exteriors, had knowledge of and jointly participated in Local 66's efforts coordinate project bids. On at least one occasion, Northshore's competitors did in fact coordinate bids for a project (Interlake High School Classroom Addition). (TAC 17:20-22, ECF No. 128).

Taken together, the TAC states a claim under § 1 of the Sherman Act based on the attempted exclusion of Northshore from the relevant market. Contrary to Local 66's assertion, the TAC plausibly states a claim by identifying the who, what, where and when of the conspiracy. In addition to the factual allegations related to the general contractors and competitors, the TAC further alleges that two of Local 66's employees, Tim Carter and Aaron Bailey, are also trustees of the Organizational Trust that operates or has control over the Equity Fund and is alleged to have the ability to direct job targeting funds to certain projects. (*Id.* 16:11-13). The TAC also plausibly alleges that Local 66 had the opportunity to meet at various times to form the anti-competitive behavior, such as the meeting on or about October 27, 2016, the day after Local 66 was decertified by Northshore's employees as their bargaining representative. **[*16]**

Given the plausible allegations of concerted action to exclude Northshore and other Carpenter signatories from the relevant market, it is incumbent on Local 66 to point to some plausible pro-competitive reason for the parallel actions. All the motion to dismiss points to is that the owners and general contractors may have acted rationally in attempting to avoid the labor disputes threated by the Local 66. This is not the sort of legitimate business concern that could undercut other circumstantial evidence of an antitrust violation. *See* *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S.Ct. 705, 3 L. Ed. 2d 741 (1959)* ("Group boycotts, or concerted refusals by traders to deal with other traders . . . have not been saved by allegation that they were reasonable in the specific circumstances"). "[E]ven purportedly involuntary participation in a conspiracy to boycott can still be viewed as an illegal boycott, since coerced but knowing acquiescence in an illegal scheme is still generally viewed as actionable participation." William Holmes and Melissa Mangiaracina, ***Antitrust Law*** Handbook, Group Boycotts Generally § 2:16 (2017). Local 66's position is untenable, essentially claiming that where it is successful in pressuring a job owner or general contractor to exclude a competitor **[*17]** from the market no antitrust action may stand. If the Court were to adopt this approach it would undercut antitrust liability just by virtue of the effectiveness of the threat even if the threat has no legitimate labor purpose.

ii. Local 66's alleged conduct is not exempt from antitrust liability.

As a secondary argument, Local 66 contends that even if it did exert illegal pressure against the various owners and general contractors to exclude Northshore from the market, the threatened conduct is exempt from antitrust liability based on the *Clayton* and *Norris-LaGuardia Acts*. *15 U.S.C. § 17*; *29 U.S.C. §§ 101 et seq.* The Court does not agree.

In general, an organized labor union may engage in those actions that otherwise might violate ***antitrust law*** based on either a statutory or nonstatutory exemption. *Granddad Bread, Inc. v. Cont'l Baking Co., 612 F.2d 1105, 1109 (9th Cir. 1979)*. The statutory exemption is subject to an important limitation—the organized labor union must not combine with nonlabor groups. *Phoenix Elec. Co. v. National Elec. Contractors Ass'n, 81 F.3d 858, 860 (9th Cir. 1996)*. The TAC is replete with plausible allegations that Local 66 combined or attempted to combine with nonlabor entities in order to accomplish its alleged goal of eliminating Northshore from the relevant market. Therefore, the statutory exemption does not apply.

The more difficult question is whether Local **[*18]** 66's conduct is covered by the nonstatutory exemption from antitrust liability. The nonstatutory exemption applies to an agreement to restrain trade when: "(1) the restraint primarily affects the parties to the agreement and no one else, (2) the agreement concerns wages, hours, or conditions of employment that are mandatory subject of collective bargaining, and (3) the agreement is produced from bona fide, arm's length collective bargaining." *Phoenix Elec. Co., 81 F.3d at 861* (citing *Continental Maritime of San Francisco v. Pacific Coast Metal Trades Dist. Council, 817 F.2d 1391 (9th Cir. 1987))*. The purpose of this exemption is to facilitate the ultimate goal of "meaningful collective bargaining" without subjecting those actions to antitrust scrutiny and thereby allow judicial use of ***antitrust law*** to resolve labor disputes. *California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1125 (9th Cir. 2011)*. The *Safeway* panel engaged in a thorough discussion of the history and evolution of the nonstatutory exemption, which makes clear that the further an alleged restraint ventures from operating primarily in the labor market to instead impact the business market, the less likely it is that the nonstatutory exemption should insulate the conduct. *Safeway, 651 F.3d at 1129-1131*.

In this case, Local 66's alleged conduct impacted more than just Local 66 and Northshore. The allegations include conduct of multiple direct competitors, owners, general **[*19]** contractors, and alleged harms against not just Northshore, but other Carpenters' signatories as well. Some of this conduct occurred long after Local 66 was decertified as the bargaining representative for Northshore. The end result is a plausible allegation that the Local 66 was not in the throes of a legitimate labor dispute, but instead was engaging in actions designed to go outside of the traditional confines of a labor dispute to fix the market against Northshore and the Carpenters' signatories. This is anything but the narrow two-party labor dispute envisioned by the non-statutory exemption. The "agreement" at issue here was not part of a collective bargaining effort but is alleged to consist of the concerted effort of Local 66 to force or obtain the participation of project owners, general contractors, and other direct competitors to exclude Northshore from jobs and essentially eliminate competition from the ASM market. As alleged in the TAC, the agreement has nothing to do with collective bargaining, but instead involved a scheme of retribution, utilizing actions inherently antithetical to competitiveness, such as bid rigging.

Local 66 attempts to narrowly define its conduct **[*20]** as merely protected incidental secondary picketing of a few employers. First, the scope of the threats plausibly alleged by the TAC appear to violate the prohibition on secondary picketing. *See NLRB v. Retail Store Emp. Union, Local 1001, 447 U.S. 607, 616, 100 S.Ct. 2372, 65 L. Ed. 2d 377 (1980)*. Second, the primary thrust of the allegations is a concerted effort to manipulate the market to harm Northshore. The core allegations of the TAC involve a concerted effort between direct competitors and Local 66 to outright exclude Northshore from working in Western Washington, and, where unable to do so by direct threats, to rig bidding on projects in a manner that would prevent Northshore from obtaining work. The bid rigging was combined with threats of picketing and economic boycotts designed to remove Northshore from present jobs where it was the winning bid, and to embroil would be employers in Local 66's plan to exclude Northshore with threats made both to the potential direct employers and the ultimate customers.

Local 66's conduct is not subject to any exemption from antitrust scrutiny and therefore the TAC states a claim for violation of the Sherman Act *§ 1* based on the attempted exclusion of Northshore and other Carpenters' signatories from the market.

*2. The TAC states a claim under **[*21]** § 1 of the Sherman Act for a "Kickback Conspiracy" related to use of the Equity Fund*.

The second *§ 1* claim in the TAC is based on Local 66's effort, with the assistance of the Organizational Trust, to use the Equity Fund in furtherance of the conspiracy by focusing Equity Fund monies to Northshore's competitors.

In general, job targeting or other similar union subsidy programs are not subject to antitrust claims because such programs are designed to increase the competitiveness of the union in areas of stiff competition with non-union labor. *See Phoenix Elec. Co., 81 F.3d at 862-63*. The fact that a job targeting program as a whole does not violate ***antitrust law*** does not mean that the program and its funds cannot, under certain circumstances, become the subject of antitrust liability. *See American Steel Erectors, Inc. v. Local Union No. 7, Intern. Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 815 F.3d 43, 69 n. 6 (1st Cir. 2016)*.

Job targeting or market recovery projects almost always involve a union and a non-labor group. Therefore, the statutory exemption to antitrust liability often does not apply, as is the case here. *See American Steel Erectors, Inc. v. Local Union No. 7, Intern. Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 536 F.3d 68, 78 (1st Cir. 2008)* (describing function of job targeting or market recovery programs). The nonstatutory exemption may cover the job targeting program, at least as it relates to conduct between the union and the employer receiving the funds. *See Phoenix Elec. Co., 81 F.3d at 862*. A more difficult **[*22]** question arises, though, when the allegations are not merely that of a union attempting to increase its members' competitiveness against non-union labor, but instead involve additional allegations of a wider conspiracy. *See American Steel Erectors, 536 F.3d at 80-81*. In these instances it is possible that the nonstatutory exemption will not apply. *Id. at 80*.

Local 66 points to *Phoenix Elec. Co.* as determinative of this matter. *Phoenix Elec. Co.* addressed whether a job targeting program could qualify for the nonstatutory exemption if it was designed to compete with non-union labor. *Phoenix Elec. Co., 81 F.3d at 863*. The panel in *Phoenix Elec. Co.* concluded that the supra-competitive effect of union members voluntarily giving up a portion of their wages to compete with lower cost non-union labor did not take the agreement out of the protection from Sherman Act liability. *Id. at 862*. In this case, the TAC indicates a different harm. Specifically, that the job targeting funds held by the Equity Fund are being diverted in a manner that furthers the conspiracy to exclude Northshore from the market. The allegation here is that by using the fund as an alter-ego, Local 66 has both wrongfully ceased payments owed to Northshore by the Equity Fund while simultaneously propping up the bids **[*23]** of direct competitors, primarily on those contracts where Northshore submits a bid.

Although Local 66 may generally have the ability to direct funds to its own union employers while remaining within the nonstatutory exemption, the protection offered is not unlimited. *See* *Phoenix Elec. Co., 81 F.3d at 862-63*. If Northshore is the low bidder by virtue of some economic advantage, the fact that a direct competitor is able to match or undercut the bid is typically the sort of supracompetitive activity recognized as appropriate by the Ninth Circuit. Nevertheless, it is possible that a job targeting fund could be used in a manner that would violate the Sherman Act, and the TAC contains sufficient allegations of such a violation. As discussed *supra*, the TAC plausibly alleges a scheme to exclude Northshore from the relevant market and prevent it and other Carpenters' signatories from even submitting bids in some instances. To the extent that Local 66's employees used their authority over the Equity Fund to further the conspiracy, that conduct is not protected by the nonstatutory exemption.

Local 66 argues that Northshore's ASM competitors must share bid information with the Organization Trust in order to receive Equity Fund money. **[*24]** Assuming this is true, Local 66 offers no logical explanation for why those competitors would share that information with each other or allow the Organization Fund to do so unless a short term agreement was in place to expand market share since these entities all compete for jobs. The TAC plausibly alleges that the Equity Fund, at the direction of Local 66's employees, diverted targeted fund money in a manner not guided by a goal of lowering prices to compete, but instead with the aim of eliminating ordinary market competition. This is the kind of harm that the Sherman Act is designed to prevent, especially where Local 66 combines with direct competitors to stifle the natural competition represented by the process of competitors bidding on jobs. The Court will not dismiss Claim Three.

B. Claim under *§ 2* of the Sherman Act for Conspiracy to Monopolize.

The Fourth Claim alleges that Local 66, in combination with Local 66 signatory employers, acted in a conspiracy to monopolize the ASM market in Western Washington. The Sherman Act *§ 2* makes it illegal for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the **[*25]** trade or commerce among the several States . . . ." *15 U.S.C. § 2*. To state a claim under *§ 2* of the Sherman Act for conspiracy to monopolize, a complaint must allege sufficient plausible facts to show: "(1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury." *Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1158 (9th Cir. 2003)*. A complaint may also state a claim for an attempt to monopolize with plausible allegations of (a) specific intent to control prices or destroy competition, (b) predatory or anticompetitive behavior directed at accomplishing the goal, (c) a dangerous probability of achieving monopoly power, and (d) causal antitrust injury. *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)*. The requisite "specific intent" may be inferred from "conduct forming the basis for a substantial claim of restraint of trade or conduct that is clearly threatening to competition or clearly exclusionary, but the focus must be on proof of unfair or predatory conduct." *Arminak & Assocs., Inc. v. Saint-Gobain Calmar, Inc., 789 F.Supp.2d 1201, 1205 (C.D. Cal. 2011)* (internal citations omitted).

Critical to any *§ 2* claim is that a single economic entity exist that may control the market. *Terminalift LLC v. Int'l Longshore and Warehouse Union Local 29, 11-CV-1999, 2013 U.S. Dist. LEXIS 70545, 2013 WL 2154793, at *3 (S.D. Cal. May 17, 2013)*. "The very phrase 'shared monopoly' is **[*26]** paradoxical; when a small number of large sellers dominates a market, this typically is described as an oligopoly." *Id.* (quoting *Oxbow Carbon & Minerals LLC v. Union Pac. R. Co., 926 F.Supp.2d 36, 46 (D.D.C. 2013))*.

The motion to dismiss does not dispute that Northshore has properly identified the relevant market as Western Washington, and fails to identify why the Court should not accept Northshore's claim that collectively Local 66 and Local 66 signatories control at least 70% of the market. The Court has already determined as discussed *supra* that the TAC contains sufficient plausible allegations of a conspiracy. The remaining question is whether such conspiracy has the potential to actually create an injury to competition within the meaning of *§ 2*.

One of the key issues for Northshore is that the "monopoly" here would actually be composed of multiple ASM companies, all of whom apparently compete against each other. The antitrust laws serve to protect competition generally, not any individual competitor. The TAC simply falls short of stating a plausible claim where the attempted "monopoly" would leave a group of ASM competitors competing against themselves for bids. This is not a monopoly within the meaning of *§ 2* of the Sherman Act. *International Longshore and Warehouse Union v. ICTSI Oregon, Inc., 15 F.Supp.3d 1075, 1096 (D. Or. 2014)*; **[*27]** *NorthBay Healthcare Group, Inc. v. Kaiser Foundation Health Plan, Inc., 17-cv-05005-LB, 2017 U.S. Dist. LEXIS 206663, 2017 WL 6059299, at *5 (N.D. Cal. Dec. 7, 2017)*; *Oxbow Carbon & Minerals LLC, 926 F.Supp.2d at 46*. Northshore cannot state a claim for conspiracy to monopolize by an entire group of competitors, thus the Court will dismiss Claim Four with prejudice.

C. State Claims for Tortious Interference with Business Relations and Civil Conspiracy.

The final claim in the TAC, Claim Five, is based on an injury to both Northshore and Northshore's President, Jeffrey Meyer. According to the TAC, Local 66's actions have resulted in harm to Northshore and Meyer by damaging goodwill with customers through intentional interference with business relations and future business expectancy. Local 66 argues that the state law claims are preempted by *§ 303 of the LMRA* because the claims overlap with those raised in Claim One of the TAC.

Section 303 of the LMRA prohibits union activities designed to force a neutral employer to stop doing business with an employer with whom the union has a dispute. *Ahearn v. Int'l Longshore & Warehouse Union, Locals 21 & 4, 721 F.3d 1122, 1128 (9th Cir. 2013)*. Commonly referred to as "secondary boycott" activities, a union is specifically prohibited from threatening, coercing, or otherwise pressuring a neutral employer to cease doing business with an entity that the union is involved **[*28]** in a dispute with. A union that engages in secondary boycott activities violates *§ 8(b)(4) of the NLRA*, which is a violation of *§ 303 of the LMRA*.

The broad statutory wording of the LMRA has convinced courts that *§ 303 of the LMRA* completely preempts state law causes of action based on the same conduct. *See* *Point Ruston, LLC v. Pac. Nw. Re'l Council of Carpenters, 658 F.Supp.2d 1266, 1277 (W.D. Wash. 2009)*; *JTS, Inc. v. City of Seattle, C13-663RAJ, 2013 U.S. Dist. LEXIS 157902, 2013 WL 5913229, at *3 (W.D. Wash. Nov. 4, 2013)* (collecting cases). The Ninth Circuit, however, rejected a complete preemption approach for *§ 303* claims after undertaking an extensive analysis of the various preemption doctrines. *See* *Retail Property Trust v. United Brotherhood of Carpenters and Joiners of America, 768 F.3d 938, 948-49 (9th Cir. 2014)*. The *Retail Property* court discussed at length the history of labor law and the numerous instances where courts, including the United States Supreme Court, have attempted to define its contours in relation to state causes of action. The ultimate conclusion by the panel in *Retail Property* is that *§ 303* does not evince congressional intent to occupy the field but where a state is not regulating activity trending toward public safety, such as trespass laws, it is likely that the state cause of action conflicts with federal labor law. *See* *Retail Property Trust, 768 F.3d at 959* (collecting cases). Therefore, the court must determine whether Claim Five of the TAC conflicts with federal law because the relief would frustrate effective implementation of *§ 303*. *Id.*

In **[*29]** this case, the TAC alleges a state law claim for tortious interference with business relations and civil conspiracy and specifically points out that Claim Five is not based on any allegation used to support the *§ 303* claim. However, the TAC focuses on the use of union pressure tactics against neutral employers, such as the threats of picketing and economic boycotts, to make the claim that Local 66 interfered with Northshore's business relations. This is also the focus of *§ 303 of the LMRA*. Unlike in *Retail Property Trust*, the TAC does not focus on state laws of general applicability designed for public safety. Instead, the TAC focuses on economic harms stemming from union conduct in a heated dispute between Northshore and Local 66. Although Northshore may claim to use a different set of facts for Claim Five, that is not the standard. Instead, it is whether the same nucleus of conduct that gave rise to the *§ 303* secondary boycott claim also forms the basis for the state claim and, if so, whether the state regulation conflicts with federal labor law or is it instead a public safety concern. In this case, the state causes of action conflict with *§ 303 of the LMRA* and its remedies.

Washington State recognizes a cause of action for tortious interference with business expectancy **[*30]** where: (1) there is a valid contractual relationship or business expectancy, (2) the defendant has knowledge of the relationship, (3) there is an intentional interference inducing or causing a breach of termination of the relationship or expectancy, (4) defendant's interference is for an improper purpose or used improper means, and (5) there is resulting damage. *Leingang v. Pierce County Med. Bur., Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (Wash. 1997)*. Washington also recognizes a claim for civil conspiracy, which is defined as a "combination of two or more persons agreeing to commit a criminal or unlawful act, or to commit a lawful act by criminal or unlawful means, or as a combination of two or more persons by concerted action to accomplish an unlawful purpose, or some purpose not in itself unlawful by unlawful means." *Couie v. Local Union No. 1849 United Broth. of Carpenters and Joiners of America, 51 Wash.2d 108, 116, 316 P.2d 473 (Wash. 1957)*. Unlike the LMRA, Washington State allows for injunctive relief and therefore state law conflicts with the federal scheme. *See* *JTS, Inc., 2013 U.S. Dist. LEXIS 157902, 2013 WL 5913229, at *4* (citing *San Antonio Cmt. Hosp. v. S. Cal. Fist. Council of Carpenters, 125 F.3d 1230, 1235 (9th Cir. 1997))*.

Although the TAC is not particularly detailed in regard to how the various allegations meet the elements of the two state law claims, it is evident that the basis for relief is Local 66's attempts to have Northshore excluded or removed from various jobs through unlawful secondary boycott activity. These claims are covered **[*31]** by the broad definitions of prohibited conduct covered by *§ 303 of the LMRA* and additionally fall subject to regulation under federal ***antitrust law***. The fact that Meyer may have suffered emotional distress does not change the result. If the resulting damage were the standard for preemption it would totally eviscerate the preemption analysis applicable to these cases. The LMRA covers any "individual" harmed by the unlawful secondary boycott activity, which includes Meyer. To allow a state cause of action here would place state law squarely between two bodies of federal law carefully designed to weigh competing rights in the same economic sphere. State regulation in this instance is simply incompatible with the requirements of federal law. Claim Five is preempted and the Court will dismiss it with prejudice.

D. Constitutional challenge to *§ 303 of the LMRA*.

Though Local 66 does not specifically request dismissal of the First Claim in the TAC, it does devote time in the motion to arguing that *§ 303 of the LMRA* is an unconstitutional restraint on *First Amendment* rights because *§ (8)(b)(4)(ii)(B)* of the NLRA—the basis for the *§ 303* violation—is a restriction on speech. Citing *Reed v. Town of Gilbert, --U.S.--, 135 S.Ct. 2218, 192 L. Ed. 2d 236 (2015)*, Local 66 argues that *§ (8)(b)(4)(ii)(B)* is a facially content, **[*32]** viewpoint, and speaker based restriction on speech. Essentially, Local 66 argues that the Supreme Court in *Reed* implicitly overruled its prior precedent upholding the constitutionality of *§ 8 of the NLRA* despite never mentioning the cases on point. *See* *IBEW, Local 501 v. NLRB, 341 U.S. 694, 705, 71 S. Ct. 954, 95 L. Ed. 1299 (1951)*; *NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 614, 100 S. Ct. 2372, 65 L. Ed. 2d 377 (1980)*. The Court declines to hold that *§ 8(b)(4) of the NLRA* constitutes an unconstitutional restriction on Local 66's free speech in light of controlling precedent.

The Supreme Court has clarified that where it has issued a prior decision that directly controls the outcome of a case, but whose viability appears in doubt based on subsequent decisions, "'the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Agostini v. Felton, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)* (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989))*. Given that the Supreme Court has not overruled the prior decisional authority that controls this case, this Court does not find the statute unconstitutional.[5]

V. CONCLUSION

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[5] The Court also questions the viability of arguing for an expansive reading of *Reed v. Town of Gilbert. See* *NLRB v. International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers Union, Local 433, 891 F.3d 1182 (9th Cir. 2018)*.

For the foregoing reasons, the Court hereby ORDERS as follows:

1. Northshore's motion to strike [141] is **GRANTED IN PART** and the Court will strike the Declaration of Paul More and related attachments, the remainder of the motion is **DENIED**;

2. Local 66's motion to dismiss [131] is **GRANTED [*33]** as to the claims based on conspiracy to monopolize under *§ 2* of the Sherman Act (Claim Four) and for tortious interference and civil conspiracy under Washington State law (Claim Five);

3. Claims Four and Five are **DISMISSED WITH PREJUDICE**.

4. Local 66's motion to dismiss is **DENIED** as to the claims under *§ 1* of the Sherman Act based on a contractor exclusion boycott (Claim Two) and kickback conspiracy (Claim Three).

IT IS SO ORDERED.

Signed this 24th day of September, 2018.

/s/ Barbara Jacobs Rothstein

Barbara Jacobs Rothstein

U.S. District Court Judge

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Huawei Techs., Co v. Samsung Elecs. Co

United States District Court for the Northern District of California

September 25, 2018, Decided; September 25, 2018, Filed

Case No. 3:16-cv-02787-WHO

Reporter

340 F. Supp. 3d 934 *; 2018 U.S. Dist. LEXIS 172103 **; 101 Fed. R. Serv. 3d (Callaghan) 1594

HUAWEI TECHNOLOGIES, CO, LTD, et al., Plaintiffs, v. SAMSUNG ELECTRONICS CO, LTD., et al., Defendants.

Prior History: *Huawei Techs. Co. v. Samsung Elecs. Co, 2016 U.S. Dist. LEXIS 162039 (N.D. Cal., Nov. 21, 2016)*

Core Terms

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For Samsung Electronics Co, Ltd., Counter-claimant: Charles Kramer Verhoeven, LEAD ATTORNEY, David Andrew Perlson, Deepa Acharya, Iman Lordgooei, Quinn Emanuel Urquhart & Sullivan, LLP, San Francisco, Ca; Alan Lee Whitehurst, Jared Weston Newton, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, Washington, DC; Benjamin Laban Singer, Singer Bea LLP, San Francisco, CA; Cole Daniel Malmberg, Kevin P.B. Johnson, Mark Thomas Gray, Ray R. Zado, Quinn Emanuel Urquhart Sullivan LLP, Redwood Shores, CA; Evan N. Budaj, Singer / Bea LLP, San Francisco, CA; Kevin Hardy, Washington, DC; Marissa R. Ducca, Philip Charles Sternhell, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, Washington, DC; Melissa J Baily, Sam Stephen Stake, Quinn Emanuel Urquhart & Sullivan, LLP, San Francisco, CA; Rafik Paul Zeineddin, ZEINEDDIN PLLC, Washington, DC; Samuel Bryant Davidoff, Williams and Connolly LLP, Washington, DC; Thomas D. Pease, Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY; Victoria F. **[**14]** Maroulis, Quinn Emanuel Urquhart Oliver & Hedges L, Redwood Shores, CA.

For Samsung Research America, Counter-claimant: Charles Kramer Verhoeven, LEAD ATTORNEY, David Andrew Perlson, Deepa Acharya, Iman Lordgooei, Quinn Emanuel Urquhart & Sullivan, LLP, San Francisco, Ca; Alan Lee Whitehurst, Jared Weston Newton, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, Washington, DC; Benjamin Laban Singer, Singer Bea LLP, San Francisco, CA; Cole Daniel Malmberg, Kevin P.B. Johnson, Mark Thomas Gray, Ray R. Zado, Quinn Emanuel Urquhart Sullivan LLP, Redwood Shores, CA; Evan N. Budaj, Singer / Bea LLP, San Francisco, CA; Kevin Hardy, Washington, DC; Marissa R. Ducca, Philip Charles Sternhell, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, Washington, DC; Melissa J Baily, Sam Stephen Stake, Quinn Emanuel Urquhart & Sullivan, LLP, San Francisco, CA; Rafik Paul Zeineddin, ZEINEDDIN PLLC, Washington, DC; Samuel Bryant Davidoff, Williams and Connolly LLP, Washington, DC; Thomas D. Pease, Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY; Victoria F. Maroulis, Quinn Emanuel Urquhart Oliver & Hedges L, Redwood Shores, CA.

For HiSilicon Technologies Co., Ltd., Huawei Device USA Inc., Huawei **[**15]** Technologies USA, Inc, Huawei Technologies, Co, Ltd, Counters-defendants: Michael J. Bettinger, LEAD ATTORNEY, Curt Holbreich, Sidley Austin LLP, San Francisco, CA; Nathaniel C. Love, Leif E. Peterson, II, PRO HAC VICE, Sidley Austin LLP, Chicago, IL; David Giardina, David T. Pritikin, Douglas I. Lewis, Ellen S. Robbins, Irene Inkyu Yang, John Weatherby McBride, Sidley Austin LLP, Chicago, IL; John P. Wisse, PRO HAC VICE, Sidley Austin LLP, Dallas, TX; Nathan A. Greenblatt, Sidley Austin LLP, Palo Alto, CA; Russell E Cass, Clark Hill PLC, Chicago, IL.

Judges: William H. Orrick, United States District Judge.

Opinion by: William H. Orrick

Opinion

[*941] ORDER ON MOTIONS FOR SUMMARY JUDGMENT, DAUBERT MOTIONS, MOTIONS TO STRIKE AND EXCLUDE - REDACTED

Re: Dkt. Nos. 328, 329, 330, 335, 336, 337

INTRODUCTION

Plaintiffs Huawei Technologies Co., Ltd., Huawei Device USA, Inc. and Huawei Technologies USA, Inc. (collectively, "Huawei") and defendants Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Research America, Inc. (collectively, "Samsung") are major players in the world of wireless telecommunications—a world governed by cellular technology standards, such as the 3G UMTS and 4G LTE standards developed **[**16]** by the Third Generation Partnership Project ("3GPP") and promulgated by standard setting organizations like the European Telecommunications Standards Institute ("ETSI").[1] Both Huawei and Samsung **[*942]** have agreed to license their declared standard essential patents ("SEPs") on fair, reasonable, and non-discriminatory ("FRAND") terms and conditions under ETSI's Intellectual Property Rights ("IPR") Policy. Compl. ¶ 63 (Dkt. No. 1[redacted], Dkt. No. 3-4[under seal]); *see also* Samsung's Answer and Am. Counterclaims ¶¶ 29, 54 (Dkt. No. 91[redacted]; Dkt. No. 90-2[under seal]). But they have been unable to agree on the terms of a cross-license to their patent portfolios or on a process that would result in a global resolution of these issues. Instead, they have chosen combat in piecemeal litigation around the globe.

This case is one of the pieces. My order here addresses each party's motion for summary judgment concerning the patents at issue, Huawei's *Daubert* motion and motion to preclude Samsung's FRAND experts, and Samsung's two motions to strike or exclude Huawei's expert reports. Because the parties are intimately **[**17]** familiar with the background in this case, I will only repeat what is necessary to resolve the issues presented by these motions.

PROCEDURAL HISTORY

On May 24, 2016, Huawei filed this action asserting claims for breach of contract, declaratory judgment of FRAND terms and conditions for a cross-license, and patent infringement of U.S. Patent No. 8,369,278, U.S. Patent No. 8,416,892, U.S. Patent No. 8,483,166, U.S. Patent No. 8,812,848, U.S. Patent No. 8,644,239, U.S. Patent No. 8,885,587, U.S. Patent No. 8,885,583, U.S. Patent No. 8,639,246, U.S. Patent No. 8,412,197, U.S. Patent No. 8,996,003, U.S. Patent No. 8,724,613. Compl. (Dkt. No. 1[redacted], Dkt. No. 59[unredacted]).

Samsung answered on August 22, 2016, and amended on October 16, 2016, asserting counterclaims for breach of contract, antitrust monopolization in violation of *Section 2 of the Sherman Act*, *15 U.S.C. § 2*, patent infringement of United States Patent Nos. 8,228,827 ("the '827 patent"), 8,315,195 ("the '195 patent"), RE44,105 ("the RE'105

[1] Standard Setting Organizations "establish technical specifications to ensure that products from different manufacturers are compatible with each other." *Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 875 (9th Cir. 2012)*("Microsoft II")(citing Mark A. Lemley, *Intellectual Property Rights and Standard—Setting Organizations*, *90 Calif. L.Rev. 1889 (2002)*). Many courts have expounded on the benefits of standards in various industries. *See, e.g.,* *Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1030 (9th Cir. 2015)*("*Microsoft IV*"); *Apple, Inc. v. Motorola Mobility, Inc., 2011 U.S. Dist. LEXIS 72745, 2011 WL 7324582, at *1 (W.D. Wis. June 7, 2011)*.

patent"), 8,457,588 ("the '588 patent"), 8,509,350 ("the '350 patent"), 9,113,419 ("the '419 patent"), 8,619,726 ("the '726 patent"), 8,761,130 ("the '130 patent"), 9,288,825 ("the '825 patent"), 7,706,348 ("the '348 patent"), and 8,995,924 ("the '924 patent"), and declaratory judgment of noninfringement and invalidity of Huawei's patents-in-suit. Answer and Am. Counterclaims (Dkt. No. 91[redacted], Dkt. No. 90-2[sealed]).

At the initial case management conference, the parties disputed whether bifurcating the case would be the most efficient way to manage it. 9/13/16 Minute Entry (Dkt. No. 75); *see* Joint Case Management St. (Dkt. No. 67). Huawei expressed **[**18]** its view that this case should be bifurcated to address the FRAND-related issues prior to the patent infringement issues, but Samsung insisted that Huawei was "asking the court to put the remedy before liability, put the cart before the horse, and that [would] not streamline things." 9/13/16 Hr'g Tr. at 20:9-12 (Dkt. No. 82). Given that the parties could not agree, I denied the request.

On November 21, 2016, I denied Samsung's motion to dismiss two of Huawei's patents (the '892 patent and the '239 patent) on grounds that they fail to claim patent eligible subject matter under *35 U.S.C. § 101*. Order Denying Samsung's MTD (Dkt. No. 103).

On April 27, 2017, I granted Samsung leave to amend its infringement contentions to include additional infringing instrumentalities **[*943]** and change the conception dates for its '827 patent and '105 patent. Order Granting Samsung Leave to Am. Inf. Contentions (Dkt. No. 130). I also directed the parties to submit joint or competing case proposals to assist in managing the scope of this case.

On June 2, 2017, I issued a case management order adopting the case narrowing procedures implemented by the Hon. Lucy Koh in *Apple Inc. v. Samsung Electronics Co., Ltd. et al.*, 5:12-cv-630-LHK (Dkt. Nos. 394, 471). The order directed **[**19]** the parties to limit their infringement contentions to 5 patents, 10 asserted claims, and 15 accused products per side.[2]

On August 31, 2017, I issued the claim construction order for the five most significant terms selected by each side. Claim Construction Order (Dkt. No. 168).[3]

On March 26, 2018, I granted Huawei's request to stay infringement claims for Samsung's '588 patent pending inter partes review before the Patent Trial and Appeal Board (PTAB). Order Granting Stay of Infringement Claim for '588 Patent Pending Inter Partes Review (Dkt. No. 267).[4] Under different circumstances, I granted a similar request from Samsung to stay certain infringement claims for Huawei's '197 patent and '166 patent pending inter partes review. Order Granting Stay of Infringement Claim for '197 and '166 Patents (Dkt. No. 307).

On April 13, 2018, I granted Samsung's motion for an antisuit injunction enjoining Huawei from enforcing the injunction orders issued by the Intermediate People's Court of Shenzhen, which had found that Samsung is

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[2] In accordance with the order, the parties narrowed their asserted patents, claims, and products on September 11, 2017 (Dkt. Nos. 172, 173), March 16, 2018 (Dkt. Nos. 255, 256), and June 26, 2018 (Dkt. Nos. 318-3, 319). At present, Huawei has narrowed its asserted claims to the following: U.S. Patent 8,416,892, claims 1, 10; U.S. Patent 8,644,239, claims 7, 18; U.S. Patent 8,885,587, claims 3, 9; and U.S. Patent 8,724,613, claims 1, 5 (Dkt. No. 318-3[redacted]). And Samsung has narrowed its claims to the following: U.S. Patent No. RE44,105, claims 28, 29, and 32; U.S. Patent No. 8,509,350, claim 1; U.S. Patent No. 8,619,726, claims 11 and 13; U.S. Patent No. 8,761,130, claims 13 and 16; and U.S. Patent No. 9,288,825, claims 1 and 4 (Dkt. No. 319).

[3] On March 1, 2018, I granted Huawei's motion for clarification or reconsideration for one of the constructions, the term "first P-temporary Mobile Station Identity (P-TMSI) in an access message," appearing in Huawei's '166 Patent, and assigned it its plain and ordinary meaning. Order on Huawei's Mot. for Clarification, or in the alternative, Reconsideration of Claim Construction Order (Dkt. No. 247).

[4] Since Samsung had selected these claims as part of its case narrowing process, it was permitted to amend its election of asserted claims and patents. Order Regarding Substitution of Patent and Claims (Dkt. No. 268); Samsung's Am. Case Narrowing St. (Dkt. No. 275).

infringing two of Huawei's Chinese SEPs, Order Granting Samsung's Mot. for Antisuit Injunction (Dkt. No. 280[redacted]). I denied Huawei's motion to alter, amend, or reconsider that order on June 19, 2018. (Dkt. No. 310).

On July 17, **[**20]** 2018, the parties stipulated to dismissal, without prejudice, of Huawei's cause of action for declaratory judgment of FRAND terms and conditions for a cross-license (count II). Stipulation (Dkt. No. 354); Order (Dkt. No. 361).

On July 3, 2018, Huawei filed its motion for summary judgment ("Huawei's MSJ") (Dkt. No. 328[redacted], Dkt. No. 327-8[under seal]), motion to preclude Samsung's FRAND experts from offering improper legal opinions ("Huawei's FRAND-related Mot. to Strike") (Dkt. No. 329[redacted], Dkt. No. 327-6[under seal]), and **[*944]** *Daubert* motion on technical issues ("Huawei's *Daubert* Mot.") (Dkt. No. 330[redacted], Dkt. No. 327-4[redacted]).

The next day, Samsung filed its motion for summary judgment ("Samsung's MSJ") (Dkt. No. 336[redacted], Dkt. No. 333-2[under seal]), motion to strike report and testimony of Huawei's experts Padilla, Lasinski, Jackson, deLisle, and Ding ("Samsung's *Daubert* Mot.") (Dkt. No. 335[redacted], Dkt. No. 334-2[under seal]), and motion to strike portions of expert reports, largely based on inadequate disclosures ("Samsung's Mot. to Strike") (Dkt. No. 337[redacted], Dkt. No. 334-2[under seal]).

On August 15, 2018, I heard argument from the parties. This **[**21]** order addresses those motions. The numerous administrative motions filed in conjunction with these substantive motions will be addressed separately.

LEGAL STANDARD

I. SUMMARY JUDGMENT

A party is entitled to summary judgment where it "shows that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A dispute is genuine if it could reasonably be resolved in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A fact is material where it could affect the outcome of the case. *Id.*

The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine dispute of material fact. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Once the movant has made this showing, the burden shifts to the nonmoving party to identify specific evidence showing that a material factual issue remains for trial. *Id.* The nonmoving party may not rest on mere allegations or denials from its pleadings, but must "cit[e] to particular parts of materials in the record" demonstrating the presence of a material factual dispute. *Fed. R. Civ. P. 56(c)(1)(A)*; *see also* *Liberty Lobby, 477 U.S. at 248*. The nonmoving party need not show that the issue will be conclusively resolved in its favor. **[**22]** *Id. at 248-49*. All that is required is the identification of sufficient evidence to create a genuine dispute of material fact, thereby "requir[ing] a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* (internal quotation marks omitted). If the nonmoving party cannot produce such evidence, the movant "is entitled to ... judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case." *Celotex, 477 U.S. at 323*.

On summary judgment, the court draws all reasonable factual inferences in favor of the nonmoving party. *Liberty Lobby, 477 U.S. at 255*. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony does not raise a genuine factual dispute and is insufficient to defeat summary judgment. *See* *Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738-39 (9th Cir. 1979)*.

II. SUMMARY JUDGMENT ON NONINFRINGEMENT

Summary judgment of noninfringement requires a two-step analysis. "First, the claims of the patent must be construed to determine their scope. Second, a determination must be made as to whether the properly construed claims read on the accused device." *Pitney Bowes, Inc. v. Hewlett—Packard Co., 182 F.3d 1298, 1304 (Fed. Cir. 1999)* **[**23]** (internal **[*945]** citations omitted). "The determination of infringement, both literal and under the doctrine of equivalents, is a question of fact." *Lockheed Martin Corp. v. Space Sys./Loral, Inc., 324 F.3d 1308, 1318 (Fed. Cir. 2003)*; *see also* *Kilopass Tech. Inc. v. Sidense Corp., No. 10-cv-02066-SI, 2012 U.S. Dist. LEXIS 115974, 2012 WL 3545286, at *4 (N.D. Cal. Aug. 16, 2012)*. Because the ultimate burden of proving infringement rests with the patentee, an accused infringer may show that summary judgment of noninfringement is proper either by producing evidence that would preclude a finding of infringement, or by showing that the evidence on file fails to create a material factual dispute as to any essential element of the patentee's case. *See* *Novartis Corp. v. Ben Venue Labs., Inc., 271 F.3d 1043, 1046 (Fed. Cir. 2001)*. "Summary judgment of noninfringement may only be granted if, after viewing the alleged facts in the light most favorable to the nonmovant and drawing all justifiable inferences in the nonmovant's favor, there is no genuine issue whether the accused device is encompassed by the patent claims." *Id.*

Direct infringement may be proven either by literal infringement or under the doctrine of equivalents. "Literal infringement requires the patentee to prove that the accused device contains each limitation of the asserted clai[m]." *Bayer AG v. Elan Pharm. Research Corp., 212 F.3d 1241, 1247 (Fed. Cir. 2000)*. "If any claim limitation is absent from the accused device, there is no literal infringement **[**24]** as a matter of law." *Id.* "The doctrine of equivalents holds that even if an accused product does not literally infringe the asserted claims of a patent, the product may infringe if the differences between the element of the accused product at issue and the claim limitation at issue are insubstantial." *Kilopass, 2012 U.S. Dist. LEXIS 115974, 2012 WL 3545286, at *7*. To defeat a defendant's motion for summary judgment of noninfringement under the doctrine of equivalents, the plaintiff must provide "particularized testimony and linking argument on a limitation-by-limitation basis that create[s] a genuine issue of material fact as to equivalents." *AquaTex Indus., Inc. v. Techniche Solutions, 479 F.3d 1320, 1328-29 (Fed. Cir. 2007)*. "Whether equivalency exists may be determined based on the 'insubstantial differences' test or based on the 'triple identity' test, namely, whether the element of the accused device performs substantially the same function in substantially the same way to obtain the same result." *TIP Sys., LLC v. Phillips & Brooks/Gladwin, Inc., 529 F.3d 1364, 1376 (Fed. Cir. 2008)*. "Whether a claim is infringed under the doctrine of equivalents may be decided on summary judgment if no reasonable jury could determine that the limitation and the element at issue are equivalent." *Zelinski v. Brunswick Corp., 185 F.3d 1311, 1317 (Fed. Cir. 1999)*.

III. MOTIONS TO STRIKE

A. Patent Local Rules

"*Patent Local Rule 3* requires patent disclosures early in a case and streamlines discovery by replacing **[**25]** the series of interrogatories that parties would likely have propounded without it." *ASUS Computer Int'l v. Round Rock Research, LLC, No. 12-CV-02099-JST, 2014 U.S. Dist. LEXIS 50728, 2014 WL 1463609, at *1 (N.D. Cal. Apr. 11, 2014)* (internal quotation marks and modifications omitted). The disclosure requirements of *Rule 3* are designed "to require parties to crystallize their theories of the case early in the litigation and to adhere to those theories once they have been disclosed." *Nova Measuring Instruments Ltd. v. Nanometrics, Inc., 417 F. Supp. 2d 1121, 1123 (N.D. Cal. 2006)*. "They are also designed to provide structure to discovery and to enable the parties to move efficiently toward claim construction and the eventual resolution of their dispute." **[*946]** *Golden Bridge Tech. Inc. v. Apple, Inc., No. 12-cv-04882-PSG, 2014 U.S. Dist. LEXIS 67238, 2014 WL 1928977, at *3 (N.D. Cal. May 14, 2014)* (internal quotation marks omitted); *see also* *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc., 467 F.3d 1355, 1365-66 (Fed. Cir. 2006)* ("The local patent rules in the Northern District of California [require] both the plaintiff and the defendant in patent cases to provide early notice of their infringement and invalidity contentions, and to proceed with diligence in amending those contentions when new information comes to light in the course of discovery. The rules thus seek to balance the right to develop new information in discovery with the need for certainty as to the legal theories.").

Patent Local Rule 3-1 requires that a party claiming patent infringement **[**26]** serve a "Disclosure of Asserted Claims and Infringement Contentions" no more than fourteen days after the initial case management conference. This disclosure must include "[e]ach claim of each patent in suit that is allegedly infringed by each opposing party, including for each claim the applicable statutory subsections of *35 U.S.C. § 271* asserted." *Patent L.R. 3-1(a)*. The party must also identify "where each limitation of each asserted claim is found within each Accused Instrumentality," and "[w]hether each limitation of each asserted claim is alleged to be literally present or present under the doctrine of equivalents." *Patent L.R. 3-1(e)*. "The Patent Local Rules require a limitation-by-limitation analysis, not a boilerplate reservation." *Rambus Inc. v. Hynix Semiconductor Inc., No. C-05-00334 RMW, 2008 U.S. Dist. LEXIS 123187, 2008 WL 5411564, at *3 (N.D. Cal. Dec. 29, 2008)*.

Patent Local Rule 3-3 requires parties accused of infringement to serve invalidity contentions. The invalidity contentions must identify "each item of prior art that allegedly anticipates each asserted claim or renders it obvious." *Patent L.R. 3-3(a)*. If obviousness is alleged, the invalidity contentions must contain "an explanation of why the prior art renders the asserted claim obvious, including an identification of any combinations of prior art showing **[**27]** obviousness." *Patent L.R. 3-3(b)*.

"Given the purpose behind [these] disclosure requirements, a party may not use an expert report to introduce new infringement theories, new infringing instrumentalities, new invalidity theories, or new prior art references not disclosed in the parties' infringement contentions or invalidity contentions." *Verinata Health, Inc. v. Sequenom, Inc., No. 12-cv-00865-SI, 2014 U.S. Dist. LEXIS 116382, 2014 WL 4100638, at *3 (N.D. Cal. Aug. 20, 2014)* (internal quotation marks omitted); *see also* *Golden Bridge Tech. Inc. v. Apple, Inc., No. 12-cv-04882-PSG, 2014 U.S. Dist. LEXIS 67238, 2014 WL 1928977, at *3 (N.D. Cal. May 14, 2014)* ("Expert reports may not introduce theories not set forth in contentions."). "Any invalidity theories not disclosed pursuant to *Local Rule 3-3* are barred ... from presentation at trial (whether through expert opinion testimony or otherwise)." *MediaTek Inc. v. Freescale Semiconductor, Inc., No. 11-cv-05341-YGR, 2014 U.S. Dist. LEXIS 22442, 2014 WL 690161, at *1 (N.D. Cal. Feb. 21, 2014)*. In determining whether to strike some or all of an expert report for failure to comply with the patent local rules, courts in this district have asked, "[W]ill striking the report result in not just a trial, but an overall litigation, that is more fair, or less?" *Apple Inc. v. Samsung Electronics Co., No. 11-cv-01846-PSG, 2012 U.S. Dist. LEXIS 190470, 2012 WL 2499929, at *1 (N.D. Cal. June 27, 2012)*; *Verinata Health, 2014 U.S. Dist. LEXIS 116382, 2014 WL 4100638, at *3*.

B. Federal Rules

Under *Federal Rule of Civil Procedure 12(f)*, "[t]he court may strike from a pleading an insufficient defense or any **[**28]** redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12*.

[*947] *Federal Rule of Evidence 702* allows a qualified expert to testify "in the form of an opinion or otherwise" where:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Expert testimony is admissible under *Rule 702* "if it is both relevant and reliable." *Cooper v. Brown, 510 F.3d 870, 942 (9th Cir. 2007)*. "[R]elevance means that the evidence will assist the trier of fact to understand or determine a fact in issue." *Id.* Under the reliability requirement, expert testimony must "relate to scientific, technical, or other specialized knowledge, which does not include unsubstantiated speculation and subjective beliefs." *Id.* "Importantly, there must be a recognized body of knowledge, learning, or expertise upon which the witness relies. Where there is no field of expertise, nobody will qualify as an expert witness on the subject." *Perez v. Seafood Peddler of San*

Rafael, Inc., No. 12-cv-00116-WHO, 2014 U.S. Dist. LEXIS 84575, 2014 WL 2810144, at *2 (N.D. Cal. June 20, 2014) (internal **[**29]** quotation marks omitted). The burden is on the proponent of the expert testimony to show, by a preponderance of the evidence, that the admissibility requirements are satisfied. Fed. R. Evid. 702 advisory committee notes.

"Trial courts must exercise reasonable discretion in evaluating and in determining how to evaluate the relevance and reliability of expert opinion testimony." United States v. Sandoval-Mendoza, 472 F.3d 645, 655 (9th Cir. 2006). A district courts serves as "a gatekeeper, not a factfinder." Id. at 654.

DISCUSSION

I. PRELIMINARY ISSUE — CLAIM CONSTRUCTION ARGUMENTS

Before addressing the merits of any motions, I must address the glaring issue that pervades the parties' motions for summary judgment and *Daubert* motions. Each side raises issues related to construing terms that were not selected by the parties for construction during the claim construction process. During that process, I addressed ten terms total as dictated by the Local Rules, allowing each side to identify its five most significant claim terms. Claim Construction Order (Dkt. No. 168).[5] Now both sides present arguments untethered to the Claim Construction Order, which gives rise to two related issues—whether these arguments are properly raised at this stage at all, and, if so, whether they may provide **[**30]** a valid basis for challenging an expert via a *Daubert* motion.

Parties have done this before in my cases. *See, e.g.,* Fujifilm Corp. v. Motorola Mobility LLC, No. 12-CV-03587-WHO, Dkt Nos. 196, 255, 2015 U.S. Dist. LEXIS 35235; Finjan, Inc. v. Sophos, Inc., No. 14-CV-01197-WHO, Dkt. Nos. 262, 2016 U.S. Dist. LEXIS 189272. There, I followed the approach used by Judge Koh in *Apple, Inc. v. Samsung Elecs. Co.*, No. 12-CV-00630-LHK. She found claim constructions presented at the summary judgment stage "untimely." 2014 U.S. Dist. LEXIS 8157, ***[*948]*** 2014 WL 252045, at *3 (N.D. Cal. Jan. 21, 2014). She noted, "[i]f the parties wanted to tee up summary judgment positions based on particular constructions, they 'could (and should) have sought ... construction[s] to [those] effect[s].'" *Id.* (quoting ePlus, Inc. v. Lawson Software, Inc., 700 F.3d 509, 520 (Fed. Cir. 2012)). She recognized the courts' "duty to resolve fundamental disputes regarding claim scope[,]" but found that it "fulfilled that duty when it provided a thorough claim construction opinion earlier in these proceedings." *Id.* (citing O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co., 521 F.3d 1351 (Fed. Cir. 2008)); *see* O2 Micro, 521 F.3d at 1362 ("[D]istrict courts are not (and should not be) required to construe *every* limitation present in a patent's asserted claims.").

Apple v. Samsung was "not a case like *O2 Micro*, where the district court erred when it declined to resolve a dispute over claim scope raised during claim construction." **[**31]** 2014 U.S. Dist. LEXIS 8157, 2014 WL 252045, at *3. Judge Koh left many of the terms that were not selected for construction to their plain and ordinary meaning, and she explained the "[s]ound practical reasons" for a court to decline to address claim construction arguments raised for the first time during summary judgment:

> The Northern District of California's local rules require the parties to narrow the number of disputed terms to 10 as part of their joint claim construction statement. *See* Patent L.R. 4-3(c). In accordance with those rules, the parties made their selections at claim construction as to "the terms whose construction will be most significant to the resolution of the case." *Id.* This requirement forces parties to identify potential case-dispositive terms at an early stage and also forces parties to help manage the scope of patent cases. The Court painstakingly adjudged the parties' claim construction disputes during the claim construction phase based on their in-depth technology tutorials and voluminous submissions of intrinsic and extrinsic evidence. The local rules and this

[5] In the Joint Claim Construction and Prehearing Statement, the parties collectively identified a total of 102 terms for the 20 asserted patents that required construction (Dkt. No. 124). *See* Terms from Huawei's Patents (Joint St., Ex. B; Dkt. No. 124-2); Terms from Samsung's Patent (Joint St., Ex. C, Dkt. No. 124-3).

> Court did not set out a particular process for resolving claim construction disputes only to let the parties make additional arguments at the summary judgment **[**32]** phase untethered to those carefully structured rules.

2014 U.S. Dist. LEXIS 8157, [WL] at *4. She concluded that she would "carefully consider" disputes over claim scope, even at the summary judgment stage, but only "as part of the infringement analysis, not part of the claim construction." *Id.* (quoting Thorner v. Sony Computer Entm't Am. LLC, 669 F.3d 1362, 1369 (Fed. Cir. 2012)); *see* Thorner, 669 F.3d at 1369 (noting that issues related to the scope of claim language that are not limited by the claims or specification are "part of the infringement analysis, not part of the claim construction").

I will follow the same procedure here, and "view the parties' disputes through the lens of whether a reasonable jury, armed with the Court's claim construction as to certain terms and an instruction that the plain and ordinary meaning controls as to others, could or would necessarily conclude that the asserted claim reads on an accused device (or that a prior art reference reads on an asserted claim)." 2014 U.S. Dist. LEXIS 8157, 2014 WL 252045, at *5. In determining the plain and ordinary meaning, I will look to "[t]he written description and other parts of the specification" for "contextual light[.]" Aventis Pharm. Inc. v. Amino Chemicals Ltd., 715 F.3d 1363, 1373 (Fed. Cir. 2013). As Judge Koh noted, "the goal at this stage is not to complete the Sisyphean task of providing definitive guidance as to a term's plain and ordinary meaning[;]" rather, "the Court **[**33]** must determine whether a jury, 'free to rely on the plain and ordinary meaning of the term[s],' may or must conclude that the accused devices (or prior art references) infringe (or anticipate) **[*949]** the asserted claims." 2014 U.S. Dist. LEXIS 8157, 2014 WL 252045, at *5 (citation omitted).

As for whether claim construction arguments may provide a proper basis for striking or excluding an expert's opinion, it depends whether an expert witness has opined on a claim's scope beyond the plain and ordinary meaning of a term. Because claim construction is a matter of law to be decided by the court, Markman v. Westview Instruments, Inc., 517 U.S. 370, 387, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996), expert witnesses are not permitted to argue claim constructions to the jury. Nationwide Transp. Fin. v. Cass Info. Sys., Inc., 523 F.3d 1051, 1058 (9th Cir. 2008); *see also* Cordis Corp. v. Boston Sci. Corp., 561 F.3d 1319, 1337 (Fed. Cir. 2009) ("[I]t is improper to argue claim construction to the jury because the 'risk of confusing the jury is high when experts opine on claim construction.'").

Judge Koh repeated the edict in *Apple v. Samsung* that terms not construed by the court would be given their plain and ordinary meaning to a person of ordinary skill in the art. 2014 U.S. Dist. LEXIS 22938, 2014 WL 660857, at *3 (N.D. Cal. Feb. 20, 2014). From this premise, she concluded that "parties may 'introduce evidence as to the plain and ordinary meaning of terms not construed by the Court to one skilled in the art,' so long as the evidence **[**34]** does not amount to 'arguing claim construction to the jury[.]" *Id.* (citations and alterations omitted); *see also* MediaTek Inc. v. Freescale Semiconductor, Inc., No. 11-CV-5341 YGR, 2014 U.S. Dist. LEXIS 31461, 2014 WL 971765, at *4-5 (N.D. Cal. Mar. 5, 2014)(following same framework and noting that experts whose opinions on claim language depend on extrinsic evidence "reveal[] an intention to argue claim construction.").

As I analyze the claim construction issues presented in the parties' *Daubert* motions, I must determine whether an expert's opinion "delve[s] too deeply into claim construction to be presented to the jury[,]" or, whether a party contends that the opinion (or argument) is wrong as a matter of law. Fujifilm, 2015 U.S. Dist. LEXIS 35235, 2015 WL 1265009, at *6. If it is the former, the opinions may properly be stricken or excluded, but if it is the latter, the issues should have been presented in a motion for summary judgment or addressed during the claim construction phase. *See id.* ("Motorola's request to strike Haeberli's testimony for applying 'incorrect constructions' of claim terms amounts to a second summary judgment motion. This alone justifies denying the request."); *see also* Finjan, 2016 U.S. Dist. LEXIS 189272, 2016 WL 4560071, at *14 (denying *Daubert* motion in part "because it amounts to an improper second summary judgment motion"). The problem, of course, is that **[**35]** there is no clear line distinguishing the two because a party that disagrees with an expert's claim construction is likely to label it wrong as a matter of law. For this reason, my analysis will focus less on the technicalities of whether the arguments are more appropriately suited for a summary judgment motion or a *Daubert* motion, and more on the rule that "it is improper to argue claim construction to the jury... ." *Cordis, 561 F.3d at 1337*.[6]

II. HUAWEI'S MOTION FOR SUMMARY JUDGMENT

A. Samsung's Antitrust Claim

1. Background

Samsung's antitrust claim is premised on its contention that Huawei never had any intention of licensing its declared SEPs on FRAND terms and conditions, **[*950]** but nonetheless induced ETSI into including Huawei's technology in the standards to exclude alternative mobile technologies, and then filed the Chinese injunction actions to coerce Samsung into accepting Huawei's demand for excessive royalties. Am. Counterclaims ¶¶ 260-536. It seeks treble damages under *section 2* and an order enjoining Huawei from seeking injunctive relief related to its SEPs.

Huawei attacks Samsung's claim on several grounds. It insists that Samsung's expert, Dr. Jerry Hausman, focused exclusively on the effects of the Chinese injunction **[**36]** actions and did not analyze how Huawei allegedly obtained monopoly power in the relevant markets (through its promises to ETSI). From this premise, it argues that Samsung has not demonstrated disputed facts establishing that Huawei has engaged in exclusionary or anticompetitive conduct forbidden by the *Sherman Act*. Huawei's MSJ at 3. It further contends that Samsung has not demonstrated harm to competition, as opposed to any alleged harm to Samsung itself. *Id.* It also urges that Samsung's claim is barred by the "act of state doctrine" which prohibits United States courts from assessing the legitimacy of the acts of a foreign sovereign. *Id.*

Dr. Hausman identified the relevant "technology market" for the SEPs for which Huawei sought an injunction as the patent, its counterparts in other jurisdictions, and alternative technology that can implement the same functionality. Hausman Report ¶¶ 41-53 (Stake Decl. ISO Opp'n to Huawei's MSJ ¶ 7 ("Stake Decl."); *id.*, Ex. 6, Dkt. No. 357-15[under seal]).[7] He defined the geographic scope for the technology markets as worldwide and found that "Huawei is a monopolist with market power in each of the technology markets." *Id.* ¶¶ 54-55. He opined that "Huawei, by seeking an injunction **[**37]** ... gained a 'bargaining chip' that changed the threat point in the negotiations with Samsung[,]" and is thereby "seeking to exploit its market power and obtain higher royalties[,]" which "are equivalent to higher prices than would have occurred in the absence of the injunction and are thus a violation of *Section 2*." *Id.* ¶ 56; *see also id.* ¶ 18.[8] He explained that "[f]iling for injunctions also should not be permitted because they confer a 'dangerous probability of success' for the SEP owner to exercise monopoly power beyond what is permitted under

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[6] The separate, but related, question of whether these arguments are more suitable for motions in limine was not presented by the parties and is not addressed here.

[7] In Samsung's declaration in support of sealing portions of Huawei's motion for summary judgment and exhibits thereto, it noted that it does not maintain a claim of confidentiality over the Hausman Report or his deposition testimony, but it did not file an unredacted version of the Report. *See* Malmberg Decl. ISO Huawei's Admin. Mot. to File Under Seal Portions of Huawei's Summ. J. and Daubert Mots. ¶¶ 5, 7, 9 (Dkt. No. 344).

[8] To support this position, Huawei also cites to Huawei executive Jason Ding's statement regarding the injunction actions:

> Perhaps judges are quite reluctant to hear injunction cases because of its staggering impact on the market. . . Even if injunction order were to be enforced, does Huawei really want to kick Samsung out of China? Is it possible? Of course not. . . . At the **[**38]** end of the day, **your purpose is to get the royalties in return**, while using legal action as a **bargaining chip**.

Dkt. No. 235-7; *see also* Song Dep. at 23:10-19 (Stake Decl. ¶ 6; *id.*, Ex. 5).

its FRAND obligations[,]" and "[t]he dangerous probability of success arises from the probability that a court will grant the requested injunction." *Id.* ¶ 58; *id.* n.50. And he posited that, "[a]t a minimum, Samsung's injury from the antitrust violation is comprised of the cost of multiple litigations, attorneys' fees, and the experts' fees paid to me and my team, and associated costs." *Id.* ¶ 60.

[*951] Samsung also cites to the negotiation history to emphasize that Huawei demanded a 1.5 percent royalty for a license to its SEPs, even though no one has ever paid that rate, which is over [TEXT REDACTED BY THE COURT], and would amount to Samsung making net payments totaling over [TEXT REDACTED BY THE COURT] for a license covering a twelve-year period. Ding Dep. at 208:19-22 (Stake Decl. ¶ 2; *id.*, Ex. 1, Dkt. No. 357-6[under seal]); Hausman Report ¶¶ 23-29; Cheng Dep. at 137:12-15 (Stake Decl. ¶ 3; *id.*, Ex. 2, Dkt. No. 357-8[under seal]); Hausman Rebuttal Report ¶ 8 (citing Lasinski Report) (Stake Decl. ¶ 10; *id.*, Ex. 9, Dkt. No. 357-20[under seal]). According to Samsung, even Huawei's own expert Dr. Lasinski, acknowledged that a FRAND rate for the 4G SEPs would be [TEXT REDACTED BY THE COURT] the amount demanded by Huawei. Lasinski Report ¶ 100 (Stake Decl. ¶ 4; *id.*, Ex. 3, Dkt. No. 357-10).

2. Legal Framework

Section 2 of the Sherman Act makes it a felony for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize **[**39]** any part of the trade or commerce... ." *15 U.S.C. § 2*.

"To prevail on this claim, [claimant] must prove that [defendant] (1) possessed monopoly power in the relevant market, (2) willfully acquired or maintained that power through exclusionary conduct and (3) caused antitrust injury." *MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1130 (9th Cir. 2004)*. The Supreme Court in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, analyzed the type of activities that would constitute anticompetitive or exclusionary conduct. It began from the premise, "as a general matter," that there is no duty to deal with competitors. *Id. at 407-08*; *see also* *MetroNet, 383 F.3d at 1131* ("The Court in *Verizon* stated that as a general matter 'there is no duty to aid competitors.'"). It then analyzed the "few existing exceptions" to this general proposition and found that the present circumstances did not justify adding another exception to the rule. *540 U.S. at 411*. In short, the possession of monopoly power and the charging of monopoly prices are not unlawful in themselves; rather, "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Id. at 407* (emphasis in original).

3. Analysis

a. Samsung Has Not Offered Evidence of Exclusionary Conduct

i. Refusal to Deal

As an initial matter, Samsung emphasizes its position that its claim is **[**40]** based on Huawei's refusal to deal and is not limited to Huawei's opening rate; rather, it contends that Huawei has maintained the same rate throughout negotiations, which it insists constitutes evidence of exclusionary conduct. Huawei counters that the refusal to deal doctrine of antitrust is wholly inapplicable in the standards arena. On the former point, I must view the evidence in the light most favorable to Samsung. On the latter point, I agree with Huawei,[9] but I will nonetheless assess the evidence in the realm of a refusal to deal claim since Samsung relies on it. Even accepting Samsung's perspective

[9] As discussed below, the irrelevance of the doctrine is clear; Huawei admits that it is a monopolist in the market because ETSI has accepted its declared SEPs.

of the negotiating history, it has not established that Huawei's negotiating conduct and pursuit of injunctive relief constitutes exclusionary conduct **[*952]** necessary to prove its monopolization claim.

Samsung relies on *Federal Trade Commission v. Qualcomm Inc., No. 17-CV-00220-LHK, 2017 U.S. Dist. LEXIS 98632, 2017 WL 2774406 (N.D. Cal. June 26, 2017)* to insist that Huawei's conduct violates the "antitrust duty to deal."[10] In *FTC v. Qualcomm*, Judge Koh summarized *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*, *Verizon Comm's, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, and *MetroNet Services Corp. v. Qwest Corp., 383 F.3d 1124 (9th Cir. 2004)*, and found "that a plaintiff alleges an antitrust duty to deal where the plaintiff alleges '[a] decision to alter a [voluntary] course of dealing together with evidence of anticompetitive malice,' **[**41]** and where the recognition of an antitrust duty to deal will not present significant judicial administrability concerns." *2017 U.S. Dist. LEXIS 98632, 2017 WL 2774406, at *20* (quoting *SmithKline Beecham Corp. v. Abbott Labs., 2014 U.S. Dist. LEXIS 164367, 2014 WL 6664226, at *4 (N.D. Cal. Nov. 24, 2014)*); *see also* *Safeway Inc. v. Abbott Labs., 2010 U.S. Dist. LEXIS 2145, 2010 WL 147988, at *6 (N.D. Cal. Jan. 12, 2010)* ("Taken together, *Aspen Skiing* and [*Verizon*] demonstrate that liability under *§ 2* can arise when a defendant voluntarily alters a course of dealing and 'anticompetitive malice' motivates the defendant's conduct.").

Judge Koh concluded that the FTC had adequately alleged a violation of the antitrust duty to deal under the *Metronet* factors because Qualcomm had voluntarily agreed to license its SEPs in accordance with FRAND and later refused to do so, its "no license-no chips" policy demonstrated that its refusal to license was motivated by anticompetitive malice, and "recognizing a duty to deal in this case would not require courts to play a larger role in setting the terms of dealing than the role that courts *already* play in determining appropriate royalties in patent cases." *2017 U.S. Dist. LEXIS 98632, 2017 WL 2774406, at *20-22*. She also determined, as the Third Circuit recognized in *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 316 (3d Cir. 2007)*, that the lack of "a regulatory structure designed to deter and remedy anticompetitive harm[,]" *Verizon, 540 U.S. at 412*, supports finding an antitrust duty to deal in the context of FRAND commitments and SSOs, which involve private entities **[**42]** and organizations. *2017 U.S. Dist. LEXIS 98632, 2017 WL 2774406, at *23*; *see* *Broadcom, 501 F.3d at 317* ("No such regulatory framework [as in *Verizon*] exists here.").

Huawei does not dispute that the first and third *MetroNet* factors are met here—it altered a voluntary and profitable course of dealing given its commitments to ETSI and there are no judicial administrability concerns. Rather, Huawei contends that Samsung has not offered any evidence of Huawei's anticompetitive malice, nor has it otherwise demonstrated that Huawei obtained its monopoly power in the relevant markets by exclusionary conduct. Huawei MSJ at 6.

Unlike the circumstances in *Qualcomm*, Samsung does not allege that Huawei refused to license its declared SEPs *on any terms. See* *2017 U.S. Dist. LEXIS 98632, 2017 WL 2774406, at *19-23* (relying on Qualcomm's outright refusal to license FRAND-encumbered SEPs to competing chip manufacturers). Rather, Samsung's claim depends on its contention that Huawei's offers to license its SEPs were not on FRAND terms, and Huawei proceeded to pursue injunctive relief. *See* **[*953]** Hausman Dep. at 203:12-17 (testifying to his opinion that Huawei acquired monopoly power, not by exclusionary conduct, but "when the SSO adopted it [Huawei's technology], and they [Huawei] said they would not exercise it because they agree to FRAND."). It relies **[**43]** on *Aspen Skiing* for the proposition that exorbitant offers constitute a refusal to deal, and it argues that the determination of whether Huawei's offers were exorbitant is a fact question. *See also* *MetroNet, 383 F.3d at 1132* ("An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal."); *Safeway Inc. v. Abbott Labs., No. C 07-05470 CW, 2010 U.S. Dist. LEXIS 2145, 2010 WL 147988, at *7 (N.D. Cal. Jan. 12, 2010)* ("By setting such unattractive terms, Abbott essentially refused to deal with its competitors.").

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[10] It is worth noting that the order addressed a motion to dismiss, not a motion for summary judgment, as I am presented with here. *See* *Qualcomm, 2017 U.S. Dist. LEXIS 98632, 2017 WL 2774406, at *22* ("FTC's allegations are sufficient, at this stage of the proceedings, to allege that Qualcomm's refusal to deal is motivated by 'anticompetitive malice.'").

But the refusal to deal cases are inapplicable to the standards setting world. The parties do not dispute that Huawei acquired its monopoly power in the relevant markets through its declarations to ETSI, not through its alleged refusal to deal with Samsung. As discussed below, Samsung seeks to claim antitrust injury as a consumer in the relevant market. It cannot turn around and attempt to show exclusionary conduct based on its status as a competitor. In other words, Samsung has not proven that Huawei "acquired or maintained" its monopoly power through exclusionary conduct. *See* MetroNet, 383 F.3d at 1130.

Moreover, it is well settled that *Aspen Skiing*, "the leading case for § 2 liability based on refusal to cooperate with a rival," "is at or near the outer boundary **[**44]** of § 2 liability." *Trinko, 540 U.S. at 409*. "As the Supreme Court has repeatedly emphasized, there is 'no duty to deal under the terms and conditions preferred by [a competitor's] rivals[.]'" *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1184 (9th Cir. 2016)*(quoting *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 457, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009))*; *see also* *Townshend v. Rockwell Int'l Corp., No. C99-0400SBA, 2000 U.S. Dist. LEXIS 5070, 2000 WL 433505, at *8 (N.D. Cal. Mar. 28, 2000)* (dismissing antitrust claim in part because "[a] patent owner's pursuit of optimum royalty income is not an act in restraint of trade which violates the antitrust laws."). Because Samsung has offered no evidence that Huawei has outright refused to deal with Samsung, "*Aspen Skiing* offers no relief here." *Aerotec, 836 F.3d at 1184*.

ii. Broadcom Claim[11]

While Samsung's antitrust claim has morphed into a refusal to deal claim, Huawei notes that the claim as alleged is actually premised on the *Broadcom* case. *E.g.*, Am. Counterclaims ¶ 263 ("Huawei's promises to license its allegedly essential patents on FRAND terms and conditions were intentionally false."); *id.* ¶ 266 ("Huawei's actions show it has never intended to comply with its promises to license its allegedly essential patents on FRAND terms and conditions."). In *Broadcom*, the Third Circuit analyzed "whether Broadcom ha[d] stated actionable anticompetitive conduct with allegations that Qualcomm deceived relevant SDOs **[**45]** [standards-determining organizations] into adopting the UMTS [Universal Mobile Telecommunications System] standard by committing to license its WCDMA technology on FRAND terms and, later, after lock-in occurred, demanding non-FRAND royalties." *501 F.3d at 313*. The court held that

> **[*954]** (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an SDO's reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct.

Id. at 314; *see also* *Apple Inc. v. Samsung Elecs. Co., No. 11-CV-01846-LHK, 2011 U.S. Dist. LEXIS 120416, 2011 WL 4948567, at *4 (N.D. Cal. Oct. 18, 2011)* ("[I]ntentionally false promises to SSOs regarding licenses with FRAND terms can give rise to actionable claims under *Section 2* of the Sherman Act.").

Samsung points to Huawei's initial SEP licensing proposal to Samsung in 2008, which Samsung contends was not FRAND, simultaneous with its patent disclosures to ETSI, and its pursuit of injunction-only relief in China, to substantiate its claim that Huawei "did not intend to license its proprietary technology at FRAND rates at the time it promised ETSI that **[**46]** it would do so." Opp'n to Huawei MSJ at 4-5. And it emphasizes that "the issue of intent is nearly always 'a fact question.'" *Id.* at 6. The latter point gains it little ground: "Until recently, summary judgment was disfavored in antitrust cases, but any presumption against the granting of summary judgment in complex antitrust cases has now disappeared[.]" *In re Online DVD-Rental Antitrust Litig., 779 F.3d 914, 921 (9th Cir. 2015)* (internal quotation marks, citations, and alterations omitted). Accordingly, Samsung cannot merely rely on the factual nature of the inquiry into intent to survive Huawei's motion.

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[11] It is also worth noting that Samsung has not presented (and Huawei is not aware of) any cases in which a plaintiff has prevailed at trial asserting an antitrust claim premised on *Broadcom*.

Its former point does not support its claim that Huawei made intentionally false promises to ETSI. As an initial matter, Samsung cannot (and does not even attempt to) explain the fact that Huawei has licensed its SEPs to other entities as part of its commitments to ETSI. Moreover, Huawei underscores (and Samsung acknowledges) that Huawei had publicly announced as early as 2008 that it expected to seek a royalty for its LTE portfolio of up to 1.5 percent, which would be "negotiable in bilateral negotiations." *See* Stasik Expert Report Regarding ETSI and Standards Setting Matters at ¶ 66, submitted in *Apple Inc. v. Samsung Electronics Co., Ltd. et. al.*, Case No. 11-cv-01846-LHK **[**47]** (N.D. Cal. Mar. 16, 2012) (including Huawei's public statement) (McBride Decl. ISO Reply ¶ 2; *id.*, Ex. 44; Dkt. No. 371-9 [under seal]); J. Ding Dep. at 208:13-25 (noting Huawei's public announcement) (Stake Decl. ¶ 2; *id.*, Ex. 1; Dkt. No. 357-6 [under seal]). Samsung has previously acknowledged that there is nothing wrong with beginning negotiations at a "headline" rate. Chang Dep. at 32-34 (McBride Decl. ISO Reply ¶ 3; *id.*, Ex. 45; Dkt. No. 371-10 [under seal]) (acknowledging Stasik's view that Samsung's [TEXT REDACTED BY THE COURT] percent royalty offer was FRAND and would be an appropriate headline rate to open negotiations); *see also* Leonard Dep. at 70:15-71:6 (McBride Decl. ISO Huawei's Reply ISO MSJ ¶ 4, *id.*, Ex. 46)(testifying that starting negotiations at an opening rate of 1.5 percent would not by itself, be problematic). As Huawei puts it, "[t]he fact that [it] opened negotiations at its previously stated public rate, and maintained that opening offer for a time in the absence of any responsive counter-proposal from Samsung, would not permit a reasonably jury to conclude that Huawei never intended to abide by its FRAND commitments." Reply ISO Huawei MSJ at 4. And the fact **[**48]** that the headline rate was public knowledge certainly undermines any claim that it unlawfully obtained its monopoly power through its representations to ETSI.

As previously mentioned, Samsung insists that its claim is not limited to Huawei's **[*955]** opening rate; it is based on Huawei maintaining that rate throughout the course of negotiations. It also cites to Huawei's subsequent pursuit of injunctive-only relief in China to substantiate its claim that Huawei had no intention of licensing its SEPs on FRAND terms. On the other hand, Huawei identifies several facts negating any possible inference that it never intended to abide by its FRAND obligations: it has repeatedly offered to submit this dispute to binding arbitration, it initially sought to bifurcate the issues in this case so that the FRAND-related issues could be addressed on an expedited basis before delving into the patent issues, and it is and has been willing to withdraw the Chinese injunction actions so long as Samsung agrees to a binding process to determine the FRAND terms of a cross-license between the parties. Reply at 4-5. Huawei's eagerness to resolve the FRAND issue is not indicative of a party who refuses to deal.

At the **[**49]** hearing, Samsung insisted that *Broadcom* is irrelevant to a refusal to deal claim, and that intent is not required under section 2. Samsung's arguments are unpersuasive. While section 2 does not explicitly reference the "intent" of the accused, the case law makes clear that a certain mental state is an explicit element of both a refusal to deal claim of the type Samsung wishes to pursue here and a *Broadcom* claim of the type it actually pursues. *See* Qualcomm, 2017 U.S. Dist. LEXIS 98632, 2017 WL 2774406, at *20 (requiring evidence of anticompetitive malice); Broadcom, 501 F.3d at 314 (requiring an intentionally false promise).

It further insisted that Huawei is wrong to contend that Samsung cannot prove bad intent with conduct occurring after the patents were declared essential. But courts have explicitly declined to expand *Broadcom* "to reach violations of FRAND commitments occurring after the standard's adoption." *E.g.,* Godo Kaisha IP Bridge 1 v. TCL Commc'n Tech. Holdings Ltd., No. CV 15-634-SLR-SRF, 2017 U.S. Dist. LEXIS 26824, 2017 WL 750700, at *7 (D. Del. Feb. 27, 2017).[12]

Samsung has not offered any evidence of Huawei's fraudulent intent, but even if it had, it would still be insufficient to establish unlawful exclusionary conduct. *See* Rambus Inc. v. F.T.C., 522 F.3d 456, 466, 380 U.S. App. D.C. 431 (D.C. Cir. 2008) ("[A]n otherwise lawful monopolist's end-run around price constraints, even when deceptive or fraudulent, does not alone present a **[**50]** harm to competition in the monopolized market."). *Compare* Aerotec, 836 F.3d at 1184, 1189 (affirming summary judgment on refusal to deal claim where plaintiff "simply did not like the

[12] The report and recommendation was subsequently adopted by the district court. 2017 U.S. Dist. LEXIS 39950, 2017 WL 1055958 (D. Del. Mar. 20, 2017).

business terms" offered by the alleged monopolist), *with* Hynix Semiconductor Inc. v. Rambus, Inc., 527 F. Supp. 2d 1084, 1098 (N.D. Cal. 2007)(finding sufficient allegations of anticompetitive conduct where "[t]he Manufacturers have alleged that Rambus participated in a standards-setting organization, understood its intellectual property disclosure policy, withheld information about its patent applications, waited until the industry was irreversibly 'locked in' to the standard, and then began a litigation campaign to extract royalties.").

That failure defeats Samsung's antitrust claim as a matter of law. But the claim also fails because Samsung has not offered any evidence of antitrust injury.

4. Samsung Has Not Demonstrated Antitrust Injury

"The antitrust laws ... were enacted for 'the protection of competition not **[*956]** competitors[.]'" Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). As a result, an antitrust claimant "must demonstrate injury to competition in the market as a whole, not merely injury to itself as a competitor." Gorlick Distribution Centers, LLC v. Car Sound Exhaust Sys., Inc., 723 F.3d 1019, 1024-25 (9th Cir. 2013).

The only "injury" to Samsung disclosed in Dr. Hausman's Report is Samsung's litigation costs, which Dr. Hausman conceded were "harms to Samsung," **[**51]** not "harms to consumers." Hausman Report ¶ 60; *see also* Hausman Dep. at 214:6-9 (Ex. 7). While litigation costs may constitute antitrust injury in some cases, Samsung has not established those circumstances here. *See* Apple, Inc. v. Motorola Mobility, Inc., 886 F. Supp. 2d 1061, 1076 (W.D. Wis. 2012) (finding no antitrust injury where antitrust claimant refused to pay the allegedly excessive royalty rate and the only purported injury was the attorney fees and costs incurred in response to patent litigation). *Compare* supra section I.A.3 (finding no evidence of anticompetitive conduct), *with* Hynix, 527 F. Supp. 2d at 1098 ("Because Rambus' alleged conduct at JEDEC can independently qualify as an anticompetitive harm under section 2, the court finds that Rambus' current patent litigation is 'causally connected' to that behavior and therefore properly included in an 'anticompetitive scheme' allegation.").

In opposition, Samsung points to Huawei's purported market power in the relevant markets, *see* Opp'n at 9 (citing Hausman Report ¶¶ 55-56), and urges that it is harmed as a purchaser of Huawei's SEPs in the relevant markets identified by Dr. Hausman (which Huawei has not challenged here), so its injury arises as a customer, not a competitor. But Huawei's market power alone does not establish any antitrust injury. **[**52]** *See* Opp'n at 9 (arguing that "it will pay overcharges and/or incur losses as a result of Huawei's monopolization."). And Samsung's potential harm likewise does not "demonstrate injury to competition in the market as a whole," rather than "injury to [Samsung] as a competitor." Gorlick, 723 F.3d at 1024-25. Samsung has not demonstrated the requisite injury to competition.[13]

To the extent that Samsung intends to rely on the potential harm to consumers in the event the Chinese injunctions are enforced, Opp'n at 9 n.8, that speculative harm would at most substantiate a claim of attempted monopolization.[14] Samsung has not alleged or pursued such a claim.

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[13] Samsung footnotes that the antitrust injury is "less demanding" when an antitrust claimant seeks injunctive relief. *See* Opp'n at 9 n.9 (citing ***Palmyra Park Hosp. Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1299 (11th Cir. 2010))***. The *Palmyra* court noted that "[t]he antitrust standing injury under § 16 of the Clayton Act [allowing injunctive relief] is less demanding than under § 4 [allowing recovery for treble damages]." ***604 F.3d at 1299***. It explained that "a plaintiff seeking relief under § 16 must still allege an antitrust injury, just as the plaintiff would under § 4[,]" but in the context of injunctive relief "we are less concerned about whether the party would be the most efficient enforcer[.]" *Id. at 1299-1300*. The court concluded that "[t]he takeaway ... is that 'if a plaintiff has standing to bring an antitrust action under section 4, he will also have standing under section 16.'" *Id. at 1300*. *Palmyra*, therefore, does not help Samsung here.

In sum, Samsung has not shown disputed facts establishing Huawei's anticompetitive **[*957]** conduct or any antitrust injury. Huawei's motion for summary judgment as to Samsung's counterclaim for antitrust violation is GRANTED.[15]

B. Noninfringement as to the '350 Patent

Asserted claim 1 of the '350 Patent requires "receiving a cell-specific parameter (P_B) signaled by one or more higher layers from the base station; and determining a cell-specific ratio (p_B/p_A)... ." '350 patent at 14:31-35. Huawei insists that it is entitled to summary judgment of noninfringement, both literal and under the doctrine **[**53]** of equivalents (DOE), because the undisputed evidence shows that the quantization coefficients used to determine the ratio are different for different phones within a cell, Samsung has offered no evidence that Huawei's UE's "determine" the cell-specific ratio, and Samsung's DOE theory relies on inadequate boilerplate recitations. Huawei MSJ at 12-13. Samsung counters with evidence that Huawei's accused products "determine a cell-specific ratio" by selecting values called quantization coefficients that correspond to the same cell-specific ratios required under the LTE standard. Opp'n at 17-18; *see* Huawei Technical Document produced as SAMSUNG-HNDCA-000614275-614370 (Stake Decl. ¶ 12; *id.*, Ex. 11); Huawei Technical Document produced as SAMSUNG-HNDCA-000614371-614439 (Stake Decl. ¶ 13; *id.*, Ex. 12).

One of Samsung's technical experts, Dr. Paul Prucnal, provided a technical analysis of documents, testimony, and source code to show that Huawei's accused products determine a cell-specific ratio as required under the LTE standard by selecting a value called a quantization coefficient that corresponds to a cell-specific ratio. Prucnal Expert Report ¶¶ 557-570 (Stake Decl. ¶ 15; *id.*, Ex. 14; Dkt. No. 357-29 [under **[**54]** seal]); *see also* Prucnal Dep. at 89:23-90:9 (explaining his demonstrative showing that the accused products use the same cell-specific ratios) (Stake Decl. ¶ 17; *id.*, Ex. 16; Dkt. No. 357-33 [under seal]); Prucnal Demonstrative (showing the same cell-specific ratios) (Stake Decl. ¶ 18; id., Ex. 17; Dkt. No. 357-35 [under seal]). Samsung also highlights Huawei's admission that the accused products practice the applicable 3GPP standard. Huawei's March 9, 2018 Supplemental Responses to Samsung's Interrogatories at 21-23 (Stake Decl. ¶ 16; *id.*, Ex. 15; Dkt. No. 357-13 [under seal]).

Huawei wishes to limit the meaning of "determining" to "calculating"; similar to Samsung's attempts to limit "obtaining" and "allocating" with respect to the '239 patent. *See infra* section V.A.3. Huawei did not select "determining" for claim construction, and the term will be given the full range of its plain and ordinary meaning. Viewing this evidence in the light most favorable to Samsung, it has identified disputed evidence that Huawei's accused products literally infringe the '350 patent, claim 1 by "determin[ing] a cell-specific ratio" when the UEs select quantization coefficients that correspond to the cell-specific ratio.

[55]** Even if I did not find disputed evidence that the accused products literally infringe, they would at least infringe under a DOE theory since Huawei's arguments against infringement largely rely on whether the UE's act of selecting a quantization coefficient is equivalent to determining a cell-specific ratio. *See* Reply ISO Huawei MSJ at 8 (noting that the Prucnal Report fails **[*958]** to show the calculation of any ratios). Dr. Prucnal's opinions, which link the accused devices to a particular claim limitation, Prucnal Report ¶ 590 (explaining DOE theory for the '350 patent, claim 1), are not the type of boilerplate DOE assertions rejected by courts. *E.g.,* *PersonalWeb Techs. LLC v. Int'l Bus. Machines Corp., No. 16-CV-01266-EJD, 2017 U.S. Dist. LEXIS 76162, 2017 WL 2180980, at *16 (N.D. Cal. May 18, 2017)* ("[E]ven if the Court were to look past PersonalWeb's failure to comply with the patent local rules, summary judgment is appropriate because PersonalWeb has failed to provide sufficient evidence to create a triable issue of fact that there is infringement under the doctrine of equivalents."); *OptimumPath, LLC v. Belkin Int'l,*

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[14] A claim for attempted monopolization requires "proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. Given the explicit requirement related to intent, an attempted monopolization claim would fare no better.

[15] Given this conclusion, I need not determine whether the act of state doctrine bars Samsung's antitrust claim.

*Inc., No. C 09-01398 CW, 2011 U.S. Dist. LEXIS 41634, 2011 WL 1399257, at *8 (N.D. Cal. Apr. 12, 2011)* ("OptimumPath also relies on a blanket statement, asserting substantial similarities as to the instrumentalities, but failing to link those similarities to particular claims or limitations within the '281 patent.").

To the extent that Huawei wishes to rely on the inadequacy of Samsung's disclosures in its infringement contentions, that alone does not justify granting its motion for summary judgment. "While the Rules are thereby intended to hasten resolution on the merits, they are *not* ... a mechanism for resolving the *merits* of the parties' dispute." *FusionArc, Inc. v. Solidus Networks, Inc., No. C 06-06760RMW(RS), 2007 U.S. Dist. LEXIS 28970, 2007 WL 1052900, at *2 (N.D. Cal. Apr. 5, 2007)*; *see also* *PersonalWeb, 2017 U.S. Dist. LEXIS 76162, 2017 WL 2180980, at *16* ("Courts in this district have cited deficient infringement contentions as additional bases for granting summary judgment of noninfringement with respect to doctrine of equivalents. However, what ultimately governs the summary judgment determination is the standard under *Fed. R. Civ. P. 56(c)*." (citations omitted)).

Huawei's motion for summary judgment of noninfringement of **[**56]** claim 1 of the '350 patent is DENIED.

C. Noninfringement as to the '130 Patent

Independent claim 13 recites the following "method for transmitting a signal in a slot of a sub-frame in a wireless communication system... :

> mapping a reference signal to a middle symbol in the slot;
> mapping the data information to remaining symbols in the slot that are not used to map the reference signal;
> mapping the acknowledgement information to first symbols among the remaining symbols in the slot, the first symbols not being used to map reference signals and the first symbols being directly adjacent to the middle symbol; and
> ...

'130 Patent, claim 13 at 8:30-37 (Dkt. No. 328-34). Huawei contends that this method claim, and dependent claim 16, recite a series of active steps that must be performed in a precise order, and Samsung's expert failed to offer any evidence that Huawei's products perform the accused functionality in the order claimed[,]" and "the undisputed evidence shows that Huawei products do not perform the function in the order claimed. Huawei's MSJ at 17 (citing Bambos Inf. Report ¶¶ 550-632); *see also* Bambos Inf. Report ¶ 468; Mahon Decl. ¶¶ 32-35.

Samsung counters that Huawei's argument depends on injecting its proposed construction that "[t]he **[**57]** second and third steps must be performed after the first." Joint Claim Construction St. at 3 (Dkt. No. 124-3). But, according to Samsung, Huawei elected not to include this claim term in those terms subject to claim construction, thereby waiving its opportunity to have **[*959]** the claim construed and relegating the claim term to its plain and ordinary meaning.[16]

The Federal Circuit has explained, "[a]s a general rule, 'unless the steps of a method claim actually recite an order, the steps are not ordinarily construed to require one.'" *Mformation Techs., Inc. v. Research in Motion Ltd., 764 F.3d 1392, 1398 (Fed. Cir. 2014)* (alterations omitted) (quoting *Interactive Gift Express, Inc. v. Compuserve Inc., 256 F.3d 1323, 1342 (Fed. Cir. 2001))*. "However, a claim 'requires an ordering of steps when the claim language, as a matter of logic or grammar, requires that the steps be performed in the order written, or the specification directly or implicitly requires' an order of steps." *Id.*

In Samsung's view, "[a]nalyzing the word 'remaining' in context, as required, reveals that the plain and ordinary meaning refers *only* to a spatial location for (1) mapping the reference signal and (2) mapping the data and acknowledgement information (as opposed to a temporal order in which those steps need to occur)." Opp'n to Huawei's MSJ at 16 (emphasis in original) (citing Ex. 20 ¶¶ 174-77).[17] Samsung's attempts to limit **[**58]** the plain

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[16] Huawei points out that Samsung proposed "no construction necessary" for each of the terms at issue for the '130, '105, and '825 patents. *See* Joint Claim Construction St. (Dkt. No. 124-3).

and ordinary meaning of "remaining" to a spatial location rather than a temporal order are unpersuasive. Samsung wishes to have the middle symbol "reserved" for the reference signal without first mapping it. But the claim does not dictate *reserving* the middle symbol in the slot for the reference symbol. To the contrary, the claims disclose *mapping* the reference symbol. As Huawei explains, the "remaining symbols in the slot that are not used to map the reference signal" do not exist until the reference signal is mapped to the middle symbol in the slot. Huawei MSJ at 17. The plain language of the claim terms requires an "ordering of steps" because no symbols are "remaining" until the reference symbol is first mapped to the middle symbol in the slots. *See* *Mformation Techs., 764 F.3d at 1398*.

Assuming an order inherent in the claim language, Huawei contends that Samsung failed to offer evidence that Huawei's products perform the claimed "mapping" in the order required. Samsung does not appear to explicitly contest this assertion, but offers the opinion of its expert, Dr. Nicholas Bambos, that Huawei's products map a reference signal to a middle symbol in the slot, data to the remaining symbols in the slot, and acknowledgement **[**59]** information to first symbols among the remaining symbols... ." Bambos Expert Report ¶¶ 530-49 (Stake Decl. ¶ 21; *id.*, Ex. 20; Dkt. No. 357-40 [under seal]); *id.* ¶¶ 550-94, 595-632 (McBride Decl. ¶ 37; *id.*, Ex. 36; Dkt. No. 327-51 [under seal]). Dr. Bambos offered his "opinion that the difference between each of the Accused Instrumentalities and the claim elements in claims 13 and claims 16 are insubstantial" because the accused products are "performing substantially the same function (i.e., PUSCH signal transmission) in substantially the same way (placing ACK/NAK information in the symbols directly adjacent to the DM RS along with data and transmitting the DM RS, ACK/NAK, and data, which is mapped to every symbol except for the symbols containing the DM RS and is multiplexed with CQI) to get substantially the same result (i.e., transmitting a signal with minimal distortion of the underlying information)." Bambos Expert **[*960]** Report ¶ 792. Dr. Bambos concluded that the order of the steps "is an insubstantial part" of the asserted claims. *Id.* ¶ 793.

Huawei argues that Dr. Bambos's DOE analysis involves several legal errors, and is insufficient to counter its motion for summary judgment. First, **[**60]** he analyzes the function/way/result of the entire claim, *see id.* ¶¶ 792-93, rather than the limitation asserted to be met by an equivalent. Second, his analysis "vitiate[s] these claim terms" because it "eliminate[s] the requirement to map to 'remaining symbols.'" Huawei MSJ at 20.

Samsung never directly addresses the first argument. It simply reiterates Dr. Bambos's opinion that order is irrelevant. "[T]he all limitations rule requires that equivalence be assessed on a limitation-by-limitation basis, as opposed to from the perspective of the invention as a whole." *Freedman Seating Co. v. Am. Seating Co., 420 F.3d 1350, 1358 (Fed. Cir. 2005)*. But when the "limitation" at issue is the implication that the steps of the claim must be performed in order, it seems appropriate to assess equivalence from the perspective of the invention as a whole.

As to the second argument, Samsung counters that "[v]itiation is not an exception or threshold determination that forecloses resort to the doctrine of equivalents, but is instead a legal conclusion of a lack of equivalence based on the evidence presented and the theory of equivalence asserted." *Cadence Pharms. Inc. v. Exela PharmSci Inc., 780 F.3d 1364, 1371 (Fed. Cir. 2015)*. In *Cadence*, the Federal Circuit affirmed the district court's rejection of defendant's vitiation argument and saw no clear error in the district **[**61]** court's finding of infringement under the doctrine of equivalents when it relied on expert testimony indicating that the timing of steps was "an insubstantial difference." *Id. at 1370-71*.

As in *Cadence*, Samsung highlights its expert's opinion that the order of steps is an "insubstantial difference." It has offered evidence that Huawei's products infringe claims 13 and 16 of the '130 patent under a DOE theory but not under direct infringement. Huawei's motion for summary judgment of noninfringement of the '130 patent is GRANTED IN PART AND DENIED IN PART.

D. Noninfringement as to the '105 Patent

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[17] During the hearing, Samsung explained this interpretation that the word "remaining" refers to "where" the data information is mapped, not "when" it is mapped.

Asserted claims 28, 29, and 32 require "modulating data information to generate non-FT precoded modulation data symbols" and then "Fourier Transform (FT) pre-coding the non-FT precoded modulation data symbols to generate FT pre-coded symbols." Huawei contends that its products cannot infringe as a matter of law because Samsung's expert testified that the "FT precoded symbols" comprise the physical uplink shared channel (PUSCH), which contains both control information and data information. Prucnal Report ¶¶ 362-77, 392-412; *see also* Prucnal Dep. 46:25-47:4, 64:22-65:5, 68:24-69:18 (testifying that control quality indicators (CQI) are FT pre-coded **[**62]** control information on the PUSCH); 68:24-18 (testifying that demodulation reference signals (DMRS) and sounding reference signals (SRS) are control signals on the PUSCH)(Ex. 26); *see also* Mahon Decl. ¶ 4-6.

Samsung attacks Huawei's arguments by relying on claim construction principles.[18] According to Samsung, the plain and ordinary meaning of "FT pre-coded symbols" is simply "symbols that contain **[*961]** information that have been FT pre-coded." Opp'n at 19. But, as explained above, in determining whether a reasonable juror could find that the plain and ordinary meaning of each disputed term reads onto the accused devices, I may consider the written description and other parts of the specification. *Aventis, 715 F.3d at 1373*. Samsung acknowledges that Dr. Prucnal's analysis identifies PUSCH symbols, which contain both data and control information. Opp'n at 20. But it insists that the claim term uses "comprising" and therefore does not foreclose the possibility that "FT pre-coded symbols" could contain control information.

Samsung also points out that construing the term as precluding control data excludes an embodiment depicted in figure 8. '105 patent at fig. 8; *see id.* at 9:14-17 ("In this embodiment, Size M FFT block 810 pre-codes **[**63]** not only the user data, but also FFT pre-codes some of the control and signaling information."). And it emphasizes that the claim term "FT pre-coded symbols" must be distinguished from "FT pre-coded data symbols" and "FT pre-coded control symbols."

Samsung's arguments are unpersuasive. The surrounding claim language makes it clear that the "*FT pre-coded symbols*" are generated by "*Fourier Transform (FT) pre-coding the non-FT pre-coded modulation data symbols*," which are generated by "modulating data information to generate non-FT precoded modulation data symbols." '105 Patent at 13:49-51. Accordingly, the FT pre-coded symbols are generated using data symbols.

The specification confirms that the term "FT pre-coded symbols" means "modulated data symbols that do not contain signaling or control information and have been put through a Fourier transform operation." *E.g.*, '105 Patent, Fig. 3 (distinguishing between "data" input and "signaling & control" input); 3:56-60 (describing figure 3); 6:65-67 ("In FIG. 3, the signaling and control information, such as pilot signals, are directly mapped to the OFDM subcarriers without FFT precoding."); claim 28 at 13:45-51 ("modulating data information to generate non-FT precoded **[**64]** modulation data symbols; modulating control information to generate non-FT precoded modulation control symbols; Fourier Transform (FT) pre-coding the non-FT pre-coded modulation data symbols to generate FT pre-coded symbols... .").

As for figure 8, Huawei explains that the claim language discloses FT pre-coding using data information and therefore does not cover figure 8. "It is true that constructions that exclude the preferred embodiment are disfavored." *Pacing Techs., LLC v. Garmin Int'l, Inc., 778 F.3d 1021, 1026 (Fed. Cir. 2015)*. "However, in a case such as this, where the patent describes multiple embodiments, every claim does not need to cover every embodiment." *Id.* "This is particularly true where the plain language of a limitation of the claim does not appear to cover that embodiment." *Id.* Such is the case here.

"Comprising is not a weasel word with which to abrogate claim limitations." *Spectrum Int'l, Inc. v. Sterilite Corp., 164 F.3d 1372, 1380 (Fed. Cir. 1998)*. "The presumption raised by the term 'comprising' does not reach into each of the six steps to render every word and phrase therein open-ended—especially where, as here, the patentee has narrowly defined the claim term it now seeks to have broadened." *Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337, 1343 (Fed. Cir. 2007)*; *see also* *Power Mosfet Techs., L.L.C. v. Siemens AG, 378 F.3d 1396, 1409 (Fed. Cir. 2004)*

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[18] As discussed below, it also moves to strike Huawei's argument because it argues that it was not timely disclosed. *See* discussion infra VII.

("'Comprising,' while permitting additional elements not required by a claim, does not remove the limitations **[**65]** that are present."). The claim clearly recites that "FT pre-coded **[*962]** symbols" contain data information, not control information.

Samsung next highlights Dr. Prucnal's testimony that "every symbol in the PUSCH does not necessarily include control information." Prucnal Dep. at 64:22-65:5, 65:22-66:6 (Ex. 16). It underscores Huawei's expert's testimony that there are times when there is only data transmitted in the PUSCH. Mahon Dep. at 238:2-13, 239:5-13, 239:14-240:11, 241:20-242:7, 242:19-244:19 (Ex. 23). Huawei takes issue with this "eleventh-hour attempt" and emphasizes that Dr. Prucnal never offered the opinion that the accused products only infringe some of the time nor did its interrogatory answers rely on such an infringement theory, and its damages expert assumes that the' 105 patent is infringed at all times. Mot. Ex. 27 ¶ 362-77, 393-412; Reply Ex. 51 at 161-215; Stake FRAND Decl. Ex. 8 ¶¶ 76-79. And even if I ignored these oversights, Huawei urges that Samsung has still not met its burden to demonstrate a disputed issue because "[a] theoretical possibility that PUSCH symbols lack control data does not mean it happens." Reply at 13.

But I must view the evidence in the light most favorable to **[**66]** Samsung. It has pointed to Dr. Prucnal's testimony that not every PUSCH symbol contains control information, meaning that some contain data and no control information. Even accepting Huawei's claim interpretation, Samsung has demonstrated disputed evidence of infringement. Its motion on this point is DENIED.

E. Noninfringement of the '825 Patent

The '825 patent provides a method for a user equipment to communicate with a base station (Node B) on a shared channel (SCH), which is a channel used by multiple UEs communicating with the same base station. '825 patent, Abstract; *id.* at 1:53-56 (Dkt. No. 140-1 at 47). The Node B must be able to differentiate UEs to ensure that data packets are sent to their intended recipient. The '825 patent discloses a method for UEs to select a temporary ID from a pool when initiating communications with a base station. Sometimes, two UEs may select the same short ID at the same time and a "collision" occurs. *Id.* at 2:14-39; *id.* at 6:47-49. The '825 patent addresses this potential problem by developing a monitoring technique in which a UE waits a "predetermined delay duration" prior to monitoring for a downlink signal, so that a first UE has time to receive its short ID before a second UE may intercept it. *Id.* ***[**67]*** at 3:33-45; *id.* at 6:34-39; *id.* at 6:65-7:7.

Asserted claims 1 (method) and 4 (apparatus) both disclose "receiving system information indicating a group of identification (ID)s." '825 Patent at 11:43-44, 12:3-4. Huawei contends that "indicating" means "including," whereas Samsung insists that "indicating" means "point out or index."[19] Huawei highlights portions of the specification, which repeatedly notes that the system information *includes* information. The description of figure 3, "a message flow diagram illustrating conventional operation for acquiring a short ID after a UE moves to a new cell," includes the following: "The system information is common information to be provided up to a cell boundary through known cell-by-cell channels, and includes information to be detected by the UE **305** for initiating communications in the cell." '825 Patent at 2:54-56, 59-63; *see also id.* at 5:32-33, figure 4 description (noting that the UE "acquires system information" and "[t]he system information includes the temporary ID pool **[*963]** of the cell A."); *id.* at 7:52-57, figure 8 description ("[t]he controller **835**, for example, manages a temporary ID pool and T and P values acquired from system information of a current cell, **[**68]** selects a temporary ID from the temporary ID pool, and delivers the selected temporary ID to the control message generator **805**."); *id.* at 8:51-52, figure 9 description (noting that the UE "acquires system information," and "[t]he system information includes a temporary ID pool of the cell A, a delay duration T, and a valid period P.").

Huawei underscores that Samsung's expert, Dr. Matthew Valenti, admitted that this description means that the T and P values are what is being transmitted. Valenti Dep. at 95-96 (McBride Decl. ¶ 41; *id.*, Ex. 40; Dkt. No. 327-

[19] In the Joint Claim Construction Statement, Huawei proposed its preferred construction, but Samsung contended that the term needed no construction. Dkt. No. 124-3 at 58.

54[under seal]). It contends that Samsung has offered no evidence that the Huawei accused products receive system information including the group of IDs. *See* Valenti Report ¶¶ 371-74, 382, 396 (Ex. 41). And its expert, Dr. La Porta, opines that "[n]othing within this source code, or elsewhere, suggest that the Huawei/HiSilicon accused devices receive system information 'including a group of identification(ID)s.'" La Porta Rebuttal Report ¶¶ 121, 132 (Ex. 42; Dkt. No. 327-56[under seal]). Dr. La Porta also contends that, even accepting Samsung's proposed construction, the claims would not read on the accused products because "the system **[**69]** information only provides data for the UE to determine the size of PreambleGroupA and PreambleGroupB[,]" but "the base station does not provide *any* information to show which preamble group to use." *Id.* ¶ 122.

Samsung begins its counterattack by insisting that "indicating" must be given its plain and ordinary meaning, since it was not selected for claim construction, and the plain and ordinary meaning of the word can mean "to point out or point to." Dkt. No. 328-41. It also emphasizes that all of the embodiments that Huawei highlights are "exemplary embodiments" and nowhere does the patentee use limiting language in reference to these embodiments. As evidence of infringement, it cites to Dr. Valenti's opinion that "[t]he received system information determines the available groups of random access preambles (including whether preamble group B exist or not), the number of preambles in the available groups, and the size of each of those preamble groups." Valenti Report ¶¶ 372, 624 (Dkt. No. 357-46[under seal]). According to Samsung, since the system information includes the number of preambles in a group, it necessarily includes the range of preamble indexes, i.e., an ID within a group **[**70]** of IDs, thereby accomplishing the claim limitation of "receiving system information indicating a group of identification (ID)s." *See* '825 Patent at 11:43-44, 12:3-4.

Even though I must look to the specification for guidance in interpreting the plain and ordinary meaning of claim terms, "it is improper to read limitations from a preferred embodiment described in the specification—even if it is the only embodiment—into the claims absent a clear indication in the intrinsic record that the patentee intended the claims to be so limited." *Epos Techs. Ltd. v. Pegasus Techs. Ltd., 766 F.3d 1338, 1341 (Fed. Cir. 2014)* (quoting another source). I cannot say that there is such a "clear indication" here. Samsung cites to several references that do not state that the system information "includes" the temporary ID pool. *E.g.*, '825 patent at 7:11-20 (referring to figure 7 and noting that the "UE acquires the temporary ID pool..."); *id.* at 9:56-65 (referring to figure 11 and noting the same).

Since "includes" must be given the "full range" of its plain and ordinary meaning, including "to point out," and Samsung has provided evidence that the accused devices **[*964]** practice this limitation, Huawei's motion for summary judgment on this point is DENIED.

Even if I did not find a genuine dispute of material fact **[**71]** as to literal infringement, I would deny the motion under a DOE theory. Dr. Valenti also opined that "any alleged differences are insubstantial[,]" so the limitation is at least practiced under DOE. Valenti Report ¶ 399; *see id.* (explaining that the accused devices perform substantially the same function, receiving information indicating a group of identifiers, in substantially the same way, receiving the system information from the base station, to get substantially the same result, obtaining a group of identifications from which the UE can select). Viewing the evidence in the light most favorable to Samsung, it has demonstrated a disputed issue as to whether the accused products infringe under a DOE theory.

III. HUAWEI'S MOTION TO STRIKE PORTIONS OF SAMSUNG'S EXPERT REPORTS RELATED TO FRAND

Huawei objects to the opinions of two of Samsung's experts related to the propriety of an SEP holder seeking injunctive relief because it insists these opinions amount to improper legal conclusions. Mot. to Preclude at 2 (Dkt. No. 327-4[under seal]; Dkt. No. 329[redacted]).

Expert Michael Davies opines that "[i]f a patent holder holds patents of the type where there were a number of credible alternative **[**72]** implementations prior to a single implementation being selected for incorporation into the standard, the patent holder would be in violation of antitrust regulations by asking for an injunction." Davies Report ¶ 27 (Peterson Decl., Ex. 1); *see also id.* ("A holder should not be granted an injunction on a patent ex-post if the patent was only one of a number of equally plausible alternatives ex-ante."). And expert Dr. Jerry Hausman noted his "view" that "companies with SEPs should not be able to seek an injunction (or an exclusion order from the U.S. International Trade Commission) except under exceptional circumstances" because "they permit the SEP patent owner to exercise monopoly power beyond what is permitted under its FRAND obligations." Hausman Report ¶ 57; *see also id.* ¶ 32 ("My review of the negotiations between the parties leads me to the conclusion that, to the extent there are any exceptions to the general rule that a SEP owner cannot pursue injunctive relief, those exceptions do not apply here."), ¶ 56 ("Thus, by seeking an injunction Huawei is seeking to exploit its market power and obtain higher royalties. These higher royalties are equivalent to higher prices than would **[**73]** have occurred in the absence of the injunction and are thus a violation of *Section 2*."), ¶ 58 ("Filing for injunctions also should not be permitted because they confer a 'dangerous probability of success' for the SEP owner to exercise monopoly power beyond what is permitted under its FRAND obligations."); Hausman Rebuttal Report ¶ 14.

Huawei cites several reasons for striking these paragraphs. As to the Davies Report, Huawei contends that (1) his opinions on the legal standard for an antitrust violation and the propriety of injunctive relief are pure issues of law, (2) he did not rely on these statements as legal assumptions provided by counsel and he admits he is not qualified to opine as an expert in ***antitrust law*** or economics, and (3) he misstates the law because there is no per se rule against injunctions on SEPs and the appropriate antitrust laws will be set forth in the jury instructions. Mot. at 2-4. And with respect to Dr. Hausman, Huawei asserts that (1) his personal "view" constitutes a legal conclusion and will be of no use to the jury, (2) he acknowledges that his personal views do not align with prevailing legal standards, (3) his conclusion **[*965]** in paragraph 56 amounts to an improper **[**74]** and unfounded legal conclusion, and (4) "his opinions run afoul of the act of state doctrine, for the reasons set forth in Huawei's motion for summary judgment." *Id.* at 4-5.

Samsung responds that none of the paragraphs should be stricken because "an expert may offer his opinions within the legal terminology of the legal framework pertinent to his opinions." Opp'n at 2. The Ninth Circuit has noted that "a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." *Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998, 1017 (9th Cir. 2004)* (quoting another source); *see also* *Fid. Nat. Fin., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburg, PA, 2014 U.S. Dist. LEXIS 47041, 2014 WL 1286392, at *9 (S.D. Cal. Mar. 28, 2014)* (allowing expert opinions "couched ... in legal terms" but noting that the court may revisit the issue in the context of specific testimony via a motion in limine); *Advanced Thermal Scis. Corp v. Applied Materials Inc., 2009 U.S. Dist. LEXIS 140818, 2009 WL 10673194, at *1 (C.D. Cal. Oct. 28, 2009)* ("The analysis of complex facts, albeit within a legal framework, is a proper role for an expert.").

But Samsung overlooks the portions of the reports that go beyond providing a legal framework and offer opinions on legal conclusions. *See* Davies Report ¶ 27 ("the patent holder would be in violation of antitrust regulations"); **[**75]** Hausman Report ¶ 32 ("to the extent there are any exceptions to the general rule that a SEP owner cannot pursue injunctive relief, those exceptions do not apply here."), ¶ 56 ("These higher royalties are equivalent to higher prices than would have occurred in the absence of the injunction and are thus a violation of *Section 2*."), ¶ 57 ("companies with SEPs should not be able to seek an injunction ... because they permit the SEP patent owner to exercise monopoly power beyond what is permitted under its FRAND obligations."), ¶ 58 ("Filing for injunctions also should not be permitted because they confer a 'dangerous probability of success' for the SEP owner to exercise monopoly power beyond what is permitted under its FRAND obligations."). These sentences will be struck.[20] *See* *Hangarter, 373 F.3d at 1016* ("[A]n expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law." (quoting another source) (emphasis in original)).

I do not, however, see any need to strike paragraphs 21 through 26 of the Davies Report, paragraph 14 of Hausman's Rebuttal Report, or the remaining portions of the paragraphs noted above.[21]

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[20] This ruling is not inconsistent with any rulings on Samsung's motion to exclude portions of Huawei's experts' reports because "the outcome depends upon how the expert expresses his opinion." *Fid. Nat. Fin., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburg, PA, No. 09-CV-140-GPCKSC, 2014 U.S. Dist. LEXIS 47041, 2014 WL 1286392, at *8 (S.D. Cal. Mar. 28, 2014)*.

IV. HUAWEI'S *DAUBERT* MOTION ON TECHNICAL ISSUES[22]

Huawei contends that Samsung's experts offer opinions based on improper **[*966]** constructions of terms in Huawei patents 8,724,613 ("'613 patent"), 8,885,587 ("'587 patent"), 8,644,239 ("'239 patent"), and 8,416,892 ("'892 patent"), and Samsung patents RE44,105 ("'105 patent"), 8,761,130 ("'130 patent"), 9,288,825 ("'825 patent"), and 8,619,726 ("'726 patent"). Huawei *Daubert* Mot. (Dkt. No. 327-4[under seal]; Dkt. No. 330[redacted]). Huawei contends that Samsung's expert witnesses offer opinions based on improper construction of claims not included in the Claim Construction Order. And it underscores that in many instances Samsung did not raise these issues in the Joint Claim Construction Statement (Dkt. No. 124). *See* supra note 5.

A. Huawei's '613 Patent

1. Background

The '613 patent enables mobile devices to know when and where to locate a service when a base station transmits it within a specific transmission unit, a fixed block of time called a radio frame. '613 at 5:10-51 (Dkt. No. 330-4). Each frame consists of 10 subframes. *Id.*, figure 4.

Claim 1 provides,

> A method for communicating, comprising:
>
> > receiving, by a user equipment (UE), a service sent by a base station, the service being sent in one or more subframes that are designated as specific subframes, the specific subframes being selected **[**77]** from one or more radio frames that are designated as specific radio frames, the specific radio frames being selected from a time unit, wherein the time unit comprises *2M* radio frames, each of the radio frames containing a number R of subframes that can be allocated to carry the service, where R is a natural number, and M is a nonnegative integer; and
> > receiving, by the UE, position information of the specific radio frames in the time unit and position information of the specific subframes in the specific radio frame on a transport channel, wherein the transport channel is mapped to a physical shared data channel;
> > wherein the position information of the specific radio frames in the time unit is represented by the number of the specific radio frames in the time unit; or the position information of the specific radio frames in the time unit is represented by an interval between two specific radio frames in the time unit,
> >
> > wherein the interval is *2m*, and OsmsM, or wherein the interval is the total number of the radio frames in the time unit divided by the number of the specific radio frames in the time unit.

'613 Patent at 18:24 - 49; *see also id.* at 18:60 - 19:18 (apparatus claim 5).

During the claim construction **[**78]** process, the parties selected only one of the '613 patent terms for construction—"receiving by a user equipment (UE), a service sent by a base station"/"receive a service sent by a

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[21] To the extent that any of these opinions are based on incorrect legal assumptions or propose views that diverge from the actual law, as Huawei asserts, those opinions may be excluded via motions *in **[**76]** limine. See* *Villalpando v. Exel Direct Inc., 161 F. Supp. 3d 873, 895 (N.D. Cal. 2016)*(addressing motions in limine and noting that "an expert's reliance on *incorrect* legal assumptions would warrant exclusion[.]").

[22] Samsung moves to strike a number of Huawei's noninfringement theories and noninfringement alternatives on the basis that they were not timely disclosed, and some of those arguments are implicated here. As discussed below, *see* discussion *infra* section VII, I am denying that motion.

base station" ('613 Patent, claims 1 and 5). I decided that no construction was necessary. Claim Construction Order at 9-11.

Samsung's expert, Dr. David Lyon, submitted a rebuttal report on noninfringement of the '613 patent in which he offered his opinion of noninfringement. Lyon '613 Noninfringement Rebuttal Report (Ex. 2, Dkt. No. 327-10[under seal]; **[*967]** Ex. A, Dkt. No. 355-7[under seal]). Huawei argues that Lyon's opinions are based on three new claim constructions not raised during the claim construction phase:

(1) the "position information" of claims 1 and 5 must be the "position information for the specific frames and subframes that contain the service[,]" rather than position information for frames and subframes that are "reserved" to carry the service (Lyon '613 Noninfringement Report ¶ 82)

(2) claims 1 and 5 "do not provide a mechanism for representing the position of the first specific frame in the time unit to be anywhere other than the first frame of the time unit—a non-zero offset. In other words, the asserted claims do not allow **[**79]** there to be an 'offset' of frames in addition to the regular spacing of the specific frames within the time unit." (Lyon '613 Noninfringement Report ¶ 171), and

(3) "[t]he majority of the claimed limitations require performance in the network, not the UE" (Lyon '613 Noninfringement Report ¶ 188), and "Dr. Akl needed to show that Samsung controlled the network to perform these limitations to such a degree that their actions could be imputed to Samsung" (Lyon '613 Noninfringement Report ¶ 190).

2. Analysis

As an initial matter, Samsung misconstrues Huawei's arguments. Huawei is not arguing that Dr. Lyon is "applying a different plain and ordinary meaning of claim terms than Huawei's experts[.]" Opp'n at 2. Rather, Huawei contends that Dr. Lyon's opinions "exceed the bounds" of the plain and ordinary meaning of the claim terms, *Apple, 2014 U.S. Dist. LEXIS 22938, 2014 WL 660857, at *6*, thereby "delv[ing] too deeply into claim construction to be presented to the jury[.]" *Fujifilm, 2015 U.S. Dist. LEXIS 35235, 2015 WL 1265009, at *6*. Under these circumstances, expert opinions are properly excluded and need not be included in a summary judgment motion. *E.g., Media Tek, 2014 U.S. Dist. LEXIS 31461, 2014 WL 971765, at *5* (rejecting argument that expert was "merely offering testimony within the purview of the plain and ordinary meaning of the patent claim terms" when the **[**80]** expert "relies heavily on the prosecution history, specifications, and even provisional applications to explain and expound upon a specific meaning and/or requirements of the terms identified.").

a. "Position Information"

The parties dispute whether the plain and ordinary meaning of "position information" allows for an interpretation limiting it to the "specific radio frames" that contain "specific subframes" that *actually* contain the "service" sent by the base station, as opposed to whether the "position information" can refer to all "specific radio frames" and "specific subframes" that are reserved for the service, but may not necessarily contain it. Huawei contends that Dr. Lyon's opinions based on "position information" find no support in the intrinsic evidence and should be stricken. *See* Huawei's *Daubert* Mot. at 5 (seeking to strike paragraphs 28, 59, 64, 67, 71, 81-82, 120-21, 141-43, 153, 159, and 161). Samsung insists that Dr. Lyon does not provide any claim construction analysis of the term "position information," he merely relies on his understanding of the plain and ordinary meaning of the term. Opp'n at 3; *see* Lyon '613 Rebuttal Report ¶¶ 35-36.

But Dr. Lyon's bare assertion **[**81]** that he "applied the plain and ordinary meaning" does not make it so. And he need not include paragraphs "delv[ing] deeply" into construction for his opinions to be improperly based on claim construction arguments. A brief examination of the claims and his opinions proves the point.

Part of claim 1 requires, "the service being sent in one or more subframes that are designated as specific subframes, the specific subframes being selected from one or more radio frames that are designated **[*968]** as specific radio frames," '166 Patent at 18:28-29, and another part mandates that the UE receive "position information of the specific radio frames in the time unit and position information of the specific subframes in the specific radio frame on a transport channel," *id.* at 18:35-37. A proper reading of these claim elements requires that the UE receive a "service" that is "sent in one or more" designated "specific subframes," which are selected from designated "specific radio frames," and the UE receives "position information" for those designated "specific radio frames."

Huawei frames this as an issue over the construction of "position information," and (in reply) argues that "[t]he plain meaning of 'position information' **[**82]** is information relating to its position." Reply at 2. But it appears that the parties actually dispute the meaning of the "specific radio frames" and "specific subframes," and whether those "specific" frames/subframes must contain the service. The claims do not require this limitation. The service is "sent in" "one or more ... specific subframes" that are "selected from one or more ... specific radio frames... ." The "one or more" language suggests that not all of the "specific" frames/subframes have to carry the service.[23] As Huawei frames it, contrary to Dr. Lyon's opinion, "[n]othing in the plain language of the claims requires that all of the 'designated' frames and subframes actually contain the service, such that there is an exact one-to-one correspondence between the designated frames/subframes and the frames/subframes that actually contain the service[.]" Huawei's *Daubert* Mot. at 3.

Portions of the targeted paragraphs of Dr. Lyon's report depend on his interpretation that the claims dictate *limiting* the "position information" to those "specific frames and subframes that contain the claimed service." Lyon Report ¶¶ 59, 64, 67, 81-82, 120, 141-42, 159, 161; *see also id.* ¶¶ 28, 71, **[**83]** 153 (implying the same). The take-away is that his opinions seek to *narrow* the plain and ordinary meaning of the claim language.[24] But claim terms are given their full scope absent disavowal by the patentee or a clear intent to act as his own lexicographer. *Thorner v. Sony Computer Entm't Am. LLC, 669 F.3d 1362, 1365 (Fed. Cir. 2012); see also 3M Innovative Properties Co. v. Tredegar Corp., 725 F.3d 1315, 1329 (Fed. Cir. 2013)*("[O]ur cases do not support prescribing a more particularized meaning unless a narrower construction is required by the specification or prosecution history."). Because claim construction is a matter of law to be decided by the court, and, by implication, experts are not permitted to argue claim construction to the jury, an expert's opinion that seeks to limit the full scope of a term's plain and ordinary meaning must be stricken.

[*969] Samsung underscores the undisputed purpose of the '613 patent, which is to "save electric energy of the user equipment[,]" '613 patent at 3:53-54, to argue that "it would not make any sense for the UE to read frames and subframes that only might carry the service[.]" Opp'n at 5. But directing the UE to read certain reserved subframes as opposed to all subframes would still accomplish this purpose. Moreover, the argument is irrelevant to whether Dr. Lyon's opinions limit the plain and **[**84]** ordinary meaning of the claim terms.

During the hearing, Samsung argued that Huawei's request to strike certain paragraphs was overly broad because it included portions that did not run afoul of claim construction tenets. It provided a copy of the report with highlighted portions involving Dr. Lyon's opinion that "position information" is limited to position information of the specific radio frames and specific subframes that actually contain the service. Highlighted Lyon Report (Ducca Decl., Ex. A, Dkt. No. 396-5[under seal]); *see* Notice Re: Tentative Rulings (Dkt. No. 396-3[under seal]). The

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[23] This conclusion is confirmed by the specification, which notes that the invention discloses "[a] method for transmitting service [that] includes: selecting a part or all of radio frames in one time unit as specific radio frames; selecting a part of all of subframes in the specific radio frames as specific subframes for sending a specific service; sending the service according to the above time division multiplexing mode; and sending position information of the specific radio frames and/or position information of the specific subframes." '613 Patent at 2:63-3:3.

[24] The "exceed the bounds" language of *Apple*, see *2014 U.S. Dist. LEXIS 22938, 2014 WL 660857, at *6*, may cause confusion because one could interpret a more narrow interpretation as *falling within the bounds* of plain and ordinary, rather than "exceed[ing]" them. But, as explained, an improperly narrow construction technically falling within the bounds of a plain and ordinary meaning would still inappropriately delve too deep into claim construction.

highlighted sentences of the targeted paragraphs (last sentences of paragraph 64, 67, 71, 81, 82, 141, 159) will be struck. The remaining technical information is not tied to an improper limitation of the claim language and may remain.

3. "Non-Zero Offset"

Huawei seeks to strike paragraphs 171 through 175 of Dr. Lyon's report because he explicitly opines that "[t]he claims do not provide a mechanism for representing the position of the first specific frame in the time unit to be anywhere other than the first frame of the time unit—a non-zero offset." Lyon Report ¶ 171; *see also* ¶¶ 173-175 (detailing **[**85]** "an example where a non-zero offset would not infringe the asserted claims..."). But, according to Huawei, nothing in the claim language requires a specific starting position, let alone a "non-zero" starting position. Huawei's *Daubert* Mot. at 6. It also cites numerous locations in the specification that dictate the permissive instruction that "the starting position *may* be appointed as 0[.]" *E.g.*, '613 patent at 13:57, *id.* at 14:14-15, *id.* at 14:22 (emphasis added); *see also id.* at 14:26 ("the position may be a first radio frame in the sub-time unit."). And it emphasizes that the specification's use of a variable (g0) rather than a constant to represent the starting position reinforces that it need not always be 0.

Samsung counters that every embodiment of the specification uses a starting position of zero. Opp'n at 6. This is true, but it does not justify limiting a claim's plain and ordinary meaning absent disavowal or a clear intent to define. *See* *Electro Med. Sys., S.A. v. Cooper Life Scis., Inc., 34 F.3d 1048, 1054 (Fed. Cir. 1994)* ("[A]lthough the specifications may well indicate that certain embodiments are preferred, particular embodiments appearing in a specification will not be read into the claims when the claim language is broader than such embodiments."). That is what **[**86]** Dr. Lyon does when he opines, "The claims do not provide a mechanism for representing the position of the first specific frame in the time unit to be anywhere other than the first frame of the time unit—a non-zero offset." Lyon Report ¶ 171. This sentence, and the sentences before and after it, must be struck.

I do not, however, see a need to strike the remaining portions of this paragraph, nor the other paragraphs Huawei seeks to strike. Those paragraphs explain Dr. Lyon's opinion that "[w]hen there is a non-zero offset, the Accused Products do not infringe the asserted claims." Lyon Report ¶ 171. He can opine on this issue, but he cannot argue that *the claims require* a non-zero offset.

[*970] 4. Divided Infringement

Dr. Lyon opined that "network components are necessary to infringe claims 1 [method] and 5 [product]" of the '613 patent, including that "the majority of the claimed limitations require performance in the network, not the UE[,]" and in order to show infringement, Huawei needed to demonstrate that "Samsung controlled the network to perform these limitations to such a degree that their actions could be imputed to Samsung." Lyon Report ¶¶ 188-190. Huawei argues that Dr. Lyon's divided infringement **[**87]** theory "fails as a matter of law."

Dr. Lyon's opinions here do not rely on improper claim constructions, but they depend on incorrect statements of the law and are therefore excludable under *Rule 702* because they will not help the trier of fact understand the evidence. *See* *Fed. R. Evid. 702*; *see also* *Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292, 1306 (Fed. Cir. 2011)* ("Under *Daubert*, the district court must exercise its 'gatekeeper' function in ensuring that scientific testimony is relevant and reliable.") (citing *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999))*. Both claims 1 and 5 are directed to the "user equipment." *See* '613 patent, claim 1 at ("A method for communicating, comprising: receiving, by a user equipment (UE)... receiving, by the UE, ..."); *id.*, claim 5 at ("A user equipment, comprising ... .").

As an initial matter, his divided infringement theory does not apply to product or apparatus claims, such as claim 5 of the '613 patent, so it fails as a matter of law. *See* *Georgetown Rail Equip. Co. v. Holland L.P., No. 6:13-CV-366, 2016 U.S. Dist. LEXIS 78365, 2016 WL 3346084, at *15 (E.D. Tex. June 16, 2016)*, *aff'd*, *867 F.3d 1229 (Fed. Cir. 2017)* ("Holland's position was wrong as a matter of law, because the asserted claim 16 is a *system* claim and the law of divided infringement that Holland relied on applies only to *method* claims." (citing Akamai Techs., Inc v. Limelight Networks, Inc., 786 F.3d 899, 910 (Fed. Cir. 2015) (panel decision) ("[O]nly method claims can raise an issue of divided infringement") *vacated* Akamai Techs., Inc v. Limelight Networks, Inc., 786 F.3d 899, 910 (Fed. Cir. Aug. 13, 2015) (en banc)); **[**88]** *see also* Arcelormittal & Arcelormittal Atlantique Et Lorraine v. AK Steel Corp., No. CV 13-685-SLR, 2017 U.S. Dist. LEXIS 7199, 2017 WL 239344, at *4 (D. Del. Jan. 19, 2017) ("Plaintiffs' request for discovery is unnecessary given that divided infringement applies to method claims in particular circumstances, not to the product by process claims at bar." (citing Akamai Techs., Inc v. Limelight Networks, Inc., 797 F.3d 1020, 1022 (Fed. Cir. 2015)). Since divided infringement only applies to method claims, Dr. Lyon's divided infringement opinion with respect to apparatus claim 5 is irrelevant to the issue of infringement of that claim.

But as for method claim 1, I cannot say that Dr. Lyon's divided infringement theory fails as a matter of law. The claim is undeniably directed towards the "user equipment." "[A] patentee can usually structure a claim to capture infringement by a single party, by focusing on one entity." Uniloc USA, 632 F.3d at 1309 (internal quotation marks and alterations omitted); *see also* Tech. Patents LLC v. T-Mobile (UK) Ltd., 700 F.3d 482, 501 (Fed. Cir. 2012) (finding divided infringement theory inapplicable because the claim "require[d] action only by the originating user," and "do not require performance by multiple actors."). The patentee elected to direct the claims of the '613 patent towards the "user equipment." But claim 1 also requires other actors in the network, such as a "service sent by a base station." *E.g.*, '613 patent at 18:25-26. **[**89]**

As the *Uniloc* court noted, "[t]hat other parties are necessary to complete **[*971]** the environment in which the claimed element functions does not *necessarily* divide the infringement between the necessary parties." 632 F.3d at 1309 (emphasis added). But this claim explicitly requires action by a third party, not implicitly as in the example provided by Uniloc. *See id.* (noting that a claim that provides "'[a]n algorithm incorporating means for receiving e-mails' may require two parties to function, but could nevertheless be infringed by the single party who uses an algorithm that receives e-mails."). Under these circumstances, I am not prepared to strike Dr. Lyon's divided infringement opinion related to claim 1 of the '613 patent. If it is determined pre-trial that divided infringement is not an applicable theory of infringement for this claim, then Huawei may move to exclude these opinions via a motion *in limine*.[25]

B. Huawei's '587 Patent

Huawei attacks paragraphs 134 through 136, which pertain to the '587 patent, because they present the same type of divided infringement opinions as discussed above with respect to the '613 patent. *See* Lyon Report re: Noninfringement of '587 Patent ¶ 134 ("the majority of the claimed limitations [in claims 3 and 9 of the '587 patent] require **[**90]** performance in the network, not the UE.") (McBride Decl. ISO Huawei's *Daubert* Mot. ¶ 9; *id.*, Ex. 8, Dkt. No. 327-12); *id.* ¶ 136 ("Dr. Akl [Huawei's technical expert] needed to show that Samsung controlled the network to perform these limitations to such a degree that their actions could be imputed to Samsung.").

It presents the same arguments—that Samsung has not shown that a divided infringement theory applies to apparatus/product claims (as in claim 9 of the '587 patent), and, regardless, the claims are written from the perspective of the UE, so divided infringement is inapplicable. *See* Huawei's *Daubert* Mot. at 9-10.

As with the '613 patent, the portions of these opinions that reference claim 9 will be stricken, because divided infringement does not apply as a matter of law to product/apparatus claims. But the remaining portions of the paragraphs can remain, unless and until it is determined that divided infringement does not apply to the method claims at issue in this case. *See* discussion above re: '613 patent.

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[25] This conclusion is reinforced by the conditional language in Dr. Lyon's report. *See* Lyon Report ¶ 190 ("[T]o the extent there is a determination that the asserted claims require multiple actors to infringe the claims, Dr. Akl and Huawei have not set forth evidence to show that Samsung had any control over the third party network entities, and therefore, the Accused Products would not infringe the asserted claims.").

C. Samsung's '105 Patent

The '105 patent provides "a mechanism for FFT [Fast Fourier Transform] pre-coding of data to reduce peak-to-average power ration (PAPR) in a multi-carrier wireless network[,]" '105 patent at 1:38-40 (Dkt. No. 328-47), **[**91]** subject to certain protocol, such as "orthogonal frequency division multiplexing (OFDM)," or "orthogonal frequency division multiple access (OFDMA)[,]" *id.* at 1:43, 50-51. Asserted claim 28 requires, "mapping the FT pre-coded symbols to a first set of subcarriers[,]" and "mapping the non-FT pre-coded modulation control symbols to a second set of subcarriers[.]" *Id.* at 13:52-55. And, "performing an inverse Fourier Transform (IFT) operation on at least one of (i) the FT pre-coded symbols based on the first set of subcarriers and (ii) the non-FT pre-coded modulation control symbols based on the second set of subcarriers to generate an output signal... ." *Id.* at 13:56-60.

[*972] Huawei points to figure 3 of the patent to argue that "the OFDM/OFDMA transmitter according to the '105 Patent performs Fourier transform (FFT or FT) precoding on only the data symbols before the symbols are converted into the time domain signals via IFFT (or IFT)." Huawei *Daubert* Mot. at 10 (citing Min Expert Report ¶ 157). Dr. Prucnal opines that the "first set of subcarriers" corresponds to the physical uplink shared channel (PUSCH) and the "second set of subcarriers" corresponds to the physical uplink control channel (PUCCH). **[**92]** Prucnal Report ¶¶ 416, 432 (Ex. 11, Dkt. No. 327-14[under seal]). From this premise, Huawei argues that Dr. Prucnal's opinion "contradicts the claim and should be excluded" because it does not allow for both sets of subcarriers to be available for the same IFT operation (the operation that creates the transmission symbols), which it contends is required by the claims. Huawei *Daubert* Mot. at 11; *see* Mahon Decl. ¶ 4 ("In the LTE standard, the Physical Uplink Shared Channel (PUSCH) and Physical Uplink Control Channel (PUCCH) are allocated to separate subcarriers and are never transmitted at the same time.") (citing LTE standard, TS 36.211 v.8.7.0, p. 16, attached as Ex. A)(Dkt. No. 328-44).

Huawei seeks to exclude Dr. Prucnal's opinion related to these two claim limitations because it contends that they depend on an incorrect interpretation of the claim that "allow[s] separate IFT operations on the alleged control information and alleged data information, even when the IFT operations are separated in time." Huawei Daubert Mot. at 11-12 (citing Prucnal Report ¶¶ 446-463). But Samsung counters that nothing in the plain language of the claims requires that IFT is performed on *both sets* of **[**93]** subcarriers. Samsung is correct. The claim recites "at least one" of the subcarriers, and the patent discloses embodiments in which two sets can undergo different IFT operations at different times.[26] *See* '105 patent at figures 9 and 10.

Huawei's attempts to limit the claims to require both sets be available at the same time reads out certain embodiments and impermissibly narrows the plain and ordinary meaning of the claims. Its arguments do not provide a valid basis for striking portions of Dr. Prucnal's report.

D. Samsung's '130 Patent

1. "Mapping data information to remaining symbols"

Huawei seeks to exclude certain opinions of Samsung's expert, Dr. Nicholas Bambos, because they purportedly "rel[y] on an improper construction of the phrase 'mapping data information to remaining symbols.'" Huawei *Daubert* Mot. at 13 (seeking to strike paragraphs 550 to 594). Huawei insists that "the claim language is unequivocal that the 'data information' goes into each and every symbol that does not hold the reference signal." *Id.* at 12 (citing '130 patent at figure 10). It then attacks Dr. Bambos's opinion that the physical uplink shared channel (PUSCH) satisfies this element of the claim because some of the symbols in the PUSCH carry a sounding **[**94]** reference signal

[26] In Reply, Huawei argues that "at least one of' includes both, as well as either." Reply at 9. So, in its estimation, since "[t]he claim recites only one IFT operation," both sets must be available at the same time. *Id.* This argument does not alter the conclusion that Huawei's theory depends on a limited interpretation of the claims.

(SRS) and no data information, and therefore, the PUSCH cannot satisfy this element. *See* Mahon Decl. ¶ 37 (citing LTE standard, TS 36.211, section 5.3.4).

But Dr. Bambos explains that "a majority (if not overwhelming majority) of the subframes have no SRS in them," Bambos Report ¶ 558, which, according to Samsung, **[*973]** "result[s] in each of these subframes having mapped data information in each of the symbols in the slow except for the middle symbol containing the DM RS." Opp'n at 17. Huawei points out that Dr. Bambos admitted at his deposition that as many as half of the subframes can carry SRS. Bambos Dep. at 52:5-53:8 (McBride Decl. ISO Reply to Daubert, Ex. 38). And it underscores that Dr. Bambos never opined that the accused products infringe only some of the time. Reply at 14.

Huawei's challenge to Dr. Bambos's opinion is not based on an improper claim construction argument. It simply questions the soundness of his conclusions; these attacks can be presented at trial. *See* *Apple Inc. v. Motorola, Inc., 757 F.3d 1286, 1313 (Fed. Cir. 2014)* ("In *Daubert*, . . . the focus 'must be solely on principles and methodology, not on the conclusions that they generate.'"); *Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1318 (9th Cir. 1995)* ("[T]he test under *Daubert* is not the correctness of the expert's conclusions, but the **[**95]** soundness of his methodology.").

2. "CQI Information Being Multiplexed with the Data Information"

Claim 13 includes the following limitation,

> transmitting the signal including the mapped data information, the mapped acknowledgement information, and the mapped reference signal,
>
> wherein some of the data information is mapped to the first symbols which are directly adjacent to the middle symbol, and
>
> wherein CQI information is multiplexed with the data information.

'130 patent at 8:38-45.

Huawei claims that Dr. Bambos's report asserts that every non-reference symbol in LTE contains CQI. Huawei's *Daubert* Mot. at 13 (citing Bambos Report ¶ 564, in which he opines on LTE standard, TS 36.211, section 5.3.4). And it argues that "[h]e is wrong[,]" and Dr. Prucnal, another one of Samsung's experts, even testified that Dr. Bambos was wrong. *Id.* (quoting Prucnal Dep. at 61:19-62:8).

Samsung contends that "Dr. Bambos never said any such thing[,]" and it cites Bambos's declaration submitted in support of Samsung's opposition to Huawei's motion for summary judgment in which Bambos explains that he was referring to a "generic example," but there is a specific case where no CQI is sent. Bambos Decl. ISO Opp'n to Huawei MSJ ¶ 16. And **[**96]** it cites to Huawei's own expert, Dr. Mark Mahon, who conceded during his deposition that there are situations where CQI may not appear in a particular slot. Mahon Dep. at 150:19-151:1; *id.* at 238:2-13.

Huawei has not provided a valid basis for excluding these portions of Bambos's report. To the extent Bambos's opinions are inconsistent with other evidence, Huawei may attack his credibility. *See, e.g., Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d 960, 969 (9th Cir. 2013)* ("All of Avis's challenges to Alaska Rent-A-Car's expert are colorable, but none go to admissibility. They amount to impeachment.").

E. Huawei's '239 Patent

1. "Obtaining ... a group number k of a sequence group allocated by the system"

Asserted claim 6 provides "[a] method for processing sequences in a communication system, comprising: obtaining, by a cell or a base station or a user equipment, a group number k of a sequence group allocated by the system... ." '239 patent at 25:1-5. Huawei selected the term "a group number k of a sequence group allocated by the system" for construction by the court. In the Claim Construction Order, I noted that the surrounding language and specification made **[*974]** it "clear that 'a group number k' is 'obtain[ed]' by being 'allocated by the system.'" Claim Construction Order at 9. **[**97]** I construed the term as "a group number k allocated by the system, where the group number k identifies a sequence group and where the value k is the same throughout the claim." *Id.*

Samsung's expert, Dr. Vijay Madisetti, opined that "[t]he Accused Products do not practice this limitation" because "a person of ordinary skill in the art would understand that this claim limitation requires a mobile device *to actually receive* the group number k from the system (*i.e.*, from the base station or eNB) that allocates the group number to the mobile device." Madisetti Report ¶ 65 (emphasis added) (Ex. 15, Dkt. No. 327-17 [under seal]). In opposition, Samsung reiterates this position. *See* Opp'n at 11 ("When the Court's construction is read in combination with 'obtaining' from the asserted claims, a person of ordinary skill in the art would have understood that the group number k must itself be received from the system that allocated it."); *id.* at 12 ("In order to obtain what the system allocates, the UE would have to receive the group number k from the system.").

Huawei argues that Dr. Madisetti's opinion seeks to narrow the definition of "obtain" to require the UE to "actually receive" the group number k **[**98]** from the system, rather than calculating the group number k from information received from the system. Huawei *Daubert* Mot. at 15. It highlights the specification, which provides that "[t]he transmitter and the receiver may obtain the data through calculation in this way rather than store the data." '239 patent at 13:13-15; *id.* at 21:47-48. Samsung argues that these portions of the specification relate to the generated sequences that are computed using the group number k, not the claimed group number k itself. Opp'n at 12. Huawei obliquely acknowledges this, but insists that it provides an example of how the claims intend to use the word "obtain." *See* Reply at 5 ("This contradicts Dr. Madisetti's read of 'obtaining' as excluding 'calculating,' even if it is describing processing different data.").

I agree with Huawei. Nothing in the claims requires that "obtaining" a "group number k" that is "allocated by the system" means that the UE actually receives the group number k from the system. Because Dr. Madisetti's opinions rely on a construction of "obtaining" that is narrower than its plain and ordinary meaning in light of the specification, his opinions on the matter (paragraphs 64 and 65) must **[**99]** be excluded.[27]

2. Claimed "sequence"

Claim 7 provides, "[t]he method of claim 6, wherein the sequences correspond to at least one of: Zadoff-Chu sequences and Gauss sequences." '239 patent at 25:24-26; *see also id.* at 26:34-36, claim 18 ("The sequence processing apparatus of claim **17**, wherein the sequences correspond to at least one of: Zadoff Chu sequences and Gauss sequences.").

Dr. Madisetti's noninfringement opinions for these claims depend on his assertion that the sequences must be Zadoff-Chu or Gauss sequences. *See* Madisetti Report ¶¶ 92, 95. In other words, he interprets the claim language "correspond to" as requiring that the sequences "***actually be***" either Zadoff-Chu or Gauss sequences, not just a portion of one with additional numbers appended, as Samsung explains. **[*975]** Opp'n at 12-13. Huawei argues that this interpretation improperly limits the claim language and it seeks to have paragraphs 91 through 95 of his report stricken. Huawei *Daubert* Mot. at 16.

Samsung relies on the dictionary definition of "correspond" to argue that "[t]his definition makes clear that "correspond" involves more than just being "related to" a Zadoff-Chu sequence; rather, it must be a Zadoff-Chu sequence because correspondence **[**100]** denotes an equivalence or sameness." Opp'n at 13. It also contorts excerpts from the specification to support its position. *Id.* Contrary to Samsung's position, however, the specification is careful to never describe those "desired sequences" that resulted from cyclic extension as "Zadoff-Chu sequences" precisely because the "desired sequences" do not have to be ZC sequences. *See* '239 patent at 11:41-

[27] The same result follows even if the dispute is framed around the "allocated by the system" language, as Samsung contends. As Huawei notes, "[t]he system could easily allocate the 'group number k' and then send data allowing the mobile to calculate it." Reply at 5.

46 ("The sequences with a length of the maximum prime number less than the quantity of sub-carriers, namely, the Zadoff-Chu sequences corresponding to the lengths 31, 47 and 59, are selected, and the desired sequences are obtained through cyclic extension of such sequences.").

Huawei explains that "correspond to" can describe a "connection" between two things, as is the case here, where "the generated sequences contain a ZC sequence plus the repetition of as much of that sequence as is necessary to complete the sequence." Reply at 6; *see* Mathematics Definition of "Correspondence" (including definition of correspondence as a function) (McBride Decl. ISO Reply, Ex. 34, Dkt. No. 374-5). Samsung's (and Dr. Madisetti's) interpretation improperly reads out the "correspond to" language. *See, e.g., 3M Innovative Properties Co. v. Tredegar Corp., 725 F.3d 1315, 1325 (Fed. Cir. 2013)* (agreeing **[**101]** with patentee that "the plain and ordinary meaning of the claim term supports a broad claim scope."); *TI Grp. Auto. Sys. (N. Am.), Inc. v. VDO N. Am., L.L.C., 375 F.3d 1126, 1138 (Fed. Cir. 2004)* (explaining patentee "is entitled to the full breadth of claim scope supported by the words of the claims and the written description."). Accordingly, paragraphs 92 through 95 will be struck.

3. "Selecting ... n sequences"

Claims 6 and 17 also include the limitation "selecting ... n sequences from a candidate sequence collection... ." '239 patent at 25:6-7; *id.* at 26:19. Dr. Madisetti opines that the claim refers to " 'sequences' (plural) so this would require the selection of more than one sequence per sub-group." Madisetti Report ¶ 76; *see id.* ("One of ordinary skill in the art reading the claim language and the specification would understand that the selection of a *single* sequence (v=0 or v=1) would not meet this limitation.") (emphasis in original).

Huawei argues that this interpretation is contrary to law, the surrounding claim language, and the specification. The Federal Circuit has "recognized that, in context, the plural can describe a universe ranging from one to some higher number, rather than requiring more than one item." *Versa Corp. v. Ag-Bag Int'l Ltd., 392 F.3d 1325, 1330 (Fed. Cir. 2004)* (citing *Dayco Products, Inc. v. Total Containment, Inc., 258 F.3d 1317, 1328 (Fed. Cir. 2001))*. Huawei points to an embodiment in the specification, **[**102]** in which "n is 1" to highlight that the specification provides the "context" necessary to find that the plural can include one. *See* '239 patent at 9:9; *see also id.* at 19:26-34 (describing another embodiment where, "[p]referably, n is 1... .").[28]

[*976] Samsung unconvincingly attempts to distinguish *Versa* and separate the portions of the specification relied on by Huawei. But Dr. Madisetti cannot narrow the claim language when the specification supports a broader interpretation, and binding precedent dictates the same. Paragraphs 76 and 77 will be struck.

F. Huawei's '892 Patent

The '892 patent, titled "Method and Apparatus of Transmitting a Random Access Preamble," reduces signal interference by cyclically shifting a RAP sequence with a particular "Zero Correlation Zone (ZCZ) length." '892 Patent at 9:28-12:24.

Claim 1 provides,

> A method of facilitating communication in a mobile communication system, the method comprising:
> selecting, by a user equipment (UE), a random access preamble from a set of random access preambles; and
>
> transmitting, by a UE, the selected random access preamble, wherein the set of random access preambles is provided with Zero Correlation Zones of length N CS-1, where NCS is a cyclic shift increment selected from a predefined **[**103]** set of cyclic shift increments, the pre-defined set including all of the following cyclic shift increments of 0, 13, 15, 18, 22, 26, 32, 38, 46, 59, 76, 93, 119, 167, 279, 419.

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[28] In Reply, it also highlights dependent claim 8, which provides "[t]he method of claim 6, wherein n is a value from the group of values consisting of: one... ." '239 patent at 25:27-28.

Id. at 9:29-41.

1. Ncs in the Claims

Dr. Madisetti opines that "[t]he accused products do not select a cyclic shift increment 'from a pre-defined set of cyclic shift increments'" because "it is ***the base station*** that signals the cyclic shift increment to the UE in the *NCS* configuration value." Madisetti Report ¶ 127 (emphasis in original). According to Huawei, "the claim does not require the UE select NCS and can also cover the situation where the base station selects the NCS value and sends it to the UE." Huawei *Daubert* Mot. at 19. It seeks to strike paragraphs 116-121 of Dr. Madisetti's report. *Id.*

Samsung's and Dr. Madisetti's interpretation of the claims once again reads in a limitation not present in the claim language. The claims do not require that "[t]his selection of the NCS value connects back to the UE 'select[ing] a random access preamble.'"

Dr. Madissetti opines that "the accused products do not 'select[] ... a random access preamble'" because the mobile device receives certain parameters from the base **[**104]** station, including the cyclic shift NCS . Madisetti Report ¶ 116; *see also id.* ¶¶ 117-121. The portions of his opinions that depend on this overly narrow interpretation are struck (paragraph 116, second to last sentence; paragraph 127, last sentence; and any other portions).

2. "A set of Random Access Preambles"

[TEXT REDACTED BY THE COURT] Madisetti Report ¶ 122. Huawei argues that the plain and ordinary meaning of "'selecting ... a random access preamble from a set of random access preambles' does not require storing the set of random access preambles on the UE." Huawei Daubert Mot. at 19.

While I agree with Huawei, I am not certain that this provides a valid basis for striking the opinions in this instance. Dr. Madisetti is free to argue his perspective that the "set of random access preambles" is not stored anywhere, and Huawei can argue that the claims do not require the "set of random access preambles" to be stored anywhere.

G. Samsung's '825 Patent

The '825 patent provides a method for a user equipment to communicate with a base station (Node B) on a shared channel **[*977]** (SCH), which is a channel used by multiple UEs communicating with the same base station. '825 patent, Abstract; *id.* at 1:53-56 (Dkt. No. 140-1 at 47). **[**105]**

Claim 1 provides,

> A method for performing random access in a user equipment (UE) of a mobile communication system, the method comprising:
> receiving system information indicating a group of identification (ID)s;
> selecting an [sic] first ID from among the group of the IDs;
> transmitting a first uplink signal corresponding to the selected first ID for random access to a Node B;
>
> after the transmitting of the first uplink signal, <u>waiting for a predetermined delay duration without checking a downlink channel</u>;
>
> <u>after the waiting for the predetermined delay duration, checking the downlink channel during a valid period</u>;
> determining whether a downlink signal responding to the first uplink signal is received in the valid period, the downlink signal comprising a second ID and an UE-ID; and
> transmitting a second uplink signal using the UE-ID, if the downlink signal is received during the valid period and the second ID is equal to the first ID, wherein the valid period starts when the predetermined delay duration starting from transmission of the first uplink signal has terminated.

'825 patent at 11:39-62 (emphasis added to claim term).

Huawei contends that Dr. Valenti's infringement opinions depend on construing "without **[**106]** checking a downlink channel" as "without checking a downlink channel <u>for a specific message</u>[.]" Huawei *Daubert* Mot. at 20-21 (citing Valenti ¶¶ 470, 483 and Valenti Dep. at 85: 23-86:3; *id.* at 90:6-24). It insists that Valenti's infringement theories are based on the accused products not monitoring for a specific message, rather than not monitoring at all, and, therefore, seek to "broaden the scope of the claim by rewriting a negative claim limitation to disclaim only one specific example... ." Huawei *Daubert* Mot. at 21. Huawei also insists that this theory was not previously disclosed.

But Huawei acknowledges that Valenti's opinion only "implicitly construes" the claim language. Huawei's *Daubert* Mot. at 20; *see also id.* at 21 ("Dr. Valenti's implicit construction impermissibly broadens the scope of the asserted claims beyond to encompass UEs that check a downlink channel for only some, but not all, messages during the 'predetermined delay duration.'"). Because he does not explicitly opine on an improper claim construction, I see no basis for striking his opinions. Samsung may argue that the claim limitations are not satisfied because the UEs do not monitor for a particular message, and Huawei **[**107]** can counter that the claims do not require checking the downlink channel for any particular message.

H. Huawei's '726 Patent

The '726 patent relates to a technique for providing Voice over Internet Protocol (VoIP), where a person's voice is converted into small data packets that are transmitted over the network using persistent resource allocation. '726 patent at 1:38-42 (Dkt. No. 140-1 at 23).

Claims 11 and 13 require "associating a HARQ process with the calculated HARQ process ID... ." According to Huawei, the "associating" element must have meaning and "requires some affirmative act of deterministically relating the calculated value with a HARQ process." Huawei Daubert Mot. at 24-25. Huawei insists that Dr. Bambos's opinions "read[] out this claim element" and should be stricken. *Id.* at 23 (citing Bambos Report ¶¶ 837, 847, 855). **[*978]** Huawei's argument depends on construing "associating" in a particular way that is not explicitly required by the claim language. This portion of its motion is DENIED.

V. SAMSUNG'S MOTION FOR SUMMARY JUDGMENT

Samsung's motion for summary judgment attacks the validity and infringement of Huawei's '239 patent and '613 patent, and it seeks to preclude a prior art reference and a finding of inequitable conduct for its own '105 patent. ***[**108]*** *See generally* Samsung's MSJ (Dkt. No. 336[redacted]; Dkt. No. 333-2[under seal]). Huawei represents that it is not pursuing an inequitable conduct defense to Samsung's '105 patent, so that is no longer at issue in this case.

A. '239 Patent, Independent Claims 6 and 17, Dependent Claims 7 and 18

The '239 Patent, titled "Method and Apparatus for Allocating and Processing Sequences in Communication System," aims to reduce cell interference. *Id.* Its claims focus on interference between cells, and creating sub-groups of highly correlated sequences, thereby preventing these sequences from appearing in other sequence groups, resulting in low correlation and low interference between subgroups. '239 Patent. Huawei's expert, Dr. Venugopal V. Veeravalli, opined that the Accused Samsung Products infringe the '239 patent by "grouping sequences that have certain common mathematical characteristics" so as to "take[] into account the interferences between sequences of different lengths." Veeravalli Report ¶¶ 52, 78 (Mack Decl., Ex. B, Dkt. No. 333-9[under seal]). He also asserted infringement under the doctrine of equivalents.[29] *Id.* ¶ 254.

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[29] Samsung has moved to strike assertions based on a DOE theory of infringement because Huawei did not disclose it in its Infringement Contentions. *See infra* section VII.E.

Huawei asserts claims 6, 7, 17, and 18 of the '239 patent. I previously discussed independent claims 6 and 17 in the context **[**109]** of Huawei's *Daubert* Motion. *See supra* section IV.E. As relevant here, they recite "obtain[ing] ... a group number k of a sequence group allocated by [a/the] system." '239 patent at 25:3-5, *id.* at 26:17-18. During claim construction, I construed "a group number k..." to mean "a group number k allocated by the system, where the group number k identifies a sequence group and where the value k is the same throughout the claim." Claim Construction Order at 7-9.

Claim 7 depends on independent claim 6 (method claims), and claim 18 depends on independent claim 17 (apparatus claims). Claim 7 provides, "[t]he method of claim 6, wherein the sequences correspond to at least one of: Zadoff-Chu sequences and Gauss sequences." '239 patent at 25:24-26; *see also* 26:34-36 ("The sequence processing apparatus of claim 17, wherein the sequences correspond to at least one of: Zadoff-Chu sequences and Gauss sequences.").

1. Ineligible Subject Matter Under *35 U.S.C. § 101*

With the benefit of discovery, Samsung repeats its argument from nearly two years ago that the claims are invalid because they claim ineligible subject matter.[30] Samsung's MSJ at 9-14. Under *Section 101 of the Patent Act*, "Whoever invents or discovers any new and useful **[*979]** process, machine, manufacture, or composition **[**110]** of matter, or any new and useful improvement thereof, may obtain a patent therefor... ." *35 U.S.C. § 101*. The Supreme Court "has long held that this provision contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable." *Alice Corp. Pty. v. CLS Bank Int'l, 573 U.S. 208, 134 S. Ct. 2347, 2354, 82 L. Ed. 2d 296, 189 L. Ed. 2d 296 (2014)* (citing another source).

The *Alice* court applied the two-step framework articulated in *Mayo Collaborative Services v. Prometheus Laboratories, Inc., 566 U.S. 66, 132 S. Ct. 1289, 182 L. Ed. 2d 321 (2012)*, to determine whether claims are patent eligible. *134 S. Ct. at 2355*. The court first ascertains whether the claims are directed to a patent-ineligible concept, and if so, the court searches for an "inventive concept" to "transform the nature of the claim" into patent-eligible subject matter. *Id.*

In the Order Denying Samsung's MTD ("Prior Order) (Dkt. No. 103), I accepted Samsung's argument that the asserted claims of the '239 patent were directed to an abstract idea akin to allocating or sorting, but found that they provided the requisite inventive concept because they were tied to the concrete structure of mobile devices. *See id.* at 17-18. Samsung now reiterates that the claims are directed to "the abstract idea of creating groups of numeric sequences that are not highly correlated with each other[,]" Samsung's MSJ at 11, and it insists that the patent contains no inventive step. *Id.* at 12.

Samsung's analysis **[**111]** does not provide clear and convincing evidence that the patent claims ineligible subject matter. First, its "directed to" inquiry minimizes elements of the claims tying the claimed innovations to the telecommunications systems that it purports to improve on the grounds that those elements are "generic" and "high-level." Samsung MSJ at 13. But "whether a claim element or combination is well-understood, routine, and conventional ... falls under step two in the *§ 101* framework, in which we 'consider the elements of each claim both individually and as an ordered combination to determine whether the additional elements transform the nature of the claim into a patent eligible application.'" *Aatrix Software, Inc. v. Green Shades Software, Inc., 890 F.3d 1354, 1359 (Fed. Cir. 2018)* (internal quotation marks omitted). Next, the inquiry must look at the claim as a whole, not as isolated elements, and determine whether it is directed to a patent-ineligible concept, "it is not enough to merely identify a patent-ineligible concept underlying the claims[.]" *Rapid Litig. Mgmt. Ltd. v. CellzDirect, Inc., 827 F.3d 1042, 1050 (Fed. Cir. 2016)*.

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[30] At the hearing on Samsung's motion to dismiss these patents because they claim ineligible subject matter, Huawei argued that the court should have experts explaining the technology and "that there could be an appropriate time" to decide the issue down the road. 10/26/16 Hr'g Tr. at 10-11 (Dkt. No. 96).

In Reply, Samsung cites the Prior Order as "holding" that the '239 patent is directed to an abstract idea under step one in an attempt to undermine Huawei's arguments. That was not the holding of the Prior Order. To the contrary, I "accept[ed]" Samsung's argument **[**112]** that the claims were directed to an abstract idea, in part because Huawei had offered no rebuttal, and proceeded to step two, where I concluded that "the claims contain[ed] enough of an inventive concept to be patent eligible, at least based on the allegations in the Complaint." Prior Order at 17-18. The Prior Order does not bind me to finding that the patent is directed to an abstract idea; it is Samsung's burden to prove that it is by clear and convincing evidence in order to move on to the second step.

But even if I accepted Samsung's assertion that the patent is directed to an abstract idea, the claims contain an inventive step. Samsung relies on inventor Bingy Qu's testimony that he did not invent the **[*980]** generation of reference signal sequences, Qu Dep. at 104:9-11, and Dr. Madisetti's opinion that all of the non-mathematical equation elements of the asserted claims are disclosed by the prior art, Madisetti Report ¶ 142. But Samsung missteps in removing the mathematical equation elements of the asserted claims. *See* *Diamond v. Diehr, 450 U.S. 175, 188, 101 S. Ct. 1048, 67 L. Ed. 2d 155 (1981)* ("It is inappropriate to dissect the claims into old and new elements and then to ignore the presence of the old elements in the analysis."). The *Diehr* court rejected **[**113]** petitioner's argument that *Parker v. Flook, 437 U.S. 584, 98 S. Ct. 2522, 57 L. Ed. 2d 451 (1978)* (which Samsung relies on here), mandated that a "mathematical algorithm must be assumed to be within the 'prior art'" and removed from the analysis in determining whether patent eligible subject matter is claimed. *450 U.S. at 189 n.12*. The *Diehr* court concluded, "when a claim containing a mathematical formula implements or applies that formula in a structure or process which, when considered as a whole, is performing a function which the patent laws were designed to protect (*e. g.*, transforming or reducing an article to a different state or thing), then the claim satisfies the requirements of *§ 101*." *Id. at 1059-60*.

Samsung does not address this misstep in reply. *See* Reply at 7-8 (discussing *Diehr* and *Flook*). Instead, it repeats the mistake. *See id.* at 8 ("As explained in the Motion, only a couple of limitations at the end of those claims are not related to the claimed mathematical formula."). But "[t]he mere fact that something is disclosed in a piece of prior art, for example, does not mean it was well-understood, routine, and conventional." *Berkheimer v. HP Inc., 881 F.3d 1360, 1369 (Fed. Cir. 2018)*.

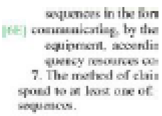
Huawei insists that the claims are directed towards an improvement to telecommunication networks. Samsung never addresses this point, but Huawei provides evidence **[**114]** in support of it. *E.g.*, Veeravelli Report ¶ 11 ("The '239 Patent allows UEs to transmit reference signals to the cell tower with reduced interference between the reference signals transmitted by different UEs connected to different cells. This reduced interference improves the cellular network by allowing the UEs to transmit reference signals that the base station is better able to distinguish as intended for it, as opposed to intended for nearby cells.") (Mack Decl. ISO Samsung's MSJ ¶ 4; *id.*, Ex. B, Dkt. No. 333-9). Samsung's analysis fails to address the claims as a whole and ignores the patent's disclosure of providing an improvement to telecommunication systems. *See* *Aatrix Software, Inc. v. Green Shades Software, Inc., 882 F.3d 1121, 1127 (Fed. Cir. 2018)* ("We have repeatedly held that inventions which are directed to improvements in the functioning and operation of the computer are patent eligible."). It has not met its burden to demonstrate that the patent claims ineligible subject matter.

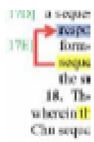
2. Invalidity Under *35 U.SC. § 112*

Samsung contends that the dependent claims' reference to "the sequences" is ambiguous because the claims recite more than one set of sequences and it is impossible to know "the sequences" claimed, rendering the dependent claims indefinite under *35 U.S.C. § 112*, ¶ 2. Samsung's MSJ at 4.

"[A] patent is invalid **[**115]** for indefiniteness if its claims [under *§ 112*, ¶ 2] read in light of the specification delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention." *Nautilus, Inc. v. Biosig Instruments, Inc., 572 U.S. 898, 134 S. Ct. 2120, 2124, 189 L. Ed. 2d 37 (2014)*. "Some modicum of uncertainty" is allowed, but "a patent must be precise enough to afford clear notice of what is claimed, thereby **[*981]** 'appris[ing] the public of what is still open to them.'" *Id. at 2128-29* (internal quotation marks omitted). "Otherwise there would be '[a] zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims.'" *Id. at 2129*.

Samsung insists that such a "zone of uncertainty" exists here, given the independent claims' multiple references to "sequences." Samsung MSJ at 5. According to Samsung, "[t]he plain language of claim 6 therefore requires at least three claimed sequences: the selected sequences, the formed sequences, and the generated, corresponding sequences." *Id.* It emphasizes Dr. Veeravelli's admission that there are "three" sequences recited in the claim. *See* Veeravalli Rebuttal Report ¶ 94 (Mack Decl., Ex. D). But Huawei counters that a POSITA would understand that "the sequences" in the dependent claims refers back **[**116]** to the antecedent "corresponding sequences" in the independent claims. Huawei adds annotations and highlights to the claims to prove the point:





I agree with Huawei. The dependent claims use of "the sequences" refers back to the immediately preceding use of "the sequences" in the independent claims (elements 6E and 17E in the figures), which in turn refers back to the immediately preceding use of "corresponding sequences" in elements 6D and 17D. This conclusion is bolstered by the fact that the claims only use "the sequences" three times in each, once in the dependent claims, once in the last element of the independent claims (6E and 17E), and once in the second to last element (6D and 17D). *See Fin Control Sytems Pty, Ltd. v. OAM, Inc., 265 F.3d 1311, 1318 (Fed. Cir. 2001)* ("[T]he same terms appearing in different portions of the claims should be given the same meaning unless it is clear from the specification and prosecution history that the terms have different meanings at different portions of the claims."). And "the sequences" refers to the immediately preceding "generated, corresponding sequences" of Samsung's list.[31] The other references to sequences, which Samsung labels "selected sequences" and "formed sequences" do not use "the" to describe them, and are **[**117]** separated from "the sequences" by the "generated, corresponding sequences." Samsung has not demonstrated by clear and convincing evidence that the structure of the claims provides the "reasonable certainty" necessary for a POSITA to understand their scope. *See Nautilus, 134 S. Ct. at 2129*.

[*982] 3. Noninfringement

a. The Sequences of the Dependent Claims

Samsung argues that even if the claims are not indefinite because their reference to "the sequences" is ambiguous, it is entitled to summary judgment of noninfringement because "Huawei and its expert have not advanced any evidence that the alleged 'corresponding' sequences in the accused products 'correspond to at least one of: Zadoff-Chu sequences and Gauss sequences,' as required by asserted claims 7 and 18." Samsung MSJ at 8.

But, as explained above in the discussion on Huawei's *Daubert* motion, *see* section IV.E, Samsung's argument depends on its misunderstanding that "the sequences" of the dependent claims *are actually* Zadoff-Chu sequences. *See id.* at 9 ("This extension is critical because Huawei's expert has provided ***no evidence*** that these extended sequences—which correspond to the claimed 'corresponding' sequences that are then 'communicated' according to the claims—are themselves Zadoff-Chu **[**118]** sequences as required by asserted claims 7 and 18 (assuming the Court chooses to resolve the inherent ambiguity noted above)."). Huawei does not offer evidence that "the

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[31] In Reply, Samsung focuses on the reference to "the sequences" in 6D and 17D, which Huawei ignores, to argue that "[t]his is just the type of confusion that shows indefiniteness inherent in the asserted claims." Reply at 3. But "the sequences" in 6D and 17D describe the "generated, corresponding sequences." In other words, the reference does not detract from Huawei's interpretation.

sequences" are actually ZC sequences because nothing in the claims or specification dictates this limitation. Samsung's interpretation reads out the "correspond to" language of the claim, or at least narrowly interprets it to require equivalence as opposed to some other relationship, and must be rejected.

Huawei has at least offered disputed evidence that "the sequences" of the dependent claims "correspond to" Zadoff-Chu sequences. *See* Veeravalli Report ¶ 240 (explaining how the "reference signal sequence" is "defined by a cyclic shift..."). Samsung's motion on this point is DENIED.

b. Group number k

Samsung also argues that it is entitled to a judgment of noninfringement because Dr. Veeravalli admitted that he used the value "u" for the claimed "group number k" in the "obtaining" step and "u +1" for the "basic sequence ri" limitation, in contravention of the court's construction of the term "group number k," which dictates that the "value k is the same throughout the claim." Samsung's MSJ at 3. Huawei counters that it and its expert have **[**119]** "consistently mapped the value 'u +1' in the LTE standard to the claimed 'group number k.'" Opp'n at 2; *see* HW 239 Inf. Cont. at 5 ("The following terms in the claim are met as indicated by the LTE standard: . . . 'Group number k of a sequence group' = u+1.")(Szczepanik Decl., Ex. 1); Veeravelli Report ¶ 253 ("In the LTE standard, the 'group number k of a sequence group' is 'u+1,' where u is determined as explained in the previous paragraph. The processing required by the LTE standard uses the same value of k, that is 'u+1,' throughout the processing that corresponds to this claim."); Veeravalli Dep. at 136:10-14 (testifying that he only provided analysis where k equals u plus 1).

Huawei contends that Samsung's argument is based on its misreading of paragraph 252 of the Veeravalli report, which explains how the Samsung products "obtain" a value for "u." Opp'n at 2-3; *see* Veeravalli Report ¶ 252 ("The Infringing Samsung Products perform steps required by the LTE standard to obtain a value for 'u,' which is allocated by the system... .") (citing the LTE standard to explain how "u" is allocated by the system). Huawei's opposition is careful to repeatedly use the word "acquire," as opposed **[**120]** to "obtain," even though Veeravalli used "obtain" in his report. This exposes the source of the confusion—the claims explicitly require "obtain[ing] ... a group number k... ." Samsung **[*983]** seizes on Veeravalli's use of "obtain" in connection with "u" to urge that Huawei's infringement analysis depends on using both "u" and "u + 1" for "a group number k." But this result is unnecessary.

Dr. Veeravalli never asserts that the value "u" represents the claimed "group number k." As discussed above in the discussion on Huawei's *Daubert* motion, *see supra* section IV.E, the plain and ordinary meaning of "obtain" will not be limited to "receive"; rather, "obtain" may mean "calculate" in the context of these claims. But this does not entirely settle the issue. The claim construction dictates "a group number k allocated by the system, where the group number k identifies a sequence group and where the value k is the same throughout the claim." Claim Construction Order at 7-9. Samsung's *real* issue centers around the "allocated by the system" limitation. Dr. Veeravalli opined that the value "u" is "allocated by the system," which explains Samsung's attempt to assign "u" to "a group number k." *See* Reply **[**121]** at 1 ("Because the only values 'allocated' by the system cited by Dr. Veeravalli are the values used to compute the 'sequence-group number u,' the value 'u' must be the claimed 'group number k' that is obtained by the UE.").

What Samsung should have argued in its motion, but only developed in reply, is that Huawei has not offered evidence that "a group number k" is "allocated by the system," and therefore has not demonstrated disputed facts that the claim limitations are met by the accused products. *See* Reply at 2 ("Huawei presents no evidence that 'u +1' is a value 'allocated by the system' that the UE obtains.") (citing Veeravalli Report). Samsung insists that Huawei cannot present such evidence. *See, e.g.*, Marisetti Report ¶ 18 ("The UE never 'obtains' the value 'u+1' at any point in time when generating reference signals; nor is the value 'u+1' ever 'allocated' by the system, as required by the Court's construction.").

As with the "obtaining" limitation, Huawei contends that "allocated by the system" does not prohibit receiving precursors to the group number k from the system (i.e., the value "u"), and subsequently calculating the group number k ("u+1") from the precursor. It cites **[**122]** to the dictionary definition of "allocate" (which the parties apparently agree on) to support its position. Dictionary Definition of "allocate" (Mack Decl. ISO Samsung's Opp'n to Huawei's Daubert Mot. ¶ 5; *id.*, Ex. D, Dkt. No. 356-1)("to set apart for a particular purpose; assign or allot"). I agree with Huawei that "allocated" should not be limited to "receiving" in the same way that "obtaining" is not limited to "receiving." *See supra* discussion IV.E. In other words, Huawei can prove infringement by showing that the "group number k" is allocated by the system because "u" is sent by the system, a necessary prerequisite to "allocating" "u+1." As Huawei put it during the hearing, Samsung concedes that "u" is "allocated by the system," but insists that "u+1" is not allocated. I cannot say, that "no reasonable jury could determine two elements to be equivalent[.]" Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 39 n.8, 117 S. Ct. 1040, 137 L. Ed. 2d 146 (1997).

To answer Samsung's charge that Huawei's DOE theory was not adequately disclosed, Huawei contends that Dr. Veeravalli's DOE opinion was provided in response to Samsung's "cryptic" disclosure on the last day of discovery that "Huawei impermissibly redefines the group number 'k' to be 'u+1' in the standard—but of course 'u+1 **[**123]** is not the group number." Samsung March 9, 2018 Suppl. Resps. To Huawei Interrog. at 243 (Yang Decl., Ex. 3). That interrogatory response never disclosed Samsung's current assertion that **[*984]** "obtaining" cannot include calculating. Since the claim language will not be interpreted to limit "obtaining" to "receiving," *see supra* section IV.E, I question whether the DOE theory remains relevant. But, as discussed below, I am not striking these paragraphs as untimely. *See infra* section VII.E.

Samsung also argues that the DOE theory fails on the merits. Dr. Veeravalli opined that the accused products infringe under the DOE because the "differences between using 'u' or 'u+1' for the group number k are insubstantial" because "the group number k corresponds to 'u+1." Veeravalli Report ¶ 254. But Samsung counters that the difference between the value "u" and the value "u+1" is substantial because "[u]sing the value 'u' as the group number (as required by the LTE standard) would result in a functioning UE that will be able to communicate with the base stated (or eNB)[,]" whereas "[u]sing 'u+1' as the group number (as suggested by Dr. Veeravalli) would result in an invalid uplink reference signal and **[**124]** incoherent signal demodulation at the base station." Madisetti Report ¶ 19; *see also id.* ¶¶ 15-19. The parties have presented competing experts opining whether DOE provides a valid theory of infringement. Viewing the evidence in the light most favorable to Huawei, I cannot rule as a matter of law that there is a substantial difference between the value "u" and the value "u+1"—that will be up to the jury to decide.

B. Noninfringement of '613 Patent claims 1 and 5

Claim 1 of the '613 patent requires "receiving, by a user equipment (UE), a service by a base station... ." '613 patent at 18:25-26; *see also id.*, claim 5 at 18:61 - 62 ("receive a service sent by a base station"). Huawei's expert, Dr. Robert Akl, opined that Samsung's accused devices meet this limitation, and "[t]he service is, for example, the eMBMS service."[32] Akl Report ¶ 77 (Mack Ex., Ex. I, Dkt. No. 333-21[under seal]). But Samsung contends that the accused devices [TEXT REDACTED BY THE COURT] Samsung MSJ at 15 (citing experts Kim, Song, and Nam).

In response, Huawei highlights evidence that "Samsung witnesses deposed in this matter [TEXT REDACTED BY THE COURT] Akl Decl. ¶ 4a; *see* Song Dep. at 8:2-4, 21:10-22:2 (testifying that "[TEXT REDACTED BY THE COURT]); Kim Dep. at **[**125]** 21:24-22:7 ("With regards to eMBMS service, I know just approximately what that is, and [TEXT REDACTED BY THE COURT]."). According to Huawei, "[v]erifying the feature by testing in the actual network requires receiving a service sent by a base station." Akl Decl. ¶ 4a; *see also* Song Dep. at 35:25-36:4 ("[TEXT REDACTED BY THE COURT]"); *id.* at 36:5-13 (testifying that [TEXT REDACTED BY THE COURT]).

Huawei also highlights testing documents from official testing organizations certifying that [TEXT REDACTED BY THE COURT]. *See* Akl Decl. ¶ 4c. Samsung attacks this evidence because the test results [TEXT REDACTED BY THE COURT] Reply at 9; *see id.* at 10 ("These test results [TEXT REDACTED BY THE COURT] "receiving, by a user equipment (UE), a service sent by a base station, the service being sent in one or more subframes that are designated as specific subframes, the specific subframes being selected from one or more radio frames that are

[32] eMBMS is Evolved Multimedia Broadcast Multicast Service. Akl Report ¶ 68.

designated as specific radio frames, the specific radio frames being selected from a time unit."). Samsung challenges Huawei's other evidence on various grounds, but none of them expunge the evidence relied on by Huawei. Huawei's evidence demonstrates a disputed fact **[**126]** of whether the accused devices receive the eMBMS service.

Huawei also points out, with respect to apparatus claim 5, that the user equipment need only be "configured to receive a service **[*985]** sent by a base station." Samsung counters that the devices require middleware and user applications to meet this claim element. According to Samsung, Huawei has not offered any evidence that the accused products [TEXT REDACTED BY THE COURT] "it just assumes that these requirements are present to perform testing." Reply at 12. But, as discussed above, the evidence is sufficient to demonstrate a genuine issue as to whether the accused products are configured to receive the service. *See* *Texas Advanced Optoelectronic Sols., Inc. v. Renesas Elecs. Am., Inc., 895 F.3d 1304, 1327 (Fed. Cir. 2018)*("Although infringement of the apparatus claims requires that Intersil's products have the ability to perform in Mode 3, infringement does not require actual use of Intersil's products in Mode 3."); *Carucel Invs., L.P. v. Novatel Wireless, Inc., Case No.: 16-cv-118-H-KSC, 2017 U.S. Dist. LEXIS 222002, 2017 WL 1394068, at *4 (S.D. Cal. Mar. 2, 2017)* (denying motion for summary judgment of noninfringement of claims with "configured to" language, based in part on evidence that "designing and testing was undertaken to ensure that the accused products" could satisfy the claim element).

C. The '105 Patent

1. Prior Art

Huawei **[**127]** and its expert, Dr. Mark Mahon, rely on an "earlier internal draft of 3GPP submission R1-050245" by Motorola ("the Motorola Draft") to argue that Samsung's '105 patent is invalidated by prior art.

To invalidate a patent based on prior art under *35 U.S.C. § 102(g)*(pre-AIA), "on a motion for summary judgment, a challenger of a patent must prove by clear and convincing evidence that the invention was made in this country by another inventor." *Fox Grp., Inc. v. Cree, Inc., 700 F.3d 1300, 1304 (Fed. Cir. 2012)* (internal quotation marks omitted). "Then, the burden shifts to the patentee to produce evidence sufficient to create a genuine issue of material fact as to whether the prior inventor has suppressed or concealed the invention." *Id.* (internal quotation marks omitted). "Finally, the burden shifts again to the challenger who must rebut any alleged suppression or concealment with clear and convincing evidence to the contrary." *Id.* (internal quotation marks omitted).

"A challenger ... has two ways to prove that it was the prior inventor: (1) it reduced its invention to practice first ... or (2) it was the first party to conceive of the invention and then exercised reasonable diligence in reducing that invention to practice." *Id.* (quoting another source)(alterations omitted). Dr. Mahon relies **[**128]** on the Motorola Draft as evidence of prior conception by Motorola, and he relies on the filing of U.S. Provisional Patent App. No. 60/759,683 ("the '683 Provisional") by Motorola as evidence of alleged reduction to practice. Mahon Invalidity Report at 46-51 (Ex. R).

Samsung argues that Huawei's evidence of reduction to practice fails as a matter of law because the '683 Provisional was abandoned, by statute, 12 months after it was filed.[33] *See* *35 U.S.C. § 111(b)(5)*. "It has long been settled, and we continue to approve the rule, that an abandoned application, with which no subsequent application was copending, cannot be considered a constructive reduction to practice." *In re Costello, 717 F.2d 1346, 1350 (Fed. Cir. 1983)*. In response, however, Huawei does not rely on the '683 Provisional.

Instead, it cites to evidence of Motorola's computer simulations as proof of reduction to practice of the Motorola Draft. *See* Mahon Decl. ¶¶ 5-7; *see also* Ghosh **[*986]** Dep. at 54:2-56:2, 74:22-75:7 (Szczepanik Decl., Ex. 11); Motorola Draft R1-050245 at 9-10 (Szczepanik Decl., Ex. 12). Dr. Ghosh, the creator of the Motorola Draft, testified

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[33] Samsung does not contest Motorola's conception of the Motorola Draft.

that his team at Motorola "ran simulations using the software for each of the three options, OFDM, DFTS[-]OFDM, and IFDMA prior to giving this **[**129]** presentation [R1-050245]." Szczepanik Decl. Ex. 11, Ghosh Dep. 55:18-24. The simulations "show[ed] the bit error rate versus SNR for all these modulations and also these PAPR cubic metric comparison[s]" and "entail[ed] replicating these block diagrams [illustrated in Motorola Draft R1-050245], the transmitter and also the receiver, and running random bits through the simulation and through the channel to see what is the link performance." *Id.* at 54:19-21, 55:6-9. The simulations were custom-designed by Motorola engineers and used the computer languages C, C++, and MATLAB. *Id.* at 55:10-17. The results of these simulations were illustrated in the bar charts in Motorola Draft R1-050245. Szczepanik Decl. Ex. 11, Ghosh Dep. 55:25-56:2; Ex. 12, Motorola Draft R1-050245 at 9-10. Ghosh testified that it was Motorola's practice to "prove" the idea before submitting a patent application. Ghosh Dep. at 74:22-75:7.

Courts have found computer simulation sufficient evidence of reduction to practice. *Mosaid Techs. Inc. v. Samsung Elecs. Co., 362 F. Supp. 2d 526, 547-48 (D.N.J. 2005)* ("But surely, in this technologically advanced society of ours, there are areas of science where a successfully run simulation represents the end of the inventive process and the construction of the **[**130]** physical embodiment is but a matter of mere routine and mechanical application. In that case, and only in that case, it seems appropriate that a simulation should be a valid reduction to practice."). In reply, Samsung emphasizes that this computer simulation theory is new and was not disclosed in Huawei's invalidity contentions or expert reports. Reply at 13; *see* Exhibit C-9 to Huawei's First Supplemental Invalidity Contentions (Ex. D); Mahon Rebuttal Report ¶¶ 111-16 (Dkt. No. 333-38). It underscores Mahon's deposition testimony that he cited to the '683 Provisional to show reduction to practice. Mahon Dep. at 198:7-10 (Ex. E). But it omits the portion when he testified that he is "relying on the testimony of Dr. Ghosh as cited previously towards the development of that technology and the submission of the provisional application." *Id.* at 199:10-18.

Huawei has provided sufficient evidence that the Motorola Draft R1-050245 was adequately reduced to practice and constitutes prior art.

2. Inequitable Conduct

In response to Samsung's motion, Huawei acknowledges that "the record facts do not support a pleading of inequitable conduct defense with the required particularity." It states that **[**131]** it will not be proceeding with this defense on the '105 patent. Accordingly, Samsung is entitled to judgment that the '105 patent is not invalid based on its inequitable conduct.

VI. SAMSUNG'S MOTION TO PARTIALLY EXCLUDE HUAWEI'S EXPERTS

Samsung moves to partially exclude the reports and testimony of Jorge Padilla, Michael J. Lasinki, and Charles Jackson, on the grounds that they use unreliable methodologies and offer opinions beyond their qualifications. Samsung's Mot. to Exclude (Dkt. No. 335[redacted]; Dkt. No. 331-2[under seal]). Samsung also moves to strike certain rebuttal opinions offered by Jacques deLisle and Zhi Ding because they offer improper expert rebuttal testimony under *Federal Rule of Civil Procedure 26(a)(2)(D)(ii)*. *Id.*

[*987] A. Whether Portions of Lasinski's Report Are Unreliable

1. Exclusion of [TEXT REDACTED BY THE COURT] Agreement from Comparable License Analysis

Samsung argues that Lasinski's opinions are unreliable because he unjustifiably excludes [TEXT REDACTED BY THE COURT]" (Stake Decl. ¶ 20, *id.*, Ex. 19; Dkt. No. 331-37[under seal])("[TEXT REDACTED BY THE COURT] Agreement") from his comparable license analysis. Mot. at 5.

The parties do not dispute that the [TEXT REDACTED BY THE COURT] Agreement does not explicitly address rights to **[**132]** non-SEPs. It defines Licensed Essential Patents as "any and all Essential Patents" that a party owns or controls. Ex. 19, § 1.1. [TEXT REDACTED BY THE COURT] acquires rights to Huawei's Licensed Essential Patents in Section 2.1 and Huawei acquired rights to [TEXT REDACTED BY THE COURT] Licensed Essential Patents in Section 3.1. *Id.*, §§ 2.1, 3.1.1 Section 3.4 entitled "No Other Rights; Complete License" provides that "All rights not expressly granted by [TEXT REDACTED BY THE COURT] hereunder are reserved by [TEXT REDACTED BY THE COURT]" and Section 2.4 contains a corresponding provision for Huawei. *Id.*, §§ 2.4, 3.4. The agreement also contains a merger clause, Section 12.1 entitled "Entire Agreement," which provides that the agreement "sets forth the entire understanding of the Parties with respect to the subject matter hereof, and replaces any prior oral or written communications, discussions or agreements between them with respect to such subject matter." *Id.*, § 12.1. Section 12.4, entitled "Amendment and Waiver" provides that the agreement "cannot be modified, terminated or amended in any respect orally or by conduct of the Parties. . . ." *Id.*, § 12.4. The agreement also contains a choice of law provision, stating that the agreement is to be governed by New York law. *Id.* at § 11.1.

Despite **[**133]** the undisputed fact that the face of the [TEXT REDACTED BY THE COURT] Agreement is limited to the parties' SEP portfolios, Lasinski elected not to include it (along with other agreements) in his comparable license analysis. He explained that he chose not to include the [TEXT REDACTED BY THE COURT] Agreement because, "in addition to obtaining cash consideration and a cross-license to [TEXT REDACTED BY THE COURT] ... I understand that Huawei believed it would achieve — as it has — general patent peace from [TEXT REDACTED BY THE COURT] commitment." Lasinski Report ¶ 28 (Stake Decl. ¶ 2, *id.*, Ex. 1; Dkt. No. 331-6[under seal]). He noted that "[t]he inclusion of even modest value attributable to patent peace in the analysis of this agreement would result in a one-way effective rate received by Huawei for its 4G SEPs that is significantly higher when compared to the other indicators." *Id.* And that it was therefore inappropriate to include the [TEXT REDACTED BY THE COURT] Agreement in his analysis of the FRAND dispute in this case. *Id.*

Samsung challenges the reliability of Lasinski's opinions since the purported basis for excluding the [TEXT REDACTED BY THE COURT] Agreement from his analysis **[**134]** is not included anywhere within the four corners of the agreement. Even Lasinski acknowledged that the expectation of patent peace is not included within the four corners of the agreement. Lasinski Dep. at 201:2-13 (Stake Decl., Ex. 7). According to Samsung, because the terms of the agreement are unambiguous and the contract contains a merger clause, New York law forbids courts from considering extrinsic evidence. *See Schron v. Troutman Sanders LLP, 20 N.Y.3d 430, 436, 986 N.E.2d 430, 963 N.Y.S.2d 613 (2013)* ("Parol evidence—evidence outside the four corners of the document—is admissible only if a court finds an ambiguity in the contract. As a general rule, extrinsic evidence is inadmissible to alter or add a provision to a written agreement."). It therefore concludes that Lasinski's opinions are unreliable and should be stricken.

[*988] Huawei points out that Samsung does not challenge Lasinski's opinion that the agreement would be incomparable if it did include patent peace; rather, it criticizes Lasinski's basis for asserting the agreement included an expectation of patent peace. But Huawei provides evidence supporting the reliability of Lasinski's conclusion that the [TEXT REDACTED BY THE COURT] relationship included general "patent peace" in addition to the SEP licensing component. **[**135]** *See* Opp'n at 5 (citing deposition and other testimony of Huawei's lead negotiator Mr. Xuxin Cheng, deposition testimony of Ms. Nanfen Yu, one of Huawei's 30(b)(6) witnesses, and the fact that [TEXT REDACTED BY THE COURT] has not litigated its non-SEPs against Huawei in light of [TEXT REDACTED BY THE COURT]).[34] Huawei also underscores that Lasinski's reliance on this sort of information is within the scope of what other qualified experts typically consider under these circumstances. It specifically cites the testimony of Samsung's own licensing witnesses that many factors, including the relationship between the parties, may influence the ultimate decision of what constitutes FRAND for SEPs in any given case, even though those factors may not be

[34] The parties bicker over the inferences to be drawn from Ms. Yu's testimony. *See* Opp'n at 5; Reply at 4. Samsung insists that Ms. Yu admitted that the agreement omits any reference to patent peace because the parties were unable to agree on the "scope and mechanism to include nonessential patents." Yu Dep. at 91:25-92:5 (Stake Decl., Ex. 20). But the disagreement is irrelevant to whether portions of Lasinski's opinions should be stricken.

apparent on the face of an agreement. Chang Dep. at 169-170 (Peterson Decl., Ex. 3; Dkt. No. 347-14[under seal]); Hong Dep. at 83-85, 167-170 (Peterson Decl., Ex. 4; Dkt. No. 347-14[under seal]).

In analyzing the propriety of expert witness testimony and reports, district courts are to act as "gatekeeper[s], not fact finder[s]." *Sandoval-Mendoza, 472 F.3d at 655*. "[A]n expert may be allowed to state an opinion on the actual matter in controversy where the opinion clearly identifies **[**136]** what is *assumed* versus what is opinion." *Biotechnology Value Fund, L.P. v. Celera Corp., No. C 13-03248 WHA, 2015 U.S. Dist. LEXIS 3914, 2015 WL 138168, at *3 (N.D. Cal. Jan. 9, 2015)*. Samsung is not challenging Lasinski's opinions because they are based on an unreliable methodology; rather, it contends that his analysis is unreliable because it includes a faulty assumption. "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010)*.

Lasinski explained the reasons for excluding the [TEXT REDACTED BY THE COURT], as well as other agreements, from his analysis of a comparable licensing rate. And Huawei has provided substantial evidence supporting the reasonableness of Lasinski's assumption. I see no basis to strike any portion of Lasinski's report on this ground; Samsung can attack this assumption through cross-examination. *See, e.g.*, *Interwoven, Inc. v. Vertical Computer Sys., No. CV 10-04645 RS, 2013 U.S. Dist. LEXIS 100790, 2013 WL 3786633, at *11 (N.D. Cal. July 18, 2013)* ("Any concern as to the degree of comparability between an existing and hypothetical license may be addressed through cross-examination.").

2. Portfolio Strength Indicators

Samsung also challenges Lasinski's opinions assessing the strength of the parties' portfolios, calculating appropriate FRAND rates **[**137]** (and ultimately determining whether the parties' offers were FRAND) because the two indicators he used—the number of "Global Deemed SEP Families" and "the number of submissions made by each SEP holder to 3GPP that were adopted into the standard," which Lasinski labels "Approved Contributions." Lasinski **[*989]** Report ¶¶ 21, 23; *see also id.* ¶¶ 82-92; *id.*, Ex. D.

a. Approved Contributions

Samsung attacks Lasinski use of this indicator because (1) he does not offer empirical or quantitative analyses linking Approved Contributions to the economic value of a company's SEP portfolio, (2) it is inappropriate (and redundant) to consider this sort of "proxy" data when actual data on the underling patents is available via Jackson's Essentiality Database, (3) it is self-serving because Huawei is an active participant in the standard setting process, and (4) Huawei's own expert, Dr. Padilla, testified that "we don't know how strong the correlation is" between Approved Contributions and portfolio value. Padilla Dep. at 35:1-36:13.

Huawei counters with evidence that use of the Approved Contributions indicator is reliable. It cites academic literature and empirical analysis to support its contention that there **[**138]** is "a strong logical and intuitive connection between the number of a firm's technical contributions approved for incorporation into a standard and its number of SEPs[.]" Opp'n at 18 (citing Exs. 17, 18, and 19).[35] It also underscores the generally accepted practice that many industry firms—including Samsung—have used Approved Contributions to assess portfolio strength in licensing negotiations. Lasinski Report ¶¶ 89-90.

Samsung's arguments are unconvincing. Lasinski accounts for expired patents and uses a weighted calculation to combine deemed essential patent counts with Approved Contributions, so a firm with a robust SEP portfolio but no contributions would still be assigned a significant patent value. *See* Opp'n at 19-20. Further, the use of the indicator is not duplicative of the database because the deemed essential patents are extrapolations given the number of

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[35] But Samsung responds that Lasinski did not cite these studies in his report.

patents involved, and the indicator simply provides another factor to consider in analyzing the portfolio strength, which yields more reliable results. And Huawei responds with a fuller recitation of Padilla's deposition testimony:

> Q. And can SEP contributions be used as a proxy for value of a patent portfolio?
>
> A. I think as **[**139]** a profession, as economists, we are struggling to understand or to develop good proxies for value. We have over the years developed some measures, forward citations with — this case is one of them. There is some unsatisfaction about the usefulness of forward citations or patent counting and so we are all looking for different ways in which we could proximate the value. Contributions is one of the notions that has been put forward, and, you know, it has has [sic] its pros and its cons and its problems as well.
> And people are trying to come with new ideas as to how to proxy value, because it's a difficult exercise, and so, you know, I think that my view on contributions is set out in my report, is just one additional proxy that you may want to consider. And my view at this stage is that since there is no perfect proxy, all of these are useful and potentially informative, but all of them should be taken with a pinch of salt.

Padilla Dep. at 34:4-23 (Peterson Decl., Ex. 9; Dkt. No. 347-13[redacted], Dkt. No. 347-14[under seal]). In his Rebuttal Expert Report, he explains that "in certain cases contributions may not be directly tied to SEPs," but "contribution counting has been considered **[**140]** by several authors and companies to be a useful tool to assess the relative strength of patent portfolios—particular as between companies that are active in the SSO—because companies typically file patents based on inventions related **[*990]** to their contributions and as such, it may be closely tied to the value of the portfolio." 5/25/18 Padilla Report ¶ 4.2(c) (Stake Decl., Ex. 3; Dkt. No. 331-10[under seal]); *see also* ¶ 4.5 ("[R]esearch has shown that several of these different approaches can be used simultaneously and in combination to more effectively measure patent value. I understand Mr. Lasinksi has done so in his opening report by combining the essentiality study of Dr. Jackson with the contributions data.")(footnote omitted).

Samsung cites *TCL v. Ericsson* to support its view that Lasinski's reliance on the Approved Contributions indicator is unreliable. In *TCL*, the court noted "two major flaws with contribution counting"—" the absence of any evidence that it corresponds to actual intellectual property rights, and its inability to account for transferred or expired patents." *2017 U.S. Dist. LEXIS 214003, 2017 WL 6611635, at *41 (C.D. Cal. Dec. 21, 2017)*. But Huawei underscores that Lasinski addressed each of these "flaws" in his report: his blended index produces **[**141]** results consistent with the parties' historical license agreements, Lasinski Report ¶¶ 88-91, the effect of transfers are accounted for in Jackson's database, and Lasinski explicitly accounts for expirations, *id.* ¶ 91 n.213.

Samsung has not established that Lasinksi's use of the Approved Contributions indicator is so unreliable that his report should be excluded. He should have cited the studies cited by Padilla in his Rebuttal Report, ¶ 4.5 n.22 and Huawei in opposition, Opp'n at 18-19, but this oversight, and the absence of a published, peer-reviewed study supporting Lasinski's specific approach do not dictate that his findings are unreliable.

b. "Global Deemed SEPs"

The second portfolio strength indicator relied upon by Mr. Lasinski is the "number of SEP families with at least one issued member in the [United States], Europe, and China deemed to be actually essential in a recent patent census and essentiality study conducted by Dr. Charles Jackson." Lasinski Report ¶ 21. Samsung attacks this litigation-motivated indicator largely on grounds that it is "obviously biased... ." Mot. at 20.

But Lasinski explained that additional information could be gleaned by looking at the number of patent **[**142]** families in the portfolio with active members in the United States, Europe, and China because most of a portfolio's value is driven by a relatively small number of inventions and one way to identify the most valuable inventions is to ascertain the ones for which the inventor has sought patent protection in multiple jurisdictions. Lasinski Report ¶ 86. Huawei points out that Samsung's own expert, Dr. Leonard, recognizes these points. *See* Leonard Report ¶188 (noting that "[t]he top 10 percent of patents ... make up approximately 65 percent of total value" and "[t]he next 10 percent of patents ... make up approximately 14.6 percent of the value"); *id.* ¶ 180 ("Large, multinational companies have a strong incentive to file for patents in multiple jurisdictions, particularly in the US, given the strong intellectual property protection and large market share."); *id.* ¶ 180 n.233 ("For example, it has been found that patents applied in both EP and USPTO or at the USPTO alone are more valuable that those applied in EP alone."); *id.* ¶ 180 ("Additionally, filing patents in multiple jurisdictions involves additional costs and risk of rejections; it therefore makes economic sense for the patent **[**143]** owner to apply in multiple jurisdictions only for its more valuable patents.").

Moreover, Lasinski used "Global Deemed SEPs" as an indicator of relative portfolio value, so it is not true, as Samsung asserted, that "Lasinski's proposed 'value indicator considers worthless any **[*991]** patents without corresponding family members in the U.S., Europe, and China." Mot. at 19. As Lasinski explained,

> [I]t is important to bear in mind that I have used Global Deemed SEP Families as an indicator of *relative* portfolio value. Such an application does not require the conclusion that all other declared and/or deemed SEPs have no value whatsoever, but simply that a company's share of Global Deemed SEP Families is more indicative of its relative portfolio strength when assessing a global license than its share of declared SEP families and/or deemed SEP families with issued members in any one jurisdiction anywhere in the world would be.

Lasinski Report ¶ 87. And he expounded on the basis for choosing these three jurisdictions (U.S., Europe, and China). *Id.* ¶ 83, Figure 32. This figure shows that these three jurisdictions represent the majority of handset revenue between 2011 and 2016 for [TEXT REDACTED BY THE **[**144]** COURT] and over 80 percent for Huawei.[36] *Id.* While Samsung claims that including China is biased in Huawei's favor because it has "many Chinese patents as a Chinese company[,]" the multi-jurisdictional approach reduces this advantage. Huawei also highlights that both parties (like the majority of the industry) manufacture a substantial portion of their smartphones in China, Lasinski Report ¶ 84, Leonard Report, Ex. 6a (" [TEXT REDACTED BY THE COURT])(Dkt. No. 331-20[under seal]).

Samsung's challenges to Lasinski's inclusion of these two indicators are best suited for cross-examination and through introduction of its own experts' divergent methodology. Its arguments do not justify striking the opinions.

B. Whether Lasinski and Padilla Have Inappropriately Opined on French Law

Both parties agree that French law governs the ETSI IPR Policy, and each side has submitted reports from French law experts and taken the respective depositions. Samsung attacks certain portions of the reports of Lasinski and Padilla because they reference the meaning of a "FRAND" commitment, and provide a subjective analysis of whether each party has complied with its FRAND obligations. Mot. at 8-9; *see* Lasinski Report **[**145]** ¶¶ 68-76 (Stake Decl., Ex. 1; Dkt. No. 331-6[under seal]); Padilla Report ¶¶ 1.13, 3.20-3.38, 6.8 (Stake Decl., Ex. 2; Dkt. No. 331-8[under seal]). But Huawei points out that Lasinski merely states his general understanding of the terms "reasonable" and "non-discriminatory," Lasinski Report ¶¶ 69-75, and it contends that Lasinski's understanding of the meaning of the terms aligns with the understanding of Samsung's own experts. *Compare* Lasinski Report ¶¶ 70, 75, *with* Leonard Report ¶ 30 and ¶ 7.[37] Moreover, Lasinski explains the basis for his understanding of the terms "reasonableness" and "non-discriminatory," including references to court opinions, policymakers, and academics. Lasinski Report ¶¶ 68-72; *id.* ¶¶ 75-76.

Samsung also takes issue with portions of Lasinski's and Padilla's reports that recite the parties' negotiation history. Mot. at 9. Both experts admitted that they had no personal knowledge of the history, but based their opinions on information relayed to them by others. Huawei counters that the details are largely undisputed, and Samsung's own experts likewise include **[*992]** similar chronologies in their reports. It also acknowledges that Dr. Padilla's report

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[36] Samsung [TEXT REDACTED BY THE COURT] Reply at 14 (citing Lasinski Report, Figure 32).

[37] It further contends that Samsung's French law expert admits that French law does not define these terms, but the cited testimony does not reference the terms at all. Samsung pointed out this omission in reply, but did not offer affirmative evidence that French law does in fact define these terms.

includes his conclusion **[**146]** that Samsung's conduct is consistent with patent hold-out and with it being an unwilling licensee and licensor, whereas Huawei's conduct is not consistent with patent hold-up (as Samsung's experts claim), and is consistent with it being a willing licensor and licensee. Padilla Report ¶¶ 6.9-6.16.

The Federal Rules make clear that "[a]n opinion is not objectionable just because it embraces an ultimate issue." *Fed. R. Evid. 704(a)*. "That said, an expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law. Similarly, instructing the jury as to the applicable law is the distinct and exclusive province of the court." *Nationwide Transp. Fin. v. Cass Info. Sys., Inc., 523 F.3d 1051, 1058 (9th Cir. 2008)* (quoting another source). "It is well accepted that an expert witness may always testify to facts and opinions that, if found, would allow the trier of fact to reach its own conclusion on an ultimate issue of fact." *Microsoft Corp. v. Motorola, Inc., No. C10-1823JLR, 2013 U.S. Dist. LEXIS 109905, 2013 WL 4008822, at *12 (W.D. Wash. Aug. 5, 2013)*.

In *Microsoft*, Judge Robart noted that "[i]t is a more nuanced question whether the expert is permitted to directly express an opinion on that ultimate issue—for example, ... as is relevant here, whether the defendant acted in 'good faith.'" *Id.* "The touchstone of this inquiry is **[**147]** whether the expert's testimony on an ultimate issue of fact will be helpful to the jury." *Id.* "Where the jury is in as good a position as the expert to draw conclusions from the evidence, and is capable of drawing its own inferences, the expert's ultimate issue testimony is not helpful and should be excluded." *Id.* "On the other hand, in a more complicated case or a case dealing with a concept less familiar to ordinary jurors, expert testimony on an ultimate issue may be useful for 'guiding the trier of fact through a complicated morass of obscure terms and concepts.'" *Id.*

Judge Robart concluded that certain statements pertaining to how a patent holder fulfills its FRAND obligation constituted impermissible expert testimony because they were "paradigm legal conclusions[.]" *Id.* He found that the court would inform the jury through its jury instructions as to the rights and obligations of the parties under their RAND commitments, and "expert testimony leaving an impression on the fact-finder concerning the duties and obligations pursuant to the RAND commitment is impermissible." *2013 U.S. Dist. LEXIS 109905, [WL] at *14*. But he did not strike certain statements reciting factual background and "the testimony of an expert in the **[**148]** SEP industry about whether such offer letters were in fact sent in good faith and about Microsoft's response to those letters[.]" *2013 U.S. Dist. LEXIS 109905, [WL] at *17*. He noted that "[t]his is a complicated case and the jury will be asked to hear, among other things, evidence regarding offer letters of patent portfolios, industry royalty rates and ranges determined by analysis of those patent portfolios, and the legal framework surrounding RAND licensing both domestic and abroad." *2013 U.S. Dist. LEXIS 109905, [WL] at *19*. And he determined that Holleman's opinions on Motorola's good faith would be helpful to the jury. *Id.*

The challenged portions of Dr. Padilla's report provide factual context and relay Padilla's conclusion that Huawei has acted as a willing licensor and Samsung has not. *See* Padilla Report ¶¶ 6.9-6.16. As an initial matter, the factual background provides necessary context to the challenged conclusions. Samsung has not challenged the accuracy of those statements, only the propriety of the expert witnesses opining on matters for which they lack personal knowledge. But Huawei has indicated that it does not intend to substitute expert **[*993]** testimony for that of fact witnesses. I see no reason to strike the factual background paragraphs from the expert **[**149]** reports. If Huawei improperly attempts to introduce this testimony through experts rather than fact witnesses at trial, I will entertain the appropriate objection at that time.

As for Padilla's conclusion, *see* 6.16, although phrased in different terms, it essentially asserts that Huawei has acted in good faith, whereas Samsung has not. Samsung distinguishes this opinion from the "good faith" opinion that Judge Robart found admissible in *Microsoft* by highlighting that Padilla's opinion is based on "his understanding of each party's negotiation conduct," as opposed to whether the terms of an offer were made in good faith. I do not think it is necessary to so narrowly define the scope of admissible "good faith" expert testimony. Padilla's opinions do not explicitly state that one party's actions were "fully consistent with its [F]RAND obligations... ." *Microsoft, 2013 U.S. Dist. LEXIS 109905, 2013 WL 4008822, at *15*. As in *Microsoft*, Padilla's opinions will prove helpful to the jury in determining the ultimate issue of whether either party breached its FRAND obligations.

C. Whether Padilla Improperly Bolsters Lasinski

Samsung next challenges portions of Padilla's Rebuttal Expert Report that it contends are intended to bolster Lasinski's report. Mot. **[**150]** at 10; *see* Padilla Rebuttal Report, ¶¶ 2.4, 2.8, 3.9, 4.5 (Stake Decl., Ex. 3).[38] Huawei argues that Padilla is not vouching for Lasinski, "but rather bringing to bear his economic expertise on Mr. Lasinski's methodologies." Opp'n at 11.

Huawei provides no legal support that such opinions are admissible. Huawei cannot legitimately claim that the challenged paragraphs do not qualify as vouching. *See, e.g.*, 3.9 ("Therefore [Lasinksi's] analysis is better designed to ensure a FRAND rate is derived for Huawei and Samsung's SEP portfolios"). Courts have stricken the testimony of expert witnesses intended to bolster the testimony of another expert. *E.g., K&N Eng'g, Inc. v. Spectre Performance, 2011 U.S. Dist. LEXIS 164981, 2011 WL 13131157, at *10 (C.D. Cal. May 12, 2011)* ("[A] testifying expert can use facts, data, and conclusions of other **[*994]** experts to offer an opinion within the testifying expert's domain of expertise, but the testifying expert cannot vouch for the truth of the other expert's conclusion."); *Estate of Creach v. Spokane Cty., No. CV-11-432-RMP, 2013 U.S. Dist. LEXIS 200049, 2013 WL 12177099, at *3 (E.D. Wash. May 2, 2013)* (noting that an expert may not provide testimony that is "needlessly cumulative or simply bolsters [another witness's] testimony... ."). Because it would be unhelpful, or even confusing, for the jury to hear the testimony of Padilla, an economist, supporting **[**151]** the methodology used by Lasinski, an accountant, those paragraphs will be struck.

D. Whether Jackson's Essentiality Database is Unreliable

Both parties acknowledge that not all patents that are declared essential are actually essential to the particular standard. To determine which patents are actually essential, a qualified technical expert must examine the declared essential patent and compare it to the relevant standard. To aid its case, Huawei tasked Dr. Charles Jackson with providing "oversight and assistance" in the construction of a database of allegedly every potentially essential 3G or 4G patent worldwide. To this end, he produced an "Essentiality Analysis Protocol[,]" which outlines the requisite steps to determine the actual essentiality of declared essential patents. Jackson Report, Appendix C (Stake Decl., Ex. 7). Dr. Jackson and Concur IP, the team in India tasked with working under him, started with a database of over 220,000 patents declared essential, organized them into patent families, and reviewed them for essentiality using a two-step process that Dr. Jackson refers to as "census" and "deeming." Jackson Report, Section 5. The team identified 12,787 actually essential patents. **[**152]** Jackson Report, Table 10. But Samsung contends that he failed to adequately oversee the development of the database in this case because the bulk of the work was done by Concur IP without Dr. Jackson's direct involvement, and much of the data was extracted from the work of Dr.

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[38] Samsung challenges the following paragraphs: Ex. 3, ¶ 2.4. ("In contrast, Mr. Lasinski's first report is much more in line with the conception of a comparable license analysis that I described in my first report"); *id.* at ¶ 2.8 ("Lastly, in my opinion, using more than one approach, where possible, is likely to lead to more reliable results. This is what Mr. Lasinski has done in his opening report by combining the technical essentiality study of Dr. Jackson with contributions data"); *id.* at ¶ 3.9 ("By contrast, the comparable license analysis conducted in Mr. Lasinski's first report is much more in line with the conception of a comparable license analysis that I described in my first report because he has discussed comparability of the comparable and focal agreement along several criteria, including date of the agreement, the scope of the licensed portfolio, and the nature of the licensee's products. He has considered Huawei's agreements with Ericsson, Nokia, InterDigital Apple, NTT DoCoMo and Qualcomm as well as Samsung's agreements with Ericsson, Nokia, InterDigital, NEC and Qualcomm, has assessed in detail which of those agreements are comparable given the parties, circumstances, and structure of the agreements, and has unpacked those comparable agreements to inform his opinion as to the FRAND rate. As such, Mr. Lasinski appropriately used information from more than one license to guide and check his analysis. Therefore his analysis is better designed to ensure a FRAND rate is derived for Huawei and Samsung's SEP portfolios"); *id.* at ¶ 4.5 ("Moreover, research has shown that several of these different approaches can be used simultaneously and in combination to more effectively measure patent value. I understand Mr. Lasinski has done so in his opening report by combining the essentiality study of Dr. Jackson with the contributions data").

Apostolos Kakaes in unrelated litigation involving TCL and Ericsson. Neither attack provides a sound ground for striking Jackson's opinions.

As an initial matter, the database is not an "opinion," it is data from which Dr. Jackson forms his opinions.[39] The Federal Rules explicitly allow an expert to "base an opinion on facts or data in the case that the expert has been made aware of or personally observed." *Fed. R. Evid. 703*; *see also* *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1142 (9th Cir. 1997)* ("The fact that Engelke's opinions are based on data collected by others is immaterial; *Federal Rule of Evidence 703* expressly allows such opinion testimony."). Dr. Jackson explained in detail the steps the team took to create the database. Samsung questions the reliability of the database on the grounds that Dr. Jackson contributed to an essentiality decision "in the ballpark of 100" and "spot checked ... in the neighborhood of 20" out of the 158,574 decisions that were made under his purported **[*995]** supervision. Jackson Report 6; **[**153]** *see also* Jackson Dep. at 157:15-22, 160:24-161:4 (Stake Decl., Ex. 11). But it does not appear to challenge the qualifications of the Concur IP team, or the methodology that they followed in developing the database. Rather, it attacks the "minimal quality control" and the undisputed fact that some of the data came from the database developed by Concur IP under the direction of Dr. Kakaes in *TCL Commc'n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, No. CV 15-2370 JVS(DFMX).

In *TCL*, Judge Selna was "not persuaded that the individuals on the Concur IP team lacked the qualifications to perform this work." *2017 U.S. Dist. LEXIS 214003, 2017 WL 6611635, at *17 (C.D. Cal. Dec. 21, 2017)*. Samsung cites to an earlier decision in *TCL*, in which Judge Selna granted Ericsson permission to depose Concur IP team leaders, even though they would not be testifying at trial, in part because "neither of the testifying experts could fully explain how the teams in India came to their conclusions in the Census and Industry Essentiality Analysis." *2016 U.S. Dist. LEXIS 185159, 2016 WL 6662727, at *4-5 (C.D. Cal. July 7, 2016)*. But he explicitly opted not to strike portions of the reports nor to preclude TCL from offering certain testimony "to buttress the reliability of the factual predicates" of the reports. *See* *2016 U.S. Dist. LEXIS 185159, [WL] at *5*.

As Huawei highlights, Judge Selna **[**154]** rejected several challenges to the methodology and ultimately allowed TCL's experts to testify based on the database. *2017 U.S. Dist. LEXIS 214003, 2017 WL 6611635, at *18 (C.D. Cal. Dec. 21, 2017)* ("Ultimately the Court finds that the flaws are not enough to justify rejecting TCL's experts' calculation of the total number of SEPs entirely."). Because Samsung does not offer legitimate grounds for attacking the reliability of the database, its motion to strike the Jackson Report is DENIED.[40] Its challenges go to the weight to be given to Jackson's opinions, not their admissibility. Samsung can attack his testimony on cross-examination.

E. Objections to Rebuttal Reports

1. Dr. deLisle's "Rebuttal" Report Related to Chinese Legal System

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[39] Samsung offers an inapposite hypothetical to "demonstrate[] the absurdity of Huawei's position[:] [s]uppose an associate working for Huawei's counsel were tasked with going through the Concur IP database and marking all of Huawei's patents 'essential while demining all other patents 'non-essential.'" Reply at 9 n.7. Under this scenario, Huawei's accounting expert would then take this database and "value the patents of anyone other than Huawei at zero, highly distorting his 'comparable license' and 'top-down' approaches in Huawei's favor." *Id.* But under this hypothetical, Samsung would have ample grounds for challenging the methodology of the associate in generating the data underlying Lasinski's opinions. Here, Samsung is not actually challenging the methodology of any of the individuals involved in developing the database.

[40] In Reply, Samsung focuses more on its contention that Jackson is merely serving as a conduit to introduce the opinions of Dr. Kakaes. *See* Reply at 10. But, regardless of the quantity of Kakaes's work used in compiling the database, Jackson's opinions are clearly his own. As Huawei points out, Samsung could have sought to depose Kakaes or members of the Concur IP team, but it did not.

Under *Federal Rule of Civil Procedure 26*, a party must disclose expert testimony "if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under *Rule 26(a)(2)(B)* or *(C)*, within 30 days after the other party's disclosure. *Fed. R. Civ. P. 26(a)(2)(D)(ii)*. "Rebuttal testimony cannot be used to advance new arguments or new evidence." *Wadler v. Bio-Rad Labs., Inc., No. 15-CV-02356-JCS, 2016 U.S. Dist. LEXIS 143480, 2016 WL 6070530, at *3 (N.D. Cal. Oct. 17, 2016)* (quoting another source). "The test of whether an expert's opinion constitutes rebuttal or a 'new' opinion, however, is not 'whether a rebuttal expert employs new testing or methodologies' **[**155]** but instead, whether 'a rebuttal attempts to put forward new theories outside the scope of the report it claims to rebut.'" *Id.*

Huawei's "rebuttal" expert Jacque deLisle's opinions relate to "evaluations of Chinese court proceedings and Chinese law[,]" deLisle Dep. at 70:14-15 (Stake Decl., Ex. 16; Dkt. No. 335-17), which Samsung claims do not respond to any of its experts' opinions or arguments. Mot. at 21; *see* deLisle Rebuttal Report (Stake Decl. ISO Samsung's Mot. to Partially Exclude, Ex. **[*996]** 15; Dkt. No. 335-16). But Huawei counters that Dr. deLisle's report directly responds to claims by Samsung's experts that Huawei's pursuit of Chinese injunctions was improper in violation of its FRAND obligations and U.S. ***antitrust law***. Opp'n at 24; *see* Leonard Report § VI (citing Huawei's Chinese injunction actions and "conclud[ing] that Huawei's threat of an injunction in China is likely to lead to hold-up."); *id.* ¶¶ 190-193 (explaining why "an injunction in China is likely to hold-up Samsung worldwide, forcing Samsung' to pay above-FRAND royalty rates for Huawei's SEP portfolio while accepting less-than-proportional rates for its own portfolio") (capitalizations omitted).

"The proper function **[**156]** of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party." *Matthew Enter., Inc. v. Chrysler Grp. LLC, No. 13-CV-04236-BLF, 2016 U.S. Dist. LEXIS 108694, 2016 WL 4272430, at *1 (N.D. Cal. Aug. 15, 2016)* (quoting another source). Dr. deLisle's report does not directly "contradict" Leonard's opinions, but it does provide important context intended to "defuse the impact" of a critical inference drawn from Leonard's report—that Huawei improperly sought injunctive relief in China to "hold-up Samsung for above-FRAND royalties." Leonard Report ¶ 190. Moreover, Huawei notes that the parties agreed that Samsung would have the opportunity to submit a supplemental report responding to Dr. deLisle, *see* Email Exchange re: Improper Rebuttal (Peterson Decl., Ex. 13; Dkt. No. 347-14 at 153-54[under seal]), but Samsung elected not to, so it cannot claim prejudice. Opp'n at 25. On this point, Samsung counters that it reserved its rights to object and "could not reasonably submit a report responding to Dr. deLisle within one week of being surprised by his report."

Samsung's motion is GRANTED IN PART.[41] Huawei may use portions of deLisle's opinions properly intended to "diffuse the impact" of Samsung's experts' opinions that seeking **[**157]** injunctions was improper, but it may not introduce his opinions generally related to the integrity of the Chinese legal system.

2. Dr. Ding's Rebuttal Report

Samsung moves to strike paragraphs 115, 127-143, and 150 of Dr. Ding's Rebuttal Expert Report because they do not directly respond to any portion of Dr. Davies' opening report. Mot. at 21. Huawei offered the objected to portions of the rebuttal report of Dr. Zhi Ding because they were intended to rebut the testimony and opinions of Samsung's expert Dr. Leonard, but since Dr. Leonard did not rely on the Unwired Planet patents in his assessment, Huawei agrees that it will not present Dr. Ding's testimony on the subject so long as Dr. Leonard does not introduce the subject. Samsung does not offer further representations in reply, only acknowledging Huawei's concession. Reply at 3. Since Huawei offered no argument against striking these paragraphs from Ding's Report, Samsung's motion is GRANTED.

VII. SAMSUNG'S MOTION TO STRIKE PORTIONS OF EXPERT REPORTS

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[41] Samsung does not request specific paragraphs to be excluded. To the extent that this direction is unclear, the parties may determine via motions in limine precisely which of Dr. deLisle's opinions are admissible at trial.

Samsung moves to strike portions of Huawei's expert reports because they were not disclosed in accordance with the rules governing pleading and contentions. Mot. to Strike (Dkt. No. 337 **[**158]** [redacted]; Dkt. No. 334-2 [under seal]).

[*997] A. Inequitable Conduct Defense for the '105 Patent

As discussed above, Huawei is no longer pursuing this defense, so I need not address striking these portions of its experts' reports.

B. Huawei's Undisclosed Invalidity Contentions for the '825 Patent

Huawei's First Supplemental Invalidity Contentions, served on September 22, 2017, included assertions that the '825 Patent was invalid under *35 U.S.C. § 112* because certain terms lacked written description and lacked enablement. Ex. C. Huawei's expert, Dr. La Porta, offered several opinions why the '825 patent is invalid that were not disclosed via contentions, including that the terms: (1) "a signal generator configured to: select a first ID from among the group of IDs," (2) "a downlink signal processor configured to: after transmitting the first uplink signal, wait for a predetermined delay duration without checking a downlink channel," and (3) "predetermined delay duration," all lack written description support and/or are not enabled. Ex. D at 173-77. He also opined that the terms "a downlink signal processor configured to: after transmitting the first uplink signal" and "a transceiver configured to: transmit the generated first uplink signal to a NodeB" **[**159]** are indefinite. *Id. at 184-85*.

The patent local rules require a party to disclose any grounds for invalidity that "give[] the other party sufficient notice for it to engage in meaningful discovery and preparation of its case." *MediaTek, 2014 U.S. Dist. LEXIS 22442, 2014 WL 690161, at *6*. Huawei insists that it has met this threshold requirement for each of the issues identified by Samsung.

1. Claim 4's "signal generator," "downlink signal processor," and "transceiver"

Huawei explains that Samsung's interpretation of these claim elements did not become clear until its interrogatory response served on March 9, 2018, the last day of fact discovery. Its expert, Dr. La Porta, therefore concluded that "signal generator" and "downlink signal processor" lacked written description, and "downlink signal processor" and "transceiver" are indefinite when considered together in the context of the claim. La Porta Invalidity Report ¶¶ 479-83 (Yang Decl., Ex. 10). It insists that it provided sufficient notice by timely serving its opening expert reports, Samsung never objected during expert discovery, and Samsung has suffered no prejudice, as demonstrated by Dr. Valenti's rebuttal report which fully addresses Dr. La Porta's opinions on indefiniteness and Samsung's opportunity **[**160]** to depose Dr. La Porta about his opinions. Opp'n at 12. It points to *Medimmune, LLC v. PDL Biopharma, Inc., No. C 08-5590 JF (HRL), 2010 U.S. Dist. LEXIS 145936, 2010 WL 760443 (N.D. Cal. Mar. 4, 2010)*, for support.

In *Medimmune*, the Hon. Jeremy Fogel denied a motion to strike invalidity contentions based on insufficient disclosures because the contentions were asserted with the requisite specificity, and "discovery ha[d] proceeded to the point that PDL ha[d] received MedImmune's extensive expert reports with respect to the subject contentions." *2010 U.S. Dist. LEXIS 145936, [WL] at *3 n.3*. The difference here is that Huawei did not include these indefiniteness challenges in its invalidity contentions and never sought leave to amend. But it did expound on the theory in Dr. La Porta's opening report, which is dated April 27, 2018.

Samsung cites to *BioCell Tech. LLC v. Arthro-7, 2013 U.S. Dist. LEXIS 189647, 2013 WL 12131282 (C.D. Cal. Apr. 16, 2013)* to argue that Huawei's position regarding lack of prejudice "would make it impossible to strike any new argument in an opening expert report, robbing the Patent Local Rules of meaning." Reply at 4. The *BioCell* court found that "Defendants waived and/or [were] estopped from **[*998]** asserting indefiniteness in light of their

Invalidity Contentions and stipulation to claim construction." 2013 U.S. Dist. LEXIS 189647, [WL] at *9. The court compared the circumstances to those in Apple, Inc. v. Samsung Electronics Co., 920 F. Supp. 2d 1079, 2013 WL 412858 (N.D. Cal. 2013) **[**161]** and concluded that "Defendants' present argument is a clear example of 'unfair surprise.'" BioCell, 2013 U.S. Dist. LEXIS 189647, 2013 WL 12131282, at *10. In *Apple*, Judge Koh found that Samsung had not waived its indefiniteness challenge even though it had not selected the term for construction because Samsung had raised the issue in its answer, invalidity contentions, summary judgment briefing, and at trial. 920 F. Supp. 2d 1079, 2013 WL 412858, at *6.

These circumstances fall in between Apple and BioCell. Samsung cannot legitimately claim any "unfair surprise," but Huawei has not asserted these indefiniteness challenges since the inception of this case. But the reason for that is because the theory is directly driven by Samsung's interpretation of the claim terms. In this situation, I am "extremely reluctant" to dispose of substantive invalidity attacks based on procedural defects. *See* Biogenex Labs., Inc. v. Ventana Med. Sys., Inc., No. C 05-860JFPVT, 2006 U.S. Dist. LEXIS 57067, 2006 WL 2228940, at *4 (N.D. Cal. Aug. 3, 2006) ("While it ultimately concludes that Biogenex acted unreasonably with respect to both its shift in infringement position and its failure to respond to relevant discovery requests, the Court is extremely reluctant to dispose of substantive infringement claims based upon procedural defects, particularly given that BioGenex has offered at least articulable reasons for its conduct and that there is no evidence of bad faith.").

2. Predetermined delay duration

Samsung acknowledges that Huawei identified the term in its invalidity contentions, but argues that "there are two distinct deficiencies in [the] disclosure." Mot. at 11. First, it contends that Huawei merely **[**162]** identified an indefiniteness challenge, but did not note a specific challenge based on lack of written description, on which its expert specifically opines. Second, it insists that the disclosure is insufficient because it failed to explain why it contends that the term "predetermined delay duration" is indefinite. It also urges that Huawei has waived the argument because it failed to raise it during claim construction briefing.

But Huawei did address the term during claim construction—it argued that its proposed construction, "delay duration provided by base station," was necessary for the system to work as intended. *See* Huawei's Responsive Claim Construction Br. at 13 ("The '825 patent, however, describes a single way of predetermining the delay duration that is necessary in order for the invention to work."). In the Claim Construction Order, I twice noted Huawei's argument that this is the only way for the invention to work, but opted not to import the limitation that the delay duration be provided by the base station. *See* Claim Construction Order at 23-24. Huawei did not waive this argument.[42]

[*999] As for Huawei's **[**163]** challenge based on written description, it argues that "Samsung was indisputably on notice of the written description issue no later than the Court's claim construction order, if not well before, and cannot credibly claim prejudice." Opp'n at 11. The patent local rules explicitly provide that a party would have good cause to amend its infringement or invalidity contentions after "[a] claim construction by the Court different from that

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[42] In support of its argument, Samsung cites to out-of-district cases for the proposition that a party waives indefiniteness challenges by not raising them in claim construction briefing. *See* Edgewell Pers. Care Brands, LLC v. Albaad Massuot Yitzhak, Ltd., No. CV 15-1188-RGA, 2017 U.S. Dist. LEXIS 70242, 2017 WL 1900736, at *4 (D. Del. May 9, 2017); Silver State Intellectual Techs., Inc. v. Garmin Int'l, Inc., 32 F. Supp. 3d 1155 (D. Nev. 2014). But neither case stands for the proposition that a challenge must clearly be labeled as one for "indefiniteness." The *Edgewell* court found that the defendants waived a challenge to "truncated" based on their assertion that it would be unclear where the truncation begins, when they failed to raise the argument in their briefing. 2017 U.S. Dist. LEXIS 70242, 2017 WL 1900736, at *4. But the court also noted, "[e]ven assuming it was not waived, one skilled in the art would understand with reasonable certainty where the truncation begins in light of the figures provided the specification." *Id.* And the *Silver State* court denied Garmin's motion to amend its invalidity contentions when it based its challenge on the court's claim construction and waited two months to amend. 32 F. Supp. 3d at 1166. Neither case is helpful here, where Samsung's argument is essentially that Huawei did not label its "will not work" argument as an indefiniteness challenge.

proposed by the party seeking amendment[.]" *Patent L.R. 3-6(a)*. It was Huawei's duty to amend its contentions, not Samsung's responsibility to infer Huawei's arguments based on the Claim Construction Order. But Huawei points to the lack of prejudice to Samsung, as evidenced by Dr. Valenti's rebuttal report, and urges that the court should decline to strike this substantive argument based on a procedural defect. Opp'n at 11 (citing *Biogenex, 2006 U.S. Dist. LEXIS 57067, 2006 WL 2228940, at *4)*. As with the previous issue, I am "extremely reluctant" to dispose of substantive arguments based on procedural defects. *See* *Biogenex Labs., 2006 U.S. Dist. LEXIS 57067, 2006 WL 2228940, at *4*.

I also reject Samsung's contention that Huawei's disclosure in its invalidity contentions was insufficient because it failed to explain why it contends that the term "predetermined delay duration" is indefinite. **[**164]** As evidenced during claim construction arguments, Samsung understood Huawei's position that the term is indefinite if the delay duration is not determined by the base station because the patent provides no other mechanism for determining the delay duration.

Samsung's request to strike paragraphs 478-485, 489, and 499-501 is DENIED.

C. Huawei's Undisclosed Noninfringing Alternatives, Noninfringement Contentions, and Noninfringement Theories

1. For Samsung Asserted Patents

During fact discovery, Samsung served interrogatory no. 14 asking Huawei to identify noninfringing alternatives to the Samsung patents-in-suit. Ex. E at 30-31. Huawei initially indicated that it would "respond to this interrogatory at an appropriate time." Its final response asserted that it would "disclose its experts' opinions in accordance with the expert discovery schedule in this matter," noted that the functionality of its products constituted a "design-around," and identified as responsive the entirety of the "deposition testimony of its technical and source code witnesses deposed in this case."

2. Noninfringing Alternatives

Huawei never supplemented this interrogatory response and did not identify any noninfringing **[**165]** alternatives in its opening reports, but disclosed several in its rebuttal reports. Samsung moves to strike the following portions of Huawei's expert reports: Mahon Rebuttal Report Regarding Noninfringement of the '105 patent ¶ 11 (last sentence), ¶¶ 149-157 (Ex. J); La Porta Rebuttal Report Regarding Noninfringement of the '825 patent ¶¶ 35, 265-270 (Ex. K); Akl Rebuttal Report Regarding Noninfringement of the '350 patent ¶ 20 (last sentence), ¶¶ 263-66 (Ex. L); Mahon Expert Report Regarding Noninfringement of the '130 patent ¶¶ 10, 137-140 (Ex. M); Fuja Expert Report Regarding Noninfringement of the '726 patent ¶¶ 41, 228-230 (Ex. N).

[*1000] Huawei aims to justify this apparent failure by contending that the interrogatory request did not seek the information contained in its experts' reports. Interrogatory no. 14 sought "design-around or alternative technology or method (design-around) that . . . *can* be used as an alternative to the claimed subject matter of the asserted(s) of the Samsung Patents-In-Suit." Ex. E at 30 (emphasis added). The portions of the reports listed above that Samsung seeks to strike include opinions concerning what acceptable alternative technology existed *at the time the 3GPP standard was adopted*. Huawei argues that those **[**166]** alternative technologies *could not* be used as an alternative at the time Samsung served its interrogatory request because the standard had already been adopted, after which there is no way to "design around" a patent that embodies mandatory standards technology. *See* Opp'n at 19 (citing Lasinski Op. Expert Report at 40).

Samsung counters that Huawei's "assertion strains credibility." Reply at 4. I agree with Samsung that the interrogatory was directed towards noninfringing alternatives, but I am not convinced that Huawei's explanation should be so easily brushed aside. The interrogatory sought technology that "can" be used as an alternative, and

Samsung does not directly dispute Huawei's contention that once the standard was adopted, no acceptable alternative technology exists. It does, however, dispute any "temporal limitation" in the interrogatory, and it underscores the language asking "when the alleged design-around was available for use" as support that the request sought "any and all design-arounds at any point in time." Reply at 5.

But Samsung cannot deny that its interrogatory used "can," not "could" as it claims in its motion. Huawei insists that a request for "present-day design-arounds **[**167]** to the asserted patents" is "irrelevant to the issue of whether there were any acceptable alternative technologies at the time of the adoption of the relevant 3GPP standard," which is the subject of its rebuttal reports. Given the plain language of the interrogatory, I agree with Huawei. Samsung can legitimately argue that Huawei should have known what it intended by its request, but that does not change the plain language of the request.

Moreover, this case is different than those relied on by Samsung that place the burden of identifying noninfringing alternatives during the accounting period on the accused infringer. None of those cases dealt with a technology that was declared essential to a standard.

Huawei also emphasizes that it consistently took the position that this subject was properly suited for expert, not fact, discovery, and therefore need not have been disclosed in interrogatories. *See* *Ericsson Inc. v. TCL Commc'n Tech. Holdings, Ltd., 2017 U.S. Dist. LEXIS 183216, 2017 WL 5137401, at *13 (E.D. Tex. Nov. 4, 2017)* ("[E]xpert theories need not be disclosed in response to interrogatories."). To the extent that Samsung disagreed with this contention, it could have moved to compel a further response. Huawei insists that its experts' reports were directly responsive to Samsung's experts' opinions concluding **[**168]** that there were no "viable non-infringing alternative[s]" and criticizing certain alternative technologies available at the time the standard was implemented. *See* Bambos '130 Opening Infr. Report ¶¶ 975-76 (Yang Decl., Ex. 2); Prucnal '105 Opening Inf. Report ¶¶ 706-07 (Yang Decl., Ex. 14); Valenti '825 Opening Infr. Report ¶ 926 (Yang Decl., Ex. 9); Bambos '726 Opening Infr. Report ¶¶ 975, 977 (Yang Decl., Ex. 2); Prucnal '350 Opening Inf. Report ¶¶ 706, 708 (Yang Decl., Ex. 14). Samsung cannot claim any **[*1001]** prejudice since it introduced the issue into its opening expert reports.

3. Noninfringement Theories

Samsung also takes issue with several of Huawei's noninfringement theories that it contends were not disclosed during discovery:

> For the '105 patent: (1) the Accused Instrumentalities do not use "FT pre-coded symbols" because Physical Uplink Shared Channel ("PUSCH") symbols purportedly contain control information in addition to data information (see Ex. J at 29-34); (2) the Accused Instrumentalities do not map PUSCH and Physical Uplink Control Channel ("PUCCH") symbols to two sets of subcarriers such that both sets of subcarriers are available for transformation during the same IFFT operation (id. at 38-46 **[**169]**); and (3) the Accused Instrumentalities do not perform the same IFT operation on the PUSCH and PUCCH (id. at 47-50);
>
> For the '350 patent: (1) performing only the steps in method claim 1 does not result in the determination of "downlink transmit power," which is based on a new claim construction theory that the preamble is limiting (*see* Ex. L at 53-59); (2) the claimed "determining a cell-specific ratio" cannot be met by using a lookup table based on Huawei's proposed construction of "determining" as "calculating" (*id.* at 60-63); (3) the claimed "receiving a cell-specific parameter" is not met by receiving an index value for a lookup table based on Huawei's proposed construction of "cell-specific parameter" as "a parameter representing an RS boosting value" (*id.* at 63-65); and (4) the Accused Instrumentalities do not use a cell-specific ratio because "[t]he same 'ratio' is not used by all user equipment in a cell" and that different manufacturers purportedly use different ratios (*id.* at 69-72).
>
> For the '130 patent: data is not mapped to "remaining" symbols in the slot when a Sounding Reference Signal ("SRS") is sent (*see* Ex. M at 40-41).
> For the'726 patent: Samsung has failed to point to evidence of a claims "HARQ processor" (see Ex. N at 76 - 81)

Huawei responds to **[**170]** Samsung's attack by offering that noninfringement contention interrogatory responses are not required in this district, it nonetheless sought to meet and confer with Samsung regarding mutual supplementation of the parties' noninfringement interrogatories, it provided responses at the same level of detail as Samsung, and certain positions were unforeseeable until Samsung served its opening infringement reports.

Given the uncertainty as to the requisite particularity of the responses and the lack of prejudice, I will not strike these theories on procedural grounds.

4. For Huawei Asserted Patents

Samsung's Interrogatory No. 35 asked Huawei to describe any "design-around alternatives" to Huawei's asserted patents.[43] Ex. O at 2. Three weeks after the close of discovery, Huawei responded:

> there were no alternative proposals that solved the problems solved by Huawei's inventions. Any alternatives either failed to solve the same problems, or failed to provide an efficient solution like Huawei's inventions. Due to their superiority as compared to available alternatives, Huawei's inventions were adopted into the LTE standards.

[*1002] Ex. P at 22. Huawei did not identify any specific design-around alternatives, **[**171]** but referred to its response to Interrogatory No. 20, which mentions alternatives for the '613 and '587 patents. Ex. Q at 18-19, 22-23, 25-26. Samsung argues that Huawei's opening expert reports identify several previously undisclosed purported noninfringing alternatives for each of Huawei's patents-in-suit. But that is not what the reports identify. To the contrary, they opine on why certain technologies could not serve as a feasible alternative to Huawei's patents. *See* Ex. R ¶¶ 537-45 ('239 patent); Ex. S at ¶¶ 481-500 ('892 patent); Ex. T at ¶¶ 296-309 ('587 patent); Ex. U at ¶¶ 279-84 ('613 patent).

Huawei asserts that it could not have known that its responses were inadequate given the parties' agreement, and therefore had no duty to supplement. To the extent that Samsung contends that Huawei's responses were inadequate, it should have moved to compel supplemental responses rather than seeking to strike portions of the expert reports at this stage.

D. Huawei's Omission of Priority Dates for the '587 and '892 patents in its Opening Expert Reports

Huawei's opening expert reports offering opinions on alleged infringement of the '587 and '892 patents failed to mention any priority date for either patent, *see* Ex. S at ii-iii; Ex. T at ii-v, but the rebuttal reports included **[**172]** specific priority dates, *see* Ex. V ¶¶ 62-65; Ex. W ¶¶ 59-77.

Huawei responds that its infringement contentions on October 25, 2016 identified December 3, 2009, the date of the original Chinese application, as the priority date for the '587 patent, and identified April 30, 2007, the date of the original Chinese application, as the priority date for the '892 patent. Given this disclosure, which Samsung does not directly address, I fail to see any basis for concluding that Huawei "needed to include" this evidence in its opening reports, thereby justifying striking its rebuttal expert reports.

E. Huawei's Undisclosed DOE Theory for the '239 patent

Samsung contends that Huawei did not invoke a DOE theory in its infringement contentions served for the '239 patent, and it made no attempt to amend. But Huawei's opening expert report on infringement of the '239 patent includes the opinion that "u+1" is equivalent to the "group number K" from the asserted claims under the DOE. Ex. R at ¶¶ 254, 271, 282, 318, 338, 370. Samsung seeks to strike these opinions.

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[43] Unlike Samsung's Interrogatory No. 4, this request sought "design-around alternatives" that "could have been utilized" in lieu of Huawei's asserted patents.

Huawei argues that the claims "do not require receiving the 'group number k' directly from the network and can cover receiving precursors and calculating the group number." Opp'n at 4. From this **[**173]** premise, it insists that Samsung ([TEXT REDACTED BY THE COURT]) literally infringes. According to Huawei, Samsung's interrogatory responses on noninfringement of the '239 patent stated that "Huawei impermissibly redefines the group number 'k' to be 'u + 1' in the standard — but of course 'u + 1' is not the group number." Yang Decl., Ex. 3 at 243.[44] But it did not disclose Samsung's current theory that "obtaining" cannot include calculating. This theory was first presented in Dr. Madisetti's rebuttal noninfringement report. Madisetti '239 NonInf. Report ¶¶ 64-68 (Yang Decl., Ex. 4).[45] **[*1003]** It further contends that Samsung has not been prejudiced as evidenced by its full response to the DOE theory in Madisetti's rebuttal report and opportunity to depose Dr. Veeravalli about any statements in his opening report. Samsung counters that Huawei could have sought leave to amend its infringement contentions to include its DOE theory if it was "truly ... blindsided by Samsung's noninfringement argument[,]" and could have brought a motion to strike portions of Madisetti's report if it thought the theory was not adequately disclosed. Reply at 15.

Both sides have failed here. Huawei should have sought leave **[**174]** to amend its infringement contentions when it realized that it would offer evidence under a DOE theory of infringement. On the other hand, its initial infringement contentions inform Samsung of the substance of its DOE argument—that it contends that the group number k equals "u+1[.]" I see no reason to apply an overly formalistic approach to the rules to strike these portions of Dr. Veeravalli's report, given that they are not really "new infringement theories" but simply have a "new" label. *See* *Verinata Health, 2014 U.S. Dist. LEXIS 116382, 2014 WL 4100638, at *3* ("Given the purpose behind [these] disclosure requirements, a party may not use an expert report to introduce new infringement theories... ."). In determining whether to strike portions of expert reports for failure to comply with the patent local rules, I assess whether striking will result in litigation that is more fair, or less. *Apple, 2012 U.S. Dist. LEXIS 190470, 2012 WL 2499929, at *1*. Samsung was aware of the underlying theory of infringement since Huawei's initial contentions (although not labeled as "DOE"), including the particular limitation that the group number k is equal to "u+1" and fully responded to the arguments in Dr. Madisetti's rebuttal report, so I will not strike these paragraphs.

This brings me to Samsung's failure, which is **[**175]** not truly at issue in this motion since Huawei has not separately moved to strike any portion of Dr. Madisetti's report. As Samsung points out, Huawei moved to exclude Dr. Madisetti's opinions on the "obtaining ... a group number k" limitation based on claim construction arguments, but it did not separately move to strike those opinions based on failure to comply with the local rules. This does not absolve Samsung of the same responsibility to abide by the patent local rules. It should have amended its interrogatory response to include its theory that it does not infringe because "obtaining" cannot include calculating.

VIII. MOTIONS TO SEAL

In conjunction with the briefing on these motions, the parties have asked to seal an inordinate amount of information. This is a court of public record and the parties must have a compelling reason to justify concealing information from the public. This case is proceeding to trial and I expect much of the information the parties currently seek to seal will by necessity — given the information's centrality to the parties' arguments — be discussed during trial. I will not seal, or close the courtroom, when information central to the parties' arguments **[**176]** in this case is being discussed before the jury unless the parties demonstrate the most compelling of reasons and show through persons with direct knowledge why significant harm *would* occur if the information became public.

For current purposes, the parties must re-review each of the documents and pieces of information they believe should remain under seal under the compelling justifications standard. They must then submit one, joint chart

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[44] Huawei notes (without support) that Samsung served these responses at 11 pm on the last day of fact discovery, so it "could not have responded with its equivalents argument before discovery closed." Opp'n at 5.

[45] As discussed above, Huawei has moved to exclude these portions of Dr. Madisetti's report because they apply overly narrow interpretations of claim terms. *See supra* section IV.E.1.

identifying by specific docket and sub-docket number (*e.g.*, ECF Dkt. No. 384-2) and then by page/line **[*1004]** or paragraph number the specific, narrowly tailored information they seek to seal. For each piece of information to be sealed, the chart shall identify the specific portion of a declaration, by docket number and then page/line or paragraph number, where a person with knowledge has demonstrated compelling reasons for sealing that specific piece of information, including the harm that would be caused if the information were publicly disclosed. The joint chart shall also identify — again by ECF Dkt. No. and sub-number — docket numbers that can be wholly unsealed because no party currently believes the information should remain under seal.

This joint chart **[**177]** and any supplemental declarations in support, shall be filed within twenty (20) days of the date of this Order.

When deciding what information the parties believe should remain under seal, they should adhere the following guidance:

Percentages of royalties sought or secured in negotiations or resulting licensing agreements may remain under seal at this juncture, if those terms are not otherwise publicly known. This includes references to the identities of third-parties to those agreements, assuming the existence of the agreement itself is not otherwise publicly known.

No other provisions of proposed or secured licensing agreements shall be sealed, unless a person with knowledge explains why specific provisions are so unique to that agreement that disclosure would cause significant harm.

Descriptions of confidential functions of accused products, including references to the contents of source code are sealable, if those functions or portions of source code are not otherwise obvious, expected, or publicly known.

Expert and percipient witness discussions of how the patents function or the alleged prior art are not sealable.

Information disclosed during open court, in particular during the hearing **[**178]** on these pending motions, shall not be sealed. Likewise, information that is not ultimately redacted from this Order shall not be sealed.

CONCLUSION

The motions are resolved in accordance with the forgoing discussion.

IT IS SO ORDERED.

Dated: September 25, 2018

/s/ William H. Orrick

William H. Orrick

United States District Judge

LexisNexis

Zendejas v. Redman

United States District Court for the Southern District of Florida

September 25, 2018, Decided; September 25, 2018, Entered on Docket

CASE NO. 15-81229-CIV-MARRA

Reporter

334 F. Supp. 3d 1249 *; 2018 U.S. Dist. LEXIS 168551 **

ALEJANDRO ZENDEJAS, Plaintiff, v. EUGENIE H. REDMAN, and COLIN J. SYQUIA, Defendants.

Prior History: *Zendejas v. Redman, 2016 U.S. Dist. LEXIS 42557 (S.D. Fla., Mar. 30, 2016)*

Core Terms

horse, exposure, reasonable basis, good faith, nominal, offers, Motions, Entitlement, attorney's fees, nominal offer, new trial, discovery, offeror, soreness, matter of law, lameness, bill of sale, settlement, damages, Costs, jury verdict, trial court, argues, entitled to judgment, competitions, pre-purchase, warranties, equine, absence of good faith, undisputed

Counsel: **[**1]** For Alejandro Zendejas, Plaintiff: David Yuji Yoshida, T. Randolph Catanese, LEAD ATTORNEYS, PRO HAC VICES, Catanese & Wells, Westlake Village, CA USA; Donna Greenspan Solomon, LEAD ATTORNEY, Solomon Appeals, Mediation & Arbitration, Ft. Lauderdale, FL USA.

For Colin J. Syquia, Defendant: Colleen Lynn Smeryage, Patricia Anne Leonard, LEAD ATTORNEYS, Shutts & Bowen LLP, West Palm Beach, FL USA.

For Eugenia H. Redman, Defendant: Dean Angelo Morande, LEAD ATTORNEY, Carlton Fields PA, West Palm Beach, FL USA; John Robert Hart, LEAD ATTORNEY, Sarah Cortvriend, Carlton Fields Jorden Burt, P.A., West Palm Beach, FL USA.

Judges: KENNETH A. MARRA, United States District Judge.

Opinion by: KENNETH A. MARRA

Opinion

[*1251] **ORDER**

This action arises out of Plaintiff Alejandro Zendejas's purchase of a horse named Vorst from Defendant Eugenie H. Redman. Following a jury trial, the jury unanimously found in favor of Defendants Redman and Colin J. Syquia on all counts. On August 18, 2017, judgment was entered in Defendants' favor and against Plaintiff. (DE 257.) Now pending before the Court is Plaintiff's Motion for Judgment as a Matter of Law and in the Alternative Motion for a New Trial (DE 270). Defendants Eugenie H. Redman and Colin J. **[**2]** Syquia both filed responses (DE 268 & 302), and Plaintiff filed a reply (DE 307). Also pending before the Court are Defendants Redman's and Syquia's respective Motions for Entitlement to Attorney's Fees and Costs ("Motions for Fee Entitlement") (DE 263 & 264). Plaintiff filed responses to the Motions for Fee Entitlement (DE 67 & 268), and Defendants filed replies (DE 277 & 281). The Court has considered the arguments of counsel and is otherwise fully advised in the premises. For the reasons stated below, the Motion for Judgment as a Matter of Law and in the Alternative Motion for a New Trial is denied, and the Motions for Fee Entitlement are granted.

I. DISCUSSION

A. Motion for Judgment as a Matter of Law

Plaintiff argues that he is entitled to judgment in his favor on certain claims and affirmative defenses under *Rule 50(b) of the Federal Rules of Civil Procedure*. The standard for granting a renewed motion for judgment as a matter **[*1252]** of law under *Rule 50(b)* is precisely the same as the standard for granting the pre-submission motion under 50(a). *Chaney v. City of Orlando, 483 F.3d 1221, 1227 (11th Cir. 2007)*. The standard of review for a district court to grant the motion is whether, "when the facts and inferences are viewed in the light most favorable to the opposing party, they 'point so strongly and overwhelmingly **[**3]** in favor of one party the Court believes that reasonable men could not arrive at a contrary verdict.'" *United States v. Vahlco Corp., 720 F.2d 885, 889 (11th Cir. 1983)* (quoting *Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969))*[1] A court must "affirm the jury verdict unless there is no legal basis upon which the jury could have found for [the plaintiff]." *Telecom Tech. Servs., Inc. v. Rolm Co., 388 F.3d 820, 830 (11th Cir. 2004)*.

Plaintiff contends that he is entitled to judgment as a matter of law on Counts XI and XII of the First Amended Complaint, which allege claims for violations of the Florida Deceptive and Unfair Trade Practices Act, *Fla. Stat. § 501.201 et seq.* ("FDUTPA"), based upon his argument that he established at trial that the bill of sale for the horse violated various provisions of Florida's Administrative Code. Under the Code, only "[a] violation of any provision of Chapter 5H-26, F.A.C., *resulting in actual damages to a person*, shall be considered an unfair and deceptive trade practice pursuant to Chapter 501, Part II, F.S." *Fla. Admin. Code R. 5H-26.003* (emphasis added). Here, the jury found that Plaintiff did not suffer actual damages as a result of the violations. (DE 254.) Hence, the jury's finding that the bill of sale violated Florida's Administrative Code does not mean that Plaintiff is entitled to judgment as a matter of law on the FDUTPA claims.

Alternatively, Plaintiff argues that the jury's finding **[**4]** that Plaintiff did not suffer damages is speculative and unreasonable because Plaintiff's expert opined that the horse was worth only $30,000 on the date of the transaction but Plaintiff paid $250,000. However, contrary to Plaintiff's suggestion otherwise, there was competing evidence presented to the jury that the horse was worth $250,000 (which was the purchase price) on the date of sale. (DE 290, Leone Test., Trial Tr., vol. 4 124: 2-4.) The jury was free to reject Plaintiff's expert's opinion in favor of Peter Leone, Defendants' expert, who opined that the horse was worth $250,000 on the date of purchase. Thus, there was sufficient evidence in the record for a reasonable juror to conclude that Plaintiff suffered no damages and that therefore Plaintiff was not entitled to a jury verdict on the FDUTPA claims in Counts XI and XII of the First Amended Complaint.

Next, Plaintiff argues that he is entitled to judgment in his favor because Syquia provided medical information about the horse but Defendants allegedly did not accurately disclose all information responsive to the inquiry, in violation of FAC *Rule 5H-26.003(12)*. Plaintiff contends that the jury's finding to the contrary did not have a legally **[**5]** sufficient evidentiary basis.

Specifically, Plaintiff argues that the horse's back and gluteal soreness and receipt of pain medicine should have been disclosed because that information would have been responsive to the questions that **[*1253]** Dr. Gomez asked Syquia regarding any "history of recurring lameness" and/or "any other pertinent medical history." Plaintiff posits that when Syquia responded "no" to the questions whether the horse had a "history of recurring lameness" or "any other pertinent medical history," Defendants violated *Rule 5H-26.003(12)* by not giving more information.

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[1] The decisions of the United States Court of Appeals for the Fifth Circuit, as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit. *Bonner v. Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981)* (en banc).

Plaintiff emphasizes that Redman admitted that she failed to disclose certain insurance policy medical exclusions and that Dr. Ted Vlahos testimony's indicates that administration of the drug Bute to the horse demonstrates the horse's lameness.

However, there was also testimony presented at trial, including the testimony of Redman and Syquia, from which a jury could have reasonably concluded that the horse's soreness and the associated medicine were not sufficient to constitute "recurring lameness" or "medical history." (DE 288, Redman Test., Trial Tr., vol. 2 117:4-5 ("[The horse] did not have any ongoing serious problems. He had **[**6]** minor aches and pains."); *id.* 27: 7-9 ("Any horse that's doing that type of jumping is going to have some [gluteal] muscle soreness."); *id.* 23:7-13 ("I use these [chiropractic, acupuncture and laser therapies for the horse] as preventive medicine, because I know that when the animal is competing at a high level physically, that they have muscle soreness, or if they pull a -- they sprain something, or the gluteal muscles hurt or whatever. So if you catch these things before they become really very painful, then you prevent more serious injuries that take longer to heal."); *id.* 37:13-17 ("[H]orses and human athletes, whenever they're performing at a high level, soreness occurs, or strain occurs, and it's temporary, it gets treated, it doesn't cause a problem, and then next year he doesn't have it . . ."); *id.* 39: 17-19 ("And the sore back was not an ongoing thing. It came up here and there, but it did not -- was not anything that presented itself every single time."); *id.* 100:3-6 ("The vets told me it wasn't that important and would not affect the horse in the long-term. This was a temporary situation that was easily taken care of with new shoes and packing."); DE 289, Syquia Test., Trial Tr., vol. **[**7]** 3 249:22-24 ("After certain competitions, after many days in a row, as is customary in our industry, I gave the horse one Bute tablet after competition."); *id.* 84:21-25 ("[A]t times after competition, after maybe the second day, it was customary that all my horses would get one Bute tablet in their feed after large competitions just as a nice way to go to sleep, yeah, after a hard week's of competition, like if you went to the gym and did a hard workout . . . ."); *id.* 14:10-11 ("I never found Vorst to have a sore back that was a concern to me."). It was within the province of the jury to credit the testimony of Redman and Syquia regarding the horse's soreness and the use of medication over the competing evidence.

Lastly, the Court notes that because the jury did not find for Plaintiff on any of the claims, the issue of the sufficiency of the evidence (or alleged lack thereof) supporting Defendants' affirmative defenses is moot. For the reasons stated above, the Court finds that the evidence does not point so strongly and overwhelmingly in favor of Plaintiff that reasonable jurors could not have arrived at a verdict again him, and therefore Plaintiff is not entitled to judgment as a **[**8]** matter of law under *Rule 50 of the Federal Rules of Civil Procedure*.

B. Motion for New Trial

Plaintiff argues that he is entitled to a new trial under *Rule 59 of the Federal Rules of Civil Procedure* because the jury verdict is against the clear weight of the evidence. The law is clear that a **[*1254]** district court may grant a motion for a new trial only if the jury verdict is contrary to the great weight of the evidence. *Ard v. Sw. Forest Indus., 849 F.2d 517, 520 (11th Cir. 1988)*. "This rule does not, however, grant a license to the trial judge merely to substitute his judgment for that of the jury on questions of fact. Consequently, when considering a motion for new trial, the trial judge may weigh the evidence, but it is proper to grant the motion only if the verdict is against the great, not just the greater, weight of the evidence." *Id.*

Plaintiff argues (in a summary fashion) that the jury's findings are against the great weight of the evidence given the alleged evidence that Defendants failed to disclose material health issues about the horse prior to the purchase. Based on the evidence presented at trial, which is discussed in part in Section I.A *supra*, the Court finds that it was reasonable and not against the great weight of the evidence for a jury to conclude that Plaintiff failed to meet his burden and to return a verdict for Defendants. There is no **[**9]** basis to decide that the jury's verdict was contrary to the great weight of the evidence.

Plaintiff also contends that a new trial is warranted based upon the misconduct of opposing counsel in using arguments that eluded to Plaintiff's wealth. According to Plaintiff, defense counsel emphasized that Plaintiff spent millions of dollars acquiring horses in his opening and closing arguments. Although Plaintiff did not press this issue in his reply brief, the Court will consider the issue on the merits.

The Court of Appeals for the Eleventh Circuit has indicated a "reluctan[ce] to set aside a jury verdict because of an argument made by counsel during closing arguments." *Vineyard v. Cty. of Murray, Ga., 990 F.2d 1207, 1214 (11th Cir. 1993)*. "Statements made in oral arguments must be plainly unwarranted and clearly injurious to constitute reversible error." *Peterson v. Willie, 81 F.3d 1033, 1036 (11th Cir. 1996)*.

Based upon this Court's review of the record, including the arguments of counsel, the Court finds that the statements of counsel were far from "plainly unwarranted and clearly injurious" since they were relevant to the issues in the case. Defendants' arguments, which were based upon the evidence, were warranted to advance their theory that Plaintiff was an experienced and knowledgeable purchaser of expensive **[**10]** jumping horses, was not duped when he entered the transaction in question, and knew what to expect in terms of the performance level and limitations of the horse he purchased. Therefore, the Court will not grant Plaintiff's request for a new trial. *See* *BankAtlantic v. Blythe Eastman Paine Webber, Inc., 955 F.2d 1467, 1474 (11th Cir. 1992)* (affirming denial of a new trial in part because the offending remarks were based on record evidence that was relevant to the case).

C. Fee/Cost Entitlement

Defendants seek to recover their attorney's fees pursuant to *section 768.79 of the Florida Statutes.* The Florida offer of judgment statute entitles a defendant to an award of reasonable attorney's fees and costs if the defendant's offer is not accepted and if the judgment ultimately obtained is one of no liability or is at least twenty-five percent less than the offer.[2] *See* § 768.69, Fla. Stat. The record reflects that Defendant Syquia proposed a settlement offer of $500 and Defendant Redman offered $5,000, neither of which Plaintiff **[*1255]** accepted. Later, a judgment of no liability was entered in favor of Defendants after a jury found against Plaintiff on all counts.

The purpose behind the offer of judgment statute is to encourage early settlement and termination of the litigation. *See* *MGR Equip. Corp., Inc. v. Wilson Ice Enterprises, Inc., 731 So. 2d 1262, 1264 (Fla. 1999)*. "If a party is entitled to costs and fees pursuant to the **[**11]** provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees." *See* § 768.69, Fla. Stat. The offeree bears the burden of proving the absence of good faith with respect to the offer. *Levine v. Harris, 791 So.2d 1175, 1177 (Fla. 4th DCA 2001)*; *Donohoe v. Starmed Staffing, Inc., 743 So. 2d 623, 624 (Fla. 2d DCA 1999)*.

As explained by the Court of Appeals for the Eleventh Circuit, the good faith requirement under Florida law does not "demand that an offeror necessarily possess, at the time he makes an offer or demand under the statute, the kind or quantum of evidence needed to support a judgment. The obligation of good faith merely insists that the offeror have some reasonable foundation on which to base an offer." *McMahan v. Toto, 311 F.3d 1077, 1083 (11th Cir. 2002)*. The same standard applies where the offer is nominal: "[a] nominal offer is appropriate where the offeror has a reasonable basis to believe that exposure to liability is minimal." *Zachem v. Paradigm Properties Management Team, Inc., 867 So.2d 1263, 1263 (Fla. 1st DCA 2004)*; *see also* *McMahan, 311 F.3d at 1083* ("Although 'nominal offers are suspect where they are not based on any assessment of liability and damages,' *Fox v. McCaw Cellular Communications of Fla., Inc., 745 So.2d 330, 332 (Fla. 4th DCA 1998)*, they can be valid if the offerors have 'a reasonable basis at the time of the offer to conclude that their exposure was nominal.' *Id. at 333*.")).

1. Correct Standard

Plaintiff insists that in cases where a nominal **[**12]** offer is made a reasonable basis exists only where the "undisputed record" strongly indicates that the defendant had "no exposure." Plaintiff cites to language from a First District case, *General Mechanical Corp. v. Williams, 103 So. 3d 974, 976 (Fla. 1st DCA 2012)*, which in turn cites to a Third District case, *Event Services America, Inc. v. Ragusa, 917 So.2d 882, 884 (Fla. 3d DCA 2005)*. However, after the *General Mechanical* opinion was issued, in *Taylor Engingeering Inc. v. Dickerson Florida, Inc., 221 So. 3d 719, 723 (Fla. 1st DCA 2017)*, the First District receded from the "undisputed record"/"no exposure" standard. In *Taylor*, the First District explained that "*Event Services*—the case on which *General Mechanical* relies—appears to

[2] There is no dispute among the parties that in this diversity action, the Court looks to the substantive law of Florida to determine the attorney's fees issue.

be a deviation from the standard generally used in the Third District" and opined "the appropriate standard is whether the offeror had a reasonable basis to conclude that his/her exposure was nominal or minimal." *Id.* Likewise, and as noted in *Taylor*, aside from *Event Services*, the Third District has consistently held that the standard is whether there is a reasonable basis to conclude that a defendant's exposure was nominal. *See, e.g., Isaias v. H.T. Hackney Co., 159 So. 3d 1002, 1004-05 (Fla. 3d DCA 2015)* ("The determination of whether a 'nominal' offer is in good faith requires the trial court to consider whether the offeror had a reasonable basis to conclude, at the time of making the offer, that its exposure was nominal." (footnote omitted)); *Downs v. Coastal Sys. Int'l, Inc., 972 So. 2d 258, 262 (Fla. 3d DCA 2008)* (applying standard **[**13]** requiring a reasonable **[*1256]** conclusion of nominal exposure); *Dep't of Highway Safety & Motor Vehicles, Fla. Highway Patrol v. Weinstein, 747 So. 2d 1019, 1020 (Fla. 3d DCA 1999)* (applying standard requiring reasonable basis to conclude that exposure was nominal).

Moreover, the other Florida District Courts of Appeal consistently apply a standard requiring a reasonable basis to conclude that a defendant's exposure was nominal. *See Gawtrey v. Hayward, 50 So.3d 739, 743 (Fla. 2d DCA 2010)* ("In assessing whether Ms. Gawtrey's nominal offer was made in good faith, the trial court was required to look at whether Ms. Gawtrey had a reasonable basis when the offer was made to conclude that her exposure in the case was nominal."); *Nants v. Griffin, 783 So. 2d 363, 365 (Fla. 5th DCA 2001)* ("[A] minimal offer can be made in good faith if the evidence demonstrates that, at the time it was made, the offeror had a reasonable basis to conclude that its exposure was nominal."). Notably, in *Citizens Property Insurance Corp. v. Perez, 164 So. 3d 1, 3 (Fla. 4th DCA 2014)*, the Fourth District reversed the trial court's denial of attorney's fees based upon the trial court's improper use of the "undisputed record"/"no exposure" standard. The *Citizens* court explained:

> The trial court used the incorrect standard in determining whether Citizens' proposal for settlement was made in good faith. Perez cited to the trial court, and the trial court seems to have relied on, language from a Third District case, *Event Services America, Inc. v. Ragusa, 917 So. 2d 882 (Fla. 3d DCA 2005)*. In *Event **[**14]** Services*, the Third District stated: A reasonable basis for a nominal offer exists only where 'the undisputed record strongly indicate[s] that [the defendant] had no exposure' in the case. *Id. at 884* (quoting *Peoples Gas Sys., Inc. v. Acme Gas Corp., 689 So. 2d 292, 300 (Fla. 3d DCA 1997))* (emphasis added). However, the Fourth District has consistently held that: "The rule is that a minimal offer can be made in good faith if the evidence demonstrates that, at the time it was made, the offeror had a reasonable basis to conclude that its exposure was nominal." *State Farm Mut. Auto. Ins. Co. v. Sharkey, 928 So. 2d 1263, 1264 (Fla. 4th DCA 2006)* (emphasis added) (quoting *Connell v. Floyd, 866 So. 2d 90, 94 (Fla. 1st DCA 2004))*.

164 So. 3d 1 at 3.

Hence, given the state of the law in Florida, the Court cannot agree with Plaintiff that the correct standard to apply where a nominal offer is made is whether the "undisputed record" strongly indicates that the defendant had "no exposure." Rather, the correct standard under Florida law is whether the offerors had "a reasonable basis at the time of the offer to conclude that their exposure was nominal." *McMahan, 311 F.3d at 1083* (citation and internal quotation marks omitted) (applying Florida law).

2. Application of the Standard to the Facts at Bar

Having set forth the correct standard in determining whether Defendants' proposals for settlement were made in the absence of good faith, the Court now turns to the issue **[**15]** of whether Plaintiff has met that burden. As more fully explained below, the Court finds that there was a reasonable basis, at the time of the offers, for Defendants to conclude that their exposure was minimal.

Defendant Syquia's assessment of the fraud and negligent misrepresentation claims lodged against him at the time of the offer of judgment was that it was unlikely that a jury would find liability based upon the facts of the case. The fraud **[*1257]** and misrepresentation claims were premised upon Syquia's failure to advise Plaintiff that the horse allegedly had a lameness issue and a preexisting history and reputation as a "dirty stopper." However, there was credible evidence, which presented at trial, that Syquia, who had trained and competed with the horse for almost two years prior to the sale, did not know or have reason to believe the horse had a history of stopping for no reason in competitions. (*See* DE 289, Syquia Test., Trial Tr., vol. 3 104:6-13 (testifying under oath that the horse only stopped four times in competitions over two years (three of which were on videotape) and that none of those times were attributable to stopping for no reason).) Likewise, there was credible evidence, **[**16]** which was also presented at trial, that Syquia did not know or have reason to believe that the horse had a history of sore back or weak gluteal muscles. (*See* DE 289, Syquia Test., Trial Tr., vol. 3 12:18-20, 13:3-7 (testifying under oath that the horse did not have a sore back or weak gluteal muscles that were a concern to him).) Therefore, the Court finds that Defendant Syquia had a reasonable basis for concluding that Plaintiff would not be able to prove the fraud and misrepresentations claims based upon the horse's alleged history of "dirty stopping" and lameness.

Similarly, Defendant Redman's assessment of the claims lodged against her at the time of the offer of judgment (breach of contract, breach of express warranties, breach of implied warranty of fitness, breach of implied warranty of merchantability, violation of Magnuson Moss Warranty Act, unjust enrichment, respondeat superior, rescission, and Florida's Deceptive and Unfair Trade Practices Act) was that a jury was not likely to find in Plaintiff's favor based upon the facts of the case, among other reasons. Like the claims against Syquia, the claims against Redman were premised upon the horse's undisclosed alleged lameness **[**17]** and refusal to jump at competitions, as well as the alleged use of Simon Nizri as an undisclosed dual agent in the sale. However, according to Defendant Redman's Motion, prior to her offer of judgment Redman conducted extensive legal research, a factual investigation, and a review of document discovery obtained as a result of the litigation. (DE 277, Mot. at 2-4.) Redman based her offer of judgment on the following evidence, among other things: the horse's pre-purchase show record indicating strong recent performances with Syquia, the lack of a pre-purchase history of stopping without cause at competitions, the pre-purchase examination showing that the horse was sound (DE 258-1), the bill of sale (DE 57-2), the post-sale treatment of the horse, the post-sale examination showing lameness (DE 258-8), and Simon Nizri's admissions that he was not a dual agent. Although there was evidence that Redman had an insurance policy for the horse that contained exclusions for back and right hind conditions, it was not unreasonable to conclude that the insurance policy exclusions did not expose Defendants to more than minimal liability given the other evidence and Defendants' own experience and personal **[**18]** knowledge about the horse and the transaction. As a result, the Court finds that Defendant Redman had a reasonable basis for concluding that a jury would not find in favor of Plaintiff on the claims brought against her, which centered upon the horse's alleged history of "dirty stopping" and/or lameness and the use of a dual agent.

Plaintiff's arguments to the contrary are not availing. Plaintiff argues that the $500 and $5,000 offers made by Defendants Syquia and Redman, respectively, were not made in good faith for the following main reasons: (1) the offers were nominal **[*1258]** compared to the potential liability and attorney's fees; (2) there was no likelihood that Plaintiff would accept the offers; (3) no supporting declarations were filed; (4) the offers were premature because discovery had not been propounded at the time of Syquia's offer and had not been completed at the time of Redman's offer; (5) the claims were highly fact-specific and would almost certainly require lengthy litigation and a jury trial; (6) Defendants' motions for summary judgment were denied; and (7) the issues that were litigated were novel and/or complex. The Court considers each argument in turn.

First, Plaintiff's **[**19]** argument that the offers were nominal does not establish bad faith. Plaintiff heavily relies upon the decision by the Fourth District Court of Appeal in *Eagleman v. Eagleman, 673 So. 2d 946, 948 (Fla. 4th DCA 1996)*, which opined that "trial courts should view with considerable skepticism nominal offers . . . ." However, in *Fox v. McCaw Cellular Communications of Florida, Inc., 745 So. 2d 330 (Fla. 4th DCA 1998)*, the Fourth District explained the *Eagleman* decision with the following discussion:

> *Eagleman* merely holds that nominal offers are suspect where they are not based on any assessment of liability and damages. When a nominal offer is not based on an evaluation of potential liability and damages, the offer raises a question as to the intentions of the offeror. In that circumstance, *Eagleman* holds that an issue of good faith arises for resolution by the trial court.

Id. at 332-33.

"[N]ominal offers of judgment are not alone determinative of bad faith." *Id. at 333*. The mere fact a plaintiff seeks a high amount of damages does not undermine a defendant's reasonable belief of minimal exposure. *See McMahan v. Toto, 311 F.3d 1077, 1083 (11th Cir. 2002)* (affirming district court's finding that $100 offer was made in good faith over argument that the nominal offer could not have been made in good faith because lawsuit involved millions of dollars in potential liability).

Here, as explained above, Defendants' offers **[**20]** were based upon a reasonable evaluation of potential liability and damages, and, as indicated in the case law, the nominal nature of the offers is not sufficient to show bad faith. *See* *Fox, 745 So. 2d at 333* (citing *Weesner v. United Services Auto. Ass'n, 711 So. 2d 1192 (Fla. 5th DCA 1998)* (fact that offer is nominal not necessarily determinative of issue of good faith); *State Farm Mut. Auto. Ins. Co. v. Marko, 695 So. 2d 874 (Fla. 2d DCA 1997)* (offer of $1 treated as in good faith); *Peoples Gas System Inc. v. Acme Gas Corp., 689 So. 2d 292 (Fla. 3d DCA 1997)* (offer of $2,500 in case later settled for $3.5 million not determinative of bad faith)).

Second, contrary to Plaintiff's contention otherwise, "a mere belief that a figure offered or demanded will not be accepted does not necessarily suggest an absence of good faith . . . ." *Ryan v. Lobo De Gonzalez, 841 So. 2d 510, 522 (Fla. 4th DCA 2003)* ("A mere belief that the figure offered or demanded will not be accepted does not necessarily suggest an absence of good faith, where the offeror fully intends to conclude a settlement if the offer is accepted as made, and the amount of the offer is not so widely inconsistent with the known facts of the case as to suggest on its face the sole purpose of creating a right to fees if it is not accepted." (quoting *Levine v. Harris, 791 So. 2d 1175, 1178 (Fla. 4th DCA 2001))*. Relatedly, the Florida Supreme Court has opined that "the reasonableness of the rejection is irrelevant to the question of entitlement." *TGI Friday's,* ***[*1259]*** *Inc. v. Dvorak, 663 So. 2d 606, 613 (Fla. 1995)*.

Third, the lack of a supporting declaration attached **[**21]** to the Motions for Fee Entitlement does not automatically defeat Defendants' Motions for Fee Entitlement. The case law requires Defendants to "come forward with a reasonable explanation for [their] offer," which they did in this case. *See* *Allstate Ins. Co. v. Manasse, 715 So. 2d 1079, 1082 (Fla. 4th DCA 1998)* (suggesting that the good faith inquiry is properly made based upon the parties' arguments and a review of the evidence at trial without the need of any additional evidence). Plaintiff cites *Pickett v. R.J. Reynolds Tobacco Co., 948 F. Supp. 2d 1314, 1325 (M.D. Fla. 2013)*, *aff'd*, *564 F. App'x 981 (11th Cir. 2014)*, for the untethered proposition that the Court cannot make a finding as to a subjectively reasonable motivation for the offers of judgment because the Motions for Fee Entitlement were not supported by declarations. While the *Pickett* court noted that the record there did not contain affidavits as to the reason for the offer, nothing in the *Pickett* opinion (or any other Florida case) indicates that the explanation for an offer of judgment must be contained within a sworn affidavit. On the contrary, in deciding whether the offer lacked good faith, the *Pickett* court instructed that a court should "consider the entire record in its analysis." *Id. at 1324*.

In any event, the Court notes that in response to Plaintiff's concern regarding the lack of an affidavit on the **[**22]** issue of good faith, Defendant Syquia filed his own affidavit and the affidavit of his attorney with his reply brief. In the former, Syquia declared under penalty of perjury that he based his proposal for settlement on his "firsthand knowledge of the facts surrounding the transaction." (DE 281-1, Decl. of Syquia ¶ 8.) In the latter, Amanda S. Luby, Esq., who is experienced in the area of equine law, provided the following basis for Syquia's offer of judgment (in relevant part):

> At the time the Proposal was made, Mr. Syquia and I had engaged in several in-depth conversations regarding the background of the case and the transaction at the heart of the lawsuit. It was during these conversations that I learned the facts set forth in my December 17, 2015 correspondence. As part of my fact-finding prior to when the Proposal was made, I also had multiple conversations with counsel for Mrs. Redman and Michael Romm, who was the attorney for Simon Nizri, a defendant who settled with the Plaintiff and was dropped from the case in May 2016.
>
> In addition to these conversations, I was also able to review a number of documents that supported Mr. Syquia's position prior to the time that the Proposal **[**23]** was served. These documents were the Bill of Sale and the Pre-Purchase Examination Report of Vorst ("PPE"), both of which Mr. Zendejas attached to his Complaint, as well as the horse's publicly available show record and text messages between Defendant Simon Nizri and Mr. Zendejas regarding the payment of commission. I also viewed various videos easily accessible on-line of Vorst competing before the Proposal was served.

> As a result, I was aware of many facts in advance of discovery beginning in the case. For example, I was aware that Vorst had been examined by internationally respected equine veterinarian Dr. Jorge Gomez as part of a Pre-Purchase Examination requested and paid for by Mr. Zendejas, and that Dr. Gomez had found Vorst to be in satisfactory condition, with an exception noted by Dr. Gomez in the PPE. I was also aware that it was only after this examination **[*1260]** that Mr. Zendejas made the final decision to purchase Vorst.
> Additionally, I was aware that Vorst had a show record which was inconsistent with Plaintiff's allegations concerning the horse.
>
> I was also aware that the Bill of Sale memorializing the transaction stated that Vorst was being sold "as is" and that the seller had **[**24]** not made any representations or warranties with respect to Vorst, nor were there any representations or warranties that Plaintiff nor his agent, Nizri, ever requested should be in the Bill of Sale.
> The facts known to be by the date of the Proposal undermined Plaintiff's claims both legally and factually.
> In addition to the facts known to me at the time. I had also familiarized myself with the case law that I believed supported Mr. Syquia's position, both with regard to the claims against him and his own affirmative defenses, prior to the Proposal being served. Some, but not all, of this legal research is referenced in my December 17, 2015 correspondence setting forth the basis for Mr. Syquia's Proposal.
> Based on the relevant case law, Mr. Syquia's knowledge of the underling transaction as shared with me, my years of experience in the field of equine law, and my review of the Bill of Sale, PPE, show record, and the Nizri text messages regarding commissions, I was able to assess Mr. Syquia's exposure in the lawsuit at the time the Proposal was made. It was my reasonable and good faith belief at the time the Proposal was made that Mr. Syquia's exposure was minimal.

(DE 281-2.) Based upon **[**25]** the Court's review of Syquia's and Ms. Luby's affidavits, the Court finds that the record contains ample support for the objective and subjective reasonableness of Defendant Syquia's offer of judgment, which, incidentally, also lends support to the reasonableness of Defendant Redman's offer.

Fourth, the Court finds that the timing of the offers does not show the absence of good faith under the circumstances of this case. It is true that discovery had not been propounded at the time of Syquia's offer and had not been completed at the time of Redman's offer. Nevertheless, courts have granted motions for reasonable fees under *section 768.79* in cases where substantial discovery had not been completed at the time of the offers of judgment. *E.g., Ryan, 841 So. 2d at 522-23* (reversing trial court's refusal to award attorney's fees under *section 768.79* because even though substantial discovery had not been completed defendants had a reasonable foundation to believe they had a viable defense at the time the offers were made). For example, in *Land & Sea Petroleum, Inc. v. Bus. Specialists, Inc., 53 So. 3d 348, 354-55 (Fla. 4th DCA 2011)*, a Florida appellate court reversed the trial court's refusal to award attorney's fees under *section 768.79* even though little discovery had been exchanged. *Id.* The court reasoned that "[t]he seller never wavered from its **[**26]** argument that the brokerage commission contract was unenforceable because its contract with the buyer was unenforceable. The seller needed very little, if any, discovery to support that argument because the lack of essential terms in the contract with the buyer was apparent from the face of that contract." *Id.*

Here, as in *Land & Sea Petroleum*, Defendants have been steadfast in their argument that the bill of sale and the pre-purchase examination (both of which were attached to the complaint), the horse's publicly-available show record, and their own knowledge of the horse and the transaction disproved Plaintiff's claims. While **[*1261]** protracted discovery may have been necessary to prepare this case for a jury trial, the record shows that little discovery was needed for Defendants to arrive at a reasonable assessment of liability.

Fifth, because there was a reasonable basis for concluding that their exposure was nominal, Plaintiff's argument that the claims in this case were highly fact-specific and required a jury trial, while true, does not indicate that the offers lacked good faith. *Donovan Marine, Inc. v. Delmonico, 40 So. 3d 69, 71 (Fla. 4th DCA 2010)* ("When the employer made the proposal, it had a reasonable basis for admitting no liability. Although its **[**27]** employee admitted to making the statement, the employer never admitted the statement was defamatory or that it was made in the course and scope of the employee's employment. Rather, the employer maintained the statement was not defamatory because it was true, and further that it failed to cause any resulting damage. The jury verdict confirmed that employer's position."); *see also* *Talbott v. Am. Isuzu Motors, Inc., 934 So. 2d 643, 647 (Fla. 2d DCA 2006)*

("Isuzu made an initial offer of $500 and a subsequent offer of $1500 because it evaluated no liability, a conclusion also reached by the jury."); *Dean v. Vazquez, 786 So.2d 637, 640 (Fla. 4th DCA 2001)* ("[A]s confirmed by the jury verdict the Defendants had a reasonable basis to conclude their exposure was nominal.").

Sixth, and similarly, the fact that Defendants' motions for summary judgment were denied is not a sufficient basis to support a finding of a lack of good faith because the record provided a reasonable basis for their offers. *Isaias v. H.T. Hackney Co., 159 So. 3d 1002, 1005 (Fla. 3d DCA 2015)* ("The fact that a motion for summary judgment had been denied without elaboration does not control the assessment of the proposals for settlement. We therefore conclude that Hackney failed to demonstrate that the settlement proposals by REW Dairy and Toni Gas were not made in good faith, and we reverse that determination in **[**28]** the orders below.").

Seventh, the novelty of the factual situation in this case does not undermine the reasonable basis of Defendants' offers under the circumstances of this case. As an initial matter, Plaintiff's attempt to analogize the factual issues in this case to the novelty of the legal theories at issue in *JES Properties, Inc. v. USA Equestrian, Inc., 432 F. Supp. 2d 1283 (M.D. Fla. 2006)* falls flat. In *JES Properties*, the plaintiffs sought to "recover under antitrust laws based upon the alleged anticompetitive impact of the [d]efendants' adherence to the rules promulgated by the national governing body of equestrian sport in the United States." *Id. at 1290*. In addressing another issue in the case, the court described the novelty of the issues presented in the case as follows: "the facts of this case did not squarely fall within binding case precedent [and] [p]laintiffs attempted to stretch the parameters of existing ***antitrust law*** in bringing their claims." *Id. at 1291*. Hence, the district court there found that the offers of judgment were not made in good faith in part because of "the novelty and difficulty of the issues in th[e] case." *Id. at 1295*.

Here, unlike the case in *JES Properties*, Plaintiff was not attempting to stretch the parameters of existing precedent or make novel legal arguments **[**29]** in bringing his claims, which may have made Defendants' task of assessing liability difficult. The dispute in this case was, at its essence, a factual one; although the case might have involved numerous claims and protracted factual discovery concerning equine performance, the case did not raise any novel legal theories difficult to assess.

[*1262] As to the factual issues in the case, Defendants were personally familiar with the horse in question, the horse's abilities, and the subject of equine performance in general and had ready access to the horse's show record. Moreover, Defendant Syquia's attorney, Amanda S. Luby, Esq., who made the offer, had "handled a significant number of cases in the equine law field throughout [her] career." (DE 281-2, Decl. of Amanda S. Luby, Esq. ¶ 3.) Thus, Defendants were uniquely positioned to make early judgment calls about their exposure in the case.

II. CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiff is not entitled to judgment as a matter of law or a new trial. Further, Defendants have established a reasonable foundation for their offers of judgment and therefore their Motions for Fee Entitlement under *section 768.79 of the Florida Statutes* are granted.[3]

The parties shall **[**30]** confer on Defendants' pending Motions for Reasonable Attorney's Fees and Costs (DE 265, 271, 303, 308) as indicated below.

Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion for Judgment as a Matter of Law and in the Alternative Motion for a New Trial (DE 270) is **DENIED**. Defendant Redman's and Syquia's respective Motions for Entitlement to Attorney's Fees and Costs (DE 263 & 264) are **GRANTED**. Plaintiff's motion to stay (DE 286) is **DENIED** as moot.

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[3] The alternative request for fees under *section 501.2105 of the Florida Statutes* is moot.

In light of the Court's Order herein, the parties shall confer on Defendants' pending Motions for Reasonable Attorney's Fees and Costs (DE 265, 271, 303, 308). After conferring, the parties shall file, within fifteen (15) days of the entry date of this Order, a Joint Notice indicating whether the parties have arrived at a mutual agreement on the remaining fees and costs issues. If the parties cannot reach an agreement, the Court will refer these motions to the assigned United States Magistrate Judge.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 25th day of September, 2018.

/s/ Kenneth A. Marra

KENNETH A. MARRA

United States District Judge

Humphrey v. GlaxoSmithKline PLC

United States Court of Appeals for the Third Circuit

May 24, 2018, Argued; September 26, 2018, Opinion Filed

No. 17-3285

Reporter
905 F.3d 694 *; 2018 U.S. App. LEXIS 27443 **

PETER HUMPHREY; YU YINGZENG; CHINAWHYS COMPANY LTD, Appellants v. GLAXOSMITHKLINE PLC; GLAXOSMITHKLINE LLC

Prior History: [1]** On Appeal from the United States District Court for the Eastern District of Pennsylvania. (D. C. Civil No. 2-16-cv-05924). District Judge: Honorable Nitza I. Quinones Alejandro.

Humphrey v. GlaxoSmithKline, PLC., 2017 U.S. Dist. LEXIS 162495 (E.D. Pa., Sept. 29, 2017)

Core Terms

domestic, alleged injury, courts, injuries, effects, district court, Plaintiffs', intangible, factors, principal place of business, extraterritorial, allegations, Defendants', abroad, private right of action, tangible property, enterprise, misconduct, fraudulent, cases, pattern of racketeering activity, racketeering activity, alleged misconduct, foreign country, suffer injury, predicate, resident

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Governments > Legislation > Statutory Remedies & Rights

HN1[] **Racketeer Influenced & Corrupt Organizations, Claims**

Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, creates a private right of action for a plaintiff that is injured in his or her business or property as a result of conduct that is proscribed by the statute. In RJR Nabisco, Inc. v. European Community, the Supreme Court determined that, although a litigant may file a civil suit against parties for racketeering activity committed abroad, *§ 1964(c)*'s private right of action is only available to a litigant that can allege and prove a domestic injury to its business or property.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN2[] **Racketeer Influenced & Corrupt Organizations, Remedies**

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. §§ 1961-1968, creates a private civil cause of action that allows any person injured in his business or property by reason of a violation of section 1962 to sue in federal district court. 18 U.S.C.S. § 1964(c). A successful plaintiff may recover threefold the damages. 18 U.S.C.S. § 1964(c).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN3[] **Racketeer Influenced & Corrupt Organizations, Claims**

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. §§ 1961-1968, is implicated when defendants have engaged in a pattern of racketeering activity. 18 U.S.C.S. § 1962(c). That pattern consists of certain statutorily defined predicate acts encompassing dozens of state and federal offenses that together demonstrate the existence or threat of continued criminal activity. The statute sets forth four specific prohibitions aimed at different ways in which a pattern of racketeering activity may be used to infiltrate, control, or operate an enterprise's criminal misconduct. Section 1962(c) proscribes participating in the conduct of an interstate enterprise's affairs through a pattern of racketeering activity, which RICO defines as at least two acts of racketeering activity. 18 U.S.C.S. § 1961(5). Section 1962(d) makes it unlawful to conspire to violate subsections (a) through (c).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

HN4[] **Racketeer Influenced & Corrupt Organizations, Claims**

To prove a violation under 18 U.S.C.S. §1962(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. §§ 1961-1968, Plaintiffs must show: (1) that two or more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity; (2) that the defendant was a party to or member of that agreement; and (3) that the defendant joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

HN5[] **Racketeer Influenced & Corrupt Organizations, Claims**

To establish liability pursuant to 18 U.S.C.S. § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. §§ 1961-1968, a plaintiff must establish the existence of an enterprise that exists separate and apart from the pattern of activity in which the enterprise engages. RICO defines "enterprise" as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. 18 U.S.C.S. § 1961(4). Plaintiffs can show the presence of an enterprise by pointing to a group of persons associated together for a common purpose of engaging in a course of conduct.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > Authority to Regulate

Governments > Legislation > Statutory Remedies & Rights

HN6[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The relevant inquiry as to whether the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *18 U.S.C.S. §§ 1961-1968*, applies extraterritorially, that is, to events occurring and injuries suffered outside the United States, involves two separate questions: first, whether RICO's substantive provisions apply to extraterritorial conduct, and second, whether RICO's private right of action affords relief for injuries that are suffered outside the United States.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Governments > Legislation > Interpretation

Evidence > Inferences & Presumptions > Presumptions > Creation

International Trade Law > Authority to Regulate

Governments > Legislation > Statutory Remedies & Rights

HN7[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. This presumption against extraterritoriality avoids the international discord that can result when U.S. law is applied to conduct in foreign countries. It also ensures that Congress—rather than the judiciary—is responsible for navigating the delicate field of international relations. Nevertheless, the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *18 U.S.C.S. §§ 1961-1968*, can reach extraterritorial conduct. However, *18 U.S.C.S. § 1964(c)* does not allow recovery for injuries suffered in foreign territories. Nothing in *§ 1964(c)* provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States. Thus, although RICO creates a cause of action for misconduct committed abroad, *§ 1964(c)* requires a domestic injury. There is no consensus on what specific factors must be considered when deciding whether an injury is domestic or foreign.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Governments > Legislation > Statutory Remedies & Rights

International Law > ... > Comity Doctrine > Areas of Law > Commercial Transactions

HN8[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Courts are advised to proceed cautiously when deciding if plaintiffs under the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *18 U.S.C.S. §§ 1961-1968*, have alleged a sufficient domestic injury to recover under *18 U.S.C.S. § 1964(c)*. Providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct. The domestic injury requirement promotes comity and avoids international friction because it, inter alia, creates less of an opportunity for litigants in foreign countries to bypass those territories' less generous remedial schemes. Allowing litigants who are abroad to sidestep foreign remedies only to seek those available under domestic law would upset the balance of competing considerations embodied in the laws of foreign countries. The need to enforce the presumption against extraterritoriality is at its apex when extraterritorial application of U.S. law raises the risk of international friction.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

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

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN9[] **Racketeer Influenced & Corrupt Organizations, Claims**

When a case does not involve Article III standing, but rather presents an issue of statutory standing, subject matter jurisdiction is not implicated, and the parties incorrectly rely on *Fed. R. Civ. P. 12(b)(1)* to challenge standing. Civil RICO standing is usually viewed as a *Fed. R. Civ. P. 12(b)(6)* question of stating an actionable claim, rather than as a 12(b)(1) question of subject matter jurisdiction. Moreover, given that *Rule 12(b)(6)* provides a plaintiff with significantly more protections, and because an appellate court may affirm on any ground supported by the record and there is no prejudice to appellants in reviewing the district court's dismissal as if it were grounded on *Rule 12(b)(6)*, the appellate court may review a statutory standing matter under *Rule 12(b)(6)*. Accordingly, the appellate court considers only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record. In evaluating whether the complaint adequately pleads the elements of standing, the appellate court accepts as true all material allegations set forth in the complaint and construes those facts in favor of the nonmoving party.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN10[] **Racketeer Influenced & Corrupt Organizations, Claims**

18 U.S.C.S. § 1964(c) of the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *18 U.S.C.S. §§ 1961-1968*, creates no private cause of action for injuries suffered outside the United States.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Antitrust & Trade Law > International Aspects > International Application of US Law

HN11[] **Racketeer Influenced & Corrupt Organizations, Claims**

Two schools of thought have emerged regarding the requirement of proof of domestic injury for civil claims under the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *18 U.S.C.S. §§ 1961-1968*. The locus of effects test looks only to where the plaintiff felt the effects of the alleged injury and not where the injurious acts were allegedly committed. Courts applying this approach have largely focused upon the plaintiffs' place of residency or principal place of business. Other courts are guided by where the alleged misconduct was targeted or directed and focus largely, though not exclusively, on that location.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > International Aspects > International Application of US Law

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN12[] **Racketeer Influenced & Corrupt Organizations, Claims**

There is a general consensus among the courts that have had to apply RJR Nabisco's holding that *18 U.S.C.S. § 1964(c)* of the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *18 U.S.C.S. §§ 1961-1968*, requires a domestic injury, that the location of a RICO injury depends on where the plaintiff suffered the injury—not where the injurious conduct took place. That may result from the U.S. Supreme Court's framing of the issue: whether RICO's private right of action, contained in *§ 1964(c)*, applies to injuries that are suffered in foreign countries?

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Antitrust & Trade Law > International Aspects > International Application of US Law

HN13[] **Racketeer Influenced & Corrupt Organizations, Claims**

In the context of claims under *18 U.S.C.S. § 1964(c)* of the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *18 U.S.C.S. §§ 1961-1968*, for which plaintiffs are required to show a domestic injury, courts grappling with alleged injuries to intangible property have largely tried to trace the location of the effects of the alleged injurious conduct to determine the place of injury. In other words, these courts have aligned themselves with the locus of effects approach and focus on where the plaintiff felt the effects of the injury-inducing predicate acts, no matter where they occurred.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Governments > Legislation > Statutory Remedies & Rights

Antitrust & Trade Law > International Aspects > International Application of US Law

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN14[] **Racketeer Influenced & Corrupt Organizations, Claims**

The analysis of whether a plaintiff has alleged a domestic injury for purposes of a claim under *18 U.S.C.S. § 1964(c)* of the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *18 U.S.C.S. §§ 1961-1968*, must focus principally on where the plaintiff has suffered the alleged injury. Nothing in *§ 1964(c)* provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Antitrust & Trade Law > International Aspects > International Application of US Law

HN15[] **Racketeer Influenced & Corrupt Organizations, Claims**

For purposes of a claim under *18 U.S.C.S. § 1964(c)* of the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *18 U.S.C.S. §§ 1961-1968*, whether an alleged injury to an intangible interest was suffered domestically is a particularly fact-sensitive question requiring consideration of multiple factors. These include, but are not limited to, where the injury itself arose; the location of the plaintiff's residence or principal place of business; where any alleged services were provided; where the plaintiff received or expected to receive the benefits associated with providing such services; where any relevant business agreements were entered into and the laws binding such agreements; and the location of the activities giving rise to the underlying dispute. the applicable factors depend on the plaintiff's allegations; no one factor is presumptively dispositive. A domestic injury under *§ 1964(c)* is found where the relevant factors, appropriately weighed, establish that the alleged harm was suffered in the United States.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

International Law > Authority to Regulate

Antitrust & Trade Law > International Aspects > International Application of US Law

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN16[] **Racketeer Influenced & Corrupt Organizations, Claims**

While courts have generally noted that a company suffers economic injuries at its principal place of business, few have done so in the context of a claim under *18 U.S.C.S. § 1964(c)* of the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *18 U.S.C.S. §§ 1961-1968*, that would extend beyond the borders of the United States. Even fewer have done so where the alleged conduct had an effect on intangible property. Although a litigant's residence or principal place of business is obviously a relevant consideration, and perhaps a useful place to begin a *§ 1964(c)* inquiry, it does not necessarily determine the ultimate question of whether there has been a domestic injury. It is merely one factor that informs the court's inquiry.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Antitrust & Trade Law > International Aspects > International Application of US Law

HN17[] **Racketeer Influenced & Corrupt Organizations, Claims**

It cannot be the case that the mere fact that a loss is economic means that foreign corporations are unable to avail themselves of the protections of civil actions under *18 U.S.C.S. § 1964(c)* of the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *18 U.S.C.S. §§ 1961-1968*, even in cases where all of the actions causing the injury took place in the United States. There is no evidence that Congress meant to so preclude foreign corporations from the protection offered by *§ 1964(c)*, and doing so conflicts with the Supreme Court's recognition that Congress did not limit RICO to domestic enterprises.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > International Aspects > International Application of US Law

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Antitrust & Trade Law > Clayton Act > Jurisdiction

Antitrust & Trade Law > Clayton Act > Scope

HN18[] **International Aspects, Foreign Trade Antitrust Improvements Act**

There is good reason not to interpret *18 U.S.C.S. § 1964(c)* of the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *18 U.S.C.S. §§ 1961-1968*, to cover foreign injuries just because the *Clayton Act*, a federal antitrust statute, does so. First, the *Clayton Act* explicitly authorizes foreign entities to bring suit under the statute. Further, the Foreign Trade Antitrust Improvements Act of 1982 excludes from the reach of antitrust laws most conduct that causes only foreign injury.

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Judges: Before: McKEE, SHWARTZ and NYGAARD, Circuit Judges.

Opinion by: McKEE

Opinion

[*696] McKEE, Circuit Judge

HN1[] *Section 1964(c)* of the *Racketeer Influenced and Corrupt Organizations Act ("RICO")*, *18 U.S.C. §§ 1961-1968*, creates a private right of action for a plaintiff that "is injured in his [or her] business or property" as a result of conduct that is proscribed by the statute. In *RJR Nabisco, Inc. v. European Community*, the Supreme Court determined that, although a litigant may file a civil suit against parties for racketeering activity committed **[**2]** abroad, *§ 1964(c)*'s private right of action is only available to a litigant that can "allege and prove a *domestic* injury to its business or property."[1]

In this case of first impression for this court, we must decide whether Plaintiffs pled sufficient facts to establish that they suffered a domestic injury under *§ 1964(c)*. For the reasons that follow, we will affirm the District Court's judgment that they have not.

I.

A. Factual Background

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[1] *136 S. Ct. 2090, 2106, 195 L. Ed. 2d 476 (2016)*.

Plaintiffs Peter Humphrey and Yu Yingzeng are co-founders of ChinaWhys, an investigations firm that assists foreign companies doing business in China with American anti-bribery regulations compliance. Although Plaintiffs resided in Beijing during the events alleged in their complaint, much of ChinaWhys' business was conducted with American companies.

Plaintiffs allege that Defendants, GlaxoSmithKline plc ("GSK PLC") and GlaxoSmithKline LLC ("GSK LLC"), engaged in widespread bribery in China in order to obtain improper commercial advantages and that they did so with the approval of Mark Reilly. Reilly was the Chief Executive Officer of GlaxoSmithKline Investment Co., Ltd. ("GSK China"). GlaxoSmithKline is a multinational healthcare company that has offices in England and **[**3]** the United States. Sometime in 2011, a whistleblower who had worked for Defendants sent Chinese regulators correspondence accusing GlaxoSmithKline of bribery. Those allegations of corruption included a claim that GSK China maintained a policy of paying off doctors to **[*697]** increase sales. Thereafter, Defendants tried to uncover the whistleblower's identity.

As part of the ensuing inquiry, Humphrey and Yingzeng met with Reilly and other members of GSK China's senior management in GSK China's Shanghai office to discuss GlaxoSmithKline's internal investigation into the source of the whistleblower reports. According to Plaintiffs, GSK China representatives told ChinaWhys that it believed Vivian Shi, a GSK China employee who had been fired, orchestrated a "smear campaign" against GlaxoSmithKline by falsely accusing the pharmaceutical company of engaging in corrupt practices. ChinaWhys agreed to conduct a background investigation of Shi in what Plaintiffs describe as an attempt to limit the "efficacy of her extortion."[2] The details of that understanding were memorialized in a "Consultancy Agreement."[3] That agreement provided that, among other things, the arrangement was to be governed by Chinese **[**4]** law and that all disputes arising out of, or in connection to, it were subject to arbitration in China.[4]

GlaxoSmithKline later learned of additional whistleblower emails and GSK China asked ChinaWhys to also identify the source of those communications. In addition, GSK China personnel asked ChinaWhys to investigate certain Chinese agencies to find out who was conducting the investigation into GSK China's alleged misconduct.

In July 2013, Plaintiffs were arrested when police raided ChinaWhys' Shanghai office and Plaintiffs' Beijing home. The arrests resulted in Plaintiffs' conviction and imprisonment. They were deported from China upon their release from prison.

Reilly was subsequently convicted of bribing physicians and was also imprisoned and deported from China upon his release. The Chinese government fined GSK PLC $492 million for its bribery practices in the region, and GSK PLC entered a settlement agreement with the United States Securities Exchange Commission.

Plaintiffs brought this suit in the United States District Court, alleging, *inter alia*, RICO claims and pendent state law claims. GSK China was not named as a party.[5] Plaintiffs contend that their business was "destroyed and **[**5]** their prospective business ventures eviscerated" as a result of Defendants' misconduct.[6] They also contended that "GSK officials" knew that the accusations of corruption were true and that the bribery had been carried out at Reilly's direction.

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[2] Plaintiffs' Br. 13, 16.

[3] Joint App'x A69.

[4] Joint App'x A74.

[5] GSK China was not named a defendant even though it is the arm of GlaxoSmithKline that ChinaWhys entered into the Consultancy Agreement with. Moreover, as the District Court observed, "all of Plaintiffs' contacts were with employees of either GSK China or GSK Pte Ltd., a Singaporean entity, and none were with Defendants. From the complaint, it is apparent that it was GSK China employees and GSK China's CEO who requested that Plaintiffs investigate Shi . . . ." *Humphrey v. GlaxoSmithKline, PLC., No. CV 16-5924, 2017 U.S. Dist. LEXIS 162495, 2017 WL 4347587, at *7 (E.D. Pa. Sept. 29, 2017)*. The decision not to name GSK China as a defendant is likely an attempt to downplay ties to China.

[6] Plaintiffs' Br. 8.

Defendants moved to compel arbitration, or, in the alternative, to dismiss the complaint for lack of subject-matter jurisdiction. They argued that subject-matter jurisdiction was lacking because, even though Plaintiffs may have had numerous clients in the United States, their alleged injuries were foreign because Plaintiffs' **[*698]** business was in China, their only offices were in China, no work was done outside of China, Plaintiffs resided in China, and because any destruction of Plaintiffs' business occurred while Plaintiffs were imprisoned in China by Chinese authorities. The District Court agreed and granted Defendants' motion to dismiss. This timely appeal followed.

B. Legal Background

HN2[] RICO "creates a private civil cause of action that allows '[a]ny person injured in his business or property by reason of a violation of *section 1962* to sue in federal district court . . . ."[7] A successful plaintiff may "recover threefold the damages. . **[**6]** . ."[8]

HN3[] RICO is implicated when defendants have engaged in a "pattern of racketeering activity."[9] That pattern consists of certain statutorily defined predicate acts "encompass[ing] dozens of state and federal offenses" "that together demonstrate the existence or threat of continued criminal activity."[10] The statute "sets forth four specific prohibitions aimed at different ways in which a pattern of racketeering activity may be used to infiltrate, control, or operate a[n] enterprise['s]" criminal misconduct.[11] Plaintiffs allege that Defendants violated two of those prohibitions—*§§ 1962(c)* and *(d)*. *Section 1962(c)* proscribes participating in the conduct of an interstate enterprise's affairs through a "pattern of racketeering activity,"[12] which RICO defines as "at least two acts of racketeering activity."[13] *Section 1962(d)* makes it unlawful to conspire to violate *subsections (a) through (c)*.[14]

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[7] *RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2097, 195 L. Ed. 2d 476* (citing *18 U.S.C. § 1964(c)*).

[8] *18 U.S.C. § 1964(c)*.

[9] *18 U.S.C. § 1962(c)*.

[10] *RJR Nabisco, 136 S. Ct. at 2096-97*.

[11] *Id. at 2097* (brackets in original) (citation and internal quotation marks omitted).

[12] *18 U.S.C. § 1962(c)*.

[13] *18 U.S.C. § 1961(5)*.

[14] *Id.* (citing *18 U.S.C. § 1962*). *18 U.S.C. § 1962* provides:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of *section 2, title 18, United States Code*, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any **[**7]** interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

[*699] ***HN4***[] To prove a violation under *§1962(c)*, Plaintiffs must show:

> (1) that two or more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity; (2) that the defendant was a party to or member of that agreement; and (3) that the defendant joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity.[15]

HN5[] To establish liability pursuant to *§ 1962(c)*, a plaintiff must establish the existence of an enterprise that exists "separate and apart from the pattern of activity in which [the enterprise] engages."[16] RICO defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group **[**9]** of individuals associated in fact although not a legal entity."[17] Plaintiffs can show the presence of an enterprise by pointing to a "group of persons associated together for a common purpose of engaging in a course of conduct."[18]

The complaint alleges that the enterprise here is an association of, *inter alia*, Defendants, "others convicted of crimes related to GSK activities," "and other countries who accepted bribes and kickbacks from GSK."[19] Plaintiffs further allege that Defendants participated in the following racketeering activity: mail fraud; wire fraud; obstruction of a criminal investigation; tampering with witnesses; retaliating against a witness, victim, or an informant; use of interstate facilities to conduct unlawful activity; and money laundering.[20] Plaintiffs contend they lost their business as a result of these alleged predicate racketeering acts.[21]

In *RJR Nabisco*, the Supreme Court considered ***HN6***[] "whether RICO applies extraterritorially—that is, to events occurring and injuries suffered outside the United States."[22] The relevant inquiry involves two separate questions: first, whether RICO's substantive provisions apply to extraterritorial *conduct*, and second, whether RICO's private right **[**10]** of action affords relief for "*injuries* that are suffered" outside the United States.[23]

The Court explained that ***HN7***[] "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[24] This presumption against extraterritoriality "avoid[s] the

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> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged **[**8]** in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of *subsection (a)*, *(b)*, or *(c)* of this section.

[15] *United States v. John-Baptiste, 747 F.3d 186, 207, 60 V.I. 904 (3d Cir. 2014)* (citation omitted); *see also* *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)* ("A violation of *§ 1962(c)* . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.").

[16] *United States v. Turkette, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)*.

[17] *18 U.S.C. § 1961(4)*.

[18] *Turkette, 452 U.S. at 583*.

[19] Joint App'x A54.

[20] Joint App'x A56.

[21] Joint App'x A59.

[22] *RJR Nabisco, Inc., 136 S. Ct. at 2096*.

[23] *Id. at 2099* (emphasis added).

[24] *Id.* (citation omitted).

international discord that can result when U.S. law is applied to conduct in foreign countries[.]"[25] It also ensures that Congress—rather than the **[*700]** judiciary—is responsible for navigating the "delicate field of international relations."[26] Nevertheless, the Court concluded that RICO can reach extraterritorial conduct.[27] However, the Court held that *18 U.S.C. § 1964(c)* does not allow recovery for injuries suffered in foreign territories.[28] The Court explained that "[n]othing in *§ 1964(c)* provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States."[29] Thus, although RICO creates a cause of action for misconduct committed abroad, *§ 1964(c)* requires a "domestic injury."

However, since the plaintiffs in *RJR Nabisco* had waived their claims for domestic injuries,[30] the Court did not need to explain how courts should determine whether an alleged injury has been **[**11]** suffered domestically or abroad.[31] Moreover, as the District Court observed here, there is a dearth of case law grappling with the *RJR Nabisco* decision.[32] In addition, those courts that have considered whether an alleged injury was suffered in the United States have applied varying standards.[33] Thus, there is no consensus on what specific factors must be considered when deciding whether an injury is domestic or foreign.

RJR Nabisco did advise ***HN8***[] courts to proceed cautiously when deciding if RICO plaintiffs have alleged a sufficient domestic injury to recover under *§ 1964(c)*. "[P]roviding a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct."[34] The Court observed that the domestic injury requirement promotes comity and avoids international friction because it, *inter alia*, creates less of an opportunity for litigants in foreign countries to bypass those territories' "less generous remedial schemes."[35] The Supreme Court also warned that allowing litigants who are abroad to sidestep foreign remedies only to seek those available under domestic law would upset the balance of **[**12]** competing considerations embodied in the laws of foreign countries.[36] The Court cautioned that "the need

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[25] *Id.* (citations omitted).

[26] *Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 133 S. Ct. 1659, 1664, 185 L. Ed. 2d 671 (2013)*.

[27] *RJR Nabisco, Inc., 136 S. Ct. at 2103*.

[28] *See id. at 2106*.

[29] *Id. at 2108*.

[30] *Id. at 2111*.

[31] *Bascuñán v. Elsaca, 874 F.3d 806, 809 (2d Cir. 2017)* ("The Supreme Court did not explain, however, how to determine whether an alleged injury is domestic or foreign.").

[32] *Humphrey, 2017 U.S. Dist. LEXIS 162495, 2017 WL 4347587 at *5* ("Neither the Third Circuit Court of Appeals, other Appellate Circuits, nor the District Court for the Eastern District of Pennsylvania have addressed what constitutes a domestic or foreign injury for civil RICO purposes subsequent to the *RJR Nabisco* decision . . . .").

[33] Compare *Dandong Old N.-E. Agric. & Animal Husbandry Co. v. Hu., No. 15 CIV. 10015 (KPF), 2017 U.S. Dist. LEXIS 122471, 2017 WL 3328239, at *6 (S.D.N.Y. Aug. 3, 2017)* (considering the totality of the circumstances without relying on any single circumstance), *with* *Union Commercial Servs., 2016 U.S. Dist. LEXIS 156098, 2016 WL 6650399, at *4 (E.D. Mich. Nov. 10, 2016)* (considering whether the defendant's conduct was intended to have effects in the United States).

[34] *Id. at 2106*.

[35] *Id. at 2106-07* & n. 9.

[36] *Id.*

to enforce the presumption [against extraterritoriality] is at its apex" when extraterritorial application of U.S. law raises the "risk" of **[*701]** international friction.[37]

II.

HN9[] Because this case does not involve Article III standing, but rather presents an issue of statutory standing, subject matter jurisdiction is not implicated, and the parties incorrectly relied on *Rule 12(b)(1)*. Our precedent makes clear that "[c]ivil RICO standing is usually viewed as a *12(b)(6)* question of stating an actionable claim, rather than as a *12(b)(1)* question of subject matter jurisdiction."[38] Moreover, given that *Rule 12(b)(6)* provides a plaintiff with "significantly more protections,"[39] and because we may affirm on any ground supported by the record and "there is no prejudice to appellants in our reviewing the district court's dismissal as if it were grounded on *Rule 12(b)(6)*,"[40] we will review this matter under *Rule 12(b)(6)*. Accordingly, we "consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record."[41] In evaluating whether the complaint adequately pleads the elements of standing, we accept as true **[**13]** all material allegations set forth in the complaint and construe those facts in favor of Plaintiffs, the nonmoving party.[42]

III.

Plaintiffs allege that, as a result of Defendants' racketeering activity, Plaintiffs lost "numerous ongoing contracts and engagements with U.S. law firms and companies"—purportedly destroying "Plaintiffs' business . . . and their prospective business ventures."[43] Plaintiffs thus seek redress under *§ 1964(c)*. However, as we stated above, ***HN10***[] *§ 1964(c)* creates no private cause of action for injuries "suffered outside the United States."[44] Accordingly, Plaintiffs' civil RICO suit can survive a motion to dismiss only if they sufficiently allege domestic injuries.[45] As we will explain, there is no bright-line rule that we can apply in assessing whether the alleged injuries are domestic or foreign. Rather, we must engage in a fact-intensive inquiry that will ordinarily include consideration of multiple factors that vary from case to case.

A. The Domestic Injury Requirement

The District Court recognized that ***HN11***[] two "schools of thought" have emerged regarding proof of domestic injury for civil RICO claims. The "locus of effects" test looks only to where the plaintiff felt the effects of the

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[37] *Id. at 2107*.

[38] *Anderson v. Ayling, 396 F.3d 265 (2005)* (citing *Maio v. Aetna, Inc., 221 F.3d 472, 482 n.7 (3d Cir. 2000))*.

[39] *Hartig Drug Co. Inc. v. Senju Pharmaceutical Co. Ltd., 836 F.3d 261, 270 (3d Cir. 2016)*.

[40] *Maio, 221 F.3d at 481 n.7*.

[41] *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)*. No documents were attached for the District Court's consideration.

[42] *Maio, 221 F.3d at 481-82* (citations and internal quotation marks omitted).

[43] Joint App'x A59.

[44] *RJR Nabisco, 136 S. Ct. at 2108* ("Nothing in *§ 1964(c)* provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States.").

[45] *Id.*

alleged **[**14]** injury and not where the injurious acts were allegedly committed.[46] Courts applying this approach have largely focused upon the plaintiffs' place of residency or principal place of business.[47] Other **[*702]** courts are guided by where the alleged misconduct was "targeted" or "directed" and focus largely, though not exclusively, on that location.[48] Although the District Court found the former school of thought more persuasive, it ultimately did not have to adopt either approach because Plaintiffs were unable to prevail under either test.[49]

This case presents an excellent example of why the inquiry required under *§ 1964(c)* must be undertaken in the context of the specific injuries alleged in a given case rather than relying on a one-size-fits-all approach or bright-line rule. Plaintiffs allege injuries to intangible business interests, including reputation and goodwill. Accordingly, relying on such tangible factors as the location of lost funds, damaged property or plaintiff's residence is not only of little use, but it could also be very misleading. Instead, we must consider multiple factors in determining whether the injuries in question **[**15]** were suffered in the United States or abroad.

Nevertheless, ***HN12***[] there is a general consensus among the courts that have had to apply *RJR Nabisco* that the location of a RICO injury depends on where the plaintiff "suffered the injury"—not where the injurious conduct took place.[50] That may result from the Court's framing of the issue in *RJR Nabisco*. The Court specifically framed the question before it as whether: "RICO's private right of action, contained in *§ 1964(c)*, applies to injuries that are suffered in foreign countries?"[51]

The Court of Appeals for the Second Circuit is one of only two federal appellate courts that have grappled with *RJR Nabisco's* domestic injury instruction. In *Bascuñán v. Elsaca*, the court considered whether a Chilean resident suffered a domestic injury although he was not located in the United States during the events in question.[52] The plaintiff there alleged that the defendant had fraudulently caused banks to wire the plaintiff's funds from the plaintiff's U.S. bank accounts to the defendant's accounts.[53] The plaintiff also alleged that the defendant or his agent physically removed bank shares from the plaintiff's New York safety deposit box.[54] The district court held that **[**16]** the plaintiff could not allege a domestic injury because he was a resident of Chile, and the injuries alleged were necessarily suffered at the plaintiff's place of residence.[55] Two questions guided the court's inquiry:

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[46] *Humphrey, 2017 U.S. Dist. LEXIS 162495, 2017 WL 4347587 at *6*.

[47] *See, e.g., Bascuñan v. Elsaca, No. 15-CV-2009 (GBD), 2016 U.S. Dist. LEXIS 133664, 2016 WL 5475998, at *6 (S.D.N.Y. Sept. 28, 2016)* ("All of the funds at issue, even those distributed among the Corporate Plaintiffs, were purportedly owned by Bascuñan, and thus, he is the person that ultimately suffered the loss. And as a Chilean citizen and resident, he suffered the losses in Chile." (citations omitted)), *rev'd in part, vacated in part sub nom*. *Bascuñan v. Elsaca, 874 F.3d 806 (2d Cir. 2017)*.

[48] *See, e.g., Akishev v. Kapustin, No. CV 13-7152, 2016 U.S. Dist. LEXIS 169787, 2016 WL 7165714, at *1-2, 7-8 (D.N.J. Dec. 8, 2016)*; *Union Commercial Servs. Ltd. v. FCA Int'l Operations LLC, No. 16-CV-10925, 2016 U.S. Dist. LEXIS 156098, 2016 WL 6650399, at *4 (E.D. Mich. Nov. 10, 2016)*; *Tatung Co., Ltd. v. Shu Tze Hsu, 217 F. Supp. 3d 1138, 1156 (C.D. Cal. 2016)*.

[49] *Humphrey, 2017 U.S. Dist. LEXIS 162495, 2017 WL 4347587 at *6*. ("[T]his Court need not decide whether the focus is entirely on where the injury occurred or if the location of the conduct is relevant, because under any of the injury-focused tests employed by other district courts, and under a conduct-focused test, it is clear to this Court that the alleged injuries suffered by Plaintiffs are foreign, and not domestic.").

[50] *See id.* (collecting cases).

[51] *RJR Nabisco, 136 S. Ct. at 2099*.

[52] *874 F.3d 809 (2d Cir. 2017)*.

[53] *Id. at 811*.

[54] *Id. at 810*.

who became poorer as a result of the alleged conduct and where **[*703]** did that individual become poorer?[56] "Its holding set forth, in sum and substance, the following rule: a foreign plaintiff who suffered an 'economic loss' due to a RICO violation cannot, absent extraordinary circumstances, allege a domestic injury."[57]

On appeal, the Court of Appeals for the Second Circuit rejected the district court's "residency-based" approach and held that "a plaintiff who is a foreign resident may [in fact] allege a civil RICO injury that is domestic."[58] It noted that the district court's focus on the plaintiff's place of residence improperly disregards *RJR Nabisco's* attempt "to make plain that its opinion should not be taken to 'mean that foreign plaintiffs may not sue under RICO.'"[59] The Second Circuit opined that the focus of the domestic injury analysis should be the location of the alleged injuries as opposed to the location of the plaintiff's residence or of the defendant's alleged misconduct. **[**17]** The court explained: "[i]n order to determine where the [injuries] alleged by a civil RICO plaintiff are located geographically, courts must examine more closely the specific type of injuries alleged."[60] It then categorized the alleged injury as an injury to tangible property, which "can be fairly said to exist in a precise location."[61] Taking that approach, the court easily concluded that "[w]here the injury is to tangible property . . . absent some extraordinary circumstance, the injury is domestic if the plaintiff's property was located in the United States when it was stolen or harmed, even if the plaintiff himself resides abroad."[62]

Thus, the court held that when a defendant's conduct is alleged to effect tangible property, the location of that property usually constitutes the place of the injury. Since the plaintiff's money and bank shares were in the United States when stolen, the court reasoned that the injury occurred in New York and the plaintiff therefore properly alleged a domestic RICO injury.[63] Several considerations counseled that conclusion. The court reasoned that plaintiffs who are injured as a result of harm done to their domestically located tangible property are entitled **[**18]** to the remedial benefits conferred by a RICO private right of action because such litigants "expect that our laws will protect them in the event of damage to that property."[64] That "expectation [was] entirely justified, especially when we consider that a foreign resident's property located in the United States is otherwise subject to all of the regulations imposed on private property by American state and federal law."[65] The rule thus "ensures that both foreign and domestic plaintiffs can obtain civil RICO's remedy for damage to their property[.]"[66]

Although this approach, which focuses on the location of the property giving rise to the harm, is useful where the alleged injury is to tangible property, it is not helpful where, as here, harm to intangible business interests is alleged.

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[55] *Id. at 809*.

[56] *Id. at 813-14*.

[57] *Id. 809-10*.

[58] *Id. at 814*.

[59] *Id. at 821* (emphasis omitted) (citing *RJR Nabisco, 136 S. Ct. at 2110 n. 12*).

[60] *Id. at 817*.

[61] *Id. at 820*.

[62] *Id. at 820-21*.

[63] *Id.*

[64] *Id. at 821*.

[65] *Id. at 821*.

[66] *Id.*

The location of such injuries simply cannot be identified **[*704]** with the same geographic certainty that is endemic in the very concept of tangible property. Thus, ***HN13***[] courts grappling with alleged injuries to intangible property have largely tried to trace the location of the effects of the alleged injurious conduct to determine the place of injury. In other words, these courts have aligned themselves with the locus **[**19]** of effects approach and focus on where the plaintiff felt the effects of the injury-inducing predicate acts, no matter where they occurred.

For example, in *Cevdet Aksut Ogullari Koll. Sti. v. Cavusoglu*, the district court found that a plaintiff's principal place of business and the location of its operations were merely helpful considerations in determining whether the effects of an alleged injury were domestic or foreign.[67] There, a Turkish corporation "assert[ed] that its domestic business was injured because it had . . . annual sales to customers in the United States prior to transacting with the RICO enterprise."[68] The court held that, even if it were to assume that the plaintiff lost earnings from customers located in the United States, it nonetheless could ascertain no "domestic injury to [the plaintiff's] business because its business [was] entirely located in and operated out of Turkey."[69] The "plaintiff's injury was felt in the only place it had ever been located, in Turkey."[70] Although the *Cevdet* court found the physical location of the plaintiff's corporation to be relevant, it did not announce the same kind of residency-based rule that was rejected by the Court of Appeals in *Bascuñán* ***[**20]*** . Instead, it declared that a foreign corporation with "substantial business operations within the United States" could, hypothetically, assert a RICO domestic injury because the injury could be felt in the United States.[71]

Picking up where *Cevdet* left off, the district court in *Elsevier, Inc. v. Grossman* (*Elsevier II*) held that, in assessing whether a plaintiff has alleged a domestic RICO injury to its intangible business operations, courts should determine where the "substantial negative business consequences occurred."[72] The court suggested that a plaintiff might be able to show a domestic injury by alleging "some effect on Plaintiffs' relationships with actual or prospective U.S. customers."[73] The court, however, found that the plaintiff had made no such allegation. Elsevier, the plaintiff, had sued to recover after it sold academic journals to the defendants at discounted rates because of the defendants' alleged misrepresentations that they were buying the journals for "valid personal use."[74] The plaintiff argued that he suffered a domestic injury simply because the defendants ordered the subscriptions from the United States and paid for them with checks drawn on a U.S. bank account. First, **[**21]** the court held that this was insufficient to show that the plaintiff's injuries occurred in the United States. The trial court noted "that it is possible for fraudulent conduct to take **[*705]** place in one location, but cause injury in another location."[75] While resolving post-trial motions, though, the district court found that, as alleged, "48 of the 51 fraudulent subscriptions were either physically shipped from the United States or were authorized for shipment by an Elsevier employee located in the

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[67] *245 F. Supp. 3d 650 (D.N.J. 2017)*.

[68] *Id. at 653*.

[69] *Id. at 659*.

[70] *Id. at 660*.

[71] *Id. at 659*.

[72] *199 F. Supp. 3d 768, 786 (S.D.N.Y. 2016)* ("If the plaintiff has suffered an injury to his or her business, the court should ask where substantial negative business consequences occurred. By contrast, if the plaintiff has suffered an injury to his or her property, the court should ask where the plaintiff parted with the property or where the property was damaged.").

[73] *Id. at 788*.

[74] *Elsevier Inc. v. Pierre Grossmann, IBIS Corp. (Elsevier III), 2017 U.S. Dist. LEXIS 182859, 2017 WL 5135992, at *1 (S.D.N.Y. Nov. 2, 2017)*.

[75] *Elsevier II, 199 F. Supp. 3d at 788*.

United States."[76] Accordingly, the district court reversed course and found that the plaintiff "relinquished control of the journals in the United States under false pretenses and thereby suffered the effects of [the defendant's fraudulent] conduct in the States."[77] The court therefore found that the plaintiff's harm constituted a domestic injury "even if [the plaintiff] were a foreign entity."[78]

Despite *Elsevier II*'s earlier indication that, in determining whether an injury is domestic, "court[s] should ask where substantial negative business consequences occurred,"[79] its post-trial opinion was based on its finding that the alleged misappropriation of the plaintiff's property occurred in the United **[**22]** States. That is consistent with the approach taken by the Court of Appeals in *Bascuñán*. Nevertheless, since *Elsevier* involved an alleged injury to tangible property, it is not helpful to our inquiry here.[80]

The court's analysis in *Dandong Old N.-E. Agric. & Animal Husbandry Co. v. Hu* is more analogous to our inquiry.[81] The plaintiff there was a Chinese company that was one of the largest purchasers of soybeans produced in the United States.[82] It alleged, *inter alia*, that the defendant's RICO misconduct caused the plaintiff to lose contracts with soybean suppliers in the United States.[83] The plaintiff claimed the loss of much of its market share and that its business operations slowed as a result of its inability to receive soybeans from U.S. suppliers at the same volume as before the defendant's alleged misconduct.[84] The plaintiff also alleged that it was forced to terminate 90 of its China-based employees.[85] The court disregarded the location of the predicate acts that were alleged and instead focused only on where the plaintiff felt the effects of the alleged injury.[86] That analysis caused the court to conclude that the plaintiff failed to establish a domestic injury. The trial court found **[**23]** that "[a]ny deprivation of [the] [p]laintiff's money was felt in China. And, in sharp contrast to *Elsevier*, [the] Plaintiff was not deprived of its property in the United States[] [because,] indeed, [the] Plaintiff received all of the soybeans for which it contracted with U.S. suppliers."[87]

[*706] The plaintiff's principal place of business was in China, all the terminated employees were fired in China, any expenses resulting from the alleged misconduct were paid from China, and the plaintiff's business operated

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[76] *Elsevier III, 2017 U.S. Dist. LEXIS 182859, 2017 WL 5135992, at *4*.

[77] *Id.*

[78] *Id.*

[79] *Elsevier II, 199 F. Supp. 3d at 786*.

[80] *Dandong Old N.-E. Agric. & Animal Husbandry Co., 2017 U.S. Dist. LEXIS 122471, 2017 WL 3328239 at *6* (clarifying that *Elsevier* "focused on where the plaintiff had been deprived of money or property [and] . . . found that the plaintiff had sufficiently alleged a domestic injury by asserting that nearly all of the subscriptions at issue had been shipped from within the United States—and thus, that the plaintiff had been deprived of its property (i.e., the scientific journals) in the United States" (citing *Elsevier III, 2017 U.S. Dist. LEXIS 69677, 2017 WL 1843298, at *6))*.

[81] *2017 U.S. Dist. LEXIS 122471, [WL] *13*

[82] *2017 U.S. Dist. LEXIS 122471, [WL] at *1*.

[83] *2017 U.S. Dist. LEXIS 122471, [WL] at *3*.

[84] *Id.*

[85] *Id.*

[86] *2017 U.S. Dist. LEXIS 122471, [WL] at *11*.

[87] *2017 U.S. Dist. LEXIS 122471, [WL] at *13*.

only out of China.[88] The court found that the foreign plaintiff's allegation that it lost prospective business opportunities from U.S. suppliers insufficient to establish that the plaintiff experienced a domestic injury because such a claim, without more, "is far too attenuated to suffice as a domestic injury under RICO."[89] For these reasons, the *Dandong* court ultimately held that "[r]egardless of where the conspirators' conduct took place, [the p]laintiff's injury was felt in China, the only place its business had ever been located."[90] Although other courts have reached similar results,[91] *Dandong*'s approach to determining the location of the alleged injury is particularly helpful because **[**24]** it is nuanced and the court considered the totality of the circumstances without relying on any single circumstance.

As we will explain, a focus upon where the alleged injuries were felt best guides our inquiry. However, unlike courts that have taken this "locus of effects" approach, we do not view a plaintiff's residence or principal place of business as detemintive. Although it will almost always be an important factor, allegations in a given case will ususally necessitate consideration of additional factors as well.

B. Merits

With this background as our guide, we must determine if Plaintiffs here have alleged a plausible domestic injury under *§ 1964(c)*. We begin with *RJR Nabisco*'s clear command:***HN14***[] the analysis of whether a plaintiff has alleged a domestic injury must focus principally on where the plaintiff has suffered the alleged injury.[92] "Nothing in *§ 1964(c)* provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States."[93]

As noted above, the Court in *RJR Nabisco* cautioned against applying U.S. law in the absence of a domestic injury for the substantial practical and policy **[**25]** reasons the Court explained. Thus, we must decide if Plaintiffs' alleged domestic injuries justify allowing a civil remedy under RICO. There may well be cases where plaintiffs do, in fact, suffer some injury in the United States and courts must determine whether those domestic injuries are sufficient to justify application of domestic law despite the concerns the Supreme Court has explained. As with any standard that is not susceptible to mechanical application, "few answers will be written in black and **[*707]** white."[94] We therefore appreciate that some cases will be so close that courts may have to split jurisdictional hairs to determine if a domestic injury has been alleged. As we explain, the Plaintiffs here have not really alleged any

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88 *2017 U.S. Dist. LEXIS 122471, [WL] at *14*.

89 *2017 U.S. Dist. LEXIS 122471, [WL] at *13*.

90 *2017 U.S. Dist. LEXIS 122471, [WL] at *14*.

91 In *City of Almaty, Kazakhstan v. Ablyazov* for example, the plaintiff alleged that the defendant (who was the former mayor) stole city funds and invested those funds in New York City real estate projects. *226 F. Supp. 3d 272, 275 (S.D.N.Y 2016)*. The court held that even though the mayor and his co-conspirators used the funds in the United States, the plaintiff did not suffer a domestic injury. *Id. at 284*. In other words, because the plaintiff suffered economic harm to its business, the place of injury was "the state of plaintiff's residence, and foreign corporations are recognized to reside either in their principal place of business or their place of incorporation." *Id. at 282* (citation and internal quotations omitted). Unlike Plaintiffs here, the plaintiff in *City of Almaty* alleged no additional contacts with the United States. The case therefore offers limited guidance here.

92 *RJR Nabisco, 136 S. Ct. at 2108*.

93 *Id.*

94 *Kulko v. Superior Court of California, 436 U.S. 84, 92, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978)* (internal quotation marks omitted).

domestic injury, so we have no trouble concluding that they have not alleged a sufficient injury to defeat that presumption and justify the extraterritorial application of domestic law.

Given the intangible nature of the alleged injuries here, our inquiry must focus primarily upon where the effects of the predicate acts were experienced. This will better allow for appropriate consideration of the nuanced nature of intangible interests.

HN15[] Whether an alleged injury **[**26]** to an intangible interest was suffered domestically is a particularly fact-sensitive question requiring consideration of multiple factors. These include, but are not limited to, where the injury itself arose; the location of the plaintiff's residence or principal place of business; where any alleged services were provided; where the plaintiff received or expected to receive the benefits associated with providing such services; where any relevant business agreements were entered into and the laws binding such agreements; and the location of the activities giving rise to the underlying dispute.

As we have already explained, the applicable factors depend on the plaintiff's allegations; no one factor is presumptively dispositive.[95] A domestic injury under *§ 1964(c)* is found where the relevant factors, appropriately weighed, establish that the alleged harm was suffered in the United States.[96] Although they have rarely done so explicitly, the courts that have applied *RJR Nabisco*—including the District Court here—have largely engaged in this kind of multi-factor inquiry.[97]

Applying these principles to the allegations here, we have no difficulty concluding that Plaintiffs have not alleged **[**27]** a domestic injury. Rather, it is clear that the alleged injuries were suffered in China. As the District Court noted, at all relevant times, Plaintiffs lived in China; had their principal place of business in China; provided services in China (albeit to some American companies - but even they were operating in China); entered the Consultancy Agreement in China and agreed to have Chinese law govern it;[98] met with Defendants' representatives **[*708]** only in China; and themselves indicated on the civil cover sheet that the underlying incident arose in China.[99] "[C]ompanies came to [ChinaWhys] when they sought to do business in China."[100] Plaintiffs have not alleged that they possess offices, assets, or any other property in the United States. Thus, Plaintiffs have not alleged a domestic injury pursuant to *18 U.S.C. § 1964(c)*, even though they do allege loss of goodwill and some unidentified number of actual and prospective U.S. customers.[101] To the extent that these intangible assets were

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[95] *See, e.g., Bascuñán, 874 F.3d at 824* (noting that "[a] plaintiff's residence may often be relevant—perhaps even dispositive—in determining whether certain types of business or property injuries constitute a domestic injury"); *Dandong, 2017 U.S. Dist. LEXIS 122471, 2017 WL 3328239, at *13-14* (considering a plethora of factors to determine whether the alleged intangible injuries constitute a domestic injury).

[96] *RJR Nabisco, 136 S. Ct. at 2108* ("Nothing in *§ 1964(c)* provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States.").

[97] *See, e.g., Dandong, 2017 U.S. Dist. LEXIS 122471, 2017 WL 3328239 at *13-14*; *Tatung Co., Ltd., 217 F. Supp. 3d at 1155-56*.

[98] We recognize that our review of a motion to dismiss is generally limited to the face of the complaint and documents attached to it. However, we may consider the Consultancy Agreement because Defendants attached the undisputed document as an exhibit to its motion to dismiss and Plaintiffs claims are based on the document. *See Pension Ben. Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)*; *see also Schuchardt, 839 F.3d 336, 343 (3d Cir. 2016)* ("If . . . the defendant contests the pleaded jurisdictional facts, "the court must permit the plaintiff to respond with evidence supporting jurisdiction." (citation and internal quotation marks omitted).

[99] *Humphrey, 2017 U.S. Dist. LEXIS 162495, 2017 WL 4347587, at *6 n.14*.

[100] *2017 U.S. Dist. LEXIS 162495, [WL] at *6*.

injured, it is not enough to overcome the Supreme Court's caution against extraterritorial application of domestic law in *RJR Nabisco*. Consequently, the District Court correctly dismissed Plaintiffs' RICO claims.

Dismissal of **[**28]** those claims is consistent with *RJR Nabisco's* policy considerations. As noted earlier, the Supreme Court cautioned against the risks of "international friction" associated with allowing foreign entities to "bypass" potentially "less generous remedial schemes" available in their home jurisdictions and pursue treble damages for injuries suffered abroad through civil RICO actions in the United States.[102] Plaintiffs seek redress here for Defendants' alleged racketeering activity although Plaintiffs were prosecuted and imprisoned in China. "Allowing [Plaintiff's] RICO claims to proceed under these circumstances would be at odds with the Supreme Court's directive that the need to enforce the presumption against extraterritoriality is 'at its apex' when remedies available in United States courts may conflict with those available abroad."[103] Indeed, it would be odd to permit Plaintiffs to seek civil redress for alleged harm arising from the very crimes they were convicted of in China and that arose from China's application of its own criminal laws, absent allegations that would give rise to a domestic injury in the United States.

We realize that the Court of Appeals for the Seventh Circuit rejected **[**29]** the analytical approach that we today adopt, in *Armada (Singapore) PTE Ltd. v. Amcol Int'l Corp.*[104] But we do not find that analysis particularly helpful or persuasive here. There, that court held that "a party experiences or sustains injuries to its intangible property at its residence."[105] The *Armada* plaintiff was a Singapore shipping company that alleged that the Illinois-based defendant violated RICO by thwarting the plaintiff's attempt to recover on its breach of contract claim. The court held, without much discussion, that the plaintiff's "principal place of business [was] in Singapore, so any harm to [the plaintiff's] intangible bundle of litigation rights was suffered in **[*709]** Singapore."[106] It therefore concluded that the "injury [was] not domestic, and [that the plaintiff had] failed to plead a plausible claim under civil RICO."[107]

Although the ease with which such a bright-line rule can be applied gives it some surface appeal, we resist the temptation to adopt it as the law of this circuit. ***HN16***[] While courts have generally noted that a company suffers economic injuries at its principal place of business, few have done so in the context of a RICO claim that would extend beyond the borders **[**30]** of the United States.[108] Even fewer have done so where the alleged conduct had an effect on intangible property. Although a litigant's residence or principal place of business is obviously a relevant consideration, and perhaps a useful place to begin a *§ 1964(c)* inquiry, it does not necessarily determine the ultimate question of whether there has been a domestic injury. It is merely one factor that informs our inquiry.

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[101] It is unclear whether an allegation of harm to goodwill constitutes a showing of "a concrete financial loss and not mere injury to a valuable intangible property interest." *Maio, 221 F.3d at 483* (citation and internal quotation marks omitted).

[102] *RJR Nabisco, 136 S. Ct. at 2106-07* (citation and internal quotation marks omitted).

[103] *City of Almaty, 226 F. Supp. 3d at 287* (citing *RJR Nabisco, 136 S. Ct. at 2107*).

[104] *885 F.3d 1090 (7th Cir. 2018)*.

[105] *Armada, 885 F.3d at 1094-95* (citing *Kamel v. Hill-Rom Co., Inc., 108 F.3d 799, 805 (7th Cir. 1997)*. Although we reject the analytical framework used in *Armada*, we note that it would not necessarily lead to a different result here because Plaintiffs resided in China when Defendants are alleged to have engaged in the conduct Plaintiffs rely upon for RICO liability.

[106] *Id. at 1095*.

[107] *Id.*

[108] *See, e.g., id.* (collecting cases); *see also* *Global Fin. Corp. v. Triarc Corp., 93 N.Y.2d 525, 715 N.E.2d 482, 485, 693 N.Y.S.2d 479 (N.Y. 1999)* ("When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss.").

The Supreme Court anticipated that the RICO domestic injury inquiry would not always be susceptible to easy resolution. The Court explained that "[t]he application of [the domestic injury rule] in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is 'foreign' or 'domestic.'"[109] Moreover, we think the *Armada* rule is too inflexible to be useful in resolving cases where the nature of the injured property interest is not "self-evident."[110]

Armada's residency-based rule also effectively precludes all foreign plaintiffs alleging intangible injuries from recovering under *§ 1964(c)* regardless of their alleged connection with the United States. ***HN17***[] "It cannot be the case that the mere fact that a loss is economic means that **[**31]** foreign corporations are unable to avail themselves of the protections of civil RICO, even in cases where all of the actions causing the injury took place in the United States."[111] There is no evidence that Congress meant to so preclude foreign corporations from the protection offered by *§ 1964(c)* and doing so conflicts with the Supreme Court's recognition that "Congress did not limit RICO to domestic enterprises."[112]

We next address Plaintiffs' contention that, notwithstanding factors supporting a finding that the alleged injury was foreign, they have nonetheless alleged a domestic injury because "the alleged underlying RICO conduct plainly was both targeted at, and was intended to have substantial effects in, the United States."[113] We disagree.

As we mentioned at the outset, a minority of courts have suggested that a plaintiff can show that it has suffered a domestic injury by merely pointing to misconduct that occurred in, or was directed to, the United States. However, those cases are also not helpful here and do not establish the domestic injury that Plaintiffs claim. Plaintiffs contend *Akishev v. Kapustin*[114] **[*710]** relied on this so-called "location of the injury-inducing conduct" test.[115] The plaintiffs there **[**32]** were citizens of multiple foreign countries who were fraudulently induced to make online purchases of used cars from the defendant's U.S. dealership.[116] The plaintiffs alleged no other connection to the United States. The court found that the location of the fraudulent conduct was *an* important factor in determining whether there was a "domestic injury," because the case arose in the context of an online sale. The court reasoned that "[i]f [the] plaintiffs [had] traveled to the United States, went to the physical location of [the defendant's] purported car dealerships . . . chose a car, paid for it on the spot, and arranged for the car to be shipped to Eastern Europe, [the] plaintiffs would have suffered from a clear domestic injury when [the defendant] failed to deliver the car and failed to return plaintiffs their money."[117] The case may well be helpful when allegations involve the tenaciously difficult question of where misconduct in cyberspace occurs. However, it is of limited assistance here.

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[109] *RJR Nabisco, 136 S. Ct. at 2111*.

[110] *Id.*

[111] *Tatung Co., Ltd., 217 F. Supp. 3d at 1155*.

[112] *RJR Nabisco, 136 S. Ct. at 2104*.

[113] Plaintiffs' Br. 35.

[114] *2016 U.S. Dist. LEXIS 169787, 2016 WL 7165714 at *1 (D.N.J. Dec. 8, 2016)*.

[115] Plaintiffs' Br. 32-33.

[116] *Akishev, 2016 U.S. Dist. LEXIS 169787, 2016 WL 7165714 at *7*.

[117] *Id.*

We do note, however, that "the court [ultimately] appeared to focus on where plaintiffs' injuries were felt—*i.e.*, on defendant's United States-based website and, therefore, in the United States." **[**33]** [118] To this extent, *Akishev's* actual holding relies on the "locus of effects" approach discussed above and does not itself compel the adoption of an approach that places undue emphasis on the location of the alleged injury-inducing misconduct.

Plaintiffs also rely on *Tatung Co., Ltd. v. Shu Tze Hsu*[119] and claim that it emphasizes that the location of a defendant's conduct is important in determining whether a domestic injury has been alleged. Even so viewed, *Tatung* does not support Plaintiffs' contention. The foreign plaintiff maintained a "hub" of business in the United States and extended credit and delivered goods to one of the defendants within the United States.[120] When the defendant defaulted on its credit obligation, the plaintiff was awarded a judgment through arbitration in California.[121] The plaintiff subsequently alleged a RICO conspiracy to siphon funds from the defendant's corporation and render it an empty shell in order to avoid the judgment.[122] The court found that RICO civil liability was appropriate because "the defendants specifically targeted their conduct at California with the aim of thwarting [the plaintiff's] rights in California."[123] The court found **[**34]** a domestic injury because the plaintiff had a domestic judgment entitled to the protection of United States law.[124] The *Tatung* plaintiff also maintained substantial business operations within the United States and contractually availed itself of dispute resolution via arbitration within the United States.[125] Consequently, the plaintiff in that case could plausibly argue that its United States-based business was harmed by the defendants' RICO conduct **[*711]** and that it suffered a domestic injury because it felt the impact of that injury within the United States.

Finally, Plaintiffs rely upon *Union Commercial Services. Ltd. v. FCA International Operations LLC*'s suggestion that a plaintiff could allege a domestic injury under RICO by simply pointing to injurious conduct intended to produce effects in the United States.[126] They contend that "the alleged underlying RICO conduct [here] plainly was both targeted at, and was intended to have substantial effects in, the United States" because "[a] central goal of the alleged racketeering conduct was to avoid detection and further sanctions from U.S. regulators and criminal authorities . . . ."[127] In *Union Commercial*, the court relied upon cases decided in the **[**35]** context of ***antitrust law*** and concluded that courts must ask "whether a defendant's conduct is intended to or has produced 'substantial effects' in the United States."[128][129] The court found that the plaintiff suffered no "domestic injury" because the

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[118] *Cevdet Aksut Ogullari Koll. STI, 245 F. Supp. 3d at 657* (citing *Akishev, 2016 U.S. Dist. LEXIS 169787, 2016 WL 7165714 at 8**).

[119] *217 F. Supp. 3d 1138, 1155 (C.D. Cal. 2016)*.

[120] *Id. at 1155*.

[121] *Id. at 1156*.

[122] *Id. at 1158*.

[123] *Id. at 1157*.

[124] *Id. at 1156*.

[125] *Id. at 1155-56*.

[126] *No. 16-CV-10925, 2016 U.S. Dist. LEXIS 156098, 2016 WL 6650399, at *4 (E.D. Mich. Nov. 10, 2016)*.

[127] Plaintiffs' Br. 35.

[128] *Union Commercial Servs. Ltd., 2016 U.S. Dist. LEXIS 156098, 2016 WL 6650399 at *4*.

[129] *RJR Nabisco* observed that ***HN18***[] "[t]here is good reason not to interpret *§ 1964(c)* to cover foreign injuries just because the *Clayton Act*[, a federal antitrust statute,] does so." *RJR Nabisco, 136 S.Ct. at 2109*. First, the Clayton Act explicitly authorizes

"defendants' alleged conduct was directed at, and any effects were felt by, plaintiff's business or property interests outside of the United States."[130] Here again, even though the court emphasized the nature of the defendant's conduct, it focused on the fact that the effects of the alleged harm were felt outside the United States.

Given the numerous factors we have discussed that converge to paint a picture of an injury in China and not in the United States, the individual circumstances that Plaintiffs rely on cannot establish a domestic injury.

IV.

[36]** For the foregoing reasons, we will affirm the judgment of the District Court.

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foreign entities to bring suit under the statute. *Id.* Further, and as the Court described in *F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*, the *Foreign Trade Antitrust Improvements Act of 1982* excludes from the reach of antitrust laws "most conduct that 'causes only foreign injury.'" *RJR Nabisco, 136 S.Ct. at 2109* (citing *Empagran, 542 U.S. at 158*).

[130] *Union Commercial Servs., 2016 U.S. Dist. LEXIS 156098, 2016 WL 6650399, at *5*.

Chaiwong v. Hanlees Fremont, Inc.

United States District Court for the Northern District of California

September 27, 2018, Decided; September 27, 2018, Filed

Case No. 16-cv-04074-HSG

Reporter
2018 U.S. Dist. LEXIS 166884 *; 2018 WL 4677600

WEERACHAI CHAIWONG, Plaintiff, v. HANLEES FREMONT, INC., et al., Defendants.

Subsequent History: Reconsideration denied by, Remanded by *Weerachai Chaiwong v. Hanlees Fremont, Inc., 2019 U.S. Dist. LEXIS 74554 (N.D. Cal., May 2, 2019)*

Prior History: *Chaiwong v. Hanlees Fremont, Inc., 2017 U.S. Dist. LEXIS 142318 (N.D. Cal., Sept. 1, 2017)*

Core Terms

lease, motion to dismiss, terminated, scheduled, unfair, cross-claims, mileage, allegations, end date, wear, leave to amend, courts

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Judges: HAYWOOD S. GILLIAM, JR., United States District Judge.

Opinion by: HAYWOOD S. GILLIAM, JR.

Opinion

ORDER GRANTING MOTIONS TO DISMISS AND SETTING CASE MANAGEMENT CONFERENCE

Re: Dkt. Nos. 60, 66

Pending before the Court is Defendant Ally Financial, Inc.'s ("Ally") motion to dismiss Plaintiff Weerachai Chaiwong's ("Plaintiff") second amended complaint ("SAC"), Dkt. No. 60, as well as Ally's motion to dismiss **[*2]** the cross-claims of its co-Defendant Hanlees Fremont, Inc. ("Hanlees"), Dkt. No. 66. Having carefully considered the parties' papers, the Court **GRANTS** both motions for the reasons set forth below.[1]

I. BACKGROUND

The Court dismissed Plaintiff's first amended complaint and Hanlees' cross-claims on September 1, 2017. *See* Dkt. No. 55. The Court granted leave to amend, despite being "skeptical that Plaintiff or Hanlees" would be able to plead additional facts sufficient to survive a second motion to dismiss. *Id.* at 9:19. The Court's skepticism was warranted, as Plaintiff and Hanlees have pled essentially the same facts and still fail to state a claim upon which relief can be granted.

A. Factual Background

For purposes of this motion to dismiss, the Court accepts the following facts as true. Plaintiff leased a Chevrolet Equinox from Fremont Chevrolet on June 22, 2010. SAC, Dkt. No. 57, ¶¶ 29-32. The lease agreement listed the "Scheduled Lease End Date" as September 21, 2013. *Id.* ¶ 34 & Ex. 3 at 4.[2] However, the lease also stated that "[i]f this lease ends on or after the last scheduled payment is due, we will treat the lease as if it ended as scheduled and not as if it ended early" (the "Treat **[*3]** As" clause). *Id.* Ex. 3 at 4. The lease also stated that at lease end Plaintiff would owe "any excess mileage charge, any lease end daily extension charge, and [Ally's] estimated or actual cost of repairing excess wear, plus any tax," but that Plaintiff was free to terminate the lease "anytime" prior to its scheduled end date, though early termination fees would then apply. *Id.*

Prior to Plaintiff's termination of the lease, Ally accepted assignment of the contract. *Id.* ¶ 32. On September 19, 2013, Plaintiff attempted to "trade" the vehicle in to Defendant Hanlees, a third-party dealership, in connection with the lease of a Hyundai Santa Fe, rather than returning the vehicle to Ally directly. *Id.* ¶ 36. Plaintiff claims that Hanlees "represented to Plaintiff that it was authorized to accept the [Equinox] as a trade-in vehicle." *Id.* ¶ 39. Plaintiff also claims that as a result of his alleged "trade-in" of the vehicle, Hanlees became responsible for paying Ally the $17,543.50 to buy out the lease, but Hanlees only issued a check to Ally in the amount of $15,736.00. *Id.* ¶ 44.

While Hanlees initially indicated that it wished to purchase the Equinox, Ally mistakenly repossessed the **[*4]** vehicle in October 2013, causing Hanlees to change its mind, and Ally issued Hanlees a refund of the $15,736.00 check. Dkt. No. 61 ¶¶ 76-81; SAC Ex. 2. Because Plaintiff relinquished the Equinox two days prior to the "Scheduled Lease End Date" listed in the contract, Plaintiff believed he was terminating his lease with Ally early. SAC ¶ 36. However, because Plaintiff had already made the final payment on the lease, Ally treated the lease as if it had ended as scheduled, and charged Plaintiff $9,712.76 for excess wear and mileage and related sales/use taxes. *Id.* ¶ 49.

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[1] The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b).

[2] Under the incorporation by reference doctrine, a court may consider a document extrinsic to the complaint in deciding a Rule 12(b)(6) motion if the document's "authenticity is not contested and the plaintiff's complaint necessarily relies on" it. *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)* (citing *Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)*); *see also United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)* (document may be incorporated by reference "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim"). When a document is incorporated by reference, "the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *Ritchie, 342 F.3d at 908*. The Court thus deems Exhibits 1-4 to the SAC to be incorporated by reference.

Within a few months of "trading" the vehicle in, "Plaintiff began receiving calls from Defendant Ally stating that he was delinquent on payments for the lease of the Chevrolet." SAC ¶ 45. Plaintiff "notified [] Ally that he had traded in the Chevrolet to [] Hanlees." *Id.* In addition, Plaintiff "immediately" notified Hanlees of the issue and "requested that [] Hanlees fulfill its contractual obligation to pay off any remaining lease balance on the Chevrolet" to Ally. *Id.*

A. Procedural History

Plaintiff filed suit against Ally and Hanlees in the Superior Court of California on May 25, 2016. Dkt. No. 1 Ex. 1. On July 20, 2016, **[*5]** the action was removed to this Court under the *Class Action Fairness Act*. *Id.* at 1. Plaintiff filed a first amended individual and class action complaint on September 1, 2016 ("FAC"). Dkt. No. 19. Hanlees answered the FAC and asserted several cross-claims against Ally. *See* Dkt. No. 25. Ally moved to dismiss both Plaintiff's and Hanlees' claims. *See* Dkt. No. 21, 36. The Court granted Ally's motions on September 1, 2017, but gave Plaintiff and Hanlees leave to amend. Dkt. No. 55.

Plaintiff filed its second amended individual and class action complaint on September 29, 2017. *See* SAC, Dkt. No. 57. The SAC alleges three claims against Ally, including (1) violation of the *Unfair Competition Law ("UCL") Business and Professions Code § 17200* by committing unfair and unlawful acts, *id.* ¶¶ 92-102; (2) violation of the Rosenthal *Fair Debt Collection Practices Act ("FDCPA")*, *id.* ¶¶ 103-20; and (3) declaratory relief, *id.* ¶¶ 121-27. The SAC also asserts claims against Hanlees arising out of Hanlees' alleged misrepresentation to Plaintiff that it would pay off the balance of the Equinox after Plaintiff traded the vehicle in for the Hyundai. *Id.* ¶¶ 66-91.

In its answer to the SAC, Hanlees asserted several cross-claims **[*6]** against Ally, including (1) violation of the UCL *Business and Professions Code § 17200* by committing unlawful, unfair, and deceptive acts, Dkt. No. 61 ¶¶ 95-114; (2) equitable indemnity, *id.* ¶¶ 115-18; and (3) intentional interference with prospective economic advantage, *id.* ¶¶ 119-26.

Ally filed a motion to dismiss Plaintiff's claims, Dkt. No. 60, and a motion to strike or dismiss Hanlees' claims, Dkt. No. 66. Plaintiff responded in opposition, Dkt. No. 63, and Ally replied, Dkt. No. 65. Hanlees responded in opposition, Dkt. No. 69, and Ally replied, Dkt. No. 70.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under *Federal Rule of Civil Procedure 12(b)(6)*. "Dismissal under *Rule 12(b)(6)* is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*. To survive a *Rule 12(b)(6)* motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant **[*7]** is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. Nonetheless, Courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Secs. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*.

Federal Rule of Civil Procedure 9(b) heightens these pleading requirements for all claims that "sound in fraud" or are "grounded in fraud." *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)* (citation omitted); *Fed. R. Civ. P. 9(b)* ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). "[The Ninth Circuit] has interpreted *Rule 9(b)* to require that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir. 1993)* (quotation marks and citation omitted).

III. ANALYSIS

B. Ally's Motion to Dismiss the SAC

The Court was skeptical that Plaintiff could plead new facts in its second amended complaint that would change the Court's analysis — and that skepticism was borne out. Plaintiff's second amended **[*8]** complaint contains nearly identical factual allegations to the prior dismissed complaint, with the only notable additions being a longer explanation of the mechanics of car leases and added legal conclusions. *See* SAC ¶¶ 9-28.

Just as before, each of Plaintiff's claims against Ally rests on the same flawed contention: that Plaintiff terminated his lease with Ally early when he "traded" his Equinox in for a Hyundai two days prior to the scheduled lease end date. Despite Plaintiff's protestations that "the VLA excludes multiple or alternative lease end dates," Dkt. No. 63 at 8, such an interpretation is flatly belied by the Code itself. *See* *Cal. Civ. Code § 14(a)* ("the singular number includes the plural, and the plural the singular"). This Court reaffirms its finding that the Treat As clause in the lease established alternative scheduled end dates, such that Plaintiff's September 19, 2013 return of the vehicle did not constitute an early termination. Because Plaintiff ended the Equinox lease on time, rather than early, *Sections 2987(a)* and *(f)(2)* of the *Vehicle Leasing Act ("VLA")* do not apply.

Plaintiff claims that Ally's actions were unlawful or unfair under the UCL. To state a claim based on unlawful business practices under **[*9]** the UCL, a plaintiff must allege that a defendant violated an underlying law. *Finuliar v. BAC Home Loans Serv. Corp, LLP, No. C-11-02629 JCS, 2011 U.S. Dist. LEXIS 107324, 2011 WL 4405659, at *9 (N.D. Cal. Sept. 21, 2011)*. But Ally cannot have violated the VLA as alleged, because the sections of the VLA Plaintiff relies upon apply only to leases that were terminated early.

Nor has Plaintiff adequately alleged that Ally's actions were unfair. Although California courts are split as to the definition of "unfair" under the UCL, because Ally was complying with the express terms of the contract when it treated Plaintiff's return of the vehicle as a scheduled termination, Plaintiff has alleged no facts that could establish that Ally's conduct was unfair.[3] *See* *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1169-1170 (9th Cir. 2012)* (holding that while "the proper definition of 'unfair' conduct against consumers is currently in flux among California courts," the consumer's "fail[ure]to read the terms and conditions before agreeing to them" begged the conclusion that "any harm he suffered was the product of his own behavior, not the advertisements" at issue) (internal quotation omitted).

Just as before, Plaintiff contends that Ally violated the *FDCPA* by making "false representations to Plaintiff of the character, amount, or legal status of the alleged debt **[*10]** of $9,187.76," making "false representations to the Law Offices of Patenaude & Felix of the character, amount, or legal status of the alleged debt," and "[a]ttempt[ing] to collect the alleged debt . . . owed by Plaintiff that was not permitted by the California VLA." SAC ¶ 114. Because the

[3] California Courts have contemplated three tests to determine whether a practice was "unfair" in consumer-filed UCL actions. A practice is considered unfair when (1) "the consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided," *Daugherty v. Am. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 839, 51 Cal. Rptr. 3d 118 (2006)*; (2) the practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers," *Smith v. State Farm Mutual Auto. Ins. Co., 93 Cal. App. 4th 700, 719, 113 Cal. Rptr. 2d 399 (2001)* (citations omitted); or (3) "the public policy which is a predicate to the action [is] tethered to specific constitutional, statutory or regulatory provisions," *Scripps Clinic v. Superior Court, 108 Cal. App. 4th 917, 940, 134 Cal. Rptr. 2d 101 (2003)* (internal quotation marks omitted).

Court has already found that Plaintiff terminated the lease on time, his claim that Ally improperly charged and attempted to collect the fees owed to it for excess wear and mileage fails as a matter of law.

Finally, and for the same reasons discussed above, the Court declines to consider Plaintiff's declaratory relief claim, which requests that the Court use its discretion to declare, among other things, that he terminated the lease early, and is not liable for the excess wear and mileage owed under the lease. SAC ¶ 126; *Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 533 (9th Cir. 2008)* (citations omitted) ("Federal courts do not have a duty to grant declaratory judgment; therefore, it is within a district court's discretion to dismiss an action for declaratory judgment.").

The Court **GRANTS** Ally's first motion to dismiss in full, without leave to amend.

A. Ally's Motion to Dismiss Hanlees' Cross-Claims

To begin, Hanlees' cross-claims against Ally are untimely. The **[*11]** Court set a deadline of September 30 to amend the cross-complaint, *see* Dkt. No. 55, but Hanlees did not file until October 27, *see* Dkt. No. 61. Hanlees has provided no valid reason for this delay. This Court could exercise its discretion to dismiss Hanlees' cross-claims for failure to comply with the deadline. *See Fed. R. Civ. P. 41(b)*; *Yourish v. California Amplifier, 191 F.3d 983, 986 (9th Cir. 1999)*. However, the late filing is of little consequence, because Hanlees fails to state a claim upon which relief can be granted.

First, Hanlees claims that Ally violated UCL Business and Professions Code § 17200 by committing unlawful, unfair, and deceptive acts, Dkt. No. 61 ¶¶ 95-114. Once again, the Court need not reach the issue of Hanlees' standing to bring a UCL claim, because even assuming that Hanlees has standing, it fails to plead facts sufficient to establish a UCL violation. Hanlees alleges that Ally violated "California laws limiting prohibitions on assignment" because it refused to "honor Plaintiff's right to trade in the" Equinox or to "accept[] Hanlees' full payoff" of the Equinox. *Id.* ¶¶ 98-99, 107. But Hanlees' legal theory is irreconcilable with its allegations that it "paid Ally the entire agreed balance," *id.* ¶ 71, "Ally accepted and cashed the Payoff Check in full satisfaction," *id.* ¶ 74, and **[*12]** "Ally acknowledged to Hanlees that Ally had no right to possession of the [Equinox] at the time of the [repossession]," *id.* ¶ 81. In other words, Hanlees attempts to allege both that Ally illegally prohibited assignment to Hanlees and that Ally acknowledged the validity of the assignment to Hanlees. *See also* SAC Ex. 2.

Nor was Ally's conduct unfair as alleged. To demonstrate unfairness as a competitor in its amended cross-claim, Hanlees would have needed to allege facts that show that Ally's conduct "threaten[ed] an incipient violation of an ***antitrust law***, or . . . violate[d] the policy or spirit of one of those laws because its effects [were] comparable to a violation of the law, or [] otherwise significantly threaten[ed] or harm[ed] competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 183, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Hanlees alleges that Ally has imposed "mileage and condition penalties" and made "unlawful overage claims" that have damaged Hanlees' business and reputation. Dkt. No. 61 ¶ 106. But Ally was well within its right to collect the excess wear and mileage fees based on the express terms of the contract. Hanlees fails to allege facts sufficient to establish that Ally's attempt to collect fees that were owed to it either violated an ***antitrust* [*13] *law***, violated the spirit of any such law, or "otherwise significantly threaten[ed] or harm[ed] competition." *Cel-Tech Commc'ns, 20 Cal. 4th at 183*.

Finally, in order to establish that Ally's acts were fraudulent under the UCL, Hanlees must plead facts that establish that Ally's conduct was likely to deceive members of the public. *Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1267, 10 Cal. Rptr. 2d 538, 833 P.2d 545 (1992)*. Once again, Hanlees contends that Ally's acts served to "[s]ystematically misrepresent[] to potential customers of Hanlees that they cannot trade in their vehicles leased from Ally without mileage and condition penalties." Dkt. No. 61 ¶ 106. However, because Plaintiff has not adequately alleged that he terminated the lease early and the lease agreement explicitly states that Ally's customers may be charged for excess wear or mileage at lease end, this claim also fails. *See Walker v. Countrywide Home Loans, Inc., 98 Cal. App. 4th 1158, 1178, 121 Cal. Rptr. 2d 79 (2002)* (affirming finding that

Plaintiffs were not "likely to be deceived" under the UCL where "deed of trust contained language sufficient to notify the [plaintiffs] that such fees could be imposed on them").

Just as in its original cross-complaint, Hanlees asserts claims for equitable indemnity and indemnification under the UCL, contending that because Plaintiff's claims "in the [SAC] arise from a series of related transactions **[*14]** in which both Hanlees and Ally are alleged to have been involved, . . . to the extent that Hanlees and Ally may be found to be jointly and severally liable . . . Ally should be determined to be entirely responsible and liable for all damages that Plaintiff may be found to have suffered." Dkt. No. 61 ¶¶ 115-18. Hanlees' claims for indemnification fail because Hanlees does not allege facts sufficient to establish that Ally violated a duty to Plaintiff when it followed the express terms of the lease agreement in treating Plaintiff's September 19, 2013 "trade-in" of the Equinox as a scheduled termination.

Finally, Hanlees brings the exact same claim of intentional interference with prospective economic advantage as it did in its first cross-complaint. Dkt. No. 61 ¶¶ 119-26. Just as before, that claim is time-barred. The statute of limitations for intentional interference claims is two years, but Hanlees waited until May 25, 2016 to file claims arising out of a 2013 alleged violation. *Cal. Code Civ. Proc. § 339*; Dkt. No. 1, Ex. 1; *Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482, 484 n.1 (9th Cir. 1987)* (holding that a statute of limitations defense may be raised by a motion to dismiss if "the running of the statute is apparent on the face of the complaint").

The Court **GRANTS** Ally's second **[*15]** motion to dismiss in full, without leave to amend.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** both of Ally's motions to dismiss, without leave to amend.

The Court **SETS** a case management conference for October 24, 2018 at 2:00 p.m. Plaintiff and Hanlees shall meet and confer and file a joint case management statement, in compliance with *Civil Local Rule 16-9(a)*, by October 17. In the statement, the parties must include a proposed case schedule for the prompt resolution of what remains of this action.

IT IS SO ORDERED.

Dated: 9/27/2018

/s/ Haywood S. Gilliam, Jr.

HAYWOOD S. GILLIAM, JR.

United States District Judge

[In re Qualcomm Antitrust Litig.]

United States District Court for the Northern District of California, San Jose Division

September 27, 2018, Decided; September 27, 2018, Filed

Case No. 17-MD-02773-LHK

Reporter

328 F.R.D. 280 *; 2018 U.S. Dist. LEXIS 168484 **; 101 Fed. R. Serv. 3d (Callaghan) 1662; 2018-2 Trade Cas. (CCH) P80,542; 2018 WL 11448026

IN RE: QUALCOMM ANTITRUST LITIGATION

Subsequent History: Appeal granted by, Motion granted by *Stromberg v. Qualcomm Inc., 2019 U.S. App. LEXIS 2230 (9th Cir. Cal., Jan. 23, 2019)*

Vacated by, Remanded by *Stromberg v. Qualcomm Inc., 2021 U.S. App. LEXIS 29395 (9th Cir. Cal., Sept. 29, 2021)*

Prior History: *In re Qualcomm Antitrust Litig., 273 F. Supp. 3d 1373, 2017 U.S. Dist. LEXIS 52784, 2017 WL 1282907 (J.P.M.L., Apr. 5, 2017)*

Core Terms

modem, chips, Plaintiffs', license, cellular, pass-through, damages, royalty, manufacturers, predominance, handsets, prices, overcharge, consumers, class member, purchasers, calculate, antitrust, carriers, retailers, phones, practices, royalty rate, network, communications, above-FRAND, wireless, methodology, indirect, costs

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Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

[*285] ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; DENYING QUALCOMM'S MOTION TO STRIKE THE DECLARATION OF KENNETH FLAMM

Re: Dkt. Nos. 524, 643

Plaintiffs Sarah Key, Terese Russell, Carra Abernathy, Leonidas Miras, and James Clark (collectively, "Plaintiffs") bring a putative class action against Defendant Qualcomm Incorporated ("Qualcomm") alleging antitrust violations. Before the Court are (1) Plaintiffs' motion for class certification; and (2) Qualcomm's motion to strike the declaration of Kenneth Flamm. Having considered the parties' briefing, the relevant law, and the record in this case, the Court GRANTS Plaintiffs' motion for class certification and DENIES Qualcomm's motion to strike the declaration of Kenneth Flamm.

I. BACKGROUND

A. Factual Background

This case requires understanding the complicated interaction between cellular communications standards, standard essential patents ("SEPs"), and the market for baseband processors, **[**17]** or "modem chips." The Court begins by discussing cellular communications standards and modem chips generally. Then, the Court discusses Qualcomm's cellular communications SEPs and Qualcomm's participation in the markets for modem chips. **[*286]** Next, the Court discusses Plaintiffs' allegations that Qualcomm has used its cellular SEPs and its modem chips monopoly to harm competition in certain modem chips markets. Finally, the Court discusses Plaintiffs' allegations that Qualcomm's conduct has caused them harm by raising the prices paid for products containing modem chips.

1. Cellular Technology and the Baseband Processor Industry Generally

i. Cellphone Networks

Cellular communications depend on widely distributed networks that implement cellular communications standards. ECF No. 490 ("FAC") ¶ 33. Cellular communications standards have evolved over four "generations." *Id.* ¶ 35. "First-generation cellular communications standards were developed in the 1980s. These standards support analog transmissions of voice calls." *In re Qualcomm Antitrust Litig., 292 F. Supp. 3d 948, 955 (N.D. Cal. 2017)* (citation omitted).

Second-generation ("2G") cellular communications were developed in the early 1990s. FAC ¶ 36. 2G cellular communications standards support digital transmissions **[**18]** of voice calls. *Id.* The leading 2G standards are the Global System for Mobile Communications standard ("GSM") and second generation Code Division Multiple Access standard ("2G-CDMA"). *Id.* AT&T and T-Mobile chose to operate GSM networks. *Id.* By contrast, Verizon and Sprint operate 2G-CDMA networks. *Id.*

In the late 1990s, third-generation ("3G") cellular communications standards were introduced. *Id.* ¶ 37. The leading 3G standards are the Universal Mobile Telecommunications System ("UMTS") and third-generation CDMA ("3G-CDMA") standards. *Id.* Network operators that deployed 2G GSM networks, such as AT&T and T-Mobile, transitioned to 3G UMTS networks. *Id.* By contrast, network operators that deployed 2G-CDMA networks, such as Verizon and Sprint, transitioned to 3G-CDMA networks. *Id.*

In late 2009, fourth-generation ("4G") cellular communications standards were introduced. *Id.* ¶ 38. These standards support substantially higher data-transmission speeds than 3G standards. *Id.* The leading 4G standard is Long-Term Evolution ("LTE"). *Id.* Most major network operators worldwide have deployed LTE. *Id.*

ii. Standard Essential Patents

Cellular communications standards, such as CDMA and LTE standards, are **[**19]** adopted by standards setting organizations ("SSOs"). *Id.* ¶ 34. SSOs that adopt cellular telecommunications standards include the European Telecommunication Standards Institute ("ETSI"), the Telecommunications Industry Association ("TIA"), and the International Telecommunications Union ("ITU"). *Id.* ¶ 35.

In setting a cellular communications standard, SSOs often include technology in the cellular communications standard that is patented. Patents that cover technology that is incorporated into a standard are known as "standard essential patents" ("SEPs"). *Id.* ¶ 34.

Importantly, before incorporating a technology into a standard, SSOs "require participants to publicly disclose any claimed SEPs and promise to license [SEPs] to anyone who practices the standard on a royalty-free or [fair, reasonable, and non-discriminatory ('FRAND')] basis." *Id.* ¶ 45. "Absent [such] safeguards, SEP holders could abuse the standard-setting process via 'patent hold-up,' which happens 'when the holder of a[n] [SEP] demands excessive royalties after companies are locked into using a standard.'" *Id.* ¶ 43 (citation omitted).

iii. Baseband Processors

In order to communicate with a cellular communications network, a **[**20]** cellphone handset ("handset") must contain a semiconductor device known as a baseband processor, or "modem chip." *Id.* ¶ 33. More specifically, in order to communicate with a *particular* cellphone network, the handset must contain a modem chip that complies with the cellular communications standards that the particular cellphone network supports. *Id.* For example, a handset that contains a modem chip that complies only with UMTS standards cannot communicate with a cellular network that uses 3G-CDMA standards. "Multi-mode" modem **[*287]** chips can comply with more than one cellular communications standard. *Id.*

To be used on a network that deploys LTE—the leading 4G standard used by major cellular network operators—the handset must ordinarily contain a modem chip that complies with LTE standards and is also "backward compatible" with 2G and 3G standards. *Id.* ¶ 41. This is because network operators have "continued to use the prior standards" and "have not yet replaced their 2G and 3G infrastructure with the new 4G infrastructure." *Id.* Accordingly, most manufacturers "must purchase multimode chips in order to make [handsets] that can function on the major U.S. wireless networks." *Id.*

iv. Cellular Handset [21] Tiers and Smartphones**

Cellular handsets are produced by original equipment manufacturers ("OEMs") such as Apple and Samsung. *Id.* ¶¶ 1-2, 39. Since the late 2000s, the market for handsets with advanced computing capability, such as smartphones and tablets, has "grown tremendously." *Id.* ¶¶ 2-3.

Competition in the manufacturing and sale of handsets has developed over time into "tiers": premium, mid, and low. *Id.* ¶ 39. "Premium"-tier smartphones include brands such as Apple's iPhone and Samsung's Galaxy-S. *Id.* Premium smartphones are of particular importance to OEMs because they "tend to have higher prices and margins than lower-tier products and are important for branding." *Id.*

Among the cellular communications standards discussed above, "LTE functionality, including its high data transmission speed, is central to modern [handsets], as consumers increasingly use them to transmit large volumes of data." *Id.* ¶ 40. Specifically, LTE allows for the transmission of large volumes of data, which has grown increasingly more important than cellular voice traffic. *Id.*

2. Qualcomm's Participation in the Modem Chip Market

Qualcomm is the leading supplier of modem chips worldwide. *Id.* ¶ 7. In particular, **[**22]** Qualcomm is dominant in the supply of two types of modem chips: (1) modem chips that comply with CDMA standards ("CDMA modem chips"); and (2) modem chips for use in premium tier handsets, which comply with advanced LTE standards ("premium-LTE modem chips"). *Id.*

i. CDMA Chips

First, Qualcomm has been particularly dominant in the supply of CDMA modem chips. *Id.* ¶¶ 57-58. As set forth above, major carriers such as Verizon and Sprint have deployed CDMA networks. *Id.* ¶ 36. OEMs that wish to manufacture handsets to operate on CDMA networks such as Verizon and Sprint must use modem chips that comply with CDMA standards.

Qualcomm is the dominant supplier of CDMA modem chips. From 2001 through 2015, Qualcomm's worldwide share of CDMA modem chips exceeded 80%. *Id.* ¶ 57. At the time of the FAC, it was also estimated that "Qualcomm's worldwide share of the CDMA [modem] chip market for 2016 [was] likely to exceed or at least meet its historically greater than 80% share of the market." *Id.*

Qualcomm faces "limited competition for the supply of CDMA" modem chips. *Id.* ¶ 58. In the past ten years, "the only supplier of CDMA [modem chips] other than Qualcomm was Via Technologies," a Taiwanese company. *Id.* ***[**23]*** (citation omitted). However, Via Technologies has focused its sales on the lower-tier handset market, rather than the premium market. *Id.* This is partly because Via Technologies has not offered multi-mode modem chips "that combine CDMA functionality with UMTS or LTE functionality." *Id.* (citation omitted). In 2015, Intel Corporation ("Intel") acquired Via Technology's CDMA modem chip business. *Id.* However, Intel "has not yet commercialized a [modem] chip that integrates Via [Technology]'s CDMA technology" with "Intel's [own] multi-mode [modem chip] technologies." *Id.*

Another Taiwanese company, MediaTek Inc. ("MediaTek"), licensed technology from Via Technologies in late 2013 and began to offer CDMA modem chips in 2015. *Id.* However, MediaTek has not offered multi-mode CDMA modem chips that are "suitable for use in flagship handsets." *Id.* (citation omitted). **[*288]** Overall, MediaTek's sale of CDMA modem processors has been small. *Id.*

ii. Premium-LTE Modem Chips

As discussed above, most cellular network operators have deployed LTE networks. *Id.*

¶ 59. This includes major U.S. cellular network operators such as Verizon, AT&T, T-Mobile, and Sprint. *Id.* LTE functionality has continually advanced since **[**24]** the first LTE network was introduced in 2010. *Id.* These advances have allowed for progressively faster data speeds. *Id.* Accordingly, as LTE technology has progressed, "[modem] chip manufacturers have added advanced features." *Id.* For premium tier handsets, OEMs typically require modem chips with "advanced LTE functionality" that support advanced data download and upload speeds, in addition to other functions. *Id.* For an OEM designing and manufacturing a premium tier handset, a modem chip that supports only earlier LTE technology is not a substitute for a modem chip that supports advanced LTE standards. *Id.* Accordingly, just as OEMs produce handsets in "tiers," competition among LTE modem chip manufacturers also occurs in tiers. *Id.* ¶ 60.

Qualcomm has consistently been the dominant supplier of premium LTE modem chips. *Id.* ¶ 61. From 2012 through 2014, Qualcomm's annual worldwide share of premium LTE modem chip sales exceeded 80%. *Id.* Although Qualcomm's worldwide share dipped to 69% in 2015, its worldwide share for 2016 "remained at the dominant levels it [had] since 2012." *Id.*

Qualcomm faces limited competition in the premium LTE modem chip market. *Id.* ¶ 62. Indeed, one of Qualcomm's **[**25]** "only competitor[s] in the LTE modem chip market is Intel." *Id.* Intel has begun to supply a portion of Apple's modem chip requirements for the iPhone 7, *id.* ¶ 109, but for many years "Qualcomm effectively blocked Apple from using Intel as a [modem] chip supplier," *id.* ¶ 62.

3. Qualcomm's Cellular Communications SEPs

In addition to supplying modem chips to OEMs, Qualcomm also has several patents that have been declared essential to cellular communications standards. *Id.* ¶¶ 45, 50.

Qualcomm has participated in the cellular standard setting process through SSOs such as ETSI, TIA, and Alliance for Telecommunications Industry Solutions ("ATIS"). *See id.* ¶ 50. "Qualcomm was a leading developer and proponent of 2G-CDMA standards. Qualcomm has a correspondingly high share of all patents declared essential to 2G-CDMA standards. Qualcomm also participated in 3G standard setting, though to a less significant degree." *In re Qualcomm Antitrust Litig., 292 F. Supp. 3d at 957-58* (citation omitted). Qualcomm "had a smaller share of SEPs related to the UMTS and 3G-CDMA standard than its share of the 2G-CDMA SEPs." FAC ¶ 37. Qualcomm's share of SEPs in LTE standards "is much lower" than Qualcomm's share of CDMA SEPs. *Id.* ¶ 38. Qualcomm's share of LTE SEPs "is **[**26]** roughly equivalent to that of other industry competitors." *Id.* "One study of declared LTE SEPs found that Qualcomm had a 13% share of 'highly novel' essential LTE patents, compared to 19% for Nokia and 12% for both Ericcson and Samsung." *Id.*

Qualcomm has committed "to ETSI, TIA, [ATIS], and other SSOs that it w[ill] license its cellular SEPs" on FRAND terms. *Id.* ¶ 50. "Qualcomm is thus required to license its cellular SEPs on FRAND terms to [handset] OEMs, as well as competing [modem] chip suppliers." *Id.* ¶ 52. In practice, however, Qualcomm licenses its cellular SEPs to OEMs, but Qualcomm "refuses" to license its cellular SEPs to competing modem chip manufacturers. *Id.* ¶ 65.

In licensing its cellular SEPs to OEMs, Qualcomm collects a royalty rate of approximately 5% of the value of the net selling price of the handset. *Id.* ¶ 13. For example, if an OEM sells a handset that is priced at $600, Qualcomm will collect a $30 royalty for each sale. Among SEP holders, Qualcomm garners an outsized share of licensing revenues paid by OEMs, and OEMs pay Qualcomm far more in royalties than OEMs pay other SEP licensors, even those with comparable portfolios of cellular SEPs. *Id.* Indeed, an analysis **[**27]** conducted by Qualcomm in 2015 **[*289]** showed that revenues from Qualcomm's licensing program were "'equivalent in size to the sum of ~12 companies with a form of technology licensing,' including leading cellular SEP licensors such as Ericsson, Nokia, and Interdigital." *Id.* (citation omitted).

4. Qualcomm's Alleged Anticompetitive Conduct

Plaintiffs allege that Qualcomm uses its dominance in the supply of CDMA and premium-LTE modem chips to skew SEP licensing negotiations toward outcomes that benefit Qualcomm and harm Qualcomm's modem chip competitors. *Id.* ¶ 52. Plaintiffs allege that Qualcomm does this through a course of conduct that includes three primary practices: (i) a "no license-no chips" policy; (ii) Qualcomm's refusal to license its cellular SEPs to competing modem chip manufacturers; (iii) Qualcomm's exclusive dealing arrangements with Apple. *Id.* ¶ 53.

i. "No License-No Chips"

As discussed above, Qualcomm's FRAND commitments "require[] [Qualcomm] to license its cellular SEPs on FRAND terms to [handset] OEMs, as well as competing chip suppliers." *Id.* ¶ 52. Nonetheless, Qualcomm refuses to license its cellular SEPs to competing modem chip manufacturers. Thus, competing modem chip manufacturers **[**28]** cannot sell to OEMs modem chips "that convey the rights to Qualcomm's cellular SEPs." *Id.* ¶ 72. Instead, Qualcomm licenses its cellular SEPs to only OEMs who make and sell handsets (or those OEMs' contract manufacturers). *Id.* ¶ 8a. In licensing its cellular SEPs to OEMs, Plaintiffs allege that "Qualcomm conditions OEMs' access to [Qualcomm's modem] chips on [OEMs'] accepting a separate license to Qualcomm's cellular SEPs on Qualcomm's preferred terms." *Id.* ¶ 74. Essentially, unless OEMs agree to take out a separate SEP licensing agreement with Qualcomm on Qualcomm's preferred terms that covers all of the handsets that the OEM sells, Qualcomm will not supply the OEM with any Qualcomm modem chips. *Id.* Plaintiffs call this practice Qualcomm's "no license-no chips" policy. *Id.*

Plaintiffs allege that Qualcomm's conduct is unique among modem chip suppliers and suppliers of other cellular-equipment components. *Id.* ¶ 85. "Other component suppliers rely on component sales to convey their intellectual property rights to OEM customers, rather than selling the components and also entering into a separate intellectual property license." *Id.* When a supplier sells a component, such as a modem chip, **[**29]** to an OEM, that sale, under the doctrine of patent exhaustion, ordinarily terminates any right of the supplier under patent law to control any further use or sale of the component. *Id.* "Thus, a supplier's sale of a component to an OEM would already exhaust their patent rights, obviating the need—and making it unlawful—to require a separate patent license." *Id.*

Plaintiffs further allege that Qualcomm's "no license-no chips" policy stifles the normal process of negotiating the royalty rates of Qualcomm's FRAND-encumbered cellular SEPs. OEMs have a number of grounds to "attack Qualcomm's royalty demands in court as being non-FRAND." *Id.* ¶ 83. For example, OEMs could argue that Qualcomm's royalties "do not reflect the value contributed by its patented inventions," are much higher than those "charged by other SEP licensors with similar technical contributions," constitute "a percentage of the [entire handset's] price," and "do[] not account for the value of any cross-licensed patents." *Id.* However, Plaintiffs allege that OEMs do not challenge Qualcomm's royalty terms because of Qualcomm's "no license-no chips" policy. *Id.* ¶ 96. Losing access to Qualcomm's modem chips would be a substantial **[**30]** loss to OEMs given Qualcomm's "dominance in CDMA and premium LTE [modem] chips." *Id.* ¶ 95.

Thus, "[t]o maintain access to Qualcomm's [modem] chips, OEMs have been coerced into accepting royalty and other license terms that they would not otherwise accept." *Id.* ¶ 96. Specifically, OEMs pay Qualcomm royalties that "do not reflect OEMs' assessment of patent royalties that a court or neutral arbiter would deem reasonable, including in light of Qualcomm's FRAND commitments." *Id.* "Instead, the royalties reflect Qualcomm's dominant position in the [modem] chip markets, and include the added **[*290]** increment that OEMs pay to Qualcomm to avoid disruption of [modem chip] supply." *Id.*

Plaintiffs call this "added increment"—the incremental above-FRAND royalty that OEMs pay Qualcomm—a "surcharge." *Id.* ¶ 82. This "surcharge" raises an OEM's cost of purchasing any *modem chip* because OEMs consider the "all-in" cost of a modem chip as consisting of two components: (i) the nominal price of the modem chip itself, and (ii) "any patent royalties the OEM must pay to use that [modem] chip in a [handset]." *Id.* ¶ 77. Qualcomm's "surcharge" raises the latter component—the patent royalties to use the modem chip in the **[**31]** handset—for every modem chip that an OEM buys, including the modem chips made by Qualcomm's competitors. *Id.* ¶ 78. "By raising OEMs' all-in cost of using competitors' chips, Qualcomm's conduct has diminished OEMs' demand for such processors, reduced competitors' sales and margins, and diminished competitors' ability and incentive to invest and innovate." *Id.* ¶ 138. Moreover, Qualcomm has also "limited competitors' ability to discipline the all-in prices that Qualcomm charges for [modem chips]." *Id.* ¶ 79. "Th[e] inflated supra-FRAND royalty is ultimately passed onto consumers of [handsets] like Plaintiffs." *Id.* ¶ 96.

In addition, Plaintiffs allege that "Qualcomm can discriminate in its royalties" by "offer[ing] OEMs incentive payments to discount Qualcomm's above-FRAND royalties if an OEM uses Qualcomm's chips as opposed to those of a competitor." *Id.* ¶ 81. Qualcomm can do so based on its accumulation of funds from charging the surcharge. *Id.* ¶ 80. In other words, "the surcharge is a means to extract a higher price for Qualcomm's own chips without being undercut by competing chip manufacturers." *Id.* In this way, the revenue that Qualcomm earns from its surcharge "comes back to Qualcomm **[**32]** as a form of profit and maintains Qualcomm's chip monopoly." *Id.*

ii. Qualcomm's Refusal to License its SEPs to Chip Competitors

As discussed briefly above, Plaintiffs allege that Qualcomm refuses to license its FRAND-encumbered cellular SEPs to competing modem chip manufacturers. Rather, Qualcomm licenses its cellular SEPs only to OEMs who manufacture handsets (or those OEMs' contract manufacturers). *Id.* ¶ 8a. Plaintiffs contend that this practice violates Qualcomm's FRAND commitments, which "require[] [Qualcomm] to license its cellular SEPs on FRAND terms to [handset] OEMs, as well as competing chip suppliers." *Id.* ¶ 52. Although several of Qualcomm's competitors, including Intel and Samsung, have requested SEP licenses from Qualcomm, "Qualcomm has simply refused to offer *any* licenses to potential competitor [modem] chip manufacturers." *Id.* ¶ 65.

According to Plaintiffs, if Qualcomm licensed its modem chip competitors—as opposed to only OEMs—Qualcomm would not be able to use the threat of a disruption in supply of its modem chips to induce OEMs to agree to Qualcomm's preferred royalty terms. *Id.* ¶ 78. This is because, unlike OEMs who depend on Qualcomm for modem chip supply, competing **[**33]** modem chip manufacturers do not need modem chips from Qualcomm. *Id.* However, because Qualcomm does not license its competitors, competitors cannot offer competitive pricing and are therefore unable to "discipline the all-in prices that Qualcomm charges for" modem chips. *Id.* ¶ 79. Again, "[t]he revenue from Qualcomm's surcharge comes back to Qualcomm as a form of profit and maintains Qualcomm's chip monopoly." *Id.* ¶ 80.

iii. Qualcomm's Exclusive Deals with Apple

In addition to Qualcomm's "no license-no chips" policy and Qualcomm's refusal to license its cellular SEPs to its competitors, Plaintiffs further allege that Qualcomm has entered exclusive deals with Apple. *Id.* ¶ 106.

"Apple is a particularly important OEM from the perspective of a nascent [modem chip] supplier." *Id.* ¶ 108. Specifically, "Apple sells large volumes of premium handsets that require premium LTE" modem chips which "command higher prices . . . than lower-tier [modem chips]." *Id.* ¶ 108a. Moreover, Apple provides additional benefits to chip suppliers because modem chip suppliers for Apple learn from Apple's engineer teams, achieve "technical validation" by meeting Apple's **[*291]** complicated technical requirements, and "can field-test **[**34]** [their modem chips] through global launches." *Id.* ¶ 108b—d.

Plaintiffs allege that Apple has entered into *de facto* exclusive agreements with Qualcomm to use only Qualcomm's modem chips in Apple's flagship products. *Id.* ¶ 106. Specifically, Apple "repeatedly engaged in negotiations with

Qualcomm concerning the excessive royalties Qualcomm charged such contract manufacturers to license its SEPs." *Id.* ¶ 98. Apple entered into agreements with Qualcomm in 2007, 2009, 2011, and 2013.

In 2007, "Qualcomm agreed to pay to Apple marketing incentives." *Id.* ¶ 100. In return, Apple had to agree not to incorporate a prospective fourth-generation standard that was opposed by Qualcomm but championed by Intel, Qualcomm's competitor. *Id.*

In 2009, Qualcomm and Apple entered into an agreement "address[ing] the process by which Qualcomm supplied chips and associated software to Apple." *Id.* ¶ 101. Under the agreement, "Apple's ability to sue Qualcomm for patent infringement concerning Qualcomm [modem] chips" was restricted. *Id.* Additionally, Qualcomm "capp[ed] its liability for the failure to supply" and "reserv[ed] for itself the ability to terminate its obligation to supply [modem] chips to Apple's contract **[**35]** manufacturers." *Id.*

In 2011, Qualcomm entered into an agreement with Apple through which "Qualcomm agreed to make substantial incentive payments to Apple if Apple agreed to exclusively use Qualcomm [modem] chips in all new iPhone and iPad models." *Id.* ¶ 102. If Apple launched a new handset with a non-Qualcomm modem chip, "Apple would forfeit all of these incentive payments." *Id.* The agreement also provided that "Apple could not initiate any action or litigation against Qualcomm for intellectual property infringement." *Id.*

In 2013, Qualcomm entered into an agreement with Apple that modified and extended the term of the exclusivity arrangement set forth in the companies' 2011 agreement. *Id.* ¶ 103. Under the 2013 agreement, Qualcomm "agreed to make payments to Apple consistent with" the 2007 agreement involving marketing incentives. *Id.* ¶ 104. Qualcomm's agreement to do this was subject to a new condition: "Apple could neither initiate nor induce others to initiate litigation based on Qualcomm's failure to offer licenses on FRAND terms." *Id.* ¶ 103. Further, "Qualcomm also agreed to make separate substantial incentive payments to Apple so long as Apple exclusively sourced [modem] chips from **[**36]** Qualcomm." *Id.* If, during the period of the agreement, Apple launched a new handset with a non-Qualcomm modem chip, Apple would forfeit past and future incentive payments. *Id.*

According to Plaintiffs, "Qualcomm's 2011 and 2013 agreements with Apple were, and were intended by Qualcomm to be, *de facto* exclusive deals that were as effective as express purchase requirements and that essentially foreclosed Qualcomm's competitors from gaining [modem chip] business at Apple." *Id.* ¶ 106. Although Apple had "an interest in developing and working with additional suppliers of [modem chips]," the "large penalties that Apple would face" from Qualcomm if Apple chose to source chips from another supplier "prevented Apple from using alternative suppliers" during the effective exclusivity period under the agreements. *Id.* ¶ 106a—b; *see also id.* ¶ 109 (alleging penalties are sufficiently large that they effectively prevent other modem chip manufacturers from competing with Qualcomm to gain business from Apple).

As a result of Qualcomm's exclusive dealing arrangements with Apple, Apple sourced modem chips exclusively from Qualcomm for all new iPad and iPhone products that Apple launched from October 2011 **[**37]** until September 2016. *Id.* ¶ 107. Qualcomm's exclusive agreements with Apple "excluded competition from other [modem] chip suppliers and harmed competition." *Id.* ¶ 108. These exclusive agreements also "prevented Qualcomm's competitors from attaining the[] benefits" of working with Apple "and foreclosed a substantial share of the market for premium LTE chips." *Id.* ¶ 109.

5. Plaintiffs' Alleged Injury

Plaintiffs assert that Qualcomm's conduct caused them injury. According to Plaintiffs, **[*292]** "Qualcomm used its" practices to "coerce acceptance of [above]-FRAND licensing rates and terms for its SEPs." *Id.* ¶ 143. As noted above, this raises the "all-in" price of every modem chip because OEMs must pay a surcharge to Qualcomm "to ensure continued access to Qualcomm's modem chips supply." *Id.* "The artificially inflated all-in cost for modem chips in turn resulted directly in increases for the price of [handsets] that use those [modem] chips." *Id.*

Plaintiffs further allege that the surcharge was "passed down the distribution chain from the modem chips purchasers to Plaintiffs" who purchase "the [handsets] containing such [modem] chips." *Id.* ¶ 144. In other words, Qualcomm's surcharge was "passed on" **[**38]** to Plaintiffs through OEMs, distributors, and retailers and "can be directly traced through a straightforward distribution chain." *Id.* OEMs, distributors, and retailers cannot "readily absorb the [surcharge] Qualcomm charges for its modem chips" because they are "generally subject to vigorous price competition" and "generally operate on thin margins." *Id.* ¶ 150. "The inflated all-in cost of a modem chip raises the prices consumers pay for [handsets] incorporating modem chips." *Id.* ¶ 126. Qualcomm's royalty rates are generally based on "a percentage of the wholesale price of" the entire handset, rather than the modem chip. *Id.* ¶ 146. Plaintiffs allege that, in this way, Qualcomm "directly distorted and increased the price of the [handsets] paid by Plaintiffs." *Id.* ¶ 145. By "us[ing] a royalty base that is the price of the [handset] as a whole," Qualcomm targeted the effect of its conduct "at the [handsets] as a whole rather than merely their components." *Id.* ¶ 146. Therefore, according to Plaintiffs, "[t]he [handset] product market is inextricably intertwined with the CDMA and premium-LTE [modem] chip markets." *Id.* ¶ 127.

B. Procedural Background

In a separate action initiated in January **[**39]** 2017, the Federal Trade Commission ("FTC") sued Qualcomm in this Court and alleged that Qualcomm engaged in unfair methods of competition in violation of *§ 5 of the Federal Trade Commission Act*. *FTC v. Qualcomm Inc., No. 17-CV-00220-LHK, 2017 U.S. Dist. LEXIS 98632, 2017 WL 2774406, at *7 (N.D. Cal. June 26, 2017)*.

Subsequently, a number of class action lawsuits were filed by consumers against Qualcomm. These lawsuits generally alleged that Qualcomm's conduct violated state and federal antitrust and consumer protection laws. In early 2017, Plaintiffs in several of the class action lawsuits moved to centralize pretrial proceedings in a single judicial district. *28 U.S.C. § 1407(a)* ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."). On April 6, 2017, the Judicial Panel on Multidistrict Litigation issued a transfer order selecting the undersigned judge as the transferee court for "coordinated or consolidated pretrial proceedings" in the multidistrict litigation ("MDL") arising out of Qualcomm's allegedly anticompetitive conduct. *See* ECF No. 1 at 1-3.

On July 11, 2017, Plaintiffs in the MDL action filed a Consolidated Class **[**40]** Action Complaint ("CCAC") asserting two federal statutory claims and two state statutory claims: (1) a claim under the *California Cartwright Act*, (2) a claim under *§ 1 of the federal Sherman Act*, (3) a claim under *§ 2* of the federal Sherman Act, and (4) a claim under the California Unfair Competition Law ("UCL"). ECF No. 94.

On August 11, 2017, Qualcomm moved to dismiss all of the claims in the CCAC and to strike Plaintiffs' nationwide class allegations. ECF No. 110. On November 10, 2017, the Court granted Qualcomm's motion in one limited respect but otherwise denied Qualcomm's motion. ECF No. 175 at 45. Specifically, the Court granted with prejudice Qualcomm's motion to dismiss Plaintiffs' federal *Sherman Act § 1* and *§ 2* claims to the extent those claims seek damages, but otherwise denied Qualcomm's motion to dismiss and to strike Plaintiffs' nationwide class allegations. *Id.* Thus, Plaintiffs retain their California Cartwright Act and UCL claims in their entirety and their federal *Sherman Act § 1* and *§ 2* claims to the extent those claims do not seek damages.

[*293] On May 31, 2018, Plaintiffs sent Qualcomm a copy of a proposed amended complaint. ECF No. 489 at 1. On June 12, 2018, Qualcomm consented to the **[**41]** filing of the proposed amended complaint. *Id.* The next day, on June 13, 2018, Plaintiffs filed the First Amended Complaint ("FAC"). *See* FAC. Qualcomm filed an answer on June 27, 2018. ECF No. 495.

On July 5, 2018, Plaintiffs filed the instant motion for class certification. ECF No. 524 ("Mot."). Plaintiffs seek to certify the following class under *Federal Rule of Civil Procedure 23*:

> All natural persons and entities in the United States who purchased, paid for, and/or provided reimbursement for some or all of the purchase price for all UMTS, CDMA (including CDMAone and cdma2000) and/or LTE

> cellular phones ("Relevant Cellular Phones") for their own use and not for resale from February 11, 2011, through the present (the "Class Period") in the United States. This class excludes (a) Defendant, its officers, directors, management, employees, subsidiaries, and affiliates; (b) all federal and state governmental entities; (c) all persons or entities who purchased Relevant Cellular Phones for purposes of resale; and (d) any judges or justices involved in this action and any members of their immediate families or their staff.

Id. at 1. Qualcomm filed an opposition to Plaintiffs' motion for class certification on August 9, 2018, ECF No. **[**42]** 642 ("Opp."), and Plaintiffs filed a reply on September 6, 2018, ECF No. 725 ("Reply").

Qualcomm also filed a motion based on *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, to strike the declaration of one of Plaintiffs' experts, Dr. Kenneth Flamm, on August 9, 2018. ECF No. 643 ("*Daubert* Mot."). Plaintiffs filed an opposition to Qualcomm's *Daubert* motion on August 30, 2018. ECF No. 709 ("*Daubert* Opp.").

II. LEGAL STANDARD

Class actions are governed by *Rule 23 of the Federal Rules of Civil Procedure*. *Rule 23* does not set forth a mere pleading standard. *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*. To obtain class certification, plaintiffs bear the burden of showing that they have met each of the four requirements of *Rule 23(a)* and at least one subsection of *Rule 23(b)*. *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001)*. "A party seeking class certification must affirmatively demonstrate . . . compliance with the Rule[.]" *Dukes, 564 U.S. at 350*.

Rule 23(a) provides that a district court may certify a class only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)*. That is, the class must satisfy the requirements of numerosity, commonality, **[**43]** typicality, and adequacy of representation to maintain a class action. *Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 588 (9th Cir. 2012)*.

If all four prerequisites of *Rule 23(a)* are satisfied, the Court must also find that the plaintiffs "satisfy through evidentiary proof" at least one of the three subsections of *Rule 23(b)*. *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*. The Court can certify a *Rule 23(b)(1)* class when plaintiffs make a showing that there would be a risk of substantial prejudice or inconsistent adjudications if there were separate adjudications. *Fed. R. Civ. P. 23(b)(1)*. The Court can certify a *Rule 23(b)(2)* class if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Fed. R. Civ. P. 23(b)(2)*. Finally, the Court can certify a *Rule 23(b)(3)* class if the Court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating **[*294]** the controversy." *Fed. R. Civ. P. 23(b)(3)*.

"[A] court's class-certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim[.]'" *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 465-66, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)* (quoting *Dukes, 564 U.S. at 351*); *see also* *Mazza, 666 F.3d at 588* ("'Before certifying a class, the trial court **[**44]** must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of *Rule 23*.'" (quoting *Zinser, 253 F.3d at 1186*)). This "rigorous" analysis applies to both *Rule 23(a)* and *Rule 23(b)*. *Comcast, 569 U.S. at 34* (stating that Congress included "addition[al] . . . procedural safeguards for *(b)(3)* class members beyond those provided for *(b)(1)* or *(b)(2)* class members (e.g., an opportunity to opt out)" and that a court has a "duty to take a '"close look"' at whether common questions predominate over individual ones" (citation omitted)).

Nevertheless, "*Rule 23* grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen, 568 U.S. at 466*. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied." *Id.* If a court concludes that the moving party has met its burden of proof, then the court has broad discretion to certify the class. *Zinser, 253 F.3d at 1186*.

III. DISCUSSION

Plaintiffs seek certification of an injunctive relief class under *Rule 23(b)(2)* and a damages class under *Rule 23(b)(3)*. The Court first addresses whether the proposed class meets the requirements of *Rule 23(a)*, then addresses whether the action meets the requirements of either *Rule 23(b)(2)* or **[**45]** *Rule 23(b)(3)*.

A. *Rule 23(a)*

Plaintiffs assert that their class satisfies the elements of *Rule 23(a)*: numerosity, commonality, typicality, and adequacy of representation. Mot. at 4-7; *see Fed. R. Civ. P. 23(a)*. Qualcomm does not contest that Plaintiffs have satisfied all four requirements of *Rule 23(a)*, as evidenced by the fact that Qualcomm does not meaningfully address any of these requirements in its opposition. *See generally* Opp. Nevertheless, the Court briefly addresses each in turn.

First, the Court finds that Plaintiffs have satisfied *Rule 23(a)(1)*'s numerosity requirement. Pursuant to *Rule 23(a)(1)*, Plaintiffs must show that "the class is so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. Here, Plaintiffs define their class by reference to objective criteria—namely, persons and entities who purchased particular types of cell phones in the United States from February 11, 2011 to the present. The parties agree that the class members number in the hundreds of millions. Mot. at 4; Opp. at 1; *see also* ECF No. 725-1 ¶ 14 ("The claims administrators estimated the size of the class to range from 232.8 million to 250 million."). The Court finds joinder of all members of this proposed class to be impracticable. *See Twegbe v. Pharmaca Integrative Pharm., Inc., 2013 U.S. Dist. LEXIS 100067, 2013 WL 3802807, *3 (N.D. Cal. July 17, 2013)* ("[T]he numerosity requirement is usually satisfied where **[**46]** the class comprises 40 or more members."). Thus, the numerosity requirement is satisfied. *See Fed. R. Civ. P. 23(a)(1)*.

Second, the Court finds that Plaintiffs have satisfied *Rule 23(a)(2)*'s commonality requirement. *Rule 23(a)(2)* requires that "there are questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. Nevertheless, "even a single common question will do." *Dukes, 564 U.S. at 359* (internal quotation marks, citation, and alterations omitted). As this Court has previously recognized, "[a]ntitrust liability alone constitutes a common question." *In re High-Tech Employee Antitrust Litig., 985 F. Supp. 2d 1167, 1180 (N.D. Cal. 2013)*. Thus, Plaintiffs here have satisfied *Rule 23(a)(2)*'s commonality requirement by raising the issues whether Qualcomm's business practices are anticompetitive and whether each class member suffered the same injury as a result of Qualcomm's anticompetitive conduct.

[*295] Third, the Court finds that Plaintiffs have satisfied *Rule 23(a)(3)*'s typicality requirement. The "permissive" typicality requirement "requires only that the representative's claims are reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1029 (9th Cir. 1998)*. Typicality is present "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendants' liability." *Rodriguez v. Hayes, 591 F.3d 1105, 1122 (9th Cir. 2010)* (citations **[**47]** omitted). Thus, "[i]n antitrust cases, 'typicality usually will be established by plaintiffs and all class members alleging the same antitrust violations by defendants.'" *In re High-Tech, 985 F. Supp. 2d at 1181* (internal quotation marks omitted) (quoting *Pecover v. Elec. Arts Inc., No. 08-CV-02820-VRW, 2010 U.S. Dist. LEXIS 140632, 2010 WL 8742757, at *11 (N.D. Cal. Dec. 21, 2010))*. Here, all class members allege the same injury stemming from the same conduct by Qualcomm. Accordingly, the Court finds that Plaintiffs' interests align with the interests of the class, and the typicality requirement of *Rule 23(a)(3)* is met.

Finally, the Court finds that Plaintiffs satisfy *Rule 23(a)(4)*'s adequacy requirement. Legal adequacy of a class representative under *Rule 23(a)(4)* turns on two inquiries: (1) whether named plaintiffs and their counsel have "any conflicts of interest with other class members," and (2) whether named plaintiffs and their counsel will "prosecute the action vigorously on behalf of the class." *Hanlon, 150 F.3d at 1020*. As noted above, Plaintiffs and class members share an interest in proving that Qualcomm's conduct violated the antitrust laws and caused injury to consumers.[1] In addition, Plaintiffs and Class Counsel do not have any conflicts of interest with class members and have demonstrated a commitment to prosecuting this action vigorously. Therefore, **[**48]** Plaintiffs have satisfied *Rule 23(a)(4)*.

Having conducted a "'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of *Rule 23*," *Mazza, 666 F.3d at 588*, the Court finds that Plaintiffs' proposed class satisfies the numerosity, commonality, typicality, and adequacy requirements. Thus, Plaintiffs have satisfied the requirements set forth by *Rule 23(a)*. The Court now turns to *Rule 23(b)*.

B. *Rule 23(b)*

Plaintiffs contend that their proposed class meets the requirements of two subsections of *Rule 23(b)*—namely, *Rule 23(b)(2)* and *Rule 23(b)(3)*. Mot. at 7. The Court first analyzes *Rule 23(b)(3)*, then turns to *Rule 23(b)(2)*.

1. *Rule 23(b)(3)*

Plaintiffs first seek to certify their proposed class for damages and injunctive relief under *Rule 23(b)(3)*. Mot. at 7-8. As noted above, *Rule 23(b)(3)* can be broken into two component pieces: (1) predominance, and (2) superiority. *Hanlon, 150 F.3d at 1022*. The Court analyzes each in turn.

i. Predominance

Under *Rule 23(b)(3)*, plaintiffs must show "that the questions of law or fact common to class members predominate over any questions affecting only individual members." *Fed. R. Civ. P. 23(b)(3)*. The *Rule 23(b)(3)* predominance requirement is "even more demanding" than *Rule 23(a)*'s commonality counterpart. *Comcast, 569 U.S. at 34*. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (citation omitted). The Ninth Circuit has held **[**49]** that "there is clear justification for handling the dispute on a representative rather than an individual basis" if "common **[*296]** questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon, 150 F.3d at 1022* (citation omitted).

Thus, the predominance inquiry "focuses on the relationship between the common and individual issues." *Id.* As the U.S. Supreme Court recently explained, the ultimate predominance question is "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016)* (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:49 (5th ed. 2012)). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under *Rule 23(b)(3)* even though other important matters will have to be tried separately, such as damages or some affirmative

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[1] Qualcomm opens its opposition by discussing the particular circumstances of Plaintiffs and their phone purchases. Opp. at 2-3. For example, some Plaintiffs bought refurbished phones or subsidized phones. *Id.* However, Qualcomm does not challenge either the adequacy or typicality of these Plaintiffs. As Plaintiffs point out, each Plaintiff had at least one phone purchase whose legitimacy Qualcomm does not question. Reply at 15; ECF No. 722-6 ("Flamm Reply Decl."), App'x B. To the extent that Qualcomm challenges particular marketing and pricing strategies, those strategies are discussed in the predominance section below.

defenses peculiar to some individual class members.'" *Id.* (quoting 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1778 (3d ed. 2005)). The U.S. Supreme Court has also observed that the predominance standard is "readily met" in antitrust **[**50]** class actions. *Amchem, 521 U.S. at 625*.

"Considering whether questions of law or fact common to class members predominate begins . . . with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011)* (internal quotation marks omitted). A court must analyze these elements in order to "determine which are subject to common proof and which are subject to individualized proof." *In re TFT—LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 291, 311-13 (N.D. Cal. 2010)*, *abrogated on other grounds by* *In re ATM Fee Antitrust Litig., 686 F.3d 741, 755 n.7 (9th Cir. 2012)*.

In the instant case, Plaintiffs allege that Qualcomm violated *§§ 1* and *2 of the federal Sherman Act*, *15 U.S.C. §§ 1-2*, as well as the California Cartwright Act and UCL, *Cal. Bus. & Prof. Code §§ 16700*, *17200*. FAC ¶¶ 168-210. With regard to Plaintiffs' Cartwright Act claim, "[t]he analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act was modeled after the *Sherman Act*." *Cty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*. Also, Plaintiffs' UCL claim is premised at least in part upon the Sherman and Cartwright Act violations. *See* *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 539-40 (Cal. 1999)* (explaining that the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable" (citation omitted)). Neither party identifies any material difference between the federal and state claims warranting separate treatment. Thus, the Court may treat the state **[**51]** law claims together with the federal claims in this case.

To establish a federal antitrust claim, "plaintiffs typically must prove (1) a violation of antitrust laws, (2) an injury they suffered as a result of that violation, and (3) an estimated measure of damages." *In re High-Tech, 985 F. Supp. 2d at 1183* (quoting *In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 19 n.18 (1st Cir. 2008))*.[2] The Court proceeds through each of these elements and finds that common questions predominate overall and with regard to all three elements—antitrust violation, antitrust impact, and damages.

a. Antitrust Violation

Qualcomm does not seriously dispute that Plaintiffs' asserted antitrust violations are subject to common proof. The Court agrees that Plaintiffs have presented copious common evidence to prove that Qualcomm **[*297]** engaged in three uniform practices—namely, (1) Qualcomm's "no license-no chips" policy, (2) Qualcomm's refusal to license cellular SEPs to competing modem chip manufacturers, and (3) Qualcomm's exclusive dealings with Apple. Plaintiffs' lawsuit centers on whether these practices individually or collectively maintained Qualcomm's monopoly in the premium modem chip market in violation of the antitrust laws. As detailed below, the Court finds Plaintiffs have demonstrated that adjudication of Qualcomm's **[**52]** alleged antitrust violations will overwhelmingly turn on common legal and factual issues.

First, Plaintiffs provide substantial evidence that Qualcomm requires OEMs to accept a separate license to Qualcomm's cellular SEPs in order to gain access to Qualcomm's modem chips. Qualcomm admitted in interrogatory responses that Qualcomm does not sell modem chips to unlicensed OEMs. ECF No. 519-1 at 10. Numerous Qualcomm employees have also confirmed the existence of Qualcomm's uniform "no license-no chips" policy. In fact, the former General Manager of Qualcomm's modem chip division testified in his deposition that Qualcomm's "no license-no chips" policy has been in place since at least 1997. ECF No. 518-3 at 163:16-164:4. Qualcomm's "no license-no chips" policy is embodied in all of Qualcomm's component supply agreements.

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[2] The antitrust violations are slightly different under *§§ 1* and *2* of the Sherman Act. Whereas *§ 1* prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States," *§ 2* punishes "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *15 U.S.C. §§ 1-2*. Neither party identifies any relevant material difference between *§ 1* and *§ 2* for purposes of the instant motion for certification.

Moreover, Qualcomm has entered into cellular SEP licenses with nearly every OEM, and most of the licenses have the same general structure across these OEMs. ECF No. 518-1 at 19.

Plaintiffs' antitrust theory is that Qualcomm's "no license-no chips" policy amounts to an anticompetitive tie that allows Qualcomm to extract an above-FRAND royalty rate across the entire market. **[**53]** In a tying arrangement, a "seller conditions the sale of one product (the tying product) on the buyer's purchase of a second product (the tied product)." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016)* (quoting *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 912 (9th Cir. 2008))*. In the instant case, Plaintiffs point to common evidence—market share data in particular—to calculate Qualcomm's global market share in CDMA2000 modem chips and premium-LTE modem chips. *See* ECF No. 517-4 ("Flamm Decl.") ¶¶ 38, 54-55; *In re Dynamic Random Access Memory Antitrust Litig., No. M 02-1486 PJH, 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166, at *9 (N.D. Cal. June 5, 2006)* (certifying a class where expert used market share estimates to analyze monopoly power). Plaintiffs and their experts theorize that Qualcomm was able to leverage that market dominance in the modem chip market to coerce OEMs into entering licenses with above-FRAND royalty rates. ECF No. 517-5 ("Elhauge Decl.") ¶ 5.

Plaintiffs' licensing expert, Michael Lasinski, opined that the overcharge resulting from Qualcomm's above-FRAND royalty rate can be calculated by reference to common evidence. To determine whether Qualcomm's SEP royalty rates were fair and reasonable, Mr. Lasinski would (1) allocate a reasonable aggregate royalty rate for the entire standard to each SEP holder **[**54]** based upon that SEP holder's proportional share of SEP value, and (2) assess comparable agreements. ECF No. 517-6 ("Lasinski Decl.") ¶¶ 14, 107, 126. Mr. Lasinski performed an exemplary calculation based on multiple license agreements and documentary evidence regarding Qualcomm's licensing practices to calculate the total aggregate overcharge for each of the five largest U.S. OEMs. *Id.* ¶ 147. His report found that the incremental overcharge for each of these five OEMs ranged from 1.13% to 3.84% of the total cost of the device. *Id.*; ECF No. 639-4.

The fact that Qualcomm was able to charge an above-FRAND royalty is evidence that there is a market for the tied product, i.e., Qualcomm's cellular SEPs. *See, e.g., F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* ("[P]roof of actual detrimental effects . . . can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects." (internal quotation marks and citation omitted)). As Plaintiffs' expert Professor Einer Elhauge explains, "SEPs are inherently a market where, as is the situation in this case, there is direct evidence of anticompetitive effects." ECF No. 722-1 ("Elhauge Reply Decl.") ¶ 5; *see* ***[*298]*** *also id.* ¶ 6 (providing a basis for concluding that **[**55]** cellular SEPs "intrinsically constitute their own markets" because "the control of SEPs creates a potential to extract supra-competitive rents" and "all four major U.S. cellphone networks operate on the cellular standards at issue"). Professor Elhauge concludes that "the prices of Qualcomm's chipsets and royalties both exceeded their fair market value." *Id.* ¶ 7; *see also* Elhauge Decl. ¶ 66 (explaining that common "actual evidence conflicts with any claim that any change in SEP license royalty rates would be offset by an opposing change in Qualcomm's chipset prices").

Plaintiffs also provide an explanation for why Qualcomm was able to impose these above-FRAND royalty rates across the entire market. In particular, as discussed in more detail below, Plaintiffs have submitted common evidence that Qualcomm has adopted a uniform policy of refusing to offer exhaustive licenses for its cellular SEPs to competing modem chip manufacturers. This policy obstructed competing modem chip manufacturers from selling chips that were not subject to Qualcomm's above-FRAND royalty rate created by the "no license-no chips" tie. Elhauge Decl. ¶¶ 129, 132. Testimony from competing modem chip manufacturers **[**56]** confirms that the inability to obtain an exhaustive license from Qualcomm limited their ability to sell modem chips to OEMs. *See, e.g.*, ECF Nos. 519-8, 520-1. Because the threat of losing access to Qualcomm's dominant chip supply was too great, OEMs accepted the licenses with above-FRAND rates that applied to all handsets that they sold. Elhauge Decl. ¶¶ 40, 58. The above-FRAND payments, in turn, reinforced Qualcomm's dominant market position. *Id.* ¶ 57. Therefore, the common legal and factual issues surrounding Qualcomm's "no license-no chips" policy will predominate over any individual issues.

Second, Plaintiffs set forth significant evidence that Qualcomm has adopted a uniform policy of refusing to offer exhaustive licenses for its cellular SEPs to competing modem chip manufacturers. Plaintiffs rely on evidence that is common to the class, including internal Qualcomm documents, licenses, and licensing negotiations. For example, in a 2016 submission to the FTC, Qualcomm admitted that "Qualcomm does not . . . grant exhaustive licenses to manufacturers of . . . modem chips." ECF No. 517-7 at 1. To be sure, Qualcomm's licenses have evolved over time in response to legal decisions from **[**57]** the U.S. Supreme Court and Federal Circuit regarding the doctrine of patent exhaustion. *See, e.g., Quanta Computer, Inc. v. LG Elecs., Inc., 553 U.S. 617, 638, 128 S. Ct. 2109, 170 L. Ed. 2d 996 (2008)*; *TransCore, LP v. Elec. Transaction Consultants Corp., 563 F.3d 1271, 1274 (Fed. Cir. 2009)*. However, the relevant condition has remained constant: Qualcomm refuses to provide exhaustive licenses to competing manufacturers of modem chips. *See* ECF No. 517-7. Qualcomm has consistently applied this core policy to all modem chip competitors, *id.*, and Qualcomm does not point to any evidence of a deviation from this policy for any specific modem chip manufacturer.

Plaintiffs allege that Qualcomm has violated its FRAND commitments by refusing to license its cellular SEPs to competing modem chip manufacturers. FAC ¶ 52. Plaintiffs further identify common evidence that Qualcomm's refusal to license has had an anticompetitive effect on the market. Notably, Plaintiffs point to evidence that Qualcomm's refusal to provide exhaustive licenses to competing modem chip manufacturers deterred entry into the market and encouraged exit from the market. *See, e.g.*, ECF Nos. 520-4, 520-5. Similarly, there is documentary evidence that Qualcomm itself recognized that its refusal to license competing modem chip manufacturers increased Qualcomm's monopoly power and reduced competing modem chip manufacturers' **[**58]** ability to compete with Qualcomm for sales of modem chips. *See, e.g.*, ECF Nos. 520-8, 520-9, 520-10, 520-11. Thus, like Qualcomm's "no license-no chips" policy, the question whether Qualcomm's licensing practices are anticompetitive is subject to common proof.

Third, and finally, Plaintiffs' allegation that Qualcomm entered into exclusive dealings with Apple depends upon evidence that does not vary from class member to class member. In particular, Plaintiffs cite to two agreements **[*299]** between Qualcomm and Apple—namely, a 2011 agreement and a 2013 agreement (which amended the 2011 agreement). ECF Nos. 519-3 ("2011 Agreement"), 519-4 ("2013 Agreement"). Under the 2011 and 2013 agreements, Apple would lose past and future lump-sum incentive payments from Qualcomm if Apple launched any new products that contained modem chips from a manufacturer other than Qualcomm. 2011 Agreement ¶ 1.5; 2013 Agreement ¶ 5.

Whether the 2011 and 2013 agreements amounted to exclusive dealing arrangements is an issue subject to common proof. As the law instructs, exclusive dealing involves "an 'agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor,' and **[**59]** forecloses competition." *Aerotec Int'l, 836 F.3d at 1180* (quoting *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 996 & n.1 (9th Cir. 2010))*. Thus, one of the key issues here is whether the 2011 and 2013 agreements positively induce Apple to accept a loyalty condition or negatively penalize Apple for noncompliance. One of Plaintiffs' experts, Professor Elhauge, concludes that the 2011 and 2013 agreements operate as penalties by looking to the common evidence of (1) Qualcomm's gross margin on sales of modem chips to Apple and to Qualcomm's other modem chip customers, and (2) Qualcomm's price to Apple during the term of the agreements and after the agreements had expired. Elhauge Decl. ¶¶ 129, 132. Professor Elhauge finds that comparing these pieces of evidence shows that (1) Apple would have paid more than Qualcomm's other modem chip customers if Apple violated the 2011 or 2013 agreement, and (2) Apple paid the same or higher prices with exclusivity than without exclusivity. *Id.* ¶¶ 131, 133. Furthermore, Plaintiffs submit documents from Apple confirming that the conditions in the 2011 and 2013 agreements prevented Apple from pursuing other opportunities. ECF No. 519-7 at 9. More specifically, testimony and documents from both Apple and Intel confirm that, in the absence of Qualcomm's exclusivity **[**60]** payments, Apple likely would have started using Intel modem chips in Apple's devices at an earlier date. ECF Nos. 522-1 at 4, 522-5 at 332:24-333:18.

This substantial evidence presented by Plaintiffs suggests that adjudication of Qualcomm's alleged antitrust violations will turn on legal and factual issues that are common to the proposed class. Accordingly, the Court finds that common questions will predominate with respect to the alleged antitrust violations.

b. Antitrust Impact

Having found that common questions predominate with respect to the first element, antitrust violation, the Court now turns to the second element, antitrust impact. "Antitrust 'impact'—also referred to as antitrust injury—is the 'fact of damage' that results from a violation of the antitrust laws." *In re Dynamic Random Access Memory, 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166, at *7*. "It is the causal link between the antitrust violation and the damages sought by plaintiffs." *In re New Motor Vehicles, 522 F.3d at 19 n.18* (citing *Sullivan v. Nat'l Football League, 34 F.3d 1091, 1103 (1st Cir. 1994))*. Thus, Plaintiffs here "must be able to establish, predominantly with generalized evidence, that all (or nearly all) members of the class suffered damage as a result of [Qualcomm's] alleged anti-competitive conduct." *In re High-Tech Employee Antitrust Litig., 289 F.R.D. 555, 567 (N.D. Cal. 2013)* (quoting *In re TFT-LCD, 267 F.R.D. at 311*).

Because Plaintiffs are indirect purchasers, "their burden is two-fold." *In re Optical Disk Drive Antitrust Litig., 303 F.R.D. 311, 324 (N.D. Cal. 2014)*. Plaintiffs **[**61]** must demonstrate that "all or nearly all of the original *direct* purchasers . . . bought at inflated prices" and that "those overcharges were passed through all stages of the distribution chain" to Plaintiffs. *Id.*; *see also* *In re Graphics Processing Units Antitrust Litig., 253 F.R.D. 478, 499 (N.D. Cal. 2008)* ("[I]ndirect-purchaser plaintiffs must demonstrate that defendants overcharged their direct purchasers . . . and that those direct purchasers passed on the overcharges to plaintiffs.").

With regard to direct purchasers, Qualcomm raises only one argument: (1) that Plaintiffs cannot show with common evidence **[*300]** that all or nearly all OEMs paid overcharges. Opp. at 8-9. However, Qualcomm's central focus is on Plaintiffs' theory and methodology for showing that the overcharges were passed through the distribution chain to end consumer class members. *See id.* at 1. Qualcomm raises two additional arguments in this regard: (2) that Plaintiffs cannot show with common evidence that overcharges were passed through to consumers at each step of the distribution chain, and (3) that a large portion of the putative class suffered no impact. *Id.* at 7-8, 9-18. Additionally, Qualcomm's *Daubert* motion challenges the opinions of one of Plaintiffs' experts, Dr. Flamm. *See Daubert* Mot. The Court addresses Qualcomm's three **[**62]** arguments in turn, including a discussion of Qualcomm's *Daubert* challenge in the second section examining Plaintiffs' pass-through theory.

(1) Impact to Direct-Purchaser OEMs

As noted above, before demonstrating that the alleged overcharge was passed through to consumers, Plaintiffs must demonstrate that all (or nearly all) direct-purchaser OEMs paid an overcharge. *In re Optical Disk, 303 F.R.D. at 324*. Qualcomm does not seriously dispute that Plaintiffs can use common evidence to prove that at least some OEMs faced an overcharge as a result of Qualcomm's three allegedly anticompetitive practices. Indeed, the Court's previous discussion of the antitrust violation element details Plaintiffs' common evidence that Qualcomm's practices had the effect of excluding competitors from the market and raising prices to OEMs. For example, internal Qualcomm emails and OEM testimony support that Qualcomm's market power and "no license-no chips" policy inflated Qualcomm's royalty rates to above-FRAND levels. *See, e.g.*, ECF Nos. 521-2, 521-4 at 11-12, 521-6 at 331:25-332:8. Similarly, common documentary and testimonial evidence indicates that Qualcomm's refusal to license to competing modem chip manufacturers discouraged competition by **[**63]** limiting competitors' ability to offer modem chips that were not subject to the above-FRAND royalty charge. *See, e.g.*, ECF Nos. 519-8 at 140:11-141:9, 520-1 at 380:3-19, 520-2 at 1. The issue whether these practices, alone and in combination with Qualcomm's alleged exclusivity arrangements with Apple, increased Qualcomm's monopoly power and excluded rivals from the market are also common to the class. *See, e.g.*, 520-4 at 169:4-176:16, 522-1 at 4, 522-5 at 332:24-333:18.

Rather than focusing generally on whether its practices resulted in an overcharge, Qualcomm argues that Plaintiffs cannot show with common methods and evidence that all or nearly all OEMs actually paid an alleged overcharge. Opp. at 8. In particular, Qualcomm notes that the methodology of Plaintiffs' expert, Mr. Lasinski, is OEM-specific. *Id.*[3] Specifically, Mr. Lasinski uses Qualcomm's transaction logs to determine each OEM's "historical weighted

[3] Although Qualcomm also appears to suggest that Mr. Lasinski would need to perform his analysis on a device-by-device basis using different evidence, Opp. at 8-9, Qualcomm relies on a portion of Mr. Lasinski's declaration in which he explains solely that

average running royalty rate." Lasinski Decl. ¶ 77. In his report, Mr. Lasinski performs an exemplary calculation for "the five devices OEMs with the largest U.S. market share, which collectively generated over 90% of U.S. revenues" during the relevant period. *Id.* ¶ 76. To calculate the **[**64]** overcharge, he then compares the historical weighted average running royalty rate to a hypothetical FRAND rate, which he determines based on an assessment of comparable agreements and an allocation of reasonable aggregate rates to the cellular SEPs at issue. *Id.* ¶ 147. Qualcomm does not explain why the use of OEM-specific data defeats predominance. As Mr. Lasinski explains, his methods for calculating the overcharge "could be extended to all other OEMs with U.S. sales." *Id.* ¶ 76. Moreover, Mr. Lasinski performs an exemplary calculation on a large share of the OEM market and concludes that all five of the OEMs that he examined were overcharged by rates of between 1.13% and 3.84%. *Id.* ¶ 147; ECF No. 639-4. Mr. Lasinski's methodology is well-suited to show that all (or nearly all) direct-purchaser OEMs actually paid an overcharge.

[*301] (2) Plaintiffs' Pass-Through Theory

The Court next turns to the parties' contentions regarding impact to indirect purchasers. As a preliminary matter, Plaintiffs argue that California law permits a presumption of class-wide impact. Reply at 6. In particular, Plaintiffs point to the California Court of Appeal's observation that, under California substantive **[**65]** law, courts ordinarily may assume injury to the class "in cases where consumers have purchased products in an anticompetitive market, even if some consumers did not actually have to pay the overcharge because of their individual circumstances." *In re Cipro Cases I & II, 121 Cal. App. 4th 402, 17 Cal. Rptr. 3d 1, 8 (Ct. App. 2004)*. This presumption has been applied "to markets characterized by individually negotiated prices, varying profit margins, and intense competition, as well as to indirect purchasers who buy the product from middlemen in a largely unaltered form." *Id.* However, Plaintiffs "do not rest on the presumption of classwide impact alone," Reply at 6, and they have supplied a reasonable methodology for measuring class-wide impact regardless of whether California law permits an inference that this element is met.

Where, as here, the class is composed of indirect purchasers, "proof of class-wide antitrust impact is made more complex because plaintiffs must offer a model of impact and damages that demonstrates the alleged overcharge was passed through to each successive link in the distribution chain, and ultimately to the plaintiffs." *In re Lithium Ion Batteries Antitrust Litig., No. 13-MD-02420-YGR, 2018 U.S. Dist. LEXIS 35744, 2018 WL 1156797, at *3 (N.D. Cal. Mar. 5, 2018)*. In the instant case, Plaintiffs have proposed a valid theory **[**66]** and methodology for showing, based on common evidence, that Qualcomm's overcharge was passed through to all class members in the form of higher quality-adjusted prices. The Court first presents an overview of Plaintiffs' model, including the three types of common evidence that Plaintiffs' expert, Dr. Flamm, relies upon to show antitrust impact to all class members. The Court then turns to Qualcomm's *Daubert* challenge to Dr. Flamm's opinions. Finally, the Court addresses Qualcomm's challenge that the pass-through theory does not hold at specific links in the distribution chain—namely, (1) OEMs and (2) retailers and wireless carriers. Opp. at 9-18.

(i) Overview of Plaintiffs' Pass-Through Theory

The Court begins with an overview of Plaintiffs' theory and model for showing that Qualcomm's above-FRAND royalty charges were passed through to consumers. Plaintiffs marshal substantial evidence—including documentary evidence and expert reports using statistical modeling, economic theory, and data—to demonstrate that common questions will predominate over individual questions in determining the impact of the antitrust violations. Central to the analysis is the report of one of Plaintiffs' experts, Dr. Flamm. **[**67]**

In order to provide a baseline understanding for Dr. Flamm's report, the Court first briefly discusses the reports of two other experts, Professor Elhauge and Mr. Lasinski. Professor Elhauge explains in his report that Qualcomm's alleged above-FRAND royalty rate operates as an industry-wide tax on OEMs. Elhauge Decl. ¶ 58. In particular,

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it would "be possible to approximate the overcharge on a more detailed basis," such as a device-by-device basis, Lasinski Decl. ¶ 148 n.263; *see also* ECF No. 641-13 at 108:3-109:5.

under Qualcomm's "no license-no chips" policy, OEMs must agree to a license that covers all handsets that the OEM sells, including handsets that contain non-Qualcomm modem chips. *Id.* In this way, OEMs are subject to an industry-wide tax because they must pay Qualcomm's royalty "for the use of Qualcomm's SEPs on each device, regardless of whose [modem chip] is in the device." *Id.* Mr. Lasinski, in turn, devises a methodology for calculating the amount of the overcharge to OEMs. In his report, Mr. Lasinski first uses Qualcomm's transaction logs to calculate the "historical weighted average running royalty rate" for five major OEMs. Lasinski Decl. ¶ 77. He then uses two approaches to determine an appropriate FRAND rate: (1) taking a reasonable rate appropriate for an entire cellular communications standard and determining the portion of the rate attributable **[**68]** to the share of SEP value, and (2) analyzing comparable agreements and determining an appropriate rate. *Id.* ¶¶ 107, 126-29. At that point, Mr. Lasinski subtracts the calculated FRAND rate from the historical weighted average running royalty rate for each OEM **[*302]** to retrieve each OEM's percentage overcharge. *Id.* ¶ 147. Finally, Mr. Lasinski applies those percentage overcharges to each OEM's revenue to calculate the ultimate overcharge. *Id.* ¶ 148.

That background forms the basis for Dr. Flamm's pass-through theory. Dr. Flamm assumes that Professor Elhauge and Mr. Lasinski have demonstrated that "absent Qualcomm's alleged anticompetitive behavior Qualcomm would have charged [OEMs] a substantially lower FRAND royalty for a license to Qualcomm's portfolio of [cellular SEPs]." Flamm Decl. ¶ 12 & n.6. Dr. Flamm's objective is to show how OEMs' above-FRAND royalty charge is passed through to Plaintiffs. More precisely, Plaintiffs retained Dr. Flamm to provide an analysis of "whether common evidence would be available to show how the overcharge levied by Qualcomm would have affected the price and performance characteristics of mobile devices sold by mobile device hardware OEMs to mobile communications **[**69]** service providers, distributors, and retailers," and "how those price and performance characteristics would in turn be reflected in the price and performance of mobile devices purchased by final consumers." ECF No. 517-4 ("Flamm Decl.") ¶ 13. Dr. Flamm particularly relies on three types of common evidence from which Plaintiffs will be able to argue that all (or nearly all) class members suffered damage as a result of Qualcomm's allegedly anticompetitive conduct.

First, Dr. Flamm describes the economic consensus, confirmed by theoretical and empirical research, that industry-wide taxes—like Qualcomm's here—are passed through to end purchasers as higher prices. Dr. Flamm explains that as a general matter, economics predicts that higher costs of manufacture will be passed on to consumers. *Id.* ¶ 121. Important here, he notes that "academic literature suggests that industry-wide costs are typically more likely to be passed through than OEM specific costs." *Id.* ¶ 122. In fact, one study "find[s] the more widespread a cost change, the higher the pass-through rate in response." *Id.* ¶ 122 n.90. The basic underlying theory is that "while refineries have little ability to pass on idiosyncratic **[**70]** cost shocks, shared cost changes have increasingly larger impacts, culminating in slightly greater than full pass-through for an industry-wide shock." *Id.* (citation omitted).

Moreover, these theoretical conclusions are bolstered by empirical studies, which "generally show that a large share of taxes are passed through to the end consumer." *Id.* For example, Dr. Flamm cites an empirical study finding that a 15% tax on Japanese television sales was passed through to consumers at rates greater than 100%. *Id.* ¶ 140. Dr. Flamm also points to other studies finding similar results for state or local taxes on products, such as gasoline, alcohol, and cigarettes. *Id.* ¶¶ 137-46. Qualcomm's expert, Dr. John Johnson, does not rebut this economic literature but instead admits that he has not found any scholarship "support[ing] the inference that an industry-wide reduction in royalty rates would be unlikely to lead to a reduction in price or an improvement in quality of [handsets]." ECF No. 723-2 at 90:6-13.

Second, Dr. Flamm relies on documentary and testimonial evidence evincing that Qualcomm, OEMs, and wireless carriers treated Qualcomm's royalty as a known component cost and "included the Qualcomm **[**71]** royalty in their calculations of the total costs of cellular phones." Flamm Decl. ¶ 147. For example, Qualcomm's own internal analysis of the average sales price of phones in 2011 and 2013 showed that Qualcomm considered royalties as one component of the cost to OEMs that would be incorporated in the price to retailers and then incorporated into the price to consumers. *Id.* fig.10; ECF No. 522-7. Moreover, Dr. Flamm identifies multiple pieces of testimony in which Qualcomm and other participants in the cellular industry (including OEMs and wireless carriers) stated that Qualcomm's royalty would be an added component to the price of the phone. *See, e.g.*, Flamm Decl. ¶¶ 148-65.

Third, and finally, Dr. Flamm proposes a methodology for measuring class-wide impact in which he analyzes device sales data from each step of the distribution chain. He examines data from six major OEMs, including the five largest OEMs in the U.S. market (Apple, Samsung, Motorola, LG, and HTC). *Id.* ¶ 261. "These OEMs accounted for approximately **[*303]** 90% of total cell phone sales" during the relevant period. *Id.* Dr. Flamm examines data from six of the largest U.S. retailers, including Best Buy, Amazon, Walmart, and Target. **[**72]** *Id.* "These companies represent roughly 84% of the national retailer market." *Id.* Dr. Flamm also examines data from five wireless carriers, comprising the four major U.S. carriers (AT&T, Sprint, T-Mobile, and Verizon) as well as one regional carrier (US Cellular). *Id.* "These [carriers] represent approximately 97% of the market for wireless operators." *Id.* Finally, Dr. Flamm examines data from the largest U.S. distributor and a major contract manufacturer. *Id.*

In order to analyze this data, Dr. Flamm employs hedonic regression, a method commonly used in economics to determine the relative importance of the variables which affect the price of a good. *Id.* ¶ 15; *see also* *In re High-Tech Emple. Antitrust Litig., No. 11-CV-02509-LHK, 2014 U.S. Dist. LEXIS 47181, 2014 WL 1351040, at *14 (N.D. Cal. Apr. 4, 2014)* ("[N]umerous courts have held that regression analysis is generally a reliable method for determining damages in antitrust cases and is 'a mainstream tool in economic study.'" (citation omitted)). Dr. Flamm uses the same ten quality-control characteristics in his model that Qualcomm's own retained experts used in a submission to the FTC. Flamm Decl. ¶ 256. Those ten characteristics are operating system, OEM, data speed, battery storage capacity, storage, design **[**73]** weight, screen size, camera megapixels, MHz speed, and download speed. *Id.* Dr. Flamm's decision to focus on these ten characteristics imposes a constraint on his available data: he has to exclude data that does not contain sufficient information about these ten characteristics. *Id.*

Additionally, Dr. Flamm decides to use "prices and costs from the first period a product is observed." *Id.* ¶ 257. Dr. Flamm describes why he uses this data for different marketplace actors. For OEMs, this data "capture[s] the prices set with carriers as they negotiate the phone configurations to be offered in retail locations." *Id.* "[I]n the case of Apple," this data reflects "the price [Apple] selected for the features it included in phones to be offered in its stores and through other resellers." *Id.* Finally, with regard to retailers and wireless carriers, "using prices and costs from the first period shows the pass-through of their initial procurement costs into initial sales prices." *Id.* After removing the non-probative data, Dr. Flamm performs a regression analysis in which he controls for the ten quality-control characteristics in order to determine what effect, if any, a change in Qualcomm's royalty **[**74]** rate would have on the price of phones to consumers in the "but for" world. *Id.* ¶ 256.

Applying this common statistical model, Dr. Flamm calculates the pass-through rate for each segment of the distribution chain, including OEMs, contract manufacturers, wireless carriers, distributors, and retailers. *Id.* ¶ 262. Dr. Flamm calculates pass-through rates for each individual market participant for which he had data as well as combined segments of the distribution chain (such as all OEMs and all retailers). *Id.* ¶¶ 263-82. Dr. Flamm finds positive pass-through rates for each market participant, indicating that costs were passed through. *Id.* Many of his pass-through rates—especially those for OEMs and retailers—are also exceptionally high, often exceeding 90% or 100%. *Id.* Such high rates indicate that a substantial portion of cost was passed through.

Dr. Flamm acknowledges that "[c]lass products are sold through different sales channels on their way to end users." *Id.* ¶ 283. Accordingly, Dr. Flamm identifies 18 primary sales channels and determines what proportion of the total sales each primary sales channel represented. *Id.* ¶¶ 283, 288. By way of example, the sales directly from OEMs to end **[**75]** users constituted a 5.9% share of total sales, while sales from OEMs to wireless carriers to end users constituted a 42.4% share. *Id.* tbl.21. Dr. Flamm uses the pass-through rates for each segment of the distribution chain to calculate cumulative pass-through rates for each of the 18 sales channels. *Id.* ¶ 289. At the final step of his analysis, Dr. Flamm weights the pass-through rate for each of the 18 sales channels by percentage of total sales to yield a final overall pass-through rate that "estimate[s] damages to end purchasers due to Qualcomm's overcharge." *Id.* ¶ 290.

[*304] Performing these calculations, Dr. Flamm retrieves an overall "channel-weighted pass-through rate [of] 87.4%." *Id.*; *see also* ECF No. 722-6 ("Flamm Reply Decl.") ¶ 161 (updating figure to 87.8%). Put another way, Dr. Flamm ascertains that, on a weighted average basis, each $1.00 of Qualcomm's royalty overcharge was passed through to consumers as an approximately $0.88 increase in the quality-adjusted prices of cell phones. Thus, because Mr. Lasinski calculated an above-FRAND royalty payment of $5.54 billion, Dr. Flamm's estimated lower bound on damages to the indirect purchaser class is $4.84 billion. Flamm Decl. ¶ **[**76]** 291; ECF No. 693 ¶ 1.

The Court finds that Plaintiffs' documentary evidence and expert reports paint a picture of Qualcomm's business practices and the nature of the market that suggests that common proof could be used to demonstrate that Qualcomm's above-FRAND royalty charges are passed through every level of the distribution chain to consumers. In other words, Plaintiffs' proposed theory and methodology strongly appear to satisfy the predominance requirement.

The Court now turns to Qualcomm's specific challenges to Plaintiffs' pass-through theory. The Court first addresses Qualcomm's broadest argument that Dr. Flamm's testimony should be stricken under *Daubert*. The Court then analyzes Qualcomm's more-targeted challenges to the pass-through theory at specific links in the distribution chain—namely, (1) OEMs and (2) retailers and wireless carriers.

(ii) *Daubert* Arguments

Qualcomm's broadest contention is that Dr. Flamm's entire pass-through theory should be excluded. Specifically, Qualcomm has filed a motion to strike Dr. Flamm's declaration under *Daubert* and Federal Rule of Evidence 702. *Daubert* Mot. at 1. The Court addresses Qualcomm's *Daubert* motion at this stage because Dr. Flamm's model is a central component **[**77]** of Plaintiffs' proposed method to show that all or nearly all of the putative class members suffered an injury.

Federal Rule of Evidence 702 allows admission of "scientific, technical, or other specialized knowledge" by a qualified expert if it will "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Expert testimony is admissible pursuant to Rule 702 if it is both relevant and reliable. Daubert, 509 U.S. at 589. An expert witness may provide opinion testimony if: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. "The duty falls squarely upon the district court to 'act as a gatekeeper to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards.'" Estate of Barabin v. AstenJohnson, Inc., 740 F.3d 457, 463 (9th Cir. 2014) (en banc) (quoting Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011)). However, this duty is to evaluate not the correctness of the expert's conclusions, but the principles and methodology used to generate the conclusions. *Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010)*. Moreover, the inquiry into admissibility of expert opinion is a "flexible one," where "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, **[**78]** not exclusion." *Id.* (citing Daubert, 509 U.S. at 594). In other words, the Court has broad discretion and flexibility in structuring and assessing an expert's reliability. *Murray v. S. Route Mar. SA, 870 F.3d 915, 924 (9th Cir. 2017)*.

Dr. Flamm is a professor at the University of Texas who specializes in applied microeconomics. Flamm Decl. ¶¶ 1-2. His credentials and expertise to offer expert opinion in this matter are not challenged. As noted above, Plaintiffs retained Dr. Flamm to provide an analysis of "whether common evidence would be available to show how the overcharge levied by Qualcomm would have affected the price and performance characteristics of mobile devices," and "how those price and performance characteristics would in turn be reflected in the price and performance of mobile devices purchased by final consumers." *Id.* ¶ 13. Dr. Flamm performs this analysis by relying on hedonic regression, a method commonly used in economics to determine **[*305]** the relative importance of the variables which affect the price of a good. *Id.* ¶ 15. In its motion to strike Dr. Flamm's declaration, Qualcomm does not—and could not—dispute that "regression analysis is generally a reliable method for determining damages in antitrust cases and is a mainstream tool in economic study." **[**79]** In re High-Tech, 2014 U.S. Dist. LEXIS 47181, 2014 WL 1351040, at *14 (internal quotation marks and citation omitted). Indeed, courts regularly recognize that hedonic regression is a widely accepted econometric methodology that satisfies the four *Daubert* factors of testability, peer review and publication, measurable error rate, and general acceptance. *See, e.g.,* In re ConAgra Foods, Inc., 90 F. Supp. 3d 919, 947 (C.D. Cal. 2015), *aff'd sub nom.* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017);

In re Toyota Motor Corp. Hybrid Brake Mktg., No. 10-MD-02172-CJC, 2012 U.S. Dist. LEXIS 151559, 2012 WL 4904412, at *4 (C.D. Cal. Sept. 20, 2012).

Instead, Qualcomm argues that "Dr. Flamm's regression results are built on completely unreliable data." *Daubert* Mot. at 2. However, district courts within and outside this district have often concluded that "experts' decisions about what data to use" in their analysis bear on the weight, not the admissibility, of expert testimony. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 10-CV-01064-SI, 2013 WL 124347, at *1 (N.D. Cal. Jan. 8, 2013); *see also, e.g.,* In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-01175-VVP, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *49 (E.D.N.Y. Oct. 15, 2014) ("The determination of which dataset is most reliable is a merits question and does not preclude [an expert's] preference of one over the other."), *report and recommendation adopted*, No. 06-MD-01775-JG, 2015 U.S. Dist. LEXIS 90402, 2015 WL 5093503 (E.D.N.Y. July 10, 2015); In re Static Random Access Memory Antitrust Litig., No. 07-MD-01819-CW, 2010 U.S. Dist. LEXIS 141670, 2010 WL 5071694, at *6 (N.D. Cal. Dec. 7, 2010); In re Sulfuric Acid Antitrust Litig., 446 F. Supp. 2d 910, 923 (N.D. Ill. 2006). Relatedly, the U.S. Supreme **[**80]** Court has held that an expert's omission of variables from a regression analysis will normally "affect the analysis' probativeness, not its admissibility." *Bazemore v. Friday, 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)*. These limitations on expert testimony are properly tested in the adversarial process "through competing evidence and incisive cross-examination." *Murray, 870 F.3d at 925*.

In any event, Qualcomm's challenges to Dr. Flamm's dataset do not sufficiently undermine the reliability of Dr. Flamm's regression analysis to warrant exclusion. Qualcomm's contention that Dr. Flamm did not examine sufficient data to reach a reliable conclusion is misplaced. *Daubert* Mot. at 2. As Qualcomm acknowledges, Dr. Flamm applies his methodology to extensive transactional data supplied by actors at every step of the handset distribution chain. Flamm Decl. ¶ 261. Specifically, Dr. Flamm analyzes data from six major OEMs, five wireless carriers, six of the largest U.S. retailers, the largest U.S. distributor, and a major contract manufacturer. *Id.* Although Qualcomm faults Dr. Flamm for using information from only one distributor and one contract manufacturer, *Daubert* Mot. at 6-8, Qualcomm does not suggest how the small sample size affected Dr. Flamm's conclusions. Indeed, after **[**81]** receiving data from another distributor, Dr. Flamm has updated his analysis and has found that the distributor pass-through estimate shifted from 89.1% in his original report to 88.4% in his updated report. ECF No. 708-7 ("Flamm Opp. Decl.") ¶ 15.

Qualcomm relatedly claims that Dr. Flamm's decision to use a small fraction of the available data was motivated by "convenience, not sound statistical practices." *Daubert* Mot. at 2. However, an examination of Dr. Flamm's report reveals that he did not discard evidence as a matter of convenience. Instead, Dr. Flamm's data selection is based on two neutral methodological choices: (1) to include data with sufficient information about the ten quality-control characteristics in his model, and (2) to focus his analysis on the first period a product is observed. *Daubert* Opp. at 17; Flamm Decl. ¶¶ 256, 258. Qualcomm does not argue that these methodological choices on their own are grounds for exclusion. Moreover, Dr. Flamm provides adequate explanations for each of these methodological choices.

[*306] First, Dr. Flamm uses the same ten quality-control characteristics in his model that Qualcomm's own retained experts used in a submission to the FTC. Flamm Decl. ¶ 256. In his **[**82]** analysis, Dr. Flamm controls for these ten quality-control characteristics in order to determine what effect, if any, a change in Qualcomm's royalty rate would have on the price of phones to consumers in the market. *Id.* Notably, Qualcomm identifies only two Samsung phone models that Dr. Flamm excluded from his analysis on the basis of inadequate data, as compared to the 971 models that Dr. Flamm did include. Flamm Opp. Decl. ¶¶ 13, 36. Indeed, the number of phone models considered by Dr. Flamm far exceeds the approximately 238 models considered by Qualcomm's own experts in their FTC filing. *Daubert* Opp. at 18. Moreover, Dr. Flamm's analysis and conclusion remain essentially unaltered even after he updates his regression analysis to account for these two additional phone models. *Id.* ¶ 14.

Second, Dr. Flamm explains why he uses "prices and costs from the first period a product is observed." Flamm Decl. ¶ 257. Dr. Flamm describes why he uses this data for different marketplace actors. For OEMs, this data "capture[s] the prices set with carriers as they negotiate the phone configurations to be offered in retail locations." *Id.* "[I]n the case of Apple," this data reflects "the price [Apple] selected for the **[**83]** features it included in phones to be offered in its stores and through other resellers." *Id.* Finally, with regard to retailers and wireless carriers, "using prices and costs from the first period shows the pass-through of their initial procurement costs into initial sales prices." *Id.* After removing the non-probative data, Dr. Flamm performs a regression analysis in which he controls for the ten quality-control characteristics in order to determine what effect, if any, a change in Qualcomm's royalty rate would have on the price of phones to consumers in the "but for" world. *Id.* ¶ 256. To double-check his result, Dr. Flamm also performs another regression analysis for OEMs, contract manufacturers, and distributors using average price and cost data for the entire lifespan of the devices. Flamm Opp. Decl. ¶¶ 33-35. "[A] number of courts have held that averaged and aggregated data may be used to demonstrate pass-through." *In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 605 (N.D. Cal. 2010)*; *see also* Giuliano v. Sandisk Corp., No. 10-CV-02787 SBA, 2015 U.S. Dist. LEXIS 193817, 2015 WL 10890654, at *18 (N.D. Cal. May 14, 2015) ("Courts have . . . held that averaged and aggregated data is not fatal to econometric models used to measure the extent of pass-through of component costs in the prices paid for end-use products."). These alternative results **[**84]** based on average price and cost data are consistent with Dr. Flamm's previous results and show consistent, positive pass-through rates for the examined segments of the distribution chain. *Id.*

Finally, Qualcomm purports to identify errors in Dr. Flamm's coding that supposedly undermine the reliability of his conclusions. *Daubert* Mot. at 2. Qualcomm argues only that Dr. Flamm's miscoding "add[s] further critical errors to his already unreliable methodology and data selection." *Id.* at 12. Nevertheless, the Court rejects Qualcomm's argument on its own terms. Some of Dr. Flamm's coding mistakes stem from mistakes made by Qualcomm's own expert, Dr. Johnson. ECF No. 692-4 at 1 ("Errors in the launch dates of certain versions of some Apple models were inadvertently incorporated into Exhibit 22, resulting in incorrect entries."). The remaining errors that Qualcomm identifies are minor inaccuracies that had no appreciable effect on Dr. Flamm's analysis or conclusions. Flamm Opp. Decl. ¶¶ 12, 14. For example, with respect to the "most glaring" coding error noted by Qualcomm, *Daubert* Mot. at 11, Dr. Flamm's pass-through rate for the relevant distributor—Wistron—remains identical even after correction, Flamm **[**85]** Opp. Decl. ¶ 12. As with its other challenges above, Qualcomm does not attempt to show that the coding errors were so significant as to render Dr. Flamm's hedonic regression unreliable. For these reasons, the Court DENIES Qualcomm's motion to strike the declaration of Dr. Flamm.

The Court next considers Qualcomm's more-targeted challenges to Plaintiffs' theory of pass-through at specific links in the distribution chain—namely (1) OEMs and (2) retailers and wireless carriers.

[*307] (iii) Pass-Through by OEMs

Qualcomm first contends that Plaintiffs have failed to establish predominance on the antitrust impact element because Dr. Flamm's model cannot show that any OEM "actually raised the price of a phone" or "would have made a different, 'better' phone absent the overcharge." Opp. at 10. Qualcomm raises two specific arguments. First, Qualcomm contends that Plaintiffs' theory of OEM pass-through is deficient because it fails to account for varying profit margins across OEMS. *Id.* at 11-13. Second, Qualcomm asserts that Plaintiffs' model of OEM pass-through ignores that the alleged overcharges make up only a small portion of total cost. *Id.* at 13-15. The Court addresses each argument in turn.

First, Qualcomm argues that Dr. Flamm **[**86]** incorrectly presumes that OEMs must account for increased costs by raising prices or reducing quality. *Id.* at 11. Qualcomm states that Dr. Flamm's premise is faulty because real-world evidence shows that "OEMs make highly individualized decisions about costs and margins." *Id.* In particular, Qualcomm cites deposition testimony that OEMs have other options to respond to price increases, such as renegotiating other costs or adjusting profit margins. *Id.* at 11-12.

In attempting to inject these individual inquiries into the analysis, Qualcomm appears to misapprehend the relevant inquiry. Plaintiffs' theory in the instant case is that Qualcomm imposed an industry-wide above-FRAND royalty charge on all handsets sold by OEMs. *See* Elhauge Decl. ¶ 58. Qualcomm and the OEM enter into a license ex ante that fixes the royalty rate, which is generally applied to the net sales price that the OEM charges for the handset. *See id.* ¶ 110. Thus, the relevant question in the counterfactual "but for" analysis is whether a reduction in Qualcomm's systematic and predictable royalty charge would have resulted in lower quality-adjusted prices for consumers. *See* Flamm Reply Decl. ¶ 18 ("[T]he relevant pass-through question at issue **[**87]** in this case is: in a counterfactual 'but-for' world in which consistent and predictable market-wide royalties throughout the relevant period were systematically lower than what prevailed in the actual world, would end-consumers have experienced systematically lower quality-adjusted prices?"). Dr. Flamm's analysis, which relies on testimony from OEMs and basic economic principles regarding pass-through of industry-wide taxes, answers that question.

Qualcomm, by contrast, focuses on the slightly different question of how OEMs can respond to changes in cost. Opp. at 11 (listing ways that "OEMs faced with cost changes can respond"); Flamm Reply Decl. ¶ 16 ("Dr. Johnson implies that the relevant 'but-for' world is one in which an individual OEM would be faced with unexpected shifts in the Qualcomm royalty it anticipated paying mid-way through a device's life cycle."). However, the crux of this case does not involve a situation in which "OEMs incurred unexpected cost reductions on some or all the phone designs already in production." Flamm Reply Decl. ¶ 18. In fact, Plaintiffs rationally assume that such price fluctuations would be the same in the "as is" and "but for" worlds because, in light of **[**88]** intense competition in the smartphone industry, OEMs can be expected to "pursue the profit-maximizing motive of negotiating the best cost for the components they purchase, all else being equal." *Id.* ¶¶ 17, 50 n.45. Qualcomm's royalty rates, on the other hand, remain a known constant throughout the life cycle of a product. *Id.* ¶ 17. Although the royalty amount may fluctuate based on the net sales price charged by the OEM, the royalty rate stays the same. Thus, the Court is not persuaded by Qualcomm's first contention that variances in profit margins across OEMs overwhelm common issues of antitrust impact.

The Court also finds unpersuasive Qualcomm's second, and related, contention that Dr. Flamm fails to account for the fact that "an OEM's response to a change in the cost of a specific input will depend (among other things) on the input and the size of the change." Opp. at 14. Once again, the relevant question centers on how OEMs would act in a "but for" world where Qualcomm's ex ante royalty rate is reduced, not how OEMs respond to changes in cost. Flamm Reply Decl. ¶ 49. More fundamentally, Qualcomm overlooks substantial documentary and testimonial **[*308]** evidence that OEMs did not optimize stand-alone **[**89]** component costs in isolation, but rather optimized total incremental costs as a whole. *See id.* ¶¶ 99-102 (citing testimony). Indeed, both economic theory and witness descriptions of industry practice confirm that royalty costs (including Qualcomm's royalty) are considered with all costs when making determinations about price and quality. *Id.* For this reason, the competing model offered by Qualcomm's expert, Dr. Johnson, does not undermine Dr. Flamm's methodology because Dr. Johnson performs his analysis by dividing component costs into sub-categories. ECF No. 641-11 ("Johnson Decl.") ¶¶ 110-11; Flamm Reply Decl. ¶ 108 ("[S]licing component cost categories into sub-categories can produce spurious estimates of pass-through relationships in finite samples, even when firms are passing through total incremental unit cost."). To the extent that Qualcomm has identified some examples where market participants have not always passed through cost-savings, Opp. at 15, Qualcomm raises a merits question, not a basis to deny class certification.

Qualcomm's comparison of the instant case to *In re Optical Disk, 303 F.R.D. 311*, is unpersuasive. In that case, the court explained that the indirect purchasers had "not presented a persuasive explanation **[**90]** as to why it would be reasonable to assume a uniform pass through rate given that [the components at issue] typically make up a relatively small portion of the cost of the products into which they are incorporated." *Id. at 324*. Qualcomm asserts that Dr. Flamm here has "not presented a persuasive explanation as to why it would be reasonable to assume a uniform pass through rate" for OEMs when the "overcharge" makes up a "relatively small portion" of the phone's total cost. Opp. at 13. Dr. Flamm, however, offers an explanation supported by economic theory and studies for why OEMs will pass through industry-wide taxes. Moreover, he does not simply assume a uniform pass-through rate for OEMs. Instead, he examines transactional data for six different OEMs—including the five largest OEMs in the U.S. market (Apple, Samsung, Motorola, LG, and HTC)—who "accounted for approximately 90% of total cell phone sales" during the relevant period. Flamm Decl. ¶ 261. Dr. Flamm calculates individual pass-through rates for these six OEMs in order to model a composite pass-through rate. *Id.* While his results show the pass-through rates are not identical, they are uniformly high and positive. The court in *In re Optical Disk* ***[**91]*** *Drive* made a similar observation when it later certified the class of indirect purchasers based on a more-substantial study of pass-through to consumers. *In re Optical Disk Drive Antitrust Litig., No. 10-MD-2143 RS, 2016 U.S. Dist. LEXIS 15899, 2016 WL 467444, at *9 (N.D. Cal. Feb. 8, 2016)* ("The [plaintiffs] offer that they have now measured pass-through rates for over 273 million . . . products. While results show the pass-through rates are not uniform, they are uniformly high and positive—which [plaintiffs] contend is sufficient to show that overcharges were consistently passed through to consumers."). Thus, the Court rejects Qualcomm's predominance challenges to Plaintiffs' ability to show pass-through at the OEM level.

(iv) Pass-Through by Retailers and Wireless Carriers

Qualcomm next contends that Plaintiffs cannot show common impact at either the retailer or wireless carrier level. Opp. at 9-10, 16-18. Qualcomm focuses on two particular practices used by these market participants. First, retailers and wireless carriers employ a practice called focal-point pricing. *Id.* at 9-10. Second, retailers and wireless carriers utilize different pricing and marketing practices. *Id.* at 16-18. Qualcomm suggests that the individualized nature of these practices raises issues unique to each market participant that are **[**92]** not adequately addressed by Dr. Flamm's model and, therefore, defeat predominance. The Court examines each of the two practices in turn.

First, Qualcomm argues that Dr. Flamm "does not account for how, and by how much, focal-point pricing affects the alleged pass-through rate." Opp. at 10. Focal-point pricing is a marketing strategy in which sellers set consumer prices at "focal points," such as those ending in $9.99. Johnson Decl. ¶ 118. Qualcomm's expert Dr. Johnson indicates in his report that focal-point pricing was a dominant strategy employed by the retailers and **[*309]** wireless carriers in this case, and that most devices were sold "at just two focal points, i.e., prices ending in $49.99 and in $99.99." *Id.* ¶ 119; *see also id.* ¶¶ 120-21 (providing specific pricing figures for specific retailers and wireless carriers). The consequence of focal-point pricing is that sellers "may assign products with small to moderate differences in costs to the same price point despite cost differences, or may not move a given product to the next higher price point in response to relatively small cost increases." *In re Lithium Ion Batteries, 2018 U.S. Dist. LEXIS 35744, 2018 WL 1156797, at *4*. Qualcomm argues that this pricing strategy results in class members who purchased at a focal point **[**93]** price and experienced no overcharge.

What Qualcomm fails to appreciate is that Dr. Flamm's model is designed to measure quality-adjusted price, not simply nominal price. The economic term "quality-adjusted prices" captures both the nominal price and total quality of a particular product. Flamm Decl. ¶ 98. To take a simple example, although a $2.00 two-liter soda has a higher nominal price than a $1.50 one-liter soda, the $2.00 two-liter soda has a lower quality-adjusted price than the $1.50 one-liter soda. *See generally* ¶¶ 92-97. In the instant case, Dr. Flamm's reply declaration posits that even if the nominal, focal-point price would not shift in the "but for" world where Qualcomm's overcharge is lessened or eliminated, the quality-adjusted price will change. *See* Flamm Reply Decl. ¶ 73 (stating that his hedonic regression model "demonstrates that 88% of upstream cost changes are passed through to consumers in the form of quality-adjusted price changes"). In particular, under Dr. Flamm's theory, OEMs would develop higher-quality phones with improved features even though the price charged to consumers by retailers and wireless carriers remains the same. OEMs have the economic incentive **[**94]** to either improve the phone's features or lower the price to consumers because of the intense competition among OEMs in the smartphone industry. *Id.* ¶¶ 50, 58-61. Indeed, Dr. Flamm notes occasions in which OEMs pursued "cost breaks" even smaller than Qualcomm's royalty overcharge to obtain modem chips from Qualcomm with disabled functionality. *Id.* ¶ 62. Dr. Flamm's conclusion has added force in light of the various economic literature and supporting empirical studies showing that industry-wide taxes, like Qualcomm's, are passed through to end purchasers. Flamm Decl. ¶ 122. Thus, notwithstanding focal point pricing, Dr. Flamm's hedonic regression remains a viable "method for determining whether the entire class of consumers was harmed (or not) by pass-through of Qualcomm's alleged overcharge." Flamm Reply Decl. ¶ 73.

Case law from this district supports that conclusion. In *In re Optical Disk Drive*, the court certified a class of indirect purchasers over the defendants' focal-point pricing predominance challenge. The court explained that the "[indirect-purchaser] plaintiffs ha[d] proffered evidence that in competitive markets, economic theory (supported by empirical studies) consistently **[**95]** predicts that pass-through rates will be at or near 100%." *In re Optical Disk Drive, 2016 U.S. Dist. LEXIS 15899, 2016 WL 467444, at *8*. To account for focal-point pricing, the plaintiffs "contend[ed] that in some instances manufacturers will adjust the 'quality' of particular computer systems, rather than the price." *2016 U.S. Dist. LEXIS 15899, [WL] at *9*. The court stated that "the manufacturer [could] select the particular components and features to include or omit so as to preserve the expected profit margins for a particular target retail price." *Id.*

Thus, the court accepted the plaintiffs' "reduced quality" theory "as the means by which they intend to argue they overpaid in some instances." 2016 U.S. Dist. LEXIS 15899, [WL] at *10.

The decision in *In re Lithium Ion Batteries* is not to the contrary. There, the court concluded that the plaintiffs' expert's quality-adjusted pricing theory did not "demonstrate that any products (and thus the purchasers of those products) actually experienced a quality reduction, rather than an increased cost, as a result of the alleged price-fixing conspiracy." In re Lithium Ion Batteries, 2018 U.S. Dist. LEXIS 35744, 2018 WL 1156797, at *4. The court went on to observe that, even "assuming that consumer class members experienced quality reductions rather than price differences, [the expert] d[id] not explain how the existence of those quality reductions affects the reliability **[**96]** of his prior overcharge pass-through regression calculations," which were based on actual **[*310]** cost and price data. 2018 U.S. Dist. LEXIS 35744, [WL] at *5. Here, for the reasons detailed above, Dr. Flamm adequately explains how his regression analysis shows that consumers in the "but for" world would have paid lower quality-adjusted prices. In one possible scenario, consumers would have paid the same nominal price for the phone but would have received a phone of higher quality. As in In re Optical Disk Drive, Dr. Flamm provides a sound economic basis—rooted in academic literature, empirical studies, and his own regression analysis on actual transactional data—to support his theory and methodology. For these reasons, the Court disagrees that the presence of focal-point pricing at the retail and wireless carrier level defeats predominance.

Second, Qualcomm argues that Dr. Flamm has not accounted for instances in which retailers and wireless carriers offered a variety of rebates, discounts, promotions, bundling programs, financing, upgrades, trade-ins, and other similar pricing strategies. Opp. at 16. However, Plaintiffs offer a simple rebuttal. Specifically, Plaintiffs contend that it is reasonable to assume that the same pricing strategies **[**97]** would have occurred in the "but for" world. Reply at 12-13. Federal and state cases alike support this proposition. *See* In re Optical Disk Drive, 2016 U.S. Dist. LEXIS 15899, 2016 WL 467444, at *10 (rejecting the notion that the plaintiffs "ha[d] not accounted for, and will never be able to account for, instances in which retailers sold computer systems below cost, provided discounts or rebates, or bundled products together"); In re : Cathode Ray Tube (CRT) Antitrust Litig., No. 1917, 2013 U.S. Dist. LEXIS 137945, 2013 WL 5429718, at *20 (N.D. Cal. June 20, 2013) ("CRT manufacturers would have offered special price concessions to those buyers in the but-for as well as the actual world."), *report and recommendation adopted*, No. 07-CV-05944-SC, 2013 U.S. Dist. LEXIS 137946, 2013 WL 5391159 (N.D. Cal. Sept. 24, 2013); Rosack v. Volvo of Am. Corp., 131 Cal. App. 3d 741, 182 Cal. Rptr. 800, 808 (Ct. App. 1982) ("[C]ontentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected." (citation omitted)).

Nor has Qualcomm identified a predominance issue on the ground that some wireless carriers partially or fully subsidized phones for customers who subscribed to their services. Johnson Decl. ¶¶ 125-34. As a result of these subsidy programs, many customers paid less than full price for their phones, or even received their phones at less than cost or for free. *Id.* ¶ 133. However, Dr. Flamm "provide[s] empirical analysis of pass-through that directly controls for the subsidization strategy emphasized by [Qualcomm], as well as **[**98]** for financing and other important aspects of carrier phone sales." Flamm Reply Decl. ¶ 127. Specifically, Dr. Flamm performs separate pass-through rate calculations for subsidized and unsubsidized phones and finds statistically significant pass-through rates for each wireless carrier for subsidized and unsubsidized phones. *Id.* tbl.5. Dr. Flamm also responds to Qualcomm's concern that some phones are free or purchased for below the production cost: he describes how service contracts are used in conjunction with subsidies to recover the cost of phones. *Id.* ¶ 127; *see also* Flamm Decl. ¶¶ 234-44. As support, Dr. Flamm cites to an FCC filing in which a wireless carrier admits that it can recoup phone subsidies through locked-in service plans. Flamm Reply Decl. ¶¶ 130-31.

In sum, the Court is persuaded that the common issues that Plaintiffs identify with respect to pass-through will predominate over the individualized issues that Qualcomm raises.

(3) No Impact to Certain Segments of Indirect Purchasers

Qualcomm lastly contends that Plaintiffs' proposed class includes a large number of members who have suffered no impact as a result of Qualcomm's conduct. Opp. at 7-8. "[A] well-defined class may inevitably **[**99]** contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct." Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1136 (9th Cir. 2016). However, predominance may be lacking if the "class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct." Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 824 (7th Cir. 2012); *see also* Mazza, 666 F.3d at 596 (concluding that common issues did not predominate because **[*311]** large numbers of class members were never exposed to the challenged conduct to begin with); In re Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14, 137-38 (D.D.C. 2017) (determining that predominance was lacking where over 2,000 uninjured plaintiffs would have to be "weeded out" of the 16,000-member class). The Court finds that Plaintiffs overcome that potential issue in the instant case.

Plaintiffs' basic theory of impact is that all actors in the distribution chain (including OEMs, retailers, and carriers) passed on the above-FRAND portion of Qualcomm's license fees to indirect purchasers. Qualcomm points out that Apple and its contract manufacturers began withholding payments of iPhone royalties from Qualcomm in October 2016 and stopped paying altogether in January 2017. ECF No. 641-12 at 325:17-326:12. Therefore, according to Qualcomm, the large number of consumers who purchased Apple **[**100]** iPhones after October 2016 could not be affected by Qualcomm's overcharge. Opp. at 8. For support, Qualcomm notes that Plaintiffs' experts, Mr. Lasinski and Dr. Flamm, do not calculate overcharges to Apple for the period after October 2016. *Id.*

The Court disagrees with Qualcomm's assessment that Plaintiffs' experts have conceded that the segment of the class that purchased Apple iPhones after October 2016 have suffered no antitrust impact. Whether or not Apple and its contract manufacturers elected to stop paying royalties does not definitively answer whether Apple incorporated potential future payments of the royalties into its consumer pricing. Indeed, Apple's internal documents show that Apple considered Qualcomm's royalty when pricing and designing iPhones to be sold in 2017. ECF No. 724-4 at 21. Apple's decisional choice makes sense because Qualcomm continues to charge royalties and has initiated ongoing litigation efforts to collect those royalties. *See* ECF No. 725-7 at 19. Additionally, the previous effects of Qualcomm's allegedly anticompetitive conduct on Apple (and all OEMs) continued even after Apple and its contract manufacturers ceased royalty payments. Elhauge Reply Decl. ¶ 9. **[**101]** In this way, "[t]he effect of Qualcomm's anticompetitive conduct on chipset prices is a common impact across all OEMs, including Apple, that persists beyond 2016." *Id.*

Qualcomm reads too much into Mr. Lasinski's and Dr. Flamm's statements to argue that "Plaintiffs' experts admit [that the post-October 2016 Apple purchasers] were not impacted." Opp. at 8. In his report, Mr. Lasinski performs an exemplary calculation of the above-FRAND surcharge paid by Apple (and four other OEMs). Lasinski Decl. ¶¶ 12 n.5, 22. That calculation is based on common evidence of multiple license agreements and documentary evidence regarding Qualcomm's licensing practices. *Id.* ¶ 147. Although Mr. Lasinski has not yet calculated the above-FRAND surcharge paid by Apple after 2016, he confirms that he would apply the same methodology and common evidence to quantify the surcharge. ECF No. 725-3 ("Lasinski Reply Decl.") ¶ 4 n.4. Likewise, Dr. Flamm's statement that post-2016 Apple purchasers are not part of the class must be read in the context of his additional statement that he had been asked to use Mr. Lasinski's numbers in performing the analysis. ECF Nos. 641-9 at 147:3-15, 724-6 at 148:10-150:1. The Court has not **[**102]** been shown or located anything in Mr. Lasinski's or Dr. Flamm's reports suggesting that quantification of the industry-wide above-FRAND overcharge requires individualized inquiries for portions of the putative class.

In sum, the structure of Plaintiffs' proposed class reveals a reasonably close fit with Plaintiffs' theory of antitrust impact, and the membership of the class is co-extensive with those who could have been injured by Qualcomm's allegedly anticompetitive conduct.

(4) Conclusion on Antitrust Impact

Plaintiffs have shown that common issues will predominate with respect to the element of impact, as to both direct purchasers and indirect purchasers. In particular, Plaintiffs' theory and methodology of demonstrating pass-through to consumers on a common basis withstands scrutiny. Of course, Qualcomm has submitted evidence purportedly contradicting Plaintiffs' pass-through theory and has launched attacks on the completeness and accuracy of Dr.

Flamm's pass-through studies. Nevertheless, the persuasiveness of **[*312]** Qualcomm's evidence and arguments is an issue to be decided on the merits, not at class certification.

c. Damages

Qualcomm's final predominance arguments center on Plaintiffs' **[**103]** ability to prove damages on a class-wide basis. First, Qualcomm contends that California law cannot be applied to a nationwide class of consumers. Opp. at 23-24. Second, Qualcomm contends that Plaintiffs' damages equation cannot workably prove individual damages because the results vary by distribution channel. *Id.* at 18-19. The Court addresses each contention in turn.

(1) Choice of Law

Qualcomm first contends that California law may not be applied to a nationwide class of consumers. Plaintiffs rely on the California Cartwright Act for damages because Plaintiffs cannot seek damages under the federal Sherman Act. As the Court explained in ruling on Qualcomm's motion to dismiss, Plaintiffs are indirect purchasers who cannot "bring suits for money damages [under the Sherman Act], even if the indirect purchasers suffered an injury in the form of an overcharge passed on from direct purchasers." ECF No. 175 at 42 (quoting *Ill. Brick Co. v. Illinois, 431 U.S. 720, 730, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977))*. The California Cartwright Act, however, does not contain the same prohibition against damages suits by indirect purchasers. *Id.* at 39.

Thus, the operative question is whether Plaintiffs may seek damages on behalf of the entire class under the California Cartwright Act. It is important to conduct such a choice-of-law **[**104]** analysis because "[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance." *Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996)*; *see also* *Mazza, 666 F.3d at 589* (holding that "the district court erred by misapplying California's choice of law rules and certifying a nationwide class under California's consumer protection and unjust enrichment laws"). As Qualcomm recognizes, the Court already ruled at the motion to dismiss stage that the Cartwright Act may be applied to a nationwide class because other states do not have an interest in barring their own citizens from recovering damages for a California-based corporation's anticompetitive conduct that took place almost entirely in California. ECF No. 175 at 36-42. Although Qualcomm repeats its argument that a nationwide class cannot be certified under California law, Qualcomm raises the issue solely "for the purposes of preserving the argument." Opp. at 23. The Court reproduces its reasoning here.

A court must ensure that the certification of a nationwide class under the laws of a single state comports with due process. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)*. "Under California's choice of law rules, the class action proponent bears the initial burden to show that California has significant contact or significant **[**105]** aggregation of contacts to the claims of each class member." *Mazza, 666 F.3d at 589* (citation and internal quotation marks omitted). "Once the class action proponent makes this showing, the burden shifts to the other side to demonstrate that foreign law, rather than California law, should apply to class claims." *Id. at 590* (citation and internal quotation marks omitted).

"[A]nticompetitive conduct by a defendant within a state that is related to a plaintiff's alleged injuries and is not 'slight and casual' establishes a 'significant aggregation of contacts, creating state interests.'" *AT & T Mobility LLC v. AU Optronics Corp., 707 F.3d 1106, 1113 (9th Cir. 2013)* (footnote and citation omitted). Qualcomm does not dispute that Plaintiffs have sufficiently alleged that California has a constitutionally sufficient aggregation of contacts to the claims of each putative class member in this case. The Court agrees, as Qualcomm's principal place of business is in California, Qualcomm made business decisions related to its anticompetitive conduct in California, and Qualcomm negotiated the licenses at issue in California. Accordingly, the Court finds that Plaintiffs have met their initial burden. "California has a constitutionally sufficient aggregation of contacts to the claims of each putative class **[**106]** member in this case," **[*313]** and application of California law here poses no constitutional concerns. *Mazza, 666 F.3d at 590*; *see also* *In re Yahoo Mail Litig., 308 F.R.D. 577, 602 (N.D. Cal. 2015)* (concluding application of California law was constitutionally permissible where defendant's corporate headquarters were in

California, the defendant's executive decision makers were largely in California, and the processes at issue were developed and directed in California); *Clothesrigger, Inc. v. GTE Corp., 191 Cal. App. 3d 605, 236 Cal. Rptr. 605 (Ct. App. 1987)* (finding application of California law was constitutionally permissible where defendant's principal offices were in California and the allegedly fraudulent misrepresentations emanated from California).

Because the Court is satisfied that Plaintiffs have adequately alleged that California has sufficient contacts with the proposed class claims, the burden is on Qualcomm to show "that foreign law, rather than California law, should apply." *Mazza, 666 F.3d at 590* (citation omitted). California law may be applied on a classwide basis only if "the interests of other states are not found to outweigh California's interest in having its law applied." *Id.* (quoting *Wash. Mut. Bank, FA v. Superior Court, 24 Cal. 4th 906, 103 Cal. Rptr. 2d 320, 15 P.3d 1071, 1082 (Cal. 2001))*. To determine whether the interests of other states outweigh California's interest, courts administer the following three-step government interest test. The court must first **[**107]** determine whether the law of the other states is materially different from California law. *Id. at 590*. Second, if there are differences, the court determines whether the other state has an interest in having its law applied to decide whether a true conflict exists. *Id. at 591-92*. Third, if another state has an interest, the court determines which state's interest would be most impaired if its policy were subordinated to the law of another state. *Id. at 593*.

(i) Material Differences in State Law

The Court finds that Qualcomm has met its burden on the first step of California's choice-of-law analysis. Plaintiffs concede, as they must, that there are material differences between California's Cartwright Act and the antitrust statutes of certain other states. Specifically, some states would not allow suits for damages by indirect purchasers, like Plaintiffs, to proceed at all. This difference is material, as its application would "spell the difference between the success and failure of a claim." *Mazza, 666 F.3d at 591*.

(ii) Other States' Interests

As for step two, the Court finds that while California has an interest in applying its law, other states have no interest in applying their laws to the current dispute. California's interest is clear. **[**108]** The California Supreme Court has held that the "primary concern" of the Cartwright Act is "the elimination of restraints of trade and impairments of the free market." *Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066, 1083 (Cal. 2010)*. The mechanism of enforcing that commitment and deterring anticompetitive behavior is to allow private rights of action for treble damages. *Id.* Here, California has an interest in allowing this suit to proceed to address Qualcomm's unlawful business activities in California and deter such anticompetitive conduct perpetuated by a resident California corporation.

In contrast, the other states have no interest in applying their law to prevent this lawsuit from going forward. As noted above, the state laws at issue prohibit indirect purchasers from seeking damages for antitrust violations. These laws are designed to protect businesses and other actors from excessive antitrust liability by limiting suits for damages to those brought by direct purchasers. *See* *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 208, 212, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)* (explaining that the rule barring monetary recovery by indirect purchasers serves the purposes of "eliminat[ing] multiple recoveries" and "eliminat[ing] the complications of apportioning overcharges between direct and indirect purchasers").

The other states' interest in **[**109]** preventing excessive antitrust recovery for defendants is not implicated in the present case, where the sole defendant is a California resident. The California Supreme Court has recognized that in enacting liability limits, a state has an "interest in protecting resident defendants **[*314]** from excessive financial burdens." *Hurtado v. Superior Court, 11 Cal. 3d 574, 114 Cal. Rptr. 106, 522 P.2d 666, 672 (Cal. 1974)*. When the state "has no defendant residents to protect," the state also "has no interest in denying full recovery to its residents injured by [out-of-state] defendants." *Id. at 670*. Here, Qualcomm is the only defendant and is a resident of California, not one of the states that would forbid a damages suit to proceed. Thus, the other states have no interest in disallowing the suit to proceed against Qualcomm. *See* *Munguia v. Bekins Van Lines, LLC, No. 11-CV-01134-LJO, 2012 U.S. Dist. LEXIS 151596, 2012 WL 5198480, at *10 (E.D. Cal. Oct. 19, 2012)* (explaining that "a jurisdiction's only interest in having its [stricter] damages limitation rules applied is to protect its resident defendants from excessive financial burdens or exaggerated claims"); *Pecover v. Elec. Arts Inc., No. 08-CV-02820-VRW, 2010 U.S. Dist. LEXIS 140632, 2010 WL 8742757, at *20 (N.D. Cal. Dec. 21, 2010)* ("[I]n cases involving [California] resident defendants, foreign states do not have a legitimate interest in limiting the amount of recovery for nonresident plaintiffs under California **[**110]** law."). Indeed, applying other states' laws to bar recovery here would paradoxically disadvantage the other states' own citizens for injuries caused by a California defendant's unlawful activities that took place primarily in California. In such a circumstance, "California's more favorable laws may properly apply to benefit nonresident plaintiffs." *Clothesrigger, 236 Cal. Rptr. at 610*.

In fact, one of Qualcomm's principal authorities draws the same resident—nonresident distinction discussed above. In *In re Lithium Ion Batteries Antitrust Litigation*, like here, the indirect purchaser plaintiffs asked the court to certify a nationwide class under the Cartwright Act even though the class would encompass states that would prohibit such a suit for damages from proceeding. *No. 13-MD-02420-YGR, 2017 U.S. Dist. LEXIS 57340, 2017 WL 1391491, at *14 (N.D. Cal. Apr. 12, 2017)*. The court concluded that a nationwide class would be improper because three of the defendants were based in New Jersey whose law barred indirect purchaser damages suits. *Id.* The court reasoned that where states bar indirect purchasers from seeking damages, "'it is too much of a stretch to employ California law as an end run around the limitations those states have elected to impose on standing' to protect [their] *resident businesses*." *Id.* ***[**111]*** (emphasis added) (quoting *In re Optical Disk Drive Antitrust Litig., No. 10-MD-02143-RS, 2016 U.S. Dist. LEXIS 15899, 2016 WL 467444, at *12 (N.D. Cal. Feb. 8, 2016))*; *see also* *In re TFT-LCD (Flat Panel) Antitrust Litig., No. 07-MD-01827-SI, 2013 U.S. Dist. LEXIS 97825, 2013 WL 4175253, at *2 (N.D. Cal. July 11, 2013)* (concluding that Texas law prohibiting indirect purchaser suits should apply to Texas defendants). Qualcomm's own authority counsels in favor of the conclusion that the other states have no legitimate interest in applying their law to this dispute.[4]

Mazza is not to the contrary. In *Mazza*, the Ninth Circuit examined whether California's consumer protection laws could properly be applied to automobile sales that took place in 44 different states. *666 F.3d at 589, 592*. In concluding that other states had an interest in applying their consumer protection laws to the transactions at hand, the Ninth Circuit explained that each state has an interest in regulating the interactions of resident consumers and out-of-state businesses within the state by setting requirements like scienter and remedies. *Id. at 591-92*. In this way, the states could properly calibrate liability to protect consumers while attracting business. *Id. at 592-93*. *Mazza* therefore followed the principle that "[e]very state has an interest in having its law applied to its *resident* ***[**112]*** *claimants*." *Id. at 591-92* (emphasis added) (quoting *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1187 (9th Cir. 2001))*. The same interests are not implicated by the state laws at issue in this case. No resident claims the benefit of non-California law here because those state laws do not seek to protect consumers by governing their interactions with businesses. Instead, the laws at issue limit which actors may bring **[*315]** antitrust damages actions to the benefit of the state's resident defendants.

Qualcomm has not met its burden of showing that the other states have an interest in having their laws applied. Thus, the Court need not address which state's interest would be most impaired if its policy were subordinated to the law of another state. The Court "find[s] California law applicable without proceeding to the third step in the analysis." *Pokorny v. Quixtar, Inc., 601 F.3d 987, 995 (9th Cir. 2010)* (citation omitted).

(2) Workability of Proving Damages

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[4] Qualcomm's remaining authorities either do not contemplate or do not provide full discussion of the significance of the defendant's state of residence. *See* *In re Packaged Seafood Prods. Antitrust Litig., 242 F. Supp. 3d 1033, 1067 (S.D. Cal. 2017)*; *In re Korean Ramen Antitrust Litig., No. 13-CV-04115-WHO, 2017 U.S. Dist. LEXIS 7756, 2017 WL 235052, at *22 (N.D. Cal. Jan. 19, 2017)*; *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1027-28 (N.D. Cal. 2007)*.

Qualcomm next contends that Plaintiffs' damages equation cannot workably prove individual damages because the results vary by distribution channel and other individualized circumstances. Opp. at 18-19. Although individual damages calculations alone do not make class certification inappropriate under *Rule 23(b)(3)*, *see* *Leyva v. Medline Indus., Inc., 716 F.3d 510, 514 (9th Cir. 2013)* ("[T]he amount of damages is invariably an individual question and does not defeat **[**113]** class action treatment."), the U.S. Supreme Court has held that plaintiffs bear the burden of providing a damages model showing that "damages are susceptible of measurement across the entire class for purposes of *Rule 23(b)(3)*." *Comcast, 569 U.S. at 35*. The damages model must be tailored to "measure only those damages attributable to" plaintiffs' theory of liability. *Id.* If plaintiffs do not offer a plausible damages model that matches the theory of liability, "the problem is not just that the Court will have to look into individual situations to determine the appropriate measure of damages; it is that Plaintiffs have not even told the Court what data it should look for." *In re MyFord Touch Consumer Litig., 2016 U.S. Dist. LEXIS 179487, 2016 WL 7734558, at *15 (N.D. Cal. Sept. 14, 2016)*.

Plaintiffs have provided a damages model that fits Plaintiffs' theory of liability and can measure damages across the entire class. As noted above, Plaintiffs' basic theory is that Qualcomm's three interrelated anticompetitive practices allowed Qualcomm to extract an above-FRAND royalty payment from OEMs that was passed through to consumers. The Court has already detailed above Mr. Lasinski's methodology for calculating a weighted, average overcharge for each OEM as a result of Qualcomm's above-FRAND royalty. Lasinski Decl. ¶¶ 77, 107, 126-29, 147-48. **[**114]** Similarly, this Court has exhaustively explained Dr. Flamm's methodology for calculating an average overall pass-through rate of 87.4% to consumers. Flamm Decl. ¶¶ 256, 258, 261-83, 88-90. To calculate the total estimated damage of $4.84 billion to the class, Dr. Flamm multiplies his average overall pass-through rate by Mr. Lasinski's total overcharge to OEMs. *Id.* ¶ 291; ECF No. 693 ¶ 1.

Qualcomm's sole objection is that Dr. Flamm's damages model does not provide a way to calculate the overcharge on any particular device purchased by a class member, which Qualcomm says would require a "different pass-through rate for every permutation of possible distribution channels." Opp. at 18. However, Qualcomm does not explain why such an individualized inquiry is necessary. As explained above, Dr. Flamm calculates an average overall pass-through rate based on the weighted share of commerce in 18 primary sales channels. Flamm Decl. ¶¶ 283, 288. Other courts have approved similar weighted-average methodologies in calculating pass-through rates. *See, e.g.,* *In re Optical Disk Drive, 2016 U.S. Dist. LEXIS 15899, 2016 WL 467444, at *7* (allowing some degree of averaging and aggregating data); *In re Static Random Access Memory Antitrust Litig., 264 F.R.D. 603, 614 (N.D. Cal. 2009)* (permitting "the use of averaged and aggregated data"). **[**115]** These methods avoid the "retailer-by-retailer, manufacturer-by-manufacturer and product-by-product analysis of pass-through" that has been found problematic in other cases. *See* *In re Flash Memory Antitrust Litig., No. 07-CV-00086-SBA, 2010 U.S. Dist. LEXIS 59491, 2010 WL 2332081, at *12 (N.D. Cal. June 9, 2010)*. Even if Plaintiffs' damages model requires some individualized calculation of damages, class certification would still be appropriate. *See* *Leyva, 716 F.3d at 513* ("In this circuit, . . . damage calculations alone cannot defeat certification." (quoting *Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010))*.

[*316] d. Conclusion Regarding Predominance

This Court's rigorous analysis shows that common issues are likely to predominate over individual issues. Importantly, this Court's qualitative assessment of predominance includes some analysis into how this case, should it proceed to trial, would actually be litigated. *See* *In re New Motor, 522 F.3d at 20* ("Under the predominance inquiry, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." (internal quotation marks and citation omitted)).

As such, this Court notes that there is no dispute that antitrust violation can be shown using exclusively evidence that is common to the entire class for the reasons **[**116]** discussed above. The Court further finds that antitrust violation is likely to be a central, disputed issue at summary judgment and at trial. Qualcomm has made clear—in filings in both this action and the FTC enforcement action—that Qualcomm will seek to contest the issue of antitrust violation by contending that its practices had no anti-competitive effect on the market. Given the considerable, compelling common proof Plaintiffs have submitted regarding Qualcomm's alleged antitrust violation, this question is likely to be central to this litigation. As a result, the voluminous class-wide proof of antitrust violation weighs in favor of a finding that common questions predominate.

In addition to concluding that common questions will predominate with respect to the central element of antitrust violation, the Court also finds that common questions will predominate over individual questions with respect to antitrust impact. The question of antitrust impact also falls at the heart of this case and is likely to be vigorously litigated by the parties. On this question, the extensive documentary evidence suggests that Qualcomm imposed an industry-wide above-FRAND royalty rate on OEMs. Moreover, **[**117]** based on the expert reports, the Court concludes that Plaintiffs have presented a methodology that supports a finding that evidence common to the class will be utilized in demonstrating impact to both direct and indirect purchasers.

Finally, the Court finds that Plaintiffs have set forth a methodology for calculating damages on a class-wide basis. Thus, following a rigorous analysis, the Court finds that Plaintiffs have satisfied *Rule 23(b)(3)*'s predominance requirement with respect to all three elements— antitrust violation, antitrust impact, and damages.

ii. Superiority

Rule 23(b)(3) provides four non-exhaustive factors for a court to consider in determining whether a class action is superior to other methods of adjudication. These factors are:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). "[T]he purpose of the superiority requirement is to assure that the class action **[**118]** is the most efficient and effective means of resolving the controversy." *Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1175 (9th Cir. 2010)* (alteration in original) (citation omitted). As a leading treatise on civil procedure has observed, "if common questions are found to predominate in an antitrust action, then courts generally have ruled that the superiority prerequisite of *Rule 23(b)(3)* is satisfied." 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1781 (3d ed. 2018). Examining the four superiority factors in the instant case, the Court reaches the same conclusion that Plaintiffs have established superiority here.

The first factor is each class member's interest in "individually controlling the prosecution or defense of separate actions." *Fed. R. Civ. P. 23(b)(3)(A)*. "Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." **[*317]** *Wolin, 617 F.3d at 1175*. Here, the amount at stake for each individual class member is too small to bear the risks and costs of litigating a separate action. Litigation costs would be high, given that the case involves the intersection of complex intellectual property and economic issues and requires substantial expert testimony. As one district court in this district recognized, **[**119]** "[i]n antitrust cases such as this, the damages . . . are likely to be too small to justify litigation, but a class action would offer those with small claims the opportunity for meaningful redress." *In re Static Random Access Antitrust Litig., No. 07-CV-01819-CW, 2008 U.S. Dist. LEXIS 107523, 2008 WL 4447592, at *7 (N.D. Cal. Sept. 29, 2008)*.

The second factor is "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." *Fed. R. Civ. P. 23(b)(3)(B)*. Pursuant to an order from the Judicial Panel on Multidistrict Litigation ("JPML"), federal cases filed throughout the country were transferred to this Court for coordinated or consolidated pretrial proceedings. *See* *In re Qualcomm Antitrust Litig., 273 F. Supp. 3d 1373, 1376 (U.S. Jud. Pan. Mult. Lit. 2017)*. As the JPML articulated, the "actions share[d] factual questions" about whether Qualcomm's conduct violated "federal and state antitrust and consumer protection laws" and "involve[d] overlapping putative nationwide classes of cell phone purchasers." *Id. at 1375*. Thus, centralization would "eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel, and the judiciary." *Id.* Since that time, the parties have alerted the JPML to additional actions that involve the **[**120]** same common questions of fact, and the JPML has transferred those additional actions to this Court. *See* ECF No. 5. At present, there are 36 actions pending before this Court. Consequently, this factor too weighs in favor of certification.

The third factor is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." *Fed. R. Civ. P. 23(b)(3)(C)*. When the JPML issued its transfer order, it selected this district as the appropriate transferee district. *In re Qualcomm Antitrust, 273 F. Supp. 3d at 1376*. The JPML observed that this district "presents a convenient and accessible forum with the necessary judicial resources and expertise to manage this litigation efficiently." *Id.* More specifically, numerous actions were already pending in this district, including the FTC enforcement action. *Id.* As the JPML expected, centralization in this district has facilitated coordination of discovery and other pretrial activities between the FTC action and this MDL. *Id.* Finally, this district will serve as a convenient location for many potential witnesses, such as the employees of Apple and other cell phone manufacturers, who live in or around this district. *Id.* Thus, this factor likewise supports certification.

The parties here **[**121]** focus on the manageability factor, which requires that courts consider "the likely difficulties in managing a class action." *Fed. R. Civ. P. 23(b)(3)(D)*. This manageability consideration "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*. Thus, courts should consider, for example, "the potential difficulties in notifying class members of the suit, calculation of individual damages, and distribution of damages." *Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1304 (9th Cir. 1990)*. "Manageability concerns must be weighed against the alternatives and will rarely, if ever, be sufficient to prevent certification of a class." *Bowerman v. Field Asset Servs., Inc., 242 F. Supp. 3d 910, 933 (N.D. Cal. 2017)* (quoting *Trosper v. Styker Corp., No. 13-CV-0607-LHK, 2014 U.S. Dist. LEXIS 117453, 2014 WL 4145448, at *17 (N.D. Cal. Aug. 21, 2014))*.

As Plaintiffs point out, additional proceedings in this case will focus almost exclusively on the common evidence concerning Qualcomm's behavior and the resulting effect in the market. Reply at 14. Splintering this case into more than a hundred million individual cases would not make the case more manageable. Along the same lines, Qualcomm proposes that Plaintiffs divide their single class into "subclasses based on brand, distribution **[*318]** channel, or some other criteria that might prove practicable." Opp. at 21. The Court questions whether **[**122]** Qualcomm's proposal actually qualifies as an alternative to class action treatment. Regardless, the Court finds Qualcomm's proposal would not conserve resources because the majority of the proof does not vary by brand or distribution channel. Qualcomm does not identify any defenses or other individual inquiries unique to each class member or categories of class members. *See id.* As this Court explained in rejecting a similar request for "bellwether" trials, Qualcomm's approach "would merely multiply the number of trials with the same issues and evidence." *In re High-Tech, 985 F. Supp. 2d at 1228*.

Qualcomm also raises practical problems based on the sheer size of the class. Qualcomm broadly contends that a class of hundreds of millions of consumers holding such a large amount of claims "is inherently unmanageable, unfair, and inferior to alternative forms of adjudication." Opp. at 20. More precisely, Qualcomm worries about difficulties in "providing notice, managing damages inquiries, and administering and verifying claims." *Id.* at 21. However, Plaintiffs' responses to these points are persuasive. Plaintiffs note that "many courts have certified broad classes with similarly high numbers of potential class members" where common evidence rendered **[**123]** class treatment manageable. Reply at 15 & n.13 (citing Ninth Circuit cases involving more than 100 million class members). Moreover, Plaintiffs have contacted three claims administrators who have confirmed that they will be able to reach a minimum of 70% of the estimated 232.8 million to 250 million class members using notice methods approved in other similarly large antitrust class actions. ECF No. 725-1 ¶¶ 14-15. The Court also expects that Plaintiffs will be able to propose efficient means to calculate and distribute damages to class members. Thus, questions regarding manageability weigh in favor of finding class treatment superior to other methods of adjudication.

In sum, the Court finds that the proposed class members' interests weigh in favor of having this case litigated as a class action. In particular, the nature of Qualcomm's alleged overarching conduct and the desirability of concentrating the litigation in one proceeding weigh heavily in favor of finding that class treatment is superior to other methods of adjudication of the controversy. *See* Zinser, 253 F.3d at 1190-92. Nor do manageability concerns favor another form of adjudication. Therefore, Plaintiffs have satisfied the superiority requirement. **[**124]** Because Plaintiffs have also satisfied the predominance requirement, the Court GRANTS Plaintiffs' motion for class certification under Rule 23(b)(3).

2. Rule 23(b)(2)

To the extent that Plaintiffs seek to certify a separate class for injunctive relief only under Rule 23(b)(2), Mot. at 7, the Court also grants that request. "Rule 23(b)(2) allows class treatment when 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Dukes, 564 U.S. at 360 (quoting Fed. R. Civ. P. 23(b)(2)). "Unlike Rule 23(b)(3), a plaintiff does not need to show predominance of common issues or superiority of class adjudication to certify a Rule 23(b)(2) class." In re Yahoo Mail, 308 F.R.D. at 587. Rather, Rule 23(b)(2)'s "requirements are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." Parsons v. Ryan, 754 F.3d 657, 688 (9th Cir. 2014).

As described in detail in the predominance section above, Plaintiffs here have established that Qualcomm engages in two common practices applied uniformly throughout the market— namely, (1) Qualcomm's "no license-no chips" policy, and (2) Qualcomm's refusal to exhaustively license cellular SEPs to competing **[**125]** modem chip manufacturers. Additionally, Plaintiffs contend that Qualcomm's exclusive dealings with Apple exacerbated the effects of those two common practices. Qualcomm's practices are generally applicable to the entire class, and Plaintiffs seek an injunction to remedy these market-wide anticompetitive restraints and effects. FAC ¶¶ 164, 189, 196, 202, 210.

[*319] Qualcomm's main response is to analogize to cases where the plaintiffs attempted to certify claims for monetary relief under Rule 23(b)(2). *See* Opp. at 22. For example, in *Dukes*, the plaintiffs sought to certify claims for backpay under Rule 23(b)(2). 564 U.S. at 360. The U.S. Supreme Court rejected that effort because the monetary relief sought was not "incidental to" the injunctive relief. *Id.* The Court explained that "Rule 23(b)(2) applies only when a single injunction . . . would provide relief to each member of the class," not when each individual class member would be entitled to "a *different* injunction . . . against the defendant" or "an individualized award of monetary damages." Id. at 360-61. Those principles do not preclude Plaintiffs in the instant case from certifying a class for injunctive relief alone. Based on Plaintiffs' allegations and offer of proof, a single injunction barring Qualcomm's **[**126]** anticompetitive conduct would offer forward-looking relief to every member of the class. Unlike the backpay at issue in *Dukes*, the injunctive relief that Plaintiffs seek here does not depend on the specific circumstances of any individual class member.

Courts have approved the practice of "certify[ing] the injunctive aspects of [a] suit under Rule 23(b)(2) and the damages aspects under Rule 23(b)(3), achieving both consistent treatment of class-wide equitable relief and an opportunity for each affected person to exercise control over the damages aspects." Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 898 (7th Cir. 1999). Indeed, the Ninth Circuit has recognized that Rule 23(b)(2) and Rule 23(b)(3) "are not mutually exclusive." Smith v. Univ. of Wash., Law Sch., 233 F.3d 1188, 1196 (9th Cir. 2000). Accordingly, courts in this district have certified classes under both Rule 23(b)(2) and Rule 23(b)(3) in antitrust suits where defendants' conduct "was market-wide and not specific to individual customers." In re TFT-LCD, 267 F.R.D. at 596; *see also* In re Korean Ramen Antitrust Litig., No. 13-CV-04115-WHO, 2017 U.S. Dist. LEXIS 7756, 2017 WL 235052, at *24 (N.D. Cal. Jan. 19, 2017). This Court follows that well-trodden course in the instant case.

Qualcomm also suggests that Plaintiffs' proposed class is not sufficiently cohesive to warrant the same injunctive relief for the entire class. Opp. at 22-23. The Court disagrees. As described above, Plaintiffs have shown that

Qualcomm's allegedly anticompetitive conduct has market-wide **[**127]** application and effect. Because Qualcomm's practices "are generally applicable to the class as a whole," Plaintiffs may pursue an injunction on behalf of a *Rule 23(b)(2)* class. *Parsons, 754 F.3d at 688*. Qualcomm's remaining arguments repeat the same arguments made above with respect to *Rule 23(b)(3)* predominance. Opp. at 23. In addition to the fact that *Rule 23(b)(2)* class actions have no predominance requirement, *In re Yahoo Mail, 308 F.R.D. at 587*, the Court has already rejected Qualcomm's predominance arguments in the preceding section. Accordingly, to the extent that Plaintiffs seek to certify a *Rule 23(b)(2)* class for injunctive relief only, the Court GRANTS Plaintiffs' motion for class certification.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiffs' motion for class certification, and DENIES Qualcomm's motion to strike the declaration of Kenneth Flamm. The Court CERTIFIES the following class under *Rule 23(b)(2)* and *Rule 23(b)(3)*:

> All natural persons and entities in the United States who purchased, paid for, and/or provided reimbursement for some or all of the purchase price for all UMTS, CDMA (including CDMAone and cdma2000) and/or LTE cellular phones ("Relevant Cellular Phones") for their own use and not for resale from February 11, 2011, through the present (the "Class Period") in the United States. **[**128]** This class excludes (a) Defendant, its officers, directors, management, employees, subsidiaries, and affiliates; (b) all federal and state governmental entities; (c) all persons or entities who purchased Relevant Cellular Phones for purposes of resale; and (d) any judges or justices involved in this action and any members of their immediate families or their staff.

[*320] As Qualcomm does not challenge the adequacy of the proposed class representatives or proposed class counsel, the Court APPOINTS Sarah Key, Terese Russell, Carra Abernathy, Leonidas Miras, and James Clark as representatives of the class and APPOINTS Kalpana Srinivasan of Susman Godfrey L.L.P. and Joseph W. Cotechett of Cotchett, Pitre & McCarthy, LLP, as class counsel.

IT IS SO ORDERED.

Dated: September 27, 2018

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

End of Document

Iowa Pub. Emples. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc.

United States District Court for the Southern District of New York

September 27, 2018, Decided; September 27, 2018, Filed

17 Civ. 6221 (KPF)

Reporter

340 F. Supp. 3d 285 *; 2018 U.S. Dist. LEXIS 166733 **; 2018-2 Trade Cas. (CCH) P80,549; 2018 WL 4636993

IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM; LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION; ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM; SONOMA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION; and TORUS CAPITAL, LLC, on behalf of themselves and all others similarly situated, Plaintiffs, -v.- MERRILL LYNCH, PIERCE, FENNER & SMITH INC.; MERRILL LYNCH L.P. HOLDINGS, INC.; MERRILL LYNCH PROFESSIONAL CLEARING CORP.; CREDIT SUISSE AG; CREDIT SUISSE SECURITIES (USA) LLC; CREDIT SUISSE FIRST BOSTON NEXT FUND, INC.; CREDIT SUISSE PRIME SECURITIES SERVICES (USA) LLC; GOLDMAN SACHS & CO. LLC; GOLDMAN SACHS EXECUTION & CLEARING, L.P.; J.P. MORGAN SECURITIES LLC; J.P. MORGAN PRIME, INC.; J.P. MORGAN STRATEGIC SECURITIES LENDING CORP.; J.P. MORGAN CHASE BANK, N.A.; MORGAN STANLEY & CO. LLC; PRIME DEALER SERVICES CORP.; STRATEGIC INVESTMENTS I, INC.; UBS AG; UBS AMERICAS INC., UBS SECURITIES LLC; UBS FINANCIAL SERVICES INC.; EQUILEND LLC; EQUILEND EUROPE LIMITED; and EQUILEND HOLDINGS LLC, Defendants.

Subsequent History: Request granted, Request denied by *Iowa Pub. Emples. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 2019 U.S. Dist. LEXIS 237108, 2019 WL 11828239 (S.D.N.Y., Nov. 5, 2019)*

Motion granted by *Pub. Emples. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 2019 U.S. Dist. LEXIS 221167, 2019 WL 7283254 (S.D.N.Y., Dec. 26, 2019)*

Motion granted by, in part *Iowa Pub. Emples. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 2019 U.S. Dist. LEXIS 222637 (S.D.N.Y., Dec. 27, 2019)*

Motion denied by, Without prejudice *Iowa Pub. Emples. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 2020 U.S. Dist. LEXIS 156670, 2020 WL 6273396 (S.D.N.Y., Aug. 27, 2020)*

Magistrate's recommendation at *Iowa Pub. Employees' Ret. Sys. v. Bank of Am. Corp., 2022 U.S. Dist. LEXIS 117036 (S.D.N.Y., June 30, 2022)*

Core Terms

allegations, Broker, conspiracy, lenders, clearing, Defendants', trading, platform, stock loan, transactions, borrowers, stock, meetings, motion to dismiss, factors, pricing, joint venture, lending, concealment, broker-dealer, pleads, rule of reason, boycott, transparency, counterparty, implausible, threats, alleged conspiracy, clearinghouse, antitrust

Counsel: **[**1]** For Iowa Public Employees' Retirement System, on behalf of themselves and all others similarly situated, Plaintiff: Julie Goldsmith Reiser, LEAD ATTORNEY, Kit A. Pierson, Richard A. Koffman, Robert White Cobbs, Cohen Milstein Sellers & Toll PLLC (DC), Washington, DC; Christopher James Bateman, Michael Benjamin Eisenkraft, Cohen Milstein Sellers & Toll PLLC, New York, NY; Jeremy Daniel Andersen, Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP (CA), Los Angeles, CA; Maaren Alia Shah, Quinn Emanuel Urquhart & Sullivan

LLP, New York, NY; Maxwell Paden Deabler-Meadows, Quinn Emanuel Urquhart & Sullivan, New York, NY; Sascha Nicholas Rand, Steig Olson, Thomas Lepri, Daniel Lawrence Brockett, Quinn Emanuel, New York, NY; Thomas Popejoy, Quinn Emanuel Urquhart & Sullivan (NYC), New York, NY.

For Orange County Employees Retirement System, on behalf of themselves and all others similarly situated, Plaintiff: Christopher James Bateman, Michael Benjamin Eisenkraft, Cohen Milstein Sellers & Toll PLLC, New York, NY; Jeremy Daniel Andersen, Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP (CA), Los Angeles, CA; Maaren Alia Shah, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY; Maxwell Paden Deabler-Meadows, **[**2]** Quinn Emanuel Urquhart & Sullivan, New York, NY; Robert White Cobbs, Cohen Milstein Sellers & Toll PLLC (DC), Washington, DC; Sascha Nicholas Rand, Steig Olson, Thomas Lepri, Daniel Lawrence Brockett, Quinn Emanuel, New York, NY; Thomas Popejoy, Quinn Emanuel Urquhart & Sullivan (NYC), New York, NY.

For Sonoma County Employees' Retirement Association, on behalf of themselves and all others similarly situated, Plaintiff: Christopher James Bateman, Michael Benjamin Eisenkraft, Cohen Milstein Sellers & Toll PLLC, New York, NY; Jeremy Daniel Andersen, Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP (CA), Los Angeles, CA; Kit A. Pierson, Richard A. Koffman, Robert White Cobbs, Cohen Milstein Sellers & Toll PLLC (DC), Washington, DC; Maaren Alia Shah, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY; Maxwell Paden Deabler-Meadows, Quinn Emanuel Urquhart & Sullivan, New York, NY; Robert White Cobbs, Cohen Milstein Sellers & Toll PLLC (DC), Washington, DC; Sascha Nicholas Rand, Steig Olson, Thomas Lepri, Daniel Lawrence Brockett, Quinn Emanuel, New York, NY; Thomas Popejoy, Quinn Emanuel Urquhart & Sullivan (NYC), New York, NY.

For Los Angeles County Employees Retirement Association, Plaintiff: **[**3]** Jeremy Daniel Andersen, Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP (CA), Los Angeles, CA; Maaren Alia Shah, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY; Maxwell Paden Deabler-Meadows, Quinn Emanuel Urquhart & Sullivan, New York, NY; Sascha Nicholas Rand, Steig Olson, Thomas Lepri, Daniel Lawrence Brockett, Quinn Emanuel, New York, NY; Thomas Popejoy, Quinn Emanuel Urquhart & Sullivan (NYC), New York, NY.

For Torus Capital, LLC, Plaintiff: Jeremy Daniel Andersen, Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP (CA), Los Angeles, CA; Maaren Alia Shah, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY; Maxwell Paden Deabler-Meadows, Quinn Emanuel Urquhart & Sullivan, New York, NY; Peter George Safirstein, Safirstein Metcalf LLP, New York, NY; Sascha Nicholas Rand, Steig Olson, Thomas Lepri, Daniel Lawrence Brockett, Quinn Emanuel, New York, NY; Thomas Popejoy, Quinn Emanuel Urquhart & Sullivan (NYC), New York, NY.

For Merrill Lynch, Pierce, Fenner & Smith Incorporated, Merrill Lynch L.P. Holdings, Inc., Defendants: Adam Selim Hakki, Richard Franklin Schwed, LEAD ATTORNEYS, Shearman & Sterling LLP (NY), New York, NY; Ryan Ashby Shores, LEAD ATTORNEY, Shearman & Sterling LLP **[**4]** (DC), Washington, DC.

For Credit Suisse AG, Credit Suisse Securities (USA) LLC, Credit Suisse First Boston Next Fund, Inc., Defendants: David George Januszewski, Elai E. Katz, Herbert Scott Washer, Jason Michael Hall, Margaret Ann Barone, Sheila Chithran Ramesh, Cahill Gordon & Reindel LLP, New York, NY.

For Goldman Sachs & Co. LLC, Goldman Sachs Execution & Clearing, L.P., Defendants: Robert Y. Sperling, LEAD ATTORNEY, Winston & Strawn LLP (IL), Chicago, IL; Andrew Hunter Reynard, Sullivan & Cromwell, LLP (NYC), New York, NY; Richard C. Pepperman, II, Sullivan and Cromwell, LLP(NYC), New York, NY; Staci Lynn Yablon, Winston & Strawn LLP (NY), New York, NY.

For J.P. Morgan Securities LLC, J.P. Morgan Prime, Inc., J.P. Morgan Strategic Securities Lending Corp., J.P. Morgan Chase Bank, N.A., Defendants: Henry Liu, Kuntal Cholera, Robert D. Wick, Covington & Burling, LLP (DC), Washington, DC; John S. Playforth, Covington & Burling LLP, Washington, DC.

For Morgan Stanley & Co. LLC, Prime Dealer Services Corp., Strategic Investments I, Inc., Defendants: Damaris Hernandez, Daniel Slifkin, Michael A Paskin, LEAD ATTORNEYS, Lauren Michelle Rosenberg, Cravath, Swaine & Moore LLP, New York, NY.

[5]** For UBS AG, UBS Americas Inc., UBS Securities LLC, UBS Financial Services Inc., Defendants: David Charles Bohan, LEAD ATTORNEY, Peter Ginewicz Wilson Katten Muchin Rosenman LLP (Chicago), Chicago, IL.

For EquiLend LLC, EquiLend Europe Limited, EquiLend Holdings LLC, Defendants: Carmine D. Boccuzzi, Jr, LEAD ATTORNEY, Cleary Gottlieb, New York, NY; Alexis L. Collins, David I. Gelfand, Cleary Gottlieb Steen & Hamilton LLP (DC), Washington, DC.

For Credit Suisse Prime Securities Services (USA) LLC, Defendant: David George Januszewski, Elai E. Katz, Herbert Scott Washer, Jason Michael Hall, Margaret Ann Barone, Sheila Chithran Ramesh, Cahill Gordon & Reindel LLP, New York, NY.

Judges: KATHERINE POLK FAILLA, United States District Judge.

Opinion by: KATHERINE POLK FAILLA

Opinion

[*297] OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

In a 398-paragraph complaint, Plaintiffs detail a wide-ranging conspiracy to prevent the antiquated stock loan market from evolving into a transparent, direct, all-to-all electronic exchange. This market is critical to the short selling of stocks, a not-uncommon investment tool. The thrust of Plaintiffs' allegations is that Defendants conspired to boycott new market entrants — specifically, **[**6]** AQS, SL-x, and Data Explorers — in order to maintain their monopoly grip as prime broker intermediaries, and, by extension, to charge excessive fees under the cover of price opacity.

Defendants have jointly moved to dismiss the Amended Class Action Complaint (the "Amended Complaint" or "AC") under *Federal Rule of Civil Procedure 12(b)(6)* on five primary bases: the allegations are implausible; the alleged conduct as to SL-x and Data Explorers neither qualifies as *per se* unlawful nor violates the rule of reason; Plaintiffs lack antitrust standing; Plaintiffs' claims are untimely; and Plaintiffs' claim of unjust enrichment fails for the same reasons as their antitrust claim. Defendant EquiLend adds, in a supplemental motion to dismiss, that its alleged conduct was consistent with rational business strategy, and that the Court lacks specific personal jurisdiction over EquiLend Europe.

As set forth in the remainder of this Opinion, the Court rejects these arguments and denies Defendants' motions to dismiss. While it remains to be seen whether Plaintiffs' factual allegations will be borne out in discovery, the Court is not permitted to dismiss them at this early stage of the litigation.

BACKGROUND[1]

[1] This Opinion draws its facts from Plaintiffs' Amended Complaint (Dkt. #73) ("AC"), the well-pleaded allegations of which are taken as true for purposes of the instant motions. *See, e.g., Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. For ease of reference, the Court will refer to the memorandum in support of the joint motion to dismiss submitted by the various Bank of America, Credit Suisse, Goldman Sachs, J.P. Morgan, Morgan Stanley, and UBS defendants (collectively, the "Prime Broker Defendants") as "Def. Br." (Dkt. #110); to Defendant EquiLend's memorandum in support of its motion to dismiss as "EquiLend Br." (Dkt. #107); to Plaintiffs' memorandum in opposition to the joint motion to dismiss as "Pl. Opp." (Dkt. #112); to Plaintiffs' memorandum in opposition to EquiLend's motion to dismiss as "Pl. EquiLend Opp." (Dkt. #113); to the Prime Broker Defendants' joint reply as "Def. Reply" (Dkt. #115); and to EquiLend's reply as "EquiLend Reply" (Dkt. #114).

The Court pauses to observe that the briefing on all sides was excellent, for which the Court extends its gratitude.

A. Factual Background

[7]** Construed in the light most favorable to Plaintiffs, the Amended Complaint alleges the following:

[*298] 1. The Parties

During the class period, Defendants Bank of America,[2] Credit Suisse,[3] Goldman Sachs,[4] J.P. Morgan,[5] Morgan Stanley,[6] and UBS[7] (collectively, the "Prime Broker Defendants" or "Defendants") engaged in securities lending and stock lending transactions with class members, either directly or through Defendants' affiliates. (AC ¶¶ 50, 56, 61, 69-70, 77-78, 86-87). The Prime Broker Defendants are each partial owners of Defendant EquiLend, and their employees served on EquiLend's Board of Directors during the Class Period. (*Id.*). Employees from Bank of America, Goldman Sachs, J.P. Morgan, and Morgan Stanley also served on the Boards of Directors for the Options Clearing Corporation ("OCC") and the Depository Trust Clearing Corporation ("DTCC"), which are **[*299]** central clearinghouses for stock loan transactions. (*Id.* at ¶¶ 50, 61, 69, 77). Defendant UBS's employees served on the Board of Directors for DTCC. (*Id.* at ¶ 86). Defendant EquiLend is a "dealer consortium," which, it is alleged, Defendants used as a front for their conspiracy. (*Id.* at ¶¶ 10, 12).[8]

Plaintiffs **[**8]** Iowa Public Employees' Retirement System ("IPERS"), Los Angeles County Employees Retirement Association ("LACERA"), Orange County Employees Retirement System ("OCERS"), and Sonoma County Employees' Retirement Association ("SCERA") provide retirement and other benefits to public employees. (AC ¶¶ 40-43). Each manages many billions of dollars in assets and each has lent significant volumes of stock to the Prime

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2 The claims against Bank of America Corporation were dismissed without prejudice by stipulation of the parties on January 26, 2018. (Dkt. #105). However, due to Bank of America Corporation's 2009 acquisition of Merrill Lynch & Co., and to Bank of America Securities LLC's 2010 merger with Defendant Merrill Lynch, Pierce, Fenner & Smith Inc., the Amended Complaint uses the term "Bank of America" to refer to Defendants Merrill Lynch, Pierce, Fenner & Smith Inc., Merrill Lynch Professional Clearing Corp., Merrill Lynch L.P. Holdings, Inc., and their parents, subsidiaries, and affiliates. (AC ¶¶ 46, 50). This Opinion will do the same.

3 The term "Credit Suisse" refers collectively to Defendants Credit Suisse AG, Credit Suisse Securities (USA) LLC, Credit Suisse Prime Securities Services (USA) LLC, and Credit Suisse First Boston Next Fund, Inc. (AC ¶¶ 53-56). Credit Suisse Securities (USA) LLC and Credit Suisse Prime Securities Services (USA) LLC are registered as broker-dealers with the SEC. (*Id.* at ¶¶ 53-54). Credit Suisse Prime Securities Services (USA) LLC is also a member of OCC. (*Id.* at ¶ 53). Credit Suisse First Boston Next Fund, Inc. is a part owner of Defendant EquiLend. (*Id.* at ¶ 55).

4 The term "Goldman Sachs" refers collectively to Defendants Goldman Sachs & Co. LLC, and Goldman Sachs Execution & Clearing, L.P. (AC ¶¶ 58-61). Goldman Sachs & Co. LLC is registered as a broker-dealer with the SEC and is a member of OCC. (*Id.* at ¶ 59). Goldman Sachs Execution & Clearing, L.P. is registered as a broker-dealer with the SEC. (*Id.* at ¶ 60).

5 The term "J.P. Morgan" refers collectively to Defendants J.P. Morgan Securities LLC, J.P. Morgan Prime, Inc., J.P. Morgan Strategic Securities Lending Corp., and J.P. Morgan Chase Bank, N.A. (AC ¶¶ 63-69). J.P. Morgan Securities LLC and J.P. Morgan Prime, Inc. are registered as broker-dealers with the SEC. (*Id.* at ¶¶ 64-65). J.P. Morgan Securities LLC is a member of OCC. (*Id.* at ¶ 64).

6 The term "Morgan Stanley" refers collectively to Defendants Morgan Stanley & Co. LLC, Prime Dealer Services Corp., and Strategic Investments I, Inc. (AC ¶¶ 73-75, 77). Morgan Stanley & Co. LLC and Prime Dealer Services Corp. are registered as broker-dealers with the SEC, and Morgan Stanley & Co. LLC is also a member of OCC. (*Id.* at ¶¶ 73-74, 76).

7 The term "UBS" refers collectively to Defendants UBS Americas Inc., UBS Securities LLC, and UBS Financial Services Inc. (AC ¶¶ 80-82, 86). UBS Americas Inc. is a part owner of Defendant EquiLend. (*Id.* at ¶ 80). UBS Securities LLC and UBS Financial Services Inc. are registered broker-dealers with the SEC and members of OCC. (*Id.* at ¶¶ 81-82).

8 The term "EquiLend" refers to Defendants EquiLend Holdings LLC, EquiLend LLC, EquiLend Europe Limited, and their parents, subsidiaries, and affiliates. (AC ¶ 89).

Broker Defendants and their clients. (*Id.*). SCERA has also borrowed significant volumes of stock from Defendant Credit Suisse. (*Id.* at ¶ 43). Plaintiff Torus Capital, LLC ("Torus") is a trading firm, headquartered in Connecticut, that has borrowed significant volumes of stock from Defendants Goldman Sachs and Bank of America. IPERS, LACERA, OCERS, SCERA, and Torus (collectively, "Plaintiffs") bring this suit as a class action on behalf of themselves and all other similarly situated persons and entities who entered into stock loan transactions with the Prime Broker Defendants from January 7, 2009, to the present (the "Class Period"). (*Id.* at 1). The proposed class in this action includes borrowers and lenders. (*Id.* at ¶ 7).

2. The Stock Loan Market

Stock lending transactions are used primarily **[**9]** to facilitate the short selling of stocks, in which short sellers predict that a stock price will decrease. (AC ¶ 94). Short sellers generally do not own the stocks they sell. (*Id.* at ¶ 95). Instead, they typically use the services of a broker-dealer to "borrow" the stock, in exchange for cash collateral and a lending fee. (*Id.* at ¶¶ 95, 97). In a stock "loan" transaction, the lender transfers title of the security to the borrower, and the borrower promises to return equivalent securities in the future, in exchange for return of the collateral. (*Id.* at ¶¶ 105-06). A short seller who accurately predicts that a stock price will decrease can profit by borrowing the stock, selling the "borrowed" stock at a high price to a third party, waiting for the stock price to fall, and then buying back the equivalent stock at the lower price to return to the "lender." (*Id.* at ¶¶ 95, 97, 105-06). This process is risky in part because stock loans typically have no set termination date; either the lender or borrower can terminate the loan at will. (*Id.* at ¶ 106).

A stock lending transaction generally involves a number of different parties. (AC ¶ 97). The owner of the stock is known as the "stock lender" **[**10]** or the "beneficial owner." (*Id.*). An intermediary agent, called an "agent lender," works for the lender in exchange for a portion of the lending fee. (*Id.*). Agent lenders are often banks that service many lenders, and thus have large aggregate collections of stocks to loan out. (*Id.* at ¶ 107). A "broker-dealer" acts as an intermediary matchmaker between the agent lenders and prospective borrowers. (*Id.* at ¶ 97). The broker-dealer collects a fee from the borrower, takes a cut, and pays the remainder to the lender. (*Id.*). At present, broker-dealers do not reveal to either lenders or borrowers what their counterparty has paid or received, or what percentage of the fee the broker-dealer has pocketed. (*Id.*). "Stock borrowers" are **[*300]** generally investors who borrow stocks to facilitate short selling. (*Id.*).

The stock loan market is known as an "over-the-counter" (or "OTC") market because it has no central marketplace where participants can engage in direct exchanges, or obtain real-time data about trading prices and transaction volumes. (AC ¶ 98). These characteristics of the market leave prospective lenders and borrowers dependent on the broker-dealer intermediaries, who often set the price **[**11]** of a trade without negotiation, and who keep data about the prices and volume of trades hidden from the market as a whole. (*Id.* at ¶¶ 98-99).

"Prime brokers" are broker-dealers who offer an array of services that include stock lending. (AC ¶ 102). Between 2014 and 2017, the Prime Broker Defendants controlled between 76% and 80% of market share for prime brokerage services, and, accordingly, the vast majority of real-time price and volume data. (*Id.* at ¶¶ 102-03). In 2016, the Prime Broker Defendants' share of lending fees amounted to approximately 65% of total industry revenue. (*Id.* at ¶ 113). In presumed justification, Defendants represented to their clients that one aspect of their role as prime brokers was to "protect[] clients from credit and counterparty risk by standing between clients and lenders in every stock loan trade." (*Id.* at ¶ 147).

Plaintiffs allege that the stock loan market has failed to evolve alongside other, more efficient markets for financial services that take advantage of central electronic trading exchanges, where buyers and sellers can transact more directly, and more transparently, such as the publicly-traded stock exchange. (AC ¶¶ 114-16). Financial markets **[**12]** with central electronic trading exchanges operate through a central counterparty, called a "clearinghouse," which acts as an intermediary between lenders and borrowers, and which guarantees the obligations of each to the other, thereby reducing risk from counterparty default. (*Id.* at ¶¶ 9 n.3, 116 n.25). "The clearinghouse becomes the borrower to every lender and the lender to every borrower ... [and] maintains sufficient capital to stand behind every trade it clears." (*Id.* at ¶ 145). Participants on these central electronic trading exchanges transact with the clearinghouse via "clearing brokers," who match buyers and sellers, and who sponsor the participants' access to the central clearing platform. (*Id.* at ¶¶ 115, 116 n.25).

Clearing brokers are generally members of the clearinghouse who have contributed to its capitalization. (AC ¶ 120 n.26). They "vouch for a counterparty's credit with the clearinghouse ... [and t]he clearinghouse then clears the trade, having marked the transaction against the sponsoring clearing member's credit." (*Id.*). In 2016, OCC was the only major clearinghouse that both was licensed by the SEC to clear securities lending transactions and offered clearing **[**13]** of stock loan trades. (*Id.* at ¶ 289). It is alleged that central clearing threatened Defendants' prime brokerage business in part because, with central clearing, the clearinghouse assumed the risk of counterparty default against which Defendants purported to protect their clients. (*Id.* at ¶ 147).

Plaintiffs allege that the lack of a central electronic trading exchange, and the opacity of price and volume data, in the stock loan market impede price consistency, obstruct performance benchmarking of service providers, and enable the Prime Broker Defendants to charge excessive fees as middlemen. (AC ¶¶ 103-04, 116, 118). Plaintiffs allege that a regulated, centralized exchange would lower borrowing costs and increase returns for stock loan transactions. (*Id.* at ¶ 119).

[*301] 3. The New Market Entrants

a. Quadriserv/AQS:

During the period relevant to the Amended Complaint, several entities attempted to bring innovation to the stock loan market. In 2001, industry veterans founded Quadriserv to provide new financial services to that market. (AC ¶ 127). One early Quadriserv product offered a "give to get" data-sharing service for daily stock loan transactions. (*Id.* at ¶¶ 128-29). Quadriserv launched **[**14]** another early product that acted as a registered broker-dealer, raised capital to make it a creditworthy counterparty, and matched borrowers and lenders anonymously for a flat, transparent fee. (*Id.* at ¶¶ 140-42). By 2005, more than $2 billion in stock loan transactions were matched on the Quadriserv platform, which maxed out the platform's credit exposure limit. (*Id.* at ¶ 143).

Quadriserv then began developing a second platform through its subsidiary, Automated Equity Finance Markets, Inc. ("AQS"). (AC ¶ 144). In or about 2005 or 2006, AQS began negotiating a partnership whereby OCC would provide central clearinghouse services for AQS transactions. (*Id.* at ¶ 148). As noted, the Prime Broker Defendants viewed central clearing as a threat to their control of the stock loan market. (*Id.* at ¶ 147). Accordingly, AQS undertook a series of moves to evade the influence of the Prime Broker Defendants' representatives on the OCC Board, following which the Board passed a proposed deal with AQS. (*Id.* at ¶¶ 149-52).

On January 7, 2009, Quadriserv launched AQS and announced its agreement with OCC. (AC ¶ 154). According to an OCC newsroom release dated January 7, 2009, AQS offered a platform to "match **[**15]** lenders and borrowers using a hybrid auction and continuous price discovery mechanism" where "matched loans [would] be processed through the OCC, which [would] provide central counterparty guarantees." (*Id.*). OCC began providing central clearing services for AQS transactions in early 2009. (*Id.* at ¶ 156). In late 2009, AQS announced that Eurex, a European clearinghouse, had agreed to provide central clearing services for AQS transactions involving European equities. (*Id.*).

By September 2009, AQS was "primed" to offer direct stock loan transactions via clearing brokers, in partnership with OCC and SunGard's Loanet platform, which is an "accounting and settlement processing system for securities lending[.]" (AC ¶¶ 161-62). In October 2010, SunGuard integrated its technology with AQS, and a SunGuard vice president and general manager stated that SunGuard's customers had "responded favorably" to the integration. (*Id.*

at ¶¶ 162-63).[9] AQS provided trade matching, access to central clearing via a broker, live pricing data, daily liquidity data, and the option to trade anonymously. (*Id.* at ¶¶ 146, 159).

AQS received "strong encouragement" from the Federal Reserve Bank of New York, which **[**16]** thought AQS had potential to improve systemic risk controls in the stock loan market. (AC ¶ 155). AQS also received support from Barclays Global Investors, an asset manager and stock lender; Renaissance Technologies, a quantitative hedge fund and stock borrower; Bessemer Ventures, a venture capital fund; and Deutsche Bourse, an exchange that supported AQS through its subsidiaries, one of which was Eurex. (*Id.* at ¶ 160). AQS received approximately $100 million in investment funds. (*Id.* at ¶ 299). Citi was an early investor in AQS. (*Id.* at ¶ 157 n.37). Defendant Bank of America made equity **[*302]** investments in AQS in 2007, 2008, 2009, and 2011. (*Id.* at ¶ 205). Some hedge fund clients switched their prime brokerage services to Bank of America, "*expressly referencing AQS* in their decisions to do so." (*Id.* at ¶ 157 (emphasis in original)). AQS also received support from "numerous agent lenders" because of its ability to reduce fees. (*Id.* at ¶ 165). AQS's own analysis of the market predicted that its services would "increase the market volume" and reduce broker-dealer fees by over 30%. (*Id.* at ¶¶ 167-69).

b. SL-x:

SL-x, which stands for "securities lending exchange," was founded in late 2010. (AC **[**17]** ¶ 172). SL-x was designed to enable "prime brokers, broker-dealers, and agent lenders" to communicate bids and offers simultaneously to all of their existing market contacts, and to engage in simultaneous negotiations, without requiring a phone call, Bloomberg message, instant message, fax, or other one-to-one means of communication. (*Id.* at ¶¶ 173-75). SL-x provided an automated matching service for "easy-to-borrow stock" transactions, and a preliminary screening service for potential counterparties. (*Id.* at ¶¶ 175, 180). Broker-dealers and agent lenders could trade anonymously on the SL-x platform, which could "progressively reveal information about each party, and important criteria such as number and price of securities and the nature and amount of collateral." (*Id.* at ¶¶ 179-80). SL-x also permitted access to central clearing through Eurex for trades in certain European stocks, and "took steps to access central clearing in the U.S.," such as beginning negotiations with, and building a platform that could connect to, OCC. (*Id.* at ¶¶ 178, 233). Centrally-cleared SL-x transactions "were estimated" to provide broker-dealers with "more than $8 billion in capital savings benefits through **[**18]** balance sheet risk weighting and the zeroing out of counterparty credit risk when facing a central counterparty[,]" in addition to "reduced operational and administrative costs." (*Id.* at ¶ 181).

SL-x also planned to offer "a real-time display of the price and quantity of completed loans" (which would reveal the fees taken by the Prime Broker Defendants). (AC ¶¶ 175, 183-84). SL-x intended to provide "real-time pricing information (including stock name, trade time, trade quantity, and trade price) on a live ticker viewable by all platform participants, providing an up-to-theminute stream of available, actionable stock loan prices for all SL-x users." (*Id.* at ¶ 177). In addition, SL-x "worked to integrate data and analytics from other market sources." (*Id.*).

SL-x received initial positive reception. One Prime Broker Defendant called SL-x "the most intelligent, thoughtful and usable approach to the [stock loan] market that we have ever seen." (AC ¶¶ 227, 230-32). And on December 4, 2012, UBS executives told SL-x that transitioning to a centrally-cleared market would in principle help market participants, and recognized "the unmistakable momentum arising from regulatory considerations and **[**19]** other pressures" toward central clearing. (*Id.* at ¶ 231). In an October 16, 2012 meeting, Karl von Buren, HSBC's Global Head of Equity Finance, told SL-x executives that the stock loan market was moving towards central clearing, and that HSBC might embrace SL-x. (*Id.* at ¶ 232). J.P. Morgan Chase executives also acknowledged that central clearing would benefit the stock loan market overall. (*Id.*).

In meetings with SL-x executives on February 26, March 19, May 9, July 10, and September 6, 2013, executives from Credit Suisse, Deutsche Bank, J.P. Morgan, Citigroup, and UBS praised the SL-x platform. (AC ¶ 230).

[9] The Amended Complaint also touts AQS's partnership with "DTC" (*see* AC ¶ 161), which is a subsidiary of DTCC that operates in conjunction with SunGuard (*see id.* at ¶ 162).

Specifically, on February **[*303]** 26, 2013, in a meeting in London, Karl Bishti, the European Prime Brokerage Desk Head at Credit Suisse and an Associate Director of EquiLend, told SL-x executives that the stock lending market would "change overnight" to increase automation and efficiency if SL-x gained broad support. (*Id.* at ¶¶ 240-41). Bishti raved that SL-x had "all the bells and whistles" he expected, lacked nothing, and had "no shortcomings" that would impede its marketability. (*Id.* at ¶ 230). Kevin Soobadoo, Head of Supply Trading at Deutsche Bank, called the SL-x platform "brilliant," **[**20]** "impressive," and the "most state-of-the-art piece of kit to hit the securities lending space." (*Id.*). On February 28 and October 17, 2013, executives from Nomura and Société Générale called the platform "fantastic" and "really an awesome product." (*Id.*). And on September 6, 2013, UBS executives Casey Whymark and Laurent Issner called the platform "very cool" and noted that they were "impressed." (*Id.*).

c. Data Explorers

In 2002, securities market participants founded Data Explorers, which initially offered a "give to get" data-aggregation service for stock loan transactions that enabled customers to compare the prices for their own transactions to those of comparable market participants. (AC ¶¶ 130-34). By 2007, every major agent lender and 20 borrower clients were participating in the service. (*Id.* at ¶ 137). By 2009, Data Explorers had acquired market data from both agent lenders and beneficial owners. (*Id.* at ¶ 185). Several Prime Broker Defendants also shared pricing data with Data Explorers in return for market analytics. (*Id.* at ¶ 138).

Data Explorers provided separate products for agent lenders and borrowers, and strictly segregated the data for each. (AC ¶ 136). Plaintiffs allege **[**21]** that Data Explorers maintained this segregation for the benefit of the Prime Broker Defendants, who remained the sole actors in the market who knew the "spread" between what borrowers were charged and what lenders received. (*Id.* at ¶¶ 136, 139). However, in or about 2010, Data Explorers began to offer "performance" data, and also started successfully marketing its product to other types of customers, including hedge funds. (*Id.* at ¶¶ 187-88). The performance data service enabled end-user borrowers and lenders to compare the financial terms of their own trades to those of comparable trades. (*Id.* at ¶ 188).

4. EquiLend

If AQS, SL-x, and Data Explorers were the *enfants terribles* of the stock loan world, EquiLend was the anachronism against which they rebelled. EquiLend was founded in 2001 and provides primarily post-trade "reconciliation" services for stock loan transactions, verifying that the shares, the margins, and the collateral were handled correctly, as well as other posttrade services such as billing delivery and recalls. (AC ¶ 305). EquiLend also offers a daily automated service to effect transactions for stock loans between agent lenders and broker-dealers at predetermined fixed **[**22]** rates. (*Id.* at ¶ 306). However, it "does not offer fully electronic, price-transparent trading capabilities or the ability to negotiate terms with multiple potential counterparties simultaneously, nor does it offer central clearing to market end users." (*Id.* at ¶ 307).

Plaintiffs allege that the Prime Broker Defendants "used their positions on the EquiLend Board to co-opt EquiLend as a vehicle through which to promote and achieve their anticompetitive objectives." (AC ¶ 304). For most of the Class Period, EquiLend had ten owners, six of whom were the Prime Broker Defendants. (*Id.* at ¶¶ 122, 309). Numerous members of EquiLend's **[*304]** Board of Directors were employees of the Prime Broker Defendants. (*Id.* at ¶ 309). EquiLend's directors met regularly to discuss "industry challenges such as central clearing." (*Id.* at ¶¶ 249-50). Under the Prime Broker Defendants' control, EquiLend acted "in illegitimate, non-competitive ways ... that in many cases did not further its own economic interests." (*Id.* at ¶ 304). Specifically,

> [t]he Prime Broker Defendants used EquiLend to: (i) suppress price transparency by refusing to release pricing data to its customers, despite having access to this data and despite **[**23]** a clear market demand for such data; (ii) force competitors out of the market by coercing their customers to use EquiLend ... even though EquiLend ... offered lower quality or entirely different services than what their customers desired and what prospective competitors offered; and (iii) stymie pro-competitive market developments by purchasing valuable

> patents and trading platform technology from SL-x and AQS for valuable consideration, and then refusing to use or capitalize on those assets in any way[.]

(*Id.* at ¶ 311).

Defendants' conspiratorial communications in emails, Bloomberg chats, text messages, internal memoranda, and recorded phone calls are allegedly housed on EquiLend's servers (as well as those of the individual Prime Broker Defendants). (AC ¶ 312). These communications show that Defendants told EquiLend's representatives, including its CEO, Brian Lamb, not to "break rank," and not to take action "until the 'EquiLend banks' determined as a group whether they would support any of the new platforms." (*Id.* at ¶ 16). Of note, when EquiLend Board member William Conley discussed ensuring that data transparency would not "kill our business," the businesses to which he was referring **[**24]** were those of the Prime Broker Defendants, not of EquiLend. (*Id.* at ¶ 313). During the Prime Broker Defendants' individual meetings with AQS and SL-x, they "made clear that they considered themselves bound by understandings reached in EquiLend board meetings." (*Id.*).

The Amended Complaint proffers several allegations to support an inference of counter-profit behavior. In or about August 2011, Palamon Capital Partners and SL-x jointly proposed to acquire EquiLend at a price that would have yielded a profit for all parties. (AC ¶ 314). The EquiLend Board refused to engage or negotiate the offer. (*Id.*). And in late 2014 or 2015, the tables were turned: "[T]he Prime Broker Defendants directed EquiLend to purchase [SL-x and AQS] to complete the elimination of them as competitors." (*Id.* at ¶ 270). Plaintiffs argue that, if "EquiLend had truly behaved as a profit-maximizing firm, it would naturally have ... capitalized on the valuable assets and technology" purchased from AQS and SL-x. (*Id.* at ¶ 315). One EquiLend executive "complained that EquiLend needed to upgrade its services and build something like SL-x, and EquiLend never did so." (*Id.*). Based on these actions, Plaintiffs conclude that **[**25]** EquiLend "is not the independent joint venture that it purports to be[.]" (*Id.* at ¶ 319).

5. Defendants' Anticompetitive Conduct

a. Allegations Concerning AQS

To review, Plaintiffs allege that Morgan Stanley and Goldman Sachs led the other Prime Broker Defendants in a conspiracy to block new market entrants from offering electronic trading and clearing platforms and services to enhance price transparency. (AC ¶¶ 198-99, 212). As one facet of this conspiracy, the Prime Broker Defendants "agreed on a common stance vis-à-vis **[*305]** AQS." (*Id.* at ¶ 210). Following initial meetings with AQS executives in or about 2009, Goldman Sachs refused to support the AQS platform at all. (*Id.* at ¶¶ 196, 209). At a 2009 meeting between the head of the Stock Loan Desk at Bank of America and William Conley of Goldman Sachs, Conley said that he was "opposed to transparency in any form" because of the "spread" fees that Goldman Sachs made on stock loan transactions; indeed, Conley "got so angry at the mention of [AQS's] name that spit was coming out of his mouth." (*Id.* at ¶ 200). Conley pressured Bank of America to "reverse course and to join the opposition to Quadriserv/AQS[.]" (*Id.*).

At the same time, Credit Suisse, **[**26]** J.P. Morgan, Morgan Stanley, and UBS each communicated to AQS "that the only way they would support the platform was if AQS made it ... a broker-only platform ... [and] lenders and borrowers would be barred from trading on the platform." (AC ¶ 210). When AQS refused, the Prime Broker Defendants agreed to starve AQS "by collectively refusing to participate on the platform, and thereby to keep their trade flow and trade data outside of the platform's electronic market." (*Id.* at ¶¶ 211-12). This collective boycott of AQS compromised its utility for other market participants. (*Id.* at ¶ 212).

In preparation for an SEC roundtable discussion on securities lending held on September 29 and 30, 2009, the Bank of America executive whom Conley had pressured "convened what he characterized as a meeting of 'the five families' ... so the Prime Broker Defendants could settle on their collective messaging[.]" (AC ¶ 202). Around the same time, Goldman Sachs's Conley, a Credit Suisse employee named Shawn Sullivan, and others held a private meeting in which they discussed electronic trading platforms, where "each agreed to oppose AQS and disparage AQS and central clearing during the roundtable discussion." **[**27]** (*Id.* at ¶ 203). One participant in that meeting later stated that she felt "sorry for what [they were] about to do" to AQS. (*Id.*). At the subsequent SEC meeting, Sullivan spoke out against AQS, arguing that central clearing would reduce liquidity and expose beneficial owners to greater credit risk from counterparties. (*Id.* at ¶ 204).

By 2011, under pressure from Goldman Sachs, Morgan Stanley, Credit Suisse, and unspecified "others," Bank of America withdrew its support for AQS. (AC ¶¶ 205-06). More pointedly, "Bank of America/Merrill Lynch personnel who had formerly supported AQS were purged." (*Id.* at ¶ 206). Specifically, Mike Stewart, Global Co-Head of Equities and an advocate for AQS, "was abruptly replaced with ... Stuart Hendel, the former head of prime brokerage at Morgan Stanley and UBS." (*Id.*). Hendel directed Bank of America personnel to disavow AQS, limited the volume of transactions that the Bank of America stock loan desk was permitted to place on AQS to a small fraction of prior volume, and made no further investments in AQS. (*Id.* at ¶ 207).

The Prime Broker Defendants also undertook to stop other market participants, including their clients, from using AQS. In 2012, Goldman **[**28]** Sachs threatened executives at agent lender BNY Mellon, including James Slater, its Head of Global Collateral Management and Securities Finance: If BNY Mellon used AQS for stock loan transactions, "Goldman Sachs would return all of the open stock borrowing trades with BNY and stop trading with the BNY stock loan desk altogether." (AC ¶ 218). Thereafter, BNY Mellon abruptly withdrew an offer to AQS of $50 million in credit and an agreement to participate actively on the AQS platform. (*Id.* at ¶ 18). And Defendants also threatened to **[*306]** cut off an array of services to their own hedge fund clients — including Renaissance Technologies, D.E. Shaw, Millennium Management, and SAC Capital — if those clients transacted on AQS. (*Id.* at ¶¶ 213, 215-16).

Finally, Defendants blocked access to AQS by refusing to serve as clearing brokers. OCC's by-laws required "that *only* broker-dealer members of OCC, such as the Prime Broker Defendants, could transact on AQS, either as the lender or borrower." (AC ¶ 214). Accordingly, the Prime Broker Defendants refused to "sponsor" their hedge fund clients' access to AQS by "stand[ing] in to facilitate and clear their trades." (*Id.*). Plaintiffs allege that the Prime **[**29]** Broker Defendants would not have refused to provide their hedge fund clients with access to AQS if they were acting unilaterally, as each would have been concerned about losing customers to other prime brokers. (*Id.* at ¶ 217).

By the end of 2014, AQS was struggling to maintain sufficient liquidity to act as a financially viable stock lending platform, and was marginalized in the market. (AC ¶ 269). However, around the same time, a regulatory development sparked new interest in AQS. On January 1, 2014, the Basel Committee on Banking Supervision had issued a set of measures, known as "Basel III," that "required the Prime Broker Defendants to carry more capital on their balance sheet to cover the same risk" in stock loan transactions. (*Id.* at ¶ 274). One way banks could comply was to centrally clear stock loan transactions, "thereby offloading the risk to a central clearing counterparty." (*Id.* at ¶ 276). According to Plaintiffs, staff at each Prime Broker Defendant were siloed to such a degree that the "loan trading staff did not know, and were not told by senior management until later, that a move toward central clearing of stock loan transactions — while superficially beneficial under **[**30]** Basel III — would be disastrous to the bank's profitability on a much larger scale." (*Id.* at ¶ 278). Hence, the following drama.

In 2014, Susan O'Flynn, Global Head of CCP Strategy, Governance and Optimization at Morgan Stanley, began promoting central clearing of stock loan transactions as a way to comply with Basel III while reducing balance sheet costs and increasing returns on Morgan Stanley's stock lending business. (AC ¶ 281). O'Flynn publically supported central clearing through Eurex and OCC, though she did not share her support with senior management or executives on Morgan Stanley's stock loan desk. (*Id.* at ¶¶ 282-83). In late 2015 or early 2016, executives from Morgan Stanley's stock loan business became aware of O'Flynn's activities and told O'Flynn and her direct supervisor, Thomas Wipf, Global Head of Bank Resource Management, that central clearing threatened Morgan Stanley's business as a prime broker intermediary for stock loan transactions. (*Id.* at ¶¶ 281, 284).

Rather than retreat from the balance sheet cost savings that central clearing would provide, Wipf maintained the budget projections that O'Flynn had provided while imposing three conditions on centrally cleared **[**31]** trades.

(AC ¶ 287). Specifically, Wipf required that (i) central clearing maintain price opacity, meaning that neither the borrower nor the lender would know the price at which their counterparty transacted; (ii) the clearinghouse not link to an independent trading platform; and (iii) the clearinghouse not publish market data from Morgan Stanley transactions. (*Id.*). Wipf also wanted the Prime Broker Defendants to gain complete control of access to the clearinghouses so that market participants would have no other choice but to use the Prime Broker Defendants' services to clear trades. (*Id.* at **[*307]** ¶ 288). That meant controlling OCC because, in 2016, OCC was the only clearinghouse licensed by the SEC that cleared stock loan trades. (*Id.* at ¶ 289).

At that time, OCC was negotiating a deal to acquire AQS, and AQS was developing a new service to assist lenders in investing the cash collateral from their loans through what are known as "repurchase agreements." (AC ¶¶ 291-92). Wipf devised a plan to stop the acquisition and gain exclusive control over all the pathways to central clearing, a plan that he and his colleagues at Morgan Stanley code-named "Project Gateway." (*Id.* at ¶¶ 21, 293). Between **[**32]** late 2015 and January 2016, Wipf and William Conley from Goldman Sachs met over a series of dinners in New York City that were paid for by Wipf. (*Id.* at ¶¶ 21-22, 294). Wipf and Conley agreed that Morgan Stanley and Goldman Sachs should acquire AQS in order to shut it down. (*Id.*). Specifically, Wipf and Conley planned to persuade the other Defendants to use EquiLend to purchase AQS in order to destroy it. (*Id.*).

In a January 2016 internal call, Wipf communicated the plan to his team at Morgan Stanley, which included Susan O'Flynn; Matthew Collins; Tejash Patel, the Managing Director and Co-Head of U.S. Securities Lending; and Thomas Kinnally, the Global Head of Client Financing, Firm Financing and Collateral Risk Management. (AC ¶¶ 22, 295). During the call, Wipf stated that he and Conley had agreed to "get a hold of this thing." (*Id.* at ¶¶ 22, 296). By use of that phrase, Wipf meant that "Goldman Sachs and Morgan Stanley needed to act together to acquire AQS and shut it down." (*Id.* at ¶ 296).

At a series of private dinners, meetings at industry conferences, and EquiLend board meetings, executives at Morgan Stanley and Goldman Sachs persuaded the other Defendants to join Project Gateway **[**33]** in order to maintain control over the "universal gateway" to central clearing. (AC ¶ 297). Defendants also agreed to clear all stock loan transactions through their own pipelines to OCC, which pipelines were not connected to an electronic trading platform. (*Id.*). And Defendants agreed to exert influence, as Directors of OCC and EquiLend, to prevent OCC's acquisition of AQS. (*Id.* at ¶ 298).

Late in the negotiations between OCC and AQS, OCC abruptly pulled out of the deal and stopped returning AQS's calls. (AC ¶ 298). Shortly thereafter, on August 1, 2016, EquiLend purchased AQS's assets — the fruits of nearly $100 million in investment — for less than $5 million. (*Id.* at ¶¶ 299-300). Following the purchase, "the Prime Broker Defendants did not increase their participation in the new electronic trading platform or take other action to make it prosper." (*Id.* at ¶ 301).

b. Allegations Concerning SL-x

As with AQS, Goldman Sachs refused to support SL-x from the outset. (AC ¶ 196). In a private meeting in 2011, William Conley told other Goldman Sachs employees that any central trading platform with counterparty clearing threatened Goldman Sachs's market position. (*Id.* at ¶ 219). Conley told **[**34]** SL-x executives: "I ain't supporting this," informing them that the Prime Broker Defendants would only support the evolution of central clearing through an entity that they controlled, specifically EquiLend. (*Id.* at ¶ 220). Brad Levy, Global Head of Goldman Sachs' Principal Strategic Investments Group, told SLx executives: "You ain't going to get this done." (*Id.* at ¶¶ 17, 220).

On August 1, 2011, SL-x sent a letter to EquiLend's Chairman, Jeffrey Benner, proposing a joint venture between SL-x and EquiLend that would afford EquiLend "strong governance rights and a meaningful **[*308]** 'seat at the table' in the development of the SL-x marketplace and shift to a CCP-model." (AC ¶ 221). The EquiLend Board members met in August and September 2011, decided against SL-x's proposal, agreed that no EquiLend member bank would support SL-x, and further agreed only to support such market innovations if developed within EquiLend. (*Id.* at ¶ 223).

On September 21, 2011, EquiLend's CEO, Brian Lamb, declined SL-x's offer. (AC ¶ 224). The same day, a Morgan Stanley employee, Edward McAleer, told SL-x that he had spoken (also on that day) with Anthony Schiavo, a Managing Director at Morgan Stanley and a Director **[**35]** at EquiLend, who said that SL-x should deal directly with EquiLend, not with Morgan Stanley, and that "approaching a group of brokers outside the EquiLend arena is not an approach he wants to take." (*Id.* at ¶ 226). On October 12, 2011, McAleer reiterated to SL-x, copying Schiavo on the communication, that "all the relevant people at MS" shared the "house view" that "we do not want to participate in a separate consortium," and noted Morgan Stanley's view "that any solution ... needs to involve EquiLend." (*Id.* at ¶ 227).

Thereafter, none of the Prime Broker Defendants supported SL-x individually. (AC ¶ 225). Each "withheld capital and support from SL-x through the fall of 2011 and throughout 2012[.]" (*Id.* at ¶ 228). From 2012 to 2014, SL-x executives met with and pitched its product to high-ranking stock loan executives at each of the six Prime Broker Defendants (Bank of America, Credit Suisse, Goldman Sachs, J.P. Morgan, Morgan Stanley, and UBS), all of whom sat on the board of EquiLend USA or EquiLend Europe. Each refused to support SL-x, allegedly as a result of the EquiLend agreement. (*Id.* at ¶ 229). In an October 2012 meeting with SL-x executives, some unspecified prime brokers expressed **[**36]** concern that SL-x provided "too much transparency," or "too much immediate transparency." (*Id.* at ¶ 184). SL-x refused a request from J.P. Morgan for "the ability to turn off the real-time ticker, or block certain trades from being included[.]" (*Id.*).

The Prime Broker Defendants doubled down on this position in mid-tolate 2013, when they "agreed to boycott SL-x, collectively refused to use its platform, and took steps to ensure that other market participants turned their back on SL-x as well." (AC ¶ 236). Following initially enthusiastic meetings with SL-x executives, "each bank went cold and, without explanation, refused to engage or proceed further with SL-x." (*Id.* at ¶¶ 237-38). In July 2013, Credit Suisse declined to join the SL-x platform, explaining that it would only join if and when the "Big Boys" committed to doing so and SL-x had acquired substantial liquidity. (*Id.* at ¶ 241). Also in July 2013, UBS declined to join the SL-x platform, saying that it would not do so until SL-x had secured "commitments from other large market participants and demonstrate[d] evidence of significant liquidity." (*Id.* at ¶ 242). In meetings on July 26, 2013, and September 26, 2013, James Buckland, **[**37]** UBS's Global Head of Securities Lending, "frequently referenced EquiLend in the context of discussing SL-x's strategy to gain widespread market acceptance of its platform, noting the benefit of being '***inside the club***' of EquiLend member banks to effectuate market changes and suggesting that any market transition towards an SL-x platform and central clearing of stock loan trades would need to come from inside EquiLend." (*Id.* (emphasis in original)).

As with AQS, the Prime Broker Defendants "in some instances threatened their clients with the loss of other prime brokerage services if they signed on to the SL-x **[*309]** platform[.]" (AC ¶¶ 237, 243). On October 12, 2012, Andrew Clayton, the Global Head of Securities Lending at stock lending agent Northern Trust, told SL-x executives that Northern Trust would not support SL-x without approval from Goldman Sachs. (*Id.* at ¶¶ 18, 252). In 2015, OCC's Chief Operating Officer told SL-x executives that "nothing was going to happen" between SL-x and OCC without approval from the Prime Broker Defendants and specifically from Goldman Sachs. (*Id.* at ¶ 253). DTCC's Managing Director also told SL-x that it could not offer central clearing services to SL-x without **[**38]** approval from the Prime Broker Defendants and, specifically, from Goldman Sachs. (*Id.*).

The Prime Broker Defendants were aware that EquiLend was an "archaic" and "entrenched although unexciting system," with poor functionality that could not compete with SL-x's capacity. (AC ¶¶ 247-49). Nonetheless, they communicated "similar statements" that they would only support innovations such as SL-x's from within EquiLend. (*Id.* at ¶ 245). On February 26, 2013, Credit Suisse representatives told SL-x executives that "a successful launch will require cooperation of EquiLend." (*Id.* at ¶ 246). On June 18, 2014, in a meeting in Berlin, Morgan Stanley executives, including EquiLend Board member Edward McAleer, told SL-x that Morgan Stanley would only support central clearing through EquiLend. (*Id.* at ¶ 243). At a meeting on July 19, 2013, Bishti told SL-x that winning market support would mean "facing off against EquiLend" and that transitioning to central clearing would require "cooperation" and "collaboration" with EquiLend; described EquiLend's Directors as "key players" and "members of the club"; and compared EquiLend to "the mafia run by five crime families[.]" (*Id.* at ¶¶ 241, 249). On August **[**39]** 7, 2013, John Shellard, Managing Director of Trading Services at J.P. Morgan and EquiLend Board member, told

SL-x executives that there was a "general agreement among Directors" of EquiLend "that industry advances should be achieved from within EquiLend," rather than through third parties like SL-x. (*Id.* at ¶¶ 17, 239). In July 2014, Bank of America told SL-x executives that there was internal controversy about how endorsing SL-x's product would affect Bank of America's relationship with EquiLend. (*Id.* at ¶ 244).

By September 2014, SL-x had exhausted its financial resources, cancelled its U.K. trading license, and abandoned plans to enter the U.S. market. (AC ¶ 268). After SL-x "shut its doors," the Prime Broker Defendants began negotiating with SL-x's private equity owner to purchase SL-x's intellectual property. (*Id.* at ¶ 271). In 2015, EquiLend purchased SL-x's intellectual property, without undertaking full due diligence, and allegedly with no intent to actually use it. (*Id.* at ¶ 272). EquiLend has since shelved the patents. (*Id.*).

c. Allegations Concerning Data Explorers

With its 2010 offering of "performance" data, the Prime Broker Defendants became "increasingly wary that Data **[**40]** Explorers would eventually package data that would expose the breadth of the price gap between borrowers and lenders[.]" (AC ¶ 186). During ten meetings that spanned 2011-2012, two Goldman Sachs employees, Shawn Byron and William Conley, "grilled Data Explorers" about "siloing borrower and lender data, despite Data Explorers' constant assurances that there was no leakage." (*Id.* at ¶ 189). Defendants "gradually decided they could not entrust market data to a firm they did not control." (*Id.* at ¶ 190). Accordingly, Goldman Sachs began contacting hedge funds, including SAC Capital Advisors, to stop them from sharing data with Data Explorers, achieving **[*310]** mixed success. (*Id.* at ¶ 191). "In approximately the second or third quarter of 2010, a representative from Goldman Sachs contacted Peter Economou at State Street (a large, influential agent lender) and demanded that State Street not report any of the trading data concerning State Street's trades with Goldman Sachs to Data Explorers, threatening State Street's business if it did not comply." (*Id.*). State Street refused to comply. (*Id.*). "[W]hen borrower clients instructed Morgan Stanley to provide Data Explorers with their market data, Morgan **[**41]** Stanley would provide a file that contained stale, sparsely populated data scrubbed clean of any timely or actionable information." (*Id.* at ¶ 192).

At a meeting of the EquiLend Board of Directors, William Conley stated that transparency about the spread between the fees paid to beneficial owners and those collected from borrowers would "kill our businesses." (AC ¶ 255). In response, the Prime Broker Defendants agreed to "neutralize" Data Explorers by "set[ting] up a competing business" called DataLend, which was formed as a division within EquiLend in 2011. (*Id.* at ¶¶ 255, 257).

The Prime Broker Defendants each agreed (first amongst one another and subsequently with DataLend) to distribution agreements with DataLend that ensured that their data would not be disclosed to lenders or borrowers, and specifically that data about what borrowers paid for stock loans would not be disclosed to beneficial owners. (AC ¶ 257). Plaintiffs allege that DataLend's purpose was to offer a bare minimum of data to compete with Data Explorers while still withholding transparency about the Prime Brokers' fees. (*Id.* at ¶ 258). Accordingly, the Prime Broker Defendants allegedly told Data Explorer's customers **[**42]** that it was "inaccurate and unreliable." (*Id.* at ¶ 259).

The Prime Broker Defendants also attempted to stop borrowers and lenders from accessing each other's data directly by seeking "to monopolize access to" agent lender data about aggregate stock loan supply. (AC ¶ 260). To accomplish this, DataLend sought to lure away Data Explorer's agent lender customers by offering "to provide the same data services to agent lenders effectively for nothing." (*Id.* at ¶¶ 261-62). All major agent lenders except BNY Mellon were members of EquiLend and were "offered DataLend's products for no additional fee." (*Id.* at ¶ 261). "Agent lenders used the new stream of lowcost information provided by DataLend to renegotiate prices with Data Explorers," causing Data Explorers' revenues to drop. (*Id.* at ¶ 264). The hobbled Data Explorers was acquired by another company over which Defendants allegedly wielded influence, and which has not indicated an interest in "carrying out Data Explorers' original vision of bridging the data divide between wholesale and retail customers." (*Id.* at ¶ 265).

B. Procedural Background

Plaintiffs filed an initial Complaint on August 16, 2017 (Dkt. #1), and an Amended Complaint on **[**43]** November 17, 2017 (Dkt. #73). On January 26, 2018, Plaintiffs voluntarily dismissed all claims against Defendants Bank of America Corporation; Credit Suisse Group AG; The Goldman Sachs Group, Inc.; J.P. Morgan Chase & Co.; Morgan Stanley; Morgan Stanley Capital Management, LLC; and UBS Group AG, without prejudice to their inclusion at a later time. (Dkt. #105). The parties stipulated that any statutes of limitations or repose concerning the claims against these dismissed Defendants would be tolled as if they were filed on August 16, 2017. (*Id.*).

[*311] On January 26, 2018, the Prime Broker Defendants filed a joint motion to dismiss the Amended Complaint (Dkt. #109), and Defendant EquiLend filed its own motion to dismiss the Amended Complaint (Dkt. #106). Plaintiffs filed oppositions to both of these motions, separately, on March 2, 2018. (Dkt. #112, 113). The Prime Broker Defendants and Defendant EquiLend filed separate replies on March 30, 2018. (Dkt. #114, 115).

DISCUSSION

A. Applicable Law

1. Motions to Dismiss Under *Federal Rule of Civil Procedure 12(b)(6)*

"To survive a [*Rule 12(b)(6)*] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting **[**44]** *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Allco Fin. Ltd. v. Klee, 861 F.3d 82, 94-95 (2d Cir. 2017)* (quoting *Iqbal, 556 U.S. at 678*). "While *Twombly* does not require heightened fact pleading of specifics, it does require enough facts to 'nudge [a plaintiff's] claims across the line from conceivable to plausible.'" *In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007)* (quoting *Twombly, 550 U.S. at 570*). In determining a *Rule 12(b)(6)* motion to dismiss, "the only facts to be considered are those alleged in the complaint, and the court must accept them, drawing all reasonable inferences in the plaintiff's favor." *Doe v. Columbia Univ., 831 F.3d 46, 48 (2d Cir. 2016)*.

2. Restraints of Trade in Violation of the Sherman Act, *15 U.S.C. § 1*

To state a claim under *Section 1* of the Sherman Act, a plaintiff must show "[i] a combination or some form of concerted action between at least two legally distinct economic entities that [ii] unreasonably restrains trade." *United States v. Am. Express Co., 838 F.3d 179, 193 (2d Cir. 2016)*. The Court considers each of these elements in turn.

To plead the first element, a plaintiff must show whether "the challenged conduct 'stems from independent decision or from an agreement, tacit or express.'" *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 135 (2d Cir. 2013)* (quoting *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010))*. "Agreements that fall within the scope of *Section 1* are characterized as either 'horizontal' or 'vertical.'" *In re Zinc Antitrust Litig., 155 F. Supp. 3d 337, 376 (S.D.N.Y. 2016)*. "A horizontal **[**45]** agreement is an 'agreement between competitors at the same level of the market structure,' while a vertical agreement is a 'combination[ ] of persons at different levels of the market structure.'" *Id.* (quoting *United States v. Topco Assocs., Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972))*.

"Section 1 does not disallow any and all agreements; it disallows only those 'in restraint of trade or commerce among the several States.'" In re Elec. Books Antitrust Litig., 859 F. Supp. 2d 671, 682 (S.D.N.Y. 2012) (quoting 15 U.S.C. § 1). Moreover, Section 1 "outlaws only unreasonable restraints." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007). Therefore, to plead the second element, a Plaintiff must show that the concerted action was unreasonable. Courts generally evaluate reasonableness under **[*312]** the "rule of reason," which requires courts to weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition," including factors such as the relevant business and the history, nature, and effect of the restraint. *Id.*

B. The Prime Broker Defendants' Motion to Dismiss Is Denied

1. The Amended Complaint Adequately Alleges That Defendants Conspired to Restrain Trade in Violation of 15 U.S.C. § 1

a. Applicable Law

Defendants focus their efforts on Plaintiffs' pleading of the first element of a Sherman Act claim: whether there has been "a combination or some **[**46]** form of concerted action between at least two legally distinct economic entities[.]" Am. Express Co., 838 F.3d at 193 (internal quotation marks and citation omitted). Their opening sortie is to argue that Plaintiffs have failed to plead a plausible antitrust conspiracy. Such an argument presents a high hurdle in the context of a motion to dismiss, and a hurdle that is not crossed here.

"A plaintiff's job at the pleading stage, in order to overcome a motion to dismiss, is to allege enough facts to support the inference that a conspiracy actually existed." Citigroup, 709 F.3d at 136; *accord* Twombly, 550 U.S. at 556 ("[S]tating [a Section 1] claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made."). "To survive dismissal, 'the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment, or a trial.'" Gelboim v. Bank of Am. Corp., 823 F.3d 759, 781 (2d Cir. 2016) (quoting Anderson News, LLC v. Am. Media, Inc., 680 F.3d 162, 184 (2d Cir. 2012)), *cert. denied*, *137 S. Ct. 814, 196 L. Ed. 2d 599 (2017)*. "Instead, a well-pleaded complaint may proceed even if ... actual proof of those facts is improbable, and ... a recovery is very remote and unlikely as long as the complaint presents *a* plausible interpretation **[**47]** of wrongdoing." In re London Silver Fixing, Ltd., Antitrust Litig., 213 F. Supp. 3d 530, 558 (S.D.N.Y. 2016) (emphasis in original) (internal quotation marks and citations omitted).

b. Discussion

Defendants' arguments with respect to the first element of Section 1 touch on six main issues, which the Court will address in turn: (i) facial plausibility; (ii) group pleading; (iii) direct evidence of conspiracy; (iv) parallel conduct; (v) so-called "plus factors"; and (vi) the sufficiency of the pleadings with particular respect to Bank of America, J.P. Morgan, UBS, and Credit Suisse.

i. The Alleged Conspiracy Is Facially Plausible

Defendants first argue that Plaintiffs' conspiracy theory is facially implausible. For the reasons that follow, the Court finds otherwise.

Duration and Membership: Defendants contend that it is facially implausible that "just six prime brokers effected a nine-year conspiracy that blocked the migration of stock loans to an anonymous exchange[,]" when borrowers, lenders, and agent lenders could have dealt with the "dozens of other prime brokers" in existence. (Def. Br. 17). Defendants cite no legal authorities to support this assertion, and the Court is aware of none. (*Id.*).

[*313] As an initial matter, the Court agrees with Plaintiffs that there is nothing facially implausible **[**48]** about the timeline of the alleged conspiracy, which began in 2009 with Goldman Sachs and Morgan Stanley, expanded by 2011 to include the other Defendants in a "general agreement," and continued "until the boycott achieved its objectives." (Pl. Opp. 20; AC ¶¶ 195-208, 239). *Cf. In re Foreign Exch. Benchmark Rates Antitrust Litig., 74 F. Supp. 3d 581, 585, 587 (S.D.N.Y. 2015)* (finding that allegations of a "long-running conspiracy" that endured for "over a decade" were plausible).

Contrary to Defendants' contentions, it is also not facially implausible that a small subset of prime brokers could bring about an actionable conspiracy, because the six named Prime Broker Defendants allegedly controlled between "76% and 80% of the market share in the stock loan market," and used that "overall clout in the market" to discourage others from investing in, or patronizing, AQS, SL-x, and Data Explorers. (AC ¶¶ 102, 122; Pl. Opp. 20). Plaintiffs argue, not without force, that it is not facially implausible for market participants who control this percentage of market power to carry out an effective group boycott. (Pl. Opp. 21). *See, e.g., Fashion Originators' Guild of Am. v. Fed. Trade Comm'n, 312 U.S. 457, 462, 465, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 (1941)* (finding that members of a garment manufacturing and distribution guild, who collectively sold between 38% and 60% of all women's garments within a particular **[**49]** price range, and thus "occup[ied] a commanding position in their line of business[,]" carried out a group boycott in violation of the Sherman Act); *Starr, 592 F.3d at 323-24* (vacating the dismissal of an antitrust complaint that alleged price-fixing based on parallel conduct by defendants who controlled over 80% of the market). Of course, at later stages of litigation, Plaintiffs will be required to show in more detail how Defendants effectuated the alleged conspiracy. *Cf. Fashion Originators' Guild of Am., 312 U.S. at 461, 463* (observing that the boycott was effectuated through signed cooperation agreements and audits of members' books). But at the pleading stage, allegations of a conspiracy undertaken by six defendants that controlled 76% to 80% of the market are not rendered facially implausible by virtue of the existence of other market participants who could have transacted with the boycotted businesses.

EquiLend Board Meetings: Defendants next argue, again without reference to legal authority, that it is implausible that the conspiracy was planned at EquiLend board meetings because those meetings included "large agent-lenders" who supported the victim businesses and whose clients would have been harmed by the conspiracy. (Def. Br. 17; Def. Reply 4). Plaintiffs **[**50]** respond that the agent lenders on EquiLend's Board were themselves "entrenched" actors who "may well have their own incentives to preserve the status quo" and align themselves with Defendants, including vulnerability to pressure from the Defendants. (Pl. Opp. 27-30).

The parties' dispute on this issue amounts to a battle of competing inferences about who had the agent lenders' greatest loyalty. On a motion to dismiss, the Court must draw "all reasonable inferences in the plaintiff's favor[.]" *Columbia Univ., 831 F.3d at 48*. Here, the Amended Complaint alleges sufficient facts to support a reasonable inference in Plaintiffs' favor: namely, that the agent lenders were willing to align themselves with Defendants, even to the detriment of their own clients. For instance, the Amended Complaint alleges that "the other owners of EquiLend effectively acquiesce[d] to the **[*314]** Prime Broker Defendants" due to the latter's overall market clout (AC ¶ 122); that agent lenders BNY Mellon, State Street, and Northern Trust told SL-x that they "could not support it" because the Prime Broker Defendants "were aligned against the platform" and because their own conduct "was subject to the approval of" a Prime Broker Defendant (*id.* at ¶¶ **[**51]** 18, 218, 251-52); and that Defendants "lure[d]" agent lenders with services provided "at very little cost or, in some cases, virtually for free (*id.* at ¶¶ 261-62). Moreover, as Plaintiffs point out, the Amended Complaint also alleges numerous meetings in furtherance of the conspiracy that took place outside of EquiLend, such as at Wipf's dinner meetings with Conley and internal Morgan Stanley "pipeline call," and other "private dinners and meetings that often occurred at industry conferences[.]" (Pl. Opp. 27; AC ¶¶ 21-22, 297). Drawing all reasonable inferences in Plaintiffs' favor, the mere presence of the agent lenders in some of the meetings where the conspiracy was allegedly formed does not undercut the Amended Complaint's explication of that formation.

Access to OCC: Defendants also argue that the conspiracy is implausible because the bylaws of the sole central clearinghouse, OCC, prevent lenders and borrowers from transacting directly and require instead that they clear stock loans through broker-dealer members of OCC. (Def. Br. 18; AC ¶¶ 120 n.26, 214). In essence, Defendants characterize the Amended Complaint as alleging that they unlawfully agreed not to provide clearing broker **[**52]** services that would have afforded borrowers and lenders access to OCC — even though, according to Defendants, providing such services was not required by regulation and would not have been in their economic self-interest, as shown by the fact that the Amended Complaint does not allege that any of the roughly 60 other broker-dealer members of OCC chose to provide the service either. (Def. Br. 19; Def. Reply 3; AC ¶¶ 120 n.26, 154 n.36; *see also id.* at ¶¶ 13-14, 214).

Defendants point out that the Amended Complaint does not allege that they "did anything to discourage or prevent" other brokerage firms from offering clearing broker services. (Def. Br. 19). From this, they seek to analogize this case to *In re Interest Rate Swaps Antitrust Litigation*, in which a sister court in this District dismissed as implausible an antitrust complaint that alleged a conspiracy to destroy central clearing platforms for all-to-all interest rate swaps ("IRS") trading, where there was no regulatory mandate that required central clearing of such transactions, and where the infrastructure for such platforms did not yet exist. (*Id.* (citing *In re Interest Rate Swaps Antitrust Litig., 261 F. Supp. 3d 430, 463-72 (S.D.N.Y. 2017)* ("*In re IRS*")). Defendants here posit that the lack of "clearing brokers **[**53]** willing to clear stock loans through OCC" in the present action is similar to the absence of infrastructure in *In re IRS*. (*Id.*).

Defendants misconstrue the Amended Complaint. It does *not* allege that the conspiracy aimed to prevent borrowers and lenders from transacting directly without a clearing broker intermediary, and thus whether such transactions were permitted by OCC is of no moment. Nor does the Amended Complaint allege — or need to allege — that Defendants conspired to stop any of the roughly 60 other broker-dealer members of OCC from offering clearing broker services. Rather, the Amended Complaint alleges that Defendants refused to provide their own clients with clearing broker services, and threatened their clients, as well as other market participants, to prevent them from taking advantage of any such opportunities that **[*315]** OCC's other broker-dealer members might have provided. In Plaintiffs' words, "the Prime Broker Defendants controlled a sufficient share of the industry that other brokers alone could not provide sufficient liquidity," and "Defendants threatened retaliation against other market participants that considered dealing with AQS and SL-x." (Pl. Opp. 21; AC ¶¶ 18-20, **[**54]** 102, 122, 215-18, 252-53). Those threats allegedly succeeded. (Pl. Opp. 22; AC ¶ 382).

Drawing all reasonable inferences in Plaintiffs' favor, the necessary infrastructure existed for services such as those promised by AQS and SL-x, and it was Defendants' conduct, not structural impediments, that caused these companies to fail. Accordingly, unlike *In re IRS, 261 F. Supp. 3d at 463-72*, there is in this case no absence of enabling infrastructure that makes the alleged conspiracy implausible.[10]

Anonymous Exchange Trading: Defendants further submit that the conspiracy is implausible because "the clearing arrangements necessary to sustain anonymous exchange trading do not exist [in the stock loan market]." (Def. Br. 18). In support, they present an array of additional factual issues that the Court may not resolve on a motion to dismiss. Defendants infer that anonymous exchange trading was unsustainable from the fact that, although the Amended Complaint alleges that the Basel III regulatory development encouraged some entities to take steps toward central clearing, no regulation *requires* central clearing in this market. (*Id.*). Defendants also contend that stock loan transactions are "ill-suited" for anonymous exchange trading **[**55]** because lenders can terminate loans at will — a risk which, Defendants assert, causes borrowers to "desire to know the source of their loans to assess the risk that the loan shares will be recalled[.]" (*Id.* at 17-18). While Plaintiffs point out that AQS was allegedly "developed by industry insiders" with knowledge of demand and feasibility, Defendants question any inference of

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[10] Of course, Defendants may well succeed at the summary judgment stage in arguing that their refusal to provide clearing-broker services was in their own economic self-interest and a "coincidence, independent responses to common stimuli[.]" ***United States v. Apple, Inc., 791 F.3d 290, 315 (2d Cir. 2015)*** (internal citation and quotation marks omitted). But such a conclusion would require factual determinations that the Court will not indulge when considering a motion to dismiss. *See Iqbal, 556 U.S. at 678*.

demand for AQS's product by submitting that even industry insiders could have erred, and by challenging the credibility of the allegation that the Federal Reserve Bank of New York supported AQS's offering. (Pl. Opp. 24; Def. Br. 18; Def. Reply 4-5).

Plaintiffs offer competing inferences concerning the stock loan market's suitability for anonymous exchange. (Pl. Opp. 23-25). They submit that the absence of a regulatory mandate is immaterial because, even without such a mandate, AQS and SL-x attracted market support for their offerings of anonymous, centrally-cleared stock lending. (*Id.* at 25). (*See also* AC ¶¶ 145-46, 154-61 (detailing AQS offerings and support); *id.* at ¶¶ 172-83 (detailing SL-x offerings and support)). Plaintiffs also submit that most borrowers do not currently care about, or demand to know, the identity of the lenders **[**56]** from whom they borrow stock. (Pl. Opp. 23). And, according to the Amended Complaint, anonymity was optional on AQS and SL-x, both of which also provided competency assessments of trading partners, including lenders' historical recall rates. (*Id.* at 23-24; AC ¶¶ 179-80, 271). Plaintiffs point to allegations in the Amended Complaint that "detail[] the demand for these new products" and explain their feasibility. (Pl. Opp. 23; *see* AC ¶¶ 7-8, **[*316]** 142-43, 179, 233, 279-84, 300, 311, 332-32).

More fundamentally, Plaintiffs submit, and the Court agrees, that these are "fact-laden arguments that cannot be credited" on a motion to dismiss. (Pl. Opp. 23, 25). On a motion to dismiss, the Court must accept all well-pleaded factual allegations as true. *See* *Iqbal, 556 U.S. at 678*; *see also* *Anderson News, 680 F.3d at 184* ("[T]o present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true[.]"). On a future motion for summary judgment, Defendants may challenge the strength of the Amended Complaint's factual allegations, including whether Plaintiffs present sufficient evidence from which a reasonable fact-finder could conclude that the Federal Reserve Bank of New York supported **[**57]** AQS's offering. But the Court may not properly address that argument at this stage of the litigation.

For all of these reasons, the Amended Complaint's factual allegations are not facially implausible.

ii. Plaintiffs Do Not Rely on Impermissible Group Pleading

"[A]n antitrust plaintiff must present evidence tending to show that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective." *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 234 (2d Cir. 1999)*. The factual allegations must be "sufficient to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Anderson News, 680 F.3d at 182* (quoting *Twombly, 550 U.S. at 555*). "Plaintiffs must allege a factual connection between each Defendant and the alleged conspiracy[.]" *Hinds Cty., Miss. v. Wachovia Bank N.A., 708 F. Supp. 2d 348, 362 (S.D.N.Y. 2010)*. Therefore, "[g]roup pleading, by which allegations are made against families of affiliated entities is simply insufficient to withstand review on a motion to dismiss." *Concord Assocs., L.P. v. Entm't Prop. Tr., No. 12 Civ. 1667 (ER), 2013 U.S. Dist. LEXIS 186964, 2014 WL 1396524, at *24 (S.D.N.Y. Apr. 9, 2014)*, *aff'd*, *817 F.3d 46 (2d Cir. 2016)*.

Defendants argue that Plaintiffs' allegations rely on impermissible generalizations about Defendants as a group. (Def. Br. 23). In this regard, they focus specifically on paragraphs of the Amended Complaint that describe "the Prime Broker Defendants," without further specification, as using **[**58]** their positions at EquiLend to discuss "their next move" (AC ¶ 211), "collectively decide[] that they could not tolerate" the victim platforms (*id.* at ¶ 25), "collectively refuse[]" to use AQS (*id.* at ¶ 212), "pressure[] other market participants" (*id.* at ¶ 251), and threaten to withhold services from hedge funds (*id.* at ¶¶ 215-16). While the Amended Complaint does name four individual Defendants as the source of the threats, it fails to allege additional details "such as when these threats supposedly occurred or whether they were made in parallel," and why the hedge funds could not have worked with other prime brokers outside the conspiracy. (Def. Br. 23).

Defendants concede that the Amended Complaint pleads some particular allegations about Goldman Sachs and Morgan Stanley, but argue that it impermissibly extends those more particular allegations to the remaining Defendants with a conclusory assertion that "Goldman Sachs and Morgan Stanley recruited the other Prime Broker Defendants to join their scheme ... primarily through Defendant EquiLend." (Def. Br. 23-24; AC ¶ 12). Defendants also argue that the Amended Complaint inadequately distinguishes between **[*317]** Defendants within corporate **[**59]** families. (Def. Br. 24). Finally, five of the Defendants are alleged to have held merely "an indirect partial ownership interest in EquiLend," which Defendants challenge as the basis for inferring participation in the conspiracy. (*Id.*).

Plaintiffs respond, and the Court agrees, that the Amended Complaint specifically alleges that each Defendant agreed to participate in the conspiracy. (Pl. Opp. 29).[11] In contrast, group pleading is "insufficient to withstand review on a motion to dismiss ... [where there are] no factual allegations in the complaint to connect each, or any, of the group defendants, directly to the conspiracy[.]" *Concord Assocs., L.P., 2013 U.S. Dist. LEXIS 186964, 2014 WL 1396524, at *24*. Because the Amended Complaint alleges each Defendant's participation separately, it is not impermissible group pleading to refer to their collective actions in furtherance of the conspiracy using a more general phrase such as "the Prime Broker Defendants." Further, the Amended Complaint identifies specific employees by name who held themselves out as representing the interests of their employers. Doing so provides each Defendant with sufficient notice of the claims against that Defendant and their grounds. As a result, it is proper to name a corporate sub-entity **[**60]** as a Defendant, such as "Credit Suisse Securities (USA) LLC," while pleading allegations using a more generic name, such as "Credit Suisse." The Amended Complaint accordingly does not rely impermissibly on group allegations.

iii. Plaintiffs Adequately Allege "Direct [**61] Evidence" of Conspiracy

At the pleading stage, there are two ways that a plaintiff may "allege enough facts to support the inference that a conspiracy actually existed." *Citigroup, 709 F.3d at 136*. One way to do this is to "assert direct evidence that the defendants entered into an agreement in violation of the antitrust laws." *Id.* An example of direct evidence is "a recorded phone call in which two competitors agreed to fix prices at a certain level." *Id.*; *see also* *Burtch v. Milberg Factors, Inc., 662 F.3d 212, 225 (3d Cir. 2011)* ("Direct evidence of a conspiracy is evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." (internal quotation marks and citations omitted)). As an alternative to pleading direct evidence, a plaintiff may allege "circumstantial facts supporting the *inference* that a conspiracy existed." *Citigroup, 709 F.3d at 136*.

Plaintiffs identify certain allegations that, they claim, suffice to plead direct evidence of a conspiracy. (*See* Pl. Opp. 11-12). They include the following:

- John Shellard, a Managing Director at J.P. Morgan and EquiLend Board member, stated in an August 7, 2013 **[*318]** meeting that there was a "general agreement among [the] directors [of EquiLend]" that "industry advances should be achieved from within EquiLend," **[**62]** rather than through third parties such as AQS, SL-x, and Data Explorers. (AC ¶ 239).

- On a recorded Morgan Stanley conference call that occurred in January 2016, Thomas Wipf stated that he and William Conley agreed that Morgan Stanley and Goldman Sachs needed to "get a hold of this thing," by which he meant that they needed to act together to acquire and shut down AQS. (*Id.* at ¶¶ 295-96).

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[11] *See* Pl. Opp. 29 n.6:

> *See, e.g.*, for Bank of America (¶¶ 46-51, 122-24, 149 n.33, 205-07 (joining the conspiracy), 225 (refusing to support SL-x), 229, 244); Credit Suisse (¶¶ 14-15, 17, 52-57, 89, 122-24, 203-05 (making false statements about AQS at the SEC panel), 210, 229, 240-41, 245-46, 249, 280); Goldman Sachs (¶¶ 11-12, 17-18, 21-23, 58-62, 89, 122-24, 149 n.33, 152-53, 189-91, 199-203 (organizing Prime Broker Defendants ahead of SEC Panel), 218 (threatening BNY Mellon), 219-20, 251-53, 257, 294-97 (formulating Project Gateway)); J.P. Morgan (¶¶ 17, 63-70, 89, 122-24, 149 n.33, 184, 210 (demanding that AQS serve as broker-only), 238-39, 245, 257 (negotiating parallel DataLend agreements)); Morgan Stanley (¶¶ 11-12, 19, 21-22, 71-78, 89, 121-24, 149 n.33, 192 (providing scrubbed data to Data Explorers), 199, 205-07, 210, 226-27, 243, 251, 279-98 (organizing Project Gateway)); UBS (¶¶ 79-87, 89, 122-24, 206-07, 210, 229, 242, 245, 249-50).

- Carl Bishti, a Credit Suisse executive and EquiLend Associate Director, stated at meetings on February 6, 2013, and July 19, 2013, that SL-x could cause the stock lending market to "change overnight," but not without the "cooperation" of EquiLend, which he described as, "the mafia run by five crime families." (*Id.* at ¶¶ 240-41).

- Emails and chats that are currently stored on Defendants' servers "indicate that EquiLend representatives, including CEO Brian Lamb, had been instructed not to 'break rank' and not to take independent actions in the marketplace until the 'EquiLend banks' determined as a group whether they would support any of the new platforms." (*Id.* at ¶ 16).

The alleged statements by Shellard and Wipf qualify as direct evidence of concerted action. It is true that, as Defendants point out, **[**63]** Shellard's statement describes an agreement among *EquiLend's directors*, not merely among the Prime Broker Defendants. (Def. Br. 21-22; Def. Reply 6). Yet the alleged conspiracy encompassed EquiLend as well as the Prime Broker Defendants. Defendants also observe that Shellard himself did not work as a prime broker for J.P. Morgan. (Def. Br. 21). The Court does not find this observation probative, as an employee need not work in a particular position to know of and describe his employer's collusive conduct. Both statements expressly describe agreements among the Defendants, and are thus direct evidence of concerted action (element one of a Sherman Act claim).

Bishti's statement, and the emails to Lamb and his colleagues, are different matters entirely. There are far too many layers of inference between Bishti's analogy to the mafia and any conclusions that might be drawn from it for the statement to qualify as direct evidence of anything much, except perhaps of Bishti's affinity for colorful speech. While the remainder of Bishti's statement might support an inference of EquiLend's strong hold on the market, it is a far cry from *direct* evidence of conspiracy. The allegation of emails and **[**64]** chats telling Lamb not to "break rank" is similarly too vague to qualify.[12]

[*319] Accordingly, Plaintiffs have adequately pleaded at least some "direct evidence" allegations of conspiracy. Notably, while the qualifying allegations may be slim, even a failure to allege direct evidence of conspiracy would not necessarily be fatal to the pleading.

iv. Plaintiffs Adequately Allege Parallel Conduct

A plaintiff may also make a showing of concerted action by alleging "circumstantial facts supporting the *inference* that a conspiracy existed." *Citigroup, 709 F.3d at 136*. For instance, a plaintiff may state a *Section 1* claim by alleging behavior "that would plausibly contravene each defendant's self-interest in the absence of similar behavior by rivals." *Starr, 592 F.3d at 327* (internal citation and quotation marks omitted). Another way to plead

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[12] Defendants argue, and Plaintiffs do not contest, that other allegations fall short of qualifying as direct evidence of conspiracy. These include, for example, an unnamed executive's statement that Credit Suisse would pursue an exchange through EquiLend rather than invest in SL-x, which Defendants argue is a natural unilateral decision not to invest in a competitor. (AC ¶ 17; Def. Br. 22; Def. Reply 6). In this regard, Defendants contend that the allegation of a 2009 "meeting of 'the five families' ... [to] settle on their collective messaging" for an anticipated discussion with the SEC does not plead direct evidence of conspiracy. (AC ¶ 202; Def. Br. 20). Defendants argue that (i) this meeting "could not have been conspiratorial" because it was organized by Bank of America, which was not alleged to have joined the conspiracy until 2011; (ii) the Amended Complaint fails to specify either who attended the meeting or when and where it occurred; and (iii) a meeting to coordinate messaging to a public official is not an antitrust violation. (Def. Br. 20). Defendants also contest that the reference to "five families" fails adequately to allege direct evidence because Plaintiffs never identify to whom the phrase refers or connect the phrase to the alleged conspiracy. (*Id.*). And the allegation of use of the "Project Gateway" code word does not, in Defendants' view, plead direct evidence because the phrase was used to refer to lawful joint venture discussions by Thomas Wipf and William Conley about Morgan Stanley and Goldman Sachs potentially purchasing AQS. (Def. Br. 21; Def. Reply 7; *see also* AC ¶¶ 11, 21-22, 294-97, 363). Finally, Defendants claim that the allegation that Morgan Stanley and Goldman Sachs conspiratorially secured the participation of the other Defendants lacks the specifics necessary to count as direct evidence of conspiracy. (Def. Br. 21). However, the fact that these, and perhaps many more, allegations in the Amended Complaint do not satisfy the standard to plead direct evidence does not mean that the Amended Complaint does not contain other, well-pleaded allegations of direct evidence of conspiracy.

circumstantial evidence of conspiracy is by alleging parallel conduct. "Examples of parallel conduct allegations that might be sufficient under *Twombly*'s standard include parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties[.]" *Citigroup, 709 F.3d at 137* (internal citation and quotation marks omitted). **[**65]**

Because parallel conduct can result from many different factors, these allegations generally must be accompanied by "plus factors" that support an inference that the conduct resulted from a prior agreement. *See Citigroup, 709 F.3d at 137-38*. The Court will first address whether Plaintiffs have adequately pleaded parallel conduct and then assess Plaintiffs' pleading of plus factors.

Plaintiffs argue — and the Court agrees — that the Amended Complaint adequately pleads parallel conduct by Defendants. To start, concerning AQS, the Amended Complaint alleges that Credit Suisse, J.P. Morgan, Morgan Stanley, and UBS each, in separate meetings, communicated an identical position to AQS: that they would not support AQS unless it became a "broker-only platform." (Pl. Opp. 13; AC ¶ 210). Defendants contend that this pleading lacks sufficient factual details about who said what to whom and when, and that the Defendants' shared position was simply a recognition that "market standards" and OCC by-laws required "broker-dealers" to transact on AQS. (Def. Br. 25-26). Defendants' argument is fallacious; that OCC required end users to clear their trades through clearing brokers is not the same as a requirement that AQS be a "broker-only **[**66]** platform," the latter of which implies that no one but broker-dealers can use it. Moreover, the claim that the allegations of Defendants' identical positions regarding AQS lacks specificity only **[*320]** works when reading paragraph 210 in total isolation. Taken holistically, the allegations of Defendants' parallel conduct toward AQS, including withdrawals and denials of support and threats to other market participants, are sufficiently specific to survive a motion to dismiss. (*See* AC ¶¶ 196-218).

Next, Defendants maintain that the Amended Complaint's allegations show divergent, rather than parallel, conduct. (Def. Br. 25-28). They point out that several Defendants allegedly joined ACS, while Bank of America was initially a strong supporter and continued to make substantial transactions on the platform through 2011. (*See* AC ¶¶ 119, 205, 207).[13] In Defendants' view, any commonalities in their behavior toward SL-x resulted not from conspiracy, but rather from the fact that they were all responding to the same prompt, *i.e.*, SL-x approaching the group of them with a proposal to form a "consortium" to invest in SL-x. (*See id.* at ¶¶ 226-28). Indeed, they posit, Defendants did not act alike toward SL-x **[**67]** because Goldman Sachs and Morgan Stanley declined support immediately, while the other Defendants waited for several years before making a decision. The Court disagrees. No doubt, the Amended Complaint contains allegations of divergent conduct, such as Susan O'Flynn's actions in support of central clearing as other Morgan Stanley decision makers schemed to prevent it. (*See* AC ¶¶ 281-87). But the presence of some divergent conduct does not negate the allegations of other, parallel conduct.

As to Data Explorers, Defendants argue that the Amended Complaint makes no allegations of parallel conduct. (Def. Br. 27). That is incorrect. The Amended Complaint alleges that Defendants entered into identical distribution agreements with DataLend in an attempt to undermine Data Explorers and push it from the market. (Pl. Opp. 14; AC ¶¶ 257-58).

In a variation on this theme, Defendants argue that, to the extent the Amended Complaint *does* plead parallel conduct, it fails to support an inference of conspiracy because the alleged parallel conduct was not contrary to Defendants' self-interest and made good business sense. (Def. Br. 26-31). After all, AQS and SL-x threatened Defendants' profits as stock **[**68]** loan middlemen, and the platforms they offered were new, untested, and bereft of critical mass and client demand. Precisely because of these deficiencies, it made business sense for Defendants to decline to run trades through the AQS and SL-x platforms. And the fact that SL-x allegedly failed in Europe suggests it had little to offer, and that Defendants were wise not to invest. (Def. Br. 27; AC ¶ 268). Finally, according

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[13] Defendants suggest that the 2011 date is significant because it is "two years after the alleged conspiracy commenced." (Def. Br. 25). This reasoning lacks merit because the Amended Complaint does not allege that Bank of America joined the conspiracy until 2011.

to Defendants, the refusals to invest do not support an inference of conspiracy to block all-to-all trading in the United States because SL-x had no immediate plans to offer such trading in the United States. (Def. Br. 27). Indeed, the SL-x platform was not even operational in the United States during the relevant Class Period. (*See* AC ¶¶ 20, 253, 268). More generally, Defendants caution against drawing inferences from their failure to invest in SL-x, which they deem to be nothing more than an allegation of inaction, a "particularly perilous" basis from which to draw conclusions. (Def. Br. 27).

The Court appreciates the challenges of drawing inferences from allegations of inaction. Nonetheless, on a motion to dismiss, all reasonable inferences must be **[*321]** drawn in Plaintiffs' **[**69]** favor, including those arising from allegations of inaction. On the broader contentions that the parallel conduct pleaded in the Amended Complaint fails to support an inference of conspiracy, the Court turns to a "plus factor" analysis.

v. Plaintiffs Adequately Allege Plus Factors

Allegations that a defendant engaged in parallel conduct, without more, are often insufficient to plead circumstantial evidence of a conspiracy if "such behavior could be the result of coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *United States v. Apple, Inc., 791 F.3d 290, 315 (2d Cir. 2015)* (internal citation and quotation marks omitted). Therefore, to survive a motion to dismiss, allegations of parallel conduct generally must be accompanied by "plus factors" that support an inference that the parallel conduct "flowed from a preceding agreement rather than from [the defendants'] own business priorities." *Citigroup, 709 F.3d at 137-38*. Examples of plus factors include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Id. at 136* (internal citation and **[**70]** quotation marks omitted).

"[T]hese plus factors are neither exhaustive nor exclusive, but rather illustrative of the type of circumstances which, when combined with parallel behavior, might permit a jury to infer the existence of an agreement." *Citigroup, 709 F.3d at 136 n.6*. "The mere opportunity to conspire does not *by itself* support the inference that such an illegal combination actually occurred." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 545 (2d Cir. 1993)* (emphasis added). However, allegations of an opportunity to conspire may, when considered alongside allegations of parallel conduct and other plus factors, suffice to defeat a motion to dismiss.

"[T]he presence of plus factors certainly does not compel or 'necessarily lead to an inference of conspiracy.'" *Anderson News, LLC v. Am. Media, Inc., 123 F. Supp. 3d 478, 499 (S.D.N.Y. 2015)* (quoting *Apex Oil Co. v. DiMauro, 822 F.2d 246, 254 (2d Cir. 1987))*. Of course, at the summary judgment stage, "plus factors may not necessarily lead to an inference of conspiracy. For example, such factors in a particular case could lead to an equally plausible inference of mere interdependent behavior[.]" *Apex Oil, 822 F.2d at 254*. And sometimes, a plaintiff's allegations of parallel conduct, combined with plus factors, will not support a *Section 1* claim. "An inference of conspiracy will not arise when the conspirators' parallel conduct 'made perfect business sense,' ... 'there are obvious alternative **[**71]** explanations for the facts alleged,' ... or the alleged facts 'suggest competition at least as plausibly as [they] suggest anticompetitive conspiracy[.]'" *In re IRS, 261 F. Supp. 3d at 462* (quoting *Citigroup, 709 F.3d at 138*; *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 322-23 (3d Cir. 2010)*; *In re Elevator Antitrust Litig., 502 F.3d at 51*). Nonetheless, "the requirement of '*plausible* grounds to infer an agreement *does not impose a probability requirement at the pleading stage*; it simply calls for enough facts to raise *a reasonable expectation* that *discovery* will reveal evidence of illegal agreement[.]'" *In re IRS, 261 F. Supp. 3d at 462* (internal quotation marks omitted) (emphases in original) (quoting *Anderson News, 680 F.3d at 184*).

Interfirm Communications: As Plaintiffs point out, the Amended Complaint **[*322]** pleads multiple interfirm meetings at conferences, private dinners, and EquiLend board meetings, including the 2009 meeting convened by Bank of America (AC ¶ 202), meetings between Wipf and Conley (*id.* at ¶¶ 21, 294); a 2009 meeting between Bank of America and Goldman Sachs executives (*id.* at ¶ 200); meetings between Morgan Stanley, Goldman Sachs, and other Defendants at private dinners and conferences (*id.* at ¶¶ 297, 312); and meetings of EquiLend's Board (*id.* at

¶¶ 223, 297). At this stage of the litigation, these allegations are sufficient both to plead "a high level of interfirm communications" and to support **[**72]** an inference of an opportunity to conspire. *Gelboim, 823 F.3d at 781*.

Defendants counter that agent lenders were also present at the EquiLend board meetings, and that it is implausible that meetings in furtherance of the conspiracy took place with agent lender participation. (Def. Br. 31-32). The Court has already rejected Defendants' contention that the mere presence of agent lenders at the EquiLend board meetings renders the allegations about those meetings implausible. Moreover, the inquiry into plus factors considers "interfirm communications," which need not necessarily be conspiratorial communications. The EquiLend board meetings easily satisfy that standard. Defendants also claim that, other than the EquiLend board meetings, the Amended Complaint presents merely "vague references to isolated discussions." (*Id.* at 32). That is not accurate. As noted above, the Amended Complaint alleges multiple interfirm meetings at private dinners and conferences, as well as during EquiLend board meetings.

Defendants concede that the Amended Complaint may adequately plead an "opportunity to conspire," but argue that such opportunity alone is insufficient to support an inference that a conspiracy actually happened. (Def. Br. 32). **[**73]** The Court does not disagree, and considers the opportunity to conspire as but one of a series of plus factors supporting an inference that Defendants' parallel conduct flowed from conspiracy.

Common Motive to Conspire: Plaintiffs argue that the Prime Broker Defendants had a "common motive to preserve their supracompetitive profits" from charging excess fees under cover of price opacity. (Pl. Opp. 18). The Amended Complaint makes this allegation explicitly: "The Prime Broker Defendants feared that, if borrowers and lenders saw what their counterparties were paying, they would use competition to reduce the Prime Broker Defendants' outsized intermediary profits." (AC ¶ 24). The Court has little difficulty finding a common motive to conspire from these allegations. Conversely, the Court rejects Defendants' argument that, while the Amended Complaint alleges that Defendants each had a unilateral interest in waiting to see how the purported victim entities evolved instead of "supporting ventures that supposedly threatened its profits," it falls short of alleging that Defendants had a common motive to conspire. (Def. Br. 32-33).

Actions Against Individual Self-Interest: Plaintiffs contend that **[**74]** the Amended Complaint alleges actions against self-interest because, "[a]bsent the conspiracy, it would have been in the self-interest of many of the Prime Broker Defendants to support the platforms to avoid the risk of being left behind[,]" and to offer their clients access to AQS to avoid their jumping ship to a competitor. (Pl. Opp. 18-19). At this stage of the litigation, the Court accepts this inference as reasonable. The Court thus concludes that Defendants' lack of support for the new market entrants serves as an additional plus factor, **[*323]** adding to other circumstantial evidence of conspiracy.

Defendants contend that the Amended Complaint effectively alleges that they "continued to conduct business as they always had," which — in Defendants' view — required no conspiracy to accomplish. (Def. Br. 33). That may well be the case, but it is not the appropriate inquiry for the moment. The law is clear that plus factors do not "necessarily lead to an inference of conspiracy." *Apex Oil Co., 822 F.2d at 254*. And they do not need to; "plus factors" need not *require* conspiracy in order to support an inference that parallel conduct by the defendants flowed from one.

Collusion in Other Markets: The Amended Complaint additionally **[**75]** alleges that Defendants' "stock loan conspiracy is but the latest in a string of anticompetitive conspiracies involving the financial markets in which the Prime Broker Defendants have participated[.]" (AC ¶ 346; *see also id.* at ¶¶ 347-62 (detailing alleged conspiracies in other markets)). "Allegations of anticompetitive wrongdoing in [other venues] — absent any evidence of linkage between such foreign conduct and conduct here — is merely to suggest ... that if it happened there, it could have happened here." *In re Elevator Antitrust Litig., 502 F.3d at 52* (internal citation and quotation marks omitted). The Court agrees squarely with Defendants that these allegations are irrelevant, and will not consider them for purposes of evaluating the sufficiency of the Amended Complaint. (*See* Def. Br. 33).

In sum, the Amended Complaint adequately pleads plus factors in addition to parallel conduct, and thereby supports an inference of concerted action from circumstantial evidence.

vi. Plaintiffs' Allegations Are Adequate As Against Bank of America, J.P. Morgan, UBS, and Credit Suisse

Bank of America: Defendants seek dismissal of the claim against Bank of America on the basis that its membership in the conspiracy is implausible because it was **[**76]** an early supporter of, and investor in, AQS before allegedly joining the conspiracy in 2011, at which point it declined to invest additional funds in AQS, and limited its transactions with AQS. (Def. Br. 34-36; *see* AC ¶¶ 157, 205-07). Defendants observe that Bank of America never withdrew its *initial* investment in, or eliminated *all* transactions with, AQS. (Def. Br. 35; Def. Reply 13; *see* AC ¶¶ 205, 207). Defendants infer from these observations, respectively, that joining the conspiracy would have been contrary to Bank of America's interests, and that Bank of America would not have wanted to harm AQS. (Def. Br. 35). Plaintiffs respond that it is entirely plausible that Bank of America initially supported AQS but changed its mind and joined the conspiracy as a result of pressure from the other Defendants, especially given that the transfer of Morgan Stanley's and UBS's head of prime brokerage to be head of Global Prime Brokerage at Bank of America allegedly facilitated such pressure. (Pl. Opp. 22; AC ¶¶ 200, 205-07).

Defendants also suggest an alternate explanation for Bank of America's decision not to invest more funds and to reduce its transactions with AQS in or about 2011: AQS was **[**77]** failing. (Def. Br. 35; *see* AC ¶¶ 212-13, 269). But, as Plaintiffs point out, AQS was not failing when Bank of America withdrew its support in 2011; it was not failing until the end of 2014, following the trade-flow hypoxia caused by Defendants. (Pl. Opp. 22; AC ¶¶ 206, 266, 269).

As to SL-x and Data Explorers, Bank of America allegedly continued meetings with SL-x longer than the other Defendants, **[*324]** and further had independent reasons not to support SL-x due to Bank of America's support of its rival AQS. (Def. Br. 36; AC ¶¶ 234, 239-40, 244). According to Defendants, the sole plausible allegation against Bank of America in relation to Data Explorers is that it held a seat on EquiLend's board. (Def. Br. 36). Unfortunately for Bank of America, presence on EquiLend's board, combined with allegations of parallel conduct supported by plus factors, is enough at this stage of the litigation.

To be sure, Defendants do hit on a weakness: the Amended Complaint arguably contradicts itself by alleging that Bank of America convened a meeting of the "five families" in furtherance of the conspiracy in 2009, a point in time when it was allegedly still a strong supporter of AQS. (Def. Br. 36; Def. Reply **[**78]** 13-14). Nonetheless, Defendants' counter-explanations for Bank of America's behavior improperly draw inferences against Plaintiffs. (Pl. Opp. 22). While the Court may be skeptical about the strength of the claims against Bank of America, at least as concerns conduct toward AQS, Plaintiffs' arguments, when taken as a whole, are not entirely implausible and thus cannot be rejected at the pleading stage.

J.P. Morgan, UBS, and Credit Suisse: Defendants argue that the allegations against J.P. Morgan, UBS, and Credit Suisse are insufficient because the Amended Complaint fails to allege that these Defendants threatened or discouraged AQS, SL-x, or their potential customers, or that they participated in any conspiratorial meetings. (Def. Br. 37). According to Defendants, the Amended Complaint also fails to allege that J.P. Morgan or UBS used the phrase "five families." (*Id.*). The primary allegations against these three Defendants are that they did not invest in or transact with AQS and SL-x, which decisions are, in Defendants' view, consistent with the Defendants' unilateral interests. (*Id.*; *see* AC ¶¶ 210, 239, 242, 245).

These arguments are not meritorious. As explained above, the Amended Complaint **[**79]** does allege that these Defendants participated in conspiratorial meetings. And because, as also explained above, the Court is not relying on references to the "five families," the fact that not every Defendant used that term does not matter. Not every member of a conspiracy needs to issue the same threats for the conspiracy to exist. Plaintiffs have adequately pleaded that these Defendants' failures to invest in or support new market entrants was part of a conspiracy to reduce competition in the market. More broadly, Plaintiffs adequately plead the first element of a Sherman Act claim.

2. The Amended Complaint Adequately Alleges an Unreasonable Restraint on Trade Under Either a *Per Se* or a Rule of Reason Theory

a. Applicable Law

Defendants also attack the sufficiency of Plaintiffs' pleadings on the second element of a Sherman Act claim — whether the alleged concerted action was an unreasonable restraint on trade — albeit to a lesser degree. Courts undertaking this analysis "apply one of two rules designed to provide guidance in forming judgments about the competitive significance of challenged restraints." *Am. Express Co., 838 F.3d at 193*. Plaintiffs may either plead that the alleged concerted action was *per se* illegal **[**80]** under *Section 1* of the Sherman Act, or that the conduct violated what is known as the "rule of reason." *See, e.g., Texaco Inc. v. Dagher, 547 U.S. 1, 3-5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*.

[*325] The *per se* rule applies to "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *N. Pac. R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*; *see also Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 290, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)* (reiterating the *per se* rule). For instance, "[i]t has long been settled that an agreement to fix prices is unlawful *per se*. It is no excuse that the prices fixed are themselves reasonable." *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980)*.

Courts have made clear, however, that "[o]nly 'manifestly anticompetitive' conduct ... is appropriately designated *per se* illegal." *Bogan v. Hodgkins, 166 F.3d 509, 514 (2d Cir. 1999)* (internal citations and quotation marks omitted). Courts "presumptively appl[y] rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Dagher, 547 U.S. at 5*. The rule of reason "requires a court to weigh all of the circumstances surrounding the challenged conduct to determine whether the alleged restraint is unreasonable, **[**81]** taking into account the nature of the specific business, the industry, the restraint's history, and whether the defendant has market power." *LLM Bar Exam, LLC v. Barbri, Inc., 271 F. Supp. 3d 547, 578-79 (S.D.N.Y. 2017)* (quoting *In re Aluminum Warehousing Antitrust Litig., No. 13 MDL 2481 (KBF), 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510, at *25 (S.D.N.Y. Aug. 29, 2014)*).

"Group boycotts, which generally consist of agreements by two or more persons not to do business with other individuals, or to do business with them only on specified terms, may in some limited circumstances constitute *per se* violations of the Sherman Act." *Balaklaw v. Lovell, 14 F.3d 793, 800 (2d Cir. 1994)* (citing *Volvo N. Am. Corp. v. Men's Int'l Pro. Tennis Council, 857 F.2d 55, 73 (2d Cir. 1988)*). "[T]he category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*. In contrast, "modern ***antitrust law*** evaluates [joint venture] conduct — including the creation of the joint venture itself, its business focus, its product selection, and its pricing — under the rule of reason, with the pleading requirements that standard imposes." *In re IRS, 261 F. Supp. 3d at 467* (citing *Dagher, 547 U.S. at 1 n.1 & 6-7*). The animating inquiry is "whether there is a contract, combination ... or conspiracy amongst separate economic actors pursuing separate economic interests, such **[**82]** that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition[.]" *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (internal citations and quotation marks omitted). Of course, even participants in joint ventures may be liable *per se* for conduct undertaken outside the venture. *Cf. Ariz. v. Maricopa Cty. Med. Soc., 457 U.S. 332, 355-57, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*.

[*326] b. Discussion

Defendants' second line of attack is to argue that, to the extent Plaintiffs' allegations concern joint venture or joint investment conduct, those allegations should trigger a rule of reason analysis — which, in Defendants' view, would fail. Plaintiffs respond that the conduct alleged should be deemed *per se* illegal, but that, in the alternative, the allegations also suffice to plead a claim even under the rule of reason. The Court agrees with Plaintiffs on both issues.

i. The Alleged Conduct Is *Per Se* Unlawful

Defendants argue that, except for the alleged boycott of AQS, all of the Amended Complaint's allegations concern actions taken in the context of, and in furtherance of, a joint venture, and thus should be evaluated under the rule of reason rather than the *per se* standard. (Def. Br. 38). Even though the Amended Complaint **[**83]** pleads at one point that EquiLend "is not the independent joint venture that it purports to be," Defendants observe that it elsewhere characterizes EquiLend as "organized as a joint venture." (Def. Br. 38; AC ¶¶ 310, 319). In Defendants' words, "Plaintiffs' antitrust claim primarily rests on allegations regarding EquiLend that are entirely consistent with lawful joint-venture conduct." (Def. Reply 14). Further, Defendants reiterate that the fact that EquiLend's ownership and board included agent lenders "contradict[s] any suggestion that it is illegitimate." (Def. Br. 38; *see* AC ¶¶ 308, 378).

Plaintiffs argue in contrast that "[t]he question of whether to apply *per se* or rule of reason turns on the type of *claim* at issue, not on isolated allegations that make up the claim." (Pl. Opp. 31). Plaintiffs argue that, taken as a whole, the Amended Complaint alleges a group boycott, which Plaintiffs contend automatically falls within a category of *per se* illegal conduct. (*Id.* at 7-8, 31). Even taking elements of the Amended Complaint in isolation, and even if EquiLend may have been a joint venture in some respects, Plaintiffs argue that the alleged conduct should still be analyzed under the *per se* rule because **[**84]** it was undertaken "*outside of the joint venture*." (*Id.* at 33 (emphasis in original)). In other words, Defendants' alleged concerted actions, aimed at starving AQS, SL-x, and Data Explorers of data and liquidity, took place in circumstances that exceeded Defendants' service on EquiLend's Board, even if the conduct was planned and agreed to at EquiLend meetings. Plaintiffs rely on *Starr v. Sony BMG Music Entertainment*, in which the Second Circuit vacated and remanded a rule-of-reason-based dismissal of an antitrust complaint involving purported joint ventures, where the plaintiffs had challenged the joint ventures as a sham means to implement anticompetitive agreements and there were "many allegations of conduct that took place outside of the joint ventures[.]" *Starr, 592 F.3d at 326-27*. (*See also* Pl. Opp. 32).

The Court agrees with Plaintiffs. The Amended Complaint alleges that EquiLend's joint venture status was a smokescreen behind which the Prime Broker Defendants could operate. The full relevant allegation in the Amended Complaint is that, "[t]hough EquiLend is nominally organized as a joint venture, this fact does not shield it — or the Prime Broker Dealers — from the antitrust laws. This is because EquiLend does **[**85]** not act as an independent, rational market participant[.]" (AC ¶ 310). In other words, the Amended Complaint is entirely consistent in its allegations regarding EquiLend's joint venture status. More importantly, the Amended Complaint alleges that the Prime Broker Defendants, acting as separate **[*327]** and individual economic decision-makers, conspired to boycott SL-x, Data Explorers, and also AQS, and that this conduct was undertaken on behalf of each Prime Broker Defendant, and not in furtherance of a legitimate joint venture.

Defendants rely on *Texaco Inc. v. Dagher*, in which the Supreme Court held that it was not *per se* illegal for "a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products." *547 U.S. at 3*. But Defendants' reliance is misplaced. In *Dagher*, Texaco and Shell had formed a joint venture, called Equilon Enterprises, that "was approved by consent decree, subject to certain divestments and other modifications, by the Federal Trade Commission," in order to refine and sell gasoline. *Id. at 4*. The consent decree imposed no restriction on prices, and Equilon sold the gasoline at a single price under both the Texaco and Shell brand names. *Id.* The Supreme **[**86]** Court reasoned that the *per se* rule against price-fixing did not apply because:

> Texaco and Shell Oil did not compete with one another in the relevant market — namely, the sale of gasoline to service stations in the western United States — but instead participated in that market jointly through their investments in Equilon. In other words, the pricing policy challenged here amounts to little more than price

setting by a single entity — albeit within the context of a joint venture — and not a pricing agreement between competing entities with respect to their competing products.

Id. at 5-6. Here, in contrast, the parties have not disputed that the Prime Broker Defendants are direct competitors in the stock loan market. To be sure, some of the Prime Broker Defendants' alleged conduct toward SL-x and Data Explorers may arguably have been "*consistent with* lawful joint-venture conduct" (Def. Reply 14 (emphasis added)), rather than conduct undertaken by "separate economic actors pursuing separate economic interests," *Am. Needle, 560 U.S. at 195*. But mere consistency with an alternate inference supporting the Defendants' position is not enough at this stage of the litigation, where the Court must draw all reasonable inferences in **[**87]** favor of Plaintiffs.

In any event, plenty of relevant allegations cannot be so characterized. For instance, the Amended Complaint alleges that, at EquiLend board meetings in August and September 2011, the Prime Broker Defendants each agreed not to support SL-x. (AC ¶ 223). Thereafter, each Prime Broker Defendant separately and individually "withheld capital and support from SL-x through the fall of 2011 and throughout 2012[.]" (*Id.* at ¶ 228). A Morgan Stanley employee told an SL-x representative to deal directly with EquiLend. (*Id.* at ¶¶ 224-26). In late 2013, the Prime Broker Defendants allegedly agreed to a collective boycott of SL-x, and began threatening other market participants to deter them from using SL-x. (*Id.* at ¶¶ 236-37). Similarly, the Amended Complaint does not allege that EquiLend, acting as an "independent center[] of decisionmaking," *Am. Needle, 560 U.S. at 195*, launched DataLend because it wished to compete with Data Explorers. Rather, the thrust of the allegations is that the Prime Broker Defendants used EquiLend to launch a subpar product in an attempt to undermine Data Explorers so as to maintain opacity in pricing data *and* their lucrative roles as prime broker intermediaries. These allegations **[**88]** are a far cry from *Dagher*, and the alleged conduct is not immunized from the *per se* rule by virtue of EquiLend's presence in the fact pattern.

[*328] ii. The Alleged Conduct Violates the Rule of Reason

Despite the Court's conclusion that the allegations in the Amended Complaint qualify as *per se* unlawful restraints of trade under the Sherman Act, for completeness the Court also undertakes a rule of reason analysis. The Second Circuit has defined anticompetitive conduct as "conduct without a legitimate business purpose that make[s] sense only because it eliminates competition." *In re Adderall XR Antitrust Litig., 754 F.3d 128, 133 (2d Cir. 2014)*. Plaintiffs argue that, even if a rule of reason applies, the Amended Complaint satisfies this standard. (Pl. Opp. 33-41). The Court also finds that it has.

With respect to AQS, Defendants argue that the Amended Complaint alleges nothing improper about EquiLend's purchase of AQS, which it acquired at a low price after the platform failed and OCC declined to buy it. (Def. Br. 41-42; *see* AC ¶¶ 294, 299). Indeed, according to Defendants, the Amended Complaint does "not allege any facts suggesting that the Prime Broker Defendants undermined AQS's discussions with OCC." (Def. Br. 42; *see* AC ¶¶ 292, 298). While acknowledging **[**89]** that the Amended Complaint alleges that the purchase was made to "bury" AQS (AC ¶ 21), Defendants contend that, in fact, after the acquisition, EquiLend continued to operate the AQS technology, and the Amended Complaint has not alleged "facts suggesting otherwise" (Def. Br. 42). Plaintiffs respond that EquiLend's purchases of both SL-x and AQS were anticompetitive because "it would have been irrational for Defendants to buy platforms they had no intention of using in the absence of an anticompetitive motive," and, further, that when considered in the context of the Amended Complaint as a whole, both purchases confirm Defendants' alleged anticompetitive intent. (Pl. Opp. 38).

Drawing all inferences in favor of Plaintiffs, as required on a motion to dismiss, the Court concludes that the Amended Complaint adequately pleads that Defendants purchased both AQS's and SL-x's intellectual property for anticompetitive purposes, as evidenced by the underuse of the products after purchase. Defendants' contention that EquiLend *did* operate the AQS technology post-purchase, and that the Amended Complaint has not alleged "facts suggesting otherwise" (Def. Br. 42), improperly draws inferences in Defendants' **[**90]** favor. Further, the Amended Complaint does allege that, "the Prime Broker Defendants agreed to exert their influence as Directors of OCC and Directors of EquiLend to prevent OCC from acquiring AQS." (AC ¶ 298). That allegation supports an inference that "Defendants undermined AQS's discussions with OCC," even without specific factual allegations of precisely how Defendants went about doing so. (Def. Br. 42).

As to SL-x, Defendants contend that EquiLend's decision not to merge with SL-x cannot support an antitrust claim because there is no indication that a merger would have been in EquiLend's interest. (Def. Br. 41; *see* AC ¶¶ 224, 253, 268). Separately, Defendants argue that the Amended Complaint fails adequately to allege specific action by Defendants impeding SL-x's access to central clearing, or collusion not to invest in SL-x, and that any such allegation would fail a rule of reason analysis because each Defendant had rational unilateral reasons not to pursue the investment. (Def. Br. 41). Similarly, Defendants maintain that EquiLend's purchase of SL-x's intellectual property, and subsequent non-use of it, was "legitimate joint venture conduct." (*Id.*; AC ¶ 272). Plaintiffs respond **[**91]** that the Amended Complaint alleges more than a declined merger. For instance, Conley "told SL-x **[*329]** executives that the Prime Broker Defendants would not support SL-x" and would only permit this type of market evolution from within EquiLend, and the Prime Broker Defendants each declined to support SL-x *as a result of* their agreed boycott. (Pl. Opp. 37). Taking Plaintiffs' allegations as true and drawing all inferences in their favor, these allegations are sufficient to support a reasonable inference that Defendants' conduct toward SL-x was a result of an agreement among the Defendants, rather than of unilateral decision-making, and that EquiLend's purchase and non-use of SL-x's intellectual property was anticompetitive conduct that lacked "a legitimate business purpose" and made sense "only because it eliminates competition." *In re Adderall XR Antitrust Litig., 754 F.3d at 133*.

Defendants next argue that EquiLend's creation of DataLend was pro-competitive, as shown by its lower prices, and that the Amended Complaint does not allege any anticompetitive use of trading data or other anticompetitive conduct. Indeed, Defendants observe, the Amended Complaint does not even allege that Defendants failed to subscribe to Data Explorer's data service **[**92]** or forced Data Explorers to shut down. (Def. Br. 40; AC ¶¶ 261, 257). Plaintiffs respond by identifying allegations that Defendants overlook, allegations that evince both insult and injury: Defendants created DataLend not to compete with, but rather to "kill," Data Explorers by agreeing "in lockstep, to distribution agreements with DataLend" that limited price transparency but still provided a product that, while anemic and subpar, could nonetheless "undermine Data Explorers," and then aggressively underpriced that product. (Pl. Opp. 36-37). Plaintiffs argue as well that the restrictions limiting the distribution of pricing data were not pro-competitive. (*Id.* at 37). Plaintiffs are correct. At this stage of the litigation, the possibility that Defendants' conduct could conceivably be characterized as improving competition does not warrant dismissal.

Finally, Defendants argue that the joint-venture allegations (which comprise everything except the AQS boycott) fail the rule of reason. They form this conclusion because, in their view, the Amended Complaint (i) lacks allegations as to EquiLend's market power and the joint venture's competitive benefits and harms, and (ii) relies solely on assertions **[**93]** "that Defendants' conduct generally caused anticompetitive harm" and lacked a "pro-competitive rationale." (Def. Br. 38-39; AC ¶¶ 323-35, 389). Plaintiffs respond that they *have* alleged circumstantial evidence of Defendants' market power in the form of an allegedly successful boycott that drove out competitors. (Pl. Opp. 40). *See* *Todd v. Exxon Corp., 275 F.3d 191, 206-07 (2d Cir. 2001)* ("If a plaintiff can show an actual adverse effect on competition, such as reduced output ... we do not require a further showing of market power."). Plaintiffs point as well to the uncontested allegation that the Prime Broker Defendants controlled approximately 70% of market share. (Pl. Opp. 40; Def. Br. 39-40).

This dispute boils down to whether the allegations concern conduct by EquiLend alone, or conduct undertaken by the Prime Broker Defendants using EquiLend. As explained above, the Amended Complaint alleges that the Prime Broker Defendants took concerted action outside the scope of their joint venture in regards to both SL-x and Data Explorers. It is therefore the Prime Broker Defendants' market power, not Defendant EquiLend's market power, that matters. The Amended Complaint has adequately alleged that the Prime Broker Defendants held substantial market **[**94]** power.

[*330] In sum, whether analyzed as *per se* unlawful conduct, or under the rule of reason, the Amended Complaint adequately pleads that Defendants' concerted actions amounted to an unreasonable restraint on trade.

3. Plaintiffs Have Antitrust Standing

a. Applicable Law

In addition to a comprehensive attack on Plaintiffs' allegations of an antitrust violation, Defendants also contest whether Plaintiffs have standing to challenge any such violation. To confer antitrust standing, an alleged injury must be "of the type the antitrust laws were intended to prevent and [an injury] that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. A plaintiff must also allege that it is an "efficient enforcer" of the antitrust laws. *Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 222 n.1 (2d Cir. 2008)*. Courts determine "efficient enforcer" standing by primarily considering the following factors:

> [i] the directness or indirectness of the asserted injury; [ii] the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; [iii] the speculativeness of the alleged injury; and [iv] the difficulty of identifying damages and apportioning them among direct and indirect victims so as **[**95]** to avoid duplicative recoveries.

Gatt Commc'ns, Inc. v. PMC Assocs., LLC, 711 F.3d 68, 78 (2d Cir. 2013) (internal citation omitted). "The extent to which these factors apply when plaintiffs sue for injunctive relief depends on the circumstances of the case." *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 443 (2d Cir. 2005)*. "Similarly, the weight to be given the various factors will necessarily vary with the circumstances of particular cases." *Id.*

As to the third factor, speculativeness, a plaintiff need not "account precisely for the likely effects of" competition that would have occurred but for the defendant's wrongful conduct as long as there is a "fair assumption" that "those effects can be sufficiently estimated and measured[.]" *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 689 (2d Cir. 2009)*; *see also* *J. Truett Payne Co., Inc., v. Chrysler Motors Corp., 451 U.S. 557, 566-67, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)* (describing a "willingness to accept a degree of uncertainty in ... ascertaining business damages").

b. Discussion

Plaintiffs argue that Defendants' alleged boycott of AQS, SL-x, and Data Explorers deprived them "of more efficient, competitive, and transparent trading options" that would have increased price transparency and competition. (Pl. Opp. 41-42). Plaintiffs rely in particular on three allegations in the Amended Complaint, to the effect that the lack of a central marketplace for stock loan transactions (i) creates bottlenecks, (ii) wastes resources, and (iii) causes volatile, **[**96]** opaque, and artificially inflated prices. (AC ¶ 118). Defendants allegedly preserved this "inefficient, antiquated OTC structure," which conceals information about pricing and availability and leads to "high search costs and inefficient pricing," by blocking the development of "a fully electronic and transparent trading environment." (*Id.* at ¶¶ 324-26, 328). Defendants thereby maintained themselves as middlemen and stopped Plaintiffs from trading directly, making negotiations "cumbersome and difficult to do," and "reduc[ing] the volume of trades that would otherwise occur[.]" (*Id.* at ¶¶ 327, 329-30).

[*331] According to Plaintiffs, these harms could have been avoided through centralized "electronic trading" for stock loan transactions. (AC ¶¶ 117, 119). More specifically, AQS and Data Explorers would have provided price transparency to the stock loan market (*id.* at ¶¶ 146, 255), and SL-x would have made more lender stocks visible to potential borrowers (*id.* at ¶ 176). If "Defendants had acted unilaterally," they would have taken "the pro-competitive path to central clearing[,]" which in turn would have enhanced borrower choice in selecting brokers, increased competition, and lowered transaction **[**97]** costs. (*Id.* at ¶¶ 302, 344-45). The likely effect of centralized electronic trading in the OTC stock loan market — and thus the injury Defendants caused by blocking its development — could reasonably be expected to surpass that of electronic trading in futures exchange markets, which has been researched and quantified. (*Id.* at ¶¶ 334-35).

Defendants do not challenge that the injury alleged is "of the type the antitrust laws were intended to prevent[.]" Brunswick Corp., 429 U.S. at 489. Nor do they contest that Plaintiffs have satisfied three of the four factors to plead "efficient enforcer" standing. Instead, Defendants argue the remaining factor — the speculativeness of the alleged injury — disfavors standing for three reasons.

First, Defendants argue that the alleged injury is "base[d]" on the loss of an all-to-all trading platform, but Data Explorers and SL-x had no plans to offer such a trading platform in the United States. (Def. Br. 42-43; *see* AC ¶¶ 179, 193). Defendants describe Data Explorers as "a pricing service," and SL-x as "a non-operational platform that lacked central clearing in the United States and did not plan to offer anonymous trading." (Def. Reply 20).

Plaintiffs counter that Data Explorers and **[**98]** SL-x would have "increased efficiency and price competition and transparency in the market in different ways from AQS." (Pl. Opp. 43). Plaintiffs point to the Amended Complaint's allegations that Data Explorers offered "performance" data and other products to enhance borrowers' and lenders' insight into whether their terms were consistent with comparable market trades (*id.* at ¶ 188), and that it would have reduced pricing opacity (*id.* at ¶ 193). As for SL-x, the Amended Complaint alleges that it would have alleviated the need "to contact the Prime Broker Defendants by telephone or instant messages in order to get a quote" (*id.* at ¶ 173); provided "real-time" data about pricing and quantity, potentially "integrat[ing] data and analytics from other market sources" (*id.* at ¶¶ 174-75, 177); increased the visibility of lenders' stocks to potential borrowers (*id.* at ¶ 176); permitted central clearing for certain European transactions (*id.* at ¶ 178); enabled anonymous trading by, and provided automated matching for, broker-dealers and agent lenders while also making possible "simultaneous one-to-one and one-to-many negotiations" (*id.* at ¶¶ 179-80); and was "poised to clear U.S. stock loan **[**99]** trades" and would have done so but for Defendants' wrongful conduct (Pl Opp. 29; *see* AC ¶¶ 233-35). According to the Amended Complaint, SL-x would have afforded broker-dealers $8 billion in capital savings benefits in addition to reduced operational and administrative costs. (AC ¶ 181).

Second, Defendants argue that AQS lacked the ability to enable all-to-all trading due to rules requiring broker-dealer intermediaries. (Def. Br. 42-43). Plaintiffs counter that AQS accounted for this limitation by enabling all-to-all trading using clearing agents. (Pl. Opp. 43; *see* AC ¶ 154 n.36). Further, Plaintiffs contend that the fact that many buy-side parties embraced **[*332]** AQS shows that AQS would have benefitted investors, and AQS's own quantitative analysis shows the same. (Pl. Opp. 43; *see* AC ¶¶ 160, 162-63, 168-69). Specifically, AQS would have reduced lending risks (AC ¶ 158), provided useful centralization (*id.* at ¶ 159), promised direct execution of transactions via clearing brokers (*id.* at ¶ 161), and afforded "daily price discovery and transparency" (*id.* at ¶ 164). Defendants respond that the Amended Complaint fails to allege that Defendants blocked the more than 60 other brokerage firms from **[**100]** acting as enabling clearing-agent intermediaries. (Def. Br. 42-43; Def. Reply 20; *see* AC ¶ 154 n.36).

Third, Defendants theorize that AQS, SL-x, and Data Explorers were the direct victims of the alleged conspiracy and thus the proper plaintiffs to bring this claim. (Def. Br. 45). Plaintiffs counter that those entities' decisions not to sue have no bearing, and in any event, AQS has since filed a related action. (Pl. Opp. 44). Plaintiffs maintain that they have antitrust standing as both the "direct purchasers" and the "consumers" of the financial product at issue, and that their injuries were "logical, foreseeable, and [the] intentional object of Defendants' conspiracy." (*Id.* at 41).

Defendants' arguments are thought-provoking, but insufficient to merit dismissal. To start, Defendants challenge merely one of the four factors to plead "efficient enforcer" standing. The efficient enforcer inquiry is a general balancing test in which the importance assigned to each factor "will necessarily vary with the circumstances of particular cases." Gatt, 711 F.3d at 78. Thus, even if the injury alleged veers closer to speculative than prudence would advise, it would not eliminate Plaintiffs' standing. Again for the sake of completeness, **[**101]** the Court has also assessed the parties' arguments on speculativeness and has concluded that Plaintiffs' position is the stronger. The circumstances of this case are distinct from those in In re IRS, where the court rejected antitrust standing because it was "'entirely uncertain' that, absent the scheme, the necessary infrastructural preconditions for [the alleged lost benefit] ... would have developed." In re IRS, 261 F. Supp. 3d at 494 (quoting Gatt, 711 F.3d at 79). Here, Plaintiffs have plausibly alleged that the new market entrants were met with market demand, and would have provided benefits, including increased transparency and efficiency leading to lower prices, had the conspiracy not occurred.

4. Plaintiffs' Claims Are Not Time-Barred

a. Applicable Law

Defendants also mount a challenge to the timeliness of Plaintiffs' claims. Claims under *Section 1* of the Sherman Act are subject to a four-year statute of limitations that begins to run "when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*; *see* *15 U.S.C. § 15b*. "Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to [the plaintiff] to recover all damages incurred by that date and all provable damages that **[**102]** will flow in the future from the acts of the conspirators on that date." *Zenith Radio Corp., 401 U.S. at 339*.[14] If the defendant **[*333]** engages in a continuing violation, each new overt act that is part of the violation restarts the period of limitations, but does not permit the plaintiff to recover for injuries caused by acts that occurred before that limitations period. *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* (internal citation omitted). Claims for unjust enrichment under New York law are subject to a six-year period of limitations where the plaintiff seeks an equitable remedy, and a three-year period of limitations where the plaintiff seeks monetary damages. *Matana v. Merkin, 957 F. Supp. 2d 473, 494 (S.D.N.Y. 2013)*.

The statute of limitations may be tolled by a defendant's fraudulent concealment of its conduct. "[C]lassic *§ 1* conduct [is] subject to *Rule 8(a)* pleading standards." *Hinds Cty., Miss. v. Wachovia Bank N.A., 700 F. Supp. 2d 378, 392 (S.D.N.Y. 2010)*. However, to plead fraudulent conduct, a plaintiff must allege each of the following elements with the particularity required by *Rule 9(b)*: "[i] that the defendant concealed from him the existence of his cause of action, [ii] that he remained in ignorance of that cause of action until some point within [the limitations periods], and [iii] that his continuing ignorance was not attributable to a lack of diligence on his part." *State of N.Y. v. Hendrickson Bros., 840 F.2d 1065, 1083 (2d Cir. 1988)*; *see* ***[**103]*** *also* *Butala v. Agashiwala, 916 F. Supp. 314, 319 (S.D.N.Y. 1996)* (collecting cases and confirming that to plead tolling by fraudulent concealment, each element — concealment, ignorance, and diligence — must satisfy *Rule 9(b)*'s heightened pleading standard).

b. Discussion

Plaintiffs filed their claims against the defendants named in the initial Complaint on August 16, 2017 (Dkt. #1), and against the additional defendants named in the Amended Complaint on November 17, 2017, alleging a continuing antitrust violation (Dkt. #73; AC ¶ 387). Accordingly, as Defendants' fourth line of attack, they contend that Plaintiffs' antitrust claim is time-barred to the extent it seeks damages for conduct committed before August 16, 2013, which time period would include the aspects of Plaintiffs' claim that are based on the alleged boycott of Data Explorers and the bulk of Plaintiffs' antitrust claim related to SL-x. (Def. Br. 46 (citing AC ¶¶ 254-65, 219-32)). Defendants also argue that Plaintiffs' unjust enrichment claim is time-barred for conduct prior to August 16, 2014, because, as Plaintiffs seek monetary damages, the three-year limitations period applies. (Def. Br. 46; AC ¶ 397).

i. Plaintiffs Adequately Allege Concealment

"[T]he plaintiff may prove the concealment **[**104]** element [of tolling] by showing either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing." *Hendrickson Bros., 840 F.2d at 1083*. Examples of inherently self-concealing frauds

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[14] The parties dispute whether a claim accrues when "the defendant commits an act that injures the plaintiff" (Def. Br. 45), or "when *the injury occurs*" (Pl. Opp. 50). Despite Defendants' apparent attempt to capitalize on the ambiguity of the phrase "commits an act that injures the plaintiff" (Def. Br. 45), the law is clear that the claim accrues at the time of injury. *See* *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338-39, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. (*See also* Def. Reply 22 (acknowledging that a claim accrues "[a]s soon as a plaintiff suffers *any* injury from an allegedly wrongful act")).

include passing a fake vase off as a real antique, and a conspiracy that "must remain concealed from the victim of the" collusion in order "to endure." *Id. at 1084*.

Plaintiffs argue both that the alleged conspiracy was inherently self-concealing and that Defendants took affirmative steps to conceal it. (Pl. Opp. 45-46). At a minimum, the Court agrees that the **[*334]** Amended Complaint adequately pleads inherent self-concealment because the alleged conspiracy required numerous participants, was designed to endure, and depended on concealment for its success. *Cf. Hendrickson Bros., 840 F.2d at 1083-84* (finding that a "bid-rigging conspiracy" was inherently self-concealing where it had at least six members and discovery "would have defeated the enterprise").

Defendants retort that a finding of inherent self-concealment would conflict with the Amended Complaint's allegation that they "openly threatened industry participants." (Def. Br. 47). Not so. That Defendants made "open[] threat[s]" **[**105]** does not necessarily mean they made *public* threats. The Amended Complaint alleges that Defendants communicated threats directly to individual executives at hedge funds, and that these were threats to withhold bespoke services, such as official and unofficial assistance to former employees of the Defendants, the sharing of "proprietary research," and special access to initial public offerings. (AC ¶¶ 191, 213, 218). If any inferences are to be drawn from the nature of these services, the Court infers that such services were likely provided quietly, in the context of personal relationships, and that threats to eliminate them would have been similarly personalized and discrete. Accordingly, the threats do not undermine a finding that the conspiracy was inherently self-concealing.

Defendants next assert, incorrectly, that the conspiracy alleged here cannot be inherently self-concealing because it "is essentially the same as" that alleged in *In re IRS*. (Def. Reply 23). In point of fact, the court in *In re IRS* considered the issue of equitable tolling solely in relation to a set of allegations that "overwhelmingly" centered on a trading platform that the defendants stifled after taking over **[**106]** its majority ownership. *In re IRS, 261 F. Supp. 3d at 447-49, 487-88*. The court reasoned that those allegations did not qualify as inherently self-concealing because both the takeover and the platform's subsequent failure to evolve "occurred in plain sight and in contrast to the market's expectations." *Id. at 488*.[15] This case is distinguishable because, unlike a known majority owner acting in full public view to starve the evolution of an innovative platform under its direct governance and control, Defendants here allegedly used boycotts and threats to starve new market participants of data and liquidity without exercising governance ownership or wielding any publically visible control over those entities. The *In re IRS* court expressly distinguished circumstances like those in the present action from its own reasoning about concealment, recognizing that "a group boycott of exchange trading, like a cover price fixing scheme, could be of [a self-concealing] nature, where the perpetrators' collective venture must remain concealed to be successful." *Id. at 488* (internal citation and quotation marks omitted).

The Court's finding that Plaintiffs have alleged an inherently self-concealing conspiracy discharges Plaintiffs' burden to plead concealment. **[**107]** Still again, for the sake of completeness, the Court also considers whether the Amended Complaint pleads affirmative acts of concealment. Plaintiffs maintain that Defendants took affirmative steps to conceal the conspiracy by (i) conducting **[*335]** secret meetings, (ii) using code words, (iii) misrepresenting their support for both EquiLend and central clearing, and (iv) using threats to silence victims and witnesses. (Pl. Opp. 45-46). Plaintiffs rely on the Amended Complaint's allegations that Defendants conducted the conspiracy through "private meetings of the EquiLend board," using the code name "Project Gateway," and that Defendants misrepresented EquiLend's purpose as "optimiz[ing] efficiency in the securities finance industry" when its true purpose was to prevent such efficiency. (AC ¶¶ 374, 378). The Amended Complaint also alleges that Defendants made encouraging statements to SL-x executives about the platform and about central clearing more broadly,[16] which statements misrepresented their true lack of enthusiasm as shown by the fact that, after several

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[15] The facts alleged in *In re IRS* as a whole were far broader, and included boycotts of third-party platforms over which the defendants did not exercise direct control. *In re IRS, 261 F. Supp. 3d at 452-59*. However, the majority of those other allegations occurred within the limitations period, and the court did not consider whether they qualified as an inherently self-concealing conspiracy to trigger equitable tolling. *Id. at 487-90*.

meetings with SL-x executives, Defendants allegedly "went cold," refused to engage further, and "reported that they were no longer willing **[**108]** to be first movers on SL-x." (AC ¶¶ 237-38). Finally, the Amended Complaint alleges that Defendants threatened to terminate certain services if their hedge fund clients decided to trade on AQS or on SL-x. (*Id.* at ¶¶ 213, 237, 243). For instance, the Amended Complaint alleges that a Goldman Sachs representative threatened influential agent lender State Street in an unsuccessful attempt to stop it from sharing data with Data Explorers (*id.* at ¶ 219), and that the quantitative hedge fund Renaissance Technologies "opted not to participate in AQS" after facing threats from each Defendant (*id.* at ¶ 215).

In Defendants' view, the Amended Complaint's pleadings of secret meetings and communications are too "general and conclusory," especially because Defendants' participation in and support of EquiLend was not concealed from the market. (Def. Br. 48). Defendants also argue that the Amended Complaint fails the *Rule 9(b)* requirement to plead with particularity that any alleged misrepresentations by Defendants were "intentionally false when made." (*Id.* at 48-49). On this point, the Court agrees. While the Amended Complaint does allege that Wipf and Conley met over private dinners in New York **[**109]** **[*336]** City (AC ¶¶ 21, 294); that Wipf informed his team of the planned conspiracy over an internal (albeit routine) Morgan Stanley call (*id.* at ¶¶ 22, 295); and that Morgan Stanley and Goldman Sachs persuaded the remaining Defendants to join the conspiracy during meetings at industry conferences and of the EquiLend Board (*id.* at ¶ 297), alleging that Defendants conspired during private meetings, without more, is insufficient to plead affirmative acts of concealment. *Compare* *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd., No. 08 Civ. 42 (JG) (VVP), 2011 U.S. Dist. LEXIS 51330, 2011 WL 7053807, at *50 (E.D.N.Y. Jan. 4, 2011)* (allegation that the defendants "formulated the conspiracy during secret meetings," without alleging efforts to avoid detection, such as "pretextual press announcements," did not adequately plead affirmative acts of concealment), *with* *Hendrickson Bros., 840 F.2d at 1084* (finding affirmative acts of concealment where defendants allegedly burned and shredded documents to avoid their discovery).

As to pleading intentional misrepresentations, the Amended Complaint alleges that Defendants described EquiLend's purpose as promoting the broad goal of efficiency, and made supportive statements about both central clearing in general and Plaintiffs' products in particular before turning cold. (*See* AC ¶¶ 237, 377-80). Even taken in the light most favorable to Plaintiffs, **[**110]** the allegation that Defendants' initial enthusiasm dissipated does not support a reasonable inference that the enthusiastic statements were knowingly false when made. Nor do any facts alleged in the Amended Complaint support an inference that Defendants' threats against their hedge fund clients were made in furtherance of concealment, rather than merely to stop the clients from using Plaintiffs' products. The Amended Complaint also does not support Plaintiffs' arguments that Defendants used threats to silence victims and witnesses. The word "silence" appears once in the Amended Complaint, in a conclusory and unsupported assertion that Defendants abused their market power "to silence, punish, and exclude those who dared to cross them[.]" (*Id.* at ¶ 382). What the Amended Complaint does allege is that Defendants made threats "privately and in confidence"

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[16] Plaintiffs specifically rely on the following alleged statements: On April 8, 2008, the Managing Director and General Manager of DTCC's Fixed Income Clearance and Settlement Group, Thomas Costa, told AQS executives that "this sounds great, but who's going to start your car in the morning?" (AC ¶ 171); in and around 2009, "Defendants conducted several meetings with AQS executives, initially expressing (or feigning) interest in the product" (*id.* at ¶ 209); on February 26, 2013, Credit Suisse's European Prime Brokerage Desk Head, Karl Bishti, told SL-x executives that "the product's functionality included 'all the bells and whistles' he would expect, that the platform lacked nothing that he could identify, and that he saw 'no shortcomings'" (*id.* at ¶ 230); on March 19, 2013, Deutsche Bank's Head of Supply Trading, Kevin Soobadoo, told SL-x executives that "the platform was 'brilliant' and 'impressive' and was the 'most state-of-the-art piece of kit to hit the securities lending space" (AC ¶ 230); on February 28, 2013, executives from Nomura called the SL-x platform "fantastic" (*id.*); on October 17, 2013, executives from Société Générale called the SL-x platform "really an awesome product" (*id.*); on September 6, 2013, UBS executives Casey Whymark and Laurent Issner "said the platform was 'very cool and we are impressed'" (*id.*); between November 2012 and May 2013, representatives from Defendant J.P. Morgan had several meetings with SL-x executives and "praised the SL-x product" (*id.* at ¶ 238); in October, 2014, a Morgan Stanley press release announced that "Morgan Stanley is supportive of CCP [central clearing] solutions" (*id.* at ¶ 380)(a)); in an October, 2016 interview, Thomas Wipf described the growth of "Morgan Stanley's central clearing on Eurex" (*id.* at ¶ 380(b)); and on August 1, 2016, EquiLend CEO, Brian Lamb, stated that "[m]omentum has been building in the past two years in support of CCPs [central clearing]" (*id.* at ¶ 380(c)).

to stop market participants from using and sharing data with the victim platforms. (*Id.* at ¶¶ 18, 191, 213, 215, 237, 243). These allegations do not support an inference that threats were made to silence anyone.

However, drawing all reasonable inferences in favor of Plaintiffs at this stage of litigation leads the Court to conclude that **[**111]** the phrase "Project Gateway" may have been designed as a code name rather than as mere shorthand. For this reason, the Amended Complaint plausibly alleges at least one affirmative act of concealment. When combined with the inherently self-concealing nature of the alleged conspiracy, the Amended Complaint adequately pleads concealment for tolling purposes.

ii. Plaintiffs Adequately Allege Ignorance

Plaintiffs argue that they had no prior knowledge of the collusion, which was brought to light only by counsel's recent investigation revealing "critical, non-public facts." (Pl. Opp. 47). That other industry participants and market regulators did not catch wind of the conspiracy shows, in Plaintiffs' view, that Plaintiffs could not have acquired knowledge of it through the exercise of reasonable diligence. (*Id.* at 47-48). The Court agrees.

Defendants argue that Plaintiffs were put on inquiry notice by a 2009 article in an industry magazine that called EquiLend a "cartel." (AC ¶ 125 & n.28; Def. Br. 49). But a single instance of unverified media speculation, mentioned in passing **[*337]** without any specifics, is not enough to put Plaintiffs on inquiry notice. *See Ala. Elec. Pension Fund v. Bank of America Corp., 175 F. Supp. 3d 44, 67 (S.D.N.Y. 2016)* ("a single article raising suspicions about the **[**112]** rate-setting process [at issue] is not enough to establish, on a motion to dismiss, that Plaintiffs failed to exercise reasonable diligence"); *Merced Irrigation Dist. v. Barclays Bank PLC, 165 F. Supp. 3d 122, 136 (S.D.N.Y. 2016)* (concluding that a "single, speculative" article did not put plaintiffs on inquiry notice). Defendants also contend that Plaintiffs had notice based on the Amended Complaint's assertion that a conspiracy is the only good explanation for why the stock loan market remains opaque. (AC ¶ 5; Def. Br. 49). However, the Court agrees with Plaintiffs that the alleged substantial investment support for the victim platforms shows that, at the least, it was not obvious that a conspiracy was in the works to destroy them. (*See* Pl. Opp. 47-48). Accordingly, the Amended Complaint adequately pleads ignorance for purposes of tolling.

iii. Plaintiffs Adequately Allege Diligence

"With respect to the third element, a 'plaintiff will prove reasonable diligence either by showing that: [i] the circumstances were such that a reasonable person would not have thought to investigate, or [ii] the plaintiff's attempted investigation was thwarted.'" *In re Commodity Exch., Inc., 213 F. Supp. 3d at 676* (quoting *In re Publ'n Paper Antitrust Litig., No. 3:04-MD-1631 (SRU), 2005 U.S. Dist. LEXIS 19896, 2005 WL 2175139, at *5 (D. Conn. Sept. 7, 2005))*. The Amended Complaint alleges that Plaintiffs exercised diligence by **[**113]** "regularly monitor[ing] their investments" and "regularly monitor[ing] new[s] reports concerning the financial industry and the stock lending market." (AC ¶¶ 385-86).

Defendants contend that these allegations are merely conclusory and therefore fail the *Rule 9(b)* pleading standard. (Def. Br. 50). *See also Butala, 916 F. Supp. at 319* (applying the *Rule 9(b)* standard to pleadings of tolling by fraudulent concealment). Plaintiffs argue that the allegations are sufficient because, in monitoring their investments and market news, they received no indication of the concealed conspiracy, which was only revealed when Plaintiffs' counsel conducted a diligent investigation that formed the basis of the Amended Complaint. (Pl. Opp. 48-49).

Plaintiffs have shown reasonable diligence under the first prong for purposes of defeating a motion to dismiss because, drawing all inferences in their favor, "a reasonable person would not have thought to investigate" above and beyond the standard activities of investment and news monitoring that Plaintiffs engaged in. At this stage of the litigation, requiring more from Plaintiffs would be "premature." *BPP Illinois, LLC v. Royal Bank of Scot. Grp. PLC, 603 F. App'x 57, 59 (2d Cir. 2015)* (summary order). The statutes of limitations on Plaintiffs' claims are tolled, making the claims timely. **[**114]**

5. Plaintiffs' Unjust Enrichment Claim Stands

Defendants argue that Plaintiffs' unjust enrichment claim should be dismissed because it is "entirely dependent on their fatally flawed antitrust claim." (Def. Br. 50). Since the Court has concluded Plaintiffs state a viable antitrust claim, their unjust enrichment claim stands as well.

C. EquiLend's Supplemental Motion to Dismiss Is Denied

EquiLend's supplemental motion to dismiss advances four main arguments: (i) its conduct was consistent with rational business strategy; (ii) the alleged use of its **[*338]** board meetings to plan the conspiracy is insufficient to support a claim against it; (iii) the allegations against it do not pass muster under a rule of reason analysis; and (iv) this Court lacks personal jurisdiction over EquiLend Europe. The Court addresses, and rejects, each of these arguments in turn.

To start, EquiLend contends that its purchase of AQS, its refusal to merge with SL-x, its subsequent purchase and shelving of SL-x's intellectual property, and its creation of the DataLend product were all "consistent with rational business strategy," and therefore cannot serve as evidence of its joining a conspiracy. (EquiLend Br. 4-8). Of course, **[**115]** the fact that conduct may be consistent with an innocuous explanation does not permit the Court, on a motion to dismiss, to ignore other inculpatory inferences that may reasonably be drawn from the same allegations when considered in light of the complaint as a whole. To be sure, pleading a *Section 1* claim requires "allegations plausibly suggesting (not merely consistent with) agreement[.]" *Twombly, 550 U.S. at 557*. That is why pleading parallel conduct that is consistent with unilateral action, unaccompanied by other circumstantial evidence of a conspiracy in the form of "plus factors," is insufficient to state a *Section 1* claim. *Id.* However, the Amended Complaint does not rest on bare allegations that EquiLend engaged in parallel conduct; Plaintiffs also allege circumstantial evidence of conspiracy, in that EquiLend acted against its own economic self-interest under direction from the Prime Broker Defendants. For example, the Amended Complaint alleges that: "EquiLend representatives, including CEO Brian Lamb, had been instructed not to 'break rank' and not to take independent actions" (AC ¶ 16); the Prime Broker Defendants "instruct[ed] EquiLend's then-CEO, Brian Lamb, to advance an agenda through EquiLend to halt the widespread **[**116]** dissemination of pricing data to the market at large" (*id.* at ¶ 124); EquiLend's refusal to allow itself "to be sold at any price," and its underuse of the assets purchased from AQS and SL-x, were counter-profit behaviors (*id.* at ¶¶ 314-15); and EquiLend's joint venture status was a sham (*id.* at ¶¶ 313, 319). That *some* of EquiLend's alleged conduct may be consistent with rational business strategy does not negate the presence of other "allegations plausibly suggesting ... agreement." *Twombly, 550 U.S. at 557*.

In an apparent attempt to bolster its consistency arguments, EquiLend ignores the allegations that it acted against economic self-interest and at the direction of the Prime Broker Defendants, instead making a series of assertions about what is missing from the Amended Complaint. EquiLend asserts, for instance, that the Amended Complaint "alleges no facts" connecting EquiLend's purchase of AQS to a boycott conspiracy. (EquiLend Br. 5). It follows up by noting that the Amended Complaint fails to allege that, following the purchase of AQS, EquiLend stopped operating the AQS platform. (*Id.*). Instead, the Amended Complaint merely alleges that, following the purchase, EquiLend failed to develop AQS assets further **[**117]** or to license those assets to third parties. (*See* AC ¶ 315). EquiLend acknowledges here the allegation that it purchased AQS at a rock-bottom price of $5 million, which price was a direct result of the harm caused by the boycott. (*Id.* at ¶ 301). But, it reasons, the mere fact that EquiLend may have benefited from the boycott, without more, is insufficient to infer its participation. EquiLend argues as well that there is nothing suspicious about its refusal to merge with SL-x, its purchase of, and subsequent failure to use, SL-x's intellectual property, or its launch of the DataLend product. (EquiLend **[*339]** Br. 6-8). EquiLend advances the innocuous inference that it purchased and shelved SL-x intellectual property in order to protect itself from patent trolls. (*Id.* at 7). Finally, it asserts that the Amended Complaint fails to plead that the launch of DataLend to complete against Data Explorers "is more consistent with conspiracy than it is with the 'wide swath of rational and competitive business strategy' that cannot support an inference of conspiracy." (*Id.* (quoting *Twombly, 550 U.S. at 554*)).

Unfortunately for EquiLend, the isolated facts it presents regarding its purchase of AQS's and SL-x's intellectual property and **[**118]** its launch of DataLend are not the only allegations connecting it to the boycott and the conspiracy more generally. As detailed above, the Amended Complaint alleges that EquiLend acted against self-interest, and at the direction of the Prime Broker Defendants. Those allegations support a reasonable inference that EquiLend acted on behalf of the conspiracy, not as an independent economic decisionmaker.

Next, EquiLend argues that the allegation that the conspiracy was planned at its board meetings is insufficient to implicate it in the conspiracy. (EquiLend Br. 3-4). It relies here on the reasoning of the court in *In re IRS*, which dismissed a complaint against an organization that EquiLend contends was analogous. (*Id.* at 4). The analogy is inapt. In *In re IRS*, the relevant allegations were threefold: the alleged conspirators had used the organization as a forum for conspiratorial discussions; the organization had failed to launch the product that the plaintiffs felt would have been attractive; and the organization had priced its existing products in a manner that the plaintiffs claimed was designed to be inaccessible to certain customers. *In re IRS, 261 F. Supp. 3d at 486-87*. Here, in contrast, the Amended Complaint alleges not **[**119]** merely that Defendants used EquiLend meetings as a forum to plot the conspiracy, but also that EquiLend engaged in active conduct in furtherance of the conspiracy, namely purchasing SL-x's intellectual property to shelve its enabling technology and launching DataLend to underprice and block the development of Data Explorers. These allegations of active conduct in furtherance of the conspiracy distinguish this case from *In re IRS*.

For similar reasons, EquiLend's contention that the Amended Complaint fails to plead sufficient facts to support a rule of reason violation also fails. EquiLend argues that a rule of reason analysis would require "allegations of a geographic market, a product market, market power in that market, and anticompetitive effects." (EquiLend Br. 11). But because the Amended Complaint pleads sufficient facts to support an inference that EquiLend was a member of the conspiracy, the allegations concerning the Prime Broker Defendants' market power in the U.S. stock lending market, and anticompetitive conduct including boycotts, also implicate EquiLend.

Finally, EquiLend argues that there is no specific personal jurisdiction over EquiLend Europe, which is incorporated in **[**120]** the United Kingdom and Wales and headquartered in London. (EquiLend Br. 11). Plaintiffs respond that the Amended Complaint attributes the EquiLend Board members' alleged "general agreement" not to allow "industry advances" outside of EquiLend to EquiLend Europe, as well as to the other EquiLend entities. (Pl. EquiLend Opp. 12). Plaintiffs point out that some of the alleged statements evidencing involvement in the conspiracy were made by individuals who sat on EquiLend Europe's board, and not on the board of the U.S. EquiLend entity. (*Id.*; *see* AC ¶¶ 239-46). Plaintiffs argue that, **[*340]** drawing all inferences in their favor, EquiLend Europe was part of the conspiracy. The Court agrees with Plaintiffs that it has jurisdiction over EquiLend Europe because its co-conspirators' "overt acts in furtherance of the conspiracy" may be imputed to it for purposes of exercising jurisdiction. *Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68, 87 (2d Cir. 2018)*. Accordingly, EquiLend's supplemental motion to dismiss is denied in its entirety.

CONCLUSION

For the reasons set forth above, Defendants' motions to dismiss are DENIED. Defendants are hereby directed to file an Answer to the Amended Complaint by **October 26, 2018**. The Parties are directed to file a proposed case management **[**121]** plan by **November 9, 2018**.

The Clerk of Court is directed to terminate the motions at Docket Entries 106 and 109.

SO ORDERED.

Dated: September 27, 2018

New York, New York

/s/ Katherine Polk Failla

KATHERINE POLK FAILLA

United States District Judge

2301 M Cinema LLC v. Silver Cinemas Acquisiton Co.

United States District Court for the District of Columbia

September 28, 2018, Decided; September 28, 2018, Filed

Civil Action No. 17-1990 (EGS)

Reporter

342 F. Supp. 3d 126 *; 2018 U.S. Dist. LEXIS 167176 **; 2018-2 Trade Cas. (CCH) P80,539; 2018 WL 4681007

2301 M CINEMA LLC, et al., Plaintiffs, v. SILVER CINEMAS ACQUISITON CO., et al., Defendants.

Core Terms

film, distributors, clearance, exhibitor, theaters, specialty, plaintiffs', markets, motion to dismiss, argues, monopoly power, allegations, license, negotiated, theatres, consumers, leveraging, antitrust, demands, quotations, competitor, monopoly, contends, monopolization, anticompetitive, geographic, nationwide, concerted action, anti trust law, non-competitive

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For SILVER CINEMAS ACQUISITION CO., doing business as LANDMARK THEATRES, 2929 ENTERTAINMENT, LP, Defendants: Barry J. Reingold, LEAD ATTORNEY, PERKINS COIE LLP, Washington, DC; Cori Gordon Moore, Laura Kaplan Hennessey, PRO HAC VICE, PERKINS COIE LLP, Seattle, WA; Thomas L. Boeder, PRO HAC VICE, PERKINS COIE, LLP, Seattle, WA.

Judges: Emmet G. Sullivan, United States District Judge.

Opinion by: Emmet G. Sullivan

Opinion

[*129] **MEMORANDUM OPINION**

I. Introduction

To show a film, a movie theater must obtain a license from the film's distributor. The case before the Court involves the competitive market between theaters for exclusive licenses to show specialty films. Plaintiffs—2301 M Cinema d/b/a West End Cinema ("West End Cinema"), the Avalon Theatre Project, Inc. ("the Avalon"), **[**2]** the Denver Film Society, and the Cinema Detroit (collectively, "plaintiffs")—bring this action against Silver Cinemas Acquisition Co. d/b/a Landmark Theatres and its parent corporation 2929 Entertainment, LP (collectively, "Landmark"). Plaintiffs allege that Landmark violated federal ***antitrust law*** by using its national market power to coerce film distributors into granting Landmark exclusive licenses, preventing plaintiffs and other independent theaters from showing specialty films. Plaintiffs' four-count complaint charges Landmark with: (1) circuit dealing in violation of *Section 1 of the Sherman Act*; (2) using its monopoly power in violation of *Section 2 of the Sherman Act*; (3) attempting to use its monopoly power in violation of *Section 2 of the Sherman Act*; and (4) interfering with plaintiffs' business relations.

Pending before the Court is Landmark's motion to dismiss plaintiffs' complaint. *See* Defs.' Mot., ECF No. 16. After careful consideration of the motion, the response, the reply thereto, and the applicable law, Landmark's motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**.

II. Background

Plaintiffs are four independent, community theaters that primarily show specialty films. Compl., ECF No. 1 ¶¶ **[**3]** 14-17. Specialty films include "independent films, art films, foreign films, and documentaries." *Id.* ¶ 24. Unlike mainstream commercial films, specialty films are not intended to appeal to a broad audience and are therefore released less widely than commercial films. *Id.* The first plaintiff, West End Cinema, operated in the District of Columbia from 2010 until 2015. *Id.* ¶ 14. In 2015, West End Cinema was "forced" out of business, allegedly by Landmark's anticompetitive licensing practices. *Id.* Landmark leased the West End Cinema's space and has since opened a Landmark theater **[*130]** in its place. *Id.* The Avalon is another independent theater located in the District of Columbia. *Id.* ¶ 15. The Denver Film Society is a nonprofit organization located in Denver, Colorado that provides specialty film programming via "year-round screening, film festivals, and other special events." *Id.* ¶ 16. It operates the Sie FilmCenter, a specialty film theater. *Id.* Finally, Cinema Detroit is a non-profit specialty film theater located in Detroit, Michigan. *Id.* ¶ 17.

Defendant Landmark is a Delaware corporation and subsidiary of 2929 Entertainment, LP. *Id.* ¶ 18. It operates fifty-one specialty film theaters in **[**4]** twenty-two geographic markets nationwide. *Id.* It is "the largest specialty film movie theater chain in the country" and is purportedly opening new theaters on a regular basis. *Id.*

Both plaintiffs and Landmark are "exhibitors," the industry term for movie theaters. *Id.* ¶ 21. Exhibitors must negotiate with film distributors for licenses to exhibit films at their theaters. *See id.* ¶ 22. Distributors are the entities responsible for marketing the film; they act as a "middleman" between the production studio and the exhibitor. *Id.* ¶ 5. Generally, a distributor's income for each film is tied to the revenue earned by the exhibitor during its run of the film. *See id.* ¶¶ 75-76. License agreements between distributors and exhibitors specify the terms under which the exhibitor may show a particular film. *See id.* ¶¶ 21-22, 25. In some instances, license agreements may include "clearances," or an exclusive right to show a film. *Id.* ¶ 25. In acquiescing to a clearance, a distributor agrees not to license a film to any other exhibitor, or to specific exhibitors, in the same geographic market. *Id.* Clearances are generally negotiated either for the first few weeks a film is shown, a "first-run" clearance, **[**5]** or for the entire period a film is screened by an exhibitor, a "day and date" clearance. *See id.* ¶¶ 21, 25, 28. Clearances must be negotiated on a theater-by-theater, film-by-film basis. Therefore, exhibitors may not engage in circuit-dealing, whereby "a dominant movie theater chain," known as a "circuit," "uses its market power to obtain preferential agreements, particularly clearances, from distributors for the licensing of films . . . in multiple geographic markets." *Id.* ¶ 28 (citing *United States v. Paramount Pictures, 334 U.S. 131, 154-55, 68 S. Ct. 915, 92 L. Ed. 1260 (1948))*.

Plaintiffs allege that Landmark, as the "dominant theater 'circuit' for the exhibition of specialty films in the United States," leverages its market position to obtain clearance agreements nationwide. *Id.* ¶¶ 29, 30. Rather than negotiating clearances on an individual theater-by-theater, film-by-film basis, plaintiffs assert that Landmark obtains "blanket clearances" for more than one film or theater from distributors that accede to Landmark's demands for fear of retribution and loss of Landmark's business. *Id.* ¶ 29. Plaintiffs seek an injunction, treble damages, costs and fees, and actual damages. *See id.* ¶¶ 89-90, 97-98, 102-04, 112-13.

III. Standard of Review

A motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* tests **[**6]** the legal sufficiency of a complaint. *Browning v. Clinton, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002)*. A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quotations and citations omitted).

Despite this liberal pleading standard, to survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted **[*131]** as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quotations and citations omitted). A claim is facially plausible when the facts pled in the complaint allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The standard does not amount to a "probability requirement," but it does require more than a "sheer possibility that a defendant has acted unlawfully." *Id.*

"[W]hen ruling on a defendant's motion to dismiss [pursuant to *Rule 12(b)(6)*], a judge must accept as true all of the factual allegations contained in the complaint." *Atherton v. D.C. Office of the Mayor, 567 F.3d 672, 681, 386 U.S. App. D.C. 144 (D.C. Cir. 2009)* (quotations and citations omitted). In addition, the court must give the plaintiff the "benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276, 305 U.S. App. D.C. 60 (D.C. Cir. 1994)*. Even so, "[t]hreadbare **[**7]** recitals of the elements of a cause of action, supported by mere conclusory statements" are not sufficient to state a claim. *Iqbal, 556 U.S. at 678*.

"To survive a 12(b)(6) motion to dismiss a claim in an antitrust case, plaintiffs must do more than simply paraphrase the language of the antitrust laws or state in conclusory terms that the non-movant has violated those laws." *WAKA LLC v. DC Kickball, 517 F. Supp. 2d 245, 249 (D.D.C. 2007)* (citing *Dial A Car, Inc. v. Transp., Inc., 884 F. Supp. 584, 588 (D.D.C. 1995)*, *aff'd* *82 F.3d 484, 317 U.S. App. D.C. 240 (D.C. Cir. 1996))*. "[I]f [the plaintiff] claims an antitrust violation, but the facts he narrates do not at least outline or adumbrate such a violation, he will get nowhere merely by dressing them up in the language of antitrust." *Dial A Car, 884 F. Supp. at 588* (quoting *Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648 (7th Cir. 1984))* (internal quotation marks omitted). That said, because "the proof is largely in the hands of the alleged conspirators," dismissal procedures "should be used sparingly in complex antitrust litigation" until the plaintiff is given ample opportunity for discovery. *Poller v. Columbia Broad. Sys., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*.

IV. Analysis

Landmark moves to dismiss the plaintiffs' complaint for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, putting forth several arguments. *See* Defs.' Mot., ECF No. 16. First, it contends that 2929 Entertainment should be dismissed, because the complaint does not allege that the parent corporation was responsible for the actions of its subsidiary. **[**8]** *Id.* at 29.[1] Second, Landmark argues that plaintiffs fail to state a plausible circuit dealing claim (Count I) because plaintiffs fail to allege: (1) that Landmark wielded its circuit power to coerce distributors; (2) concerted action or agreement; and (3) an antitrust injury. *Id.* at 13-25. Third, Landmark argues that plaintiffs fail to state a plausible monopolization or attempted monopolization claim (Counts II and III) because plaintiffs fail to allege: (1) that Landmark exercised leveraging conduct; and (2) that Landmark has monopoly power. *Id.* at 25-28. Finally, Landmark contends that plaintiffs fail to state a plausible tortious interference claim (Count IV). *Id.* at 28-29. The Court analyzes each argument in turn.

A. Defendant 2929 Entertainment, LP is Dismissed Without Prejudice

Landmark argues that its parent corporation 2929 Entertainment should be dismissed **[*132]** because the complaint does not allege that it was responsible for the actions of its subsidiaries. Defs.' Mot., ECF No. 16 at 29.

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[1] When citing electronic filings throughout this opinion, the Court cites to the ECF page number, not the page number of the filed document.

Plaintiffs agree and reserve the right to seek leave to amend the complaint and add 2929 Entertainment as a defendant as discovery unfolds. Pls.' Opp'n, ECF No. 17 at 37. Therefore, the Court **GRANTS** Landmark's motion and dismisses without **[**9]** prejudice defendant 2929 Entertainment, LP from this action.

B. Plaintiffs Sufficiently Allege a Circuit Dealing Claim

Landmark argues that Count I must be dismissed because plaintiffs fail to state a plausible circuit dealing claim in violation of *Section 1 of the Sherman Act.* Defs.' Mot., ECF No. 16 at 13-25. First, Landmark argues that plaintiffs fail to allege that Landmark wielded its national circuit power to coerce distributors to agree to clearance agreements. *Id.* at 13-19. Landmark also argues that plaintiffs do not allege that it negotiated any unlawful blanket clearances covering more than one theater or film. *Id.* Instead, it contends that plaintiffs merely allege a series of theater-by-theater, city-by-city negotiated clearance agreements for individual films, a lawful industry practice. *Id.* at 14-18. Plaintiffs respond that they allege "six specific instances of Landmark's circuit dealing at work." Pls.' Opp'n, ECF No. 17 at 10. Moreover, plaintiffs argue that they allege that Landmark coerces and penalizes distributors, forcing them to enter into unlawful clearance agreements to avoid retribution. *Id.* at 19-21.

Alternatively, Landmark argues that plaintiffs fail to allege concerted action or agreement between Landmark and the distributors. Defs.' Mot., ECF **[**10]** No. 16 at 19-22. Instead, Landmark contends that plaintiffs' allegations merely "indicate unilateral decision-making." *Id.* at 21. Plaintiffs argue that the complaint alleges that distributors agree to provide blanket clearances for fear of retribution, even though such clearances are against the distributors' own economic interests. *See* Pls.' Opp'n, ECF No. 17 at 24-27.

Finally, Landmark argues that plaintiffs fail to allege an injury to competition and consumers. Defs.' Mot., ECF No. 16 at 22-25. Landmark contends that plaintiffs merely assert individual harm, an insufficient antitrust injury. *See id.* Plaintiffs respond that the complaint alleges injury to competition by way of decreased output and revenue for distributors and increased prices, fewer choices, and decreased quality for consumers. Pls.' Opp'n, ECF No. 17 at 29.

1. Coercive Use of National Power

Circuit dealing constitutes a *per se* violation of the Sherman Act, as "[t]he inclusion of theatres of a circuit into a single agreement gives no opportunity for other theatre owners to bid for the feature in their respective areas and . . . is therefore an unreasonable restraint of trade." *United States v. Paramount Pictures, 334 U.S. 131, 154, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)*; *see* *Cobb Theatres III, LLC v. AMC Entm't Holdings, Inc., 101 F. Supp. 3d 1319, 1342 (N.D. Ga. 2015)*(citing *Paramount, 334 U.S. at 153-55*; *United States v. Griffith, 334 U.S. 100, 106-09, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*, *disapproved on other grounds by* ***[**11]*** *Copperweld Corp. v. Indep. Tube Corp, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. Circuit dealing occurs when an exhibitor "pools the purchasing power of an entire circuit to 'eliminate the possibility of bidding for films [on a] theatre by theatre [basis].'" *Cobb Theatres, 101 F. Supp. 3d at 1342* (quoting *Paramount, 334 U.S. at 154*). An exhibitor may pool its purchasing power by negotiating "agreements that cover exhibition in **[*133]** *two or more theatres* in a particular circuit . . . ." *Paramount, 334 U.S. at 154* (emphasis added). Such anticompetitive conduct "eliminate[s] the opportunity for a small competitor to obtain the choice of first runs," and "put[s] a premium on the size of the circuit." *Id.*

An exhibitor may also engage in circuit dealing by "unlawful monopoly leveraging," *Cobb Theatres, 101 F. Supp. 3d at 1342*, which occurs when an exhibitor "with a monopoly of theatres in any one town . . . . uses that strategic position to acquire exclusive privileges in a city where [the exhibitor] has competitors," *Griffith, 334 U.S. at 107*; *see* *United States v. Crescent Amusement Co., 323 U.S. 173, 181, 65 S. Ct. 254, 89 L. Ed. 160 (1944)* (finding circuit dealing when "the . . . defendants insist that a distributor give them monopoly rights in towns where they had competition or else defendants would not give the distributor any business in the closed towns where they had no competition"). Monopolistic advantage may be reflected in the agreements obtained or the favorable terms therein. *See* *Schine Chain Theatres v. United States, 334 U.S. 110, 115-16, 68 S. Ct. 947, 92 L. Ed. 1245 (1948)*, *overruled on other* ***[**12]*** *grounds by* *Copperweld Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628*.

Plaintiffs sufficiently allege that Landmark leverages its monopoly power by coercing film distributors to accept clearances agreements that favor Landmark and to deny plaintiffs' requests to show specialty films. *See, e.g.*, Compl., ECF No. 1 ¶¶ 4, 63. Rather than negotiating clearances on an individual theater-by-theater, film-by-film basis, as Landmark must, plaintiffs assert that Landmark wields its circuit power to obtain exclusive clearances against independent theaters. *See id.* ¶¶ 29, 64. First, plaintiffs allege that Landmark, as the largest specialty film exhibitor in the nation, exerts considerable influence over distributors. *See id.* ¶ 18. Landmark has fifty-one theaters in twenty-two major geographic markets nationwide. *Id.* ¶ 71. Specifically, plaintiffs allege several major markets in which Landmark occupies the majority of the specialty film exhibitor market, including St. Louis (80%), Houston (60%), Philadelphia (54%), Detroit (60%), Denver (73%), and the District of Columbia (68%). *Id.* ¶¶ 44-62. Taking such allegations in the light most favorable to plaintiffs, the Court must infer that distributors may be inclined to accede to Landmark's demands.

Next, plaintiffs **[**13]** allege that Landmark uses its considerable market power to deny smaller competitors, like plaintiffs, access to the market. *See id.* ¶ 71 ("Landmark's message to the distributors is clear: if you license a specialty film to any one of the plaintiffs when Landmark intends to exhibit that film, Landmark can and will use its national circuit power to retaliate against you by refusing to play that film or other films at various, if not all, of the 51 Landmark theaters in 22 major geographic markets throughout the country."). Despite Landmark's arguments to the contrary, plaintiffs allege that distributors must agree to Landmark's clearance demands or risk damaging their relationship with the largest specialty film exhibitor. For example, "distributors have informed plaintiffs that the *only* reason they were refusing to license a particular specialty film was because of clearances demanded by Landmark, and not because they desired to restrict the number of theaters playing the film." *Id.* ¶ 75 (emphasis added); *see* Cobb Theatres, 101 F. Supp. 3d at 1327 (denying motion to dismiss circuit dealing claim when defendant's conduct "operated as a demand . . . that distributors refuse to license certain films to the [plaintiff] or, alternatively, **[**14]** risk damaging **[*134]** their relationships with one of the nation's largest film exhibitors"). Such anticompetitive conduct may also be inferred by the distributors assent to Landmark's demands. *See id.* (denying motion to dismiss in part because "several major distributors began to honor [defendant's] demand for preferential treatment"). Here, plaintiffs allege that distributors frequently booked specialty film showings with plaintiffs and later cancelled the bookings, often at the last minute, "due to Landmark's clearance demands." Compl., ECF No. 1 ¶ 67, *see also id.* ¶ 66. Landmark's plausibly coercive conduct is also reflected in the favorable clearances and the advantageous terms that Landmark allegedly obtained from distributors across the three markets at issue. *See id.* ¶ 29 ("[D]istributors have denied access to virtually every specialty film for which Landmark has demanded a clearance . . . ."); *see also id.* ¶¶ 63-72.

Landmark contends that plaintiffs do not allege facts to suggest that Landmark actually threatened distributors. Defs.' Reply, ECF No. 18 at 12. But plaintiffs need not specifically allege *any* threats made by Landmark to state a plausible claim. *See* Griffith, 334 U.S. at 107-08 (finding that an exhibitor **[**15]** "need not be as crass" as to explicitly threaten a distributor "in order to make [its] monopoly power effective in [] competitive situations"). Indeed, reading the complaint in the light most favorable to plaintiffs, the Court may infer that the favorable agreements and reduced market access are plausibly attributed to Landmark's allegedly anticompetitive, coercive conduct. *See* Compl., ECF No. 1 ¶ 75; *see also* Cobb Theatres, 101 F. Supp. 3d at 1343 ("[An exhibitor] is guilty of circuit dealing . . . . even when the exhibitor does not expressly threaten distributors that it will withhold business of its closed or monopoly markets unless it is given preferential treatment"). That said, plaintiffs indeed allege that Landmark dropped a film at a Landmark theater as retribution against a distributor that failed to prevent plaintiff Avalon from showing the film at the same time. Compl., ECF No. 1 ¶ 70.

In sum, such alleged conduct may plausibly "eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit." Paramount, 334 U.S. at 154; *see* Griffith, 334 U.S. at 108 (holding that defendants may not use monopoly "to stifle competition by denying competitors less favorably situated access to the market"); *see also* ***[**16]*** Cobb Theatres, 101 F. Supp. 3d at 1343 (finding that plaintiffs stated a "monopoly leveraging" circuit dealing claim because the complaint "accuses AMC of using or attempting to use its circuit power and its monopoly power in a substantial number of non-competitive [closed] zones to drive high-quality theatres out of markets in which they compete with AMC," even though the complaint did not identify coercive threats, specific agreements, or specific closed markets).

Plaintiffs also allege that Landmark plausibly engaged in circuit dealing by negotiating blanket clearance agreements that unlawfully "cover exhibition in two or more theatres in a particular circuit." Paramount, 334 U.S. at 154. Such conduct allows "the exhibitor to allocate the film rental paid among theaters as it sees fit." *Id.* In *Cobb Theatres*, the district court denied defendant AMC's motion to dismiss, finding that the plaintiff had alleged an unlawful circuit dealing arrangement in part because AMC "simultaneously negotiated clearances for both of its Buckhead theatres." 101 F. Supp. 3d at 1343. So here too. Plaintiffs allege that Landmark negotiated a clearance for multiple theaters in the Denver market when it moved a film clearance from one theater **[*135]** to another, plausibly preventing plaintiff Sie **[**17]** FilmCenter from competing on a theater-by-theater basis. Compl., ECF No. 1 ¶ 65.

As such, the Court finds that plaintiffs allege sufficient facts to state a plausible circuit dealing claim. The Court is not persuaded by Landmark's arguments to the contrary, all of which rely on cases resolved with the benefit of discovery. *See* Defs.' Mot., ECF No. 16 at 17-19 (citing Orbo Theatre Corp. v. Loew's Inc., 156 F. Supp. 770 (D.D.C. 1957)(post-trial); Houser v. Fox Theatres Mgmt. Corp., 845 F.2d 1225 (3d Cir. 1988)(motion for summary judgment); Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, No. 03 Civ. 1895(PAC), 2007 U.S. Dist. LEXIS 504, 2007 WL 39301 (S.D.N.Y. Jan. 8, 2007)(motion for summary judgment)). Paramount cites *Reading International, Inc. v. Oaktree Capital Management, LLC* as a case in which the circuit dealing claim was dismissed. Defs.' Mot., ECF No. 16 at 18. However, such reliance is inapposite, as the district court did not reach the merits of the plaintiffs' circuit dealing claim. Instead, it dismissed the claim because "plaintiffs raise the allegation of circuit dealing for the first time in their opposition papers." 317 F. Supp. 2d 301, 318 n.9 (S.D.N.Y. 2003).

Indeed, plaintiffs' allegations are not unlike those made by Landmark in its 2016 complaint charging Regal Entertainment Group ("Regal") with anticompetitive conduct and circuit dealing. *See Landmark Theatres v. Regal Entm't Grp.*, Civ. No. 16-123-CRC.[2] In opposing Regal's motion to dismiss, Landmark argued that it had **[**18]** adequately alleged a circuit dealing claim because: (1) "it alleges that Regal derives substantial power over distributors from its status as the largest exhibitor circuit in the United States"; (2) it "alleges that Regal demanded" that distributors deny Landmark access to the market and "eliminate the opportunity for the small competitor [Landmark] to obtain the choice first runs"; and (3) this demand "deprive[s] Landmark of the inputs it needs to compete with the threat that Regal could and would disadvantage distributors' films across Regal's circuit." Landmark's Opp'n, ECF No. 17 at 19-20 (Civ. No. 16-123)(citations and quotations omitted). When confronted with a similar argument that Landmark had not alleged specific facts regarding Regal's allegedly coercive demands, Landmark noted that it could not have "possibly" alleged additional facts "[w]ithout the benefit of discovery." *Id.* at 21. So here too.

2. Concerted Action

Landmark also argues that plaintiffs do not allege a viable circuit dealing claim because plaintiffs do not allege facts permitting a plausible inference of concerted action or agreement between Landmark and the distributors. Defs.' Mot., ECF No. 16 at 19-22. Instead, **[**19]** Landmark contends that plaintiffs' allegations "at best . . . indicate unilateral decision-making" in that Landmark prefers to not show the same films at the same time as plaintiffs and that distributors prefer to honor Landmark's preferences. *Id.* at 21-22.

Under Section 1 of the Sherman Antitrust Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Therefore, "[t]o state a claim based on a Section 1 violation, a plaintiff must allege that 'defendants entered into some contract, combination, conspiracy, or other concerted activity that **[*136]** unreasonably restricts trade in the relevant market.'" WAKA LLC v. DC Kickball, 517 F. Supp. 2d 245, 250 (D.D.C. 2007)(quoting Dial A Car, Inc. v. Transp., Inc., 884 F. Supp. 584, 591 (D.D.C. 1995)). To that end, "Section 1 does

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[2] Landmark's case against Regal was settled before the district court resolved Regal's motion to dismiss. *See* Stipulation, ECF No. 19 (Civ. No. 16-123).

not prohibit unilateral or independent conduct by one organization, no matter how anticompetitive it might be." *Id.* (quotations and citations omitted). To plead concerted action, "antitrust plaintiffs may (and often must) prove conspiracies by 'circumstantial evidence and the reasonable inferences drawn from such evidence,' rather than through direct evidence." *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, Civ. No. 03-1895, 2007 U.S. Dist. LEXIS 504, 2007 WL 39301 at *7 (S.D.N.Y. Jan. 8, 2007)* (quoting *Petruzzi's IGA Supermarkets, Inc. v. Darling—Del. Co., 998 F.2d 1224, 1230 (3d Cir. 1993))*.

Plaintiffs allege "enough factual matter **[**20]** (taken as true) to suggest that an agreement was made." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. As previously discussed, plaintiffs allege that distributors and Landmark entered into anticompetitive clearance agreements, whereby "Landmark require[s] the distributor to *agree* that it will not license specified specialty films that the distributor would otherwise license to plaintiffs." Compl., ECF No. 1 ¶ 6 (emphasis added); *see also id.* ¶ 30 ("Distributors agree to Landmark's clearance demands because licenses with Landmark are essential to the commercial success of most of the specialty films they distribute."). Moreover, plaintiffs allege that distributors "refus[ed] to license" films to plaintiffs, *id.* ¶ 75, because they could not "break precedent" from their prior agreements with Landmark, *id.* ¶ 65. Plaintiffs place their allegations of Landmark's and the distributors' parallel conduct "in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly, 550 U.S. at 557*. As such, plaintiffs' allegations sufficiently "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id. at 556*.

Landmark argues that the plaintiffs merely allege unilateral **[**21]** action, as both Landmark and the distributors are acting independently for distinct, self-interested reasons. As such, it contends that its conduct can be explained by market forces. *See* Defs.' Mot., ECF No. 16 at 21-22. For example, Landmark argues that it prefers not to show the same films at the same times as plaintiffs. *See id.* It also argues that distributors likely prefer to show their films at a national, profitable exhibitor chain. *See id.* However, in so arguing, Landmark asks the Court to make a factual determination at this early stage of proceedings. *See id.* at 21. The Court may not do so. Indeed, at this stage, the plaintiffs "need not rule out independent action." *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co., 81 F. Supp. 3d 1, 13 (D.D.C. 2015)*. While conspiracy allegations may fail to state a *Section 1* claim if there are "obvious alternative explanations for the facts alleged," *id.* (quotations and alterations omitted), "'it is also clear that allegations contextualizing agreement need not make any unlawful agreement more likely than independent action . . . at the motion to dismiss stage,'" *id.* (quoting *Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 47 (1st Cir. 2013))*. Without the benefit of discovery, it is not obvious that the favorable clearance agreements are caused *only* by market forces.

The Court is not persuaded by Landmark's **[**22]** reliance on *Cinema Village Cinemart, Inc. v. Regal Entertainment Group*, an unreported case from the Southern District of New York, in which the district **[*137]** court judge granted Regal's motion to dismiss, in part because the plaintiff failed to allege concerted action. Defs.' Mot., ECF No. 16 at 20-21 (discussing *Civ. No. 15-5488, 2016 U.S. Dist. LEXIS 135941, 2016 WL 5719790 (S.D.N.Y. Sept. 29, 2016))*. Unlike plaintiffs' complaint here, *none* of the plaintiff's allegations in *Cinema Village Cinemart* suggested an agreement between Regal and the distributors. *2016 U.S. Dist. LEXIS 135941, 2016 WL 5719790 at *3*. Whereas the plaintiffs in this case described in detail the various theaters and films affected by Landmark's allegedly unlawful agreements with distributors, the plaintiff in *Cinema Village Cinemart* failed to allege "what theaters or films [the clearances] concerned, or the nature of the supposed threats that induced them." *2016 U.S. Dist. LEXIS 135941, at *3*. In light of the significant differences between the two cases, the Court cannot rely on the comparison.

3. Antitrust Injury

Finally, Landmark argues that the Court must dismiss the plaintiffs' circuit dealing claim because plaintiffs fail to allege an antitrust injury. Defs.' Mot., ECF No. 16 at 22-25. Landmark argues that plaintiffs only allege that their individual theaters have been harmed, while **[**23]** ***antitrust law*** requires plaintiffs to allege that Landmark's anticompetitive conduct hurts competition and consumers. *Id.* at 22-23.

It is "clear that a plaintiff claiming federal antitrust violations must plead and prove 'more than injury casually linked to an illegal presence in the market.'" *WAKA, 517 F. Supp. 2d at 249* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. Because the antitrust laws "were enacted for the 'protection of *competition*, not *competitors*," *Brunswick, 429 U.S. at 488*, a plaintiff must allege an anticompetitive impact on the market, *id. at 488-89*. Therefore, to allege an antitrust injury, a plaintiff must plead an "[actual] injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id. at 489*. "[A]bsent injury to competition, injury to plaintiff as a competitor will not satisfy the pleading requirement." *Mizlou Television Network, Inc. v. Nat'l Broad. Co., 603 F. Supp. 677, 684 (D.D.C. 1984)*.

Throughout the complaint, plaintiffs allege harm to competition and consumers. "[A]ctual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality." *Cobb Theatres, 101 F. Supp. 3d at 1335* (quotations and citations omitted). Here, plaintiffs allege just that. The complaint attributes decreased output and revenues for distributors to Landmark's unlawful clearance agreements. *See, e.g.*, Compl., **[**24]** ECF No. 1 ¶¶ 8-9, 73-82. For example, plaintiffs allege that fewer consumers view a film when it is shown in only one location, which leads to decreased distributor revenue. *Id.* ¶ 76. Indeed, distributors allegedly agree that clearance agreements are not necessarily in their economic interest; Landmark's clearance demands were allegedly the "only reason" that distributors refused to license films to plaintiffs. *Id.* ¶¶ 75, 77.

Additionally, plaintiffs allege that consumers have fewer exhibitor choices and endure increased movie prices and decreased theater quality as a result of the unlawful clearance agreements. *See, e.g., id.* ¶¶ 8-9, 73-82. For example, plaintiffs contend that consumers have fewer quality choices in the specialty film exhibitor market; if a consumer seeks to see a film shown by Landmark, the consumer will be unable to enjoy the film at another theater. *Id.* ¶ 78. If a Landmark theater sells out, a consumer may not be able to enjoy the film at all. *See id.* ¶ 79. Moreover, plaintiffs **[*138]** allege that the decreased competition causes higher ticket and concession prices. *Id.* ¶ 79. Finally, as a result of Landmark's alleged anticompetitive conduct, consumers may have to travel **[**25]** further to see a film. *See id.*; *see also id.* ¶ 65 (alleging that patrons in metropolitan Denver must travel an additional 6.5 miles to see a film at a Landmark theater). As Landmark stated in its opposition to Regal's motion to dismiss, it is "bedrock ***antitrust law*** that forcing consumers to travel well outside their market—at considerable inconvenience and expense—to get access to the product they desire *does* harm their welfare." Landmark's Opp'n, ECF No. 17 at 43 (Civ. No. 16-123). In sum, the plaintiffs sufficiently state an antitrust injury by "point[ing] to the specific damage done to consumers in the market." *Cobb Theatres, 101 F. Supp. 3d at 1335* (citations and quotations omitted).

Finally, Landmark disputes the accuracy of plaintiffs' allegations, arguing that plaintiffs misunderstand the relevant economic consequences of the clearance agreements. Defs.' Mot., ECF No. 16 at 22-25. For example, Landmark contends that the number of films available to the public *increased* as a result of "interbrand competition." Defs' Mot., ECF No. 16 at 23. In so arguing, however, Landmark again relies on summary judgment cases in asking the Court to make factual determinations regarding *actual* economic effects at the motion to dismiss **[**26]** stage. Again, the Court may not do so.

The Court therefore **DENIES** Landmark's motion to dismiss Count I of the complaint.

C. Plaintiffs Sufficiently Allege Monopolization

Landmark also argues that plaintiffs fail to state monopolization (Count II) or attempted monopolization (Count III) claims pursuant to *Section 2 of the Sherman Act.* Defs.' Mot., ECF No. 16 at 25-28. Landmark argues that plaintiffs do not allege two necessary elements of a *Section 2* claim: (1) leveraging conduct; and (2) monopoly power. *Id.*

"[T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *Griffith, 334 U.S. at 107*. "To plead a claim for actual monopolization, a plaintiff must allege: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.'" *WAKA LLC, 517 F. Supp. 2d at 250* (quoting *City of*

Moundridge v. Exxon Mobil Corp., 471 F. Supp. 2d 20, 41 (D.D.C. 2007) and citing United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)). "To state a claim for attempted monopolization, a plaintiff must provide facts showing: '(1) a specific intent to destroy competition or control competition in the relevant market, and (2) a dangerous probability of success in actually monopolizing **[**27]** the relevant market.'" Id. at 252 (quoting Dial A Car, Inc., 884 F. Supp. at 589-90). "The key inquiry involves the power of the defendant in the market in which it competes." *Id.* (citations and quotations omitted).

1. Leveraging Conduct

Landmark argues that plaintiffs do not state that Landmark leveraged any monopoly power because the complaint does not allege that it combined its open and closed towns when negotiating with distributors. Defs.' Mot., ECF No. 16 at 26-27. "When the buying power of the entire circuit is used to negotiate films for [an exhibitor's] competitive as well as [its] **[*139]** closed [or non-competitive] towns, [the exhibitor] is using monopoly power to expand [its] empire." Griffith, 334 U.S. at 108. The consequence of this conduct is "that films are licensed on a non-competitive basis in what would otherwise be competitive situations." *Id.*

Plaintiffs' Section 2 claims rely on the same allegations of anticompetitive behavior as their Section 1 claim. *Compare* Compl., ECF No. 1 ¶¶ 83-90 *with id.* ¶¶ 92-104. To that end, Landmark essentially repeats its argument that plaintiffs do not allege that Landmark leverages its monopoly power in non-competitive markets to negotiate favorable clearance agreements in competitive markets. Defs.' Mot., ECF No. 16 at 26-27. As **[**28]** thoroughly discussed, however, *supra* Sec. B.1, the Court finds that plaintiffs allege sufficient facts to infer that Landmark engaged in monopoly leveraging conduct. Indeed, at this stage of the proceedings, the Court cannot agree with Landmark that "there are no allegations that Landmark took advantage of its position in closed geographic markets to strengthen its hand in negotiations with distributors." Id. at 27. As discussed, plaintiffs allege that Landmark is the dominant specialty film exhibitor and that it wields its considerable market power to obtain favorable clearance agreements in competitive markets nationwide. *See, e.g.*, Compl., ECF No. 1 ¶¶ 18, 70-72, 75.

Nevertheless, Landmark argues that plaintiffs' Section 2 claims must fail because the complaint "does not identify Landmark's closed [or non-competitive] towns, if any" and because plaintiffs "say nothing about the competitive makeup of the other 15 markets where Landmark exhibits specialty films." Defs.' Mot., ECF No. 16 at 27. However, plaintiffs are not required to plead such specific facts at this early stage of the litigation. In *Cobb Theatres*, the district court denied the defendant's motion to dismiss even though the plaintiffs **[**29]** had not specifically identified non-competitive markets. 101 F. Supp. 3d at 1343. "Identifying specific closed markets used for leveraging" was "unnecessary" because plaintiffs alleged that the defendant exhibitor was "using the power of its *entire* nationwide circuit . . . to acquire exclusive privileges in markets where it had competitors." *Id.* So here too. Not only do plaintiffs allege that Landmark "leveraged its dominant position nationwide" by coercing distributors to enter into favorable clearance agreements, *see, e.g.*, Compl., ECF No. 1 ¶ 30, but plaintiffs also allege that distributors agree that Landmark's demands are the "only reason" distributors enter into such agreements, *id.* ¶ 75.[3]

2. Monopoly Power

Finally, Landmark argues that plaintiffs' Section 2 claims must fail because the complaint does not adequately allege that Landmark possessed, or had a dangerous possibility of possessing, monopoly power. Defs.' Mot., ECF No. 16 at 27-28. Monopoly power is the "existence of power to exclude competition when it is desired to do so." Griffith, 334 U.S. at 107 (quotations and citations omitted). It "may be inferred from a firm's possession of a

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[3] Moreover, the Court is not persuaded by Landmark's misplaced reliance on *Six West Retail Acquisition, Inc. v. Sony Theatre Management Corp. See* Defs.' Mot., ECF No. 16 at 27 (citing Civ. No. 97-5499, 2004 U.S. Dist. LEXIS 5411, 2004 WL 691680 at *11 (S.D.N.Y. Mar. 31, 2004)). Landmark states that the plaintiff's attempted monopolization claim in that case was "dismiss[ed]," *id.*, but *Six West* was actually resolved "after years of discovery," 2004 U.S. Dist. LEXIS 5411, 2004 WL 691680 at *3-4, 7.

dominant share **[**30]** of a relevant market that is protected by entry barriers." *United States v. Microsoft **[*140]** Corp., 253 F.3d 34, 51, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*(citations omitted).

The Court disagrees that plaintiffs do not allege facts regarding Landmark's monopoly power. As the Court has discussed, plaintiffs allege that Landmark is the largest specialty film exhibitor in the nation. *See* Compl., ECF No. 1 ¶ 18. Landmark does not dispute that allegation; it agrees that it has fifty-one theaters in twenty-two major geographic markets nationwide. *See* Defs.' Mot., ECF No. 16 at 10; *see also* Compl., ECF No. 1 ¶ 71. Moreover, plaintiffs describe several markets in which Landmark occupies the majority of the specialty film exhibitor market. *See* Compl., ECF No. 1 ¶¶ 44-62. Such allegations are sufficient at this early stage of the proceedings. For example, in *Cobb Theatres*, the district court denied the defendant's motion to dismiss in part because the plaintiff alleged that the defendant had "69% share of [the] market," an amount sufficient to infer monopoly power. *101 F. Supp. 3d at 1340* ("in some circumstances, 'over two-thirds of the market is a monopoly'")(quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 480, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*. In this case, plaintiffs allege several markets in which Landmark has close to 69% of the market, if not more. *See* Compl., ECF No. 1 ¶¶ 44-62 **[**31]** (discussing St. Louis (80%), Houston (60%), Philadelphia (54%), Detroit (60%), Denver (73%), and the District of Columbia (68%)).

Not only do plaintiffs allege that Landmark possesses a "dominant share" of the national market, but plaintiffs also allege that high entry barriers protect Landmark's monopoly and prevent access the market. *See* *Microsoft, 253 F.3d at 51*; *see also* *Cobb Theatres, 101 F. Supp. 3d at 1340* (noting that "high entry barriers to the market make it reasonable to presume [the defendant] has monopoly power"). Here, plaintiffs allege that high entry barriers, such as limited urban real estate and difficulty in obtaining financing, reinforce and protect Landmark's monopoly. Compl, ECF No. 1 ¶ 36.

The Court therefore **DENIES** Landmark's motion to dismiss Counts II and III of the complaint.

D. Plaintiffs Sufficiently Allege Tortious Interference

Both parties agree that plaintiffs' tortious interference claim "rises and falls" with plaintiffs' Sherman Act claims. Defs.' Mot., ECF No. 16 at 28 (one paragraph argument relying on its previous arguments); *see* Pls.' Opp'n, ECF No. 17 at 36-37 ("Landmark's only argument for dismissing plaintiffs' tortious interference claim is derivative of its earlier arguments").

Because the Court concludes **[**32]** that plaintiffs state claims under the Sherman Act, the Court **DENIES** Landmark's motion to dismiss Count IV of the complaint.

V. Conclusion

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Landmark's motion to dismiss. The Court **GRANTS** Landmark's motion to dismiss, in so far as defendant 2929 Entertainment, LP is dismissed from the action without prejudice. The Court **DENIES** Landmark's motion to dismiss Counts I, II, III, and IV of the plaintiffs' complaint. An appropriate Order accompanies this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan

United States District Judge

September 28, 2018

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the defendants' motion to dismiss the plaintiffs' complaint is **GRANTED IN PART** and **DENIED IN PART**; and it is further

ORDERED that defendant 2929 Entertainment, LP is **DISMISSED WITHOUT PREJUDICE**; and it is further

ORDERED that the defendants' motion to dismiss as to Counts I, II, III, and IV of the complaint is **DENIED**; and it is further

ORDERED that the remaining defendant shall answer the plaintiffs' complaint by no later than October 17, 2018.

SO ORDERED.

Signed: Emmet G. Sullivan

United [33] States District Judge**

September 28, 2018

V5 Techs., LLC v. Switch, Ltd.

United States District Court for the District of Nevada

September 28, 2018, Decided; September 28, 2018, Filed

Case No. 2:17-cv-002349-KJD-NJK

Reporter

2018 U.S. Dist. LEXIS 245769 *; 2018 WL 11409662

V5 TECHNOLOGIES, LLC, d/b/a COBALT DATA CENTERS, Plaintiff, v. SWITCH, LTD., et.al., Defendants.

Prior History: *V5 Techs., LLC v. Switch, Ltd., 2017 U.S. Dist. LEXIS 174971 (D. Nev., Oct. 23, 2017)*

Core Terms

alleges, customers, colocation, settlement agreement, prices, partnership, anticompetitive, competitors, centers, cross-connect, monopoly, lawsuit, vendors, motion to dismiss, predatory

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For Switch Ltd., Counter Claimant: Daniel H Stewart, Hutchison & Steffen, Las Vegas, NV; Christopher LaVigne, LEAD ATTORNEY, PRO HAC VICE, Shearman & Sterling LLP, New York, NY; Piers R. Tueller, Hutchison & Steffen PLLC, Las Vegas, NV; Ryan Shores, PRO HAC VICE, Shearman & Sterling LLP, Washington, DC; Chad Harrison, LEAD ATTORNEY, Selman Breitman LLP, Las Vegas, NV; Deke Shearon, LEAD ATTORNEY, PRO HAC VICE, Shearman & Sterling LLP, New York, NY; Djordje Petkoski, LEAD ATTORNEY, PRO HAC VICE, Shearman & Sterling LLP, Washington, DC; Anne-Marie Birk, Switch Ltd., Las Vegas, NV; Jeffrey R Hall, Hutchison & Steffen LLC, Las Vegas, NV; Cynthia **[*2]** Milanowski, Hutchison & Steffen LLC, Las Vegas, NV; Joseph S. Kistler, Hutchison & Steffen, Las Vegas, NV; Jacob A. Reynolds, Hutchison & Steffen, Las Vegas, NV; Ariel C. Johnson, LEAD ATTORNEY, Ariel C Johnson Law LLC, Las Vegas, NV; Shelby A Dahl, Hutchison & Steffen PLLC, Las Vegas, NV; Samuel D Castor, LEAD ATTORNEY, Switch Ltd., Las Vegas, NV; Lynnel Marie Reyes, LEAD ATTORNEY, Switch Ltd., Las Vegas, NV; Todd Stenerson, PRO HAC VICE, Shearman & Sterling LLP, Washington, DC; Mark A. Hutchison, LEAD ATTORNEY, Hutchison & Steffen LLC, Las Vegas, NV; Michael A. Wheable, LEAD ATTORNEY, Special Litigation Counsel, Ely, NV; David Higbee, LEAD ATTORNEY, PRO HAC VICE, Shearman & Sterling LLp, Washington, DC.

Paul Reynosa, Interested Party, Pro se, Las Vegas, NV.

For Switch Communications Group L.L.C., Defendant: Joseph S. Kistler, Hutchison & Steffen, Las Vegas, NV; Jeffrey R Hall, Hutchison & Steffen LLC, Las Vegas, NV; Anne-Marie Birk, Switch Ltd., Las Vegas, NV.

For Switch Ltd., Defendant: Anne-Marie Birk, Switch Ltd., Las Vegas, NV; Jacob A. Reynolds, Hutchison & Steffen, Las Vegas, NV; Jeffrey R Hall, Hutchison & Steffen LLC, Las Vegas, NV; David Higbee, LEAD ATTORNEY, PRO HAC VICE, **[*3]** Shearman & Sterling LLp, Washington, DC; Shelby A Dahl, Hutchison & Steffen PLLC, Las Vegas, NV; Piers R. Tueller, Hutchison & Steffen PLLC, Las Vegas, NV; Djordje Petkoski, LEAD ATTORNEY, PRO HAC VICE, Shearman & Sterling LLP, Washington, DC; Lynnel Marie Reyes, LEAD ATTORNEY, Switch Ltd., Las

Vegas, NV; Ryan Shores, PRO HAC VICE, Shearman & Sterling LLP, Washington, DC; Chad Harrison, LEAD ATTORNEY, Selman Breitman LLP, Las Vegas, NV; Michael A. Wheable, LEAD ATTORNEY, Special Litigation Counsel, Ely, NV; Ariel C. Johnson, LEAD ATTORNEY, Ariel C Johnson Law LLC, Las Vegas, NV; Samuel D Castor, LEAD ATTORNEY, Switch Ltd., Las Vegas, NV; Christopher LaVigne, LEAD ATTORNEY, PRO HAC VICE, Shearman & Sterling LLP, New York, NY; Todd Stenerson, PRO HAC VICE, Shearman & Sterling LLP, Washington, DC; Cynthia Milanowski, Hutchison & Steffen LLC, Las Vegas, NV; Joseph S. Kistler, Hutchison & Steffen, Las Vegas, NV; Daniel H Stewart, Hutchison & Steffen, Las Vegas, NV; Mark A. Hutchison, LEAD ATTORNEY, Hutchison & Steffen LLC, Las Vegas, NV; Deke Shearon, LEAD ATTORNEY, PRO HAC VICE, Shearman & Sterling LLP, New York, NY.

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For Switch Inc., Defendant: Jeffrey R Hall, Hutchison & Steffen LLC, Las Vegas, NV; Anne-Marie Birk, Switch Ltd., Las Vegas, NV; Joseph S. Kistler, Hutchison & Steffen, Las Vegas, NV. **[*7]**

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ATTORNEY, PRO HAC VICE, White & Case LLP, Los Angeles, CA; Bryan A. Merryman, LEAD ATTORNEY, White & Case LLP, Los Angeles, CA; Dana Foster, LEAD ATTORNEY, PRO HAC VICE, White and Case LLP; Jerry Frank Hogue, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP, Washington, DC; Celia Anne McLaughlin, PRO HAC VICE, White & Case LLP, Washington, DC; Catherine S Simonsen, LEAD ATTORNEY, White & Case LLP, Los Angeles, CA; Peter D'Agostino, PRO HAC VICE, White & Case LLP, Los Angeles, CA; Claire A. DeLelle, LEAD ATTORNEY, White & Case LLP, Washington, DC; Priya Srinivasan, PRO HAC VICE, White & Case, Los Angeles, CA; I. Scott Bogatz, LEAD ATTORNEY, Reid Rubinstein and Bogatz, Las Vegas, NV; Kerry Elizabeth Kleiman, LEAD ATTORNEY, Reid Rubinstein & Bogatz, Las Vegas, NV.

For V5 Technologies, doing business as, Plaintiff: Claire L. Leonard, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP, Washington, DC; Bryan **[*8]** A. Merryman, LEAD ATTORNEY, White & Case LLP, Los Angeles, CA; Celia Anne McLaughlin, PRO HAC VICE, White & Case LLP, Washington, DC; Peter D'Agostino, PRO HAC VICE, White & Case LLP, Los Angeles, CA; Priya Srinivasan, PRO HAC VICE, White & Case, Los Angeles, CA; Sequoia R. Kaul, PRO HAC VICE, White & Case LLP, New York, NY; Kerry Elizabeth Kleiman, LEAD ATTORNEY, Reid Rubinstein & Bogatz, Las Vegas, NV; Catherine S Simonsen, LEAD ATTORNEY, White & Case LLP, Los Angeles, CA; Claire A. DeLelle, LEAD ATTORNEY, White & Case LLP, Washington, DC; Bryan A. Merryman, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP, Los Angeles, CA; I. Scott Bogatz, LEAD ATTORNEY, Reid Rubinstein and Bogatz, Las Vegas, NV; Rory Jason Reid, LEAD ATTORNEY, Reid Rubinstein Bogatz, Las Vegas, NV; Dana Foster, LEAD ATTORNEY, PRO HAC VICE, White and Case LLP; Jerry Frank Hogue, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP, Washington, DC.

Judges: Honorable Kent J. Dawson, United States District Judge.

Opinion by: Kent J. Dawson

Opinion

ORDER

Presently before the Court is Defendant's Motion to Dismiss (#26). Plaintiff filed a response in opposition (#32) to which Defendant replied (#34).

I. Background

Switch is the long-time dominant high-end colocation **[*9]** data center provider in Las Vegas. Compl. ¶¶ 30-31. Colocation data centers allow organizations to operate their critical computing infrastructure in a third-party purpose-built and managed facility, rather than incur the capital expenditures and risks associated with housing this equipment internally. *Id.* ¶ 19. The basic offerings of data centers are space, power, cooling, and telecommunications services, including "cross-connects." *Id.* Cross-connects allow a data center's customers to connect to their vendors, suppliers, and own data located elsewhere. *Id.* ¶ 28. A customer can cross-connect internally (with another customer co-located in the same data center) or externally, to third-party facilities. *Id.* Cross-connects provide vital links to customers, suppliers, and partners. *Id.* ¶¶ 28-29, 72-73.

High-end colocation data centers — as opposed to lower-tier data centers — offer their customers continuous uptime, i.e., uninterrupted operations, through backup power, cooling, and networking capabilities. *Id.* ¶¶ 23-26, 95-100. Because of the expertise and significant capital expenditure necessary to successfully build and operate a high-end data center, customers generally cannot and **[*10]** do not self-supply. *Id.* ¶ 104.

According to the allegations of the complaint, Switch controls at least 85 percent of the high-end colocation data center market in Las Vegas. *Id.* ¶¶ 30-32. Switch has used that market power to charge prices well above what a competitive market would bear. *Id.* ¶¶ 5, 20, 32, 42, 49, 119, 133. In 2011, Michael Ballard, former President of Cobalt — who had previously been employed by Switch — began prospecting sites for a new data center. *Id.*¶ 33. Ballard developed plans for a data center on Sahara Avenue that he never ended up constructing. *Id.* ¶¶ 33-34.

When Switch learned of Ballard's plans, Switch sued Ballard — not Cobalt — for alleged theft of trade secrets and copyrighted works in designing the Sahara data center. *Id.* ¶ 34; *see* Ex. A (Switch's complaint).

On March 8, 2013, after the court in the Ballard suit denied Switch's motion for summary judgment, Switch agreed to accept the nominal sum of $40,000, to be paid to charity, in exchange for dismissing its complaint with prejudice. *See* Ex. B, Dkt. Nos. 80, 139; ECF No. 26-1 (Settlement Agreement); Compl. ¶ 34. The Settlement Agreement — to which Cobalt is also a signatory — does not contain any admission **[*11]** of liability by Cobalt. *See* Settlement Agreement at 1. According to the allegations of the complaint, Cobalt did not "publicly acknowledge[] the validity of" Switch's lawsuit (Mot. at 2 n.1). *See* Compl. ¶ 34.

The Settlement Agreement contains the following release:

> Ballard [and Cobalt] hereby release any and all claims, causes of action, disputes and damages, including, but not limited to claims of abuse of process, unfair competition, antitrust, defamation, or tortious interference against [Switch] stemming from the actions of [Switch] and arising out of the facts related to the Lawsuit . . . . This release shall remain in full effect notwithstanding the discovery or existence of any such additional or different facts. Ballard intends this release to be effective notwithstanding statutes or laws similar to *Cal. Civil Code Sect. 1542*, which reads: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

ECF No. 26-1 (Settlement Agreement) ¶ 4. Cobalt released any claims against Switch arising out of facts already in **[*12]** existence that related to Switch's lawsuit against Ballard. *Id.* Cobalt did not release claims arising out of unrelated facts, or claims that may later accrue based on future conduct. *Id.*

While Switch's lawsuit against Ballard was pending, Cobalt began designing a new data center, on Cheyenne Avenue. Compl. ¶ 35. In February 2013, Cobalt's multi-million dollar Cheyenne data center opened. *Id.* ¶¶ 35-36. Cobalt felt well positioned to compete with Switch. *See id.* ¶¶ 32, 133, 138, 140, 143-45. An experienced team of data center and real estate veterans led Cobalt, including Jefferson Brown, who later replaced Ballard as President. *Id.* ¶ 37. Industry participants predicted Cobalt's success after touring its state-of-the-art facility. *Id.* ¶ 39.

Cobalt alleges a subsequent barrage of anticompetitive and tortious conduct that Switch inflicted on Cobalt and Switch's only other competitor in the market, ViaWest Las Vegas. *See id.* ¶¶ 121-24. Plaintiff alleges that Switch's intentions quickly became clear shortly after Cobalt Cheyenne opened its doors, when Rob Roy, founder and CEO of Switch, told Cobalt in no uncertain terms that Switch would make it "impossible for Cobalt to compete with Switch" **[*13]** and that Switch was "trying to be a monopoly." *Id.* ¶ 43. Specifically, Roy told Cobalt that Switch would refuse to use carriers that "go into Cobalt"; "use the threat of taking away business to keep its vendors and carriers exclusive to Switch"; and "give away" cabinets at its Las Vegas data center to "keep control" of the market. *Id.*; *see id.* ¶ 77.

Plaintiff's complaint alleges that Switch followed through on its threat of anti-competitive conduct. First, Switch required its customers to agree to successive "Acceptable Use Policies" (AUPs) under which they were forbidden from dealing with competing data centers within 50 miles. *Id.* ¶ 48. Subsequent iterations required an agreement not to deal with data centers "within the State of Nevada" or "within [the] greater geographic area in which [the Switch Las Vegas facility] is located." *Id.* ¶ 51. Switch's 2013 AUP specifically targeted Cobalt, providing that "no entities having business dealings (Vendors and Clients) with Cobalt shall be permitted to enter or work with the Switch Ecosystem." *Id.*¶ 50. Switch reinforced the exclusionary effects of its AUPs with additional, exclusive "partnerships" with carriers. For example, Cobalt incurred **[*14]** significant time and expense fighting a battle with Switch and Zayo Group over an exclusive "marketing partnership" between Zayo and Switch. *Id.* ¶¶ 55-59. Cobalt incurred similar costs challenging an exclusive deal between Switch and CenturyLink in 2014. *Id.* ¶ 60.4

Plaintiff also alleges that Switch threatened prospective customers by not allowing them to cross-connect to trading partners in Switch's Las Vegas facility if those prospective customers co-located with a competitor (including Cobalt) instead of Switch. *Id.* ¶ 73. Plaintiff alleges that in June 2015, after promising discussions with Cannery

Casino & Hotel, Cobalt learned Cannery had decided to collocate with Cobalt. *Id.* ¶ 71. Switch heard about Cannery's decision and told Cannery that if it co-located with Cobalt, Cannery could not cross-connect directly to any of its vendors co-located at Switch. *Id.* ¶ 72. Even though Cannery preferred Cobalt over Switch, it had no choice but to give Switch its colocation business, or else it would lose access to vital trading partners. *Id.*

Switch made similar threats to suppliers that Switch's competitors needed to do business with to compete effectively. For example, Plaintiff alleges that **[*15]** in September 2014, Cobalt and SilverBack Migration, a supplier of infrastructure migration and support services, were in talks to establish a partnership. *Id.* ¶ 62. When Switch learned of the potential partnership, Roy threatened to deny SilverBack all further business with Switch if SilverBack consummated its partnership with Cobalt. *Id.* ¶¶ 62-63. As a result, SilverBack reluctantly reneged on the partnership, informing Cobalt that SilverBack "could not afford to fight" Switch. *Id.* ¶¶ 61, 63.

Although Switch disputes this allegation — stating that "ultimately . . . SilverBack agreed to do business with [Cobalt]" (Mot. at 16:1-2) — the complaint alleges the opposite: that "Switch's exclusionary tactics caused Cobalt to lose [its] important partnership with SilverBack." Compl. ¶ 61. Switch similarly threatened brokers, the Technology Business Alliance of Nevada (TBAN) (an important source of customers), Opportunity Village (a prominent nonprofit organization Cobalt was in talks with to pursue a joint promotional partnership), and the Governor's Office of Economic Development (GOED), resulting in their refusing to deal with or support Cobalt. *Id.* ¶¶ 64-70.

On top of its exclusive agreements **[*16]** and threats, Plaintiff alleges that Switch selectively employed predatory pricing to steal prospective customers from its competitors, knowing Switch could raise prices once they were sidelined. *Id.* ¶¶ 74-78. Indeed, one Switch representative admitted, "We do whatever we can to keep the other guys from getting started . . . We would even buy a billboard out front of another data center and advertise $1 per month [versus Switch's standard $1,199 per month] to keep the competition from succeeding." *Id.* ¶ 77. And Roy stated, in response to Cobalt entering the market, that Switch would be "giving away 250 cabinets per year." *Id.* The complaint alleges that Switch stole Yorba Linda Water District's business from Cobalt with a price that was below Switch's costs. *Id.* ¶ 74. And Switch told Cobalt customer Networx that it would pay Networx's legal fees if it broke its contract with Cobalt — which Networx did. *Id.* ¶ 78.

Finally, Plaintiff alleges that Switch's anticompetitive scheme also involved a campaign to slander and malign its competitors. According to the allegations of the complaint, Switch's 2013 AUP falsely represented: "The CEO of Cobalt Datacenters, Mike Ballard, signed a Settlement **[*17]** Agreement relating to Mike Ballard's unauthorized possession of Switch's intellectual property and confidential information." *Id.* ¶ 87. Switch also routinely and falsely represented to third parties that Cobalt and ViaWest Las Vegas did not offer concurrent maintainability and redundancies and referred to various agents of Cobalt as "liars" and "thieves" — long after Ballard had left Cobalt. *Id.* ¶¶ 91-92. The complaint asserts that the stream of false and disparaging statements created a cloud of uncertainty about doing business with Switch's competitors and induced numerous third parties not to deal with them. *Id.* ¶ 93.

The complaint also alleges that Switch's anticompetitive scheme caused Cobalt's failure. *Id.* ¶¶ 139-40. Despite the market's early optimism for Cobalt's Cheyenne facility, Cobalt was unable to secure enough customers to keep its doors open. *Id.* Less than three years after it opened, Cobalt shut down operations. *Id.* ¶ 41. ViaWest Las Vegas also achieved far less growth than it would have absent Switch's anticompetitive conduct. *Id.* ¶ 141.

The complaint asserts that the natural result was to provide an environment in which customers only had one choice in the market. As **[*18]** detailed in the complaint, before customers decide on a colocation data center provider to use, they decide where, geographically, they will co-locate. *Id.* ¶¶ 21-22. Customers who need absolute assurances against natural disasters choose southern Nevada — a unique attribute that Switch itself touts to sell southern Nevada as a distinct geographic market. *Id.* ¶¶ 107-12. Other customers are based in Nevada and either require close proximity to their co-located data or are required under Nevada law to house their data in state. *Id.* ¶¶ 113-14. All of these categories of customers have no reasonable substitute for Las Vegas, the only region in southern Nevada — indeed, in the state — with heightened colocation data centers. *Id.* ¶¶ 21-22, 108-14, 116-18. Having driven Cobalt from the market, Switch was able to maintain its supra competitive prices far above those offered by Cobalt or ViaWest for comparable services in competitive markets. *Id.* ¶¶ 133, 138, 142-45.

Cobalt filed the present action asserting claims for violations of the *Sherman Act (monopolization, attempted monopolization and agreements in restraint of trade)*, Nevada's Unfair Trade Practices Act (mirroring the federal Sherman Act claims), and common law claims for intentional interference with contract and prospective **[*19]** economic advantage. Defendant Switch, Ltd. has now moved to dismiss these claims.

II. Legal Standard

A motion to dismiss requires the Court to construe the facts in the light most favorable to the non-moving party. "To survive [the motion], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). This requires a two-pronged analysis. First, the Court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id. at 1949-51*. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id. at 1951*. Plausibility, in the context of a motion to dismiss, means that a plaintiff has pled facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 1949*. If the allegations state non-conclusory, plausible claims for relief, such claims survive the motion to dismiss. *Id. at 1950*.

III. Analysis

A. Release and Waiver

Defendant argues that this action is barred by Plaintiff's waiver of claims in the 2013 settlement **[*20]** agreement. A release and waiver of claims is recognized in Nevada when there is an intentional relinquishment of a known right. *See Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Ct., 123 Nev. 44, 152 P.3d 737, 740 (Nev. 2007)*. However, the settlement agreement's plain language only releases claims "arising out of the facts related to the Lawsuit." There is no plain language from which a reasonable person could conclude that they were releasing future claims based on new conduct that occurred after the settlement agreement was executed. Accordingly, the Court denies the motion to dismiss the Complaint based on the March 8, 2013 settlement agreement arising out of Switch's 2011 lawsuit against Ballard.

B. Adequacy of the Complaint

"The offense of monopoly under *§ 2* of the *Sherman Act* has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. Attempted monopolization requires (1) the defendant's specific intent to control prices or destroy competition, (2) predatory or anticompetitive conduct directed at accomplishing that purpose and (3) a reasonably dangerous probability of achieving monopoly **[*21]** power. *See Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1432-33 (9th Cir. 1995)*. The Nevada Unfair Practices Act tracks the federal ***antitrust law***. *Boulware v. Nevada, 960 F.2d 793, 800-801 (9th Cir. 1992)*.[1]

Initially, Defendant argues that Plaintiff has not pled facts with enough particularity. However, "[t]here is no requirement that . . . elements of the antitrust claim be pled with specificity." *Newcal Indus., Inc. v. Ikon Office Sol.,*

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[1] To the extent Defendant challenges Plaintiff's claims for intentional interference with contractual relations and intentional interference with prospective economic advantage, the Court finds that they are adequately pled.

513 F.3d 1038, 1045 (9th Cir. 2008). From the stated allegations noted by the Court, Plaintiff easily satisfies the elements of the monopoly and attempted monopolization claims.[2]

Further, Plaintiff alleges specific facts that satisfy the specific intent requirement of the attempted monopolization claim. While "[s]uch intent may inferred from well-pleaded allegations of predatory and or anti-competitive conduct" or from "circumstantial evidence[,]" Plaintiff alleged direct evidence of specific intent: Switch's CEO's own statements. United Energy Trading, LLC v. Pacific Gas & Elec. Co., 200 F. Supp.3d 1012, 1023 (N.D. Cal. 2016) (citing Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993); *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1027 (9th Cir. 1981)*). While Defendant may have wished for more information, such as time and place of the statements, such specific pleading is not required. A plaintiff that has pled facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" has stated claims sufficient to survive the motion to dismiss. Iqbal, 129 S. Ct. at 1949-50.

C. Federal Rule of Evidence 408

Defendant argues that many of Plaintiff's factual allegations are **[*22]** forbidden by Federal Rule of Civil Procedure 408, because they were statements made during settlement negotiations. However, there is no indication in the complaint when the statements were made, though to the degree the Court can infer from the complaint, the statements were alleged to have been made after execution of the settlement agreement in the prior case. Since the Court must rely on the allegations of the complaint in determining the sufficiency of the pleadings, it cannot consider Defendant's argument without converting the motion into a motion for summary judgment. To do so at this early stage of the litigation would deprive the parties of the benefit of discovery. Therefore, the Court declines to address this argument. Defendant may argue in a motion for summary judgment or in response to a motion for summary judgment that evidence is not admissible under Rule 408.

D. Predatory Pricing

In order to state a claim for predatory pricing under the Sherman Act, Plaintiff must allege (1) the prices complained of are below an appropriate measure of its rival's costs; and (2) that the competitor has a dangerous probability of recouping its investment in below-cost prices. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588-89, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) ("For the investment to be rational, the [predator] **[*23]** must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.")). Here, Plaintiff has made sufficient allegations to meet both prongs having alleged price below Defendant's costs and sufficient ability to recover lost profits.

E. Exclusive Dealing

Exclusive dealing involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor. Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 996 (9th Cir. 2010). There are "well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition." Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997). Consequently, "an exclusive-dealing arrangement does not constitute a *per se* violation of section 1." Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291, 1303-04 (9th Cir. 1982). Under the antitrust rule

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[2] To the extent that Defendant disputes the relevant market as pled by Plaintiff, the Court must deny the motion to dismiss based on the allegations regarding the relevant market, because "the validity of the 'relevant market' is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial." Newcal, 513 F.3d at 1044. The complaint adequately states a relevant market.

of reason, an exclusive dealing arrangement violates *Section 1* only if its effect is to "foreclose competition in a substantial share of the line of commerce affected." *Omega, 127 F.3d at 1162* (quoting *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*). Despite Defendant's assertions to the contrary, Plaintiff has adequately alleged that the exclusive dealing contracts foreclosed competition.

IV. Conclusion

Accordingly, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#26) is **DENIED**.

Dated this 28th day of September, 2018.

/s/ Kent J. Dawson

The Honorable Kent J. Dawson **[*24]**

United States District Judge

FTC v. Wilh. Wilhelmsen Holding ASA

United States District Court for the District of Columbia

October 1, 2018, Filed

Civil Action No. 18-cv-00414-TSC

Reporter

341 F. Supp. 3d 27 *; 2018 U.S. Dist. LEXIS 169049 **; 2018-2 Trade Cas. (CCH) P80,509; 2018 WL 4705816

FEDERAL TRADE COMMISSION, Plaintiff, v. WILH. WILHELMSEN HOLDING ASA, WILHELMSEN MARITIME SERVICES AS, RESOLUTE FUND II, L.P., DREW MARINE INTERMEDIATE B.V., AND DREW MARINE GROUP, INC., Defendants.

Core Terms

Global, customers, vessels, products, Fleets, suppliers, chemicals, merger, marine, trading, water treatment, prices, ships, estimates, market share, boiler, calculations, effects, products and services, ports, concentration, cluster, buyers, engine, barriers, competitor, negotiate, merging, prima facie case, firms

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Opinion

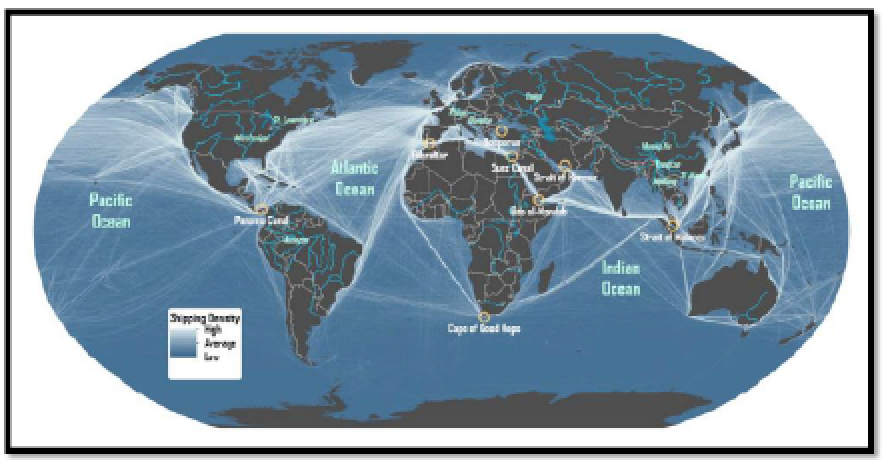
[*39] **MEMORANDUM OPINION**

The Federal Trade Commission ("FTC") has moved for a preliminary injunction to block a proposed merger between defendants Wilhelmsen Maritime Services AS ("WMS"), Wilhelmsen Ship Services ("WSS") (collectively "Wilhelmsen"), and The Resolute Fund II, L.P., Drew Marine Intermediate II B.V., and Drew Marine Group, Inc.

(collectively "Drew"), two large providers of marine water treatment chemicals and related services. The FTC objects to the merger on the grounds that Defendants are each other's closest and only realistic competition for supplying these chemicals and services on a global scale, and the merger threatens to reduce or eliminate tangible consumer benefits resulting from market competition. Having considered the evidence presented through live testimony, as well as extensive pleadings, exhibits, and other submissions, the court hereby GRANTS **[**3]** the motion for preliminary injunction.

I. BACKGROUND

This case is about the likely impact of a proposed merger in the international maritime industry—an industry on which much of the global economy, including intercontinental trade, large-scale transport of raw materials, and the import/export of foodstuffs and manufactured goods, depends. *See* PX90033 at 001; PX90034 at 001 (noting that "[international shipping transports more than 80 percent of global trade **[*40]** to peoples and communities all over the world," and that "[s]hipping is the most efficient and cost-effective method of international transportation for most goods"). By at least one estimate, the worldwide shipping industry includes 50,000 merchant ships registered in over 150 nations. PX90033 at 001. The following map, originally sourced from the National Center for Ecological Analysis and Synthesis, depicts common global shipping routes and underscores the breadth and density of maritime industry activities:



PX10126 at 023. While international merchant ships includes many types of vessels, all of them—and especially large ones—require regular maintenance to ensure continuous performance at operational levels. Companies like Wilhelmsen **[**4]** and Drew provide an array of products and services designed to ensure the continued operational performance of all types of maritime vessels. *See* PX10126 at 008-009 (noting that "VPP [vessel performance products] applications are necessary to maintain financial and operational efficiency of vessels," and that such products "are required by all commercial shipping vessel classes," which include container ships, bulk ships, cruise ships, military ships, tankers, cargo ships, and even offshore oil and gas rigs). Defendants sell maritime customers several categories of products, including cleaning chemicals, fuel treatment chemicals, welding gases, refrigerants, and, critically, water treatment chemicals. Am. Compl. ¶ 29; Ans. ¶ 29. The products at issue in this case are consumable water treatment products and related services, a category that includes products and services for the chemical treatment of boiler water, cooling water, water production, waste water, ballast water, and potable water. DX-1161 at 0019.

Marine vessels use water resources for a number of applications, including drinking, showering, cleaning, pools, spas, and—critically—for boiler and cooling systems. JX-0149 at **[**5]** 003. Depending on the type of ship, a boiler is necessary either as a constituent part of the main propulsion system or as part of an auxiliary system on which the propulsion system relies. PX90030 at 001. In auxiliary systems, the boiler primarily serves to generate steam to support ship functions in vessels running on marine diesel engines or diesel electric propulsion. PX90030 at 001. Examples include preventing Heavy Fuel Oil ("HFO")—a highly viscous substance—from falling below the temperature at which it is useable, heating HFO to ensure fluidity immediately before use in the engine, and for use in purifiers, **[*41]** booster modules, and other applications. PX90030 at 002-005. Cooling water systems reduce excess heat produced by the working machinery of a vessel's engine. PX90032 at 001. Essentially, cooling water systems circulate water through the engine to remove heat and reduce the likelihood of engine failure. Fry Hrg. Tr. at 943: 17-24 ("If you don't maintain the cooling water side, then you're relying on the oil side of the house to take up and remove that heat from the engine. And what happens is, if you don't cool the cylinders down, the oil starts breaking down. When the oil **[**6]** starts breaking down, then you get metal-to-metal contact inside the piston and the rings, and then you have an engine failure, and usually . . . under those circumstances you have a crank case explosion as well.").

Marine water treatment chemicals "are all the chemicals associated with the maritime operation of ships"—including boiler chemistry, diesel chemistry, central cooling water, and evaporators. Fry Hrg. Tr. at 936: 11-12. After measuring the pH, conductivity, temperature, and oxidation-reduction potential of the water with specialized testing equipment, ship engineers inject these chemicals into the boiler and engine cooling systems through specialized dosing equipment optimized for high-pressure/low-volume or low-pressure/high-volume applications. Fry Hrg. Tr. at 945: 10-12; JX-0135 at 005; PX90014 at 003-004. Once injected, water treatment chemicals ensure the performance and reliability of marine boiler and engine cooling systems by: (1) removing excess oxygen from the systems, (2) allowing fine-tuned control of boiler water, cooling water, and feedwater pH; and (3) preventing the leaching and circulation of harmful metals. *See* Fry Hrg. Tr. at 937: 1-21; *see also* JX-0135 **[**7]** at 002. In each of these applications, the chemicals operate to reduce or eliminate the incidence of scale, corrosion, and oxygen formation within boiler, feedwater, and engine cooling systems, as well as the risk of engine overheating with respect to cooling systems specifically. Fry Hrg. Tr. at 937: 1-6; JX-0135 at 003; Fry Hrg. Tr. at 943: 12-14 ("Q. And why do vessels use engine cooling water chemicals? A. To control the amount of corrosion and erosion within the cooling channels of the engine itself.").

Although marine water treatment chemicals "only account for a small fraction of the cost of managing a ship," PX80014 ¶ 3, failure to treat the water resources in boiler and engine cooling systems comes with significant consequences, including breakdown or catastrophic failure. *See, e.g.*, Thompson Hrg. Tr. at 259: 18-24 ("Q. What happens if a boiler develops corrosion? A. [I]t could potentially damage the boiler. It may require significant servicing or even replacement"); JX-0135 at 002 ("Deviating from recommended pH and phosphate control limits can lead to caustic corrosion and result in catastrophic failure of the boiler system."); Fry Hrg. Tr. at 942: 24-25-943:4, 17-24 (describing **[**8]** how failure to treat high pressure boiler water could cause a ruptured pipe and boiler explosion, and how failure to treat cooling water could cause engine failure or explosion). System failure requires costly repairs and unscheduled downtime that translates to lost business and profits for shipping companies. JX-0149 at 003 ("Water treatment is as much about asset protection as it is about maintaining efficiency. The consequences of not using the right treatments can be costly, resulting in unscheduled downtime, or in the worst cases catastrophic, leading to total breakdown of equipment"); PX90014 at 003; Thompson Hrg. Tr. at 259:21-24 (noting that due to the size of the boilers involved, replacement would likely require cutting a hole in the hull and removing the boiler in **[*42]** pieces). Maritime companies therefore regard a consistent and effective marine water treatment program as critical to maintaining an operational fleet of ships. *See, e.g.*, PX80014 ¶¶ 3, 5, 7 (describing the importance of water treatment chemicals to ship operations, the need for consistency and dependability in chemical products, and the preference for companies offering total packages of chemical products and **[**9]** related services); Medina Hrg. Tr. at 167: 8-10 ("[C]onstancy in the chemical makeup of [marine water treatment chemical] products is crucial to the maintenance of our equipment.").

Consistent with customer demand for reliable water treatment chemical programs, suppliers of water treatment chemicals focus their business strategy on providing more than the chemicals themselves. They supply a "total solution"—a programthat includes chemical products, test kits, technical expertise and support, and access to a global network with the ability to quickly and reliably provide product on demand, wherever a vessel is located, and whatever its specific needs may be. JX-0231 at 154 ("Manufacturer/supplier should be able to . . . [s]upply a total solution rather than just the product"); [TEXT REDACTED BY THE COURT] uses the phrase 'total solution' here, can you explain what that phrase means. A. It typically means the service that would come with the product, or even identifying what would be the best product for that application. So the total package would be not just a product but the service associated with the use, or identifying the right use of the right product for that application."); **[**10]** [TEXT REDACTED BY THE COURT] (noting that when Drew enrolls a new customer in its water treatment program it offers recommendations on how to use specific water treatment chemicals, how to test water in boiler and cooling systems, and how to properly dose the chemicals); Medina Hrg. Tr. at 170:7-171:25 (discussing various services provided by marine chemical suppliers); *see also, e.g.*, Thompson Hrg. Tr. at 279:9-281:22 (describing the specific products and services covered under contract with marine chemical supplier). Defendants—whose business is described in more detail below—provide such programs.

Defendant Drew Marine Group, Inc. is a subsidiary of defendant Drew Marine Intermediate II B.V., which is owned by defendant The Resolute Fund II, L.P., a private equity fund managed by The Jordan Company. Am. Compl. ¶ 24. Drew was originally established in 1928, and has grown over the ensuing years into a company with a global infrastructure. Am. Compl. ¶ 24; DX-1161 at 0006, 0010. As Drew Marine representatives put it at a management presentation on February 15, 2017, "Drew Marine's strength is in delivering technical support in specialty chemicals." DX-1161 at 0019. Accordingly, roughly **[**11]** [TEXT REDACTED BY THE COURT] of Drew's revenue is traceable to "Water Treatment Solutions," a category that includes an array of products and services related to the chemical treatment of boiler water, cooling water, water production, waste water, ballast water, and potable water. DX-1161 at 0019. Drew maintains a "sales, service and logistics network that spans 47 countries, with stocking locations in nearly 100 distribution facilities that in turn supply [an estimated] 1000 ports and customers worldwide." PX10126 at 017.

Defendant Wilhelmsen Maritime Services AS is a wholly owned subsidiary of defendant Wilh. Wilhelmsen Holding ASA, a publicly traded corporation headquartered in Norway. Am. Compl. ¶ 23. Wilhelmsen Ship Services (WSS) is a division of WMS that focuses on supplying marine customers with a number of products and services, including water treatment chemicals and associated equipment for boiler water, cooling water, water production, **[*43]** and pool water. PX61000 ¶¶ 51, 53; PX90046; PX90047; PX90050; PX90063. Wilhelmsen—the parent company—was founded as a shipping business in 1861. PX61000 ¶ 51. WSS was founded in 1968. Since then, WSS has developed into "the largest maritime **[**12]** services network in the world," capable of delivering "in 125 countries . . . [and] supporting [its] non-stop operations in 2,200 port locations across the globe." PX20172 at 006. Marine chemicals account for [TEXT REDACTED BY THE COURT] of WSS's total revenues. PX20137 at 0010.

Pursuant to a Share Purchase Agreement dated April 27, 2017, WMS proposed to acquire 100% of Drew's voting securities for approximately $400 million. Am. Compl. ¶ 25. The FTC then conducted a ten-month investigation, after which it "found reason to believe that the proposed Acquisition violates *Section 7* of the *Clayton Act* and *Section 5 of the FTC Act*." Mem. Supp. Prelim. Inj. 12 ("Mot."). The FTC initiated an administrative action alleging a violation of the above statutes, and the merits trial in that action is scheduled to begin on July 24, 2018. Mot. at 2. The FTC also filed the instant motion for a preliminary injunction under *Section 13(b) of the FTC Act*, to preserve the status quo pre-merger during the pendency of the administrative proceeding. Mot. at 12-13.

An evidentiary hearing on the motion for preliminary injunction began on May 29, 2018 and concluded on June 19, 2018. The court heard testimony from fifteen fact witnesses—either live or via video deposition—and **[**13]** three expert witnesses. Plaintiff and Defendants each submitted proposed findings of fact and conclusions of law on June 25, 2018, along with a combined 4,186 exhibits.

II. LEGAL STANDARDS

A. *Section 7* of the Clayton Act

Section 7 of the Clayton Act prevents mergers or acquisitions where "the effect . . . may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or in any activity affecting commerce in any section of the country." *15 U.S.C. § 18*. As the Supreme Court has noted, *Section 7* concerns "probabilities, not certainties," *Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*, and thus the FTC need not demonstrate certainty that a proposed merger will produce anticompetitive effects—only that a "substantial lessening of competition will be 'sufficiently probable and imminent' to warrant relief." *FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 115 (D.D.C. 2004)* (citing *United States v. Marine Bancorporation, 418 U.S. 602, 618, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974))*.

B. *Section 13(b)* Standard for Preliminary Injunction

Section 13(b) of the *Federal Trade Commission Act* empowers the Federal Trade Commission to seek preliminary injunctive relief in order to prevent a merger until it can adjudicate the merger's legality in an administrative proceeding, provided the agency has "reason to believe" that the merger will violate the antitrust laws. *15 U.S.C. § 53(b)*; *see also* *FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 35 (D.D.C. 2009)*; *FTC v. H.J. Heinz Co., 246 F.3d 708, 714, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)*. *Section 13(b)* provides that an injunction may issue "[u]pon a proper showing **[**14]** that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." *15 U.S.C. § 53(b)*. As the D.C. Circuit noted in *Heinz*, the omission of any irreparable harm element evinces Congress's intention "to depart from what it regarded as the . . . traditional equity standard" that applies to traditional requests for preliminary **[*44]** relief. *Heinz, 246 F.3d at 714*; *see also* *FTC v. Exxon Corp., 636 F.2d 1336, 1343, 205 U.S. App. D.C. 208 (1980)* ("In enacting [*15 U.S.C. § 53(b)*], Congress . . . demonstrated its concern that injunctive relief be broadly available to the FTC by incorporating a unique 'public interest' standard . . . rather than the more stringent, traditional 'equity' standard for injunctive relief.").

Under *Section 13(b)*, the district court balances the FTC's likelihood of success against the equities on a sliding scale. *FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1035, 383 U.S. App. D.C. 341 (D.C. Cir. 2008)* (Brown, J.) (citing *H.J. Heinz Co., 246 F.3d at 727*). Since Congress's particular "public equity consideration in enacting *Section 13(b)* was 'the public interest in effective enforcement of the antitrust laws,'" a showing of "private equities" alone will not suffice to overcome a showing of likelihood of success, and the equities often favor the FTC. *Id.* Moreover, "[t]he FTC is not required to *establish* that the proposed merger would in fact violate *section 7* of the Clayton Act" in **[**15]** a *Section 13(b)* proceeding. *FTC v. Sysco Corp., 113 F. Supp. 3d 1, 22 (D.D.C. 2015)* (quoting *Heinz, 246 F.3d at 714*). Instead, "to demonstrate the likelihood of success on the merits, 'the government need only show that there is a reasonable probability that the challenged transaction will substantially impair competition." *Id.* (quoting *FTC v. Staples, 970 F. Supp. 1066, 1072 (D.D.C. 1997))*. Thus, the trial court's role in a *Section 13(b)* proceeding is to "measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed] merger 'may be substantially to lessen competition, or to tend to create a monopoly in violation of *section 7* of the Clayton Act.'" *Id.* (quoting *Heinz, 246 F.3d at 714*). The FTC satisfies this standard where it "rais[es] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation." *Whole Foods, 548 F.3d at 1035 (Brown, J.)* (quoting *Heinz, 246 F.3d at 714-15*); *see also* *Sysco, 113 F. Supp. 3d at 22*. Nevertheless, a preliminary injunction in this context remains "an extraordinarily drastic remedy," *Exxon, 636 F.2d at 1343* (quoting *Medical Society v. Toia, 560 F.2d 535, 538 (2d Cir. 1977))*, especially since "as a result of the short life-span of most tender offers, the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated." *Id.*

C. *Baker Hughes* Burden-Shifting Framework

Courts in this Circuit apply **[**16]** the burden-shifting framework set out in *United States v. Baker Hughes Inc., 908 F.2d 981, 991, 285 U.S. App. D.C. 222 (D.C. Cir. 1990)*, to assess whether a proposed merger violates *Section 7* of the Clayton Act. Under that framework, the FTC bears the initial burden to prove that a proposed merger would result in "undue concentration in the market for a particular product in a particular geographic area." *Id. at 982*; *see also* *Heinz, 246 F.3d at 715* (quoting *United States v. Phila. Nat'l Bank, 374 U.S. 321, 363, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963))*; *United States v. Anthem, Inc., 236 F. Supp. 3d 171, 192 (D.D.C. 2017)*. Such a showing entitles the FTC to a presumption that the merger will substantially lessen competition. *Baker Hughes, 908 F.2d at 982* (citing *United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 120-22, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975))*; *Arch Coal, 329 F. Supp. 2d at 115-17*, *appeal dismissed*, *No. 04-5291, 2004 U.S. App. LEXIS 19405, 2004 WL 2066879*

(D.C. Cir. Sept. 15, 2004). Defendants are then entitled to rebut the presumption by presenting evidence that "'show[s] that the market-share statistics **[*45]** [give] an inaccurate account of the [merger's] probable effects' on competition in the relevant market." *Heinz, 246 F.3d at 715* (quoting *Citizens & Southern Nat'l Bank, 422 U.S. at 120*). Where defendants successfully rebut the presumption of illegality, "the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Baker Hughes, 908 F.2d at 983*; *see also* *Heinz, 246 F.3d at 715*.

III. DISCUSSION

A. Likelihood of Success on the Merits

1. Prima Facie Case

Given that "the ultimate determination of the legality of a merger involves an assessment of the new firm's market power . . . and the prima **[**17]** facie case concerns market concentration," *Anthem, 236 F. Supp. 3d at 193 (D.D.C. 2017)*, it is appropriate to begin a merger analysis by defining the "relevant product and geographic boundaries of the market[] in question." *FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 45 (D.D.C. 1998)*; *see also id.* ("[d]efining the relevant market is critical in an antitrust case because the legality of the proposed mergers in question almost always depends upon the market power of the parties involved."); *Marine Bancorporation, 418 U.S. at 618* (describing market definition as a "necessary predicate" to evaluating the legality of a merger under *Section 7*). The "relevant market has two components: (1) the relevant product market and (2) the relevant geographic market." *CCC Holdings Inc., 605 F. Supp. 2d at 37*; *see also* *Arch Coal, 329 F. Supp. 2d at 117*. In this case, there is no dispute regarding the relevant geographic market—the parties agree it is global. Nevo Hrg. Tr. at 564:18-565:8; Israel Hrg. Tr. at 1456:21-23. Thus, the court now turns to determining the bounds of the relevant product market.

a. Relevant Product Market

1. LEGAL STANDARD

The Supreme Court has long maintained that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it." *Brown Shoe Co., 370 U.S. at 325*. Accordingly, the touchstone is demand substitution—"[m]arket **[**18]** definition focuses . . . on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as reduction in product quality or service." 2010 Merger Guidelines § 4. The key question is "whether there are other products offered to consumers which are similar in character or use to the product or products in question, as well as how far buyers will go to substitute one commodity for another." *Staples, 970 F. Supp. at 1074* (citing *United States v. E.I. du Pont de Nemours and Co., 351 U.S. 377, 393, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*); *see also* *United States v. H & R Block, 833 F. Supp. 2d 36, 51 (D.D.C. 2011)*. Where "one product is a reasonable substitute for the other, it is to be included in the same relevant product market even though the products themselves are not the same." *Cardinal Health, 12 F. Supp. 2d at 46*.

Whether a product is a reasonable substitute for another depends on two factors: (a) the extent to which "buyers view similar products as substitutes" and thus "can substitute the use of one for the other" (i.e., functional interchangeability), *Sysco 113 F. Supp. 3d at 25*; *Arch Coal, 329 F. Supp. 2d at 119*; and (b) the extent to **[*46]** which variations in the price of one product—an increase, for example—affects demand for another (i.e., cross-elasticity of demand). *See, e.g.,* *Cardinal Health, 12 F. Supp. 2d at 46* ("a product is construed to be a 'reasonable substitute' for another when the demand for it increases in response **[**19]** to an increase in the price for the other."). Thus, the boundaries of the relevant market lie where the reasonable alternatives for substitution—based on use or price—end. "The relevant market consists of all the products that the Defendants' customers view as substitutes to those supplied by the Defendants" *id.*, "even though the products themselves are not entirely the same." *Sysco, 113 F. Supp. 3d at 25*.

Broad markets sometimes include relevant submarkets that themselves may "constitute product markets for antitrust purposes." *Whole Foods, 548 F.3d at 1037-38 (Brown, J.)* (quoting *Brown Shoe, 370 U.S. at 325*). A firm need not "be included in the relevant product market for antitrust purposes" just because "it may be termed a competitor in the overall marketplace." *H & R Block, 833 F. Supp. 2d at 51* (quoting *Staples, 970 F. Supp. at 1075*); *see also Sysco, 113 F. Supp. 3d at 26* ("[F]or example, fruit can be bought from both a grocery store and a fruit stand, but no one would reasonably assert that buying all of one's groceries from a fruit stand is a reasonable substitute for buying from a grocery store"). Moreover, "the 'product' that comprises the market need not be a discrete good for sale," *Sysco, 113 F. Supp. 3d at 26*, but can be a "cluster of products . . . and services," *Phila. Nat'l Bank, 374 U.S. at 356*, as long as the combination of "a number of different products or services" into "a single market . . . reflects commercial **[**20]** realities." *United States v. Grinnell Corp., 384 U.S. 563, 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *Sysco, 113 F. Supp. 3d at 26* ("[W]hat is relevant for consideration here is not any particular food item sold or delivered by Defendants, but the full panoply of products and services offered by them that customers recognize as 'broadline distribution.'"). Such a "cluster market" can even "allow items that are not substitutes for each other to be clustered together in one antitrust market for analytical convenience." *FTC v. Staples, Inc. (Staples II), 190 F. Supp. 3d 100, 117 (D.D.C. 2016)* (finding a cluster market of consumable office supplies justified because "market shares and competitive conditions are likely to be similar for the distribution of pens to large customers and the distribution of binder clips to large customers."); *see also ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 565-68 (6th Cir. 2014)* (describing the appropriateness of clustering multiple types of hospital services for the purposes of analytical convenience where competitive conditions were similar).

Lastly, antitrust markets can be based on targeted customers. Section 4.1.4 of the Merger Guidelines—described by the court in *Sysco* as providing "[t]he clearest articulation of [a targeted customer] approach to product market definition"—states that "[i]f a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant **[**21]** markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a [small but significant and non-transitory increase in price]." Merger Guidelines § 4.1.4; *Sysco, 113 F. Supp. 3d at 27*. In other words, a targeted customer market may exist when "[a] price increase for targeted customers may be profitable even if a price increase for all customers would not be profitable because too many other customers would **[*47]** substitute away." Merger Guidelines § 3. Thus, "[d]efining a market around a targeted consumer . . . requires finding that sellers could 'profitably target a subset of customers for price increases,'" which in turn demands that there be "differentiated pricing and limited arbitrage." *Staples II, 190 F. Supp. 3d at 117-18*.

Courts employ two main analytical approaches in order to determine whether the boundaries of a relevant product market are "drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *United States v. Aetna, Inc., 240 F. Supp. 3d 1, 20 (D.D.C. 2017)* (quoting *Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n.31, 73 S. Ct. 872, 97 L. Ed. 1277 (1953))*. These include the hypothetical monopolist test, the application of which is frequently the subject of "testimony from experts in the field of economics," and the "practical indicia" described by the Supreme **[**22]** Court in *Brown Shoe. Sysco, 113 F Supp. 3d at 27*.

In determining the bounds of a relevant market, courts often opt "to ask hypothetically whether it would be profitable to have a monopoly over a given set of substitutable products . . . . If so, those products may constitute a relevant market." *H & R Block, 833 F. Supp. 2d at 51-52*; *see also* 5C PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** (hereinafter, "Areeda & Hovenkamp"), ¶ 530a, at 237 (4th ed. 2014) ("[A] market can be seen as the array of producers of substitute products that could control price if united in a hypothetical cartel or as a hypothetical monopoly."). This hypothetical inquiry is referred to by courts and in the merger guidelines as the hypothetical monopolist test. *See Sysco, 113 F. Supp. 3d at 27*; Merger Guidelines § 4.1.1. The test essentially asks whether a "hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products . . . likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms." Merger Guidelines § 4.1.1. A SSNIP is usually defined as five percent or more. *Id.*

The Brown Shoe Practical Indicia

Courts also **[**23]** determine the boundaries of a relevant product market by examining "such practical indicia as industry or public recognition of the [relevant market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Whole Foods, 548 F.3d at 1037-38 (Brown, J.)* (quoting *Brown Shoe, 370 U.S. at 325*). The *Brown Shoe* "'practical indicia' of market boundaries may be viewed as evidentiary proxies for proof of substitutability and cross-elasticities of supply and demand." *H & R Block, 833 F. Supp. 2d at 51* (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218, 253 U.S. App. D.C. 142 (D.C. Cir. 1986))*.

2. ANALYSIS

The FTC defines the relevant product market here as "the supply of marine water treatment ("MWT") products and services to Global Fleet customers," where MWT products and services include "[t]he supply of BWT chemicals, CWT chemicals, and associated products and services." Plaintiff's Proposed Findings of Fact and Conclusions of Law ("PFF") ¶¶ 7, 17, ECF No. 81-2. This definition depends on at least three premises: (1) that there are no functional substitutes for the supply of **[*48]** boiler water treatment ("BWT") products and services or cooling water treatment ("CWT") products and services, (2) that it is appropriate to cluster BWT products **[**24]** and services and CWT products and services into one antitrust market for analytical convenience (while excluding other water treatment products), and (3) that it is appropriate to define the relevant market around "Global Fleets" as a distinct set of targeted customers. *See* PFF ¶¶ 17-44.

As an initial matter, the court finds that there are no reasonable substitutes for BWT or CWT products and services. These products and services have unique purposes—preserving the functionality of boilers and engines—and no party has pointed to any chemical or group of chemicals, or associated services, that could replace the critical functions that such products perform. In other words, it is possible to regard BWT products and services and CWT products and services as two *separate* product markets (e.g., the market for BWT and the market for CWT), insofar as none of the products grouped in either category have any reasonable substitutes that can perform the same functions.[1] Thus, the disputed threshold issues are (1) whether the markets for BWT and CWT can be clustered together in the manner proposed by the FTC, and (2) whether that cluster market can be further defined around the FTC's preferred set **[**25]** of targeted customers.

i. BWT and CWT as a Cluster Market

Defendants, supported by their expert, Dr. Mark A. Israel, advance two primary arguments against the FTC's proposed cluster market: that the market is overinclusive and underinclusive. Mem. Supp. Opp'n to Mot. at 23, ECF No. 50-2. They argue that the market is overinclusive insofar as it combines two categories of product—BWT and CWT—that are not reasonably interchangeable, meaning that combining them does not accurately reflect commercial realities and conflicts with the notion that product market definition depends on substitutability. ECF No. 50-2 at 24; DX-0060 ¶¶ 66-67. Defendants also argue that the proposed market is underinclusive because it is inappropriate for the FTC to consider BWT and CWT in the same market without also including the other water treatment and marine products typically sold alongside BWT and CWT, frequently in the same contract. ECF No. 50-2 at 25; DX-0060 ¶¶ 68-70. While Defendants acknowledge that these other products are not reasonable

[1] Defendants essentially concede this narrow point in their Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, which acknowledges that "a market could be the market for the sale of boiler water treatment chemicals." ECF No. 50-2 at 2; *see also* ECF No. 50-2 at 28 (describing the appropriateness of separate BWT and CWT product markets).

substitutes for BWT or CWT, they assert that neither are BWT and CWT reasonable substitutes for one another, such that with respect to products typically **[**26]** sold together, the FTC cannot include one product category that is not a reasonable substitute and then exclude others on that same ground. In other words, "the FTC cannot both lump BWTC and CWTC because they are part of the same sales and purchase process, but then also exclude all other products that are also part of that process." ECF No. 50-2 at 25-26.

The FTC responds first that Defendants' argument regarding overinclusiveness—based on the absence of interchangeability between BWT and CWT—fundamentally misapprehends the nature of a cluster market. According to the FTC, a cluster market does not aim to group **[*49]** together substitutable products, but rather groups non-substitutable products that face similar competitive conditions. Reply to Opp'n. to Mot. 5, ECF No. 56-2. The FTC argues that since both BWT and CWT products function to maintain operational equipment on marine vessels, both involve the same customers with the same need for global consistency, and both are distinguishable from products like cleaning chemicals, which do not require the same level of consistency. ECF No. 56-2 at 5-6. Moreover, the FTC argues that Defendants face the same set of competitors for both products, **[**27]** and therefore BWT and CWT face similar competitive conditions and can be appropriately clustered. ECF No. 56-2 at 5-6. As for Defendants' underinclusiveness argument, the FTC notes that clustering BWT and CWT with other marine products is inappropriate because those products do not share similar competitive conditions, despite the fact that customers negotiate for them at the same time as they negotiate for BWT and CWT. ECF No. 56-2 at 9-10.

The court concludes that the FTC's use of the cluster market approach is appropriate in this case.[2] Although BWT and CWT products are distinct products intended for distinct uses, they are also indisputably similar. Both are specially blended chemicals that are injected into water systems using special equipment, in order to prevent corrosion and erosion in critical systems. Thompson Hrg. Tr. at 259:18-24; Fry Hrg. Tr. at 943:13-14. While both products make up a "small fraction of the cost of managing a ship," PX80014 ¶ 3, the cost of system failure in the absence of these products is high. JX-0135 at 002. The fact that these products are low cost, highly critical, and heavily dependent on precise chemistry means that maritime companies strongly **[**28]** prefer consistency in their use, so as to avoid the risk of adverse chemical reaction and the resulting temporary or catastrophic system failure. Moreover, BWT and CWT products are frequently sold together as part of an overall management program that includes a number of additional productrelated services. Deckman Hrg. Tr. at 475: 4-14. These similar characteristics matter because they factor into customers' decisions regarding the quantity of products they purchase, the timing of those purchases, as well as where they make their purchases. In other words, similar product characteristics—including function and risk—produce similar needs and constraints for shipping companies, which in turn affects supplier strategies and, accordingly, promotes similar competitive conditions across these product categories.[3]

[*50] It follows from this point that products that do not share key characteristics do not produce similar needs or constraints for shipping companies, meaning that they give rise to different competitive conditions. The court finds that the FTC has carried its burden to demonstrate those differences. While BWT and CWT chemicals are both "water treatment chemicals"—a category **[**29]** that includes "chemicals for the treatment of evaporator water, ballast water, potable water, and pool/spa water or their related equipment," DFF ¶ 85—the evidence is clear that (1) sales of BWT and CWT are the driving force behind sales in the "water treatment chemicals" category.[4] and (2)

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[2] Defendants' argument regarding the lack of interchangeability between BWT and CWT—i.e., the alleged product market's "overinclusiveness"—is at odds with the concept of a cluster market as a doctrine that "allow[s] items that are not substitutes for each other to be clustered together in one antitrust market for analytical convenience." *Staples II, 190 F. Supp. 3d at 117*.

[3] The FTC also notes that for both BWT and CWT, "Defendants have similar market shares, earn similar margins, and face a nearly identical set of competitors," PFF ¶ 12, and the margins and revenue shares are higher than for other marine products. PX-61002 ¶¶ 84, 85. To be sure, competitive conditions for BWT and CWT are not identical. Defendants have noted that while engine manufacturers approve specific brands of CWT chemicals for use in their engines, DX-2599 at 0007, boiler manufacturers do not maintain any such list. DX-0060 ¶ 67. Moreover, there is at least one supplier of CWT chemicals that does not supply BWT chemicals. DX-0060 ¶ 67. Nevertheless, the law on cluster markets requires only *similarity* in competitive conditions—not indistinguishability. *See Staples II, 190 F. Supp. 3d at 117*.

other chemicals in that category, such as pool and spa chemicals, are easier to obtain from multiple suppliers. PX80006 ¶¶ 10. 27; Thompson Hrg. Tr. at 326:24-327:10. They also do not pose the same risks to a ship's critical systems, because they have no function related to those systems.

The same is true for the larger grouping of marine products. While Defendants correctly note that agreements for the sale of marine products to global fleets often include products in addition to BWT and CWT—such as tank cleaning chemicals, gases, or refrigerants, *see* Sarro Hrg. Tr. at 113 (noting that Teekay purchase agreements often include many different marine products, and that Teekay also purchases many products from WSS in addition to BWT and CWT); DX-1297 at 0013-0015 (listing products covered by purchase agreement)—the differences between these products and BWT/CWT are material. For example, tank cleaning **[**30]** products are less technically complex, do not pose the same operational risks, and are ordered on a short term, cleaning-by-cleaning basis, which makes it easier for shippers to switch suppliers. *See* Franzo Hrg. Tr. at 348:22-350:1-22 (describing the differences between tank cleaning and water treatment business and the difference in competitive conditions based on the characteristics of each product); JX-0254 ¶ 7 ("Different categories of chemicals require different levels of sophistication in chemistry. Water treatment chemicals are generally more sophisticated and harder to develop than other categories of marine chemicals."). Accordingly, tank cleaning presents a more lucrative business opportunity for smaller suppliers than does water **[*51]** treatment, where ships "really [do not] want to upset the apple cart by changing their products." Franzo Hrg. Tr. at 349:7-11; JX-0254 ¶ 3 (noting that tank cleaning is roughly 60% of [TEXT REDACTED BY THE COURT] business, and that water treatment business is small in comparison); PX-80028 at ¶ 3 (describing water treatment chemicals as [TEXT REDACTED BY THE COURT] "smallest product category" and tank cleaning chemicals as the largest). In other **[**31]** words, differences in product characteristics between BWT/CWT and other water treatment products lead to differences in maritime companies' sourcing decisions and are therefore connected to differences in competitive conditions.

Moreover, while the evidence suggests that companies tend to negotiate prices for multiple products at the same time, it also cuts against the notion that customers engage in one-stop shopping for all their marine products. *See* PX00004 at 010, 015 (noting that WSS and Drew customers do not typically "one-stop shop" and often "mix and match across suppliers"). In other words, framework agreements may set the price for several products from a particular supplier, but such agreements tend to be non-exclusive, leaving the door open to other, specific product purchases at individual ports. *See* PX-61002 at 041-042. Thus, an analytical approach that focuses on BWT and CWT to the exclusion of other marine products does not appear to fundamentally conflict with commercial reality, given that customers are empowered to make individualized product choices in different places and at different times.

For these reasons, the court concludes that FTC has appropriately clustered **[**32]** BWT and CWT products and services into one antitrust market for analytical convenience.

Table 2:
The Parties' Sales of Water Treatment Products by Type
2017

	WSS		Drew	
Product	Sales	Shares	Sales	Shares
Boiler water treatment chemicals	[redacted]			
Cooling water treatment chemicals				
Boiler and cooling water treatment equipment				
Water production treatment chemicals				
Pool & spa treatment chemicals				
Other water testing and dosing equipment				
Other water treatment chemicals				
Total				

Source: Parties' invoice data.

4 Notes: [illegible]

The table above, taken from DX-0060 at 0018, indicates that BWT and CWT products account for [TEXT REDACTED BY THE COURT]and[TEXT REDACTED BY THE COURT]of WSS and Drew's "water treatment products" revenue, respectively. All other chemicals in the category together account for only [TEXT REDACTED BY THE COURT]and [TEXT REDACTED BY THE COURT]of water treatment products revenue.

ii. "Global Fleets" as Targeted Customers

As defined by the FTC, "Global Fleets are fleets of 10 or more globally trading vessels—vessels above 1,000 gross tons in size that have traded at two ports that are at least 2,000 nautical miles apart in the preceding 12 months." Mot. Prelim. Inj. at 18, ECF No. 45-3. The FTC argues that it is appropriate to define the relevant product market around this group because "Global Fleets have distinct characteristics and requirements that limit customer choice, as compared to local or regional fleets," thus making them susceptible to price discrimination as a distinct customer group. ECF No. 45-3 at 19. In particular, the FTC points out that Global Fleet customers have "particular needs as it relates to centralized negotiation of contracts for delivery to geographically dispersed locations, product consistency, and product availability." ECF No. 45-3 at 19. The FTC also argues that Defendants have the ability to price discriminate because they "individually negotiate prices with each customer[,] and customers have a limited ability to arbitrage." ECF No. 45-3 **[**33]** at 19.

Defendants proffer several reasons why the "Global Fleets" distinction is not a meaningful way of segmenting customer groups. First, they contend that the definition of Global Fleets does not accord with commercial reality, given that neither WSS nor Drew use the FTC's definition of that term and less than half of WSS customers meet the Global Fleet criteria. ECF No. 50-2 at 26; DX-0060 ¶¶ 82, 85, 86. Defendants further argue that the Global Fleets construct is premised on arbitrary thresholds and accordingly produces variable and underinclusive results. Specifically, they allege that: (1) 43% of the vessels that WSS and Drew supply had trading patterns fitting the FTC's criteria in some fiscal quarters, but not in others, indicating **[*52]** that the boundaries of the Global Fleets construct are too permeable to be analytically helpful; and (2) the FTC's numerical cutoff—10 or more globally trading vessels—is arbitrary, and produces the following anomalous mismatches: (a) a quarter of the vessels in 23% of Global Fleets were not globally trading vessels, (b) 31% of the vessels in non-Global Fleets count as globally trading vessels, and (c) 20% of non-Global Fleets are comprised completely **[**34]** of globally trading vessels. ECF No. 50-2 at 27; *see also* DX-0060 ¶¶ 83-84 & Table 4. Defendants contend that including all vessels weighing 1,000 gross tons or more in the antitrust market would better accord with commercial realities.

The "Global Fleets" construct is meant to capture key aspects of the economic reality facing fleets with a significant number of globally trading vessels and which need access to the products and services that defendants provide. The construct purports to isolate a relevant subset of the market and measure how the result of a merger would affect customers within that subset. It follows that the construct is a useful way to discuss and predict economic conditions only if its key aspects correspond to elements of the existing marketplace that would make it possible to "profitably target a subset of customers for price increases" post-merger. *Sysco, 113 F. Supp. 3d at 38*. The FTC, relying on the analysis of its economic expert, Dr. Aviv Nevo, has carried its burden to show that the construct is useful here.

a. Global Fleets Constitute a Distinct Customer Group with Distinct Needs

The FTC has adequately demonstrated that Global Fleets are a distinct group with distinct needs, as compared **[**35]** to the entire group of MWT customers. The distinction matters primarily because vessel trading patterns differ. Some vessels trade more globally than regionally or locally, meaning they travel further, visit more countries and ports in more varied locations, and spend less time in port. PX-61000 ¶ 103. Within the FTC's definition of Global Fleets as fleets including ten or more globally trading vessels, a vessel trading partem that includes distances of more than 2,000 nautical miles is global, while regional patterns include distances of 500 and 2,000 nautical miles and local patterns include distances of less than 500 nautical miles. PX-61000 ¶ 105. The following data, reproduced from PX-61000 ¶ 110, illustrates the distinct travel patterns of local, regional, and globally trading vessels.

[*53]

EXHIBIT 8
Number of unique ports, countries, and continents visited, by trading pattern, 2017

	Trading Pattern	5th Percentile	25th Percentile	Median	75th Percentile	95th Percentile
	Number of unique ports visited					
1.	Global	5	12	18	25	38
2.	Regional	2	5	10	19	41
3.	Local	1	2	3	4	9
	Number of unique countries visited					
4.	Global	3	6	10	13	19
5.	Regional	1	1	3	5	12
6.	Local	1	1	1	2	3
	Number of unique continents visited					
7.	Global	1	2	3	4	5
8.	Regional	1	1	1	2	3
9.	Local	1	1	1	1	1

Source: Vessel Characteristic Data; Vessel Movement Data
Notes: Globally, regionally, and locally trading vessels are vessels that traveled more than 0 nm within the calendar year to two locations that were more than 2,000 nm, between 500 nm and 2,000 nm, and less than 500 nm apart from each other, as the crow flies. I include only the 42,986 live and active vessels of 1,000 gt or higher in 2017 that are classified as either globally trading, regionally trading, or locally trading in 2017.

Importantly, neither the emphasis on vessels with global trading patterns nor the 2,000 nautical mile cutoff for defining a globally trading vessel are arbitrary parameters. Different trading patterns create different product needs that affect how customers weigh the value of consistent worldwide seivice potential at high levels of product quality. PX-61000 ¶ 111 ("Globally trading vessels tend **[**36]** to be larger, travel much greater distances, and visit more countries and multiple continents during the course of a year. Therefore, it should be expected that then preferences over the importance of high quality water treatment products and services that are consistently available differs from vessels with regional and local trading patterns); *see* Sarro Hrg. Tr. at 77:15-25 ("Q. When Teekay's vessels are operating on a spot charter, how predictable is where they're traveling to? A. Well, it's quite unpredictable, actually, because it's subject to market conditions. So whatever charter we pick up at the time—you know, that's what ends up happening. And it's on a per-voyage basis, is whatever it is . . . would be where we're loading, and then we have to discharge. . . . Q. Do you know necessarily which port a spot charter will call in from month to month? A. No."); PX80002 at 003 ("Because we conduct much of our business as spot charters, we have limited ability to predict our vessels' trade routes, including what ports they will visit or when."). The industry itself recognizes that vessel trading patterns have commercial significance, as shown by the parties' own statements and internal **[**37]** documents. *See e.g.*, PX70006 (Grimholt IH Vol. 1 Tr.) at 164:23-167:15 (describing how WSS categorizes vessels as global when they "have traveled in excess of 2,000 nautical miles between the furthest points in a given twelve months," noting that such categorization "makes a difference [in] how [WSS] sell[s] and deliver[s]," and explaining how globally trading vessels "have different needs because they have vessels trading globally or further from their home ports, which means that our capability to serve them will be of more interest in a sales meeting than their local needs would be"); **[*54]** PX20388 at 005 (explaining that a potential sales model distinguishes between local, regional, and global trading patterns, and noting that the former two "don't necessarily correspond as well with our main competitive advantage which is our ability to provide standard products and services in virtually every port worldwide").[5] Notably, WSS collects data on which vessels traveled 2,000 nautical miles between furthest points in the last 12 months in order guide its sales strategy. *See* JX-0188 at 044-45.

The FTC's vessel size cutoff of 1,000 gross tons is also non-arbitrary and based on the parties' own conceptions **[**38]** of the market. The evidence shows that vessel size correlates with global trading pattern and, accordingly, with distinct product needs. *See* PX61000 ¶¶ 109, 111. In general, the larger the vessel, the more likely it is to trade globally. PX61000 ¶ 109. In keeping with this trend, internal documents show that Defendants

[5] Although WSS President and CEO Bjoerge Grimholt testified that trading pattern was not used internally for sales purposes, Grimholt Hrg. Tr. at 1224:24-25, this assertion is at odds with internal WSS documents explicitly using trading patterns to track sales and define market segments for sales purposes, *see, e.g.*, JX-0188 at 044-45, and with Grimholt's deposition testimony explaining the relationship between the two. PX70006 (Grimholt IH Vol. 1 Tr.) at 164:23-167:15.

focus their sales efforts on larger vessels and frame their business and competitive potential in terms of vessel size. *See* PX61000 ¶ 93; DX-1247_WSSFTC-0018878 at 11 (discussing categorization of vessels by weight for purposes of segmenting market and estimating market size); Grimholt Hrg. Tr. at 1236:10-16 (describing the total market in terms of sailing ships above 1,000 gross tons). Thus, combining the court's findings regarding trading pattern and vessel size, it follows that the FTC's definition of a globally trading vessel—vessels larger than 1,000 gross tons that have traveled 2,000 nautical miles between furthest points in the last 12 months—is both non-arbitrary and grounded in the ordinary course of business.

The evidence also shows that vessels are typically organized into fleets, containing varying numbers of globally trading vessels. *See* PX61000 ¶ 91. In **[**39]** order to measure the effect that a significant number of globally trading vessels would have on the water treatment needs of a fleet as a whole, Dr. Nevo organized the vessel-level raw data into fleets according to affiliation with unique owners or separate technical managers ("operators"). PX61000 ¶ 113. Dr. Nevo grouped vessels with the same operator into the same fleet, producing 9,407 unique "fleets" made up of varying numbers of vessels. PX61000 ¶¶ 113, 114; Nevo Hrg. Tr. at 586:6-20. He then defined "Global Fleets" as those having ten or more globally trading vessels, Nevo Hrg. Tr. at 586:21-587:6, and on the basis of that definition, identified 532 Global Fleets and calculated Defendants' market shares within the Global Fleets category. PX61000 ¶¶ 118, 123.

As noted above, Defendants objected to Dr. Nevo's definition of "ten or more globally trading vessels," on the grounds that ten vessels is arbitrary and incongruent with commercial reality. While the court agrees that Dr. Nevo's choice of ten globally trading vessels was arbitrary in the sense that the number ten is not compelled by any specific market reality, the court disagrees that Dr. Nevo's construction is therefore **[**40]** meaningless. As the court understands it, Dr. Nevo's choice of ten globally trading vessels was not intended as an exact statement of the threshold number of globally trading vessels a fleet must have in order to manifest distinct product-related **[*55]** needs and preferences. Rather, Dr. Nevo chose ten as a starting point for developing a series of statistical estimates, the non-statistical implications of which support the appropriateness of regarding Global Fleets as a distinct customer group.

Dr. Nevo's fleet-level analysis took the following course: first, he inferred—after analyzing data and documentation used or created in the ordinary course of Defendants' business—that fleets with a significant number of globally trading vessels were likely to have distinct preferences that uniquely suit global suppliers. Nevo Hrg. Tr. at 587:7-19. Then, using the fleet data he compiled, Dr. Nevo sought to approximate what share of the fleet-level market would have those preferences. Because he did not know what threshold number of vessels would separate fleets with distinct preferences from those without, Dr. Nevo chose the number ten because of its roundness and simplicity. Nevo Hrg. Tr. at 587:20-22 **[**41]** ("So then, the question is, where's the cutoff. And I started with ten. Ten is a starting point. . . . [I]t's a round number. That's literally why we chose [it]."), 589:3-4 ("[I]'ll be the first to admit . . . there's no hard rule as to why it was ten); *see also* *Staples II, 190 F. Supp. 3d at 118 n.10* (acknowledging and accepting expert's need to establish threshold cutoff for "practical analytical purposes"). After obtaining the results of that analysis, he ran trials to test the robustness of the results—that is, to measure how dependent his initial results were on his initial assumption of ten vessels. Nevo Hrg. Tr. at 589:1-590:11. Less dependency—i.e., more stability in the result—indicates the presence of a stable market reality that produces similar results despite variation in threshold numbers. *See* Nevo Hrg. Tr. at 596:20-597:19. Based on the initial trial, Dr. Nevo found that (1) Global Fleets accounted for most of all globally trading vessels—84% of vessels by tonnage and 71% by vessel count; (2) Global Fleets were mostly made up of globally trading vessels: 81.8% and 92.2% by count and tonnage; and (3) Global Fleets accounted for [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] of WSS's and Drew's **[**42]** respective MWT revenue. *See* Nevo Hrg. Tr. at 595:16-596:13; PX61000 ¶¶ 118, 161, 123. He also found that similar market share calculations held across four subsequent trials, two substituting five and then fifteen as the threshold numbers, one using ten but omitting any attempt to standardize the names of "operators" as they appeared in the raw data, and one only measuring sales to all globally trading vessels, without sorting those vessels into fleets (thus eliminating the need for any threshold number at all). PX61000 ¶ 123 n.234; Nevo Hrg. Tr. at 589:14-590:11. Notably, the specific percentages differ between each of these trials. PX61000 ¶ 123 n.234. That is because the point of the trials is not to establish that any particular set of percentages is the most accurate one, but rather to rely on the consistency across the range of percentages to illustrate that (1) there is a significant segment of the market—whatever the exact numbers—that focuses on global trading and therefore has needs and preferences that distinguish it from other customers; and (2) that segment accounts for a majority of Defendants' business. *See* PX61000 ¶¶ 119-21. In other words, the qualitative implications **[**43]** of the percentages do not change even if the percentages themselves shift somewhat across trials. *See* PX61000 ¶ 123 n.234 (noting that market share percentages "are not qualitatively sensitive to alternative definitions of 'global fleets'"); Nevo Hrg. Tr. at 589:10-13 ("So . . . I really tried to say, well, what happens if I define it as 5 and 15, or various other measures, to make sure that the end result, at least qualitatively, doesn't actually change."). The court **[*56]** considers these factual observations to be accurate and well supported, and therefore finds that the FTC has carried its burden to demonstrate that it is appropriate to consider Global Fleets a distinct customer group within the market for MWT products.

b. <u>Price Discrimination Against Global Fleet Customers is Possible Post-Merger</u>

The court finds that the FTC has carried its burden to demonstrate that price discrimination is possible post-merger because: (1) Global Fleets are a distinct group of customers with distinct needs; (2) negotiation with Global Fleets typically occurs on an individualized basis; and (3) documentation reveals that Defendants have contemplated pricing differentials based on size and trading pattern. **[**44]** As the court has already discussed the first factor, the discussion in this section focuses on the remaining two.

Defendants typically negotiate framework agreements with Global Fleets for the whole fleet or for a significant proportion of vessels. *See e.g.*, PX80006 ¶ 21 (describing fleet-level negotiations for the entire [TEXT REDACTED BY THE COURT] fleet); JX-0277 ¶ 23 (describing same for Teekay). These negotiations are customer specific, and result in customer-specific pricing at ports relevant to the particular customer. *See* JX-0248 at 014 ("In negotiations, customers often focus on specific ports that they consider to be key in light of their trading patterns. They then negotiate a customer specific net price for the ports relevant to them."). JX-0240 at 011-014 (showing course of negotiation between [TEXT REDACTED BY THE COURT] and Drew Marine). While there are general pricing trends—for instance, low volume ports tend to have higher pricing than high volume ports—ultimate prices are determined on a customer-by-customer basis. PX70000 (Cassaras (Drew) IH Tr. at 84:8-85:3, 87:7-10). While customers retain the freedom to purchase outside of framework agreements, they typically **[**45]** choose not to do so with products for which consistency is valued. Sarro Hrg. Tr. at 106:9-107:11 (noting that he prefers not to purchase outside contract when "it's really important that you have that product on board from that supplier," including BWT). This individualization makes the pricing for each Global Fleet opaque to the next, which in turn facilitates differential pricing.

Moreover, WSS internal documents expressly contemplate market segmentation for the purpose of price discrimination. An internal pricing presentation dated November 2014 notes the benefits of "value-based pricing," which allows WSS to "segment customer[s] based upon preferences." PX20381 at 003. The presentation also distinguishes local and global customers by their preference for suppliers with global reach, and then considers a price discrimination exemplar that distinguishes local and global customers, noting that global customers are willing to pay more for global reach and describing how "[v]alue based pricing identifies differences in customers' preferences and valuation of attributes, then identifies ways to make them pay different prices for virtually the same product/service." PX20381 at 003. The **[**46]** presentation also describes how "[a]greement discount levels will be built bottom up by applying indexes to multiple price discrimination levels," which include "segment" and "trading pattern" indexes, among other factors. PX20381 at 011.

In sum, based on (a) the lack of pricing transparency in a marketplace characterized by individualized negotiations, combined with (b) evidence that Global Fleets constitute a distinct segment of the market with distinct preferences, (c) evidence that WSS recognizes the potential benefits of price discrimination, and (d) the lack of **[*57]** any evidence suggesting arbitrage, the court concludes that price discrimination is possible post-merger.

iii. Hypothetical Monopolist Test

Having determined in the foregoing discussion the validity of the cluster market and targeted customer approaches in defining the relevant product market in this case, the court also finds that the *Brown Shoe* practical indicia support the FTC's candidate market, with regard to (1) a product's peculiar characteristics and uses, for which there are no reasonable substitutes; (2) industry recognition of the product market as a separate entity, as shown by ordinary course documents demonstrating **[**47]** a business focus on globally trading vessels; and (3) distinct customers with distinct needs who require (4) specialized vendors who provide both the products and value-added services. *Whole Foods, 548 F.3d at 1037-38 (Brown, J.)*; *Brown Shoe, 370 U.S. at 325*. The court now turns to an examination of expert evidence concerning the Hypothetical Monopolist Test ("HMT").

To model the course of a hypothetical monopolist, Dr. Nevo—the only economist to have performed the HMT in this case—conducted a critical loss analysis, which essentially calculates "the largest amount of sales that a monopolist can lose before a price increase becomes unprofitable." *Swedish Match, 131 F. Supp. 2d at 160*. The test has three steps. First, Dr. Nevo calculated the critical loss threshold—that is, the point at which a hypothetical monopolist would lose too many customers for a SSNIP to be profitable. This step is purely mathematical—the critical loss threshold is the point at which increased profit margins resulting from an increase in price are offset by increased costs resulting from lost sales. Second, Dr. Nevo estimated the *actual* aggregate diversion ratio, which "represents the proportion of lost sales that are recaptured by all other firms in the proposed market as the result of a price increase . . . [s]ince **[**48]** these lost sales are recaptured within the proposed market, they are not lost to the hypothetical monopolist." *H & R Block, 833 F. Supp. 2d at 63*. The aggregate diversion is calculated with reference to suppliers to whom lost customers would potentially take their business. *Sysco, 113 F. Supp. 3d at 34*. Third, Dr. Nevo compared aggregate diversion to critical loss, and if aggregate diversion exceeds critical loss, then a SSNIP would be profitable for a hypothetical monopolist. *Id.* (citing *Swedish Match, 131 F. Supp. 2d at 160*).

Dr. Nevo used four kinds of data to calculate margins for different trials—estimates of gross margin for all water treatment products sold to all customers, WSS and Drew invoice data specific to BWT/CWT and Global Fleets, lowest gross margins by quarter, and variable cost margins based on accounting data specific to BWT/CWT and Global Fleets. For aggregate diversion, Dr. Nevo used three kinds of data—revenue information provided by marine suppliers, WSS salesforce data, and WSS and Drew win-loss data. PX61000 ¶ 227. After running multiple trials with varying inputs, including a SSNIP of 10% (in addition to the typical 5%), Dr. Nevo found that across all cases, the highest critical loss estimate was 17.5%, and the lowest aggregate diversion ratio estimate was **[**49]** 90%. PX61000 ¶¶ 232, 237; Nevo Hrg. Tr. at 903:14-904:4. In cross-examining Dr. Nevo and in closing arguments, Defendants challenged the basis for his estimates of margins and aggregate diversion, correctly noting that his BWT/CWT-specific estimates are drawn from broader data sets that include all water treatment products. Nevo Hrg. Tr. at 812:1-17. Nevertheless, Defendants' expert, Dr. Israel, presented nothing to suggest that the methodology Dr. Nevo employed in arriving **[*58]** at his estimates was flawed (apart from contesting the appropriateness of a cluster market analysis), and did not present any alternative calculations or HMT results. *See generally* DX-0060. Moreover, the gap between critical loss and aggregate diversion in every trial was so large as to ensure the stability of the HMT's qualitative result against any but the gravest of statistical errors. *See* PX61000 ¶¶ 232, 237. Further, that large gap is consistent with other, qualitative evidence regarding the role of ship chandlers and industrial suppliers in the product market.[6]

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[6] Defendants argue that industrial suppliers and ship chandlers should be included as sellers in the relevant market, insofar as they sell some MWT chemicals to marine customers. The court disagrees. The evidence establishes that industrial suppliers focus most of their business on providing water treatment for industrial use on land, and have very limited involvement in the marine market. *See, e.g.*, Lange Hrg. Tr. at 1141:1-9 (noting that Nalco (owned by Ecolab) does not promote itself to the marine business), 1143:2-17 (describing total of [TEXT REDACTED BY THE COURT] in annual sales to marine industry, [TEXT REDACTED BY THE COURT] of which is to WSS); JX-0283 at 001 (explaining that [TEXT REDACTED BY THE COURT] "deals with water treatment chemicals for manufacturing industry sector on 'land,'" that only [TEXT REDACTED BY THE COURT] deals with water treatment for the marine sector, and that it only sells to a distributor in Japan). Additionally, Defendants have not shown that the small number of marine sales attributable to industrial suppliers includes the range of additional services that comprise the "total solution" that WSS and Drew provide. *Cf. Sysco, 113 F. Supp. 3d at 26* ("[F]or example, fruit can be bought from both a grocery store and a fruit stand, but no one would reasonably assert that buying all of one's groceries from a fruit stand is a reasonable substitute for buying from a grocery store."). Defendants have also produced no evidence to suggest that

In sum, the court concludes that "the supply of MWT products and services"—including BWT chemicals, CWT chemicals, and associated products **[**50]** and services—to Global Fleets constitutes a relevant antitrust market.

a. Market Concentration, Probable Effects on Competition, and Prima Facie Case

1. LEGAL STANDARD

Having defined a relevant antitrust market, the court must "consider the likely effects of the proposed acquisition on competition within that market." *Swedish Match, 131 F. Supp. 2d at 166*. At this juncture, the government must complete its prima facie case by showing that "the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market.'" *Heinz, 246 F.3d at 715* (quoting *Philadelphia Nat'l Bank, 374 U.S. at 363*); *see also* *Baker Hughes, 908 F.2d at 982*. "Market concentration . . . is often measured using the Herfindahl-Hirschmann Index ("HHI")." *Heinz, 246 F.3d at 716*; *Swedish Match, 131 F. Supp. 2d at 167 n.11*. As the court explained in *Swedish Match*:

> "The HHI calculates market power [by] summing the squares of the individual market shares of all the firms in the market. The HHI takes into account the relative size and distribution of the firms in a market, increasing both as the number of firms in the market decreases and **[*59]** as the disparity in size among those firms increases."

Id. Sufficiently high HHI figures establish a *prima facie* case of anticompetitiveness. *H & R Block, 833 F. Supp. 2d at 71* (citing *Heinz, 246 F.3d at 715 n.9*). The merger guidelines **[**51]** consider markets with an HHI above 2500 to be "highly concentrated," and state that "[m]ergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." Merger Guidelines § 5.3; *Heinz, 246 F.3d at 715* (citing *Baker Hughes, 908 F.2d at 982*) (noting that significant increase in market concentration "establishes a 'presumption' that the merger will substantially lessen competition.").

The FTC may also bolster its *prima facie* case by offering additional evidence. Relevant to this case, courts generally recognize that "a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition." *Sysco, 113 F. Supp. 3d at 61*. Where head-to-head competition between close competitors is an important feature of the relevant market, "[a] merger is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms." *H & R Block, 833 F. Supp. 2d at 81*; *see also Whole Foods, 548 F.3d at 1043 (Tatel, J.)* (citation omitted) (internal quotation marks omitted) ("[T]here can be little doubt that the acquisition of the second largest firm in the market by the largest firm **[**52]** in the market will tend to harm competition in that market.").

2. ANALYSIS

i. Defendants Have High Market Shares and HHIs Predict High Concentration

Dr. Nevo calculated HHIs based on market share information from two sources—revenue information reported by Defendants and in sworn declarations of third-party suppliers, and information provided by WSS's Potential Sales Model ("PSM").[7] PX61000 ¶¶ 250-51. Dr. Nevo claims that market shares based on revenue information are

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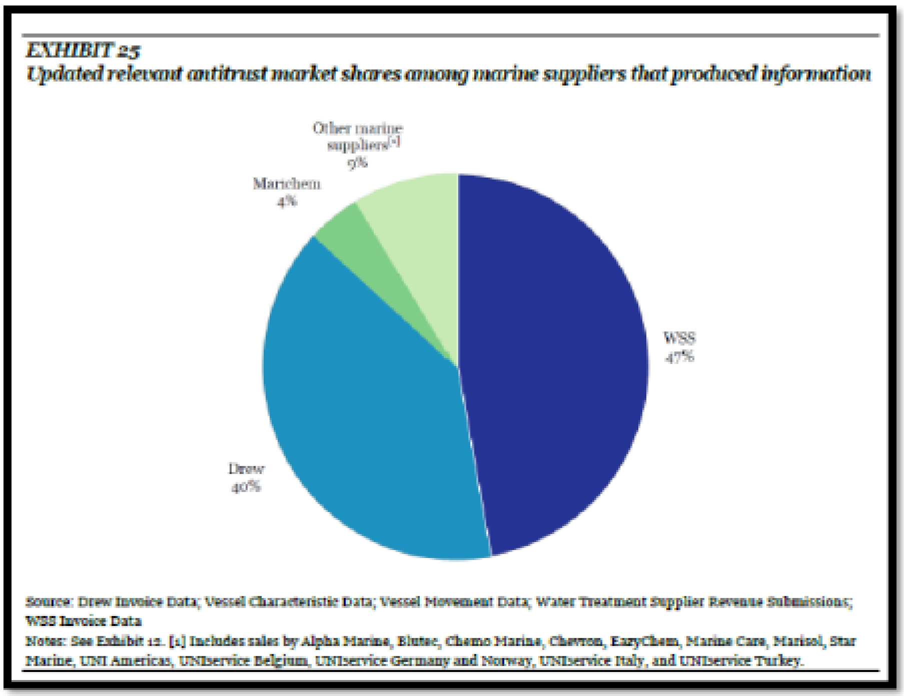
ship chandlers—marine retailers that stock a wide range of consumable goods in warehouses near ports—provide that solution. The same is true of testing equipment manufacturers. These observations are consistent with the HMT results, which suggest that neither industrial suppliers nor ship chandlers would be considered viable substitutes by any significant group of customers in the event of a price increase. To the extent that Defendants suggest that ship chandlers or other companies could easily reorganize to supply a total MWT solution that argument relates to ease of entry into the market, not to current market conditions.

preferred because such information "actually reflect[s] the actual choices made by customers when choosing products." Nevo Hrg. Tr. at 627:17-628:3. He calculated market size by (a) aggregating the revenues of all suppliers who provided information, and (b) assigning each supplier a share based on their revenue as a proportion of overall revenue. *See* PX61000 ¶¶ 252-56. The market share calculations indicated that Defendants are the two largest MWT suppliers by revenue. The following graph depicts the size of all marine water treatment suppliers who submitted revenue data.

[TEXT REDACTED BY THE COURT] PX61002 ¶ 120, Ex. 12. Acknowledging that at least one supplier failed to submit revenue data, and to account for the possibility **[**53]** that other unknown suppliers exist. Dr. Nevo ran trials including revenue entries for five and ten unknown suppliers by assigning them revenue totals equal to the median for all non-party MWT suppliers. Nevo Hrg. Tr. at 628:8-17 (noting inclusion of all suppliers mentioned by Dr. Israel with exception of one, and including "dummy" suppliers). **[*60]** Dr. Nevo also ran trials assigning the "dummy" suppliers revenues equal to the *average* of all non-party MWT suppliers. PX61002 ¶ 271. Assuming five missing suppliers, and using the median value for "dummy" suppliers. Dr. Nevo calculated market shares at 46.1% for WSS and 38.7% for Drew (84.7% combined). PX61002 ¶ 271. Additional trials with different inputs produced combined shares between 78.7% and 82.8%. PX61002 ¶ 71 Ex. 26. The following graph depicts the result of Dr. Nevo's market share calculations, which correspond to his revenue calculations.[8]



PX61002 ¶ 270, Ex. 25. Based on these market shares, the post-merger HHI is 7,214, with an increase of 3,563, indicating extremely high market concentration and a very large increase in concentration. PX61002 ¶ 272, Ex. 27. Alternative trials based on the different formulations of the revenue and **[**54]** market share calculations revealed HHIs between 6,235 and 6,883, along with changes in HHIs between 3,075 and 3,399. PX61002 ¶ 272, Ex. 27.

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[7] Though Dr. Nevo believes that the PSM tends to overestimate the size of the market and accordingly understate market concentration, he found that the results of his calculations using the PSM do not qualitatively differ from those obtained using revenue information from MWT suppliers. PX61000 ¶ 251.

[8] Defendants contend that the revenue information upon which Dr. Nevo relied is "unverified" because he made no effort to verify the accuracy of the information with the submitting parties. Hrg. Tr. at 1877:10-12. The court notes however that much of the revenue information was included in declarations given under penalty of perjury, and although some was provided in email communications with the FTC, Defendants have not proffered any specific reason to doubt the information's accuracy.

Defendants' expert Dr. Israel challenged Dr. Nevo's analysis on a number of grounds. First, Dr. Israel questioned the appropriateness of applying the cluster market doctrine and focusing on Global Fleets, contending that BWT and CWT should be broken out separately and that the relevant market should include sales to all vessels. DX-0060 ¶¶ 109-10. Dr. Israel also suggested that Dr. Nevo's use of revenues as a metric to compute shares is **[*61]** problematic because it (a) relies on several estimates and assumptions to fill gaps in revenue data, (b) places more weight on larger vessels with more engines and boilers, rather than treating every vessel as an equal business opportunity, and (c) ignores the utility of treating sales of MWT chemicals as unit sales—corresponding to vessels—where one vessel makes one lower or higher-priced product choice and so constitutes one unit share. DX-0060 ¶¶ 112-114. Dr. Israel calculated market share based on sales to all vessels weighing 1,000 gross tons or more. DX-0060 ¶¶ 108, 111, 112, 115. He also employed a "single **[**55]** invoice" rule, whereby he assumed that any vessel with less than two invoices from the merging parties in 2017 was making a "one-off" purchase, which Dr. Israel took to mean that that vessel purchased most of its BWT or CWT products from other suppliers. DX-0060 ¶ 116. Dr. Israel separated BWT and CWT into individual market categories, and, applying the single invoice rule, computed Defendants' combined market share as 31% and 33%, resulting in HHIs that are substantially lower and below the Guidelines cutoff of 2500. DX-0060 ¶ 117.

The court credits Dr. Nevo's analysis. While it has already determined that both the cluster market approach and the focus on Global Fleets are appropriate, the court also disagrees with Dr. Israel for other reasons. For one, the court sees no justification for treating all vessels as constituting equal shares of the overall market for MWT. The core of the FTC's argument in this case—as borne out by the evidence—is that all vessels are *not* created equal. *See* Nevo Hrg. Tr. at 640:18-19 (noting that "not all vessels are created equal"). Where a vessel has more boilers and engines, it has greater MWT needs that comprise a correspondingly larger part of the **[**56]** market, making such vessels more valuable to suppliers. Conducting the analysis by using just the number of vessels obscures this fact, while using revenue data acknowledges that capturing the market for larger ships means capturing a larger part of the market for MWT. The court views this increased sensitivity to market reality as a strength of Dr. Nevo's revenue-based analysis, not a flaw. Moreover, while there is some imprecision inherent in estimating revenue shares for suppliers that did not produce revenue information, there appears to be only one known supplier—Vecom—that failed to produce such data. *See* PX61002 ¶ 271 Ex. 26. Dr. Nevo ran trials accounting for up to ten additional hypothetical suppliers with revenues matching the median and average of all nonparty suppliers. *See* PX61002 ¶ 271 Ex. 26; PX61000 ¶ 263 Ex. 32. Defendants have pointed to no evidence suggesting that the absence of specific information about one missing supplier would change the data more substantially than ten additional suppliers with median or average revenues.[9] *See* *Sysco, 113 F. Supp. 3d at 54* ("The FTC need not present market shares and HHI estimates with the precision of a NASA scientist. The 'closest available approximation' **[**57]** often will do.") **[*62]** (quoting *FTC v. PPG Industries, Inc., 798 F.2d 1500, 1505, 255 U.S. App. D.C. 69 (1986))*.

Moreover, Dr. Nevo explained in his reply report that, notwithstanding his conceptual misgivings, he did compute market shares and HHI using Dr. Israel's methodology. PX61002 ¶ 142. Disregarding the single-invoice rule and clustering BWT and CWT, Dr. Nevo's analysis yielded a combined market share across all vessels of 49.2% and lower bound HHI of 2,546 with change in HHI of 945. *See* PX61002 ¶¶ 141-42, Ex. 15 & 16. Dr. Nevo further explained at the evidentiary hearing and in his reply report that he performed multiple alternative HHI calculations using several of Defendants' preferred candidate markets. Nevo Hrg. Tr. at 637:24-640:6. These markets include supply of marine water treatment as a whole, BWT separately, CWT separately, and one market including all chemicals, gases, and refrigerants—all at the vessel level, regardless of trading pattern, and including only vessels weighing at least 1,000 gross tons. Nevo Hrg. Tr. at 637:24-640:6; PX61002 ¶¶ 104-12. The results in each case

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[9] The court does however have concerns about Dr. Israel's "single invoice" rule. In an effort to exclude "one-off" purchasers, that rule excludes any vessel with only a single invoice in 2017, regardless of how much was purchased in that invoice and regardless of the timing of purchases from year to year. Thus, if a vessel were to purchase multiple times from Defendants in 2015 and 2016, but only once in 2017, the single invoice rule would treat that vessel as a non-loyal customer that bought its total supply of MWT elsewhere—ignoring the quantity it did buy from Defendants during 2017, and discounting the possibility that the vessel stocked up on supplies for the relevant time period, or experienced downtime, or did not need to purchase again during that year for some other reason.

satisfied the Guidelines threshold for a structural presumption.[10] PX61002 ¶ 104 Ex. 8. In other words, here, as in *PPG* and *Sysco*, the FTC has presented "share calculations for **[**58]** 'every market the evidence suggests is

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[10] The complete results of these trials are presented in Dr. Nevo's reply report at PX61002 ¶ 104 Ex. 8. The relevant HHI statistics are summarized in the chart below:

Alternative Market Definition

Post-merser ran

HHI

Supply of marine water treatment to all vessels

6,991

Supply of boiler water treatment to all vessels

5,899

Supplv of cooline iviteni water treatment to all vessels

4,779

Supply of marine chemicals, gases, and refrigerants to all

6,274

vessels

Alternative Market Definition

Change in

in HHI

Supply of marine water treatment to all vessels

3,399

Supply of boiler water treatment to all vessels

2,861

Supplv of cooline iviteni water treatment to all vessels

2,189

Supply of marine chemicals, gases, and refrigerants to all

2,630

vessels

remotely possible,' which yield[ed] results of similar magnitudes in market concentration." *Sysco, 113 F. Supp. 3d at 54* (quoting *PPG Industries, 798 F.2d at 1506*).

In sum, the court finds that based on Dr. Nevo's testimony and other evidence, the FTC has demonstrated that the proposed merger will significantly increase concentration in the market for supply of MWT products to Global **[**59]** Fleets. Thus, the FTC has made out a *prima facie* case and established a rebuttable presumption that the merger will substantially lessen competition in the aforementioned market.

ii. Ordinary Course Documentation and Customer Testimony Confirm Market Position and Suggest Competitive Effects From Elimination of Head-to-Head Competition

The notion that WSS and Drew are each other's primary competition in the relevant market is supported by a number of Defendants' own documents. For instance, in a January 2015 internal presentation on the strategic rationale for the merger, WSS acknowledged that "[t]he combined entity will be the unrivalled leader in maritime services in general and marine chemicals in particular." PX20329 at 48. Another WSS internal presentation titled "Global Strategy 2013-2017" described WSS as having "relatively high market shares within Marine Chemicals"—

Alternative Market Definition

Presumptively

Unlawful?

Supply of marine water treatment to all vessels

Yes

Supply of boiler water treatment to all vessels

Yes

Supplv of cooline iviteni water treatment to all vessels

Yes

Supply of marine chemicals, gases, and refrigerants to all

Yes

vessels

PFF ¶ 65.

listing WSS as possessing slightly more than 50% market share in marine chemicals and describing Drew as having 25%. JX-0192 at 005. Furthermore, internal Drew documents acknowledge that **[*63]** "Drew Marine essentially has one global competitor - Wilh. Wilhemsen Holding ASA." JX-0055 at 027; *see also* JX-0053 at 024 (noting **[**60]** that "VPP segment is dominated by Drew Marine and the market's largest participant, Wilh. Wilhelmsen Holding ASA" and that "[r]emaining market [is] characterized by small regional/local suppliers, specializing in product sub-categories with limited product offerings, execution capabilities, and geographic reach."); JX-0048 at 006 (suggesting in strategic planning email that if Drew were to "[a]cquire WSS chemical business, take away [its] main competitor and win back this space fully for [Drew Marine], this could increase our ability to charge far better prices and win across all segments."); JX-0182 at 067 (noting that "WSS and DM hold majority of contract business for marine chemicals (in particular water treatment) due to long-term market participation and global presence."); JX-0096 at 054 (describing Drew Marine as "one of two global players in the performance chemicals market"). Moreover, the record includes multiple instances of serious competition between WSS and Drew, specifically on issues such as price and other non-price incentives.[11] *See* *Sysco, 113 F. Supp. 3d at 64-65*.[12]

Customer testimony from Global Fleets further supports the notion that Defendants occupy the number one and number two market **[**61]** positions and that competition between them plays a key role in providing consumer benefits at the fleet level. *See, e.g.*, [TEXT REDACTED BY THE COURT] (describing WSS and Drew as only viable options, describing how merger would leave fleet without alternatives, describing how negotiation with Vecom broke down over capability concerns); Sarro Hrg. Tr. at 93:24-99:9, 157:6-25 (describing WSS and Drew as only realistic options, and explaining how review process that originally included multiple suppliers was necessarily narrowed to WSS and Drew based on capability considerations); [TEXT REDACTED BY THE COURT] (describing WSS and Drew as only credible options, explaining how other suppliers would be unable to meet fleet-level needs, and explaining that merger would leave fleet without options); *see also* PX400013 (same). The court agrees with Defendants that such testimony is not without its flaws—while many customers testified that they consider Drew and WSS to be the only proven suppliers capable of meeting their needs on a global basis, some also admitted that they have not undertaken any detailed investigation of other suppliers. **[*64]** *See, e.g.*, PX70028 106:14-18. It is also true that customer **[**62]** testimony alone is often considered a less reliable form of evidence in this context. *Arch Coal, 329 F. Supp. 2d at 145* (noting that "[i]n many contexts . . . antitrust authorities do not accord great weight to the subjective views of customers in the market."). Nevertheless, in light of the extensive documentary and statistical evidence the FTC has presented in this case, it does not appear that the FTC is overrelying on customer input, and the fact that the documentary and statistical evidence aligns with customer testimony bolsters the reliability of the testimony.

iii. Quantitative Evidence Suggests Competitive Effects Based on High Market Shares and Elimination of Head-to-Head Competition

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[11] *See, e.g.*, [TEXT REDACTED BY THE COURT] (describing process of pitting WSS and Drew against one another, resulting in lower prices); Knowles Hrg. Tr. at 1426:23-1427:6 (describing how Drew won [TEXT REDACTED BY THE COURT] business through competitive pricing against WSS); PX20063 (internal WSS email describing "aggressive offer from Drew" leading to increase in cost savings for Global Fleet customer); PX10346 at 002 (describing multiple non-price benefits afforded by Drew to Global Fleet customer in an effort to win business from WSS).

[12] Defendants argue that current market pricing is inconsistent with the notion that they exercise market power. This is because the generally low cost of MWT (as a function of vessel operating cost) relative to the importance of the products should incentivize suppliers to charge higher prices to realize maximum value. Defendants argue that the fact that suppliers have not done so indicates that the products must exist in a competitive environment—not a highly concentrated (and therefore noncompetitive) one. Israel Hrg. Tr. at 1500:8-1501:17. However, the court does not understand the FTC to contend that the current market is noncompetitive—rather, the FTC contends that the market *is* competitive, and that the continued competitiveness of the market depends on aggressive competition between the two existing global suppliers with high market shares. A head-to-head competition theory is not inconsistent with the presence of lower prices in the current market.

Dr. Nevo performed two additional studies to confirm that Defendants will have the incentive and ability to raise post-merger prices—the Gross Upward Pricing Pressure Index methodology ("GUPPI") and a merger simulation model.

A GUPPI analysis is essentially a bargaining framework that quantifies a firm's change in incentive to raise prices following a merger—i.e., the "upward pricing pressure." PX61000 ¶¶ 318-19. The model takes as a premise that, when WSS (or Drew) bids for business in the current market, higher prices increase **[**63]** the chance that customers will choose another supplier, and that given the closeness of competition between WSS and Drew, Drew (or WSS) will usually be the alternative supplier. PX61000 ¶ 317. In this model, the firm that chooses to raise or lower prices must balance the potential for increased profits at a higher price against the potential to lose profits but gain business at a lower price. PX61000 ¶ 317. The optimal price lies somewhere between these points. PX61000 ¶ 317. The model hypothesizes that without Drew or WSS as a check, the need for balancing disappears. PX61000 ¶ 317. The incentive to raise prices depends on the size of the fraction of diverting WSS customers that go to Drew (or vice versa) and the size of the margin that Drew or WSS earns. PX61000 ¶ 320. To estimate these variables, Dr. Nevo used a number of values drawn from market share estimates based on revenue data, market share estimates based on WSS's PSM tool, WSS salesforce data, and WSS win-loss data. PX61000 ¶ 321. For margins, Dr. Nevo used invoice data and variable cost margins. PX61000 ¶ 323. Dr. Nevo's results across multiple trials, accounting for variations of these inputs and calculated from the perspective **[**64]** of both Drew and WSS, produced percentages consistently over 20%, indicating strong incentives for post-merger price increase. Nevo Hrg. Tr. at 658:20-660:23.[13]

Dr. Nevo's merger simulation model aimed to quantify the effect that combining the first and second choice MWT suppliers would have on bargaining and prices in the relevant antitrust market. The model hypothesized that since customers needing supply are likely to solicit more than one bid and play the second-best supplier alternative off the first-best in order to secure better offers, a situation in which (a) the first and second-best merge, and (b) the third-best supplier (which will become second-best post-merger) represents a weak alternative relative to the merging parties, will tend to produce higher prices. Indeed, the weaker an option the third supplier represents relative to the merging parties, the more likely it is that customers will face higher prices. PX61000 ¶¶ 332-23; **[*65]** Nevo Hrg. Tr. at 663:22-665:5, 670:16-671:18. Using the same market share and margin estimates as in the GUPPI analysis, Dr. Nevo calculated estimated percentage price increases post-merger using eight scenarios involving all input combinations. Percentage **[**65]** increases across all sensitivities ranged from 13.6% to 53.1% ($6.7 million to $26 million in dollar increases), with ranges based on Dr. Nevo's preferred data of 29% to 46.6% (14.4 million to 23 million in dollar increases). PX61000 ¶ 339. Notably, the model did not predict the timing of price increases. As Dr. Nevo testified at the evidentiary hearing, such high price increases can be implemented over time, and in a market where it is typical for parties negotiating framework agreements to bargain over substantial discounts off list prices, price increases could simply involve reducing the amount of the discount in proportion to reduced negotiating leverage. Nevo Hrg. Tr. at 675:12-677:5.

Defendants argue that Dr. Nevo's models are flawed because they depend on unreliable data, specifically incomplete win-loss data and overbroad salesforce data. *See* Nevo Hrg. Tr. at 581:23-582:3 ("THE COURT: Dr. Nevo . . . for this win-loss data . . . what kind of numbers are we talking about in reaching these percentages? THEWITNESS: So these are very small numbers. I forget exactly. . . . But I think this is—it is very sparsely populated."), 722:11-723:8 (noting that salesforce and win-loss datasets **[**66]** are not specific to the market alleged). While the court agrees that there are some reliability issues with both the win-loss and salesforce data, the court disagrees that this flaw dooms the studies' significance, especially when, with respect to the merger simulation model in particular, the difference in market share between the merging parties and the third-best alternative so closely tracks the model's basic assumptions. Win-loss and salesforce data were the basis for market share estimates in only two of the scenarios in each analytical category (GUPPI and merger simulation), and did not form the basis of Dr. Nevo's preferred calculations. In all other trials, market shares were estimated using other data, and the results were stable across these variations. Moreover, even acknowledging the limited usefulness of

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[13] Dr. Nevo's calculations did not rely on the salesforce data for the Drew GUPPI because that data was unavailable. Nevo Hrg. Tr. at 660:15-16.

certain data, calculations using that data can be considered as confirmatory, insofar as the results match the results of calculations that use more reliable data and accord with the inferences suggested by a larger body of evidence. *See* *Sysco, 113 F. Supp. 3d at 67* (finding merger simulation strengthened *prima facie* case despite imperfections in underlying data where result was qualitatively robust **[**67]** to other variations using more reliable data). Thus, the court concludes that Dr. Nevo's GUPPI analysis and merger simulation model strengthen the FTC's *prima facie* case that the proposed merger will substantially lessen competition in the relevant antitrust market.[14]

[*66] *iv. Summary*

The FTC has made out a strong *prima facie* case of anticompetitive effects based on high market concentration and has bolstered that case with additional evidence that the merger would substantially lessen competition in the market for supply of MWT chemicals and services to Global Fleets.

2. Rebuttal

Given the court's conclusion that the FTC has met its burden to show a *prima facie* case, the burden now shifts to Defendants "to show that traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger's probable effect on competition in [this] market or that the procompetitive effects of the merger are likely to outweigh any potential anticompetitive effects." *CCC Holdings, 605 F. Supp. 2d at 46*. Typically, "the more 'compelling the [FTC's] prima facie case, the more evidence the defendant must present to rebut [the presumption] successfully." *Sysco, 113 F. Supp. 3d at 72* (quoting *Baker Hughes, 908 F.2d at 991*). Given that the FTC **[**68]** has made out a strong prima facie case, Defendants must make out a correspondingly strong rebuttal showing.

a. Barriers to Entry or Expansion

1. LEGAL STANDARD

A prima facie showing of anticompetitive effects associated with a merger can be rebutted by—among other factors—evidence that there are no significant entry barriers in the relevant market. *CCC Holdings, 605 F. Supp. 2d at 47*. Indeed, the D.C. Circuit has recognized that "[t]he existence and significance of barriers to entry are frequently . . . crucial considerations in a rebuttal analysis," given that "[i]n the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time. *Baker Hughes, 908 F.2d at 987*. Accordingly, analysis of ease of entry—"the ability of other firms to respond to collusive pricing practices by entering to compete in the market," *Cardinal Health, 12 F. Supp. 2d at 54-55*—is key to "evaluating whether market

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[14] The court also acknowledges the vessel-level "switching" study performed by Dr. Israel, which investigated head-to-head competition by examining what happens when vessels stop buying MWT from one of the merging parties, in order to find out whether the vessels "switch" to the other merging party or go elsewhere. Essentially, Dr. Israel used sales data to focus on vessels weighing 1,000 gross tons or more that purchase from one of the merging parties in one year but not the next year (or years, in some formulations). If that vessel disappeared from the invoice data for one party, and did not show up in the invoice data for the other within the relevant time period, Dr. Israel counted it as a "loss." Dr. Israel's results indicated that most vessels that switch from one merging party do not typically switch to the other. DX-0060 at ¶ 124 & Appendix 3.

Dr. Israel's study does not factor heavily in the court's calculus for several reasons: (1) the study does not appear to address the effect of the transaction on fleet-level bargaining over framework agreements, unlike Dr. Nevo's studies; (2) it employs the single-invoice rule, which this court has already found to be problematic in note 9, *supra*; (3) it assumes that vessel absences from sales data for a given period mean that another supplier is serving its needs, but provides no data to support that assumption (while the FTC has come forward with some evidence to show that the assumption is false or true in only a small number of cases that do not relate to competitive considerations, *see, e.g.*, PX70025 (Sarro Dep. Tr. at 116:12-23); PX40031 at 001)).

concentration statistics accurately reflect the pre-and likely postmerger competitive picture." *Heinz, 246 F.3d at 717 n.13*. "Low barriers to entry enable a potential competitor to deter anticompetitive behavior by firms within the market simply by its ability to enter the market." *Id.* (citing *FTC v. Procter & Gamble Co., 386 U.S. 568, 581, 87 S. Ct. 1224, 18 L. Ed. 2d 303 (1967))*. "In other words, entry is one way in which post-merger pricing practices can be forced **[**69]** back down to competitive levels." *CCC Holdings, 605 F. Supp. 2d at 47*.

Nevertheless, "[t]he prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers." Merger Guidelines § 9. Thus, entry must be "timely, likely, and **[*67]** sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *Id.*; *Cardinal Health, 12 F. Supp. 2d at 55*. According to the Merger Guidelines, entry is timely when it is "rapid enough to make unprofitable overall the actions causing [competitive] effects and thus leading to entry," likely where it is profitable even "accounting for the assets, capabilities, and capital needed and the risks involved"—including sunk costs—and sufficient where the entering competitors provide products that "are . . . close enough substitutes to the products offered by the merged firm to render a price increase . . . unprofitable" and there are limited constraints on entrants' "competitive effectiveness," such that one firm can replicate the scale and strength of a merging firm, or one or more firms can operate without competitive disadvantage. Merger Guidelines § 9.1-9.3 **[**70]** . In general, "[t]he relevant time frame for consideration . . . is two to three years." *Staples II, 190 F. Supp. 3d at 133*. The expansion of current competitors is regarded as "essentially equivalent to new entry," and is therefore evaluated according to the same criteria. *CCC Holdings, 605 F. Supp. 2d at 57*; *Cardinal Health, 12 F. Supp. 2d at 55*.

2. ANALYSIS

Defendants contend that there are no significant barriers to expansion by other firms already in the market as defined by the FTC, and that one or more of those firms will expand to provide a competitive counterbalance that will maintain prices at pre-merger levels. Defendants note that they are required only to show that "another competitor or group of competitors could fill Drew's current position in the market," DFF ¶ 280, examine a number of potential barriers, and argue that none of them prevent expansion in this case.

First, Defendants argue that "there is no meaningful limit on the supply of BWTC and CWTC," meaning that the FTC cannot argue that "current suppliers are capacity constrained." ECF No. 50-2 at 39. In particular, Defendants assert that the chemistry that guides formulation of MWT products is well known, and toll blenders—chemical companies that blend MWT chemicals for suppliers, including Drew—are not bound **[**71]** by exclusive agreements and could find another outlet for their products among other market participants. ECF No. 50-2 at 34; DFF ¶¶ 287-91. Second, Defendants argue that the need for a global distribution network does not constitute a significant barrier to entry because "there is nothing that prevents . . . competitors from easily expanding their [distribution] networks in response to customer demand." ECF No. 50-2 at 40; DFF ¶¶ 298-300. Defendants emphasize that Drew outsources about two-thirds of its MWT business, [TEXT REDACTED BY THE COURT] and engaging others such as Wrist—a large ship chandler—to make last-mile deliveries to vessels at distant ports, often far from warehouses (which are leased, rather than owned). DFF ¶¶ 301-03. Defendants also argue that the FTC has failed to identify any ports "where entry would be needed and would purportedly not occur." ECF No. 50-2 at 37; DFF ¶¶ 298, 301-14. Third, Defendants argue that the ability to offer technical services in conjunction with the delivery of chemical products poses no barrier. They point out that Drew offers only three kinds of technical services: (1) log sheet reporting, which involves periodically recording boiler **[**72]** and cooling testing results in proprietary software and collating data in a central location to ensure consistency over time; (2) initial training sessions, which involve providing new customers with written materials describing dosing and testing methods for Drew's products and conducting a presentation for onboard **[*68]** engineers; (3) on-board visits to customer vessels, during which Drew representatives answer shipboard engineers' questions, review the testing history, and make recommendations. Defendants note that Drew had 40-53 service engineers between January 2015 and June 2017, and contend that procuring engineers is not a sustainable entry barrier because an entrant can start with a smaller number and scale up over time. ECF No. 50-2 at 40-41; DFF ¶¶ 316-21. Fourth, Defendants argue that reputation and brand are not significant barriers to entry because Global Fleet customers are highly sophisticated, and are therefore unlikely to be influenced by branding. DFF ¶ 322. Defendants note that to the extent that some

Global Fleet customers believe other suppliers are incapable of serving their needs, they are uninformed. DFF ¶ 326.

The court concludes that Defendants have not carried **[**73]** their burden to establish that entry will be appropriately timely, likely, and sufficient to deter or counteract the competitive effects of the merger. *See* Cardinal Health, 12 F. Supp. 2d at 55. Defendants' contention that Drew's business—including its products, services, reputation, customer relationships, and distribution model—is simple and capable of replication in a short period of time is at odds with inferences drawn from the state of the current market and with documentary and testimonial evidence from customers and suppliers. It defies basic economic principles for a profitable market to be simultaneously characterized by (a) markedly high concentration and head-to-head competition between two dominant firms over a significant period of time, and (b) low barriers to entry and easily replicable business models. Where the latter is true, economic incentives to compete should ensure that the former is not. Low barriers signify economic opportunities, and as Defendants' own expert acknowledges, "[e]conomics teaches that firms will enter markets where there are opportunities to earn economic profits (profits above the competitive level) until those economic profits are pushed to zero." DX-0060 ¶ 224; Israel Hrg. Tr. **[**74]** at 1567:4-10, 1568:11-24. The FTC has presented strong evidence that the current market is highly concentrated and dominated by head-to-head competition between Drew and WSS, notwithstanding that a number of other suppliers have been present in the market for years. In other words, "the fact that the merging parties have been able to maintain high margins and market shares without witnessing notable entry and expansion" suggests that, contrary to Defendants' contentions, the market for supply of MWT products is characterized by significant barriers to entry. PX61002 at ¶ 244.

This perspective is borne out in documentary and testimonial evidence, which suggests that barriers to entry—especially global distribution networks, customer relationships and reputation, and customer retention rates—play a significant role in the merging parties' respective business models. Global presence in particular is consistently considered a distinguishing feature of Defendants' business that is capital intensive and difficult to replicate. *See* JX-0279 at 022 (Drew presentation describing one of its features as an "Established Global Presence with Significant Barriers to Entry," and further explaining **[**75]** that its "Expansive Global Logistics and Distribution Network Enables Swift Order Fulfillment and is Difficult and Costly to Replicate"); *see also* PX60008 (Drew) at 006 ("Q. Rough order, how long would it take and how much would it cost to replicate your global fulfillment network? A. It would take a vast investment to enter our market from a distribution perspective and even if they did that they would inevitably **[*69]** fail to gain any traction [because]: [(i)] brand reputation (quality, consistency and reliability); [(ii)] High cost of failure means customers are not going to swap supplier from a product they trust for essential compliance or maintenance products and services"); JX-0231 at 157 (consultant's internal presentation to WSS describes barriers to entry as "logistics, channel, market knowledge, and customer base"); PX20184 at 003 (internal assessment explaining that "[t]he business idea and the strategic role played by the company is to supply these products to vessels around the world . . . through a truly global and seamless operation, meticulously designed for the global shipping community . . . [t]he complexity of this operation is the major barrier to entry for competing manufacturers **[**76]** and suppliers, focusing their efforts towards larger, land based markets."). Indeed, other market participants have confirmed that expanding a distribution network to the size of Drew's would require significant capital investment. *See* Franzo Hrg. Tr. at 357: 13-358:4 ("Q. What would it take for UNI Americas to expand its distribution network to the size of Drew Marine's? A. . . . I mean, we would need financial backing to make that move . . . Drew has built a tremendous company over 50 years . . . they didn't do it overnight. . . . [I]t would take a financial influx of capital to do such a thing.").

Similarly, evidence indicates that prior customer relationships and reputation function as barriers in the MWT industry because customers are highly risk averse, leading them to favor known providers and avoid switching suppliers. *See* JX-0250 at 009 (consultant presentation of MWT analysis to WSS indicates that "[c]ustomer relationships are important to maintain sales and contract extensions," because "[w]ater treatment products has a lock-in effect, as the vessels cannot change water treatment supplier continuously, as it would defeat its purpose"); [TEXT REDACTED BY THE COURT] (describing **[**77]** elimination of Marine Care from bidding process because "[t]he evaluation of the team was that the Marine Care bid had more risk to it. They didn't cover as many ports as we were seeking. They were an unknown supplier to us, so a lot more testing would be required to consider their chemicals."); Fry Hrg. Tr. at 962:11-23 (explaining that Military Sealift Command single sources its chemicals worldwide because "[c]ommonality of chemicals, commonality of training, commonality of test equipment" helps "prevent[] . . . mistakes and . . . minimize the risk to the ship itself.");[15] PX80000 (MSC Decl.) at ¶¶ 51-52 (noting that "[r]eputation cannot be understated given that even small discrepancies in the quality, availability, or service of marine chemicals could shorten the lifecycle of equipment or cause immediate failure," and that "if another company decided to make a concerted effort to replace Drew, it would take additional time for that company to earn the reputation for quality, service, and reliability that Drew and Wilhelmsen have developed over decades in the marine industry").

In sum, evidence relating to the foregoing barriers alone shows that here, as in *Sysco*, new entry and/or **[**78]** expansion are "capital intensive and demand[] a long time horizon"—capital to fund expansion of distribution network, and time to build relationships with customers and develop a high reputation for quality and reliability. 113 F. Supp. 3d at 81. The evidence does not reveal any specific competitor or potential **[*70]** competitor with any plan to enter, and in fact suggests the opposite—that expansion is costly, and no smaller competitor or potential competitor intends to expand or reposition in order to make a bid for Global Fleet customers. *See, e.g.*, [TEXT REDACTED BY THE COURT] ¶ 10 (noting that expansion is costly, on the order of $20,000-$30,000 in shipping per container of product on top of third-party fees, and that [TEXT REDACTED BY THE COURT] has not expanded for water treatment chemicals in five years); [TEXT REDACTED BY THE COURT] ¶ 8 (noting that [TEXT REDACTED BY THE COURT] has no intention of entering the MWT business); [TEXT REDACTED BY THE COURT] ¶ 6 (noting absence of expansion plans); *cf.* Sysco, 113 F. Supp. 3d at 81 ("Based on their assessment that expansion would not be an economically viable strategy, regional distributors have said that they have no plans to expand or reposition in order to **[**79]** serve national customers."). Defendants may be correct that at some point in the future one or more smaller competitors will be in a position to replicate the competitive benefits that Drew's presence currently provides. Nevertheless, the record does not support the notion that any entry or credible threat thereof will be timely, likely, and sufficient to counteract the likely anticompetitive effects of this merger.

b. Power Buyers

1. LEGAL STANDARD

Courts have also noted that the existence of power buyers—sophisticated customers who retain strategies post-merger that "may constrain the ability of the merging parties to raise prices," Merger Guidelines § 8—is a factor that can serve to "rebut a prima facie case of anticompetitiveness." Cardinal Health, 12 F. Supp. 2d at 59. However, "[t]he ability of large buyers to keep prices down . . . depends on the alternatives these large buyers have available to them." Sysco, 113 F. Supp. 3d at 48. Where mergers reduce alternatives—i.e., prevent the use of certain competitive strategies—"the power buyers' ability to constrain price and avoid price discrimination can be correspondingly diminished." *Id.* (citing Merger Guidelines § 8). Thus, the mere presence of power buyers "does not necessarily mean that a merger will **[**80]** not result in anticompetitive effects." Cardinal Health, 12 F. Supp. 2d at 59. In assessing a power buyer argument, the court should "examine the choices available to powerful buyers and how those choices likely would change due to the merger," keeping in mind that "[n]ormally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer." Merger Guidelines § 8. Finally, although the consideration of non-entry factors—including the existence of power buyers—is "relevant, and can even be dispositive, in a section 7 rebuttal analysis," Baker Hughes, 908 F.2d at 987, courts have not typically held "that power buyers alone enable a defendant to overcome the government's presumption of anticompetitiveness." Cardinal Health, 12 F. Supp. 2d at 58; Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 440 (5th Cir. 2008) ("[C]ourts have not considered the 'sophisticated customer' defense as itself independently adequate to rebut a *prima facie* case.").

2. ANALYSIS

[15] Defendants' contention that customers who believe that there are no other MWT suppliers capable of serving their needs are uninformed is itself indicative of the importance of reputation in the industry—if reputation were less important, it is unlikely that a sophisticated customer would fail to investigate potentially cheaper alternatives.

Defendants argue that the FTC's Global Fleets construct focuses on the largest shipping companies—those most likely to have the power to constrain the merger's anticompetitive effects. In support of this contention, Defendants point out that customers tend to purchase other goods from suppliers, which permits them to discipline attempted BWT and CWT **[**81]** price increases by switching or credibly threatening to switch purchases of these other products to other suppliers or by negotiating price decreases on other products. **[*71]** ECF No. 50-2 at 45; DFF ¶¶ 246-249. Defendants further argue that customers could adapt purchases to another supplier's distribution network or shift part of their fleet to another competitor, since many vessels in Global Fleets do not avail themselves of all of Defendants' networks—instead visiting a subset of available ports and picking up MWT from an even smaller subset. DFF ¶¶ 250-253. Defendants also contend that Global Fleets could stockpile larger quantities of MWT products in order to shift purchases to major ports with lower costs, DFF ¶¶ 254-258; ECF No. 50-2 at 45-46, and that customers can partner with suppliers to sponsor entry or expansion to new ports.

The court is unpersuaded by Defendants' power buyer argument. The evidence is mixed—at best—regarding the effectiveness of each of the Defendants' suggested strategies. Although at least one witness suggested that customers could shift purchases of other products in more competitive markets to other suppliers, *see* Kelleher Hrg. Tr. at 536:6-20, there is, **[**82]** as Dr. Nevo noted, little empirical basis for the notion that this strategy—already available to large customers—would yield any additional benefits beyond those customers currently enjoy. PX61002 ¶¶ 223, 232. Similarly, while testimony suggested that customers may be able to stockpile product and concentrate purchases in ports where products are cheaper, that same testimony suggests that storage space is often limited and that customers already do so. *See e.g.*, [TEXT REDACTED BY THE COURT] (describing size of storage facilities onboard and efforts to ensure that product sourcing occurs efficiently); *see also* Fry Hrg. Tr. at 963:13-964:22 (describing space constraints due to safety regulations, number of different consumable products, and need to maximize revenue-generating space). Defendants have not identified any *new* strategy or alternative likely to emerge post-merger—instead, they have focused on strategies that are already part of the competitive landscape and which show no promise of becoming more effective. On the other hand, the FTC has shown that the merger will result in the loss of a proven strategy—the ability to leverage one large, global supplier against another—that **[**83]** appears to be the most effective price constraint in the consolidated MWT market. In other words, the FTC has established a reasonable probability that as a result of the merger, sophisticated buyers will have one less alternative strategy through which they can exercise power, and Defendants have not identified any equally or more effective buyer options to counteract that loss. Thus, the reduction of buyer alternatives means that "power buyers' ability to constrain price and avoid price discrimination can be correspondingly diminished," *Sysco, 113 F. Supp. 3d at 48*, and evidence of buyer power is insufficient to rebut the FTC's prima facie case.

c. Efficiencies

1. LEGAL STANDARD

As the Merger Guidelines explain, "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced services, or new products." Merger Guidelines § 10. Though the Supreme Court has never recognized the so-called "efficiencies" defense in a *Section 7* case, other courts and the Horizontal Merger Guidelines acknowledge that evidence of efficiencies may prove "relevant to the competitive effects **[**84]** analysis of the market required to determine whether the proposed transaction will substantially lessen competition," *Arch Coal, 329 F. Supp. 2d at 151*, and accordingly that efficiencies produced by a merger can form part of a defendant's rebuttal of **[*72]** the FTC's prima facie case. *Sysco, 113 F. Supp. 3d at 81*; *Heinz, 246 F.3d at 720*. This is true even though "[c]ourts have rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies." *CCC Holdings, 605 F. Supp. 2d at 72*.

Potential efficiencies require close judicial scrutiny—"the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior," *Heinz, 246 F.3d at 721*, and a defendant must prove "extraordinary efficiencies" where market concentration levels are high. *Id. at 720-21*. An efficiencies analysis must demonstrate that the claimed efficiencies are (1) merger-specific, and (2) verifiable—meaning that efficiency claims "must represent a type of cost saving that could not be achieved without the merger and the estimate of the predicted saving must be reasonably verifiable by an independent party." *United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 89 (D.D.C. 2011)*; *see also* *Sysco, 113 F. Supp. 3d at 82*. Moreover, "it is incumbent upon the merging firms to substantiate efficiency claims," as "much **[**85]** of the information relating to efficiencies is uniquely in the possession of the merging firms." Merger Guidelines § 10.

2. ANALYSIS

Defendants claim that the proposed merger will result in significant merger-specific efficiencies in the form of cost savings of [TEXT REDACTED BY THE COURT] and that these efficiencies will be realized in four ways: (1) production cost reductions from eliminating duplicative product lines, (2) customer-facing cost reductions from eliminating duplicative account managers and customer service operations, (3) reductions from eliminating duplicative back-office and administrative costs, and (4) price reductions as part of a plan to address expected revenue dis-synergies, in order to compensate for the possibility of lost customers who oppose the merger.

The FTC engaged an expert, Dr. Dov Rothman, to evaluate whether Defendants had substantiated their estimated cost efficiencies, and whether such efficiencies were merger-specific. Dr. Rothman reviewed data and documentation from the merging parties, and the parties' consultants provided him with spreadsheets relevant to their claimed cost savings. Dr. Rothman concluded in his report and his testimony at the evidentiary **[**86]** hearing that the merging parties had failed to provide sufficient information for him to verify the likelihood and magnitude of the claimed cost savings. PX61001 at ¶ 10. In particular, Dr. Rothman found that the alleged cost savings in each of the categories were based on a series of significant assumptions—percentage reductions in cost, percentage increases in productivity, or assumed cost/product equivalencies—that were "doing all the work" in calculation of the estimates. Rothman Hrg. Tr. at 1035:5-6. Dr. Rothman further pointed out that Wilhelmsen failed to provide any information that would have allowed him to confirm whether those assumptions are reasonable. *See, e.g.*, Rothman Hrg. Tr. at 1039:19-1040:5 ("So what Wilhelmsen has provided here, it's provided a description of the process by which these cost savings were estimated. So it's explained that it had functional teams and Cardo Partners go around and identify and assess areas of duplicative overlap. And Wilhelmsen has . . . provided information that describes the output of the analysis. What Wilhelmsen hasn't provided is information about the analysis itself. And I think there's an important distinction between describing **[**87]** the process of estimating cost savings and **[*73]** describing the actual analysis, the assumptions that go into that analysis.").

In response to these criticisms, Defendants note that WSS has a history of acquiring companies that produce MWT chemicals—specifically Unitor and Nalfleet—that demonstrates that WSS has previously achieved the cost savings it projected. Defendants also note that the efficiency estimates went through many rounds of internal vetting, DFF ¶¶ 352, 354, 357, 358, and rely on the testimony and report of Dr. Israel, who contended that the estimates are verifiable insofar as WSS identified the potential bases for cost savings, performed its own vetting and due diligence, and has a track record of realizing projected cost savings. DX-0060 ¶¶ 287, 290, 298.

The court finds that Defendants have failed to carry their burden to demonstrate the verifiability of their claimed efficiencies. In reaching this decision, the court stresses that the determinative issue is neither the presence of assumptions nor the absence of completely precise estimates. Instead, the critical issue is that because the bases for the assumptions Dr. Rothman identified and their role in the efficiencies **[**88]** analysis is unclear, the reasonableness of those assumptions, along with the ultimate determinations of likelihood and magnitude, cannot be verified with any degree of rigor. *Heinz, 246 F.3d at 721* ("[G]iven the high concentration levels, the court must undertake a *rigorous* analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior.") (emphasis added); *see also id.* (scrutinizing quantitative basis for claimed efficiencies). Nor can reference to the merging parties' past practices, managerial expertise and incentives, or internal verification processes serve to substantiate any efficiencies. The court cannot substitute Defendants' assessments and projections for independent verification. *H & R Block, 833 F. Supp. 2d at 91* ("While reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable by the Court. If this were not so, then the efficiencies defense might well swallow the whole of *Section 7* of the Clayton Act because management would be able to **[**89]** present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise."). The court concludes that Defendants have failed to provide enough information about their estimated efficiencies to render them "reasonably verifiable by an independent party." *Id. at 89*. Given this conclusion, the court need not address the question of merger-specificity.

B. Weighing the Equities

Notwithstanding the court's determination on the likelihood of success on the merits, the court must still "weigh the equities in order to decide whether enjoining the merger would be in the public interest." *Heinz, 246 F.3d at 726*. The interests at issue are "(i) the public interest in effectively enforcing ***antitrust law*** and (ii) the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial." *Sysco, 113 F. Supp. 3d at 86*; *see also* *Heinz, 246 F.3d at 726* ("The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws."). The FTC notes that absent a preliminary injunction, Defendants can combine assets and operations such that it is administratively difficult to restore competition to its pre-merger state. **[**90]** *Heinz, 246 F.3d at 726* ("*Section 13(b)* **[*74]** itself embodies congressional recognition of the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case."). On the other hand, Defendants note that if this court issues a preliminary injunction, they will abandon the transaction rather than continue with the administrative proceeding—meaning that the efficiencies that they have identified will be lost, along with their potential benefits to consumers. *See* *Arch Coal, 329 F. Supp. 2d at 160* (taking abandonment of the transaction into account in weighing the equities).

Given the court's finding that Defendants' claimed efficiencies cannot be independently verified, the court cannot conclude on this record that those efficiencies outweigh the potential harm to the public resulting from further consolidation in the MWT industry. Moreover, although the court recognizes the time, resources, and effort that Defendants have put into planning this transaction, the parties' stated intention to abandon the transaction prior to the merits proceeding is a private equity, and cannot on its own overcome the public equities that favor the FTC. *Heinz, 246 F.3d at 727*; *Sysco, 113 F. Supp. 3d at 87*.

IV. CONCLUSION

The court finds on the basis of the entire record that the FTC has carried its burden to show **[**91]** a "reasonable probability" that the proposed merger between Drew and WSS would harm competition in the market for supply of MWT products and services to Global Fleets. The FTC has "raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals," *Heinz, 246 F.3d at 714-15* (quoting *FTC v. Beatrice Foods Co., 587 F.2d 1225, 1229, 190 U.S. App. D.C. 328 (D.C. Cir. 1978))*, and Defendants have offered insufficient evidence to rebut the FTC's showing of likely harm. Moreover, the equities favor issuance of a preliminary injunction. Accordingly, the FTC's Motion for Preliminary Injunction will be GRANTED. An appropriate order accompanies this memorandum opinion.

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

[*none] ORDER

Having considered the pleadings, memoranda, declarations, exhibits, and other evidence presented by Plaintiff Federal Trade Commission (the "Commission") and by Defendants Wilh. Wilhelmsen ASA, Wilhelmsen Maritime Services AS (collectively "Wilhelmsen"), The Resolute Fund II, L.P., Drew Marine Intermediate II RN., and Drew Marine Group Inc. (collectively "Drew"), and for the reasons set forth in the accompanying Memorandum Opinion, the court hereby GRANTS **[**92]** the Commission's motion for a preliminary injunction enjoining the acquisition of Drew Wilhelmsen (ECF No. 45).

It is ORDERED that Defendants Wilhelmsen and Drew are hereby enjoined and restrained under *Section 13(b) of the Federal Trade Commission Act*, *15 U.S.C. § 53(b)*, from consummating the proposed acquisition, or otherwise effecting a combination of Wilhelmsen and Drew until the completion of the administrative proceeding evaluating the proposed merger now pending before the Commission.

It is further ORDERED that Wilhehnsen and Drew shall take any and all necessary steps to prevent *any* of their officers, directors, domestic or foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures from consummating, directly or indirectly, any such acquisition, or otherwise effecting any combination between Wilhelmsen and Drew.

It is further ORDERED that Wilhelmsen and Drew are directed to maintain the *status qua* until either (1) the completion of all legal proceedings by the Commission challenging the transaction, including all appeals, or (2) further order of the court, including upon request of the Commission, before completion of such legal proceedings.

It is further ORDERED that this court shall retain jurisdiction of this matter **[**93]** for all purposes and for the full duration of this Order, as provided in the previous paragraph.

SO ORDERED.

Date: July 21, 2018

Tanya S. Chutkan

TANYA S. CHUTKAN

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Mylan Pharms. v. Celgene Corp.

United States District Court for the District of New Jersey

October 3, 2018, Decided; October 3, 2018, Filed

Civil Action No. 14-2094 (ES)(MAH)

Reporter
2018 U.S. Dist. LEXIS 242826 *; 2018 WL 11299447

MYLAN PHARMACEUTICALS INC., Plaintiff, v. CELGENE CORPORATION, Defendant.

Notice: NOT FOR PUBLICATION

Core Terms

generic, samples, protocols, bioequivalence, damages, thalidomide, argues, testing, label, writes, brand, oral argument, requests, patent, capsules, drugs, Sherman Act, brand-name, antitrust, asserts, anticompetitive, manufacturer, contends, parties, limitations period, summary judgment, valid business, lenalidomide, confirmed, futility

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Judges: Esther Salas, United States District Judge.

Opinion by: Esther Salas

Opinion

SALAS, DISTRICT JUDGE

I. Introduction

A generic pharmaceutical company generally needs samples of a brand-name drug to perform certain studies before seeking U.S. Food and Drug Administration ("FDA") approval to market a generic version of that drug. Put simply, the generic company must show the FDA that its generic version is equivalent to the brand-name drug.

Here, Mylan Pharmaceuticals Inc. ("Mylan") wanted FDA approval to market generic versions of two brand-name drugs marketed by Celgene Corporation ("Celgene")—Thalomid® and Revlimid®. But Mylan says it **[*2]** couldn't get samples of these brand-name drugs. It blames Celgene for this, alleging that Celgene used a certain safety program as pretext to prevent Mylan from getting samples of each drug and conducting the requisite studies. Mylan asserts Celgene did this to improperly stifle generic competition. So Mylan brought this action against Celgene. It claims Celgene's conduct violates federal and state antitrust laws, as well as state laws prohibiting unfair competition and tortious interference.

Celgene has moved for summary judgment to dismiss this action. Its motion raises several issues. Indeed, the Court held lengthy oral argument and ordered supplemental briefing before and after oral argument on certain issues. No doubt this is a complex case. Rather than attempting to preview all of these issues—several of which require necessary background information—the Court provides this brief introduction and addresses each issue below after providing such background.

Based on the below discussion, the Court GRANTS in part and DENIES in part Celgene's motion for summary judgment.

II. The Hatch-Waxman Act

A. The Hatch—Waxman Act allows a generic company to "piggy-back" on a brand company's FDA [*3] approval efforts—which speeds the introduction of low-cost generic drugs to market and thereby furthers competition[1]

The Drug Price Competition and Patent Term Restoration Act of 1984—commonly known as the "Hatch-Waxman Act"—provides a regulatory framework that governs the testing and approval of new drugs. *In re Wellbutrin XL Antitrust Litig., 868 F.3d 132, 143 (3d Cir. 2017)*. This framework is "designed in part to (1) ensure that only rigorously tested pharmaceutical drugs are marketed to the consuming public, (2) incentivize drug manufacturers to invest in new research and development, and (3) encourage generic drug entry into the marketplace." *In re Lipitor Antitrust Litig., 868 F.3d 231, 240 (3d Cir. 2017)*.

A pharmaceutical company that wants to market a new drug must submit a New Drug Application or "NDA" to the FDA. *In re Wellbutrin XL Antitrust Litig., 868 F.3d at 143* (quoting *Actavis, 133 S. Ct. at 2228*). "The NDA must include, among other things, a statement of the drug's components, scientific data showing that the drug is safe and effective, and proposed labeling describing the uses for which the drug may be marketed." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 404, 132 S. Ct. 1670, 182 L. Ed. 2d 678 (2012)*. A company that gets FDA approval of its NDA is often referred to as a brand-name company or brand company, and its FDA-approved product is often referred to as a brand-name drug or brand drug. *See, e.g., F.T.C. v. Actavis, Inc., 570 U.S. 136, 142, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*; *New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 643 (2d Cir. 2015)*.

Conversely, a pharmaceutical company that seeks to market **[*4]** a generic version of a brand drug is often called a generic drug company or generic company, and its generic version of the brand drug is often referred to as a generic drug. *See, e.g., Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 427-28 (3d Cir. 2016)*; *Schneiderman, 787 F.3d at 643 n.3*; *Janssen Pharmaceutica, N.V.*, 540 F.3d at 1355-56.

"One of the goals of Hatch-Waxman is to increase competition between generic and brand-name drugs." *In re Wellbutrin XL Antitrust Litig., 868 F.3d at 143*. To that end, the Hatch-Waxman Act allows generic companies to get FDA approval "without having to endure the gauntlet of procedures associated with NDAs." *Id.* In particular, a generic company can get similar approval as the brand-name company "by submitting an Abbreviated New Drug

[1] *See F.T.C. v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 2228, 186 L. Ed. 2d 343 (2013)*.

Application ('ANDA') that shows that the generic drug has the same active ingredients as, and is biologically equivalent to, the [FDA-approved] brand-name drug." *In re Lipitor Antitrust Litig., 868 F.3d at 240*; *see also* *Caraco, 566 U.S. at 405* ("Rather than providing independent evidence of safety and efficacy, the typical ANDA shows that the generic drug has the same active ingredients as, and is biologically equivalent to, the brand-name drug."). "This way, a generic manufacturer does not need to undergo the same costly approval procedures to develop a drug that has already received FDA approval." *In re Lipitor Antitrust Litig., 868 F.3d at 240*.

"[F]or drugs that work systemically by circulating in the bloodstream after ingestion in **[*5]** the form of a pill or capsule, bioequivalence is typically measured by comparing the rate and extent of absorption of the active ingredients in the blood." *Graceway Pharms., Inc. v. Sebelius, 783 F. Supp. 2d 104, 107 (D.D.C. 2011)*. "In other words, two drugs are bioequivalent if they deliver the same amount of the same active ingredient content into a patient's blood stream over the same amount of time." *New York v. Actavis PLC, 787 F.3d 638, 644 (2d Cir. 2015)*. Importantly, a generic company must generally obtain samples of a brand name drug to demonstrate bioequivalence to a brand-name drug. *See* *Natco Pharma Ltd. v. Gilead Scis., Inc., No. 14-3247, 2015 U.S. Dist. LEXIS 131058, 2015 WL 5718398, at *1 (D. Minn. Sept. 29, 2015)* (citing *21 U.S.C. §§ 355(b)(1)(A)*, *355(j)(2)(A)*).

B. The Hatch-Waxman Act provides special procedures for identifying and resolving patent disputes between brand and generic companies[2]

The Hatch-Waxman Act sets forth procedures for patent disputes between brand and generic drug companies. *See* *In re Lipitor Antitrust Litig., 868 F.3d at 240*. When a brand company submits an NDA, it must file information about its patents with the NDA. *Id.* If approved, the FDA then will list the patents in a publication informally known as the "Orange Book." *Id.* In particular, a brand company must list in the Orange Book any patents relating to the drug's composition or methods of use. *See id.*

Once listed in the Orange Book, a generic company may file an ANDA "if it can certify that its proposed generic drug will not actually **[*6]** violate the brand manufacturer's patents." *Id.* In fact, a generic company must assure the FDA that its ANDA product will not infringe a listed patent because the FDA cannot authorize a generic drug that would infringe a patent. *See* *id. at 240-41*; *In re Wellbutrin XL Antitrust Litig., 868 F.3d at 144*. One way for a generic company to do so is by certifying that any listed patent is invalid and/or will not be infringed by the manufacture, use, or sale of the ANDA product. *See* *In re Lipitor Antitrust Litig., 868 F.3d at 240-41*; *In re Wellbutrin XL Antitrust Litig., 868 F.3d at 144*. This is referred to as a "paragraph IV certification." *In re Wellbutrin XL Antitrust Litig., 868 F.3d at 144*.

A paragraph IV certification constitutes an act of infringement and "often 'means provoking litigation' instituted by the brand manufacturer." *In re Lipitor Antitrust Litig., 868 F.3d at 241* (quoting *Caraco, 566 U.S. at 407*). If the brand company timely sues the generic company for patent infringement, "the FDA must withhold approval of the generic for at least 30 months while the parties litigate the validity or infringement of the patent." *Id.; see also* *In re Wellbutrin XL Antitrust Litig., 868 F.3d at 144* ("[T]he FDA is required to withhold approval of the generic drug for 30 months or until the infringement case is resolved, whichever comes first.").

Notably, to incentivize generic companies to file ANDAs "challenging weak patents, the Hatch-Waxman Act provides that the *first* generic manufacturer to file a paragraph IV certification will **[*7]** enjoy a 180-day exclusivity period" from the first commercial marketing of its drug. *See* *In re Lipitor Antitrust Litig., 868 F.3d at 241* (emphasis added). This 180-day exclusivity period bars any other generic drug from competing with the brand-name drug—a potentially lucrative opportunity for an ANDA-filer. *See id.*

There are at least two important considerations concerning this 180-day exclusivity period: (1) it "belongs only to the first generic manufacturer to file an ANDA; if the first-ANDA filer forfeits its exclusivity rights, no other generic manufacturer is entitled to it"; and (2) "the brand-name manufacturer is *not* barred from entering the generic market

[2] *In re Lipitor Antitrust Litig., 868 F.3d at 240*.

with its own generic version of the drug—a so-called 'authorized generic'—during the 180-day exclusivity period." *Id.* (emphasis added).[3]

III. The FDA's Risk Evaluation and Mitigation Strategy ("REMS")

Under the FDA Amendments Act of 2007, the FDA can require drug manufacturers to implement a REMS for certain drugs. *See* 21 U.S.C. § 355-1. "REMS are required risk management plans that use risk minimization strategies beyond the professional labeling to ensure that the benefits of certain prescription drugs outweigh their risks."[4] A REMS can have elements such as a "Medication Guide **[*8]** or Patient Package Insert" or "Communication Plan."[5]

Another possible element of a REMS is an "ETASU"—which stands for: "Elements to Assure Safe Use."[6] "ETASU requirements are the most extensive elements of a REMS program" and "are intended to reduce a specific serious risk listed in the labeling of the drug."[7] A REMS with an ETASU may require, for example, that: "[p]rescribers have specific training/experience or special certifications"; "[e]ach patient using the drug be subject to monitoring"; and the "[d]rug be dispensed with evidence of safe-use conditions such as laboratory test results."[8]

As noted above, a generic company must typically obtain samples of a brand drug to show bioequivalence to the brand drug for FDA approval. *See, e.g.,* *Natco Pharma, 2015 U.S. Dist. LEXIS 131058, 2015 WL 5718398, at *1*. And Congress included a provision in the FDA Amendments Act of 2007 setting forth the following: "No holder of an approved covered application shall use any element to assure safe use required by the Secretary under this subsection to block or delay approval of an . . . [ANDA]." *21 U.S.C. § 355-1(f)(8)*).

IV. Celgene's Thalomid® & Revlimid® are both subject to REMS requirements[9]

A. Thalomid®

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[3] A note on this second consideration may be helpful for contextual purposes. "An authorized generic is a generic drug sold by the company who markets the brand name drug (or a third party licensee)." *Sanofi-Aventis v. Apotex Inc., 659 F.3d 1171, 1174-75 (Fed. Cir. 2011)* (citation omitted). The brand company "who holds the approved NDA wants to stave off possible competition from the ANDA applicants (the generic makers)." *Mylan Pharms., Inc. v. F.D.A, 454 F.3d 270, 273 (4th Cir. 2006)*. And "[o]ne strategy for the NDA holder is to grant a third party a license to sell a generic version of the drug described in the approved NDA." *Id.* "The economic benefits of this practice are clear": "an authorized generic appeals to patients because it is sold at a lower price than the branded pioneer drug"—while also appealing to a brand company because it "benefits from sales of the authorized generic even after the patent protecting the [brand] drug has expired." *Id.* Indeed, "[b]y selling an authorized generic during the [180-day] exclusivity period enjoyed by the first paragraph IV ANDA applicant," the brand company "prevents that applicant from winning all of the customers who want to switch from the branded drug to a cheaper generic form." *Id.*

[4] *See* U. S. FOOD & DRUG ADMIN., *A Brief Overview of Risk Evalutation & Mitigation Strategies (REMS)*, https://www.fda.gov/downloads/AboutFDA/Transparency/Basics/UCM328784.pdf (last visited Oct. 2, 2018).

[5] *Id.* at 7.

[6] *Id.*

[7] *Id.* at 12-13.

[8] *Id.* at 13.

[9] Unless otherwise noted, citations to statements of facts are undisputed.

In the 1950s, **[*9]** a drug called thalidomide was marketed and widely prescribed in Europe and other countries as a treatment for morning sickness and nausea. (D.E. No. 228-1, Celgene's Statement of Material Facts ("Celg. SMF") ¶ 2). In the early 1960s, it was discovered that thalidomide causes severe birth defects including: missing legs, arms, feet and hands; spinal cord defects; cleft lip or palate; absent or abnormal external ears; heart, kidney, and genital abnormalities; and abnormal formation of the digestive system. (*Id.* ¶ 3). In fact, a single dose of thalidomide taken during pregnancy can cause these birth defects. (*Id.*). And about 40% of thalidomide victims died within a year of their birth. (*Id.*). So thalidomide was withdrawn from the market in many countries. (*Id.*).

Celgene obtained FDA approval in 1998 to market thalidomide—under the trade name Thalomid®—for treating manifestations of a particular form of leprosy known as erythema nodosum leprosum ("ENL"). (*See* D.E. No. 228-3, Ex. 1). But the FDA indicated that a restricted distribution program—called a "System for Thalidomide Education and Prescribing Safety" or "S.T.E.P.S."—was an integral part of the approval and a component of the terms **[*10]** of approval. (*Id.*).

In May 2006, the FDA approved the use of Thalomid®—in combination with dexamethasone—for treating newly diagnosed multiple myeloma. (D.E. No. 228-4, Ex. 12; D.E. Nos. 237-21 & 237-22, Ex. P58).

B. Revlimid®

In April 2005, Celgene sought approval from the FDA to market lenalidomide—an analogue of thalidomide that is more potent and has a better toxicity profile—under the brand name Revlimid®. (D.E. No. 228-8, Ex. 74 & 77; Celg. SMF ¶ 86). Mylan disputes the date of Celgene's NDA for Revlimid®, arguing that evidence shows Celgene's first submission was sent in December 2004, followed by more than thirty additional submissions before Celgene's application was deemed complete and approved. (*See* D.E. No. 237-1 ("Responses to Celg. SMF ¶ 87)). In any event, in December 2005, the FDA approved Revlimid® for treating transfusion dependent anemia due to myelodysplastic syndromes. (D.E. No. 228-8, Ex. 77). Notably, the FDA's approval letter states that approval was under the "RevAssist Risk Minimization Action Plan" or "RiskMAP"—and distribution of the drug is limited as described in the approval letter and in the detailed RevAssist program. (*Id.*)

In June 2006, the FDA approved **[*11]** the use of Revlimid®—in combination with dexamethasone—for treating multiple myeloma in patients who have received at least one prior therapy. (D.E. No. 228-8, Ex. 78).

C. The FDA approves Celgene's proposed REMS for each product

In September 2007, Congress enacted a law that, among other things, codified the FDA's risk management program authority under new provisions requiring that REMS programs be implemented for certain pharmaceutical products. (*See* D.E. No. 238-30, Ex. P315). As noted above, the law also prohibited a brand company from using any ETASU to block or delay approval of an ANDA. (*See id.*).

In September 2008, Celgene filed with the FDA its proposed REMS for Thalomid® and Revlimid®. (*See* D.E. Nos. 228-4, Ex. 9; 228-8, Ex. 79). In August 2010, the FDA found that REMS were necessary for Thalomid® and Revlimid ® to ensure that the benefits of the drugs outweigh their risks of side effects, and the FDA approved Celgene's REMS for each drug. (*See* D.E. Nos. 228-4, Ex. 9; 228-8, Ex. 79).

V. Mylan's Causes of Action against Celgene

On April 3, 2014, Mylan brought this action against Celgene, alleging in part that Celgene "has used REMS as a pretext to prevent Mylan from acquiring **[*12]** the necessary samples to conduct bioequivalence studies, even after the FDA determined that Mylan's safety protocols were acceptable to conduct those studies." (D.E. No. 1 ¶ 7). It alleges that, "[i]n flagrant violation of federal and state antitrust laws, Celgene has unlawfully maintained monopolies over its two 'lead' products—Thalomid and Revlimid—by preventing lower-priced generic competition from entering the market." (*Id.* ¶ 2).

Mylan asserts the following counts—some of which the Court has already dismissed and declines to further discuss here:

1. Violation of Sherman Act *Section 2* — Thalomid® — Monopolization, Attempted Monopolization and Conspiracy to Monopolize

2. Violation of Sherman Act *Section 2* — Revlimid® — Monopolization, Attempted Monopolization and Conspiracy to Monopolize

3. Violation of Sherman Act *Section 2* — Thalomid® — Denial of an Essential Facility or Resource Necessary to Compete

4. Violation of Sherman Act *Section 2* — Revlimid® — Denial of an Essential Facility or Resource Necessary to Compete

5. [*Dismissed*]

6. [*Dismissed*]

7. [*Dismissed*]
8. Violation of the New Jersey Antitrust Act, Section

56:9 3 and 56:9-4 — Thalomid® [*Partially Dismissed*]
9. Violation of the New Jersey Antitrust Act, Section

56:9 3 **[*13]** and 56:9-4 — Revlimid® [*Partially Dismissed*]
10. Violation of the New Jersey Antitrust Act, Section

56:9 3 and 56:9-4 — Thalomid® and Revlimid® [*Partially Dismissed*]
11. Violation of New Jersey Common Law — Thalomid® — Unfair Competition
12. Violation of New Jersey Common Law — Revlimid® — Unfair Competition
13. Violation of New Jersey Common Law — Thalomid® and Revlimid® — Unfair Competition
14. Violation of New Jersey Common Law — Thalomid® — Tortious Interference with an Economic Advantage
15. Violation of New Jersey Common Law — Revlimid® — Tortious Interference with an Economic Advantage
16. Violation of New Jersey Common Law — Thalomid® and Revlimid® — Tortious Interference with an Economic Advantage

17. Declaratory Judgment Pursuant to *28 U.S.C. §§ 2201-2202*

(*See id.* ¶¶ 187-380; D.E. No. 54).

VI. The Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A "genuine" issue of material fact exists for trial "if the evidence is such that a reasonable jury could return a verdict for **[*14]** the nonmoving party." *Id.*

The movant bears the initial burden of establishing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Where the non-moving party bears the burden of proof at trial, the moving party may discharge its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Id. at 325*. If the movant meets this burden, the non-movant must then set forth specific facts that demonstrate the existence of a genuine issue for trial. *Id. at 324*; *Azur v. Chase Bank, USA, Nat'l Ass'n, 601 F.3d 212, 216 (3d Cir. 2010)*.

Notably, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson, 477 U.S. at 255*. But the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *see also* *Swain v. City of Vineland, 457 F. App'x 107, 109 (3d Cir. 2012)* (stating that the non-moving party must support its claim "by more than a mere scintilla of evidence").

VII. Does the rule-of-reason burden-shifting framework apply?

Under the "rule of reason" burden-shifting framework, the party seeking to impose liability must initially provide evidence of the anticompetitive nature of a defendant's conduct. *Warner Chilcott, 838 F.3d at 438*. Once established, the defendant then has the burden of proffering nonpretextual procompetitive justifications that its conduct is **[*15]** indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal. *See id.; In re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litig., No. 16-5073, 2017 U.S. Dist. LEXIS 171322, 2017 WL 4642285, at *8 (E.D. Pa. Oct. 17, 2017)*. And "the plaintiff may then either rebut those justifications or demonstrate that the anticompetitive harm outweighs the procompetitive benefit." *Mylan Pharm., 838 F.3d at 438*.

A. The parties' contentions

Celgene argues that Mylan's claims under *Section 2* of the Sherman Act—the only remaining Sherman-Act claims in this case—require Mylan to prove that Celgene engaged in the following anticompetitive conduct: "an improper unilateral refusal to deal that had an anticompetitive effect in the alleged relevant markets for Thalomid and Revlimid." (D.E. No. 270 at 1). Celgene contends that Mylan fails to show that Celgene improperly refused to deal and, even if Mylan meets this burden, Celgene "had valid business justifications for declining to sell samples on the terms demanded by Mylan." (*Id.* at 2). Said differently, Celgene argues that there was no improper refusal to deal and therefore no anticompetitive conduct that harmed Mylan—and thus no burden-shifting from Mylan to Celgene occurs for the first step of the analysis. (*Id.*). And even assuming that Mylan could show a harmful refusal to deal, "Celgene **[*16]** nonetheless has shown indisputably valid business justifications for insisting upon certain terms before dealing with Mylan." (*Id.*).

At oral argument, Celgene contended that "it's assumed that you could have an anticompetitive effect" because this is a unilateral refusal-to-deal case. (D.E. No. 277 at 6:22-7:7). But it states that an anticompetitive effect by itself is not enough for the first prong of the burden-shifting framework. (*Id.* at 7:7-10). As such, Celgene asserts that "if our justifications, if the conditions we place on the dealing here are valid business justifications, we win" and "[y]ou don't get into this sort of back-and-forth balancing." (*Id.* at 9:3-6). It argues that, if the Court finds that Celgene had a valid business justification, then Mylan does not get an opportunity to rebut that. (*See id.* at 9:8-18).

Mylan contends that its obligation is to "present sufficient evidence to create a jury issue of anticompetitive effect," which "has been easily satisfied here by . . . abundant evidence." (D.E. No. 271 at 1). And so Mylan argues that the "prima facie case shifts to Celgene" to "com[e] forward with evidence of procompetitive justification"—but Celgene's justifications **[*17]** fail. (*Id.*). Mylan lastly asserts that—although Celgene's justifications "are entirely pretextual" and therefore a balancing is unnecessary—any "balancing outcome is clear: the net effect of Celgene's conduct is anticompetitive, with higher prices and fewer choices for consumers." (*Id.* at 2).

And at oral argument, Mylan asserted that: "Celgene cites no case from this circuit that you do not apply the standard rule of reason context in a unilateral refusal to deal case. There's no Third Circuit case that says you win if you have a valid business justification." (D.E. No. 277 at 13:21-24).

B. A burden-shifting framework applies

Both parties agree that a burden-shifting framework applies here. (*See* D.E. No. 270 at 1; D.E. No. 271 at 1). And at oral argument, both parties summarized and confirmed their respective positions regarding each of the three steps. *First*, Mylan says that Celgene refused to provide samples, allowing Celgene to retain monopolies over Thalomid® and Revlimid®—which "shifts the burden of going forward to Celgene to come up with a justification that is both legitimate in principle and in fact was the reason for the refusal to deal." (D.E. No. 277 at 15:20-16:24. *But see* D.E. No. **[*18]** 270 at 2 ("Celgene did not refuse to deal with Mylan . . . . Mylan has produced no evidence that [Celgene's] demands were unreasonable or that Mylan could not comply with them . . . .")). *Second*, Celgene provides some "primary" procompetitive, non-pretextual justifications, including: "[a]ssuring that the product was going to be used safely, that patients' health was going to be maintained, and safe conditions not only for the people involved in the test but the personnel who were administering the test" and "wanting to insure itself from the liability standpoint, from indemnification, be sure that Celgene protected itself." (D.E. No. 277 at 17:2-17:25; *see also* D.E. No. 270 at 2 ("[E]ven assuming *arguendo* that Mylan could establish a refusal to deal that harmed competition, Celgene nonetheless has shown indisputably valid business justifications for insisting upon certain terms before dealing with Mylan.")). *Third*, Mylan rebuts each of the justifications. (*See, e.g.*, D.E. No. 277 at 25:17-26:2).

It appears that the parties cannot proffer (nor can the Court find) clear binding Third Circuit precedent about how the rule-of-reason burden-shifting framework specifically and neatly applies **[*19]** in a refusal-to-deal case such as this one. (*See also* D.E. No. 277 at 8:16-18 ("[Celgene's Counsel:] I will confess, the cases are not all the model of clarity because this area of the law is really difficult, and courts struggle with it.")). What is clear, however, is no Third Circuit precedent says that any other framework applies. *See also* *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 281 (3d Cir. 2012)* ("The rule of reason governs Plaintiffs' claims under *Section 1* and *Section 2* of the Sherman Act . . . .").

Moreover, the crux of the parties' dispute is whether Celgene had valid business justifications for its refusals that are non-rebuttable as a matter of law. As evident from the discussion below, this is what the parties have litigated—and this is what the Court endeavors to resolve while being mindful of the applicable burden-shifting framework.

VIII. *Section 2* of the Sherman Act

A. *Section 2* generally

Under *§ 2* of the Sherman Act, a firm cannot "monopolize" or "attempt to monopolize." *15 U.S.C. § 2*; *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. A monopolization claim under *§ 2* requires (1) "the possession of monopoly power in the relevant market" and (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Trinko, 540 U.S. at 407* (quotation **[*20]** marks and citation omitted).[10]

First, "[m]onopoly power is the ability to control prices and exclude competition in a given market." *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007)*. But just possessing monopoly power—and the concomitant charging of monopoly prices—"is not only not unlawful; it is an important element of the free-market system." *Trinko, 540 U.S. at 407*. Thus, "the possession of monopoly power will not be found unlawful unless it is

[10] "By contrast, to succeed on a claim of attempted monopolization under *§ 2*, a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Warner Chilcott, 838 F.3d at 433* (internal quotation marks, citation, and footnote omitted).

accompanied by an element of anticompetitive *conduct*." *Id.* (emphasis in original). "Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers." *Id.*

"The *second* element of a monopolization claim under § 2 requires the willful acquisition or maintenance of monopoly power." Broadcom, 501 F.3d at 308 (emphasis added). This acquisition or maintenance of monopoly power "must be accompanied by some anticompetitive conduct on the part of the possessor." *Id.* (citation omitted). "Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits." *Id.* (citation omitted). "Conduct that impairs the opportunities of rivals and either does not further competition **[*21]** on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive." *Id.* (citation omitted). Indeed, "the Sherman Act directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." Warner Chilcott, 838 F.3d at 438 (quotation marks and citation omitted). In short, "a monopolist will be found to violate § 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification." Broadcom, 501 F.3d at 318 (quoting *LePage's Inc. v. 3M*, 324 F.3d 141, 152 (3d Cir. 2003) (en banc)).

B. Refusal to deal with competitors

"[A]s a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" Trinko, 540 U.S. at 408 (quoting United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919) (first alteration added)). Although the Supreme Court places a "high value . . . on the right to refuse to deal with other firms," this "does not mean that the right is unqualified." Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985). Thus, "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." Trinko, 540 U.S. at 408.

The Supreme Court's *Trinko* case provides key policy considerations **[*22]** and precepts for a refusal-to-deal case such as this one, including the following.

First, "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers," and "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." Id. at 407-08.[11] Further, "[e]nforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing-a role for which they are ill suited"—and "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion." Id. at 408.[12]

Second, the Court stated that, "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2"—but that the Court has been "very cautious in recognizing such

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[11] *See also* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . . ."); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1078 (10th Cir. 2013) ("Were intent to harm a competitor alone the marker of antitrust liability, the law would risk retarding consumer welfare by deterring vigorous competition . . . ."); Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 379 (7th Cir. 1986) ("[I]f conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant.").

[12] *See also* Trinko, 540 U.S. at 415 ("No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremediable by ***antitrust law*** when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.") (internal quotation marks and citation omitted).

exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Id.*

Third, "[a]ntitrust analysis **[*23]** must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation." *Id. at 411*. It is "of particular importance" to determine whether there is "a regulatory structure designed to deter and remedy anticompetitive harm." *Id. at 412*. "Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." *Id.* "Where, by contrast, there is nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust are worth its sometimes considerable disadvantages." *Id.*

IX. Celgene cannot be held liable under § 2 of the Sherman Act for conduct before FDA "approval" of Mylan's protocols

A. Relevant factual background

Thalomid® Samples.

- **9/2/2005**: Mylan wrote to Celgene requesting 3,360 capsules of Thalomid® for bioequivalency testing. (D.E. No. 228-4, Ex. 16);

- **12/19/2005**: Celgene responds to Mylan's 9/2/05 letter stating that Celgene "consider[s] our S.T.E.P.S. program to represent a binding commitment to the FDA that **[*24]** we will ensure, to the maximum extent possible, that the drug is used appropriately so as to avoid fetal exposure;" Mylan should contact the FDA to discuss S.T.E.P.S.; and, if the FDA says "in writing" to Celgene that Celgene can "violate" S.T.E.P.S., then Celgene will "further evaluate [Mylan's] request at that time." (D.E. No. 228-5, Ex. 18);

- **1/11/2006**: Mylan writes to the FDA, attaching Celgene's 12/19/2005 letter and requesting the FDA to provide Celgene with written authorization to supply Mylan with Thalomid® capsules; Mylan also provides the FDA with proposed protocols for the bioequivalence studies it intends to conduct. (*Id.* at Ex. 20);

- **2/8/2007**: The FDA writes Celgene, stating that the "FDA intends to exercise its enforcement discretion to permit Celgene to provide to another drug manufacturer (or its agent) 500 units of Thalomid for the purpose of conducting bioequivalence testing, when Celgene has received confirmation in writing from the sponsor, its agent, or FDA that the sponsor of the study either has an IND in effect for the study or has otherwise provided the agency with sufficient assurance that the bioequivalence study will be conducted in such a manner as to **[*25]** ensure the safety of the subjects." (D.E. No. 228-6, Ex. 26);

- **2/12/2007**: The FDA wrote to Mylan, referencing Mylan's 1/11/2006 letter and stating that the FDA "intend[ed] to exercise its enforcement discretion" to permit Celgene to provide 500 units of Thalomid® to another drug manufacturer "when Celgene has received confirmation in writing from the sponsor, its agent, or FDA that the sponsor of the study either has an IND in effect for the study or has otherwise provided the agency with sufficient assurance that the bioequivalence study will be conducted in such a manner as to ensure the safety of the subjects"; and "[t]hese safeguards would represent a substitute for the controls present in the S.T.E.P.S. program." (*Id.* at Ex. 28);

- **5/1/2007**: Mylan writes to the FDA stating that "[o]nce the Agency has reviewed the enclosed study protocols and has determined that Mylan has provided sufficient safeguards to assure that the bioequivalence studies will be conducted in such a manner as to ensure the safety of the subjects, we would appreciate receiving your written confirmation," which "will then be forwarded to Celgene." (*Id.* at Ex. 29);

• **9/11/2007**: The FDA writes to Mylan, stating **[*26]** that "[t]he proposed bioequivalence study protocol comparing Thalidomide Capsules . . . to . . . Thalomid® (Thalidomide) Capsules . . . are acceptable, provided that" Mylan includes 14 "recommendations." (*Id.* at Ex. 30);

• **11/16/2007**: Mylan writes to Celgene stating that "it is Mylan's understanding that" the FDA "informed Celgene that FDA intends to exercise enforcement discretion to permit Celgene to provide another drug manufacturer with Thalomid® for the purpose of conducting bioequivalence . . . testing"—and that "this letter confirms that Mylan has received affirmation from the Agency indicating the Mylan's proposed bioequivalence study protocols regarding Thalidomide Capsules provide adequate safety measures to ensure the safety of subjects" and Mylan "is prepared to pay full value for the shipment . . . of Thalomid® capsules." (*Id.* at Ex. 32).

Revlimid® Samples.

• **8/24/2012**: Mylan submits lenalidomide bioequivalence safety protocols to the FDA for review and requested "written confirmation" when the FDA determined that the protocols had "the appropriate safeguards"—and Mylan represented to the FDA that this written confirmation would then be provided to Celgene with a request **[*27]** for Revlimid®. (*See* D.E. No. 228-9, Ex. 84);

• **10/1/2012**: The FDA writes to Mylan stating that the FDA reviewed Mylan's protocols (as referenced in Mylan's 8/24/2012 letter to the FDA) and, "[b]ased upon the comparison of the safety measures in the latest approved Revlimid® labeling and the Risk Evaluation and Mitigation Strategy (REMS) RevAssist® program to the safety measures in the submitted protocols, the protocols are not safe to proceed and [certain] additions to the protocols are recommended. . . ." (*Id.* at Ex. 85);

• **11/19/2012**: Mylan writes to the FDA providing additional information and stating that "Mylan does still desire [the FDA's] assistance in obtaining . . . Revlimid®, so that we can conduct the necessary chemistry and bioequivalence testing to support the future filing of an Abbreviated New Drug Application (ANDA)." (*Id.* at Ex. 86);

• **2/28/2013**: The FDA writes Mylan stating that "[b]ased upon the comparison of the safety measures in the latest approved Revlimid® labeling and the Risk Evaluation and Mitigation Strategy (REMS) RevAssist® program to the safety measures in the submitted protocols, the three protocols are not safe to proceed." (*Id.* at Ex. 87);

• **5/1/2013**: **[*28]** Mylan writes to Celgene requesting Revlimid® samples, stating that "Mylan's safety protocols for its proposed bioequivalence testing have been submitted to the Office of Generic Drugs" and Mylan's "bioequivalence studies will be conducted in a manner to ensure the safety of the subjects." (*Id.* at Ex. 88);

• **5/7/2013**: Mylan writes to the FDA in response to the FDA's 2/28/2013 letter, submitting additional information and certain revisions. (*Id.* at Ex. 89);

• **5/14/2013**: Celgene writes to Mylan in response to Mylan's 5/1/2013 letter, stating that "Celgene will sell Revlimid to Mylan for the sole purpose of *in vitro* and *in vivo* bioequivalence testing necessary to support an ANDA upon (i) our satisfactory review of the documents requested [in the letter] and (ii) the execution of a Supply Agreement which will include the terms and conditions for sale, including indemnification provisions." Celgene also requested (among other things in nine categories of information) "written confirmation that Mylan's bioequivalence protocols have been approved by the [FDA]" and "written confirmation the FDA will allow Celgene to sell the requested amount of Revlimid . . . to Mylan." (*Id.* at Ex. 90);

• **7/29/2013** **[*29]** : The FDA writes Mylan in response to Mylan's 5/7/2013 letter, stating that the "three submitted protocols are safe to proceed." (*Id.* at Ex. 91);

- **3/11/2014**: Mylan writes Celgene, stating that the "letter serves to notify Celgene that Mylan has received all necessary approvals from the FDA to conduct the requested bioequivalence testing," citing the 7/29/2013 letter from the FDA to Mylan and attaching a copy of that letter to its correspondence." (*Id.* at Ex. 92).

B. The parties' contentions

Celgene argues that "there is no dispute that *until* at least November 2007, the FDA's February 2007 condition for permitting Celgene to sell Thalomid samples to Mylan was not satisfied." (D.E. No. 228 at 30 (emphasis in original)). And, for Revlimid®, Celgene contends that "[i]n August 2012, Mylan submitted to the FDA protocols for a lenalidomide study. The FDA rejected them, as well as Mylan's second submission, as 'not safe to proceed.' The FDA approved Mylan's protocols on its third attempt, in July 2013, and Mylan so informed Celgene in March 2014." (*Id.* (internal citations omitted)).

Celgene asserts that "[u]ntil the FDA informed Celgene that it would permit a sale for generic bioequivalence testing, **[*30]** and until Mylan communicated to Celgene that the FDA had approved its testing protocols, Celgene indisputably had at least a reasonable basis to fear that an extra-REMS sale of Thalomid or Revlimid would run afoul of the law—and potentially subject Celgene to FDA enforcement or a misbranding prosecution." (*Id.* at 31). Celgene argues that "in the absence of FDA approval, the antitrust laws do not compel a manufacturer to sell samples of a REMS product to a generic manufacturer for purposes of bioequivalence testing." (*Id.* at 32 (citations omitted)). And Celgene contends that, "[i]n addition to the law, the undisputed evidence in discovery refutes Mylan's argument that Celgene should have sold it samples before receiving the FDA's permission." (*Id.* at 33). Celgene maintains that "it was reasonable for Celgene to condition selling Thalomid and Revlimid samples on FDA authorization" and that "summary judgment should be granted on Mylan's claims that Celgene should have sold samples before Mylan informed Celgene of FDA's alleged approval." (*Id.* at 34).

In opposition, Mylan asserts that "Celgene never questioned the legality of providing samples to third parties outside of the REMs programs," and only for generic companies, **[*31]** "Celgene claimed that it needed approval from FDA. . . ." (D.E. No. 237 at 25). Mylan claims that, "at least after receiving FDA approval, Celgene had no reason (other than its anticompetitive desire to foreclose competition) to refuse to sell samples to Mylan." (*Id.* at 37). It asserts "the evidence makes clear that FDA review and approval of bioequivalence protocols is not required by law"—and the "FDA introduced the procedure in this case because there had been complaints about Celgene's refusal to provide samples." (*Id.*). Mylan maintains that generic companies were "permitted (but not required) to submit protocols for FDA review and the agency would then permit its approval to be communicated to Celgene in order to satisfy safety-related concerns." (*Id.* at 37-38). Mylan argues that "FDA review and approval of their bioequivalence protocols was unnecessary and Celgene's insistence on that review was part of its anticompetitive scheme." (*Id.* at 39-40).

C. Analysis

As noted, "a monopolist will be found to violate *§ 2* of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification." *LePage's Inc*, 324 F.3d at 152; *see also* *Retractable Techs., Inc. v. Becton Dickinson & Co., 842 F.3d 883, 892 (5th Cir. 2016)* ("To determine whether conduct is exclusionary, the court looks to the proffered business **[*32]** justification for the act. If the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported.") (internal quotation marks and citations omitted).

As an initial matter, both parties—seemingly for the sake of convenience and for summary-judgment purposes—refer to the following as FDA "approvals" of Mylan's proposed bioequivalence study protocols that were conveyed to Celgene: (1) the November 16, 2007 letter relating to Thalomid® from Mylan to Celgene that confirmed Mylan "received affirmation from the [FDA] indicating that Mylan's proposed bioequivalence study protocols regarding

Thalidomide Capsules provide adequate safety measures to ensure the safety of subjects"[13]; and (2) the March 11, 2014 letter relating to Revlimid® from Mylan to Celgene that served "to notify Celgene that Mylan has received all necessary approvals from the FDA to conduct the requested bioequivalence testing."[14] (*See, e.g.*, D.E. No. 228 at 9-10, 11-12, 30, 34; D.E. No. 237 at 10, 13, 37-38; D.E. No. 277 at 19:8-20:5, 35:2-6, 54:12-22).

The Court finds there is no genuine dispute of material fact that Celgene acted reasonably by requiring **[*33]** FDA approval before selling Mylan samples of Thalomid® and Revlimid®. In so finding, the Court assumes Mylan meets the first prong of the burden-shifting framework. But the Court finds that Celgene has met its burden at this stage that it had a valid business justification for requiring FDA approval—which Mylan has not rebutted for this issue to go to a jury. *See* *Morris Comm'cns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004)* ("Unlawful monopoly power requires anticompetitive conduct, which is conduct without a legitimate business purpose . . . .").

To begin with, the FDA's July 1998 NDA-approval letter for Thalomid® provides, in relevant part, as follows:

> We have reviewed this application under the restricted distribution regulations contained in 21 CFR 314 (Subpart H) and have concluded that restrictions on distribution and use of thalidomide are needed to assure safe use of the product. Please see *21. CFR 314.520*.
>
> We have completed our review of this application, including the restrictions on the distribution and use of this product you suggested in your June 8, 1998 submission to the NDA entitled "System for Thalidomide Education and Prescribing Safety (S.T.E.P.S.)." We have concluded that adequate information has now been presented to demonstrated [sic] that the drug, **[*34]** when marketed in accordance with the terms of restricted distribution and use outlined in the June 8, 1998 S.T.E.P.S. document, is safe and effective for use . . . .
> Please note that the June 8, 1998 S.T.E.P.S. restricted distribution program is an integral part of the approved NDA for this product and is an essential component of the terms of this NDA's approval by FDA for marketing this product in the United States. As such, any proposed change(s) in the S.T.E.P.S. program must be submitted to the FDA as a supplement to this NDA and any proposed change(s) must have FDA prior approval before implementation. Changing the S.T.E.P.S. program without prior FDA approval may render the product misbranded and an unapproved new drug.
> . . . .
> In order to monitor the success of compliance with the restricted distribution provisions of this approval action, we intend to conduct inspections of the monitoring sites, . . . as well as Celgene's records during the first quarter after product launch. We will meet with you to discuss the inspections within one month after completions of the inspections. Inspections and meetings with you will continue periodically thereafter as appropriate.

(D.E. No. 228-3, **[*35]** Ex. 1).

In its February 8, 2007 correspondence to Celgene, the FDA stated, in relevant part, that the agency

> intends to exercise its enforcement discretion to permit Celgene to provide to another drug manufacturer (or its agent) 500 units of Thalomid for the purpose of conducting bioequivalence testing, *when Celgene has received confirmation in writing from the sponsor, its agent, or FDA that the sponsor of the study either has an IND in effect for the study or has otherwise provided the agency with sufficient assurance that the bioequivalence study will be conducted in such a manner as to ensure the safety of the subjects*.

(D.E. No. 228-6, Ex. 26 (emphasis added)).

As for Revlimid®, the FDA's December 2005 NDA-approval letter states, in relevant part, as follows:

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[13] (D.E. No. 228-6, Ex. 32).

[14] (D.E. No. 228-9, Ex. 92).

> It is approved under the provisions of 21 CFR 314.520 (Subpart H) . . . for use as recommended in the agreed upon labeling text, required patient labeling, and the components of the RevAssistSM Risk Minimization Action Plan (RiskMAP).
>
> Under 21 CFR 314.520 (Subpart H), distribution of the drug is limited as described below and in the attached detailed RevAssistSM program. The primary goal of the RevAssistSM program is to prevent fetal exposures, pending complete **[*36]** and adequate characterization of the teratogenic potential of lenalidomide.
>
> . . . .
>
> We remind you that your Revlimid® RiskMAP (called RevAssistSM) is an important part of the postmarketing risk management for Revlimid® . . . .
>
> . . . .
>
> Any change to the [Revlimid® Risk Minimization Action Plan] must be discussed with FDA prior to its institution and is subject to FDA's determination that the required components continue to be met. We expect your continued cooperation to resolve any problems regarding the RevAssistSM program that may be identified following approval of this application.

(D.E. No. 228-8, Ex. 77).

In its May 14, 2013 correspondence to Mylan, Celgene stated, in relevant part, that

> Please provide written confirmation that Mylan's bioequivalence protocols have been approved by the Food and Drug Administration ("FDA"), a copy of such FDA approved protocols, and written confirmation that the FDA will allow Celgene to sell the requested amount of Revlimid (2800 capsules) to Mylan (we note in your letter that Mylan has submitted its protocols to the Office of Generic drugs) . . . .

(D.E. No. 228-9, Ex. 90).

Mylan's own expert testified at deposition that it was not unreasonable to get **[*37]** assurances from the FDA—a point Mylan conceded at oral argument. (*See* D.E. No. 228-6, Ex. 31 at 59:12-60:12, 67:13-17; *see also* D.E. No. 277 at 41:10-21 ("[Court:] Doesn't your own expert — I pulled that transcript, I have it — doesn't your own expert say it was not unreasonable to get assurances from the FDA? [Mylan's Counsel]: He does, your Honor, and that testimony is there, and I would expect Celgene to argue it vociferously to the jury. But it does not eliminate a question of fact on that issue, your Honor. But, absolutely, he said that. We don't believe it was correct, but he said it. He's our expert. We're held to it . . . . It is something that the jury will have to weigh when the jury hears it.")).

And Mylan also conceded at oral argument that it asked for FDA approval of other companies' study protocols when such companies made sample requests to Mylan for clinical testing. (*See* D.E. No. 277 at 50:17-51:13; *see also* D.E. No. 228-10, Ex. 107 (discussing "a request from Amneal to purchase a quantity of Amnesteem (isotretinoin) from Mylan for purposes of completing its product development program" and stating that "Mylan is happy to cooperate with Amneal and make the product **[*38]** available," but "Mylan will just need a letter from the FDA confirming that Amneal has submitted bioequivalence study protocols that provide for the necessary safety precautions for prevention of fetal exposure to isotretinoin and that the FDA has reviewed those protocols and found them acceptable")).

To be sure, Mylan implies that Celgene has provided Thalomid® and Revlimid® to thousands of investigator-initiated trials ("IITs"), as well as other pharmaceutical companies, that would not result in a competitive threat—*without* requiring FDA review and approval of protocols. (*See* D.E. No. 237 at 16-17, 24-26).

But the record does not support Mylan's contention. Rather, Celgene has come forward with record evidence showing the opposite. (*See* D.E. No. 240-1, Celgene's Reply Statement of Material Facts ("Celg. Reply SMF") ¶ 317)). In particular, Celgene cites the following deposition testimony: "Every single patient that is enrolled in an investigator-initiated trial is enrolled in either STEPS or RevAssist or the lenalidomide counseling program." (D.E. No. 240 at 6 n.5; D.E. No. 240-4, Ex. 130 at 90:9-15;[15] *see also* D.E. No. 238-29, Ex. P307 at 4 (agreement

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[15] The deponent previously "managed the implementation and execution of all investigator-initiated trials that involved Thalomid and Revlimid." (D.E. No. 238-27, Ex. P299 at 21:16-19; *see also id.* at 25:3-9).

between Celgene and Merck & Co., **[*39]** Inc. in which Merck & Co. must "ensure that the Investigators will prescribe . . . Revlimid® and will: a) register with Celgene's RevAssist® Program prior to prescribing . . . b) require that all Clinical Trial subjects register with Celgene's RevAssist® Program . . . and c) require that all Clinical Trial subjects return all unused" Revlimid® "in accordance with the RevAssist® Program")).

Mylan cites a portion of deposition testimony and argues that Celgene conceded "that it knew that it is possible for a company to conduct human trials using Thalidomide without necessarily using the precise STEPS method." (*See* D.E. No. 237 at 40 (internal quotation marks omitted) (citing Celg. Reply SMF ¶ 333)). But Mylan leaves out a portion reproduced in its own statement of material facts: "STEPS was designed and RevAssist was designed to mimic the types of controls we have in an IRB approved clinical trial in a commercial setting . . . [Y]es, it is possible to conduct a trial without using our STEPS or Lenalidomide REMS, *but we have to be assured that it meets a [sic] minimum standards of what is established in the way we commercially distribute our drug*." (Celg. Reply SMF ¶ 333 (alterations **[*40]** in original) (emphasis added)). After all, the issue is whether there was an objectively legitimate business justification in requiring FDA approval of study protocols before turning over samples, not the precise use of Celgene's REMS programs. *See LePage's Inc.*, 324 F.3d at 152 ("[A] monopolist will be found to violate *§ 2* of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification.").[16]

Further, persuasive authority supports that—until Celgene was informed about the FDA's approval of Mylan's testing protocols for either drug—no reasonable jury can infer that Celgene had no objectively legitimate business justification for not selling Mylan samples of Thalomid® or Revlimid®. *See Natco Pharma, 2015 U.S. Dist. LEXIS 131058, 2015 WL 5718398, at *4-6* (granting brand company's motion to dismiss generic company's *Section 2* refusal-to-deal claims, in part, because "complying with FDA requirements requiring a valid prescription before dispensing [the brand product] constitutes a valid business reason to refuse to dispense [the brand product] outside of the REMS requirements"); *cf. In re Thalomid and Revlimid Antitrust Litig., No. 14-6997, 2015 U.S. Dist. LEXIS 177541, 2015 WL 9589217, at *15 (D.N.J. Oct. 29, 2015)* (denying Celgene's motion to dismiss plaintiffs' complaint because they "specify that Mylan and [another generic company named Lannett Company, Inc. ("Lannett")] gave **[*41]** Celgene letters from the FDA that stated that the agency would not take action should Celgene provide samples to them" and "Celgene continued to refuse to deal," which "raises a plausible inference that Celgene's reliance on its distribution programs is pretextual").

The overarching flaw with Mylan's position—regarding alleged liability for Celgene's conduct before FDA "approval" of Mylan's protocols—seems to be that a jury could find liability based apparently only on intent. For example, Mylan states that:

> at least after receiving FDA approval, Celgene had no reason (other than its anticompetitive desire to foreclose competition) to refuse to sell samples to Mylan. . . . The FDA introduced the procedure in this case because there had been complaints about Celgene's refusal to provide samples. Generics were therefore permitted (but not required) to submit protocols for FDA review and the agency would then permit its approval to be communicated to Celgene in order to satisfy safety-related concerns. . . . *Although Mylan did not protest contemporaneously to Celgene that FDA approval was unnecessary, Mylan did not have access to all of the evidence it now has demonstrating that Celgene's **[*42]** modus operandi was to delay and foreclose generic entry to protect its monopoly over the thalidomide and lenalidomide markets. Now, after discovery, it is clear that Celgene's intent was to restrict competition*.

(D.E. No. 237 at 37-38 (emphasis added) (internal citations omitted)).

As stated by the Court of Appeals for the Ninth Circuit, however, intent "is not sufficient alone to establish liability." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1184 (9th Cir. 2016)* ("Competitors are not required to engage in a lovefest; indeed, '[e]ven an act of pure malice by one business competitor against another does not,

[16] *See also* *Morris Comm'cns Corp., 364 F.3d at 1295* ("Even a company with monopoly power has no general duty to cooperate with its business rivals and may refuse to deal with them if valid business reasons exist for such refusal. . . . Unlawful monopoly power requires anticompetitive conduct, which is conduct without a legitimate business purpose that makes sense only because it eliminates competition.") (internal quotation marks and citations omitted).

without more, state a claim under the federal antitrust laws."') (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*; *see also* *Olympia Equip. Leasing Co. v. W. Union Telegraph Co., 797 F.2d 370, 379 (7th Cir. 1986)* ("[I]f conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant.").

In sum, the record in this case, as well as persuasive authority, compels this Court to find that there is no genuine issue of material fact that it was objectively reasonable for Celgene to require FDA approval of Mylan's protocols before selling Mylan samples of either Thalomid® or Revlimid®. Celgene is therefore granted summary judgment on Mylan's claims that Celgene improperly withheld samples of either of these drugs before **[*43]** receiving assurance that the FDA had approved Mylan's protocols.

X. Issues of material fact exist about whether Celgene can be held liable under *§ 2* of the Sherman Act for conduct after FDA "approval" of Mylan's protocols

A. Relevant factual background

Thalomid® Samples.

- **9/11/2007**: The FDA writes to Mylan, stating: "The proposed bioequivalence study protocol comparing Thalidomide Capsules . . . to . . . Thalomid® (Thalidomide) Capsules . . . are acceptable, provided that" Mylan includes 14 "recommendations." (D.E. No. 228-6, Ex. 30);

- **11/16/2007**: Mylan writes to Celgene stating that "it is Mylan's understanding that" the FDA "informed Celgene that FDA intends to exercise enforcement discretion to permit Celgene to provide another drug manufacturer with Thalomid® for the purpose of conducting bioequivalence . . . testing" and that "this letter confirms that Mylan has received affirmation from the Agency indicating that Mylan's proposed bioequivalence study protocols regarding Thalidomide Capsules provide adequate safety measures to ensure the safety of subjects." (*Id.* at Ex. 32);

- **11/21/2007**: Celgene's then-Regulatory and Compliance Counsel sends a calendar-invite email to several Celgene **[*44]** executives with the subject line "Exclusivity Strategy Special meeting," stating that another generic company's request "is deficient in a way that the Mylan request is not, and the Mylan request is what we should anticipate future requests looking like." (*See* D.E. No. 237-16, Ex. P26);

- **1/8/2008**: Celgene writes to Mylan in response to Mylan's 11/16/2007 letter, stating that "Mylan seeks to purchase 2,500 capsules of Thalomid®" which is "contrary to FDA's stated enforcement discretion policy" that "established a 500-unit limit" such that "Celgene is prohibited from provided the requested Thalomid®." Celgene also requests that Mylan provide additional information such as "intended risk management measures," stating that "Celgene's concerns about distributing Thalomid® outside of the S.T.E.P.S.® program are independent of FDA's regulatory oversight" and "there are significant business and liability concerns associated with Celgene's distribution of Thalomid®." Further, Celgene inquires about indemnification relating to Mylan's proposed studies. (D.E. No. 228-6, Ex. 34);

- **2/25/2008**: Mylan responds to Celgene's 1/8/2008 letter, stating that it is "curious that [Celgene] is asking for these **[*45]** voluminous and proprietary materials only now, many months after our initial exchange" where no mention of wanting such items was made and that "Celgene is using these information requests as pretext to continue to delay generic competition to Thalomid®." Further, Mylan provides a draft confidentiality agreement and states that "in hopes of avoiding further delay," Mylan is prepared to provide Celgene immediately with all the requested information on a confidential basis. (D.E. No. 238-13, Ex. P170);

• **6/27/2008**: Mylan writes Celgene (in response to Celgene's 1/8/2008 letter), stating that it "has received affirmation from FDA indicating that Mylan's proposed study protocols for Thalidomide capsules provide adequate safety measures to ensure the safety of patients sufficient to permit the Agency to exercise its enforcement discretion in permitting the transfer of a limited amount of Thalomid® for study purposes." Mylan also raises concern that Celgene is using "information requests as a pretext to continue to delay generic competition to Thalomid®," but "in hopes of avoiding further delay, we provide you with all of the information you requested." Mylan also represents that it "is willing **[*46]** to enter into an appropriate indemnification arrangement to indemnify Celgene" for liability resulting from Mylan's studies. (D.E. No. 228-7, Ex. 39);

• **6/24/2009**: Celgene writes Mylan, stating that Mylan has not provided Celgene a copy of the FDA's approval letter and Mylan's proposed bioequivalence protocol—and noting certain purported omissions from Mylan's submitted information as of that day. (*Id.* at Ex. 43; Celg. SMF ¶ 52).

Revlimid® Samples.

• **5/14/2013**: Celgene writes to Mylan in response to a 5/1/2013 letter from Mylan, stating: "Celgene will sell Revlimid to Mylan for the sole purpose of in vitro and in vivo bioequivalence testing necessary to support an ANDA upon (i) our satisfactory review of the documents requested [in the letter] and (ii) the execution of a Supply Agreement which will include the terms and conditions for sale, including indemnification provisions." Celgene also requested (among other things in nine categories of information) "written confirmation that Mylan's bioequivalence protocols have been approved by the [FDA]." (D.E. No. 228-9, Ex. 90);

• **7/29/2013**: The FDA writes Mylan in response to a 5/7/2013 letter, stating that Mylan's "three submitted protocols **[*47]** are safe to proceed" and "include adequate safeguards that serve as an appropriate substitute for the controls present in the FDA mandated Revlimid® REMS program for ensuring patient safety." (*Id.* at Ex. 91);

• **3/11/2014**: Mylan writes Celgene, stating that this "letter serves to notify Celgene that Mylan has received all necessary approvals from the FDA to conduct the requested bioequivalence testing," citing the 7/29/2013 letter from FDA to Mylan and attaching a copy of that letter to its correspondence. Mylan also states that it "will not reengage in the back-and-forth correspondence initiated by Celgene over a more than three year period when Mylan similarly sought samples of thalidomide. . . ." Mylan further provided terms regarding indemnification. (*Id.* at Ex. 92);

• **3/20/2014**: Celgene writes Mylan, reiterating its requests for the information it requested in its 5/14/2013 letter. Celgene also represents that it would sell Revlimid® samples to Mylan upon its "satisfactory review of the documents and information" it requested and the execution of a Supply Agreement, including indemnification provisions substantially similar to the indemnification provisions that Mylan had proposed. **[*48]** (D.E. No. 237-27, Ex. P77);

• **5/19/2014**: The FDA writes Celgene stating that it has received a request from Mylan for help in getting Revlimid® "supplies" to test "a proposed generic lenalidomide product against Revlimid" and it "will not consider it a violation of the REMS for Celgene to provide to Mylan (or its agent) a quantity of Revlimid sufficient to allow Mylan to perform the testing to support its abbreviated new drug application." Further, the FDA noted that federal law "prohibits the holder of a new drug application covered by a REMS from using [REMS' elements] to block or delay approval of" an ANDA. Finally, the FDA said it "expects Celgene to provide Mylan with a sufficient quantity of REVLIMID to conduct necessary testing, but in any event no less than 500 capsules of each strength (2.5mg, 5mg, 10mg, 15mg and 25mg)." (D.E. No. 228-9, Ex. 93).

B. The parties' contentions

Celgene argues that "Mylan never contests that it was reasonable for Celgene to insist on information and assurances from Mylan before selling these highly dangerous medicines." (D.E. No. 240 at 4). It contends that "[t]he FDA's purported approval—which Mylan refused to disclose to Celgene until discovery **[*49]** in this litigation . . . —gave Celgene no assurances, for example, that Mylan had sufficient insurance or that Mylan would indemnify Celgene against losses." (*Id.* at 8 (internal citation omitted)).

In opposition, Mylan asserts that "Celgene purposefully developed iterative requests for which no reasonable end could be reached." (D.E. No. 237 at 23). Mylan argues that Celgene put Mylan "through multiple rounds of questioning that could only have been for the purpose of delay." (*Id.*). As an example, Mylan states that Celgene "chose to wait until serving Mylan with a second set of information demands in 2009—nearly four years after Mylan's initial request to procure product and after Mylan had already produced hundreds of pages of information that went unreviewed by anyone at Celgene." (*Id.* (citations omitted)). Mylan further contends that "several individuals identified by Celgene as the 'key decision-makers' regarding Mylan's request for samples never even reviewed the information sent by Mylan" and that "executives and employees who typically evaluated information from requesting parties ultimately played no role in processing generic requests." (*Id.* at 22).

C. Analysis

As for Celgene's conduct after **[*50]** receiving notice of FDA approval of Mylan's protocols, there are genuine issues of material fact such that a reasonable jury could infer that Celgene had no objectively legitimate business justification for not selling Mylan samples of Thalomid® or Revlimid®.

Although redundant in part, it is critical to recount some key events, as well as provide additional background. As noted regarding Thalomid®, Mylan's November 16, 2007 letter to Celgene stated that the FDA had approved Mylan's proposed protocols and that Mylan would pay the full value of shipment of Celgene's samples. (*See* D.E. No. 277 at 66:1-7). On January 8, 2008, Celgene wrote Mylan, questioning the amount of requested Thalomid® samples and requesting more information. (*See id.* at 66:8-19). On February 25, 2008, Mylan sent Celgene a letter in which Mylan represented that it was "prepared to provide" all the requested information from Celgene's January 8, 2008 letter. (D.E. No. 238-13, Ex. P170). Further, Mylan "enclosed a simple confidentiality agreement which [Mylan] ask[ed] that Celgene sign and return"—and if "any changes" are desired, to immediately contact Mylan. (*Id.*).

Celgene and Mylan negotiated over the confidentiality **[*51]** agreement until June 24, 2008, when Celgene sent Mylan the executed agreement. (Celg. Reply SMF ¶ 203). On June 27, 2008, Mylan sent Celgene a letter providing responses and supplemental information in response to Celgene's requests in its January 8, 2008 letter and also offered to enter into an appropriate indemnification agreement. (*Id.* ¶ 204). Celgene disputes any implication that Mylan's responses were complete and satisfactory. (*Id.*).

On July 25, 2008, Mylan sent Celgene a follow-up letter because it had not received a response to its June 27, 2008 letter, setting an August 1, 2008 deadline for a response or else it would pursue legal action. (*Id.* ¶ 205). In an August 1, 2008 letter, Celgene represented to Mylan that it was "carefully reviewing the documentation" that Mylan provided with its June 27, 2008 letter and that it would send Mylan a draft indemnification agreement by August 15, 2008. (*Id.* ¶ 206). But in his deposition, Celgene's then-Regulatory and Compliance Counsel confirmed that, as of March 4, 2011, no "business people" at Celgene had reviewed the supporting documentation sent by Mylan in response to Celgene's January 8, 2008 letter. (*Id.* ¶¶ 181, 209).

On August 15, **[*52]** 2008, Celgene sent a draft indemnification agreement to Mylan and the parties exchanged negotiation-related correspondence. (*See id.* ¶¶ 211-12). Finally, in a June 24, 2009 letter, Celgene wrote Mylan requesting the FDA's approval letter concerning Mylan's testing protocol, a copy of the protocol, and certain evidence concerning insurance. (D.E. No. 228-7, Ex. 43).

There are issues of fact—which may be interrelated—that are apparent from this history. First is timing. For example, regarding Mylan's request for Thalomid® samples, why did Celgene not ask for the FDA approval letter before June 24, 2009 as opposed to sooner? (*See, e.g.*, Celg. Reply SMF ¶ 213; *see also* D.E. No. 277 at 79:5-83:6). To be sure, at oral argument, Celgene argued that timing issues (such as this one) are not fatal to summary judgment. For example, it explained that these timing issues related to what it learned through its "dealings" with another generic company, Lannett Company, Inc., who also sought samples from Celgene. (*See* D.E. No. 277 at 78:16-80:21). But as the Court indicated during the oral argument, this explanation must be presented to a jury. (*See id.* at 80:22-24; *see also id.* at 81:20-83:6).

Moreover, **[*53]** no "business people" at Celgene reviewed Mylan's supporting documentation in response to Celgene's January 8, 2008 letter. (Celg. Reply SMF ¶¶ 181, 209). But Celgene served an interrogatory response in a Federal Trade Commission (the "FTC") investigation that the two then-CEOs "made the decisions on behalf of Celgene regarding Celgene's responses to pharmaceutical companies requesting to purchase THALOMID® or REVLIMID®" with legal advice from Celgene's Deputy General Counsel and then-Regulatory and Compliance Counsel. (Celgene Reply SMF ¶ 207). Yet one of these two CEOs testified at deposition that "he did not have any input into Celgene's information requests on January 8, 2008, did not know for sure who had provided input, and had never seen Mylan's June 27, 2008 letter responding to the requests"—and further, "he could not recall reviewing 'a single response from a generic company' to Celgene's information requests, or sitting in any meeting with Celgene's legal, regulatory, or drug safety departments where such a response was discussed." (*Id.*). And the other CEO testified that "he had no 'personal knowledge of whether' anyone actually reviewed the protocols submitted by various **[*54]** generic companies over time." (*Id.* ¶ 208).

In sum, the Court finds that there are genuine issues of material facts such that a reasonable jury could infer that Celgene had no objectively legitimate business justification for not selling Mylan samples of Thalomid® or Revlimid® samples after FDA approval of Mylan's study protocols.[17] Policy considerations further bolster this finding.

"Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue"—and "[p]art of that attention to economic context is an awareness of the significance of regulation." *Trinko, 540 U.S. at 411*. In fact, the Supreme Court stated in *Trinko* that "regulatory context . . . may also be a consideration in deciding whether to recognize an expansion of the contours of *§ 2*." *Id. at 412*. Juxtaposing the post-FDA approval record here with the policy behind the Hatch-Waxman Act—as well as the absence of a regulatory mechanism by which an agency can compel Celgene to turn over samples to Mylan—weighs against granting Celgene summary judgment for claims involving conduct after FDA approval of Mylan's protocols. *Cf. In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 64 F. Supp. 3d at 687 ("[R]egulatory structure requiring cooperation actually diminishes the **[*55]** need for antitrust scrutiny.").

XII. Mylan cannot recover monetary damages for claims concerning Revlimid®

A. The parties' contentions

Celgene argues that, although Mylan did not ask for Revlimid® samples until 2013, "its theory assumes that, in the but-for world, Mylan would have obtained samples, developed a generic product, passed bioequivalence testing,

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[17] Celgene's motion for summary judgment seeks dismissal of Mylan's claims for attempted monopolization and denial of an "essential facility." (*See, e.g.*, D.E. No. 240 at 8 n.8). But Celgene's proffered basis for dismissal of these claims assumes that—whether before or after FDA approval—there is no genuine issue of material fact that Celgene had a legitimate business justification for refusing to provide samples of Thalomid® and Revlimid®. (*See id.*). Because the Court cannot dismiss Mylan's claims insofar as they concern Celgene's conduct *after* FDA approval of Mylan's protocols, the Court cannot dismiss Mylan's claims for attempted monopolization and denial of an "essential facility" at this time.

Similarly, because Mylan's state antitrust claims rise and fall with the federal antitrust claims, the Court denies Celgene's motion insofar as it seeks dismissal of those claims in their entirety. (*See* D.E. No. 277 at 184:11-23).

and filed an ANDA—all by January 2010." (D.E. No. 228 at 35). "No reasonable jury could so find," says Celgene. (*Id.*).

In particular, Celgene contends that Natco Pharma ("Natco"), another generic company, filed an ANDA seeking FDA approval to market a generic version of Revlimid® in July 2010. (*Id.* (citing Celg. SMF ¶¶ 113-15)). It says that Celgene and Natco then engaged in patent litigation relating to Natco's ANDA filing—but settled such that Natco can market a limited amount of its generic version beginning in 2022, with full market entry in 2026. (*Id.* at 13, 35). Notably, Celgene asserts that "Mylan's sole damages theory for Revlimid" is that, had Celgene sold Mylan Revlimid® samples, "Mylan would have been able to file an ANDA before Natco, and that Mylan, instead of Natco, would be the one to enter the market in 2022 as the exclusive ANDA **[*56]** seller of generic lenalidomide." (*Id.* at 35-36 (citations omitted)). In other words, Celgene states that "Mylan's expert's damages model assumes that Mylan would have filed its ANDA in January 2010, before Natco, and that Mylan would have negotiated the same patent litigation settlement with Celgene that Natco did"—even though "Mylan did not ask Celgene for Revlimid samples until 2013." (*Id.* at 38 (citations omitted)).[18] Celgene argues that there is no evidence supporting this assumption. (*See id.*).

Critically, Celgene argues—in supplemental briefing requested by the Court—that, if the Court finds that Celgene cannot be held liable for conduct *before* FDA approval of Mylan's protocols, the Court need not decide whether Mylan can recover damages for Revlimid®. (*See* D.E. No. 270 at 3). Celgene thus avers that any claim concerning Revlimid® should be limited to injunctive relief. (D.E. No. 228 at 35).

In opposition, Mylan argues that any earlier request for Revlimid® samples would have been futile. (*See* D.E. No. 237 at 51-52). It contends that Celgene had a policy—until at least August 2012—that it would not, under any circumstances, sell or provide Revlimid® samples to generic companies for purposes of **[*57]** bioequivalence testing. (*Id.* at 52). Indeed, Mylan states that Celgene denied or failed to respond to every generic company's request for Revlimid® samples before 2010. (*Id.*). And, in light of this and Celgene's "years stringing along Mylan in its requests for Thalomid samples," Mylan argues that it "was entirely reasonable" that requesting samples in January 2008 would have been futile. (*Id.*). Mylan avers that, "[b]ecause of Celgene's anticompetitive conduct, the jury should resolve the issue of what Mylan's development timeline would have looked like in the but-for world." (*Id.* at 54).

Notably, Mylan argues—in supplemental briefing requested by the Court—that "any determination by the Court that FDA review of Mylan's protocols was required can easily be incorporated into Mylan's existing damages models" because, for both drugs at issue, "the time frame from submission of Mylan's protocols to the conclusion of the FDA's review was a matter of months." (D.E. No. 271 at 3). Mylan argues that this is "consistent with the negotiation timelines assumed" by its expert. (*Id.* ("Adding an express assumption that Celgene would have requested an FDA review (and that Mylan would have pursued it) to each damages **[*58]** timeline would require only a minor change in the assumptions of the model and no change to the actual damages calculations for each drug.")).

B. Analysis

Mylan's damages theory for its Revlimid® claims implicates the following figure from Mylan's expert's report:

Timing Underlying Mylan's "But For" Entry Into Generic Lenalidomide

Event	Time Required	Completion Date
Request Revlimid Sample	N/A	1/2008

[18] (*See also* D.E. No. 228 at 38 ("Mylan must produce evidence that, but for Celgene's allegedly unlawful conduct, Mylan would have: (i) asked Celgene for samples of Revlimid in 2008—five years before it actually did ask; (ii) developed a generic lenalidomide product in one-sixth of the time it actually took; (iii) shown that its product was bioequivalent to Revlimid by January 2010; and (iv) obtained the same patent settlement license from Celgene that Natco did after years of litigation.")).

Event	Time Required	Completion Date
Time to get Sample	6-12 Months	7/2008 to 1/2009
Complete bioequivalence Testing and ready To File ANDA	6 Months	1/2009 to 7/2009
File ANDA (after Celgene data exclusivity rights expire 12/27/2009)	N/A	1/1/2010
Patent Trial	30 Month Stay	7/2012
Negotiate REMS and ready to enter	6-12 Months	1/2013 to 7/2013
Entry Date Used (Based on Celgene/Natco Licensing Agreement)	N/A	Q2 2022

(D.E. No. 228-10, Ex. 99, Figure 2).[19]

Natco filed an ANDA for a generic version of Revlimid® in July 2010. (Celg. SMF ¶ 113; *see also* D.E. No. 228-10, Ex. 99 at 83). Mylan's damages theory thus contemplates an ANDA filing for a generic version of Revlimid® in January 2010—*before* Natco. (D.E. No. 228-10, Ex. 99 at 106). Importantly, this means that Mylan's damages model involves Mylan having "first-to-file" status and benefitting from the lucrative 180-day **[*59]** exclusivity period. (*See* *id. at 107*). In turn, this means that no other generic company could have marketed a generic version of Revlimid® before the fourth quarter of 2022 besides Mylan. (*See* *id. at 110*). Mylan agreed at oral argument that, for its existing damages model, it would need to be the first-filer. (*See* D.E. No. 277 at 111:19-23; *see also id.* at 124:15-17).

But, for reasons already discussed, the Court finds that Celgene is entitled to summary judgment on Mylan's claims concerning pre-FDA approval of Mylan's study protocols. In other words, there is no genuine issue of material fact that Celgene had an objectively legitimate business justification for requiring FDA approval of study protocols before turning over Revlimid® samples. And Mylan did not seek Revlimid® samples from Celgene and get FDA approval of its protocols until 2013—and did not communicate said FDA approval to Celgene until 2014.

Unlike for its Thalomid® claims (discussed below), Mylan proffers no damages model for its Revlimid® claims that contemplates an ANDA filing *after* FDA approval of its study protocols. Moreover, Mylan does not point to any evidence that Mylan could have developed its study protocols for its lenalidomide **[*60]** ANDA sooner than it actually did—which Celgene noted at oral argument. (*See* D.E. No. 277 at 117:7-12).

In contrast, for its Thalomid®-related claims, Mylan's expert proffers a damages calculation that is *not* entirely invalidated by the Court's ruling concerning FDA approval of Mylan's protocols: "I calculate damages assuming the following characteristics of the 'but for world' . . . Mylan's launch is delayed to Q3 2012 under the assumption that *Celgene does not provide samples until after Mylan gets FDA approval for its safety protocol*." (D.E. No. 228-10, Ex. 99 at 120 (emphasis added)).

At oral argument, Mylan's rebuttal boiled down to one concept: futility. Mylan reasons that, "had Celgene not engaged in this recidivist behavior," then "samples would have been requested and the process would have begun much earlier than it did" because "Mylan had identified Revlimid® for potential generic entry many years before, certainly by 2008." (D.E. No. 277 at 87:16-21). According to Mylan, "[t]here's no question that it could and would have begun the process then, and so rather than getting FDA approval in 2013, it would have gotten it in 2009 or

[19] Giving Mylan the benefit of the doubt, the Court sets aside—for purposes of summary judgment—Mylan's allegation in its Complaint that: "In January 2009, Mylan began efforts to develop a generic equivalent to Celgene's Revlimid." (D.E. No. 1 ¶ 131).

earlier." (*Id.* at 87:21-24). Mylan submits that, **[*61]** by January 2008, pursuing a generic version of Revlimid® was an opportunity for Mylan—"and had Celgene not been the problem that it had shown itself to be, . . . there's really no question that samples would have been requested at that time." (*Id.* at 103:21-24; *see also id.* at 104:14-15 (arguing that "asking for the samples had been demonstrated to be futile, expensive and painful")). Mylan stresses that "a demand is not necessary to show futility," and "the facts overwhelmingly demonstrate that such a request would have been futile." (*Id.* at 104:19-22).

Setting aside that Mylan's expert proffers no damages calculation assuming that samples are turned over *after* FDA approval of Mylan's protocols, there are still at least two problems with Mylan's position.

First, Mylan complains of futility based on Thalomid®-related back-and-forth with Celgene. As discussed, the Court has determined that Celgene cannot be held liable for conduct *before* FDA approval of Mylan's protocols. The back-and-forth preceding that date—November 16, 2007—involved: (1) Mylan's September 2, 2005 request (D.E. No. 228-4, Ex. 16); (2) Celgene's December 19, 2005 response directing Mylan to contact the FDA regarding **[*62]** S.T.E.P.S. (D.E. No. 228-5, Ex. 18); (3) the FDA's February 12, 2007 letter to Mylan stating that it will exercise enforcement discretion "when Celgene has received confirmation in writing from the sponsor, its agent, or FDA that the sponsor of the study . . . has . . . provided the agency with sufficient assurance that the bioequivalence study will be conducted in such a manner as to ensure the safety of the subjects" (D.E. No. 228-6 at Ex. 28); and (4) the FDA's September 11, 2007 letter to Mylan finding the proposed protocols acceptable and providing 14 recommendations (*id.* at Ex. 30).

So then the critical date is November 16, 2007, when Mylan notified Celgene that the FDA approved its proposed protocols. This then begs the question: what happened between November 2007 and January 2008 that convinced Mylan that it would be "futile, expensive and painful" to ask for Revlimid® samples in January 2008?

The only potential answer on this record is Celgene's January 8, 2008 letter to Mylan, a conclusion Mylan confirmed at oral argument. (*See* D.E. No. 228-6, Ex. 34; D.E. No. 277 at 150:25-151:25). And the Court is unconvinced that a reasonable jury could find futility based on this one letter; **[*63]** it amounts to a mere scintilla of evidence. After all, in its November 16, 2007 letter, Mylan sought 2,500 capsules of Thalomid®—even though the FDA had notified both Celgene and Mylan in February 2007 that it intended "to exercise its enforcement discretion to permit Celgene to provide to another drug manufacturer (or its agent) 500 units of Thalomid" for bioequivalence testing. (*See* D.E. No. 228-6, Exs. 26, 28 & 32). And Celgene noted as much in its January 8, 2008 letter. (*See id.*, Ex. 34 ("Mylan seeks to purchase 2,500 capsules of Thalomid® . . . . Mylan's request is contrary to FDA's stated enforcement discretion policy, which established a 500 unit limit.")). Moreover, Mylan ultimately decided that "it would be fruitless to" respond to Celgene's June 24, 2009 letter. (Celg. SMF ¶ 53). Mylan's counsel characterized this one letter as evidence of that Celgene "was jerking [Mylan] around." (*See* D.E. No. 277 at 151:3-12). But counsel arguing that this is evidence of futility in January 2008 is not enough. *See* Berckeley Inv. Grp. v. Colkitt, 455 F.3d 195, 201 (3d Cir. 2006) (citation omitted) ("[S]ummary judgment is essentially 'put up or shut up' time for the non-moving party: the non-moving party must rebut the motion with facts in the record **[*64]** and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument.").

To be sure, Mylan's Head of Global Regulatory Science and Operations submitted a declaration—served after his deposition in this case and after the close of fact discovery—affirming, in relevant part, that:

> 6. Mylan selected lenalidomide as a generic product for development in January of 2008.
> 7. Mylan could have requested Revlimid samples from Celgene upon selecting this product for development. The only reason that Mylan did not request samples from Celgene at that time was because Mylan knew, from its Thalomid negotiations with Celgene, that Celgene would not engage in good faith negotiations.
> 8. If Mylan requested samples from Celgene in January of 2008, and Celgene negotiated with Mylan in good faith, it should have taken Mylan and Celgene approximately six to twelve months at most to negotiate a supply agreement and for Mylan to receive samples of Revlimid.

(D.E. No. 228-9, Ex. 94 at 2). But this cannot create an issue of material fact about futility because Celgene submits that this conflicts with prior sworn testimony before the FTC and therefore is barred by the "sham affidavit" rule. **[*65]** (*See* D.E. No. 228 at 41). Mylan never responds to this—which Celgene notes. (*See* D.E. No. 240 at 16-17).

Second, even accepting that somehow the January 8, 2007 letter is enough for a jury to find futility, there is another problem: "there is not a single shred of evidence in the record, expert or otherwise, that [Mylan] could have gotten their FDA *protocols* completed, submitted and approved." (*See* D.E. No. 277 at 108:14-16 (emphasis added); *see also id.* at 109:5-9 ("They don't have any expert who says — and they've got experts who say a lot of stuff here that we don't agree with. But none of them say oh, and you somehow could have wound the clock backwards on FDA protocol development and FDA review.")). Celgene stressed this point at oral argument. (*See id.* at 117:5-12, 140:3-10, 146:17-24, 147:2-16). And it is correct: Mylan points to no *evidence* that its study protocols would have been prepared and approved. This is simply not accounted for in Mylan's timetable for market entry of a generic version of Revlimid® or Mylan's Revlimid® damages model (as it is for Thalomid®).[20]

Accordingly, the Court grants Celgene summary judgment on Mylan's Revlimid® damages claim; relief sought for **[*66]** any claim concerning Revlimid® is hereby limited to injunctive relief.[21]

XIII. Celgene's statute-of-limitations defense for Mylan's Thalomid®-related claims is denied without prejudice

A. The parties' contentions

1. Before oral argument

Celgene argues that Mylan cannot recover for injuries caused only by acts outside the four-year limitations period for antitrust claims. (*See* D.E. No. 228 at 44; D.E. No. 240 at 19). It contends that Mylan cites Celgene's conduct regarding Thalomid® samples between 2005 and 2009, with the last act occurring on June 24, 2009. (D.E. No. 240 at 19). But Celgene states that Mylan sued more than four years later, on April 3, 2014. (*Id.*). So Celgene asserts that "[t]he statute of limitations for Mylan's claims regarding Thalomid began to run on the date of Celgene's [June 24, 2009] letter, and it expired on June 24, 2013." (D.E. No. 228 at 45).

Further, Celgene argues that "Mylan cannot extend the statute of limitations indefinitely by asserting a 'continuing refusal to deal'" because "[e]ven a 'continuing offense' requires proof of a specific injurious act by the defendant within the limitations period." (*Id.* (citations omitted)). It argues that, if "the law **[*67]** was otherwise, the statute of limitations would be nonexistent for refusal-to-deal claims" because a "plaintiff would be free to wait to sue for years, or decades, after the defendant communicated a refusal to deal, only then to claim that the refusal 'continued' into the limitations period because the defendant did not sell to the plaintiff in the meantime." (*Id.* at 48).

In opposition, Mylan counters that the general rule regarding accrual of the limitations period does not apply when, as here, damages are unascertainable at the relevant time. (D.E. No. 237 at 41-42). It argues that, for claims involving unascertainable damages, the limitations period starts when damages become concrete and measurable. (*Id.* at 42). And Mylan avers that its damages claim "is based on lost profits from the sales of generic thalidomide it would have made but for Celgene's refusal to supply samples." (*Id.*). Mylan's view is that "future lost profits had not accrued" as of June 24, 2009. (*Id.*). Mylan states that, before it could start making sales, Mylan still needed to take certain steps to secure FDA approval—which could not happen without samples. (*Id.*). So Mylan says that damages

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[20] In fact, on August 24, 2012, Mylan submitted its lenalidomide protocols to the FDA—but did not receive FDA approval until July 29, 2013. (*See* D.E. No. 228-9, Exs. & 91).

[21] For the reasons stated on the record, the Court denies Mylan's eleventh-hour request to change its damages model. (*See* D.E. No. 271 at 3; D.E. No. 277 at 125:21-136:13, 152:2-13).

began accruing when it would have entered **[*68]** the market in the third quarter of 2010 because that was when the injury was suffered. (*Id.*).

Further, Mylan contends that its Thalomid®-related claims are timely because of another exception to the general statute of limitations rule: the doctrine of continuing violations. (*Id.* (citations omitted)). It argues there is evidence that "Celgene committed several overt acts demonstrating the existence of a continuing scheme to protect its franchise from generic competition during the limitations period": (1) "Celgene continued to harm competition by delaying or outright foreclosing generic entry on Thalomid"; and (2) "in conjunction with shifting the Thalomid market to Revlimid, Celgene carried out its policy of categorically refusing to supply Revlimid samples to every generic that requested it, a policy that existed until at least mid-2012." (*Id.* at 43 (internal citations omitted)).

Regarding this second point, Mylan avers that, "[u]ntil at least 2012, Celgene continued to tell the FDA, FTC, and [the Connecticut Attorney General] that it should not have to sell samples to generics, but even if it must field requests, it should be permitted to do so via a procedure of its own choosing—one that would **[*69]** enable Celgene to maintain its monopoly power in the Revlimid market" and delay or foreclose Mylan's entry just like Celgene has done for thalidomide. (*Id.* at 44). In particular, Mylan argues that "Celgene's May 14, 2013 and March 20, 2014 letters to Mylan contained requests for information that were nearly identical to the categories of information that Celgene demanded in its January 8, 2008 letter regarding Thalomid"—which "constitute overt acts within the limitations period necessary to show the existence of Celgene's scheme to protect its franchise, because it was this entire scheme that caused Mylan's Thalomid harms." (*Id.* at 44).

In reply, Celgene argues that "damages for generic entry are not 'unascertainable' up to the moment of market entry, and indeed, Mylan is seeking *Revlimid* damages based on a projected market entry date that remains [four] years into the future." (D.E. No. 240 at 19 (emphasis in original)). As for Mylan's continuing-violations argument, Celgene argues that neither of Mylan's arguments make sense because: (1) "it is undisputed that Celgene did *nothing* to Mylan with respect to Thalomid after the limitations period began, so any violation did not 'continue' long enough to **[*70]** rescue Mylan's damages claim"; and (2) "Mylan cannot lump Thalomid and Revlimid into a single continuing 'violation,'" and "Mylan offers no authority that permits it to bootstrap Celgene's conduct with respect to one alleged product market into a 'continuing violation' with respect to wholly separate conduct allegedly impacting a different product market." (*Id.* at 20-21 (citations omitted) (emphasis in original)).

2. At oral argument

Mylan stressed that its argument relating to unascertainability is as follows:

> even under the assumptions in the damages model which are the earliest in terms of time, entry doesn't occur until 2010, within the limitations period. But prior to 2010, Mylan is not making money, it's incurring losses. It's making investments, it's doing this, it's doing that. But it hasn't sold anything in the market. The only time a cause of action accrues is when you're injured, and Mylan would not, certainly in this case, have been injured until it actually began selling the pills in the marketplace.

(D.E. No. 277 at 155:2-10).

Celgene responded that, "as a legal matter," it is "permissible" for one to "file a lawsuit on day one and . . . ask for damages for lost profits into the future." **[*71]** (*Id.* at 158:21-23). Celgene argues that this is, in fact, what Mylan's Revlimid®-related claim is because it contemplates lost future profits in 2022—and "[u]nder their logic, that claim never accrued." (*Id.* at 159:1-6). In Celgene's view, "the question in this case" is "as of June 2009 . . . was your Q3 2010 entry and whatever lost sales you had then, was it so speculative and unprovable as of '09 that [Mylan] literally didn't have a claim, and so the claim wouldn't accrue until September of 2010." (*Id.* at 160:1-6). Celgene stressed that its position "is that both as a matter of law and as a matter of the record in this case, the damages model that they have submitted -- that they submitted in June of 2016 [in this case], they could have done the exact same thing back in '09 and surely within four years of '09" as Mylan has not "pointed to a single magical event or series of events that took place between June 2009 and September 2010 when they say they would have come to market" that would make damages unascertainable until September 2010. (*Id.* at 166:21-167:4).

In response, Mylan emphasized that it "could not have been injured prior to 2010 even if damages could have been calculated **[*72]** in 2009" and "damages could not have been calculated in 2009." (*Id.* at 168:11-13). Mylan seems to argue that, even though it made predictions, "those could be challenged as speculative"—and, even if calculations can be made, "the injury does not begin until pills are actually sold in the marketplace." (*See id.* at 169:9-21).

Celgene then countered that the applicable precedent "make[s] clear you're not prohibited from suing for -- today for harm in the future" and the "question is given the nature of your case, given the nature of the claim, given the market . . . is it such that today you really — you really don't know whether you've been harmed in the future." (*Id.* at 171:5-10). It asserts that, "as a matter of law, Mylan is just wrong that a claim in a generic delay case does not — can't accrue until we somehow pass the date of my expert's but-for entry date." (*Id.* at 172:3-5).

3. After oral argument

"[B]ecause the parties appeared to present the Court with remarkably divergent interpretations and related arguments on the relevant law and its application to this matter," the Court ordered supplemental briefing. (*See* D.E. No. 276). In this briefing, the parties argue as follows.

Celgene **[*73]** reiterates that June 24, 2009, is the starting point, stating that "Mylan repeatedly threatened to sue Celgene well before this date." (D.E. No. 280 at 1 (footnote omitted)). Regarding the ascertainability exception, Celgene posits that the limitations period begins when a plaintiff could have estimated the size of and possible profits of market entry. (*Id.* at 2-3 (citation omitted)). Celgene contends that Mylan "offers no coherent argument that its alleged Thalomid-related damages were so speculative in June 2009 as to be unrecoverable as a matter of law"—and it "has not argued that that there was any uncertainty in 2009 about whether Mylan would launch a generic Thalomid product in the future or that Celgene's conduct had delayed Mylan's entry into the market." (*Id.* at 3). Celgene asserts that nothing Mylan relies upon was unknown to Mylan in June 2009, "nor even reflect events that occurred between June 2009 and the third quarter of 2010 that could have made damages less speculative." (*See id.* at 3-4).

Celgene avers that Mylan offered a "new legal argument" at oral argument: regardless of whether Mylan's future damages were ascertainable in 2009, Mylan's cause of action could not have accrued in 2009 because **[*74]** Mylan could not have been injured until market entry in 2010. (*See id.* at 4). Celgene contests this argument, arguing (among other things) that the law plainly is "that a claim for provable future damages accrues on the date of the wrongful conduct." (*Id.*). Moreover, Celgene notes that this conflicts with Mylan's Revlimid®-related claim and that, under its theory, it would have to wait until 2022 to pursue such a claim. (*Id.*).

Regarding the continuing-violation exception, Celgene argues that all of Mylan's cited case law "involved an overt act that injured the plaintiff during the limitations period"—which Mylan has failed to identify here regarding Mylan's ability to sell a generic version of Thalomid®. (*Id.* at 5). Celgene contends that its dealings with other generic companies regarding Thalomid® samples, as well as its dealings regarding Revlimid® samples, do not qualify as overt acts for Mylan's Thalomid®-related claims. (*Id.*).

For its part, Mylan begins by noting that its common law claims—unfair competition and tortious interference with economic advantage—are *not* implicated by Celgene's statute-of-limitations defense. (*See* D.E. No. 281 at 1). As for its antitrust claims, Mylan argues that a "claim **[*75]** has not accrued if *either* the fact of accrual is speculative *or* the amount of damages is unprovable." (*Id.* at 2 (emphasis in original)). And Mylan contends that, here, "*both* the fact and any amount of thalidomide damages were speculative—at least sufficient to raise an issue of fact that the speculative damages exception delayed the statute of limitations from running until the injury was first suffered in Q3 2010." (*Id.* at 3 (emphasis in original)).

Mylan contests Celgene's Revlimid® comparison, arguing that its Revlimid®-related "damages claim has accrued because the fact that Natco engaged in patent litigation with Celgene and was able to obtain a settlement, coupled with the fact that Mylan was well equipped to do the same, means that the fact of Mylan's Revlimid-related injury is ascertainable." (*Id.* at 4). And Mylan argues that "the amount of Revlimid damages is not speculative because market factors necessary for formulating the damages model . . . are already specified in detail in the real-world Celgene/Natco settlement agreement." (*Id.* (citations omitted)).

Mylan also maintains its continuing-violations theory for three reasons: (1) "Celgene's overt conduct against other generics such as Lannett . **[*76]** . . confirmed Celgene's refusal to deal policy, which continued to injure Mylan throughout the limitations period"; (2) "[g]iven Celgene's overarching strategy to protect its franchise, Celgene's refusal to supply Revlimid samples to Mylan in 2013 and 2014 reaffirmed to Mylan that Celgene would continue to prevent it from introducing generic versions of both of Celgene's thalidomide products"; and (3) "under the guise of REMS, Celgene continued to impose restrictions that blocked normal distribution channels from supplying samples to Mylan and other manufacturers." (*Id.* at 5).

B. Analysis

As an initial matter, Mylan is correct about its common law claims—which Mylan argues are governed by a six-year statute of limitations: they are not affected by Celgene's statute-of-limitations defense. (*See* D.E. No. 281 at 1). Celgene has not moved to dismiss Mylan's Thalomid®-related common law claims using this defense. Thus, these claims—unfair competition and tortious interference with economic advantage—are not subject to any time bar. And, because the Court denies Celgene's only remaining challenge regarding Mylan's Thalomid®-related claims discussed *infra*, the Court must hold a jury trial over Mylan's **[*77]** Thalomid®-related claims.

As for Mylan's federal and state antitrust claims, the parties do not dispute the statute of limitations is four years. *See* 15 U.S.C. § 15b; N.J.S.A. § 56:9-14. The accrual date is the issue. And, as evident from the Court's rather painstaking review of the parties' contentions, this is one that is vigorously contested.

On a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson, 477 U.S. at 255*. And the Supreme Court has never suggested that "trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Id.*[22]

Here, as noted, the Court will hold a jury trial over Mylan's Thalomid®-related claims. And the continuing-violations doctrine, in particular, gives this Court pause to grant judgment as a matter of law at this time. After all, "[t]he purposeful nature of the inaction—here an ongoing refusal to sell . . .—obviously constitutes an injurious act, although perhaps not an overt one in the commonly-understood sense." *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1172 (3d Cir. 1993)*. "[C]ertain conspiracies, **[*78]** such as boycotts, operate through inaction." *Id.* "[O]vert acts aren't what cause damage"; "[i]t is the effectiveness of the overall conspiracy that causes damages." *Id.*

The Court finds that, at this juncture, Celgene's statute-of-limitations defense risks being too intertwined with issues of material fact. Factual development at trial concerning Mylan's Thalomid®-related claims will permit the Court to best assess the parties' contentions.[23] Therefore, in an abundance of caution and consistent with this Court's

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[22] *See also United States v. Certain Real & Personal Property Belonging to Hayes, 943 F.2d 1292, 1297 (11th Cir. 1991)* ("A trial court is permitted, in its discretion, to deny even a well-supported motion for summary judgment, if it believes the case would benefit from a full hearing."); *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc., No. 12-5847, 2015 U.S. Dist. LEXIS 80015, 2015 WL 3826713, at *4 (N.D. Cal. June 19, 2015)* ("The Supreme Court has recognized that, even in the absence of a factual dispute, a district court has the power to deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. . . . Here, a summary judgment ruling on the [issue], as plaintiffs have presented it, would resolve only a sliver of their remaining claims, one that is closely intertwined with issues that will be presented to the jury regardless of whether [the issue] is decided as a matter of law. . . . Even assuming that plaintiffs have carried their burden under *Rule 56* on [the issue], the better course here is to proceed to a full trial.") (internal quotation marks and citation omitted).

discretion given the posture of this matter, the Court denies without prejudice Celgene's motion as it concerns this defense. *See, e.g., Certain Real & Pers. Prop. Belonging to Hayes, 943 F.2d at 1297* ("A trial court is permitted, in its discretion, to deny even a well-supported motion for summary judgment, if it believes the case would benefit from a full hearing.").

XIV. An issue of material fact exists about whether Mylan would have "skinnylabeled" in light of Celgene's orphan drug exclusivity for Thalomid®

A. Relevant factual background

On July 16, 1998, the FDA approved Celgene's NDA for Thalomid® for the treatment of manifestations of a particular form of leprosy known as ENL. (Celg. SMF ¶ 9). On May 25, 2006, the FDA approved using **[*79]** Thalomid® in combination with dexamethasone for the treatment of newly diagnosed multiple myeloma. (*Id.* ¶ 18; D.E. No. 228-4, Ex. 12; D.E. No. 237-21, Ex. P58). The multiple-myeloma indication was protected by an orphan drug exclusivity, meaning that no manufacturer other than Celgene could be approved by the FDA to market thalidomide for that indication until May 25, 2013. (Celg. SMF ¶¶ 18, 71).

On September 26, 2003, Mylan formally selected thalidomide for development. (*See* Celg. Reply SMF ¶ 174). Thalidomide was identified as a "first to file" opportunity, meaning that it was an opportunity to obtain the potentially lucrative 180-day exclusivity period. (*See id.*).

In December 2006, Barr Laboratories ("Barr"), another generic company, filed an ANDA to market a generic version of Thalomid®. (Celg. SMF ¶ 71). But Barr asked the FDA to approve a label addressing the *non*-orphan indication (i.e., ENL) without mentioning the orphan indication (i.e., multiple myeloma). (*Id.* ¶¶ 71, 72). In other words, Barr's ANDA proposed to carve out multiple myeloma and sought approval for ENL only. (*Id.* ¶ 72). This type of carveout request is also known as a "skinny label." (*Id.*).

B. The parties' contentions [*80]

Celgene argues that "[i]t is undisputed that, until May 2013, [its] orphan drug exclusivity prevented the FDA from approving any generic thalidomide product that included a multiple-myeloma indication on its label." (D.E. No. 240 at 22). Celgene insists that Mylan's Head of Global Regulatory Affairs "twice testified that Mylan intended to have a multiple-myeloma indication on its generic thalidomide label." (*Id.*). Celgene also criticizes Mylan's declarations filed "days before" its opposition to summary judgment. (*Id.* at 23).

But Celgene avers that, even with these declarations, there is still no testimony that Mylan would have sought to carve out a multiple-myeloma indication from its label—only that it *could* have. (*Id.*). Finally, Celgene dispenses with Mylan's internal 2006 documentation that purportedly indicates that Mylan anticipated launching thalidomide without a multiple-myeloma indication because, at the time of that documentation, the FDA had not approved Thalomid®'s multiple-myeloma indication. (*Id.* at 24). Simply put, Celgene argues that the 2006 documentation could not anticipate a multiple-myeloma indication. (*Id.*).

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[23] For example, Mylan complains that "Celgene has an overarching strategy to protect its franchise of thalidomide and its analogs, including lenalidomide," and therefore "Celgene's refusal to supply Revlimid samples to Mylan in 2013 and 2014 reaffirmed to Mylan that Celgene would continue to prevent it from introducing generic versions of both of Celgene's thalidomide products." (D.E. No. 281 at 4-5). And the following is undisputed: Celgene's Thalomid® marketing expenses dropped from approximately $24 million in 2005 to approximately $14.1 million in 2006 and its Revlimid® marketing expenses increased from $18.9 million in 2005 to approximately $51.4 million in 2006 (Celg. Reply SMF ¶ 133)—and, in 2009, Celgene either did not respond to or categorically refused all requests from generics to purchase Revlimid® samples (*id.* ¶ 235). And lenalidomide, an analogue of thalidomide, is a more potent product with a better toxicity profile. (Celg. SMF ¶ 86).

In opposition, Mylan argues that Celgene ignores testimony of its Head of **[*81]** Global Regulatory Affairs that "she was unable to opine on Mylan's labelling strategy regarding thalidomide because Celgene's refusal to supply samples prevented Mylan from proceeding to the stage of development at which it would consider its labelling strategy." (D.E. No. 237 at 45 (citation omitted)). Mylan further argues that other people who did not report to this Head of Global Regulatory Affairs were responsible for drafting labels before 2013. (*Id.* at 45-46). Mylan cites her declaration in which she purportedly says that Mylan regularly employs carveout strategies for indications covered by orphan drug and other exclusivities. (*Id.* at 46). Mylan also cites a declaration purporting to explain that it does not finalize indications on its label for a generic product until bioequivalence testing is complete. (*Id.* (citation omitted)).

Finally, Mylan says that it has adduced multiple pieces of evidence and circumstances that make this inquiry suited for a jury, including: Barr's submission of a carved-out label; Mylan's financial incentive to file an ANDA as soon as possible for a first-to-file opportunity; Mylan carves out labels when necessary; and a 2006 planning document envisioning a launch without **[*82]** the multiple-myeloma indication. (*Id.* at 48).

C. Analysis

Mylan's evidence must be believed, and all justifiable inferences are to be drawn in its favor. *See* *Anderson, 477 U.S. at 255*. It is undisputed that, on September 26, 2003, Mylan formally selected thalidomide for development—and this was identified as a first-to-file opportunity. (Celg. Reply SMF ¶ 174). Mylan's Head of Global Policy submitted a declaration that "Mylan does not finalize its generic labels, including finalizing what indications to include, until after bioequivalence testing is complete." (D.E. No. 238-30, Ex. P316). She added that, generally, "a generic label will be finalized just before the related [ANDA] is submitted" and then the label is "updated as needed based on any relevant changes post submission to the [brand-name label], patent or exclusivity landscape." (*Id.*). For Thalomid®, she affirmed that "Mylan was unable to conduct bioequivalence testing because it never had access to Thalomid samples"—and "Mylan does not make labelling decisions until after bioequivalence testing is complete and we are preparing the labeling section of the ANDA." (*Id.*). And "Mylan regularly employs carve out strategies—successfully submitting and gaining approval **[*83]** for ANDAs that exclude (or 'carve out') indications covered by orphan drug and other exclusivities, while including all other FDA approved indications." (*Id.*).

And Mylan's Head of Global Regulatory Affairs affirmed in his declaration that "Mylan does not finalize indications on its label for a generic product until bioequivalence testing is complete and we are preparing the labeling section of the ANDA." (D.E. No. 237-20, Ex. P52). He too declared that "Mylan never had access to Thalomid for bioequivalence testing and thus had not finalize its label"—and "that Mylan regularly submits and gains approval for ANDAs that carve out indications subject to exclusivities including [orphan drug exclusivity]." (*Id.*).

As noted above, Barr's ANDA for a generic version of Thalomid® employed a carve-out. (*See* Celg. SMF ¶¶ 71, 72).

Celgene disputes that there is any genuine issue of material fact. In particular, Celgene argues that nobody said what "Mylan's label would have said." (*See* D.E. No. 277 at 180:10-11; *see also id.* at 181:3-6). And Celgene stresses several other points (*see, e.g.*, D.E. No. 240 at 22-25)—all of which may ultimately win the day. But not at this point because the Court must give **[*84]** Mylan the benefit of reasonable inferences. And the evidence is such that a reasonable jury *could* find in favor of Mylan on this skinny-labelling issue. The Court therefore denies Celgene's motion relating to Celgene's orphan drug exclusivity.

XV. Conclusion

The Court has endeavored to carefully consider an extensive record juxtaposed against a complex and developing area of law. In that vein, it is important to note that—as tempting as it may be to do so—the issue of FDA approvals of generic study protocols for brand drugs requiring REMS is one that the Undersigned believes requires careful consideration of the specific facts and circumstances. And the analysis presented above is tailored to the specific facts and circumstances of this case.

To summarize, the Court finds that, until the FDA approved Mylan's protocols and Celgene was so notified, it had a legitimate business justification for refusing to sell Mylan samples given the record before the Court. Conversely, however, the propriety of Celgene's conduct after FDA approval requires factfinding. Further, Mylan cannot recover monetary damages for its Revlimid® claims on this record. But the Court declines to find—at this time—that **[*85]** Mylan's Thalomid® claims are either time barred or that any attendant damages are barred by Celgene's orphan-drug exclusivity. These issues require factfinding. Finally, Mylan's state-law claims—both antitrust and otherwise—cannot be dismissed in their entirety in light of the Court's rulings.

An appropriate Order accompanies this Opinion.

/s/ Esther Salas

Esther Salas, U.S.D.J.

ORDER

SALAS, DISTRICT JUDGE

This matter having come before the Court on Celgene Corporation's ("Celgene") motion for summary judgment (*see* D.E. Nos. 227 & 228); and the Court having carefully considered the parties' submissions; and the Court further having ordered supplemental briefing on specific issues and having reviewed those submissions; and the Court further having considered the parties' oral arguments; and for the reasons in the accompanying Opinion,

IT IS on this 3rd day of October 2018,

ORDERED that Celgene's motion for summary judgment (*see* D.E. Nos. 227 & 228) is GRANTED in part and DENIED in part consistent with the accompanying Opinion; and it is further

ORDERED that the accompanying Opinion shall be temporarily filed UNDER SEAL; and it is further

ORDERED that the accompanying Opinion shall be unsealed **[*86] 14 days from publication of this Order on the Court's ECF System** unless an appropriate motion to seal the Opinion, **accompanied by proposed redactions**, is filed by either party, or jointly by the parties, on or before **October 16, 2018**.

/s/ Esther Salas

Esther Salas, U.S.D.J.

Indus. Bank of Korea v. Asi Corp.

United States District Court for the Central District of California

October 4, 2018, Decided; October 4, 2018, Filed

CV 17-7646-MWF (JPRx)

Reporter

2018 U.S. Dist. LEXIS 217861 *

Industrial Bank of Korea, et al. v. ASI Corporation, et al.

Prior History: Indus. Bank of Korea v. ASI Corp., 2018 U.S. Dist. LEXIS 228152 (C.D. Cal., Apr. 26, 2018)

Core Terms

allegations, Plaintiffs', receivables, Banks, purchase order, subsidiary, entities, transactions, export, factoring, Guaranty, sale agreement, alter ego, fraudulent scheme, fraudulent, finance, Non-party, aggregate value, employees, quotation, assigned, prong, negligent misrepresentation claim, conclusory, importers, ownership, products, marks, alter ego relationship, motion to dismiss

Counsel: **[*1]** For Industrial Bank of Korea, an agency or instrumentality of the Republic of Korea, Nonghyup Bank, a corporation of the Republic of Korea, Keb Hana Bank, a corporation of the Republic of Korea, Kookmin Bank, a corporation of the Republic of Korea, Plaintiffs: Kahn A Scolnick, Maurice M Suh, Vanessa A Pastora, LEAD ATTORNEYS, Daniel Leigh Weiss, Gibson Dunn and Crutcher LLP, Los Angeles , CA USA.

For Asi Corporation, a Delaware corporation, Asi Computer Technologies, Inc., a California corporation, Christine Liang, an individual also known as Christine Li-Yin Liang also known as Li Yin Chu, Defendants: Philip Hsing-Tsung Lo LEAD ATTORNEY, Gordon Rees Scully Mansukhani LLP, Irvine , CA USA; Christopher B Queally, Callahan & Blaine, Santa Ana , CA USA.

For Henry Chen Cathleen S Huang, LEAD ATTORNEY, Bowles and Verna LLP, Walnut Creek , CA USA; Richard Allen Ergo, Robert I Westerfield, Bowles and Verna, Walnut Creek , CA USA.

For Frances Chou, an individual doing business as Frances Meiling Chou, Defendant: Max Chien-Hsia Chiang, Law Office of Max C Chiang, Cerritos , CA USA.

For Newegg, Inc., a Delaware Corporation, Magnell Associate Inc, doing business as Newegg, Inc., a California Corporation, **[*2]** Defendants: Daniel Scott Carlton, Nicolas Morgan, Thomas A Zaccaro, Paul Hastings LLP, Los Angeles , CA USA.

Judges: Honorable MICHAEL W. FITZGERALD, United States District Judge.

Opinion by: MICHAEL W. FITZGERALD

Opinion

CIVIL MINUTES—GENERAL

Proceedings (In Chambers): ORDER RE: DEFENDANTS MAGNELL ASSOCIATE INC. AND NEWEGG INC.'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT [75] AND PLAINTIFFS' EX PARTE APPLICATION TO STRIKE REQUEST FOR JUDICIAL NOTICE [82]

Before the Court is the Motion to Dismiss Second Amended Complaint ("Motion"), filed by Defendants Magnell Associate Inc. dba Newegg.com ("Magnell") and Newegg, Inc. ("Newegg") (together with Magnell, "Defendants"), on June 18, 2018. (Docket No. 75). On July 16, 2018, Plaintiffs NongHyup Bank ("NH"), KEB Hana Bank ("KEB Hana"), and Kookmin Bank ("KB") (collectively, the "Banks" or "Plaintiffs") filed their Opposition. (Docket No. 79). Defendants filed their Reply on August 6, 2018. (Docket No. 80).

In connection with their Reply, Defendants also filed a Request for Judicial Notice ("RJN") on August 6, 2018. (Docket No. 81). On August 14, 2018, Plaintiffs filed an Ex Parte Application to Strike Request for Judicial Notice ("Ex Parte Application"). (Docket No. 82). **[*3]** Defendants filed their Opposition on August 16, 2018. (Docket No. 84).

The Court has read and considered these filings and held a hearing on September 19, 2018. For the reasons set forth below, the Motion, RJN, and Ex Parte Application are ruled upon as follows:

• Defendants' Motion to Dismiss Second Amended Complaint is **GRANTED** ***without leave to amend***. Based upon the allegations in the Second Amended Complaint, Plaintiffs' renewed attempt to establish secondary liability amounts to nothing more than showing a parent-subsidiary relationship between Newegg and Newegg Trading Limited ("NTL"), particularly considering the Court's previous dismissal of NTL on jurisdictional grounds. Plaintiffs therefore fail to allege sufficiently that NTL acted as Defendants' alter ego or agent. Moreover, Plaintiffs fail to plead their fraud, negligent misrepresentation, and California's Unfair Competition Law claims with sufficient specificity. Finally, Plaintiffs' allegations cannot be read to plausibly show that Newegg, rather than NTL, was the driving force behind the alleged fraudulent scheme.

• Both Defendants' RJN and Plaintiffs' Ex Parte Application are **DENIED** ***as moot***, because the Court does not rely **[*4]** upon the challenged portion of the Reply to reach its decision.

I. <u>BACKGROUND</u>

As it must, the Court assumes the truth of all facts alleged by Plaintiffs in the Second Amended Complaint ("SAC"). The Court's Order on April 26, 2018, granting Defendants' Motion to Dismiss First Amended Complaint, contained a detailed explanation of the relevant facts. (*See generally* Docket No. 62). The following background is similar but has been updated to reflect relevant additional allegations and citations to the SAC as the operative complaint.

A. <u>Parties and Relevant Non-Parties</u>

Plaintiff Industrial Bank of Korea ("IBK"), a bank incorporated under the laws of the Republic of Korea, is 51.8% owned by the Ministry of Strategy and Finance of Korea. (SAC ¶ 6). IBK's primary services include providing financing for Korea's small- and medium-sized enterprises. (*Id.* ¶ 7).

Plaintiff NH, a bank incorporated under the laws of the Republic of Korea, is primarily in the business of lending to farmers and agricultural cooperatives, deposittaking, and issuing securities and bonds. (*Id.* ¶ 9).

Plaintiff KEB Hana, a bank incorporated under the laws of the Republic of Korea, is primarily in the business of lending, deposit-taking, **[*5]** and private banking. (*Id.* ¶ 10).

Plaintiff KB, a bank incorporated under the laws of the Republic of Korea, provides lending, deposit-taking, cash management, private banking, and fund management services to retail, small business, and corporate clients. (*Id.* ¶ 11).

Defendant ASI Corporation "is or was a Delaware corporation," and Defendant ASI Computer Technologies, Inc., is a California corporation. (*Id.* ¶ 13). The Banks allege that ASI Corporation and ASI Computer Technologies, Inc., are indistinguishable and refer to the two collectively as "ASI." (*Id.*). (For the purposes of this Motion, the Court will also treat them as a single entity — "ASI."). "ASI is a wholesale distributor of computer software, hardware, and accessories that has over 500 employees and operates in four different countries, including through 13 sales and warehouse locations in the U.S. and Canada." (*Id.*).

Defendant Bill Chen was "Chief Financial Officer and/or Vice President of Finance of ASI." (*Id.* ¶ 14). Defendant Henry Chen is or was "Vice President of Business Development and/or Vice President of Sales of ASI." (*Id.* ¶ 15). Defendant Frances Chou "was a director and agent of ASI, authorized to act on behalf **[*6]** of ASI . . . ." (*Id.* ¶ 16). Defendant Christine Liang was "Chief Executive Officer and/or President of ASI" and "controlled the activities of ASI central to [Plaintiff's] Second Amended Complaint . . . ." (*Id.* ¶ 17).

Defendant Newegg, a Delaware corporation, "is the second largest online-only retailer in the United States" and owns and operates Newegg.com, which sells primarily consumer electronics, smart home, and gaming products. (*Id.* ¶¶ 18-19). The Banks allege that Newegg and Newegg.com are "one and the same." (*Id.* ¶ 20).

Defendant Magnell, a California corporation, is a wholly-owned subsidiary of Newegg. (*Id.* ¶ 21). The Banks allege that Magnell and Newegg are essentially indistinguishable. (*Id.* ¶ 24). Specifically, Newegg owns and operates the website Newegg.com and "Magnell is registered to do business as Newegg.com, and [ ] there are other indicia that Newegg.com may act through Magnell in some respects." (*Id.*).

Non-party NTL is a Hong Kong corporation. (*Id.* ¶ 28). NTL is "wholly-owned by Newegg Greater China (Hong Kong) Company Limited, which is in turn wholly-owned by Newegg Enterprises LLC," which shares the same registered address with Newegg and Magnell in the City of Industry, **[*7]** California. (*Id.*). Further, a sales agreement and two guaranties, executed and issued by Newegg, referred to NTL as "a subsidiary and affiliate of Newegg, Inc." (*Id.*). Partially on this basis, the Banks allege the corporate relationship as follows:

- Newegg dominated, influenced, and controlled Magnell and NTL, creating a unity of interest and ownership among the entities such that their separate corporate existences ceased to exist. (*Id.* ¶ 30).

- Newegg used NTL "as a mere shell or conduit for its affairs" and held itself out as liable for NTL's debts. (*Id.* ¶¶ 33-34).

- Newegg, Magnell, and NTL shared identical equitable ownership, shared some employees and directors, and conducted business on behalf of one another. (*Id.* ¶¶ 31-32).

- Newegg, Magnell, and NTL were "agents, partners, representatives, affiliates, alter egos and/or co-conspirators of each other" and therefore, Newegg had "full knowledge of, gave substantial assistance to, directed, authorized, consented to, and ratified the alleged misconduct" perpetrated by Magnell and NTL. (*Id.* ¶ 29; *see id.* ¶¶ 36-37).

Non-party Fred Chang founded Newegg and Magnell and was the Chief Executive Officer and Chairman of Newegg, the Personnel **[*8]** Manager of Magnell, and one of the two directors of NTL. (*Id.* ¶ 32). Non-party Edison Chih was the Chief Operating Officer ("COO") of both Newegg and NTL and the Director of Corporate Planning at Newegg. (*Id.*). Non-party Nicole Lee was the President of Newegg Greater China (Hong Kong) Company Limited and Chief Human Resources of Newegg, and is allegedly currently managing and overseeing NTL's finances. (*Id.*). Non-party Yueh Pai Chang was the Chief Financial Officer of Newegg and the other director of NTL. (*Id.*). Non-party James Wu was the Chief Administrative Officer and is currently the Chief Technology Officer and COO of Newegg. (*Id.* ¶ 75).

Non-party Moneual, Inc. ("Moneual") "was a prominent Korean manufacturer of computers and home appliances, including robot vacuum cleaners and various types of personal computers." (*Id.* ¶ 26). "Until its demise, Moneual was publicly perceived in Korea as a successful company on a rapid growth trajectory." (*Id.* ¶ 41).

Non-party Hong-Seok Park, whom the Banks refer to as "HS Park," "was the Chief Executive Officer of Moneual until his arrest and conviction for masterminding the massive fraud that is the subject of this lawsuit." (*Id.* ¶ 27).

B. Moneual's [*9] Relationship with the Banks

Between 2006 and 2014, Moneual requested that each of the Banks "factor" Moneual's export trade receivables from, among others, Newegg. (*Id.* ¶ 43). The Banks describe "factoring" as "a form of lending under which a lender purchases a business's trade receivables at a discount to their face value, advancing the money to the business and collecting the receivable from the business's customer at its maturity." (*Id.* ¶ 44).

Prior to agreeing to factor Moneual's receivables, the Banks purchased export finance facility ("EFF") insurance from the Korean Trade Insurance Corporation ("KSURE"), South Korea's official trade insurance agency. (*Id.* ¶ 46). In connection with the EFF insurance application process, KSURE conducted due diligence on Moneual, Newegg, and NTL, including "conducting credit investigations on each of these entities, and preparing credit certifications of each of their business histories." (*Id.* ¶ 47).

Following this due diligence from KSURE, HS Park, Moneual's CEO, would approach the Banks to "request that they factor Moneual's trade receivables . . . up to the insurance credit limits." (*Id.* ¶ 48).

C. Moneual's Relationship with the Defendants and Non-Parties [*10]

From 2012 to 2014, Newegg purchased — or, according to the Banks, purported to purchase — "home theater personal computers" ("HTPCs") from Moneual at prices varying between $2,530 and $2,980 per unit. (*Id.* ¶¶ 59, 80). The Banks allege that to "direct[] and authorize[] the Moneual transactions," Newegg used its "Hong-Kong based [NTL] to execute the transactions because Moneual had a manufacturing contractor in Hong Kong." (*Id.* ¶ 63).

To carry out the alleged fraudulent scheme, Newegg executed two guaranties and two sales agreements with Moneual:

On August 25, 2012, Newegg, which had a much higher credit rating than NTL, executed the first guaranty ("August 2012 Guaranty"), agreeing to guarantee NTL's export receivables "unconditionally and irrevocably" for "up to $20 million to Moneual and its successors and assigns on behalf of [NTL]." (*Id.* ¶ 64). Fred Chang executed the guaranty. (*Id.*).

On January 17, 2013, Fred Chang executed another guaranty ("January 2013 Guaranty") through which Newegg "guaranteed payment of up to $50 million to Moneual and its successors and assigns on behalf of [NTL]." (*Id.* ¶ 65). On November 27, 2013, Moneual entered two sales agreements with "Newegg.com" — the **[*11]** "Chih Sales Agreement" and the "Chang Sales Agreement," as the Banks refer to them. (*Id.* ¶¶ 69-71). Under the Chih Sales Agreement — executed by Edison Chih — Newegg.com agreed to purchase a total of $250 million of Moneual products over two years, which Newegg.com could then sell in the United States, Canada, and China. (*Id.* ¶ 71). Under the Chang Sales Agreement — executed by Fred Chang — Newegg.com agreed to purchase a total of $400 million of Moneual products over two years. (*Id.*). The Chang Sales Agreement also stated that Newegg's purchase orders "shall be issued, handled, and paid by [NTL]" and guaranteed by Newegg.com, which the Banks allege "necessarily referred to its owners and operator, Newegg, Inc." (*Id.* ¶ 73).

The Banks allege that Newegg permitted NTL to carry out the transactions on Newegg's behalf, even though "Newegg, Inc., acting under the name of its website, Newegg.com, was the contracting party with Moneual and the party that guaranteed to purchase significant amounts of Moneual's goods." (*Id.* ¶ 72).

The Banks also allege that all the KSURE EFF insurance policies Newegg entered into with Moneual listed the insured importer as "Newegg Inc (Newegg Com)"; the importer **[*12]** address in the City of Industry, California, where Newegg and Magnell shared the same registered corporate address; and the "Country of Payor" as the

United States. (*Id.* ¶ 75). The Banks further allege that "some of these insurance policies [but unclear as to how many] state[d] explicitly that [NTL] is Newegg, Inc.'s agent and representative." (*Id.*). Finally, NTL's purchase orders, executed by Edison Chih and submitted to Moneual, used the Newegg.com logo and referenced Newegg.com's Terms and Conditions. (*Id.* ¶¶ 78-79).

D. Relevant Factoring Transactions and Defaults

In support of the factoring relationships, Moneual provided the Banks with documentation evidencing its relationships with NTL (or Newegg.com), including: (1) invoices and purchase orders evidencing NTL's (or Newegg.com's) purchase (or purported purchase) of HTPCs from Moneual (*Id.* ¶¶ 79-80); (2) the August 2012 Guaranty and January 2013 Guaranty executed by Newegg (*Id.* ¶¶ 64-65); and (3) the Chih Sales Agreement and the Chang Sales Agreement between Newegg.com and Moneual (*Id.* ¶¶ 69-71).

The Banks allege that Moneual's "transactions with ...Newegg, Inc. (through [NTL] as its alter ego and agent) and other importers were **[*13]** merely a ruse orchestrated by Moneual — with assistance of its foreign importers ...to create the illusion that Moneual operated a genuine export business with legitimate customers and transactions so that the Banks would continue to finance Moneual's receivables." (*Id.* ¶ 80).

1. NH

NH began providing Moneual loans against its receivables in September 2011. (*Id.* ¶ 110). In February 2013, NH entered into a factoring transaction with Moneual relating to receivables due from China National Building Material Co., Ltd. ("CNBM"), a Chinese state-owned enterprise. (*Id.* ¶ 112). The CNBM factoring transactions were successful; NH was paid in full and on time (or nearly on time). (*Id.* ¶ 113). "The successful consummation of NH's first factoring transaction with Moneual gave NH comfort as to Moneual's creditworthiness, and induced it to enter into additional factoring transactions with Moneual..., including entering into EFAs ["export finance agreements"] to finance Moneual's exports to ... Newegg." (*Id.*). NH also allegedly asked Moneual additional questions about Newegg and NTL related to their business and revenue. (*Id.* ¶ 114).

On December 13, 2013, NH and Moneual entered into an EFA. (*Id.* ¶¶ **[*14]** 116). In connection with the set of receivables Moneual sought to sell NH under the EFA, Moneual provided NH with NTL's relevant purchase orders and Moneual's corresponding invoices, shipping documents, and signed SPIs, which NH staff would review before deciding to purchase the relevant receivables. (*Id.* ¶¶ 119-120).

NH purchased Moneual's NTL receivables based upon five sets of purchase orders. Pursuant to those five sets of purchase orders, NTL had ostensibly purchased thousands of HTPC units at a cost of $2,530 per unit. (*Id.* ¶¶ 136, 141, 146, 151, 156). The first set of purchase orders had an aggregate value of $9,993,500; the second set had an aggregate value of $3,795,000; the third set had an aggregate value of $6,198,500; the fourth set had an aggregate value of $3,795,000; and the fifth set had an aggregate value of $6,198,500. (*Id.* ¶¶ 139, 144, 149, 154, 159). NTL paid NH on the first, second, and third sets of purchase orders, and defaulted on the fourth and fifth sets, which were due to be paid on December 17, 2014, and December 22, 2014, respectively. (*Id.* ¶¶ 140, 145, 150, 155, 160).

2. KEB Hana

KEB Hana began providing Moneual loans against its receivables in 2012. (*Id.* ***[*15]*** ¶ 165). On August 13, 2012, after obtaining credit investigation results on Moneual and NTL (among other Moneual customers), KEB Hana and Moneual entered into an EFA. (*Id.* ¶¶ 165-167). On December 18, 2013, KEB Hana entered into an additional EFA with Moneual. (*Id.* ¶ 171).

In connection with each set of receivables Moneual sought to sell KEB Hana under the EFAs, Moneual provided KEB Hana with NTL's relevant purchase orders and Moneual's corresponding invoices, shipping documents, and signed SPIs, which KEB Hana staff would review before deciding to purchase the relevant receivables. (*Id.* ¶¶ 174-175).

Between November 9, 2012, and August 1, 2014, KEB Hana purchased Moneual's NTL receivables based upon what were ostensibly 219 shipments of goods. (*Id.* ¶ 184). NTL made timely (or near timely) payments to KEB Hana up until July 2014, which corresponded with 167 of the 219 shipments. (*Id.* ¶ 185). The Banks characterize the remaining 52 shipments as two sets of purchase orders pursuant to which NTL had ostensibly purchased millions of dollars' worth of Moneual goods, including HTPCs. (*Id.* ¶¶ 187-188, 194). The first set of purchase orders had an aggregate value of $46,754,400; the second set **[*16]** had an aggregate value of $20,235,600. (*Id.* ¶¶ 191, 197). NTL defaulted on both sets of purchase orders, which were due to be paid between September 1, 2014, and December 29, 2014. (*Id.* ¶¶ 192, 198).

3. KB

On June 10, 2013, and October 29, 2013, after obtaining credit investigation results on Moneual and NTL (among other Moneual customers), KB and Moneual entered into EFAs. (*Id.* ¶¶ 201, 203). In connection with each set of receivables Moneual sought to sell KB under the EFAs, Moneual provided KB with NTL's relevant purchase orders and Moneual's corresponding invoices, shipping documents, and signed SPIs, which KB staff would review before deciding to purchase the relevant receivables. (*Id.* ¶¶ 206-207).

KB purchased Moneual's NTL receivables based upon four sets of purchase orders. Pursuant to those four sets of purchase orders, NTL had ostensibly purchased millions of dollars' worth of Moneual products, including thousands of HTPC units at a cost of $2,530 per unit. (*Id.* ¶¶ 236, 240, 244, 248). The first set of purchase orders had an aggregate value of $19,987,000; the second set had an aggregate value of $10,120,000; the third set had an aggregate value of $9,867,000; and the fourth **[*17]** set had an aggregate value of $19,987,000. (*Id.* ¶¶ 238, 242, 246, 251). NTL timely (or nearly timely) paid KB on the first, second, and third sets of purchase orders, and defaulted on the fourth set, which was due to be paid by November 14, 2014. (*Id.* ¶¶ 239, 243, 247, 252).

E. <u>The Nature of the Alleged Fraudulent Scheme</u>

On October 20, 2014, Moneual filed for receivership in South Korea, "owing in excess of $500 million to its lenders, including the Banks." (*Id.* ¶ 254). News reports described Moneual's receivership filing as "abrupt," "unexpected," and a "shock," given Moneual's ostensibly healthy operations and finances. (*Id.*).

In late 2014, the Korean Customs Service initiated an investigation into Moneual. (*Id.* ¶ 255). On January 23, 2015, the Seoul district prosecutor indicted HS Park (Moneual's CEO) and other Moneual employees; the indictment was premised upon their execution of "large-scale fraud schemes using circular transactions." (*Id.*). "The indictment further charged that Moneual had greatly exaggerated the price of its HTPCs, often charging nearly $3,000 per unit when in fact, according to the Korean authorities, they were worth only approximately $7 to $18 per unit." (*Id.* ***[*18]***). "The indictment also detailed how Moneual's foreign importers, like ... Newegg, Inc., through its alter ego and agent, [NTL], provided Moneual with purchase order numbers to enable Moneual executives to generate false and fraudulent purchase orders, which Moneual then used to obtain financing from at least ten banks, including the plaintiff Banks." (*Id.*).

The Banks allege that the Korean authorities' investigation revealed that Newegg had prepared and emailed fraudulent purchase orders to Moneual or generated purchase order numbers that Moneual could use to create fraudulent purchase orders. (*Id.* ¶¶ 263-264). Moneual then passed these fraudulent Newegg purchase orders onto the Banks and other financial institutions to support its factoring requests. (*Id.*). However, "all of the purported transactions between Moneual and Newegg, Inc., through [NTL], took place on paper only; no physical transfer of goods ever occurred." (*Id.*).

"The Korean authorities' investigation also revealed that in exchange for foreign importers' participation in Moneual's fraudulent scheme to obtain money from financial institutions in exchange for bogus export receivables, Moneual paid the foreign importers, including **[*19]** ... Newegg, Inc. (or [NTL] on Newegg, Inc.'s behalf), and executives and employees of those foreign importers, kickbacks, which HS Park called 'commissions.'" (*Id.* ¶ 266).

The "Korean authorities' investigation revealed that the money HS Park wired to NTL, on behalf of Newegg, Inc., through the fraudulent circular transactions so that it could pay the Banks included an additional one to two percent 'commission' that Newegg, Inc. would retain as payment for its participation in the scheme." (*Id.* ¶ 272).

HS Park was ultimately convicted "of defrauding ten Korean banks, including the Plaintiff banks, of over $3 billion between 2007 and 2014 based on loans Moneual received for fraudulent export contracts." (*Id.* ¶ 274).

In their operative Second Amended Complaint, the Banks assert three claims for relief: (1) fraud; (2) negligent misrepresentation; and (3) violation of California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code §§ 17200 et seq.*

II. REQUEST FOR JUDICIAL NOTICE AND EX PARTE APPLICATION

In conjunction with their Reply filed on August 6, 2018, Defendants request that the Court take judicial notice of a "Protocol of a Suspect Examination (2nd Session) — Hong-Seok Park," a transcript of statements regarding Newegg **[*20]** made by non-party Hong-Seok Park during the course of a Korean Customs Service investigation. (*See* RJN (Docket No. 81)). Plaintiffs then filed an Ex Parte Application to Strike RJN on August 14, 2018. (Docket No. 82). On August 16, 2018, Defendants filed an Opposition. (Docket No. 84).

The Court does not rely upon the "Protocol of a Suspect Examination (2nd Session) — Hong-Seok Park," the challenged portion of the Reply, to reach its decision.

Accordingly, Defendants' RJN and Plaintiffs' Ex Parte Application are **DENIED *as moot***.

III. LEGAL STANDARD

"Dismissal under *Rule 12(b)(6)* is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013)*. "*Federal Rule of Civil Procedure 8(a)(2)* requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests . . . .'" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*.

In ruling on the Motion under *Rule 12(b)(6)*, the Court follows *Twombly, Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, and their Ninth Circuit progeny. "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting **[*21]** *Twombly, 550 U.S. at 570*). The Court must disregard allegations that are legal conclusions, even when disguised as facts. *See id. at 681* ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *Eclectic Properties E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014)*. "Although 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof is improbable,' plaintiffs must include sufficient 'factual enhancement' to cross 'the line between possibility and plausibility.'" *Eclectic Properties, 751 F.3d at 995* (quoting *Twombly, 550 U.S. at 556-57*) (internal citations omitted).

The Court must then determine whether, based on the allegations that remain and all reasonable inferences that may be drawn therefrom, the complaint alleges a plausible claim for relief. *See Iqbal, 556 U.S. at 679*; *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 (9th Cir. 2011)*. "Determining whether a complaint states a plausible claim for relief is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Ebner v. Fresh, Inc., 838 F.3d 958, 963 (9th Cir. 2016)* (quoting *Iqbal, 556 U.S. at 679*). Where the facts as pleaded in the complaint indicate that there are two alternative explanations, only one of which would result in liability, "plaintiffs cannot offer allegations that are merely consistent with their favored **[*22]** explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible." *Eclectic Properties, 751 F.3d at 996-97*; *see also* *Somers, 729 F.3d at 960*.

Fraud-based allegations are governed by *Rule 9(b)*. "*Rule 9(b)* demands that, when averments of fraud are made, the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct so that they can defend against the charge[.]" *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (internal citations omitted). Under *Rule 9(b)*, fraud allegations must include the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)* (citing *Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004))*. In other words, "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess, 317 F.3d at 1106*. Such averments must be specific enough to "give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Id.* (quoting *Bly—Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001))*.

Whereas allegations concerning the circumstances of fraud must include the "the who, what, when, where, and how of the misconduct **[*23]** charged," *id.* (internal quotation marks and citations omitted), issues of "[m]alice intent, knowledge, and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*.

IV. DISCUSSION

Through their Motion, Defendants argue that: (1) Plaintiffs' allegations do not support any form of secondary liability, (2) Plaintiffs' fraud claim is fatally deficient because the allegations fail to establish cognizable claims, (3) Plaintiffs' negligent misrepresentation claim is also fatally deficient for the same reason, and in any event, the claim is barred by the statute of limitations, and (4) Plaintiffs' UCL claim fails as a matter of law. The Court will address each argument in turn.

A. Secondary Liability

Because the thrust of the SAC remains focused on the alleged misconduct of NTL, an indirect subsidiary of Newegg, Defendants argue that Plaintiffs' renewed attempt to establish secondary liability amounts to nothing more than showing a routine parent-subsidiary relationship. The Court agrees and finds that the SAC has offered no new meaningful allegations to establish that NTL was an alter ego or agent of Newegg and/or Magnell.

1. Alter Ego Theory

Plaintiffs argue that the SAC adequately alleges **[*24]** that NTL was Newegg and/or Magnell's alter ego. (Opp. at 17-22).

"[T]he alter ego test may be used to extend personal jurisdiction to a foreign parent *or* subsidiary when, in actuality, the foreign entity is not really separate from its domestic affiliate." *Ranza v. Nike, Inc., 793 F.3d 1059, 1073 (9th Cir. 2015)* (emphasis in original). "To satisfy the alter ego test [to justify exercising personal jurisdiction or apply an alter ego theory of liability], a plaintiff must make out a prima facie case (1) that there is such ***unity of interest and ownership*** that the separate personalities [of the two or more entities] no longer exist ***and*** (2) that failure to disregard [their separate identities] would result in ***fraud or injustice***." *Id.* (internal quotation marks and citations omitted; alterations in original; emphasis added).

a. *Unity of interest and ownership*

"The 'unity of interest and ownership' prong of this test requires a showing that the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former." *Id.* (internal quotation marks and citations omitted). "This test envisions ***pervasive control*** over the subsidiary, such as when a parent corporation dictates every facet of the subsidiary's business — from broad **[*25]** policy decisions to routine matters of day-to-day operation." *Id.* (internal quotation marks and citations omitted; emphasis added).

Routine interaction and coordination between a parent and its subsidiary is not "pervasive control." *See, e.g., Corcoran v. CVS Health Corp., 169 F. Supp. 3d 970, 983 (N.D. Cal. 2016)* (so long as corporate formalities are observed, "an active parent corporation involved directly in decision-making about its subsidiaries' holdings" is insufficient to overcome presumption of corporate separateness) (quoting *Doe v. Unocal Corp., 248 F.3d 915, 928 (9th Cir. 2001)*); *AGA Service Co. v. United Air Ambulance, LLC, No. 16-cv-2663-W, 2017 U.S. Dist. LEXIS 157962, 2017 WL 4271991, at *3 (S.D. Cal. Sept. 26, 2017)* ("[A] close relationship between the [parent and subsidiary] ... is not sufficient to establish the type of pervasive control necessary to satisfy the unity-of-interest test."). Indeed, even "[t]otal ownership and shared management personnel are alone insufficient to establish the requisite level of control." *Ranza, 793 F.3d at 1073*.

Factors relevant to the unity-of-interest analysis include: "[1] the commingling of funds and other assets of the entities, [2] the holding out by one entity that it is liable for the debts of the other, [3] identical equitable ownership of the entities, [4] use of the same offices and employees, [5] use of one as a mere shell or conduit for the affairs **[*26]** of the other, [6] inadequate capitalization, [7] disregard of corporate formalities, [8] lack of segregation of corporate records, and [9] identical directors and officers." *Corcoran, 169 F. Supp. 3d at 983* (internal citations omitted; bracketed numbers in original).

Plaintiffs argue that allegations in the SAC "support at least six of nine factors." (Opp. at 18). The Court disagrees and finds only the second and ninth factors support the conclusion that NTL acted as Newegg and/or Magnell's alter ego. The remaining seven factors are neutral or militate against that conclusion.

As to the first and second factors, Plaintiffs point to same allegations in the SAC for support and address them together. Accordingly, the Court will also address them together. Plaintiffs first argue that Newegg executed the August 2012 Guaranty and the January 2013 Guaranty on behalf and for the benefit of NTL. (*Id.* at 18-19). Similarly, the Chih Sales Agreement and the Chang Sales Agreement between Newegg and Moneual — in which Newegg.com agreed to purchase $650 million of Moneual products over two years — stated that Newegg's "subsidiaries [including NTL] could purchase products for it ... [but Newegg] would guarantee the total amount of purchase from [NTL] and **[*27]** be fully responsible for any financial issues." (*Id.* at 19). Further, Plaintiffs state that Newegg issued payments for the goods and NTL continued to pay Plaintiffs — even though the SAC actually alleges that Plaintiffs "received payment for all purchased export receivables from ***Newegg, Inc***.—acting through [NTL]." (*Compare* SAC ¶ 82 *with* Opp. at 19) (emphasis added). Finally, Plaintiff appears to place much emphasis on the fact that the KSURE EFF insurance policies named Newegg as guarantor, but this is misleading because, as Defendants note, the policies were drafted and issued by KSURE and not Defendants. (*Id.*; Mot. at 17).

The Court is unpersuaded that Newegg and NTL commingled corporate funds without more relevant allegations (e.g., transferring money between accounts without documentation or having one shared account between the two entities). The Court agrees, however, that the two guaranties and two sales agreements qualify as "holding out by one entity that it is liable for the debts of another." *See* *Fru-Con Const. Corp. v. Sacramento Mun. Util. Dist., No. 05-cv-583-LKK, 2007 U.S. Dist. LEXIS 64017, 2007 WL 2384841, at *7 (E.D. Cal. Aug. 17, 2007)*. But corporate parents may, and indeed routinely do, guaranty debts of their subsidiaries while still maintaining corporate separateness. **[*28]** *See id.* ("The fact that [the parent] used its financial weight to secure [the subsidiary's] bond is insufficient to establish alter ego liability.") (collecting cases). Accordingly, the first factor militates against and the second factor militates in favor of, albeit very marginally, finding an alter ego relationship between Newegg and NTL.

As to the third factor, Plaintiffs argue that Newegg and NTL share identical equitable ownership because NTL is a wholly-owned subsidiary of Newegg, strongly suggesting that Fred Chang, Newegg's founder and CEO and an NTL director, ultimately beneficially owns both entities. (Opp. at 19). The SAC, however, alleges that NTL, via Newegg Greater China (Hong Kong) Company Limited, is whollyowned by Newegg Enterprises LLC. (SAC ¶ 28). Newegg Enterprises LLC, in turn, shares the same City of Industry, California registered address as Newegg, which suggests that NTL "is a subsidiary and affiliate of Newegg." (*Id.*; Mot. at 18). These allegations, accepted as true, merely establish that NTL is Newegg's subsidiary and do not suggest that a single person (or group of people) is the ultimate beneficial owner of both Newegg and NTL dictating the actions of both companies. **[*29]** Plaintiffs' conclusory and speculative allegation that Fred Chang ultimately beneficially owns both entities is unavailing. The third factor is thus neutral at best.

As to the fourth factor, Plaintiffs allege that Newegg and Magnell are headquartered in an office in City of Industry, California, while NTL is incorporated in and maintains its office in Hong Kong. (SAC ¶¶ 22, 27). With respect to overlapping employees, Plaintiffs point to four people: (1) Fred Chang, the founder of both Newegg and Magnell, CEO and Chairman of Newegg, Personnel Manager of Magnell, and one of two NTL directors; (2) Edison Chih, COO of Newegg and NTL and Fred Chang's assistant; (3) Nicole Lee, Chief Human Resources Officer of Newegg and President of Newegg Greater China (Hong Kong) Company Limited, which ostensibly involves managing and overseeing NTL's finances; and (4) Yueh Pai Chang, Chief Financial Officer of Newegg and the other NTL directors. (*See id.* ¶ 32; Opp. at 19-20). Plaintiffs do not identify when Nicole Lee and Yueh Pai Chang held their role at NTL or allege their misconduct, if any. In the context of establishing an alter ego relationship, Plaintiffs' allegations are underwhelming. *See* *Ranza, 793 F.3d at 1074* ("Some employees **[*30]** and management personnel move between the entities, but that does not undermine the entities' formal separation."). Plaintiffs have also failed to allege more striking facts, for example, a shared office space between Newegg/Magnell and NTL. The fourth factor thus militates against finding an alter ego relationship.

As to the fifth factor, Plaintiffs allege that Newegg used NTL as a mere shell or conduit because Newegg (1) purportedly asked to be involved in the fraudulent scheme, (2) allowed NTL to perform certain intra-Hong Kong transactions, (3) executed the two guaranties and the two sales agreements, (4) was named as the "Importer" in the insurance policies with KSURE, and (5) permitted NTL to use the Newegg.com logo and to reference Newegg's standard terms and conditions. (SAC ¶¶ 34, 61, 63-76; Opp. at 20-21). These allegations, however, are largely unavailing because they are not relevant (the insurance policies were not issued by Defendants), are conclusory and speculative (that Newegg asked to be a part of the scheme) (*id.* ¶¶ 34, 63), or contain no material deviations from previously rejected allegations in the FAC (the two guaranties and two sales agreements) (*compare id.* ¶¶ 69-74 *with* ***[*31]*** FAC ¶¶ 58-65). Moreover, as the Court previously noted, the fact that Newegg and/or NTL made use of the "Newegg.com" logo or trade name does not render them alter egos of one another. *See, e.g.,* *Eagle Canyon Owners' Ass'n v. Waste Mgmt., Inc., No. 16-cv-2811-LAB, 2017 U.S. Dist. LEXIS 109812, 2017 WL 3017501, at *5 (S.D. Cal. Jul. 13, 2017)* ("Use of a licensed logo on contracts, trucks, or online doesn't make a parent company party to a contract or subject to personal jurisdiction.") (internal citations omitted). The fifth factor thus militates against finding an alter ego relationship.

As to the sixth, seventh, and eighth factors, the SAC contains no allegations and Plaintiffs' Opposition does not suggest that any of the relevant entities are inadequately capitalized, that any of the relevant entities disregard corporate formalities, or that any of the relevant entities fail to segregate their corporate records from the records of the other entities. The sixth, seventh, and eighth factors thus militate against finding an alter ego relationship.

As to the ninth factor, the Court finds some support for Plaintiffs' position that there are identical directors and officers for the reason stated in the fourth factor. However, this factor only slightly militates in favor **[*32]** of finding that NTL was Newegg's alter ego, since "'[it] is considered a normal attribute of ownership that officers and directors of the parent serve as officers and directors of the subsidiary.'" *Gerritsen v. Warner Bros. Entm't Inc., 116 F. Supp. 3d 1104, 1138-39 (C.D. Cal. 2015)* (quoting *Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 548-49, 99 Cal. Rptr. 2d 824 (2000))*.

In sum, only two of the nine factors — Newegg assuming liability for NTL's debt under the two guaranties and overlapping directors and officers — support Plaintiffs' unity-of-interest position. That is not enough to disregard corporate separateness. *See* [Stewart v. Screen Gems-EMI Music, Inc., 81 F. Supp. 3d 938, 956 (N.D. Cal. 2015)] ("Here, three factors weigh in favor of finding a unity of interest among the [defendant] entities: equitable ownership, use of the same offices and employees..., and identical officers and directors. These factors, even when considered together, are not sufficient to support of finding of unity of interest among these entities.").

Accordingly, there is insufficient unity of interest between NTL and Newegg and/or Magnell to establish an alter ego relationship.

b. *Fraud or injustice*

Unity of interest aside, Plaintiffs have also failed to demonstrate that fraud or injustice will follow by not recognizing an alter ego relationship between Defendants and NTL.

Plaintiffs argue that because the SAC alleges a fraudulent scheme concocted **[*33]** by Defendants and NTL, fraud or injustice would follow if the Court adheres to their corporate separateness. (Opp. at 21) ("Here, the SAC alleges that Newegg, Inc. [took various actions as stated above] ... for fraudulent NTL receivables...These allegations show that Newegg, Inc. acted in bad faith, perpetuated the fraud, and misrepresented the corporate form..."). At the hearing, Plaintiffs argued that the Court should not place too much weight on corporate formalities. But accepting Plaintiffs' argument would essentially eliminate this prong of the analysis, since every complaint involving an alter ego relationship would necessarily involve allegations that one corporate entity is hiding behind the corporate veil of another.

Moreover, as previously recognized by the Court, Plaintiffs may pursue NTL, the alleged primary wrongdoer whom Defendants purportedly controlled, in its home of Hong Kong (or wherever else it might be subject to jurisdiction). Certainly, Hong Kong courts would be more than capable of resolving Plaintiffs' dispute with NTL. *See, e.g.,* [Cook v. Champion Shipping AS, 732 F. Supp. 2d 1029, 1038 (E.D. Cal. 2010)] (finding that Hong Kong is an adequate alternative forum and dismissing maritime action on forum non conveniens grounds); [Capri Trading Corp. v. Bank Bumiputra Malaysia Berhad, 812 F. Supp. 1041, 1044 (N.D. Cal. 1993)] (finding that **[*34]** Hong Kong is an adequate alternative forum and dismissing civil RICO action on forum non conveniens grounds).

Accordingly, the Court finds no risk of fraud or injustice by declining to recognize an alter ego relationship between Defendants and NTL.

2. Agency Theory

Plaintiffs next argue that Newegg and/or Magnell and NTL were in an agency relationship. (SAC ¶ 22; Opp. at 22).

The SAC, however, offers no allegations to suggest anything more than a close parent-subsidiary relationship between Defendants and NTL. For example, Plaintiffs conclude that that Defendants and NTL were "agents, partners, representatives, affiliates, alter egos and/or co-conspirators of each other" and repeatedly allege that Newegg "dominated, influenced, and controlled Magnell and [NTL]," but offer no other facts to support such descriptions. (*See* SAC ¶¶ 29-30, 32, 36, 59; Opp. at 22). Further, Plaintiffs point to the two sales agreements, the KSURE insurance policies, the purchase orders, and other contracts as evidence that Newegg "controlled NTL's day-to-day operations with respect to the fraudulent scheme." (Opp. at 23). But, as Defendants note, these contractual relationships actually cut against Plaintiffs' argument that NTL was Defendants' **[*35]** agent since they concern three distinct business relationships: Newegg and Moneual, Newegg and NTL, and Moneual and NTL.

Through unadorned labels and conclusory statements, Plaintiffs' attempt to allege the existence of an agency relationship between Defendants and NTL falls far short of the pleading standards. *See, e.g., Lomeli v. Jackson Hewitt, Inc.*, No. 17-cv-02899-ODW-KSx, 2017 WL 4773099, at *4 (C.D. Cal. Oct. 19, 2017) ("[W]here a plaintiff alleges that a defendant is liable for fraud under an agency theory, *Rule 9(b)* requires that the existence of the agency relationship be pled with particularity.") (internal citation and quotation omitted); *Sawyer v. Bill Me Later, Inc., No. 10-cv-04461-SJO-JCGx, 2010 U.S. Dist. LEXIS 138098, 2010 WL 11492736, at *15 (C.D. Cal. Oct. 4, 2010)* ("To establish a parent corporation's liability for the acts or omissions of its subsidiary under an agency theory ... a plaintiff must show that the 'parent corporation *so controls the subsidiary* as to cause the subsidiary to become *merely* the agent or instrumentality of the parent[.]'"). The Court is therefore unpersuaded that an agency relationship existed between Defendants and NTL.

Accordingly, Defendants' Motion is **GRANTED *without leave to amend*** with respect to Plaintiffs' secondary liability claim.

B. Fraud Claim

Defendants next argue that Plaintiffs **[*36]** again fail to plead their fraud and negligent misrepresentation claims with sufficient specificity and therefore should be dismissed without further leave to amend. (Mot. at 15-21; Reply at 3-13). The Court will first turn to the fraud claim.

The Court, in its Order on April 26, 2018, granting Defendants' Motion to Dismiss First Amended Complaint, noted that "the bulk of the complained-of factoring transactions involved NTL rather than Newegg" and that "NTL is the primary, and perhaps the only, wrongdoer." (Docket No. 62 at 24-25). Plaintiffs therefore might consider pursuing NTL in Hong Kong or wherever it may be pursued. (*Id.*). Further, given the pervasive failure to distinguish between the alleged misconduct between Defendants and NTL, Plaintiffs may file a SAC in which they allege with more specificity as to what Newegg and/or Magnell did or did not do. (*Id.*).

The Court is unpersuaded that Plaintiffs have sufficiently done so for several reasons:

First, rather than remedying their allegations in the FAC — which referred to Defendants and NTL collectively as "Newegg" and/or "Newegg.com" — Plaintiffs have simply repackaged their allegations to state that Newegg committed the fraud and **[*37]** that NTL acted on Newegg's behalf at all relevant times.

For example, Plaintiffs previously alleged in the FAC that:

- "Before purchasing Moneual's export trade receivables from ASI, Newegg and other importers, the Banks purchased [EFF Insurance] from KSURE]." (FAC ¶ 36);

- "[B]eginning in 2012 and continuing until the scheme was uncovered in later 2014, [NTL], with Newegg, Inc.'s ... knowledge..." (*Id.* ¶ 52);

- "In accordance with the SPIs ... the Banks received payment for all purchased export receivables from Newegg payable before September 2014...." (*Id.* ¶ 66);

- "The successful consummation of some export finance transactions with ASI and Newegg..." (*Id.* ¶ 67).

Looking at the same statements in the SAC, Plaintiffs now allege that:

- "In connection with purchasing Moneual's export trade receivables from ASI, Newegg, Inc., ***acting through [NTL]***, and other importers, the Banks purchased EFF insurance from KSURE." (SAC ¶ 85);

- "Beginning in 2012 and continuing until the scheme was uncovered in later 2014 Newegg, Inc., ***acting through its subsidiary, [NTL]***..." (*Id.* ¶ 59);

- "In accordance with the SPIs ... the Banks received payment for all purchased export receivables from Newegg, Inc.—***acting [*38] through [NTL]***—payable before September 2014..." (*Id.* ¶ 82); and

- "The successful consummation of some export finance transactions with ASI and Newegg, Inc. (***acting through [NTL]***) ..." (*Id.* ¶ 83).

Plaintiffs, in fact, riddle their allegations in the SAC with some variation of the phrase "acting through NTL" when discussing actions attributable only to Newegg. (*See, e.g.*, SAC ¶¶ 59, 82-83, 85, 91, 93-94, 97, 111, 113, 115, 119, 165, 295).

Second, the substance of the fraudulent factoring transactions in the SAC still involves allegations against NTL rather than Newegg or Magnell. For example, Plaintiffs allege that it was NTL that:

• Received and countersigned SPIs (*see, e.g., id.* ¶¶ 81 ("Moneual would send Newegg, Inc.'s agent and representative, [NTL], SPIs..."), 138 ("Moneual also sent Newegg, Inc., through its agent and alter ego, [NTL], an SPI..."));

• Issued fraudulent purchase orders for Moneual products that were passed on to the Banks (*see, e.g., id.* ¶¶ 59 ("Newegg, Inc., acting through its subsidiary, [NTL]—which Newegg, Inc. directed and controlled at all relevant times—issued fraudulent purchase orders..."), 80 ("Moneual purported to charge [NTL] between $2,530 and $2,980 per **[*39]** HTPC unit, and those amounts were stated on the invoices and purchase orders from [NTL]..."));

• Engaged in paper-only transactions with Moneual (*see, e.g., id.* ¶ 60 ("[T]he transactions entered into between Moneual and [NTL] ... took place on paper only.")); and

• Purported to purchase Moneual products and received invoices from Moneual (*see, e.g. id.* ¶ 80 ("The invoices that Moneual issued to [NTL] listed Moneual as the seller and [NTL]...as the consignee of the goods.")); and

• Made payments, prior to any default, to the Banks in accordance with the SPIs (*see, e.g., id.* ¶¶ 140 ("NH received banks transfers ... from an account in the name of [NTL]..."), 145 (same), 150 (same), 239 ("KB received a payment ... from an account in the name of [NTL]..."), 243 (same), 247 (same)).

Because the allegations continue to tie the alleged misconduct to actions perpetrated by NTL rather than Newegg or Magnell, Plaintiffs' fraud claim remains nonviable — particularly in light of the Court's previous dismissal of NTL on personal jurisdiction grounds. *See* *U.S. ex rel. Lee v. Corinthian Colleges, 655 F.3d 984, 997-98 (9th Cir. 2011)* ("*Rule 9(b)* does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more **[*40]** than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.") (internal quotation marks and citations omitted).

Third, it appears that Newegg is specifically alleged to have only executed the two guaranties and the two sales agreements and purportedly asked to be involved in the fraudulent scheme. But as already discussed, these allegations are conclusory, speculative, and insufficient to establish an alter ego or agent relationship between Defendants and NTL — something that may salvage Plaintiffs' fraud claim. *See supra*; *Lee, 655 F.3d at 998*.

Finally, at the hearing, Plaintiffs argued that there are specific allegations in the SAC that can be read plausibly to show that Newegg was the driving force behind the alleged fraudulent scheme instead of NTL being the driving force with Newegg lending financial support, consistent with an ordinary parent-subsidiary relationship.

Plaintiffs' SAC contains the following four specific allegations supporting their argument raised at the hearing: (1) Moneual is alleged to be doing business with Newegg.com, purportedly owned, operated, and controlled by Newegg at all relevant times; (2) Newegg, rather **[*41]** than NTL, was ultimately responsible for paying the receivables due on the Moneual-Newegg transactions; (3) the payments Plaintiffs were receiving were ultimately coming from Newegg; and (4) Newegg was merely acting through NTL, its Hong Kong subsidiary, with respect to the purchase orders, purported physical delivery of the goods, and all other misconduct. (*See, e.g.*, SAC ¶¶ 21-24, 29-30).

But upon further review, these allegations conflict with or are undermined by other statements in the SAC and case law examining similar allegations. Accepting uncontroverted allegations as true, these conflicting allegations suggest that Plaintiffs' theory of liability is nonviable even at the pleading stage. *See* *Webcor Construction, LP v.*

Zurich Am. Ins. Co., No. 17-cv-2220-YGR, 2017 U.S. Dist. LEXIS 160267, 2017 WL 4310763, at * 4 (N.D. Cal. Sept. 28, 2017) (granting motion to dismiss under Rule 12(b)(6) because the plaintiff's theory "is not supported by the conflicting allegations in the FAC").

The Court will turn to each of the four specific allegations.

1. Moneual's Relationship with Newegg.com

As to Plaintiffs' allegation that Moneual was conducting business with Newegg.com, allegedly owned, operated, and controlled by Newegg, the SAC contains several conflicting statements. For example, **[*42]** Plaintiffs allege that Magnell, not Newegg, "is registered to do business as Newegg.com"; that there are "other indicia that Newegg.com may have act[ed] through Magnell in some [unspecified] respects"; and that Plaintiffs cannot plead "precisely what Magnell's role was ... in the scheme ... involving Newegg.com". (SAC ¶¶ 21, 23). Plaintiffs also acknowledge that Magnell is named as a Defendant "to the extent that it took actions [again, unspecified] under the name Newegg.com." (*Id.* ¶ 24).

Plaintiffs appear to recognize that both Newegg and Magnell may have directed or controlled Newegg.com, to varying degrees, during the relevant timeframe. Yet, Plaintiffs still lump together Newegg and Magnell and attribute any actions involving Newegg.com to only Newegg without distinguishing between the actions attributable to Newegg and those attributable to Magnell. Plaintiffs even go as far as pleading that Newegg, Magnell, and NTL "were agents, partners, representatives, affiliates, alter egos and/or co-conspirators of each other and each was acting within the scope of such agency, partnership, representation, affiliation, or conspiracy" and that Newegg "dominated, influenced, and controlled **[*43]** Magnell and [NTL]" at all relevant times. (*Id.* ¶¶ 29-30). It seems that Plaintiffs, again, want to attribute all alleged fraudulent actions to Newegg, a theory that the Court has already rejected in its previous Order.

The decision in *Swartz* is particularly instructive. 476 F.3d at 765. There, the complaint contained "general allegations" that the defendants had engaged in fraudulent conduct but failed to plead which alleged misconduct is attributable to which specific defendant(s). Id. at 763-64. The Ninth Circuit noted that "there is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify [the actions of] ... each and every defendant." Id. at 764. However, the plaintiff must, at a minimum, "identify the role of each defendant in the alleged fraudulent scheme." Id. at 765 ("Rule 9(b) does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.") (internal quotation marks and citations omitted). Moreover, the Ninth Circuit concluded that "the **[*44]** lack of specificity in [the plaintiff's] allegations of fraud provides an independent reason" to dismiss under Rule 12(b)(6). *Id.*

2. Receivables Due on the Moneual-Newegg Transactions

As to Plaintiffs' contention that Newegg, rather than NTL, was ultimately responsible for paying the receivables due on the Moneual-Newegg transactions, the SAC contains allegations that point to the opposite conclusion and conclusory statements that are insufficient under Rule 12(b)(6).

At numerous points in the SAC, for example, Plaintiffs recognize that the trade receivables were due from NTL, rather than Newegg. (*See, e.g.*, SAC ¶¶ 64 ("Moneual transmitted the August 2012 Guaranty from Newegg, Inc. to KSURE ... [and] KSURE extended Moneual an insurance credit line for the ***Newegg Trading Limited trade receivables***."), 65 ("Newegg, Inc. executed the January 2013 Guaranty so that Moneual could procure EFF insurance ... for the ***Newegg Trading Limited export receivables***."), 88 ("In connection with seeking to sell its ***Newegg Trading Limited trade receivables***..."), 166 ("KEB Hana also purchased EFF insurance from KSURE ... to secure ***Newegg Trading Limited receivables*** it factor."), 206 ("for each set of ... export ***receivables from***

Newegg [*45] Trading Limited..."), 208 ("KB purchased Moneual's ASI and ***Newegg Trading Limited receivables***...") (emphasis added)).

Yet, Plaintiffs continue to attribute NTL receivables to Newegg by merely adding the phrase "acting through" in other parts of the SAC. (*See, e.g., id.* ¶¶ 85 ("In connection with purchasing Moneual's export trade receivables from ... Newegg, Inc., acting through Newegg Trading Limited..."), 93 ("Moneual agreed to transfer certain trade receivables backed by purchase orders from third parties—including ... Newegg, Inc., acting through Newegg Trading Limited..."), 111 ("In or around 2013, Moneual requested that NH factor its open account export receivables, including, among others, receivables due from ... Newegg, Inc., acting through Newegg Trading Limited, secured by EFF Insurance.").

Like the attempt to attribute all actions involving Newegg.com to only Newegg, Plaintiffs appear to want to attribute all actions involving export trade receivables to only Newegg, without differentiating the role of Newegg (as guarantor) and NTL (as the counterparty to the agreements with Moneual). This attempt, however, is unconvincing to show that Newegg was ultimately and solely responsible **[*46]** for paying the receivables due on the Moneual-Newegg transactions. *See, e.g.,* *United States v. Kiewit Pacific Co., No. 12-cv-2698-JST, 2013 U.S. Dist. LEXIS 153135, 2013 WL 5770514, at *11 (N.D. Cal. Oct. 24, 2013)* (granting motion to dismiss as to the fraud claims and noting that the plaintiffs' allegations that "Kiewit Pacific Co. ***acted through*** Kiewit Infrastructure Group" are insufficient) (emphasis added); *Filler v. Hanvit Bank, No. 01-cv-9510-MGC, 2003 U.S. Dist. LEXIS 15950, 2003 WL 22110773, at *3 (S.D.N.Y. Sept. 16, 2004)* (dismissing fraud claims against related corporate entities for lack of specificity where the "complaint are full of conclusory allegations that the Korean entity ***acted through*** [its] parent ... and assume that these two corporations constitute a single entity [without] any explanation of why these distinct corporations should be regarded as one") (emphasis added).

The difference in Plaintiffs' allegations against ASI and allegations against Newegg is also telling. Against Defendants ASI and Newegg, Plaintiffs' SAC contains some common allegations: (1) there is a parent-subsidiary relationship; (2) the parent and subsidiary share some common directors, officers, and employees; and (3) the parent and subsidiary maintain the same registered corporate address. But in contrast to the allegations against Newegg, Plaintiffs also **[*47]** allege the following against ASI:

- ASI Corp. is or was an affiliate of ASI Computer at all relevant times because it merged into ASI Computer during the fraudulent scheme;
- ASI Corp. and ASI Computer did not distinguish between themselves in communications with third parties;
- ASI Corp. and ASI Computer did not distinguish the roles of their officers, directors, employees, and agents;

- ASI Corp. and ASI Computer identified their affiliates (*i.e.*, officers, directors, employees, and agents) interchangeably with either or both entities; and
- ASI Corp. and ASI Computer shared an email domain: "@asipartner.com".

(*See, e.g.*, SAC ¶¶ 13-17). Consequently, Plaintiffs' allegations need not specifically distinguish between ASI Corp. and ASI Computer, especially considering the merger. The SAC offers a more persuasive inference at the pleading stage that ASI Computer was the driving force behind the alleged fraudulent scheme and was ultimately responsible for paying the receivables due on the Moneual-ASI transactions. The Court therefore denied Defendants ASI's Motion to Dismiss Plaintiffs Industrial Bank of Korea, et al.'s First Amended Complaint. (Docket No. 62).

3. Purported Payments from Newegg [*48]

As to Plaintiffs' contention that the payments Plaintiffs received were ultimately coming from Newegg, the SAC again contains conflicting statements and lends little to no support.

For example, for the five sets of purchase orders between NTL and NH, Plaintiffs allege the following:

- "Moneual had assigned the right to payment for goods sold pursuant to the First Set of NH-Newegg Purchase Orders to NH and ***instructing Newegg, Inc., through Newegg Trading Limited, to pay NH*** directly when payment became due." (*Id.* ¶ 138);

- "Moneual had assigned the right to payment for goods sold pursuant to the Second Set of NH-Newegg Purchase Orders to NH and ***instructing Newegg, Inc., through Newegg Trading Limited, to pay NH*** directly when payment became due." (*Id.* ¶ 144);

- "Moneual had assigned the right to payment for goods sold pursuant to the Third Set of NH-Newegg Purchase Orders to NH and ***instructing Newegg Trading Limited to pay NH*** directly when payment became due." (*Id.* ¶ 148);

- "Moneual had assigned the right to payment for goods sold pursuant to the Fourth Set of NH-Newegg Purchase Orders to NH and ***instructing Newegg Trading Limited to pay NH*** directly when payment became due." (*Id.* ¶ 153); and **[*49]**

- "Moneual had assigned the right to payment for goods sold pursuant to the Fifth Set of NH-Newegg Purchase Orders to NH and ***instructing Newegg Trading Limited to pay NH*** directly when payment became due." (*Id.* ¶ 158).

When viewing these allegations in the light most favorable to Plaintiffs, it appears that most of the payments (3 out of 5) received by NH came from NTL rather than Newegg. This interpretation is still insufficient to support Plaintiffs' contention that the payments they received were ultimately coming from Newegg. But when ignoring the conclusory and unsupported allegations that Newegg "acted through" NTL, Plaintiffs' SAC suggests that the payments received by NH all came from NTL. And in fact, Plaintiffs later recognize that the completed payments came from an NTL account. (*See, e.g., id.* ¶¶ 140 ("NH received bank transfers ... from an account in the name of Newegg Trading Limited [for the first set of purchased orders.]"), 145 ("NH received a bank transfer ... from an account in the name of Newegg Trading Limited [for the second set of purchased orders.]")).

Plaintiffs' allegations with respect to the four sets of purchase orders between NTL and KB are even more revealing: **[*50]**

- "Moneual also sent Newegg Trading Limited SPIs informing it that Moneual had assigned the right to payment for goods sold pursuant to the First Set of KB-Newegg Purchase Orders to KB and ***instructing Newegg Trading Limited to pay KB*** directly when payment became due." (*Id.* ¶ 237);

- "Moneual had assigned the right to payment for goods sold pursuant to the Second Set of KB-Newegg Purchase Orders to KB and ***instructing Newegg Trading Limited Newegg, Inc.'s agent and alter ego, to pay KB*** directly when payment became due." (*Id.* ¶ 241);

- "Moneual had assigned the right to payment for goods sold pursuant to the Third Set of KB-Newegg Purchase Orders to KB and ***instructing Newegg Trading Limited, Newegg, Inc.'s agent and alter ego, to pay KB*** directly when payment became due." (*Id.* ¶ 245); and

- "Moneual had assigned the right to payment for goods sold pursuant to the Fourth Set of KB-Newegg Purchase Orders to KB and ***instructing Newegg Trading Limited, Newegg, Inc.'s agent and alter ego, to pay KB*** directly when payment became due." (*Id.* ¶ 250).

Like the payments received by NH, the payments received by KB all came from an account in the name of and owned by NTL. The Court has already previously **[*51]** rejected — and still rejects, *see supra* — Plaintiffs' theory that NTL was Newegg's alter ego or agent, as there is insufficient unity of interest between NTL and Newegg. *See* *Xyience Beverage Co., LLC v. Statewide Beverage Co., Inc., No. 15-cv-2513-MMM, 2015 U.S. Dist. LEXIS 189549, 2015 WL 13333486, at *8 (C.D. Cal. Sept. 24, 2015)* (concluding that plaintiffs' "cross-claim does not survive *Rule 12(b)(6)* scrutiny" because plaintiffs cannot "circumvent the requirements for secondary liability by blandly alleging that [certain defendants] are alter egos of other defendants accused of committing primary violations") (internal quotation marks and citation omitted).

4. Newegg Acting Through NTL

As to Plaintiffs' contention that Newegg was merely acting through its Hong Kong subsidiary, NTL, with respect to the alleged fraud, the SAC contains mostly conclusory allegations. And as previously noted, the SAC is riddled with some variation of the phrase "acting through NTL" when discussing actions attributable only to Newegg. (*See, e.g., id.* ¶¶ 91, 93-94, 97, 111, 113, 115, 119, 165, 295). These conclusory assertions, however, cannot support Plaintiffs' theory that Newegg was the driving force behind the alleged fraud, because Plaintiffs appear to want to attribute all alleged misconduct to **[*52]** Newegg without distinguishing the roles of the three entities in question: Newegg, NTL, and Magnell.

At the hearing, Plaintiffs reasserted that Newegg's fingerprints are "all over" the alleged fraudulent scheme. But as thoroughly discussed above, courts routinely reject this vague and conclusive attempt to plead liability. *See, e.g., Swartz, 476 F.3d at 765*; *Kiewit Pacific Co., 2013 U.S. Dist. LEXIS 153135, 2013 WL 5770514, at *11*; *Filler, 2003 U.S. Dist. LEXIS 15950, 2003 WL 22110773, at *3*.

Accordingly, Defendants' Motion is **GRANTED *without leave to amend*** with respect to Plaintiffs' fraud claim.

C. Negligent Misrepresentation

Because Defendants raise the same arguments to dismiss Plaintiffs' fraud and negligent misrepresentation claims (*see* Mot. at 15-21; Reply at 3-13) and because Plaintiffs also acknowledge and respond to those arguments in defense of their claims (Opp. at 9-15), the Court concludes that Plaintiffs also fail to plead their negligent misrepresentation claim with sufficient specificity for the above-stated reasons.

At the hearing, Plaintiffs also argued that liability can be established based on a promissory fraud theory. Promissory fraud is a subspecies of fraud where a plaintiff must plead and prove that the defendant made a promise that the defendant had no intention of performing. *See* *UMG Recordings, Inc. v. Global Eagle Ent., Inc., 117 F. Supp. 3d 1092, 1109 (C.D. Cal. 2015)* (citing *Lazar v. Superior Court, 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377, 909 P.2d 981 (1996)* ("A promise to do something necessarily **[*53]** implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud.")).

According to Plaintiffs, Newegg agreed to purchase Moneual products for resale, but had no intention of legitimately reselling those products since no physical transfer of goods ever occurred. But Plaintiffs' SAC has alleged neither a promise made to Plaintiffs nor nonperformance of that promise, since the agreements Plaintiffs pointed to were between Newegg and non-party Moneual. *See* *Sunnyside Development Co., LLC v. Opsys Limited, No. 05-cv-553-MHP, 2005 U.S. Dist. LEXIS 39303, 2005 WL 1876106, at *5-6 (N.D. Cal. Aug. 8, 2005)* ("[T]he mere fact that a party breaches a promise to perform a condition of contract is as a matter of law insufficient to give rise to an inference that the breaching party acted with fraudulent intent at the time that the promise was made"); *Grant v. Aurora Loan Servs., Inc., 736 F. Supp. 2d 1257, 1271 (C.D. Cal. 2010)* ("[I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury.") (internal citations omitted).

Regardless of whether Plaintiffs' negligent misrepresentation claim is adequately pleaded, Defendants also argue that it is barred by the two-year statute of limitations. **[*54]** (Mot. at 21). Plaintiffs commenced this action on October 18, 2017. Defendants contend that the allegations contained in the SAC show that Plaintiffs' negligent misrepresentation claim accrued on or before October 18, 2014, more than two years before the original Complaint was filed. (Mot. at 22; *see also, e.g.*, SAC ¶¶ 154, 159 (NH purchased NTL export receivables on July 22 and July 25, 2014); 191, 197 (KEB Hana purchased NTL export receivables from April through August 2014); 251 (KB purchased NTL export receivables on June 17, 2014)). Plaintiffs, however, argue that their negligent misrepresentation claim is grounded in fraud, as opposed to negligence, so the statute of limitation is three years. (Opp. at 23).

Because Plaintiffs fail to plead their negligent misrepresentation claims with sufficient specificity to survive a motion to dismiss, the Court finds it unnecessary to address which statute of limitation applies. *See* *Greyhound Lines Inc. v. Viad Corp., No. 15-cv-01820-PHX-DGC, 2016 U.S. Dist. LEXIS 160960, 2016 WL 6833938, at *3 n.1 (D. Ariz. Nov. 21, 2016)* (dismissing fraud and negligent misrepresentation claims and noting that the court "need not decide which statute of limitations applies at this time").

Accordingly, Defendants' Motion is **GRANTED *without leave to amend*** **[*55]** with respect to Plaintiffs' negligent misrepresentation claims.

D. UCL Claim

Plaintiffs finally argue that they have adequately alleged a UCL claim under all three applicable prongs. (*See* SAC ¶ 321; Opp. at 25).

California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. "Because the statute is written in the disjunctive, it is violated where a defendant's act or practice violates any of the foregoing prongs." *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1168 (9th Cir. 2012)*. The UCL "does not proscribe specific activities," but rather, "borrows violations of other laws and treats them as unlawful practices that the [UCL] makes independently actionable." *Puentes v. Wells Fargo Home Mortgage., Inc., 160 Cal. App. 4th 638, 643-44, 72 Cal. Rptr. 3d 903 (2008)* (internal quotation marks and citations omitted).

As a preliminary matter, Defendants argue that Plaintiffs lack standing to sue under the UCL because Plaintiffs are neither consumers nor competitors and Plaintiffs' UCL claim is based on foreign private lending agreements. (Mot. at 23). But the UCL expressly permits claims to be brought by any "person," which is broadly defined to include "natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons." *See* *§§ 17201*, *17204*. **[*56]** Further, Plaintiffs also expressly allege that some misconduct may have occurred in California — for example, Newegg executed the two guaranties and the two sales agreements in California. (SAC ¶¶ 64-65, 69-71). Whether Plaintiffs' allegations are viable is a different question. Accordingly, Plaintiffs have standing to sue under the UCL.

The Court will now turn to each prong of the UCL.

1. Unlawful

Conduct is "unlawful" under the UCL if it "violate[s] another 'borrowed' law." *Davis, 691 F.3d at 1168* (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999))*; *cf.* *People ex rel. Bill Lockyer v. Fremont Life Ins. Co., 104 Cal. App. 4th 508, 515, 128 Cal. Rptr. 2d 463 (2002)* ("With respect to the *unlawful* prong, virtually any state, federal or local law can serve as the predicate for an action under *section 17200*.") (internal quotation marks, citations, and alterations omitted; italics in original).

Here, it appears from the face of the SAC that the "borrowed law" Plaintiffs rely upon for its UCL claim is common law fraud, *18 U.S.C. § 1341* ("Fraud and swindles"), and *18 U.S.C. § 1343* ("Fraud by wire, radio, or television"). (SAC ¶ 321; Opp. at 25). As discussed above, Plaintiffs have not adequately alleged an alter ego or agency relationship between Defendants and NTL and failed to plead any viable fraud-based claim. Moreover, alleged common law violations are insufficient for a UCL claim. *See Shroyer v. New Cingular Wireless Services, Inc., 622*

F.3d 1035, 1044 (9th Cir. 2010) ("Because Shroyer does not **[*57]** go beyond alleging a violation of common law, he fails to state a claim under the unlawful prong of *§ 17200*.").

2. Unfair

"The UCL does not define the term 'unfair,'" and "the proper definition of 'unfair' conduct against consumers is currently in flux' among California courts." *Davis, 691 F.3d at 1169* (noting that an alleged misconduct "unfair" when it is (1) "offend[ing] established public policy or ... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers"; or (2) "threaten[ing] an incipient violation of an ***antitrust law***, or violat[ing] the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threaten[ing] or harm[ing] competition") (internal quotation marks and citations omitted). But in the competitor context, the California Supreme Court articulated:

> When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *section 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of **[*58]** the law, or otherwise significantly threatens or harms competition.

See *Cel-Tech, 20 Cal. 4th at 185*.

Here, Plaintiffs' attempt to plead a UCL claim under the unfairness prong fails. Among other reasons, Plaintiffs offer no factual allegations to support the claim that any purportedly fraudulent conduct — again, not alleged with sufficient particularity — threatens to violate the letter, policy, or spirit of the antitrust laws or harm competition.

3. Fraudulent

Conduct is "fraudulent" under the UCL if it is "likely to deceive." *Morgan v. AT & T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1254, 99 Cal. Rptr. 3d 768 (2009)*. The particularity requirement of *Rule 9(b)* applies to claims under the fraudulent prong of the UCL. *See* *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*; *Sosa v. Bank of New York Mellon Trust, No. 12-cv-144-LB, 2012 U.S. Dist. LEXIS 92291, 2012 WL 2568188, at *4 (N.D. Cal. July 2, 2012)*; *Briosos v. Wells Fargo Bank, 737 F. Supp. 2d 1018, 1033 (N.D. Cal. 2010)*. *Rule 9(b)* requires the plaintiff to allege "the who, what, when, where, and how" of the alleged fraudulent conduct, *Vess, 317 F.3d at 1106*, and "set forth an explanation as to why [a] statement or omission complained of was false and misleading," *In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)* (en banc) (superseded by statute on other grounds).

Since Plaintiffs have failed to plead its alleged fraudulent conduct with sufficient particularity, their attempt to plead a UCL claim under the fraudulent prong also fails. *See* *Chase v. Hobby Lobby Stores, Inc., 2017 U.S. Dist. LEXIS 162909, 2017 WL 4358146, at *8 (S.D. Cal. Oct. 2, 2017)* (dismissing UCL claim under the fraudulent prong since the "complaint provides sufficient detail **[*59]** as to the 'who, what, when and where' of the alleged misconduct ... [but] has not adequately alleged the 'how').

Accordingly, Defendants' Motion is **GRANTED *without leave to amend*** with respect to Plaintiffs' UCL claim.

V. <u>CONCLUSION</u>

For the reasons set forth above, the Motion, RJN, and Application are ruled upon as follows:

- Defendants' Motion to Dismiss Second Amended Complaint is **GRANTED *without leave to amend***; and
- Both Defendants' RJN and Plaintiffs' Ex Parte Application are **DENIED *as moot***.

Plaintiffs' claims against Defendants Magnell Associate Inc., dba Newegg.com and Newegg, Inc., are therefore **DISMISSED**.

Remaining in this action are Plaintiffs' claims for fraud, negligent misrepresentation, and violations of California's Unfair Competition Law as to Defendants ASI Corporation, ASI Computer Technologies, Inc., Bill Chen, Henry Chen, Frances Chou, and Christine Liang.

IT IS SO ORDERED.

Nat'l Prescription Opiate Litig. v. Purdue Pharma L.P. (In re Nat'l Prescription Opiate Litig.)

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

October 5, 2018, Decided; October 5, 2018, Filed

MDL No. 1:17-cv-02804; CASE NO. 1:18-op-45090

Reporter
2018 U.S. Dist. LEXIS 176260 *; __ F. Supp. 3d __

In Re: National Prescription Opiate Litigation;COUNTY OF SUMMIT, OHIO, et al., Plaintiffs, v. PURDUE PHARMA L.P., et al., Defendants.

Subsequent History: Adopted by, in part, Rejected by, in part, Dismissed by, Motion denied by, Objection overruled by *Cty. of Summit v. Purdue Pharma L.P. (In re Nat'l Prescription Opiate Litig.), 2018 U.S. Dist. LEXIS 213657, 2018 WL 6628898 (N.D. Ohio, Dec. 19, 2018)*

Prior History: *In re Nat'l Prescription Opiate Litig., 2018 U.S. Dist. LEXIS 90899 (N.D. Ohio, Feb. 6, 2018)*

Core Terms

opioids, Manufacturers, Plaintiffs', public nuisance, allegations, Defendants', Distributors, marketing, orders, suspicious, damages, prescription, prescribing, injuries, costs, fraudulent, addiction, diversion, municipal, common law, misrepresentations, foreseeable, Pharmacies, nuisance, controlled substance, regulation, abrogated, cause of action, enterprise, courts

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For Endo Pharmaceuticals, Inc., Defendant: Brenton Webster Cole, LEAD ATTORNEY, Baker Donelson Bearman Caldwell & Berkowitz, Atlanta, GA; Carolyn Robbs Bilanko, Curt Roy Hineline, LEAD ATTORNEYS, Baker & Hostetler - Seattle, Seattle, WA; David D. Fauvre, John A. Freedman, LEAD ATTORNEYS, Arnold & Porter Kaye

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John D. Lombardo, LEAD ATTORNEY, Sean O. Morris, Arnold & Porter Kaye Scholer - Los Angeles, Los Angeles, CA; John B Pound, LEAD ATTORNEY, John B. Pound, LLC, Santa Fe, NM; Kathleen A DeLaney, LEAD ATTORNEY, DeLaney & DeLaney LLC, Indianapolis, IN; Nicole Gerritsen McDonough, Thomas John Herten, LEAD ATTORNEYS, Archer & Greiner, Hackensack, NJ; Robert James Benvenuti, III, Wesley R. Butler, LEAD ATTORNEYS, Barnett, Benvenuti & Butler, Lexington, KY; Samuel Hernandez, LEAD ATTORNEY, K&L Gates, Portland, OR; Tamela J. White, LEAD ATTORNEY, Farrell White & Legg, Huntington, WV; Carole S. Rendon, Tera N. Coleman, Baker & Hostetler **[*19]** - Cleveland, Cleveland, OH; Daniel J Dysart, Baker Donelson Bearman Caldwell & Berkowitz - New Orleans, New Orleans, LA; Ingo W. Sprie, Jr., Arnold & Porter Kaye Scholer - New York, New York, NY; Jonathan L. Stern, Arnold & Porter Kaye Scholer - Washington, Washington, DC; Kerry J. Miller, Frilot, Partridge, Kohnke & Clements, New Orleans, LA; Mark S. Cheffo, Dechert - New York, New York, NY.

For Allergan PLC, formerly known as Actavis PLS, Defendant: Seth A. Litman, LEAD ATTORNEY, Thompson Hine, Atlanta, GA; Andrea B. Daloia, John R. Mitchell, Thompson Hine - Cleveland, Cleveland, OH; Donna M. Welch, Martin L. Roth, Timothy W. Knapp, Kirkland & Ellis - Chicago, Chicago, IL; Eric R. Burris, Brownstein Hyatt Farber Schreck, Albuquerque, NM; Jennifer G. Levy, Kirkland & Ellis - Washington, Washington, DC; Mark S. Cheffo, Dechert - New York, New York, NY; Stacey A. Greenwell, INVALID ADDRESS Thompson Hine - Cleveland, Cleveland, OH.

For Actavis, Inc., formerly known as Watson Pharmaceuticals, Inc., Defendant: Tinos Diamantatos, LEAD ATTORNEY, Morgan, Lewis & Bockius - Chicago, Chicago, IL; Andrea B. Daloia, Thompson Hine - Cleveland, Cleveland, OH; Donna M. Welch, Kirkland & Ellis - Chicago, **[*20]** Chicago, IL; Eric R. Burris, Brownstein Hyatt Farber Schreck, Albuquerque, NM; James W. Matthews, Foley & Lardner - Boston, Boston, MA; Jennifer G. Levy, Kirkland & Ellis - Washington, Washington, DC; John R. Mitchell, Thompson Hine - Cleveland, Cleveland, OH; Mark S. Cheffo, Dechert - New York, New York, NY; Martin L. Roth, Timothy W. Knapp, Kirkland & Ellis - Chicago, Chicago, IL; Stacey A. Greenwell, INVALID ADDRESS Thompson Hine - Cleveland, Cleveland, OH.

For Watson Laboratories, Inc., Defendant: Craig Andrew Stanfield, LEAD ATTORNEY, INVALID ADDRESS - Morgan Lewis & Bockius, LLP - Houston, Houston, TX; Mitchell G. Blair, LEAD ATTORNEY, Georgia K.E. Yanchar, Calfee, Halter & Griswold - Cleveland, Cleveland, OH; Thomas F. Hurka, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis & Bockius - Chicago Chicago, IL; Brian M. Ercole, Morgan, Lewis & Bockius - Miamim, Miami, FL; Collie Fitch James, IV, Morgan Lewis & Bockius, Costa Mesa, CA; Eric W. Sitarchuk, Steven A. Reed, Rebecca J. Hillyer, Morgan, Lewis & Bockius - Philadelphia, Philadelphia, PA; Eric M. Sommer, Sommer Udall Hardwick & Jones, P.A., Santa Fe, NM; James W. Matthews, Foley & Lardner - Boston, Boston, MA; Jason J. Blake, Calfee, **[*21]** Halter & Griswold - Columbus, Columbus, OH; Jeremy A. Menkowitz, Morgan Lewis & Bockius, Philadelphia, PA; Mark S. Cheffo, Dechert - New York, New York, NY; Tinos Diamantatos, Morgan, Lewis & Bockius - Chicago, Chicago, IL; Wendy West Feinstein, Morgan, Lewis & Bockius - Pittsburgh, Pittsburgh, PA.

For Actavis LLC, Defendant: Craig Andrew Stanfield, LEAD ATTORNEY, INVALID ADDRESS - Morgan Lewis & Bockius, LLP - Houston, Houston, TX; Mitchell G. Blair, LEAD ATTORNEY, Georgia K.E. Yanchar, Calfee, Halter & Griswold - Cleveland, Cleveland, OH; Albert J. Lucas, Calfee, Halter & Griswold - Columbus, Columbus, OH; Andrea B. Daloia, Thompson Hine - Cleveland, Cleveland, OH; Brian M. Ercole, Morgan, Lewis & Bockius - Miamim, Miami, FL; Christine M. Haaker, Thompson Hine - Miamisburg, Miamisburg, OH; Collie Fitch James, IV, Morgan Lewis & Bockius, Costa Mesa, CA; Donna M. Welch, Kirkland & Ellis - Chicago, Chicago, IL; Eric W. Sitarchuk, Steven A. Reed, Rebecca J. Hillyer, Morgan, Lewis & Bockius - Philadelphia, Philadelphia, PA; Eric M. Sommer, Sommer Udall Hardwick & Jones, P.A., Santa Fe, NM; James W. Matthews, Foley & Lardner - Boston, Boston, MA; Jason J. Blake, Calfee, Halter & Griswold **[*22]** - Columbus, Columbus, OH; Jennifer G. Levy, Kirkland & Ellis - Washington, Washington, DC; Jeremy A. Menkowitz, Morgan Lewis & Bockius, Philadelphia, PA; John R. Mitchell, Thompson Hine - Cleveland, Cleveland, OH; Mark S. Cheffo, Dechert - New York, New York, NY; Martin L. Roth, Timothy W. Knapp, Kirkland & Ellis - Chicago, Chicago, IL; Stacey A. Greenwell, INVALID ADDRESS Thompson Hine - Cleveland, Cleveland, OH; Tinos Diamantatos, Morgan, Lewis & Bockius - Chicago, Chicago, IL; Wendy West Feinstein, Morgan, Lewis & Bockius - Pittsburgh, Pittsburgh, PA.

For Actavis Pharma, Inc., formerly known as Watson Pharma, Inc., Defendant (1:17-md-02804-DAP): Craig Andrew Stanfield, LEAD ATTORNEY, INVALID ADDRESS - Morgan Lewis & Bockius, LLP - Houston, Houston, TX; Mitchell G. Blair, LEAD ATTORNEY, Georgia K.E. Yanchar, Calfee, Halter & Griswold - Cleveland, Cleveland, OH; Thomas F. Hurka, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis & Bockius - Chicago Chicago, IL; Albert J. Lucas, Calfee, Halter & Griswold - Columbus, Columbus, OH; Brian M. Ercole, Morgan, Lewis & Bockius - Miamim, Miami, FL; Collie Fitch James, IV, Morgan Lewis & Bockius, Costa Mesa, CA; Eric W. Sitarchuk, Rebecca J. Hillyer, **[*23]** Steven A. Reed, Morgan, Lewis & Bockius - Philadelphia, Philadelphia, PA; Eric M. Sommer, Sommer Udall Hardwick & Jones, P.A., Santa Fe, NM; James W. Matthews, Foley & Lardner - Boston, Boston, MA; Jason J. Blake, Calfee, Halter & Griswold - Columbus, Columbus, OH; Jeremy A. Menkowitz, Morgan Lewis & Bockius, Philadelphia, PA; Mark S. Cheffo, Dechert - New York, New York, NY; Tinos Diamantatos, Morgan, Lewis & Bockius - Chicago, Chicago, IL; Wendy West Feinstein, Morgan, Lewis & Bockius - Pittsburgh, Pittsburgh, PA.

For Endo Health Solutions Inc., Defendant (1:17-md-02804-DAP): Brenton Webster Cole, LEAD ATTORNEY, Baker Donelson Bearman Caldwell & Berkowitz, Atlanta, GAl Carolyn Robbs Bilanko, LEAD ATTORNEY, Baker & Hostetler - Seattle, Seattle, WA; Catherine L. Hanaway, LEAD ATTORNEY, Ashcroft Hanaway, St. Louis, MO; Christine F. Miller, LEAD ATTORNEY, St. Louis, MO; Curt Roy Hineline, LEAD ATTORNEY, Baker & Hostetler - Seattle, Seattle, WA; David D. Fauvre, John A. Freedman, Steven G. Reade, LEAD ATTORNEYS, John A. Freedman, Arnold & Porter Kaye Scholer - Washington, Washington, DC; Erik W. Legg, Tamela J. White, LEAD ATTORNEYS, Farrell White & Legg, Huntington, WV; Hannah DeMarco **[*24]** Sibiski, LEAD ATTORNEY, Arnold & Porter Kaye Scholer LLP, Houston, TX; Jennifer Grandoff Cooper, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, Atlanta, GA; Joanna G Persio, Joshua M. Davis, LEAD ATTORNEYS, PRO HAC VICE, Arnold & Porter LLP, Washington, DC; John D. Lombardo, LEAD ATTORNEY, Sean O. Morris, Arnold & Porter Kaye Scholer - Los Angeles, Los Angeles, CA; John B Pound, LEAD ATTORNEY, John B. Pound, LLC, Santa Fe, NM; Kathleen A DeLaney, LEAD ATTORNEY, DeLaney & DeLaney LLC, Indianapolis, IN; Nicole Gerritsen McDonough, Thomas John Herten, LEAD ATTORNEYS, Archer & Greiner, Hackensack, NJ; Robert James Benvenuti, III, Wesley R. Butler, LEAD ATTORNEYS, Barnett, Benvenuti & Butler, Lexington, KY; Sabrina Lynn Atkins, LEAD ATTORNEY, INVALID ADDRESS- Baker Donelson Bearman, Atlanta, GA; Samuel Hernandez, LEAD ATTORNEY, K&L Gates, Portland, OR; Carole S. Rendon, Tera N. Coleman, Baker & Hostetler - Cleveland, Cleveland, OH; Daniel J Dysart, Baker Donelson Bearman Caldwell & Berkowitz - New Orleans, New Orleans, LA; Ingo W. Sprie, Jr., Arnold & Porter Kaye Scholer - New York, New York, NY; Kerry J. Miller, Frilot, Partridge, Kohnke & Clements, New Orleans, LA; Mark **[*25]** S. Cheffo, Dechert - New York, New York, NY.

For McKesson Corporation, Defendant (1:17-md-02804-DAP): Brooke G. Malcom, LEAD ATTORNEY, Lightfoot Franklin & White, Birmingham, AL; Devon J. Stewart, LEAD ATTORNEY, Steptoe & Johnson - Charleston, Charleston, WV; Dwain M. Clifford, James T. McDermott, LEAD ATTORNEYS, Ball Janik, Portland, OR; Erik Christopher Johnson, LEAD ATTORNEY, McNeely Stephenson, Indianapolis, IN; Geoffrey E. Hobart, Matthew M. Benov, LEAD ATTORNEYS, Covington & Burling - Washington, Washington, DC; Halsey G. Knapp, Jr., LEAD ATTORNEY, Krevolin Horst, Atlanta, GA; Jason L. Holliday, Jeffrey M. Wakefield, LEAD ATTORNEYS, Flaherty, Sensabaugh & Bonasso - Charleston, Charleston, WV; Kevin B. Collins, LEAD ATTORNEY, Covington & Burling, Washington, DC; Kyle Alan Eidsness, Russell S. Ponessa, LEAD ATTORNEY, Hinshaw & Culbertson, Minneapolis, MN; Paul L Jefferson, LEAD ATTORNEY, McNeely Stephenson, Indianapolis, IN; Robert Philip Scott, LEAD ATTORNEY, Blank Rome - Houston, Houston, TX; Russell Lyle Hewit, LEAD ATTORNEY, Dughi & Hewit, Cranford, NJ; Hinshaw & Culbertson, LEAD ATTORNEY, Minneapolis, MN; Suzanne L. Jones, LEAD ATTORNEY, Hinshaw & Culbertson, Minneapolis, MN; **[*26]** Alana V. Tanoury, Brian J. Laliberte, Vincent I. Holzhall, Steptoe & Johnson - Columbus, Columbus, OH; Alexander S. Vesselinovitch, Freeborn & Peters LLP, Chicago, IL; Carol Dan Browning, Stites & Harbison - Louisville, Louisville, KY; Clara Jihye Shin, Covington & Burling - San Francisco, San Francisco, CA; Dolores P. Garcia-Prignitz, Manju Gupta, Ulmer & Berne - Cleveland, Cleveland, OH; Gregory E. Mayes, Jr. Steptoe & Johnson PLLC - Louisville, Louisville, KY; Harlan Prater, IV, Jackson R. Sharman, III, Lightfoot Franklin & White, Birmingham, AL; Jeffrey K. Phillips, Steptoe & Johnson PLLC - Lexington, Lexington, KY; Larry D Maldegen, Comeau, Maldegen, Templeman & Indall, LLP, Santa Fe, NM; Mark S. Cheffo, Dechert - New York, New York, NY; Mark H. Lynch, Covington & Burling - Washington, Washington, DC; Matthew T. Connelly, Freeborn & Peters, Chicago, IL; Megan A Crowley, PRO HAC VICE, Covington & Burling, LLP, Washington, DC; Megan L. Rodgers, Covington & Burling - Redwood Shores, Redwood Shores, CA; Michael J Moffett, Comeau Maldegen Templeman & Indall LLC, Santa Fe, NM; Michael R. Turco, Brooks, Wilkins, Sharkey &

Turco, Birmingham, MI; Neil K. Roman, Covington & Burling - New **[*27]** York, New York, NY; Russell D. Jessee, Steptoe & Johnson - Charleston, Charleston, WV; Sean O. Morris, Arnold & Porter Kaye Scholer - Los Angeles, Los Angeles, CA; William D. Wilmoth, Steptoe & Johnson - Wheeling, Wheeling, WV.

For Cardinal Health, Inc., Defendant (1:17-md-02804-DAP): Anne McKenzie Roller Rucker, Christopher Scott Geyer, David M. Krinsky, LEAD ATTORNEYS, Ashley W. Hardin, Enu Mainigi, F. Lane Heard, III, Williams and Connolly, Washington, DC; Eric A. Inglis, LEAD ATTORNEY, Schenk Price Smith & King, Florham Park, NJ; Robert H. Akers, Susan M. Robinson, LEAD ATTORNEYS, Thomas Combs & Spann, Charleston, WV; Steven R. Ruby, LEAD ATTORNEY, Bailey & Glasser, Charleston, WV; Thomas Joseph Cotton, LEAD ATTORNEY, Scheef & Stone, Dallas, TX; Alana V. Tanoury, Steptoe & Johnson - Columbus, Columbus, OH; Amy Jo Quezon, McHugh Fuller Law Group, PLLC, Hattiesburg, MS; Andrew G. Schultz, Rodey Dickason Sloan Akin & Robb, P.A., Albuquerque, NM; Anita Kidd, Armstrong Teasdale, St. Louis, MO; Anita M. Kidd, Armstrong Teasdale LLP - St. Louis, St. Louis, MO; Brian A. Glasser, Bailey & Glasser - Charleston, Charleston, WV; Brian K. Murphy, James B. Hadden, Joseph F. Murray, Murray, Murphy, **[*28]** Moul & Basil, Columbus, OH; David G. Hymer, Bradley Arant Boult Cummings, Birmingham, AL; Douglas K. Rosenblum, Pietragallo Gordon Alfano Bosick & Raspanti, LLP, Philadelphia, PA; Elizabeth P. Kessler, Jones Day - Columbus, Columbus, OH; Geoffrey E. Hobart, Covington & Burling - Washington, Washington, DC; James R. Wooley, Jones Day - Cleveland, Cleveland, OH.

For Cardinal Health, Inc., Defendant (1:17-md-02804-DAP): Julie Fix Meyer, Melanie R. King, Sarah E. Hamron, Sarah E. Harmon, Armstrong Teasdale, St. Louis, MO; Marc S. Raspanti, Pietragallo Gordon, Philadelphia, PA; Mark S. Cheffo, Dechert - New York, Three Bryant Park, New York, NY; Matthew M. Benov, Covington & Burling - Washington, Washington, DC; Melanie B Stambaugh, Rodey Dickason Sloan Akin & Robb PA, Albuquerque, NM; Monica Hobson Braun, Perry M. Bentley, Stoll Keenon Ogden - Lexington, Lexington, KY; Raymond R. Fournie, Armstrong, Teasdale, Schlafly & Davis, St. Louis, MO; Raymond S. Franks, II, PRO HAC VICE, Charleston, WV; Russell D. Jessee, Steptoe & Johnson - Charleston, Charleston, WV; Steven B. Loy, Stoll Keenon Ogden PLLC - Lexington, Lexington, KY; Steven M. Pyser, Williams & Connolly, Washington, DC; Vincent **[*29]** I. Holzhall, Steptoe & Johnson - Columbus, Columbus, OH; William D. Wilmoth, Steptoe & Johnson - Wheeling, Wheeling, WV.

For AmerisourceBergen Corporation, Defendant (1:17-md-02804-DAP): Christopher R. Murphy, LEAD ATTORNEY, Reed Smith - Chicago, Chicago, IL; Edward McDowell Newsom, Eileen Elizabeth Hintz Rumfelt, LEAD ATTORNEYS, Miller & Martin, Atlanta, GA; Eric W. Sitarchuk, LEAD ATTORNEY, Meredith S. Auten, Morgan, Lewis & Bockius - Philadelphia, Philadelphia, PA; Kelly Hightower Hibbert, LEAD ATTORNEY, Reed Smith, Washington, DC; Melissa Richards Smith, LEAD ATTORNEY, Gillam & Smith, LLP, Marshall, TX; Aaron E. McQueen, Andrew N. Schock, Mark W. Bernlohr, Sandra K. Zerrusen, Jackson Kelly - Akron, Akron, OH; Adam J. Schwendeman, Jackson Kelly, Charleston, WV; Alvin L. Emch, Jackson Kelly - Charleston, Charleston, WV; Arsenio Lenell Mims, Dowd Bennett LLP - St. Louis, St. Louis, MO; Brian T. Smith, Dykema Gossett - Bloomfield Hills, Bloomfield Hills, MI; Cheryl A. Bush, Bush, Seyferth & Paige, Troy, MI; Christopher C. Hollon, Donald Jeffrey Ireland, Erin E. Rhinehart, Faruki Ireland Cox Rhinehart & Dusing - Dayton, Dayton, OH; Douglas A. Baker, Columbus, OH; James F. Bennett, Dowd **[*30]** Bennett, St. Louis, MO; Justin D Rodriguez, Atkinson, Baker & Rodriguez, P.C., Albuquerque, NM; Mark S. Cheffo, Dechert - New York, New York, NY; Michael R. Williams, Bush Seyferth & Paige PLLC, Troy, MI; Robert A. Nicholas, Shannon E. McClure, Reed Smith - Philadelphia, Philadelphia, PA.

For Russell Portenoy, Defendant (1:17-md-02804-DAP): Elizabeth Heaphy, Robert J. Muehlenweg, Rammelkamp Muehlenweg & Cordova PA, Albuquerque, NM; Jordan D. Rauch, O. Judson Scheaf, III, Hahn, Loeser & Parks - Columbus, Columbus, OH; S. Amy Spencer, Shaheen & Gordon, Concord, NH.

For Perry Fine, Defendant (1:17-md-02804-DAP): Angela Marie Richie, LEAD ATTORNEY, Gordon & Wolf, Baltimore, MD; Cecily J. McLeod, LEAD ATTORNEY, Gordon & Rees - Atlanta, Atlanta, GA; Steven Michael Stastny, LEAD ATTORNEY, Stastny Law Firm, Birmingham, AL; Brian P. FitzGerald, Littler Mendelson - Cleveland, Cleveland, OH; Bruce A. Moore, Gordon & Rees - Columbus, Columbus, OH.

For Angela Marie Richie, Scott Fishman, Lynn Webster, Defendants (1:17-md-02804-DAP): Gordon & Wolf, LEAD ATTORNEY, Baltimore, MD; Cecily J. McLeod, LEAD ATTORNEY, Gordon & Rees - Atlanta, Atlanta, GA Steven Michael Stastny, LEAD ATTORNEY, Stastny Law Firm, **[*31]** Birmingham, AL; Brian P. FitzGerald, Littler Mendelson - Cleveland, Cleveland, OH; Bruce A. Moore, Daniel J. Hyzak, Gregory D. Brunton, Tyler G. Tarney, Gordon & Rees - Columbus, Columbus, OH; John J. Robinson, Steven J. Zakrzewski, Gordon & Rees - Glastonbury, Glastonbury, CT; Kelly V. Milam, Gordon & Rees - Chicago, Chicago, IL; Kenneth Ferguson, Gordon & Rees, LLP, Austin, TX.

For Allergan Finance LLC, formerly known as Watson Pharmaceuticals, Inc. formerly known as Actavis Inc., Defendant (1:17-md-02804-DAP): Jack Wesley Hill, LEAD ATTORNEY, Ward & Smith, Longview, TX; Albert J. Lucas, Calfee, Halter & Griswold - Columbus, Columbus, OH; Andrea B. Daloia, John R. Mitchell, Thompson Hine - Cleveland, Cleveland, OH; Anthony C. White, Thompson Hine - Columbus, Columbus, OH; Donna M. Welch, Martin L. Roth, Timothy W. Knapp, Kirkland & Ellis - Chicago, Chicago, IL; Jennifer G. Levy, Kirkland & Ellis - Washington, Washington, DC; Mark S. Cheffo, Dechert - New York, New York, NY; Stacey A. Greenwell, INVALID ADDRESS Thompson Hine - Cleveland, Cleveland, OH; Tinos Diamantatos, Morgan, Lewis & Bockius - Chicago, Chicago, IL.

For Insys Therapeutics, Inc., Defendant (1:17-md-02804-DAP): Benjamin **[*32]** Richard Wilson, LEAD ATTORNEY, Holland & Knight - New York, New York, NY; Christopher M. Mussler, LEAD ATTORNEY, Gwin Steinmetz & Baird, Louisville, KY; Jessica Lynn Farmer, LEAD ATTORNEY, Holland and Knight, Washington, DC; Eric H. Zagrans, Zagrans Law Firm, Cleveland, OH; J. Matthew Donohue, Joseph L. Franco, Holland & Knight - Portland, Portland, OR; Mark S. Cheffo, Dechert - New York, New York, NY; Nicholas Alex Sarokhanian, Holland & Knight - Dallas, Dallas, TX; Trisha M. Rich, Holland & Knight LLP, Chicago, IL.

For AmerisourceBergen Drug Corporation, Defendant (1:17-md-02804-DAP): Angela L Freel, LEAD ATTORNEY, Jackson Kelly, Evansville, IN; Christopher R. Murphy, LEAD ATTORNEY, Reed Smith - Chicago, Chicago, IL; Eric W. Sitarchuk, Meredith S. Auten, LEAD ATTORNEYS, Morgan, Lewis & Bockius - Philadelphia, Philadelphia, PA; Hans N. Huggler, Peter D. Hawkes, Pilar C. French, LEAD ATTORNEYS, Lane Powell, Portland, OR; James D. Johnson, LEAD ATTORNEY, Swift Currie McGhee & Hiers, Atlanta, GA; Margaret Jane Brannon, Robert Franklin Duncan, LEAD ATTORNEYS, Jackson Kelly-Lexington, Lexington, KY; Adam J. Schwendeman, Jackson Kelly, Charleston, WV; Alvin L. Emch, Jackson Kelly - Charleston, **[*33]** Charleston, WV; Arsenio Lenell Mims, Dowd Bennett LLP - St. Louis, St. Louis, MO; Christopher C. Hollon, Donald Jeffrey Ireland, Erin E. Rhinehart, Faruki Ireland Cox Rhinehart & Dusing - Dayton, Dayton, OH; David L. Brown, Jr., H. Lanier Brown, II, Watkins & Eager Birmingham, AL; Harry G. Shaffer, III, Todd A. Mount, Shaffer & Shaffer, Madison, WV; J. Patrick Strubel, Watkins & Eager, Birmingham, AL; James F. Bennett, Dowd Bennett, St. Louis, MO; Mark S. Cheffo, Dechert - New York, New York, NY; Robert A. Nicholas, Shannon E. McClure, Reed Smith - Philadelphia, Philadelphia, PA; Sandra K. Zerrusen, Jackson Kelly - Akron, Akron, OH.

For Mallinckrodt LLC, Defendant (1:17-md-02804-DAP): Kathleen Carroll Bricken, Patrick J. Conti, LEAD ATTORNEYS, Garvey Schubert Barer, Portland, OR; Michael L. Fitzgerald, LEAD ATTORNEY, PRO HAC VICE, Ropes & Gray, INVALID ADDRESS, Boston, MA; Stephen D. Annand, LEAD ATTORNEY, Robinson & McElwee, Charleston, WV; Andrew J. O'Connor, Brien T. O'Connor, Ropes & Gray - Boston, Boston, MA; Marc J. Kessler, Hahn, Loeser & Parks - Columbus, Columbus, OH; Mark S. Cheffo, Dechert - New York, New York, NY.

For Mallinckrodt PLC, Defendant (1:17-md-02804-DAP): Stephen **[*34]** D. Annand, LEAD ATTORNEY, Robinson & McElwee, Charleston, WV; Mark S. Cheffo, Dechert - New York, New York, NY.

For Teva Pharmaceutical, Industries Ltd., Defendant (1:17-md-02804-DAP): Collie Fitch James, IV, LEAD ATTORNEY, Morgan Lewis & Bockius, Costa Mesa, CA; Mitchell G. Blair, LEAD ATTORNEY, Calfee, Halter & Griswold - Cleveland, Cleveland, OH; Thomas F. Hurka, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis & Bockius - Chicago, Chicago, IL; Jason J. Blake, Calfee, Halter & Griswold - Columbus, Columbus, OH; Mark S. Cheffo, Dechert - New York, New York, NY; Steven A. Reed, Morgan, Lewis & Bockius - Philadelphia, Philadelphia, PA.

For Noramco, Inc., Defendant (1:17-md-02804-DAP): Cari K. Dawson, LEAD ATTORNEY, Jenny A. Mendelsohn, Alston & Bird - Atlanta, Atlanta, GA; Daniel G. Jarcho, Alston & Bird - Washington, Washington, DC; Mark S. Cheffo Dechert - New York, New York, NY; Patrick H. Boggs, PRO HAC VICE, Onda, LaBuhn, Rankin & Boggs, Columbus, OH.

For Watson, Pharmaceuticals, Inc., now known as, Actavis Pharma, Inc., Defendant (1:17-md-02804-DAP): Andrea B. Daloia, John R. Mitchell, Thompson Hine - Cleveland, Cleveland, OH; Mark S. Cheffo, Dechert - New York, New York, NY; Stacey A. **[*35]** Greenwell, INVALID ADDRESS Thompson Hine - Cleveland, Cleveland, OH.

For Cardinal Health 110, LLC, Defendant (1:17-md-02804-DAP): Anita M. Kidd, Armstrong Teasdale LLP - St. Louis, St. Louis, MO; Ashley W. Hardin, Enu Mainigi, F. Lane Heard, III, Steven M. Pyser, Williams & Connolly, Washington, DC; Brian A. Glasser, Bailey & Glasser - Charleston, Charleston, WV; Elizabeth P. Kessler, Jones Day - Columbus, Columbus, OH; James R. Wooley, Jones Day - Cleveland, Cleveland, OH; Julie Fix Meyer, Melanie R. King, Sarah E. Harmon, Armstrong Teasdale, St. Louis, MO; Mark S. Cheffo, Dechert - New York, New York, NY; Raymond R. Fournie, Armstrong, Teasdale, Schlafly & Davis, St. Louis, MO; Raymond S. Franks, II, PRO HAC VICE, Charleston, WV; Steven R. Ruby, Bailey & Glasser, Charleston, WV.

For Miami-Luken, Inc., Defendant (1:17-md-02804-DAP): Jennifer D. Armstrong, Richard H. Blake, McDonald Hopkins - Cleveland, Cleveland, OH; Laurie K. Miller, Jackson Kelly - Charleston, Charleston, WV; Robert M. Stonestreet, Babst, Calland, Clements & Zomnir - Charleston, Charleston, WV; Thomas J. Hurney, Jr., Jackson & Kelly, Charleston, WV.

For CVS Indiana, L.L.C., Defendant (1:17-md-02804-DAP): Alexandra **[*36]** W. Miller, Eric R. Delinsky, Zuckerman Spaeder - Washington, Washington, DC; Anant Kumar, Zuckerman Spaeder - New York, New York, NY; Carte P. Goodwin, Joseph M. Ward, Frost Brown Todd - Charleston, Charleston, WV; Mark S. Cheffo Dechert - New York, New York, NY; Richard A. Schirtzer, Quinn Emanuel Urquhart & Sullivan - Los Angeles, Los Angeles, CA; William A. Burck, Quinn Emanuel Urquhart & Sullivan - Washington, Washington, DC.

For Rite Aid of Maryland, Inc., Defendant (1:17-md-02804-DAP): Elise Attridge, LEAD ATTORNEY, Morgan, Lewis & Bockius, Washington, DC; Elisa P. McEnroe, Morgan, Lewis & Bockius - Philadelphia, Philadelphia, PA; Judd E. Stone, Morgan Lewis Bockius, Washington, DC; Kelly A. Moore, Morgan, Lewis & Bockius - New York, New York, NY; Webster J. Arceneaux, III, Lewis Glasser, Charleston, WV.

For Wal-Mart Stores East, LP, doing business as Wal-Mart Pharmacy, Warehouse #46, doing business as Wal-Mart Pharmacy, Warehouse, Defendant (1:17-md-02804-DAP): Christopher S. Dodrill, James R. Wooley, LEAD ATTORNEYS, Jones Day - Cleveland, Cleveland, OH; Alexander Macia, Spilman Thomas & Battle, Charleston, WV; James S. Crockett, Jr., Mitchell J. Rhein, Neva G. Lusk, Spilman, **[*37]** Thomas & Battle - Charleston, Charleston, WV; Mark S. Cheffo, Dechert - New York, New York, NY; Tara A. Fumerton, Tina M. Tabacchi, Jones Day - Chicago, Chicago, IL.

For Kroger Limited Partnership II, Kroger Limited Partnership I, Defendants (1:17-md-02804-DAP): Fazal A. Shere, Gerard R. Stowers, Ronda L. Harvey, Bowles, Rice, McDavid, Graff & Love - Charleston, Charleston, WV; Jessie F. Reckart, Bowles Rice, Charleston, WV.

For Walgreen Eastern Co., Inc., Defendant (1:17-md-02804-DAP): Fazal A. Shere, Gerard R. Stowers, Ronda L. Harvey, Bowles, Rice, McDavid, Graff & Love - Charleston, Charleston, WV; Jessie F. Reckart, Bowles Rice, Charleston, WV; Kaspar J. Stoffelmayr, Bartlit, Beck, Herman, Palenchar & Scott - Chicago, Chicago, IL.

For Anda Pharmaceuticals, Inc., Defendant (1:17-md-02804-DAP): Keith A. Jones, LEAD ATTORNEY, Jones Law Group, Charleston, WV; M. Bert Ketchum, III, Paul T. Farrell, Jr., LEAD ATTORNEYS, Greene Ketchum Farrell Bailey & Tweel, Huntington, WV; James W. Matthews, Katy E. Koski, Redi Kasollja, Foley & Lardner - Boston, Boston, MA; Paul J. Cosgrove, Ulmer & Berne - Cincinnati, Cincinnati, OH.

For Anda, Inc., Defendant (1:17-md-02804-DAP): Keith A. Jones, LEAD **[*38]** ATTORNEY, Jones Law Group, Charleston, WV; M. Bert Ketchum, III, Paul T. Farrell, Jr., LEAD ATTORNEYS, Greene Ketchum Farrell Bailey & Tweel, Huntington, WV; James W. Matthews, Katy E. Koski, Redi Kasollja, Foley & Lardner - Boston, Boston, MA.

For Keysource Medical, Inc., Defendant (1:17-md-02804-DAP): Clifford F. Kinney, Jr., LEAD ATTORNEY, Spilman, Thomas & Battle - Charleston, Charleston, WV.

For Masters Pharmaceutical, Inc., Defendant (1:17-md-02804-DAP): John A. Smith, LEAD ATTORNEY, Flaherty, Sensabaugh & Bonasso - Charleston, Charleston, WV; Mark S. Cheffo, Dechert - New York, New York, NY.

For Omnicare Distribution Center LLC, Defendant (1:17-md-02804-DAP): Carte P. Goodwin, Joseph M. Ward, LEAD ATTORNEYS, Frost Brown Todd - Charleston, Charleston, WV; Mark S. Cheffo, LEAD ATTORNEY, Dechert - New York, New York, NY; Anant Kumar, Zuckerman Spaeder - New York, New York, NY; Eric R. Delinsky, Zuckerman Spaeder - Washington, Washington, DC.

For Harvard Drug Group, L.L.C., Defendant (1:17-md-02804-DAP): Robert H. Akers, Susan M. Robinson, LEAD ATTORNEYS, Thomas Combs & Spann, Charleston, WV; Enu Mainigi, Williams & Connolly, Washington, DC.

For Top Rx, LLC, Defendant (1:17-md-02804-DAP): **[*39]** Allen M. Lopus, LEAD ATTORNEY, Clark Hill - Pittsburgh, Pittsburgh, PA; Robert J. Ridge, LEAD ATTORNEY, Thorp Reed & Armstrong, Wheeling, WV.

For Bellco Drug Corp., Defendant (1:17-md-02804-DAP): Eric W. Sitarchuk, LEAD ATTORNEY, Meredith S. Auten, Morgan, Lewis & Bockius - Philadelphia, Philadelphia, PA; Adam J. Schwendeman, Jackson Kelly, Charleston, WV; Alvin L. Emch, Jackson Kelly - Charleston, Charleston, WV; Robert A. Nicholas, Shannon E. McClure, Reed Smith - Philadelphia, Philadelphia, PA; Sandra K. Zerrusen, Jackson Kelly - Akron, Akron, OH.

For Bellco Drug Corp., Defendant (1:17-md-02804-DAP): Eric W. Sitarchuk, LEAD ATTORNEY, Meredith S. Auten, Morgan, Lewis & Bockius - Philadelphia, Philadelphia, PA; Adam J. Schwendeman, Jackson Kelly, Charleston, WV; Alvin L. Emch, Jackson Kelly - Charleston, Charleston, WV; Robert A. Nicholas, Shannon E. McClure, Reed Smith - Philadelphia, Philadelphia, PA; Sandra K. Zerrusen, Jackson Kelly - Akron, Akron, OH.

For Generics Bidco I, LLC, Defendant (1:17-md-02804-DAP): Jonathan L. Stern, Arnold & Porter Kaye Scholer - Washington, Washington, DC; Michael J. Farrell, LEAD ATTORNEY, Farrell White & Legg, Huntington, WV; Sean O. Morris, Arnold **[*40]** & Porter Kaye Scholer - Los Angeles, Los Angeles, CA.

For H.D. Smith Wholesale Drug Co., Defendant (1:17-md-02804-DAP): Alexander L. Turner, Christopher D. Smith, Marc E. Williams, LEAD ATTORNEYS, Nelson, Mullins, Riley & Scarborough, Huntington, WV; Dean T. Barnhard, Larry A. Mackey, LEAD ATTORNEYS, Barnes & Thornburg - Indianapolis, Indianapolis, IN.

For Qualitest Pharmaceuticals, Inc., Defendant (1:17-md-02804-DAP): Claude F. Reynaud, Jr., Thomas R. Temple, Jr., LEAD ATTORNEYS, Danielle L. Borel, Breazeale Sachse & Wilson, Baton Rouge, LA; John J. Polak, LEAD ATTORNEY, Paul L. Frampton, Jr., Atkinson & Polak, Charleston, WV; Michael J. Farrell, LEAD ATTORNEY, Farrell White & Legg, Huntington, WV.

For Cedardale Distributors LLC, Defendant (1:17-md-02804-DAP): Patrick K. Cavanaugh, William S. Stickman, IV, LEAD ATTORNEYS, Del Sole Cavanaugh Stroyd, Pittsburgh, PA.

For SAJ Distributors, Defendant (1:17-md-02804-DAP): Fazal A. Shere, Gerard R. Stowers, Ronda L. Harvey, Bowles, Rice, McDavid, Graff & Love - Charleston, Charleston, WV; Jessie F. Reckart, Bowles Rice, Charleston, WV.

For Abbott Laboratories, Defendant (1:17-md-02804-DAP): Alper T. Ertas, LEAD ATTORNEY, Venable - San Francisco, **[*41]** San Francisco, CA; James K. O'Connor, John A. McCauley, LEAD ATTORNEYS, PRO HAC VICE, Venable - Baltimore, Baltimore, MD; Michael S. Blume, LEAD ATTORNEY, New York, NY; Alan Lee Schilling, Jr, Dan H. Ball, Daniel C. Nester, Bryan Cave LLP - St. Louis, St. Louis, MO; Mark S. Cheffo, Dechert - New York, New York, NY.

For J M Smith Corporation, doing business as Smith Drug Company, Defendant (1:17-md-02804-DAP): Craig G Pelini, Paul B. Ricard, LEAD ATTORNEYS, Pelini, Campbell & Williams - North Canton, North Canton, OH; J M Smith Corporation, c/o CT Corporation System, Charleston, WV; Alexander L. Turner, Christopher D. Smith, Marc E. Williams, Nelson, Mullins, Riley & Scarborough, Huntington, WV; Christopher Edward Penna, David Cousins, Derek A. Mendicino, Penna & Mendicino, Conyers, GA; John D. Hoblitzell, III, Kay Casto & Chaney, Charleston, WV; Samuel W. Outten, Nelson Mullins Riley & Scarborough, LLP, Greenville, SC.

For Abbott Laboratories, Inc., Defendant (1:17-md-02804-DAP): Alan Lee Schilling, Jr, Dan H. Ball, Daniel C. Nester, Bryan Cave LLP - St. Louis, St. Louis, MO; Mark S. Cheffo, Dechert - New York, New York, NY.

For Cardinal Health 112, LLC, Defendant (1:17-md-02804-DAP): **[*42]** Anita Kidd, Julie Fix Meyer, Melanie R. King, Sarah E. Harmon, Armstrong Teasdale, St. Louis, MO; Ashley W. Hardin, Enu Mainigi, Frank Lane Heard, III, Steven M. Pyser, Williams & Connolly, Washington, DC; Mark S. Cheffo, Dechert - New York, New York, NY; Raymond R. Fournie, Armstrong, Teasdale, Schlafly & Davis, St. Louis, MO.

For Cardinal Health 105, Inc., Defendant (1:17-md-02804-DAP): Anita M. Kidd, Armstrong Teasdale LLP - St. Louis, St. Louis, MO; Ashley W. Hardin, Enu Mainigi, F. Lane Heard, III, Steven M. Pyser, Williams & Connolly, Washington, DC; Julie Fix Meyer, Melanie R. King, Sarah E. Harmon, Armstrong Teasdale, St. Louis, MO; Mark S. Cheffo, Dechert - New York, Three Bryant Park, New York, NY; Raymond R. Fournie, Armstrong, Teasdale, Schlafly & Davis, St. Louis, MO.

For Cardinal Health 108, LLC, Defendant (1:17-md-02804-DAP): Enu Mainigi, Ashley W. Hardin, Frank Lane Heard, III, Steven M. Pyser, Williams & Connolly, Washington, DC; Anita M. Kidd, Armstrong Teasdale LLP - St. Louis, St. Louis, MO; Julie Fix Meyer, Melanie R. King, Sarah E. Harmon, Armstrong Teasdale, St. Louis, MO; Mark S. Cheffo, Dechert - New York, New York, NY; Raymond R. Fournie, Armstrong, Teasdale, **[*43]** Schlafly & Davis, St. Louis, MO.

For Cardinal Health 414, LLC, Defendant (1:17-md-02804-DAP): Anita M. Kidd, Armstrong Teasdale LLP - St. Louis, St. Louis, MO; Ashley W. Hardin, Enu Mainigi, Frank Lane Heard, III, Steven M. Pyser, Williams & Connolly Washington, DC;Julie Fix Meyer, Melanie R. King, Sarah E. Harmon, Armstrong Teasdale, St. Louis, MO; Mark S. Cheffo, Dechert - New York, New York, NY; Raymond R. Fournie, Armstrong, Teasdale, Schlafly & Davis, St. Louis, MO.

For Knoll Pharmaceutical Company, a wholly-owned subsidiary of ABBOTT LABORATORIES, Defendant (1:17-md-02804-DAP): Stephanie E. Parker, LEAD ATTORNEY, Jones Day - Atlanta, Atlanta, GA; David B. Alden, Jones Day - Cleveland, Cleveland, OH; J. Laurens Wilkes, Jones Day - Houston, Houston, TX.

M.D. PawanKumar Jain, Defendant, Pro se, Las Cruces, NM.

For William P. Gaspar, Defendant (1:17-md-02804-DAP): Rebecca S. Kenny, Madison & Rosan, Columbus, OH; William C. Madison, Madison, Mroz, Steinman & Dekleva, Albuquerque, NM.

For Kevin L. Foster, Defendant (1:17-md-02804-DAP): Gregory A. Schrage, LEAD ATTORNEY, CHURCH CHURCH HITTLE & ANTRIM, Fishers, IN.

For James Coomer, Defendant (1:17-md-02804-DAP): Joseph Leon Payne, LEAD ATTORNEY, **[*44]** Austin, IN.

For Abbvie Inc., Defendant (1:17-md-02804-DAP): Stephanie E. Parker, LEAD ATTORNEY, Jones Day - Atlanta, Atlanta, GA; David B. Alden, Jones Day - Cleveland, Cleveland, OH; J. Laurens Wilkes, Houston, TX.

For Actavis PLC, Defendant (1:17-md-02804-DAP): Ana M. Francisco, LEAD ATTORNEY, PRO HAC VICE, Foley & Lardner LLP, Boston, MA; Jennifer G. Levy, Kirkland & Ellis - Washington, Washington, DC; David Barry Goroff, Jonathan William Garlough, Foley & Lardner, Chicago, IL; Donna M. Welch, Martin L. Roth, Timothy W. Knapp, Kirkland & Ellis - Chicago, Chicago, IL; James W. Matthews, Katy E. Koski, Foley & Lardner - Boston, Boston, MA.

For CVS Health Corporation, Defendant (1:17-md-02804-DAP): Eric R. Delinsky, Alexandra W. Miller, Zuckerman Spaeder - Washington, Washington, DC.

For Costco Wholesale, Corporationm Defendant (1:17-md-02804-DAP): Cori Gordon Moore, David J. Burman, LEAD ATTORNEYS, Perkins Coie - Seattle, Seattle, WA; Brandon M. White, Perkins Coie - Washington, Washington, DC.

For Rite Aid Corporation, Defendant (1:17-md-02804-DAP): Elisa P. McEnroe, Morgan, Lewis & Bockius - Philadelphia, Philadelphia, PA.

For Walgreens Boots, Alliance Inc., Defendant (1:17-md-02804-DAP): **[*45]** Kaspar J. Stoffelmayr, Bartlit, Beck, Herman, Palenchar & Scott -Chicago, Chicago, IL.

For Seattle Pain Center, Medical Corporation doing business as Seattle Pain Center, Defendant (1:17-md-02804-DAP): James B. Meade, Jennifer Smitrovich, Phillip J. VanDerhoef, Fain Anderson, Tacoma, WA; Thomas H. Fain, Fain Anderson VanDerhoef Rosendahl O'Halloran, Tacoma, WA.

For Richard Johns, Defendant (1:17-md-02804-DAP): James R. Estes, Jr., LEAD ATTORNEY, Cox Cox & Estes, Fayetteville, AR.

For Advanced Pain Specialists, Inc., Christopher Creighton, Defendants (1:17-md-02804-DAP): Kenneth C. Brostron, Mark R. Feldhaus, LEAD ATTORNEYS, Lashly & Baer, St. Louis, MO.

For Amneal Pharmaceuticals of New York, LLC, Defendant (1:17-md-02804-DAP): James W. Childress, LEAD ATTORNEY, Childress & Ahlheim, St. Louis, MO; Paul J. Cosgrove, LEAD ATTORNEY, Ulmer & Berne - Cincinnati, Cincinnati, OH.

For Comprehensive Pain Specialists, LLC, Defendant (1:17-md-02804-DAP): Aaron I. Mandel, LEAD ATTORNEY, Brinker & Doyen, St. Louis, MO; James C. Thoele, LEAD ATTORNEY, Brinker & Doyen, Clayton, MO.

For Impax Laboratories, Inc., Defendant (1:17-md-02804-DAP): Charles Zachary Vaughn, LEAD ATTORNEY, Wiedner & McAuliffe, Chicago, **[*46]** IL; Paul J. Cosgrove, LEAD ATTORNEY, Ulmer & Berne - Cincinnati, Cincinnati, OH.

For KVK-Tech, Inc., Defendant (1:17-md-02804-DAP): Megan Sterchi Lammert, LEAD ATTORNEY, Baker & Sterchi, St. Louis, MO; Thomas E. Rice, Jr., LEAD ATTORNEY, Baker, Sterchi, Cowden & Rice, Kansas City, MO.

For Mallinckrodt Brand Pharmaceuticals, Inc, Defendant (1:17-md-02804-DAP): Ann M. Songer, Brice Nengsu Kenfack, Bryan T. Pratt, Robert T. Adams, LEAD ATTORNEYS, Shook, Hardy & Bacon - Kansas City, Kansas City, MO.

For Par Pharmaceutical, Inc., Defendant (1:17-md-02804-DAP): Catherine L. Hanaway, LEAD ATTORNEY, Ashcroft Hanaway, St. Louis, MO; Evan P. Moltz, LEAD ATTORNEY, Mayhard Cooper & Gale, Birmingham, AL; John A. Earnhardt, LEAD ATTORNEY, Maynard Cooper & Gale, Birmingham, AL; Lindsay L. McClure-Hartman, LEAD ATTORNEY, INVALID ADDRESS HUSCH BLACKWELL, LLP, St. Louis, MO; Mary Patricia Carl, LEAD ATTORNEY, Husch Blackwell - St. Louis, St. Louis, MO; Robert Jacob Hurtt, Jr., LEAD ATTORNEY, Husch Blackwell, St. Louis, MO; Jonathan L. Stern, Arnold & Porter Kaye Scholer - Washington, Washington, DC; Sean O. Morris, Arnold & Porter Kaye Scholer - Los Angeles, Los Angeles, CA.

For West-Ward Pharmaceutical **[*47]** Corp., Defendant (1:17-md-02804-DAP): Booker T. Shaw, LEAD ATTORNEY, Thompson Coburn - St. Louis, St. Louis, MO; Felicia R. Williams, Susan Lori Werstak, LEAD ATTORNEYS, Thompson Coburn, St. Louis, MO; Hansel Eli Lightner, II, Thomas E. Walker, LEAD ATTORNEYS, White Arnold & Dowd, Birmingham, AL; Jan P. Levine, Pepper Hamiltoln, Ronnie Fuchs, Philadelphia, PA; Logan N. Anderson, Pepper Hamilton - Philadelphia, Philadelphia, PA.

For Purdue Products L.P., Defendant (1:17-md-02804-DAP): Jae Hong Lee, Jonathan S. Tam, LEAD ATTORNEYS, Quinn Emanuel Urquhart & Sullivan, San Francisco, CA.

For Express Scripts Holding Company, Express Scripts Inc., Defendants (1:17-md-02804-DAP): Adriana Riviere-Badell, Kobre & Kim - Miami, Miami, FL; Alana F. Montas, Kobre & Kim - New York, New York, NY; Julian W. Park, Kobre & Kim - San Francisco, San Francisco, CA.

For Navitus Health Solutions, LLC, Defendant (1:17-md-02804-DAP): Janelle L. Davis, Mackenzie M. Salenger, Timothy E. Hudson, Thompson & Knight, Dallas, TX.

For Navitus Holdings, LLC, Defendant (1:17-md-02804-DAP): Janelle L. Davis, Mackenzie M. Salenger, Timothy E. Hudson, Thompson & Knight, Dallas, TX.

For Optum, Inc., OptumRX, Inc., Defendants **[*48]** (1:17-md-02804-DAP): Brian D. Boone, Alston & Bird, Charlotte, NC; Kimberly K. Chemerinsky, Alston & Bird - Los Angeles, Los Angeles, CA; William H. Jordan, Alston & Bird, Atlanta, GA.

For Prime Therapeutics, LLC, Defendant (1:17-md-02804-DAP): Matthew D. Forsgren, Robert J. Gilbertson, Greene Espel, Minneapolis, MN.

For UnitedHealth Group Incorporated, Defendant (1:17-md-02804-DAP): Kimberly K. Chemerinsky, Alston & Bird - Los Angeles, Los Angeles, CA.

For Richie Pharmacal, Richie Enterprises, L.L.C., Defendants (1:17-md-02804-DAP): Bobby H. Richardson, LEAD ATTORNEY, Richardson Gardner & Alexander, Glasgow, KY; Matthew P. Cook, Thomas N. Kerrick, Kerrick Bachert, Bowling Green, KY.

For Pd-Rx Pharmaceuticals Inc, Defendant (1:17-md-02804-DAP): Clell I. Cunningham, III, LEAD ATTORNEY, Cunningham Legal Group, Oklahoma City, OK; Drew A. Cunningham, LEAD ATTORNEY, Resolution Legal Group, Oklahoma City, OK; James K. Secrest, II, LEAD ATTORNEY, Secrest, Hill, Butler & Secrest, Tulsa, OK.

For HealthMart Systems, Inc., Defendant (1:17-md-02804-DAP): Megan L. Rodgers, Covington & Burling - Redwood Shores, Redwood Shores, CA.

For Rhodes Pharmaceuticals, L.P., Defendant (1:17-md-02804-DAP): Steven **[*49]** F. Napolitano, Skarzynski Black, New York, NY.

For Attain Med, Inc., Defendant (1:17-md-02804-DAP): Dale R. Sisco, LEAD ATTORNEY, Tampa, FL; Robert M. Brennan, LEAD ATTORNEY, Parker Hudson Rainer & Dobbs, Atlanta, GA.

For Bloodworth Wholesale Drugs, Inc., Defendant (1:17-md-02804-DAP): C. Richard Langley, LEAD ATTORNEY, Sims Fleming, Tifton, GA; David V. Hayes, Frederick N. Gleaton, LEAD ATTORNEYS, Owen Gleaton Egan Jones & Sweeney, Atlanta, GA; Hayden A. Coleman, LEAD ATTORNEY, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, New York, NY.

For PSS World Medical, Inc., Defendant (1:17-md-02804-DAP): Halsey G. Knapp, Jr., LEAD ATTORNEY, Krevolin Horst, Atlanta, GA; Megan L. Rodgers, Covington & Burling - Redwood Shores, Redwood Shores, CA.

For Corvallis Internal Medicine, P.C., Defendant (1:17-md-02804-DAP): James R. Dole, LEAD ATTORNEY, Watkins Laird Rubestein & Burgess, Eugene, OR; Julia I. Manela, LEAD ATTORNEY, Watkinson Laird Rubenstein, Eugene, OR.

Julie Ann DeMille, Defendant (1:17-md-02804-DAP), Pro se, Estacada, OR.

For James Gallant, M.D., Gallant Internal Medicine, P.C., Defendants (1:17-md-02804-DAP): James R. Dole, LEAD ATTORNEY, Watkins Laird Rubestein & Burgess, Eugene, OR. **[*50]**

For Stuart Rosenblum, M.D., Stuart M. Rosenblum, M.D., LLC, Defendants (1:17-md-02804-DAP): Amy J. DeLisa, LEAD ATTORNEY, Bennett Bigelow & Leedom, Seattle, WA.

For Collegium Pharmaceutical, Inc., Defendant (1:17-md-02804-DAP): Barry H. Boise, Jessica K. Southwick, LEAD ATTORNEYS, Pepper Hamilton - Philadelphia, Philadelphia, PA; Judith L. O'Grady, LEAD ATTORNEY, Pepper Hamilton - Washington, Washington, DC.

For Frank D. Li, Defendant (1:17-md-02804-DAP): James B. Meade, Fain Anderson, Tacoma, WA.

For Depomed, Inc., Defendant (1:17-md-02804-DAP): Kevin M. Sadler, Baker Botts - Palo Alto, Palo Alto, CA.

For Walgreen Co., Defendant (1:17-md-02804-DAP): Kaspar J. Stoffelmayr, Bartlit, Beck, Herman, Palenchar & Scott - Chicago, Chicago, IL.

For Allergan USA, Inc., Defendant (1:17-md-02804-DAP): Donna M. Welch, Kirkland & Ellis - Chicago, Chicago, IL.

For Alabama CVS Pharmacy LLC, CVS Pharmacy Inc., Defendants (1:17-md-02804-DAP): James Allen Sydnor, Jr., LEAD ATTORNEY, Huie Fernambucq & Stewart, Birmingham, AL.

For Malika Aryanpure, Mitt Larry Family Practice LLC, Defendants (1:17-md-02804-DAP): Allison J. Adams, J. Will Axon, Jr., LEAD ATTORNEYS, Starnes Davis Florie, Birmingham, AL.

For Linden **[*51]** Care LLC, Defendant (1:17-md-02804-DAP): Alicia M. Stefanski, Dinsmore & Shohl, Columbus, OH.

For H. D. Smith Holding Company, Defendant (1:17-md-02804-DAP): Dean T. Barnhard, LEAD ATTORNEY, Kathleen L. Matsoukas, Barnes & Thornburg - Indianapolis, Indianapolis, IN.

For H. D. Smith Holdings, LLC, Defendant (1:17-md-02804-DAP): Dean T. Barnhard, LEAD ATTORNEY, Kathleen L. Matsoukas, William E. Padgett, Barnes & Thornburg - Indianapolis, Indianapolis, IN.

For Walmart, Inc., Defendant (1:17-md-02804-DAP): Laura Kolesar Gura, LEAD ATTORNEY, Jones Day, Atlanta, GA; Tara A. Fumerton, Jones Day - Chicago, Chicago, IL.

For Fred's Stores of Tennessee, Inc., Defendant (1:17-md-02804-DAP): Jennifer S. Harrison, Julia M. Kavanagh, LEAD ATTORNEYS, Hall Booth Smith - Memphis, Memphis, TN; John E. Hall, Jr., LEAD ATTORNEY, Hall Booth Smith, Atlanta, GA.

For Marv Kelly, Craig Landau, Paul Medeiros, Defendants (1:17-md-02804-DAP): Jae Hong Lee, Jonathan S. Tam, LEAD ATTORNEYS, Quinn Emanuel Urquhart & Sullivan, San Francisco, CA.

For Discount Drug Mart, Inc., Defendant (1:17-md-02804-DAP): Timothy D. Johnson, Cavitch Familo & Durkin, Cleveland, OH.

For HBC Service Company, Defendant (1:17-md-02804-DAP): Erin **[*52]** G. Allen, LEAD ATTORNEY, Jeremy D. Engle, Robert M. Barnes, Marcus & Shapira, Pittsburgh, PA; Scott D. Livingston, LEAD ATTORNEY, PRO HAC VICE, Marcus & Shapira, Pittsburgh, PA; George M. Moscarino, Moscarino & Treu, Cleveland, OH; William H. Falin, Moscarino & Treu, Cleveland, OH.

For Par Pharmaceutical Companies, Inc., Defendant (1:17-md-02804-DAP): Jonathan L. Stern, Arnold & Porter Kaye Scholer - Washington, Washington, DC.

For Prescription Supply Inc, Defendant (1:17-md-02804-DAP): Craig G Pelini, Pelini, Paul B. Ricard, Campbell & Williams - North Canton, North Canton, OH.

For Kroger Co., Defendant (1:17-md-02804-DAP): Ronda L. Harvey, Bowles, Rice, McDavid, Graff & Love - Charleston, Charleston, WV.

For Henry Schein Medical Systems, Inc., Henry Schein, Inc., Defendants (1:17-md-02804-DAP): Brandan J. Montminy, Locke Lord - Houston, Houston, TX; C. Scott Jones, John P. McDonald, Locke Lord - Dallas, Dallas, TX.

For Family Drug Mart LLC, Defendant (1:17-md-02804-DAP): Abigayle Clary McDowell Farris, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, New Orleans, LA; Wayne J. Lee, Stone Pigman Walther Wittmann, New Orleans, LA.

For Advanced Pharma, Inc., Defendant (1:17-md-02804-DAP): **[*53]** Robert W. Horton, LEAD ATTORNEY, Bass, Berry & Sims, Nashville, TN.

For Allergan Sales, LLC, Defendant (1:17-md-02804-DAP): Andrea Leigh Fair, LEAD ATTORNEY, Ward, Smith & Hill, Longview, TX.

For Cardinal Health 200, LLC, Defendant (1:17-md-02804-DAP): Matthew Ryan Raley, Michael W. Mengis, LEAD ATTORNEYS, Baker & Hostetler - Houston, Houston, TX.

For Gazelle Craig, M.D., Defendant (1:17-md-02804-DAP): Don E. Lewis, LEAD ATTORNEY, Houston, TX.

For David Devido, Defendant (1:17-md-02804-DAP): Paul L. Creech, LEAD ATTORNEY, Hider & Associates, Houston, TX; Philip Harlan Hilder, Q. Tate Williams, William B. Graham, LEAD ATTORNEYS, Hilder & Associates, Houston, TX; Stephanie K. McGuire, LEAD ATTORNEY, Houston, TX.

For Endo International PLC, Defendant (1:17-md-02804-DAP): Jonathan L. Stern, Arnold & Porter Kaye Scholer - Washington, Washington, DC.

For Richard Arthur Evans, M.D., Defendant (1:17-md-02804-DAP): G. Riley Hetherington, III, LEAD ATTORNEY, Houston, TX.

For Fresenius USA, Manufacturing, Inc., Defendants (1:17-md-02804-DAP): Erin E. Lunceford, LEAD ATTORNEY, Norton Rose Fulbright, Houston, TX.

For Insys Manufacturing LLC, Defendant (1:17-md-02804-DAP): Nicholas Alex Sarokhanian, LEAD **[*54]** ATTORNEY, Holland & Knight - Dallas, Dallas, TX.

For McKesson Medical-Surgical, Inc., Defendant (1:17-md-02804-DAP): Robert Philip Scott, Jr., LEAD ATTORNEY, Blaszak, Coey, Bennett & Carlson, Elyria, OH.

For Mission Pharmacal, Company, Defendant (1:17-md-02804-DAP): Brian P. Johnson, LEAD ATTORNEY, Johnson Trent Taylor, Houston, TX.

For Neos Therapeutics, Brands LLC, Defendant (1:17-md-02804-DAP): Christopher Scott Jones, LEAD ATTORNEY, Locke Lord, Dallas, TX.

For CVS RX Services, Inc., CVS Orlando, Florida, Distribution, LLC, CVS Vero, Florida, Distribution, LLC, CVS Tennessee, Distribution, LLC, Defendants (1:17-md-02804-DAP): Eric R. Delinsky, LEAD ATTORNEY, Zuckerman Spaeder - Washington, Washington, DC.

For Morris & Dickson Co, LLC, Defendant (1:17-md-02804-DAP): Frank H. Spruiell, Jr., Russell R. Dickson, Wiener, Weiss & Madison, Shreveport, LA.

For SpecGX LLC, Defendant (1:17-md-02804-DAP): Brien T. O'Connor, Ropes & Gray - Boston, Boston, MA.

For Walgreen Arizona Drug, Co., Defendant (1:17-md-02804-DAP): Kaspar J. Stoffelmayr, Bartlit, Beck, Herman, Palenchar & Scott - Chicago, Chicago, IL.

For American Pain Society, Inc., Defendant (1:17-md-02804): Ian R Feldman, Meredith D. Stewart, **[*55]** Clausen Miller - Irvine, Irvine, CA.

For John N. Kapoor, Defendant (1:17-md-02804): Brian T. Kelly, Kurt Michael Mullen, LEAD ATTORNEYS, Nixon Peabody, LLP, Boston, MA; Daniel Kearney Bean, LEAD ATTORNEY, Abel Bean Law PLLC, Jacksonville, FL.

For UCB Inc., Defendant (1:17-md-02804): Diane E. Lifton, William J. Beausoleil, LEAD ATTORNEYS, Hughes, Hubbard & Reed, New York, NY.

For Beewell Pharmacy, Inc., McCloud Family Pharmacy, Inc., PASTM, Inc., Defendants (1:17-md-02804): Leigh Gross Latherow, LEAD ATTORNEY, VANANTWERP MONGE JONES & EDWARDS, Ashland, KY.

For Continuumcare Pharmacy LLC, Defendant (1:17-md-02804): Gerald M. Titus, III, James Simon, LEAD ATTORNEYS, SPILMAN THOMAS & BATTLE, Charleston, WV.

For Cross Lanes Family Pharmacy, Inc., Defendant (1:17-md-02804): Drannon L. Adkins, LEAD ATTORNEY, PULLIN FOWLER FLANAGAN BROWN & POE, Charleston, WV.

For MRNB, Inc., Defendant (1:17-md-02804): William Nicholas Reynolds, LEAD ATTORNEY, Campbell Woods, Huntington, WV.

For Medical Park Pharmacy LTC, Inc., Defendant (1:17-md-02804): Edward A. Smallwood, LEAD ATTORNEY, Litchfield Cavo, Barboursville, WV; Kelly Calder Mowen, LEAD ATTORNEY, Litchfield Cavo - Barboursville, Barboursville, OH; Leigh **[*56]** Gross Latherow, LEAD ATTORNEY, VANANTWERP MONGE JONES & EDWARDS, Ashland, KY; Scott W. Andrews, LEAD ATTORNEY, VAN ANTWERP ATTORNEYS, Ashland, KY.

For Rite Aid of West Virginia, Inc., Defendant (1:17-md-02804): Webster J. Arceneaux, III, LEAD ATTORNEY, Lewis Glasser, Charleston, WV.

For West Virginia CVS Pharmacy, L.L.C., Defendant (1:17-md-02804): Carte P. Goodwin, LEAD ATTORNEY, Frost Brown Todd - Charleston, Charleston, WV.

For Ernie's Pharmacy & Wellness Center, Inc., Freeland Brown Pharmacy, GCP Pharma LLC, Gaddy Discount Drug, Inc., M & D Star Drug, Inc., Defendants (1:17-md-02804): Benjamin D. Reed, Matthew B. Free, Sean H. McKee, Steven W. Simcoe, Best & Sharp, Tulsa, OK.

For Med-Econ Drug, Inc., Pippenger Pharmacies LLC, Carefirst Pharmacy, City Drug Co., City Drug of Coweta, Inc., Reasor's LLC, Spoon Drugs, Inc., Demetrios V. Polites, D.O., Defendants (1:17-md-02804-DAP): Benjamin D. Reed, Matthew B. Free, Sean H. McKee, Steven W. Simcoe, Best & Sharp, Tulsa, OK.

For Olympia Pharmacy, Defendant (1:17-md-02804-DAP): David C. Youll, LEAD ATTORNEY, Welsh & McGough, Tulsa, OK.

For Rogers Drug Co., Inc., Defendant (1:17-md-02804-DAP): Gregory E. O'Brien, LEAD ATTORNEY, Cavitch Familo **[*57]** & Durkin, Cleveland, OH.

For Smith Drug Company, Defendant (1:17-md-02804-DAP): Edward D. Papp, LEAD ATTORNEY, Bonezzi, Switzer, Polito & Hupp - Cleveland, Cleveland, OH.

For Cityplex Pharmacy, Defendant (1:17-md-02804-DAP): Ralph Streza, Critchfield, Critchfield & Johnston - Medina, Medina, OH.

For H. D. Smith, LLC, Defendant (1:17-md-02804-DAP): Kathleen L. Matsoukas, LEAD ATTORNEY, Barnes & Thornburg - Indianapolis, Indianapolis, IN; William E. Padgett, Barnes & Thornburg - Indianapolis, Indianapolis, IN.

For Mercy Clinic East Communities, Defendant (1:17-md-02804-DAP): Adam James Olszeski, LEAD ATTORNEY, ANDERSON AND GILBERT, St. Louis, MO; Michael R. Barth, Rebecca M. Christensen, LEAD ATTORNEYS, LASHLY AND BAER, P.C., St. Louis, MO; Paul N. Venker, LEAD ATTORNEY, WILLIAMS AND VENKER, LLC, St. Louis, MO.

For Allergan Finance, LLC, f/k/a Actavis, Inc. f/k/a, Watson, Pharmaceuticals, Inc., Defendant (1:17-md-02804-DAP): Donna M. Welch, Kirkland & Ellis - Chicago, Chicago, IL.

For Endo Pharmaceuticals Inc. Defendant (1:17-md-02804-DAP): Sean O. Morris, Arnold & Porter Kaye Scholer - Los Angeles, Los Angeles, CA.

For Amneal Pharmaceuticals, Inc., Defendant (1:17-md-02804-DAP): Paul J. Cosgrove, **[*58]** Ulmer & Berne - Cincinnati, Cincinnati, OH.

For Pharmacy Buying Association, Defendant (1:17-md-02804-DAP): Brian C. Fries, LEAD ATTORNEY, Lathrop & Gage - Kansas City, Kansas City, MO.

For Michael Babich, Defendant (1:17-md-02804-DAP): J. Sedwick Sollers, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Washington, DC; Philip M. Luka, LEAD ATTORNEY, Trombley & Hanes, Tampa, FL.

For Karen Hill, Defendant (1:17-md-02804-DAP): James C. Poindexter, Thomas A. Delegal, III, LEAD ATTORNEYS, Delegal Law Offices, PA, Jacksonville, FL.

For Joseph Rowan, Defendant (1:17-md-02804-DAP): Denise H. Rowan, LEAD ATTORNEY, Denise Hallmon Rowan & Associates, P.A., Panama City, FL; Eric Niles McKay, LEAD ATTORNEY, The Law Offices of Eric N. McKay, Jacksonville Beach, FL.

For Ibem R. Borges, M.D., Defendant (1:17-md-02804-DAP): Chantal Pillay, Debbie Satyal, LEAD ATTORNEYS, Adams & Reese - Fort Lauderdale, Fort Lauderdale, FL.

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For City of Wayne, Defendant: Robert B. Sickels, LEAD ATTORNEY, Sommers Schwartz, Southfield, MI.

For Magna Pharmaceuticals, Inc., Defendant (1:17-md-02804-DAP): **[*59]** Kateryna Stupnevich, LEAD ATTORNEY, Morrison Mahoney LLP - NY, New York, NY.

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For Pembroke Pharmacy, Inc., Defendant (1:17-md-02804-DAP): Jeffrey S. Ward, Lisa Nicole Higgins, LEAD ATTORNEYS, Drew, Eckl & Farnham, LLP - BWK, Brunswick, GA.

For Willie C. Conley, Jr., Defendant (1:17-md-02804-DAP): Jeffrey S. Ward, LEAD ATTORNEY, Drew, Eckl & Farnham, LLP - BWK, Brunswick, GA.

For Curtis V. Cooper, Primary Health Care, Inc., Defendant (1:17-md-02804-DAP): James B. Durham, LEAD ATTORNEY, Hall Booth Smith - Brunswick, Brunswick, GA.

For Sheriff of the City of Virginia Beach, Defendant (1:17-md-02804-DAP): Christopher Scott Boynton, LEAD ATTORNEY, Office of the City Attorney - Virginia Beach, Virginia Beach, VA.

For Fond du Lac Band of Lake Superior Chippewa, Defendant (1:17-md-02804-DAP): Andrew Adams, III, LEAD ATTORNEY, Hogen Adams, St. Paul, MN; Shauna L Coons, LEAD ATTORNEY, Best & Flanagan LLP, Mpls, MN.

For Washington Post Company, LLC, Intervenor (1:17-md-02804-DAP): Karen C. Lefton, Lefton Group, Akron, OH.

For HD Media Company, **[*60]** LLC, doing business as Charleston Gazette-Mail doing business as Herald-Dispatch, Intervenor (1:17-md-02804-DAP): Patrick C. McGinley, Suzanne M. Weise, Morgantown, WV.

For Mississippi Hospital Association, Amicus Curiae (1:17-md-02804-DAP): T. Roe Frazer, II, Frazer Law, Nashville, TN.

For Allegiance Behavioral Health Center of Plainview, Amicus Curiae (1:17-md-02804-DAP): James T. Tyminski, Jr., Gallagher, Sharp, Fulton & Norman, Cleveland, OH.

For Allegiance Behavioral Health Center of Plainview, Allegiance Health Center of Monroe, Allegiance Health Center of Ruston, Allegiance Specialty Hospital of Greenville, BSA Hospital, BSA Physicians, Bailey Medical Center, Bienville Medical Center, CLHG-Avoyelles d/b/a Avoyelles Hospital, Centennial Hills Hospital Medical Center, Corona Regional Medical Center, Desert Springs Hospital, Eureka Springs Hospital, Harrington Cancer Center, Heart Hospital of New Mexico at Lovelace Medical Center, Henderson Hospital, Hillcrest Hospital Claremore, Hillcrest Hospital Cushing, Hillcrest Hospital Henryetta, Hillcrest Hospital Pryor, Hillcrest Hospital South, Hillcrest Medical Center, Lovelace Medical Center, Lovelace Medical Group, Lovelace Regional Hospital **[*61]** Roswell, Lovelace Westside Hospital, Lovelace Womens Hospital, Amicus Curiaes (1:17-md-02804-DAP): James T. Tyminski, Jr., Theresa A. Richthammer, Gallagher, Sharp, Fulton & Norman Bulkley Bldg., Cleveland, OH; Lauren Z. Curry, Sherrard Roe Voigt, Nashville, TN.

For Manatee Memorial Hospital, North Metro Medical Center, Oakdale Community Hospital, Oklahoma Heart Institute, Physicians Surgical Hospitals, River Valley Medical Center, Sabine Medical Center, Seton Medical Center Harker Heights, Southwest - Inland Valley Medical Center, Spring Valley Hospital Medical Center, Summerlin Hospital Medical Center, Temecula Valley Medical Center, George Washington Univeristy Hospital, Tulsa Spine & Specialty Hospital, Utica Park Clinic, Valley Hospital Medical Center, Winn Parish Medical Center, Amicus Curiaes (1:17-md-02804-DAP): James T. Tyminski, Jr., Theresa A. Richthammer, Gallagher, Sharp, Fulton & Norman Bulkley Bldg., Cleveland, OH; Lauren Z. Curry, Sherrard Roe Voigt, Nashville, TN.

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For State of New Jersey, State of New Mexico, State of North Carolina, State of North Dakota, State of North Dakota, State of Oregon, State of Pennsylvania, State of Rhode Island, State of South Carolina State of Tennessee, State of Texas, State of Virginia, State of Washington, State of Wyoming, State of Illinois, State of Louisiana, State of New York, Amicus Curiaes (1:17-md-02804-DAP): Steve W. Berman, Hagens, Berman Sobol, Shapiro - Seattle, Seattle, WA.

For King Pharmaceuticals, Inc., now known as, King Pharmaceuticals, LLC, Pfizer Inc., 3rd Pty Defendants (1:17-md-02804-DAP): George S. Wang, Lynn K. Neuner, Simpson, Thacher & Bartlett - New York, Simpson, Thacher & Bartlett - New York.

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For United States, Interested Party (1:17-md-02804-DAP): James R. Bennett, II, Office of the U.S. Attorney - Cleveland, Cleveland, OH; M. Kathryn Bailey, U.S. Department of Justice - Federal Programs - 20 Massachu, Washington, DC.

For ZNAT Insurance Company, Zenith Insurance Company, Interested Partys (1:17-md-02804-DAP): Marc A. Polansky, Grotefeld Hoffman Schleiter - Encino, Encino, CA.

For David Rosenblum Cohen, Special Master (1:17-md-02804-DAP): David Rosenblum Cohen Law Office of David R. Cohen, Cleveland, OH.

For Francis McGovern, Special Master (1:17-md-02804-DAP): Francis E. McGovern, II, Houston, TX.

For Cathy Yanni, Special Master (1:17-md-02804-DAP): Catherine A. Yanni, San Francisco, CA.

For James Coomer, Counter-Claimant (1:17-md-02804-DAP): Joseph Leon Payne, LEAD ATTORNEY, Austin, IN.

For Scott, County Indiana Board of Commissioners, Counter-Defendant (1:17-md-02804-DAP): Frank C. Dudenhefer, Jr., LEAD ATTORNEY, New Orleans, LA; Robert L. Houston, LEAD ATTORNEY, HOUSTON AND THOMPSON PC, Scottsburg, IN.

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Judges: David A. Ruiz, United States Magistrate Judge. JUDGE DAN AARON POLSTER.

Opinion by: David A. Ruiz

Opinion

REPORT AND RECOMMENDATION

On May 25, 2018, the Distributor Defendants,[1] Pharmacy Defendants,[2] and Manufacturer Defendants[3] filed Motions to Dismiss the Second Amended Complaint. (R. 491, R. 497, R. 499).[4] On June 22, 2018, Plaintiffs filed an

[1] The motion to dismiss identifies the "Distributors" as AmerisourceBergen Drug Corporation, Cardinal Health, Inc., and McKesson Corporation. (R. 491, PageID# 7455).

[2] The motion to dismiss identifies the "Pharmacies" as Walmart Inc., Rite Aid Corp., Walgreens Boots Alliance, Inc., and CVS Health Corp. (R. 497, PageID# 7581).

[3] The motion to dismiss identifies the "Manufacturers" as Purdue Pharma LP, Purdue Pharma Inc., and The Purdue Frederick Company Inc. ("Purdue"); Allergan Finance, LLC f/k/a Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc. ("Allergan/Actavis"); Watson Laboratories, Inc., Actavis Pharma, Inc., Actavis LLC, Teva Pharmaceuticals, USA, Inc., and Cephalon, Inc. ("Teva"); Johnson & Johnson ("J&J"); Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica, Inc. ("Janssen"); Endo Health Solutions Inc. and Endo Pharmaceuticals Inc. ("Endo"); Insys Therapeutics, Inc. ("Insys"); and Mallinckrodt LLC ("Mallinckrodt"). (R. 499, PageID# 7632).

[4] On May 18, 2018, Plaintiffs filed their Second Amended Complaint (R. 477), which included impermissible amendments. After the motions to dismiss were filed, Plaintiffs filed two "corrected" Second Amended Complaints on May 29, 2018—a redacted version (R. 513) and a sealed version. (R. 514). In order to maintain the integrity of the paragraph numbering from the document initially filed on May 18, 2018, the Special Master advised the parties that the subsequent "corrected" filings not delete the impermissible amendments, but rather use strike-through font to denote those portions that were no longer operative. Although the parties' briefs cite to R. 477, the court cites to R. 514 as it is the operative second amended complaint. For the sake of brevity, any reference to the "complaint" hereafter refers to R. 514. Public users unable to access the sealed version may refer to R. 513, where the paragraph numbers should parallel the citations to R. 514.

omnibus brief in opposition to the motions. (R. 654). On July 13, 2018, Defendants filed their reply briefs. (R. 742, 744, 746). This report and recommendation addresses all three motions.

I. *Fed. R. Civ P. 12(b)(6)* Standard

When ruling upon a motion to dismiss filed under *Fed. R. Civ. P. 12(b)(6)*, a court must accept as true all the factual allegations contained in the complaint. *See* *Erickson v. Pardus, 551 U.S. 89, 93-94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*; *accord* *Streater v. Cox, 336 Fed. App'x 470, 474 (6th Cir. 2009)*. Nonetheless, a court need not accept conclusions of law **[*65]** as true. Under *Fed. R. Civ. P. 8(a)(2)*, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief."

> As the Court held in *[Bell Atlantic Corp. v.] Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929*, the pleading standard *Rule 8* announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id., at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929* (*citing* *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *550 U.S., at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929*. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id., at 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929*.
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id., at 570, 127 S.Ct. 1955*. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id., at 556, 127 S.Ct. 1955*. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops **[*66]** short of the line between possibility and plausibility of 'entitlement to relief.'" *Id., at 557, 127 S.Ct. 1955* (brackets omitted).

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (*quoting* *Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929*).

A court "may dismiss a complaint for failure to state a claim 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 615 (6th Cir. 2004)* (quoting *Swierzkiewickz v. Sorema N.A., 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*; *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984))*.

II. Factual Allegations of the Complaint[5]

A. Increase in Opioid Use/Abuse and Overdose Deaths

The complaint alleges that the Manufacturers and Distributors of opioids began in the late 1990s to expand the use of opioids by developing a "deliberate marketing strategy" coupled with "deliberate efforts to evade restrictions on opioid distribution." (R. 514 at ¶¶3-4). Plaintiffs allege that annual deaths from opioid overdoses increased sharply from 8,000 in 1999 to 20,000 in 2009 and up to 33,000 in 2015. *Id* at ¶4. From 1999 through 2016, it is alleged that 350,000 individuals died from an opioid overdose. *Id* at ¶5. More than 200,000 of those deadly overdoses involved prescription opioids. *Id.* For others who overdosed from non-prescription opioids, such as heroin, it is estimated that 80 percent of people who began abusing heroin in the past decade started with prescription **[*67]** opioids. *Id.* at ¶6.

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[5] This report and recommendation provides only a brief overview of the voluminous factual allegations in the over 300 page complaint.

By 2014, nearly 2 million Americans were addicted to prescription opioids with another 600,000 addicted to heroin. (R. 514 at ¶16).

B. Allegations of an Intentional Campaign to Increase Opioid Use

Plaintiffs allege that the Manufacturers[6] initiated a massive marketing campaign based on false and misleading information to cause a dramatic increase in opioid prescriptions. (R. 514 at ¶10). Despite knowing the highly addictive properties of opioids, the Manufacturers sought to dramatically increase sales by means of publications, websites, and educational programs, resulting in a fourfold increase in opioid sales since 1999 and $9.6 billion in opioid sales in 2015 alone. *Id.* at ¶¶11-13. Plaintiffs allege the Manufacturers engaged in a series of marketing techniques that knowingly misrepresented both the risks and benefits of opioids for chronic pain treatment in order to "reverse the long-settled understanding of the relative risks and benefits of opioids." (R. 514 at ¶¶174-175).

1. Nine Categories of Misrepresentations

Plaintiffs allege the Manufacturers employed the following "nine categories of misrepresentations" concerning opioid treatment: (1) the risk of addiction **[*68]** from chronic opioid therapy is low; (2) such risk can be easily identified and managed; (3) signs of addiction are "pseudoaddiction," requiring more opioids; (4) withdrawal can be avoided by tapering; (5) dosage can be increased without additional risks; (6) long-term opioid use improves functioning; (7) alternative forms of pain relief are riskier; (8) OxyContin provides twelve hours of pain relief; and, (9) new formulas of certain opioids successfully deter abuse. (R. 514 at ¶177). Plaintiffs assert that all the above are false; that the Manufacturers knew them to be false; and, nonetheless, "set out to convince physicians, patients, and the public at large of the truth of each of these propositions in order to expand the market for their opioids." *Id.* at ¶178. The complaint proceeds to allege that each of the Manufacturers perpetuated the notion that the risk of addiction from opioid use is low. *Id.* at ¶¶180-232. The complaint also alleges how some of the other eight propositions were perpetuated.[7] *Id.* at ¶¶233-351.

2. Use of Front Groups, Key Opinion Leaders, and Continuing Medical Education Courses to Spread False and Misleading Information

Plaintiffs further allege that Manufacturers **[*69]** funded and controlled advocacy groups, which Plaintiffs label as "front groups," that distributed patient education materials and treatment guidelines that overstated the benefits of opioids for chronic pain treatment while understating the risks of addiction. (R. 514 at ¶¶350-354). The front groups were used to create the façade of "neutral and credible third parties" to influence opioid prescribing practices. *Id.* These front groups included both professional societies as well as patient advocacy organizations and received millions of dollars from the Manufacturers. *Id.* at ¶353. Plaintiffs further allege that individual executives, board members, and staff members of these front groups received substantial payments from the Manufacturers, many of whom were physicians on the Manufacturers' payroll, as consultants or speakers at medical events. *Id.* at ¶¶354, 363. These front groups minimized addiction risks while promoting opioid use for chronic pain, criticized existing CDC guidelines for opioid prescribing, and lobbied against existing laws that curbed opioid use. *Id.* at 355. The Manufacturers allegedly guided, reviewed, and approved false and misleading statements issued by the front groups. **[*70]** *Id.* at ¶356.

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[6] Plaintiffs' use of the term "Marketing Defendants" includes defendants that have "manufactured and sold" prescription opioids (R. 514 at ¶63), while those same defendants identify themselves as "Manufacturer Defendants" in their motion to dismiss. (R. 499). For the sake of consistency, the court refers to this category of defendants simply as "Manufacturers."

[7] The Plaintiffs acknowledge that "not every Marketing Defendant" propagated each of the nine misrepresentations, but asserts that liability is not predicated upon every Manufacturer perpetuating all nine misrepresentations. (R. 514 at ¶179).

Plaintiffs identify numerous organizations that allegedly received funding from Manufacturers and served as front groups to distribute tens of thousands of pamphlets and other materials containing misrepresentations regarding opioids. Those entities included: American Pain Foundation (APF), an off-shoot of APF, the National Initiative on Pain Control (NIPC), American Academy of Pain Medicine (AAPM), American Pain Society, Alliance for Patient Access (APA), the U.S. Pain Foundation, and the American Geriatrics Society. (R. 514 at ¶¶357-395). Plaintiffs also allege that the Federation of State Medical Boards (FSMB), a trade organization representing various state medical boards, received grants from Manufacturers for specific opioid and pain management programs. *Id.* at ¶¶377-382. Beginning in 1998, the FSMB began "developing treatment guidelines for the use of opioids for the treatment of pain," that "was produced 'in collaboration with pharmaceutical companies.'" *Id.* at ¶379. It is alleged that the 1998 Guidelines, as well as a subsequent FSMB publication entitled *Responsible Opioid Prescribing*, "convey[ed] the alarming message that 'under-treatment of pain' would result **[*71]** in official discipline, but no discipline would result if opioids were prescribed as part of an ongoing patient relationship and prescription decisions were documented." (R. 514 at ¶¶381-382).

Plaintiffs also allege that the Manufacturers "paid and cultivated a select circle of doctors who were chosen and sponsored" for their pro-opioid messages in order "to create the grave misperception science and legitimate medical professionals favored the wider and broader use of opioids." (R. 514 at ¶396). Plaintiffs label these doctors "key opinion leaders" (KOLs). *Id.* at ¶¶176, 398. They were used "to present the appearance that unbiased and reliable medical research supporting the broad use of opioid therapy for chronic pain had been conducted and was being reported on by independent medical professionals." *Id.* at ¶397. The publications of these physicians were funded by the Manufacturers as they supported the position that opioid treatment for chronic pain was appropriate, all while knowing these statements were false and misleading. *Id.* at ¶¶401-403. According to the complaint, one of the KOLs later acknowledged in an interview that his earlier statements were "pseudoscience," the primary **[*72]** goal of which was to destigmatize opioids. *Id.* at ¶¶410-11.

The Manufacturers are alleged to have "created a body of false, misleading, and unsupported medical and popular literature about opioids that (a) understated the risks and overstated the benefits of long-term use; (b) appeared to be the result of independent, objective research; and (c) was likely to shape the perceptions of prescribers, patients, and payors." (R. 514 at ¶446). Plaintiffs allege the literature originated from the Manufacturers' marketing departments and had no scientific research basis. *Id.* at ¶¶448-451. The Manufacturers "aggressively distributed their false message ... through thousands of Continuing Medical Education Courses," (CMEs), that physicians attended to maintain their licenses. (R. 514 at ¶¶429-432). These CMEs allegedly "inflate the benefits of opioids, and frequently omit or downplay their risks and adverse effects," causing physicians that listened to these CMEs to be misled. *Id.* at ¶¶433, 440-41.

3. Branded and Unbranded Advertising and Marketing

Plaintiffs allege that the Manufacturers collectively spent more than $14 million on medical journal advertising of opioids in 2011, which included $8.3 **[*73]** million by Purdue, $4.9 million by Janssen, and $1.1 million by Endo. (R. 514 at ¶442). These included journals targeting specialists, such as the *Journal of Pain and Clinical Journal of Pain*, as well as journals with a wider medical audience, such as the *Journal of the American Medical Association. Id.* It is further alleged that the Manufacturers promoted opioids through "unbranded advertising" that, in contrast to a "branded" advertisement, does not require the advertiser to include risks, possible side effects and contraindications. *Id.* at ¶444. Such advertising was directed at physicians and consumers, as studies have shown that physicians are significantly more likely to prescribe a drug if a patient asks for it. *Id.* at ¶¶443-44. As an example one website contained testimonials from alleged pain advocates, who were paid significant sums by Defendant Purdue. *Id.* at ¶445.

It is further alleged that the Manufacturers' sales representatives met with "hundreds of thousands" of doctors "to disseminate their misrepresentations in targeted, one-on-one settings that allowed them to promote their opioids and to allay individual prescribers' concerns about prescribing opioids for chronic **[*74]** pain." *Id.* at ¶¶452-455. The Manufacturers, in 2014 alone, spent "$166 million on detailing branded opioids to doctors. This amount is twice as much as the Manufacturers spent on detailing in 2000. The amount includes $108 million spent by Purdue, $34 million by Janssen, $13 million by Teva, and $10 million by Endo." *Id.* at ¶¶455-461.

C. Distribution and Sales Allegations

Since 1999, the onset of the Manufacturers' alleged marketing actions, the amount of prescription opioids in the United States nearly quadrupled. (R. 514 at ¶12). Plaintiffs maintain that all Defendants were required to register as either manufacturers or distributors pursuant to *21 U.S.C. § 823* and *21 C.F.R. §§ 1301.11*, *1301.74*. (R. 514 at ¶¶500-504). Plaintiffs allege the Defendants have a duty "to report suspicious orders and further to not ship those orders unless due diligence disproves those suspicions." *Id.* at ¶¶501-505. Plaintiffs allege these duties stem from multiple sources including state law, common law, an assumed duty, and as registrants with the Drug Enforcement Agency (DEA) as manufacturers and/or distributors of Schedule II controlled substances. *Id.*

Plaintiffs assert that the Controlled Substances Act (CSA) requires both the Manufacturers **[*75]** and the Distributors[8] of Schedule II substances, such as opioids, to limit sales within a quota set by the DEA; register to manufacture or distribute opioids; maintain effective controls against diversion of the controlled substances that they manufacture or distribute; and to design and operate a system to identify suspicious orders of controlled substances, halt such unlawful sales, and report them to the DEA. *Id.* at ¶507. Plaintiffs allege Defendants failed to control the supply chain, prevent diversion, report suspicious orders, and halt shipments. *Id.* at ¶¶14, 518.

Plaintiffs allege Defendants worked together to increase the supply of opioids and fraudulently increased the quotas that governed the manufacture and distribution of prescription opioids. (R. 514 at ¶¶526-528). It is alleged that the Manufacturers engaged in the practice of paying rebates and/or "chargebacks" to the Distributors for sales of prescription opioids to boost sales and refine their marketing efforts. *Id.* at ¶529. Defendants worked together through trade or other organizations, such as the Pain Care Forum (PCF) or the Healthcare Distribution Alliance (HDA) to increase opioid sales. *Id.* at ¶531. The PCF, which **[*76]** included the previously described front groups, Manufacturers and Distributors, spent $140 million to lobby state and national legislatures on an array of issues, including opioids. *Id.* at ¶¶533-535.

Furthermore, Plaintiffs allege the HDA created a private network where representatives of the Manufacturers and Distributors could form relationships and create alliances between them and hold strategic business discussions between high-level executives. *Id.* at ¶¶535-540. Thus, Plaintiffs allege that the Manufacturers and Distributors were "not two separate groups operating in isolation or two groups forced to work together in a closed system," but rather "operated together as a united entity, working together on multiple fronts, to engage in the unlawful sale of prescription opioids." *Id.* at ¶¶543-46. It is alleged the Defendants worked together to ensure that the Aggregate Production Quotas, Individual Quotas and Procurement Quotas allowed by the DEA remained artificially high to ensure that suspicious orders were not reported to the DEA thereby giving the DEA no basis to refuse to increase production quotas due to diversion. *Id.* at ¶¶550-552. Defendants, it is alleged, were "on notice" **[*77]** of the problems of abuse and diversion caused "inescapably from the fact that they flooded communities with opioids in quantities that they knew or should have known exceeded any legitimate market for opioids-even the wider market for chronic pain." *Id.* at ¶557.

Further, Defendants were "in possession of national, regional, state, and local prescriber-and patient-level data that allowed them to track prescribing patterns over time." *Id.* at ¶¶558-563. It is also alleged that "Defendants refused to identify, investigate and report suspicious orders to the DEA when they became aware of the same despite their actual knowledge of drug diversion rings." *Id.* at ¶566. Plaintiffs allege Defendants also failed to report prolific

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[8] In the complaint, the Plaintiffs also classify the national retail pharmacy defendants as "Distributor Defendants." (R. 514 at ¶¶107, 111-112, 124-128). These defendants, however, moved separately to dismiss the complaint and, in the Analysis section, the court differentiates between these two categories of defendants by referring to them either as "Distributors" or "Pharmacies." For the purposes of this section only, the Plaintiffs' references to the Distributor defendants in the complaint may encompass the Pharmacies.

prescribers, but instead focused their sales efforts on them to even further increase their prescribing. *Id.* at ¶¶569-578.

Plaintiffs also allege that several Distributors and Manufacturers have either admitted, been fined for, or been charged with failing to report suspicious orders. (R. 514 at ¶¶580-593, 595). The Defendants, through their trade associations, have acknowledged that "HDMA[9] and NACDS members not only have statutory and regulatory responsibilities to guard **[*78]** against diversion of controlled prescription drugs, but undertake such efforts as responsible members of society." *Id.* at ¶599. They further have stated in court filings that "Distributors take seriously their *duty* to report suspicious orders, utilizing both computer algorithms and human review to detect suspicious orders based on the generalized information that is available to them in the ordering process." *Id.* (emphasis added).

It is alleged that the Manufacturers marketed their products and disseminated their misrepresentations in the state of Ohio, and their nationwide "policies, plans, and procedures that were the same in Summit County as they were across the country." (R. 514 at ¶¶671-672). Sales representatives from each of the Manufacturers visited prescribers in Summit County, which frequently coincided with payments to prescribers for "promotional speaking," "food and beverage," "consulting," "travel and lodging," "honoraria," and "education." *Id.* at ¶673. Summit County had an opioid prescription rate exceeding its population from 2008 to 2011—a rate that has remained higher than the national average.[10] *Id.* at ¶674.

III. Analysis

A. Counts One and Two: Federal RICO Claims

In Count **[*79]** One of the complaint, Plaintiffs allege a civil violation of the *Racketeer Influenced and Corrupt Organizations (RICO) Act § 1961 et seq.* based on a marketing enterprise theory against the Manufactures, specifically Defendants Purdue, Cephalon, Janssen, Endo, and Mallinckrodt, whom the Plaintiffs refer to as "Marketing Defendants." (R. 514, PageID# 11178). In Count Two, Plaintiffs allege a civil RICO violation based on a supply chain enterprise theory against both the Manufacturers and Distributors, specifically Defendants Purdue, Cephalon, Endo, Mallinckrodt, Actavis, McKesson, Cardinal, and AmerisourceBergen, whom Plaintiffs refer to as "Supply Chain Defendants." *Id.* at PageID# 11187.

The RICO Act includes a civil-suit provision that permits: "[a]ny person injured in his business or property by reason of" RICO's substantive provisions to "sue...in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee...." *18 U.S.C. § 1964(c)*. If a defendant "engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, **[*80]** the plaintiff has a claim under *§ 1964(c)*." *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 495, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*. The Supreme Court has instructed that "the RICO statute provides that its terms are to be 'liberally construed to effectuate its remedial purposes.'" *Boyle v. United States, 556 U.S. 938, 944, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009)* (citations omitted); *accord* *Ray v. Spirit Airlines, Inc., 836 F.3d 1340, 1349 (11th Cir. 2016)*. The Defendants' motions challenge Plaintiffs' RICO standing, allege they failed to plead causation and necessary RICO elements, and assert that Plaintiffs' supply chain enterprise theory attempts to bring a cause of action for violating the CSA for which they maintain there is no private right of action. (R. 491-1, PageID# 7477-7491, 499-1, PageID# 7664-7689).

1. Standing

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[9] HDMA is the Healthcare Distribution Management Association, the predecessor of HDA. (R. 514 at ¶522).

[10] The complaint states that from 2010 to 2016, according to Ohio data, Summit County, whose population is 540,000 residents, averaged 36.4 million doses of opioids dispensed per year, with a high of 39.5 million. (R. 514 at ¶689).

"RICO's civil-suit provision imposes two distinct but overlapping limitations on claimants—standing and proximate cause. Standing poses a threshold question involving constitutional, prudential and (as in this case) statutory limitations on who may sue, regardless of the merits of that person's claim." Trollinger, 370 F.3d at 612 (*citing* Allen v. Wright, 468 U.S. 737, 750-51, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)). In addition, "[b]ecause Congress modeled this provision on similar language in the antitrust laws (§ 4 of the Clayton Act and § 7 the Sherman Act) and because the antitrust laws have been interpreted to require that a private plaintiff show proximate cause in order to have standing to sue, RICO civil **[*81]** claims also require proximate cause." Trollinger, 370 F.3d at 612 (*citing* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992); Sedima, 473 U.S. at 496).

The Defendants are correct in asserting that the standing requirements of a civil RICO claim require a plaintiff to allege (1) a direct injury,[11] and (2) the injury is to the plaintiff's "business or property." (R. 491-1, PageID# 7478-7486; R. 499-1, PageID# 7664). Plaintiffs summarize their alleged injuries into three categories: (1) public expenditures made in direct response to opioid use and trafficking; (2) lost tax revenue resulting from abuse, misuse, and addiction; and (3) losses caused by diminished property values. (R. 514 at ¶¶ 902, 934).

a. Business or Property

There is no dispute that a RICO claim requires injury to "business or property." *See, e.g.*, Sedima, 473 U.S. at 496 ("the plaintiff only has standing [under RICO] if, and can only recover to the extent that, he has been injured in his *business or property* by the conduct constituting the violation") (emphasis added); *accord* Ray, 836 F.3d at 1349. Plaintiffs do not contest that such a requirement exists, but rather argue that "[t]he harms that the Manufacturer and Distributor Defendants caused, which also impact the Plaintiffs' revenue-generating function, are direct injuries to their 'business and **[*82]** property.'" (R. 654, PageID# 15747).

The Supreme Court in *Reiter v. Sonotone Corporation* analyzed the meaning of "business or property" under the Clayton Act and indicated that "monetary injury, standing alone, may be injury in one's 'property.'" 442 U.S. 330, 340, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979). The *Reiter* court further noted in the most unambiguous terms that "Money, of course, is a form of property." Id. at 338; *see also* Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390, 396, 27 S. Ct. 65, 51 L. Ed. 241 (1906) ("[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property."). Plaintiffs have alleged loss of tax revenue and increased public expenditures as damages in both of their RICO claims. (R. 514 at ¶¶902, 934). "[I]njuries in the form of lost tax revenues and increased law enforcement costs...are at bottom, claims for lost money. Such inherently economic losses constitute injury to 'property' within the meaning of [RICO]." European Community v. RJR Nabisco, Inc., 150 F.Supp.2d 456, 492-93 (E.D.N.Y. 2001) (citing *Reiter*). Moreover, courts have determined that a government entities' loss of tax revenue is a "business or property" interest under RICO. City of New York v. FedEx Ground Package Sys., Inc., 91 F. Supp. 3d 512, 524 (S.D.N.Y. 2015); City of New York v. Gordon, 1 F. Supp. 3d 94, 113 (S.D.N.Y. 2013) (finding the city's complaint alleging lost tax revenue "easily satisfies [RICO's injury to business or property] element); *see also* City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425, 445 (2d Cir. 2008) ("[L]ost taxes can constitute injury to 'business or property' for purposes **[*83]** of RICO...."), *rev'd on other grounds sub nom.*, Hemi Group, LLC v. City of New York, 559 U.S. 1, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010) (reversing on lack of proximate cause).

In a criminal action, the Supreme Court held that a government's "right to uncollected excise taxes ... is 'property' in its hands. This right is an entitlement to collect money from petitioners, the possession of which is 'something of value'...." Pasquantino v. United States, 544 U.S. 349, 355-56, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005)

[11] The court views the "direct injury" requirement as a consideration in the proximate cause inquiry and, therefore, addresses it below. In re Neurontin Mktg. & Sales Practice Litig., 712 F.3d 21, 36 (1st Cir. 2013) (*citing* Holmes, 503 U.S. at 274 ("our use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry")); *see also* Wallace v. Midwest Fin. & Mortg. Servs., Inc., 714 F.3d 414, 419 (6th Cir. 2013) (stating that RICO incorporated "many traditional proximate-cause considerations," and that "[o]ne such consideration is directness....").

("Valuable entitlements [to collect excise taxes] are 'property' as that term ordinarily is employed") (*citing* Leocal v. Ashcroft, 543 U.S. 1, 9, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004) ("When interpreting a statute, we must give words their ordinary or natural meaning" (internal quotation marks omitted); *Black's Law Dictionary* 1382 (4th ed. 1951) (defining "property" as "extend[ing] to every species of valuable right and interest")).

As such, Plaintiffs have alleged a facially plausible claim for injury to their property. Defendants, however, assert that a government entity, when suing as a plaintiff, "cannot rely on expenditures alone to establish civil RICO standing, and there is no indication that the County holds a property interest in the law enforcement or health care services that it provides to the public." Canyon Cty. v. Syngenta Seeds, Inc., 519 F.3d 969, 976, 979 (9th Cir. 2008). (R. 491-1, PageID# 7480-7481; R. 499-1, PageID# 7665-7666)). Defendants, however, have not identified any Supreme **[*84]** Court or Sixth Circuit case directly on point with the facts of this case. Defendants rely almost exclusively on *Canyon County* and argue that RICO precludes the recovery of such government service expenditures. *Id.* This argument, however, is not persuasive on this record.

i. "Business or Property" as Commercial Interests

Canyon County determined that the "business or property language" found in both RICO and in the Clayton Act should be interpreted uniformly. 519 F.3d at 977. The court held to the view that an injury to business or property under the Clayton Act encompasses only "the interests of the [state] as a party to a commercial transaction." 519 F.3d at 977 (acknowledging, however, that courts have "often, though not invariably, interpreted the two statutory provisions in a like manner."); *see also* Welborn v. Bank of New York Mellon Corp., 557 Fed. App'x 383, 387 (5th Cir. 2014) ("When a government sues under the civil RICO statute, the 'business or property' element requires that the injury 'refer to commercial interests or enterprises.'"). The Defendants, however, do not cite any Supreme Court or Sixth Circuit authority explicitly stating that a civil RICO action by a governmental entity is limited to property interests that stem from a commercial transaction or commercial interests. **[*85]**

Indeed, the import of the phrase "business or property" in the Clayton Act context has been construed at one time to be limited to "commercial interests." *See, e.g.,* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 264, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972) ("[T]he words 'business or property,' ... refer to commercial interests or enterprises" and a state may not seek damages for other injuries under the Clayton Act). The language in the *Hawaii* decision was greatly softened by *Reiter*, which also considered the meaning of the phrase "business or property" in the Clayton Act. The *Reiter* Court explained that the *Hawaii* Court's reference to "the phrase 'commercial interests or enterprises,' read [i]n context, in no sense suggests that only injuries to a business entity are within the ambit of [the Clayton Act]." Reiter, 442 U.S. at 339 (finding that Congress' use of the disjunctive in the phrase "business or property" indicates that "'business' was not intended to modify 'property,' nor was 'property' intended to modify 'business.'")[12] The Seventh Circuit Court of Appeals has acknowledged the *Hawaii* decision's interpretation of the "business and property" phrase under the Clayton Act as referring only to commercial interests and competitive injuries, but held that "this is not the case under RICO." Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 314 (7th Cir. 1985) **[*86]** . Other Circuit decisions also cautioned against reflexively applying the Clayton Act's antitrust principles to RICO. *See, e.g.,* Schacht v. Brown, 711 F.2d 1343, 1357-58 (7th Cir. 1983), *cert. denied sub nom. Arthur Andersen & Co., v. Schacht, 464 U.S. 1002, 104 S. Ct. 508, 104 S. Ct. 509, 78 L. Ed. 2d 698 (1983)*; Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982) ("In a RICO context, there are few countervailing reasons to lessen the impact of RICO remedies by imputing the limitations on standing which apply to ***antitrust law***."). The *Schacht* decision noted that "RICO was broadly aimed at 'striking ... a mortal blow against the property interests of organized crime," and, therefore, it was "reluctant to undermine that broad mission of RICO by engrafting onto its civil provisions a competitive injury requirement." 711 F.2d at 1358.

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[12] The *Canyon County* decision appears to endorse a restrictive reading of *Hawaii* expressly rejected by *Reiter*. "[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute." 442 U.S. at 341-342 (explaining that a "central premise" in *Hawaii* was a "concern over duplicative recoveries" and noting that the state of Hawaii was essentially trying to recover injuries to the business or property of consumers who could recover their own damage).

ii. Municipal Cost Recovery Rule

Canyon County also applied the municipal cost recovery rule, a tort doctrine developed under state common law, as a basis for concluding the public expenditures alone were insufficient to create RICO standing. *519 F.3d at 974, 979-980*. "The 'municipal cost recovery rule,' also called the 'free public services doctrine,' is a common-law rule which provides that, absent specific statutory authorization or damage to government-owned property, a county cannot recover the costs of carrying out public services from a *tortfeasor* whose conduct caused the need for the services." 32 A.L.R.6th 261 (Originally published in 2008) (emphasis added). Although the Ninth Circuit acknowledged that "we are not dealing with state common law, but with a statutory cause of action created by Congress [RICO]," the court applied the common law tort doctrine. *Id. at 980*. Furthermore, relying on a prior Ninth Circuit decision—*Diaz v. Gates, 420 F.3d 897, 900 (9th Cir. 2005)—Canyon County* found that "[f]inancial loss alone, however, is insufficient" to establish an injury to business or property **[*87]** under RICO "'[w]ithout a harm to a specific business or property interest,'" and that said inquiry is "typically determined by reference to state law." *519 F.3d at 975*.

The Sixth Circuit, however, has expressed a different view, acknowledging that "some role" may exist for state law with respect to the question of "where to set the 'business or property' threshold" in RICO cases, but emphasizing that this question "depends on federal statutory purpose, and that purpose is likely to support a definition that is uniform throughout the country." *Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F.3d 556, 565 (6th Cir. 2013)* (*quoting DeMauro v. DeMauro, 115 F.3d 94, 96-97 (1st Cir.1997))*.[13] The *Canyon County* court opted to apply the state law doctrine barring recovery of municipal costs based on the notion that had "Congress meant to disrupt settled expectations and alter the legislatively-chosen system of funding local government services[,]" and allow treble recovery "under RICO for injuries arising from [the] provision of governmental services[] ...we believe that Congress would have been more explicit." *519 F.3d at 980*.

The Sixth Circuit, in *Jackson*, however has stated:

> Concerns about the scope of RICO are not new. Courts have long recognized that RICO has evolved "into something quite different from the original conception of its **[*88]** enactors," who sought to "supplement old remedies and develop new methods for fighting crime." Nonetheless, the unexpected scope of RICO can largely be attributed to the terms of the statute itself. Congress chose "self-consciously expansive language" when it adopted RICO, defined the "predicate acts" necessary to establish a pattern of racketeering activity broadly, and directed courts to give the statute a liberal construction, Organized Crime Control Act of 1970. As a consequence, courts have frequently rejected arguments that RICO should be given constructions that prevent it from reaching conduct that Congress may not have intended it to reach. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."
> * * *
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> Another limitation in *§ 1964(c)* that has its origins in the antitrust laws is the requirement that a plaintiff be "injured in his business or property" in order to bring a civil action. While the Supreme Court has yet to definitively interpret this phrase as it appears in *§ 1964(c)*, it has construed it in the context of the antitrust laws. In *Reiter v. Sonotone Corp.*, ... the Court held that "consumers who **[*89]** pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their 'business or property'" under *§ 4*. In so doing, it rejected the respondents' argument that "the phrase 'business or property' means 'business activity or property related to one's business.'" While conceding the breadth of its ruling that

[13] *See also Miller v. York Risk Servs. Grp., 2013 U.S. Dist. LEXIS 173354, 2013 WL 6442764, at *3 (D. Ariz. Dec. 9, 2013)* (distinguishing between the Sixth Circuit's federal statutory purpose inquiry and the Ninth Circuit's state-law based approach with respect to determining whether there has been a RICO injury to business or property), *adopted*, *2013 U.S. Dist. LEXIS 191271, 2013 WL 11739992 (D. Ariz. Dec. 19, 2013)*.

> "monetary injury, standing alone, may be injury in one's 'property,'" the Court pointed out that "[t]he phrase 'business or property' also retains restrictive significance.

Jackson, 731 F.3d at 563-564 (internal citations omitted).

In addition, the court finds instructive other decisions addressing the scope of the municipal cost recovery rule and declining to find that it creates an absolute shield for chronic wrongdoers engaged in a pattern of conduct that creates great public expense. For example, courts have found an exception when the government's costs are the product of a public nuisance. The Ohio Supreme Court was not persuaded that the municipal cost recovery rule barred Cincinnati's recovery of expenses for police, emergency, health, corrections, prosecution and other related public services, in an action brought against handgun manufacturers, trade associations, **[*90]** and handgun distributors—alleging tort claims of negligence, product liability, and public nuisance. Cincinnati v. Beretta U.S.A. Corp., 95 Ohio St. 3d 416, 2002- Ohio 2480, 768 N.E.2d 1136 (Ohio 2002). The Ohio Supreme Court stated:

> Although a municipality cannot reasonably expect to recover the costs of city services whenever a tortfeasor causes harm to the public, it should be allowed to argue that it may recover such damages in this type of case. Unlike the train derailment that occurred in the *Flagstaff*[14] case, which was a single, discrete incident requiring a single emergency response, the misconduct alleged in this case is ongoing and persistent. The continuing nature of the misconduct may justify the recoupment of such governmental costs. Therefore, if appellant can prove all the elements of the alleged torts, it should be able to recover the damages flowing from appellees' misconduct. Moreover, even the *Flagstaff* court recognized that recovery by a governmental entity is allowed "where the acts of a private party create a public nuisance which the government seeks to abate." Flagstaff, 719 F.2d at 324. We therefore reject the court of appeals' holding that appellant cannot recover its governmental costs.

Id. at 1149-50.

Similarly, in *City of Boston v. Smith & Wesson Corp.*, 2000 WL 1473568 (Mass. Super. Ct. 2000), the court held that said rule did not bar the city's claim **[*91]** to recover law enforcement and emergency services costs against the defendants—firearms manufacturers, distributors, sellers, and firearms industry trade associations. The court distinguished other decisions applying the doctrine, noting as follows:

> What each of these cases has in common is that the acts causing the damage were of the sort the municipality reasonably could expect might occur, and each of the results was a discrete emergency. Fires, fuel spills and ruptured gas mains are all frequent happenings which, while every effort is made to prevent them, can be expected to occur. Train derailments and airplane crashes are more unusual, but not so rare that a municipality can never expect to have to respond to such an emergency. The cases thus stand for the principle that such contingencies are part of the normal and expected costs of municipal existence, and absent legislation providing otherwise are costs to be allocated to the municipality's residents through taxes. In addition, in those cases there is no evidence that the specific defendants had engaged in a repeated course of conduct causing recurring costs to the municipality.

Id. at * 8; *see also* James v. Arms Tech., Inc., 359 N.J. Super. 291, 820 A.2d 27, 48-49 (N.J. App. Div. 2003) ("We do not accept the proposition **[*92]** that [the municipal cost recovery rule's] reasoning should apply in a case such as this, where the City claims a *repeated course of conduct* on defendants' part, requiring the City to expend substantial governmental funds on a continuous basis.")(emphasis added);[15] City of Chicago v. Beretta U.S.A.

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[14] *Canyon County* relied upon City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co., 719 F.2d 322, 324 (9th Cir. 1983). The *Flagstaff* court applied the municipal cost recovery rule, but noted that it does not stand for the proposition that "a governmental entity may never recover the cost of its services. Recovery is permitted where it is authorized by statute or regulation ... or required to effect the intent of federal legislation [or] ... where the acts of a private party create a public nuisance which the government seeks to abate.").

Corp., 213 Ill. 2d 351, 821 N.E.2d 1099, 1145, 290 Ill. Dec. 525 (Ill. 2004) (citing *City of Flagstaff* and noting the public nuisance exception).

When balancing the fact that neither party has identified Supreme Court or Sixth Circuit precedent directly on point, with the Sixth Circuit's emphasis on federal statutory purpose over state-law based property rules and the jurisprudence confirming that the municipal cost recovery rule does not apply to preclude remedying a repeated course of conduct that allegedly injures a governmental plaintiff, the court is not persuaded that it is applicable to the present set of facts. Moreover, the Sixth Circuit has not indicated that it would concur with the Ninth Circuit's decision in *Canyon County* as it relates to the application of said rule.[16] The *Cincinnati v. Beretta* and *City of Boston* decisions declined to apply the doctrine to state law tort claims based on the persuasive reasoning that a doctrine that publicly spreads the costs caused by one-time tortfeasors, **[*93]** such as a negligent driver, is inappropriately applied where a defendant engages in a course of repetitive conduct that causes harm of a substantial magnitude and imposes a repeated burden on government services. In addition, the court declines, in this case, to completely transplant that common law tort doctrine to defeat a claim arising under this federal statute. Doing so to defeat well pleaded allegations of an ongoing pattern of intentional racketeering activity is the antithesis of the construction of RICO that Congress designed it to have.[17]

b. Personal Injuries

The Defendants also argue that RICO's aforementioned limitation to recovery for an injury to "business or property" eliminates recovery for personal injuries or pecuniary damages flowing from such injuries. (R. 491-1, PageID#

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[15] The court determined the "Municipal Cost Recovery Rule does not apply to cases ... where a municipality seeks to recover damages for the cost of abating a nuisance." Further, it also indicated that "if the City has a worthy claim, application of the Municipal Cost Recovery Rule would leave the City without a remedy." *Arms Tech., Inc., 359 N.J. Super. at 327-28*. The court noted: "[i]f tortious conduct exists, the consequence is that the gun manufacturers are subsidized for their wrongful acts, and the cost of the governmental services must be borne by the taxpayers of the City. This result is fundamentally unfair, given the City's limited resources and strained ability to provide other essential services to its citizens. Application of the rule also serves as a disincentive; if culpable, the insulated defendants have no reason to obtain liability insurance to cover the cost of their conduct, or to take reasonable measures to eliminate, or at least reduce, the harm resulting from the use of their product." *Id. at 328*.

[16] The Sixth Circuit's citations to *Canyon County* in three decisions cannot be construed as endorsing its holding with respect to the "municipal cost recovery rule," as discussion of that doctrine is entirely absent from those cases. *See* *Saia v. Flying J. Inc., 2017 U.S. App. LEXIS 25872, 2017 WL 6398013, at *3 (6th Cir. July 11, 2017)*, *cert. denied*, ***138 S. Ct. 657, 199 L. Ed. 2d 533 (2018)***, *reh'g denied*, ***138 S. Ct. 1182, 200 L. Ed. 2d 328 (2018)***; *Stooksbury v. Ross, 528 F. App'x 547, 555 (6th Cir. 2013)*; *City of Cleveland v. Ameriquest Mort. Sec., Inc., 615 F.3d 496, 504, 506 (6th Cir. 2010)*.

[17] The court also notes that a recent New York supreme court decision addressed whether local governmental entities, who brought suit against opioid manufacturers, were barred from recovering the costs of governmental services by the municipal cost recovery rule. *In re Opioid Litigation, 2018 N.Y. Misc. LEXIS 2428, 2018 WL 3115102 (N.Y. Sup. Ct., Jun. 18, 2018)*. The court found as follows:

> [A] review of the current state of the law revealed no case law supporting the Manufacturers' contention that such rule bars recovery for municipal expenses incurred, not by reason of an accident or an emergency situation necessitating "the normal provision of police, fire and emergency services," but to remedy public harm caused by an intentional, persistent course of deceptive conduct. The Manufacturers' argument that, despite allegations they designed and implemented materially deceptive marketing campaigns to mislead the public and prescribers about the risks and benefits of prescription opioids, **[*94]** the municipal cost recovery rule forecloses the plaintiffs from recovering the costs for services to treat residents suffering from prescription opioid abuse, addiction or overdose, or for the increased costs of programs implemented to stem prescription opioid-related criminal activities, if accepted, would distort the doctrine beyond recognition.

Id. (citations omitted).

7478-7479; R. 499-1, PageID# 7665) (*citing* Doe v. Roe, 958 F.2d 763, 767 (7th Cir. 1992); Jackson, 731 F.3d at 565). The *Jackson* court observed that "those regional circuits that have construed the phrase business or property have uniformly recognized that 'the ordinary meaning of the phrase injured in his business or property excludes personal injuries, including the pecuniary losses therefrom." 731 F.3d at 564-565 (internal quotation marks omitted); *accord* Gucwa v. Lawley, 731 Fed. App'x 408, 412 (6th Cir. 2018) ("Even though personal injuries may lead to monetary damages, such personal injuries and their associated pecuniary losses—including medical expenses—do not confer relief under § 1964(c).").

Plaintiffs do not contest that **[*95]** the law precludes recovering such damages, but rather argue that their "damages claims are not for personal injuries, but police and fire services, lost taxes, revenue and funding." (R. 654, PageID# 15747). They further argue that "[t]he harms that the Manufacturer and Distributor Defendants caused, which also impact the Plaintiffs' revenue-generating function, are direct injuries to their 'business and property.'" *Id.* Plaintiffs deny (and the court does not construe) the complaint as seeking to directly recover for the personal injuries sustained by opioid users/addicts. Nevertheless, the law also bars losses flowing from those personal injuries. Whether Plaintiffs' injuries flow from the personal injuries suffered by their residents is a crucial question in this litigation. Plaintiffs have alleged at least thirteen separate categories of damages with respect to their RICO claims in Counts One and Two. (R. 514, ¶¶902, 934).

The Defendants fail to meaningfully differentiate among the categories, contending they are all derivative of residents' personal injuries. (R. 491-1, PageID# 7478-7479; R. 499-1, PageID# 7665). Without a full record regarding the source of the various categories **[*96]** of damages, the court declines to paint with such a broad brush. While some of the claimed categories of damages may ultimately not survive if it is revealed through discovery that they fall into an area of prohibited recovery, the court cannot find at this preliminary stage in the proceedings that all thirteen categories are unrecoverable. For example, it is highly debatable whether Plaintiffs' costs associated with training emergency personnel and first responders flow from an individual resident's personal injuries. (R. 514 at ¶¶902(c), 934(c)). Even further removed from any personal injuries are Plaintiffs' claimed losses associated with lost tax revenue and diminished property values. *Id.* at ¶¶902(k-n), 934(k-m).[18]

The Sixth Circuit has instructed that a court "may dismiss a complaint for failure to state a claim 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Trollinger, 370 F.3d at 615 (quoting Swierzkiewickz, 534 U.S. at 514). Defendants, as the moving party, have failed to meet their burden of demonstrating that all of Plaintiffs' claimed damages are purely derivative of personal injuries and, therefore, do not constitute an injury to "business **[*97]** or property." For the foregoing reasons, Defendants' motion to dismiss on these grounds is not well taken.

2. Causation

a. "But for" Cause

The Defendants assert that Plaintiffs have plead no facts establishing "but for" causation. (R. 491-1, PageID# 7516-7517; R. 499-1, PageID# 7666-7672, 7683-7684). First, they maintain that Plaintiffs have not alleged what they characterize as the "first step" in the causal chain—"that specific Ohio prescribers were exposed to the Manufacturers' alleged deceptive marketing" or that but for the Manufacturers' purported failure to monitor and report suspicious orders of prescription opioids to DEA Field Division Offices, Plaintiffs would not have suffered the injuries associated with prescription opioid misuse, abuse, and addiction. *Id.* "But since 'we presume that general allegations embrace those specific facts ... necessary to support the claim,'...causal weaknesses will more often be

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[18] The court's recommendation should not be misconstrued as an affirmative finding that none of Plaintiffs' claimed damages are premised upon pecuniary damages flowing from personal injuries. In addition, to the extent that Plaintiffs seek damages for losses of property value in their communities, such claims may, after discovery, be too speculative. *See, e.g.* Ameriquest, 615 F.3d at 505-506. However, in this case, such arguments are more appropriate after the record has been developed.

fodder for a summary-judgment motion under *Rule 56* than a motion to dismiss under *Rule 12(b)(6)*." *Trollinger, 370 F.3d at 615*.[19]

Further, the complaint's allegations set forth a nationwide campaign targeting physicians throughout the United States to change their prescribing practices based on allegedly false **[*98]** statements and misrepresentations. The complaint alleges that the Marketing Defendants carried out this same marketing scheme in Ohio. (R. 514, PageID# 6966-6969, ¶¶671-683) ("The Marketing Defendants all marketed their products and disseminated their misrepresentations in the state of Ohio."). Plaintiffs also alleged that "sales representatives from each of the Marketing Defendants visited prescribers in Summit County." *Id.* at ¶673.[20] Thus, Defendants' first assertion is rejected.

Moreover, Defendants contend that Plaintiffs failed to allege that if they had reported suspicious orders to DEA, it would have led to enforcement actions and that would have averted prescription opioid diversion and "related societal harms in Summit County." (R. 491-1, PageID# 7516; R. 499-1, PageID# 7684). The court disagrees that Plaintiffs are required to divine the actions that the DEA would have taken had the Defendants properly reported the suspicious orders as alleged or that Plaintiffs would be required to foresee the alternate series of events had such actions been taken. Contrary to Defendants contention, "but-for" causation is rather easily satisfied by the allegations in the complaint. Reading **[*99]** the complaint's averments in favor of Plaintiffs, as required when considering a motion to dismiss, they assert but-for Defendants' allegedly deceptive marketing scheme that changed the way physicians prescribe opioids, coupled with the systemic undermining of quotas and institutional controls as well as the failure to report suspicious orders by both the Marketing and Distributor Defendants, the number of opioids would not have tripled or quadrupled thereby directly giving rise to the opioid epidemic—the costs of which have resulted in Plaintiffs' alleged injuries. Plaintiffs have sufficiently pled that the Defendants' alleged actions were the "but for" cause of their injuries as required by *18 U.S.C. § 1964(c)* and under *Holmes, 503 U.S. at 268*, and *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 456-61, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006)*.

b. Proximate Cause

The Defendants argue that Plaintiffs plead facts that are too attenuated and remote to establish proximate cause. They further contend that the causal chain is broken by: (1) the independent medical judgment of medical professionals who prescribe the opioid products; and (2) third-party criminal acts. (R. 491-1, PageID# 7481-7481; R. 499-1, PageID# 7667-7669). Defendants maintain that Plaintiffs fail to allege a direct relation between their injuries and the **[*100]** conduct of the Defendants. *Id.* Plaintiffs counter that their damages can be properly and efficiently apportioned among the Defendants, that their RICO damages cannot be sought or recovered by *any other party*, and that recovery is necessary to vindicate the purposes underlying RICO and deter future violations. (R. 654, PageID# 15749).

This court cannot say at this early stage of the proceedings that the Plaintiffs' injuries are so remote as to bar any potential recovery. Plaintiffs, local governments, have been impacted by the opioid epidemic. Their injuries, alleged to be caused by the Defendants' conspiracy to dramatically increase the usage and supply of opioids for off-label purposes, to some extent, stem from ills associated with opioid use and/or addiction. The connection between their

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[19] To the extent Defendants argue that Plaintiffs allegations fail to satisfy *Rule 9(b)*'s pleading requirements, such argument is not persuasive, because courts have recognized that pleadings are sufficient so long as they provide enough detail to put the responding party on notice and enable a response. *See infra* Section III-A-4-a.

[20] To the extent Defendants maintain that Plaintiffs were required to name specific prescribers, this court disagrees. Where the alleged scheme is so broad in scope, no meaningful purpose would be served by merely naming a doctor or several doctors to serve as examples of physicians who were misled by Defendants' marketing scheme. The complaint alleges that Summit County physicians confirmed the existence of the alleged marketing scheme in Summit County. (R. 514 at ¶675). Defendants will certainly have the opportunity to request the identity of these doctors during discovery, and Plaintiffs will need to support their theories with evidence to withstand a motion for summary judgment or persuade the trier of fact.

injuries and the Defendants' alleged racketeering and fraudulent activity is not so attenuated, as their injuries plainly stem from opioid use/abuse and not some possible other source. This court cannot find, absent any discovery, that Plaintiffs' injuries were incidental to the alleged fraud or the oversupply/diversion of opioids. While Defendants' alleged actions caused harm to others (*i.e.* those **[*101]** who became addicted to opioids), the ensuing harm to Plaintiffs—the costs associated with responding to and working to stem the opioid epidemic—cannot be deemed incidental. Taking into consideration Plaintiffs' allegation that as many as 25 percent of patients who receive prescription opioids long-term for chronic pain in a primary care setting become addicted (R. 514 at ¶16), the costs associated with dealing with this surge in addictions cannot be described as incidental but, even if not inevitable in individual cases, it is inescapable in the aggregate.

The Supreme Court has addressed proximate cause under RICO in *Holmes, 503 U.S. at 258*, *Anza, 547 U.S. at 451*, and *Hemi Group LLC, 559 U.S. at 1*. The Manufacturers have asserted that *Anza* is analogous to the case at bar (R. 499-1, PageID# 7665), while the Distributors have asserted that *Hemi* is analogous. (R. 491-1, PageID# 7482-7483). While the court disagrees that any of these decisions are factually analogous to the case at bar, the decisions remain instructive in their application of the *Holmes* factors. The *Holmes* court identified the underlying rationale behind the need for proximate cause as follows: (1) "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's **[*102]** damages attributable to the violation, as distinct from other, independent, factors," (2) "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries," and (3) "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes, 503 U.S. at 268*.

i. Directness

Relying upon *Anza, 547 U.S. at 460* and *Jackson, 731 F.3d at 565*, the Defendants, as discussed above, contend that Plaintiffs' injuries are barred because they are derivative of personal injuries suffered by third-party opioid users. (R. 491-1, PageID# 7479-7479; R. 499-1, PageID# 7665). Unsurprisingly, Plaintiffs respond that their damages were directly caused by the Defendants' actions; and, in addition, argue that the *Holmes* factors analysis weighs in favor of finding sufficient proximate cause at this early stage. The Supreme Court has cautioned that "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every **[*103]** case" and its use of "the term 'direct' should merely be understood as a reference to the proximate-cause enquiry ...." *Holmes, 503 U.S. at 274, n. 20* (citations omitted).[21] "The injurious conduct need not

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[21] Though not a RICO action, the Supreme Court recently addressed proximate cause under the Fair Housing Act (FHA). *Bank of Am. Corp. v. City of Miami, Fla., 137 S. Ct. 1296, 197 L. Ed. 2d 678 (2017)*. Significantly, the Court found that Miami's allegations—that the Defendant banks had discriminated against minorities leading to property tax and municipal spending injuries—arguably fell within the "zone of interests" protected by the FHA. *Id. at 1303*. Further, with respect to proximate cause, despite the fact that Miami's alleged injuries clearly went beyond the "first step" and flowed through individuals who had allegedly been the victims of racially discriminatory lending, the Supreme Court, rather than ordering dismissal, remanded the case for further analysis of proximate cause. *Id. at 1306, 1311* ("The lower courts should define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses.") Several lower courts have also noted that the fact that a plaintiff's increased costs/damages "runs through a separate injury" to a third party or parties "does not by itself require dismissal on proximate cause grounds." *Cty. of Cook, Illinois v. Wells Fargo & Co., 314 F. Supp. 3d 975, 2018 WL 1469003, at *6 (N.D. Ill. Mar. 26, 2018)*; *City of Oakland, 2018 U.S. Dist. LEXIS 100915, 2018 WL 3008538 at *1 (N.D. Cal. June 15, 2018)*. Nor does the lack of a direct relationship between the plaintiff and defendant defeat nor necessarily frustrate proximate cause. The Sixth Circuit found there was sufficient directness where there is a "link between the scheme and the type of injury [plaintiff] suffered." *Wallace, 714 F.3d at 420*. "What matters . . . is not whether there is a direct relationship between the plaintiff and defendant, but whether there is a 'sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury . . . .'" *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig., 2017 U.S. Dist. LEXIS 179652, 2017 WL 4890594, at *9 (N.D. Cal. Oct. 30, 2017)* (citations omitted).

be the sole cause of the plaintiffs' injuries, but there must be 'some direct relation' between the conduct and the injury to sustain a claim." Ray, 836 F.3d at 1349 (*citing* Williams, 465 F.3d at 1287-88; Anza, 547 U.S. at 457).

The first of the *Holmes* factors requires the court to determine how difficult it would be to ascertain which portion of Plaintiffs' damages resulted from Defendants' allegedly unlawful conduct versus damages that may be attributable to other factors or to other parties. First, the court notes that injuries in *Holmes* and *Anza*, unlike the injuries asserted herein, were individualized, while the injury asserted herein is rather aggregative.[22]

Defendants suggest that there are too many possible intervening causes, identifying the "exercise of independent medical judgment" by physicians who acted as "learned intermediaries," as well as "intervening third-party criminal acts." (R. 491-1, PageID# 7483-7484; R. 499-1, PageID# 7669-7670). First, the notion that the physicians cut off the chain of causation ignores pertinent allegations in **[*104]** the complaint. While the complaint alleges that Defendants directly targeted patients with their advertising, the lion's share of the allegations point to a systematic campaign, based on allegedly false statements, that *specifically targeted physicians*. Not only is it alleged that Defendants, through their sales representatives, directly contacted hundreds of thousands of prescribers (R. 514, ¶¶452-455), it is also alleged that Defendants sponsored seminars, influenced medical associations, controlled third-party front groups to maintain the guise of impartiality, and finally directly paid KOLs—all to influence physicians' prescribing decisions and to abolish concern regarding opioid addiction/abuse. (*See generally* R. 514). In other words, the complaint alleges that prescribing physicians were also targets of the misrepresentations. Given these allegations, the court declines to find that the physicians' act of writing prescriptions breaks the causal chain, as a matter of law, when the very purpose of the Defendants' alleged scheme was to achieve exactly that result. The complaint further alleges that the Manufacturers and Distributors conspired to increase opioid sales through trade **[*105]** organizations such as the PCF or HAD; they were in a unique position to recognize the diversion of drugs and did in fact make such a recognition; and they concealed this information despite an obligation to report suspicious orders, all in order to further their supply chain scheme. (R. 514, ¶¶498-593, PageID# 6918-6947). Defendants have no cogent rationale explaining how the prescribing physicians would be an intervening cause with respect to the supply-side allegations.

The court also disagrees that the complaint's RICO claims are rendered deficient by the failure to specifically identify a prescribing physician who relied on Defendants' alleged fraudulent statements. The First Circuit Court of Appeals rejected a similar argument, in *In re Neurontin Litigation*, where the defendants had maintained that "its supposed misrepresentations went to prescribing doctors, and so the causal link to Kaiser [a healthplan provider and insurer] must have been broken." 712 F.3d 21, 37 (1st Cir. 2013). Relying on the Supreme Court's holding in *Bridge*,[23] the circuit court rejected that argument. The court of appeals also rejected the argument that "no physician in this case, or in the Neurontin MDL as a whole, testified that he or **[*106]** she prescribed Neurontin because of defendants' fraudulent off-label marketing," an argument that mirrors Defendants' argument herein. Id. at 29. The court reasoned that plaintiffs had presented "other evidence" of causation to the jury, as well as "evidence as to why such individual [physician] testimony was unreliable."[24] *Id.* In addition, the defendants'

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[22] In City of Oakland, 2018 U.S. Dist. LEXIS 100915, 2018 WL 3008538, at *1, a district court, when confronted with a proximate cause issue in a claim arising under the FHA, observed that "where damages are aggregative, precision is not expected. Invariably some approximation is required," but noted that "aggregative injury itself does not obviate proximate cause analysis...."

[23] The Supreme Court in Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008), held unanimously that a civil-RICO plaintiff does *not* need to show that it *detrimentally relied* on the defendant's alleged misrepresentations. *See also* Wallace, 714 F.3d at 420 ("While reliance is 'often used to prove ... the element of causation,' that does not mean it is the only way to do so, nor does that 'transform reliance itself into an element of the cause of action.'") (*citing Bridge*).

[24] The plaintiffs' primary evidence came from expert testimony from a health economics professor, who used "aggregate data and statistical approaches to link patterns in promotional spending to patterns in prescribing for the drug." 712 F.3d at 30. The expert's regression analysis "found a causal connection between the fraudulent marketing and the quantity of prescriptions

"scheme relied on the expectation that physicians would base their prescribing decisions in part on [their] fraudulent marketing." *712 F.3d at 39*.

Further, the court is unconvinced that Defendants' reliance on *Ind./Ky./Ohio Reg'l Council of Carpenters Welfare Fund v. Cephalon, Inc.* ("*Carpenters*") compels a different result. *2014 U.S .Dist. LEXIS 69526, 2014 WL 2115498 (E.D. Pa. May 21, 2014)*. Defendants focus on the *Carpenters* court's observation that "physician-prescribers are presumed to have knowledge of a drug label's contents." *Id. at *6* (*citing* *In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 240 (3d Cir. 2012))*. However, the *Carpenters* decision was based on the finding that the allegations in the complaint were general and conclusory, it did not set forth a general rule that a physician's knowledge of a drug label insulates a drug manufacturer or distributor from liability for fraudulent **[*107]** marketing or unlawful distribution practices. *Id. at **6-7*. Defendants make no meaningful attempt to illustrate that the current complaint is similarly defective, beyond making generalized statements of insufficiency. (R. 499-1, PageID# 7675-7680). Conversely, in *In re Epogen, 590 F. Supp. 2d 1282, 1290 (C.D. Cal. 2008)*, a district court held that the plaintiff's RICO claims were essentially trying to "shoehorn allegations that Defendants have engaged in off-label promotion in violation of the FDCA into [a] RICO [action]." Although the claims therein were dismissed—with leave to amend—the court observed that "[t]he existence of the FDCA does not completely preclude injured parties from asserting claims of fraud or false advertising." *Id. at 1290, 1292*. In addition, the court observed that: "[Plaintiffs] *may* bring a RICO claim that is truly based on allegations of mail or wire fraud (in the form of deceptive advertising)....To the extent that Plaintiffs allege that Defendants made false statements or deliberately concealed material facts in order to mislead health care professionals and consumers about the safety of EPO, those claims are viable under RICO." *Id. at 1290* (emphasis in original).

Second, Defendants' statement that third party criminal acts break the chain of causation **[*108]** (R. 491-1, PageID# 7517-7519; R. 499-1, PageID# 7669), even if accepted as true, would fail to break the chain of causation for those damages that were caused by the legal prescription of opioids. The complaint alleges that out of 350,000 fatal overdoes during the relevant time span, more than 200,000 overdoses involved prescribed opioids rather than illicit heroin. (R. 514 at ¶5). It is further alleged that the vast majority of persons who began using heroin in the relevant time period turned to the drug after becoming addicted to prescription opioids.[25] (R. 514 at ¶6). Thus, under the facts pled, the criminal acts involving heroin or the illegal use/trade of legal prescriptions do not, as a matter of law upon consideration of a motion to dismiss, break the chain of causation. Even these actions can to some extent, given the allegations, be attributed and foreseeable to Defendants, who allegedly both flooded the market with opioids and created the demand for them.

Construing the allegations of the complaint as true, the court rejects Defendants' arguments and finds the first factor counsels in favor of proximate cause. The complaint contains sufficiently detailed allegations that a quantifiable **[*109]** causal link existed between Defendants' conduct and the damages suffered by Plaintiffs as a result of the opioid epidemic. The "direct causal connection" requirement has been met, as it is not apparent as a matter of law that "intricate, uncertain" inquiries are required to link the Defendants' alleged conduct to Plaintiffs'

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written for off-label indications. She also testified as to why Pfizer's proposed physician-by-physician analysis of causation was not a scientifically valid approach to causation." *Id.* The expert testified "as to the well-recognized unreliability in the field of healthcare economics of asking doctors individually whether they were influenced by the many methods of off-label marketing. She said that self-reporting from physicians about patterns of practice that may be controversial shows both conscious reluctance and unconscious bias, which lead them to deny being influenced." *Id.* Although such expert testimony is not before the court, this case cautions against prematurely determining, without a sufficiently developed record, that certain allegations must be present before causation can be determined to have been sufficiently pled. Defendants' reliance on *City of Chicago v. Purdue Pharma, L.P.*, for the proposition that the complaint must specifically identify doctors is misplaced, as the district court was addressing state law claims and found that the plaintiffs failed to allege sufficient detail about the false claims. *2015 U.S. Dist. LEXIS 60587, 2015 WL 2208423, at *14 (N.D. Ill. May 8, 2015)*. Thus, the court finds that the absence "self-reports" from physicians in the complaint is not dispositive. In addition, the court finds the rationale of *In re Neurontin* more compelling.

[25] The court recognizes that overdoses involving prescribed opioids may also include individuals who were not the prescribed user of the drug. The fact that this category may include both illicit users as well as those who were prescribed the opioids in question does not preclude proximate cause or warrant dismissal at this preliminary stage.

injuries. *Anza, 547 U.S. at 460*. Hence, the first of the *Holmes* factor weighs in favor of a finding that proximate cause has been sufficiently plead.

ii. Complexity of Apportioning Damages/Repetitive Recovery

The second *Holmes* factor is perhaps the easiest to apply to the allegations in the present case. Plaintiffs' brief in opposition expressly states that they are *not* attempting to recover any of the following: (1) personal injuries incurred by individuals "suffering as a result of [opioid] over-prescription, overuse, and addiction," (2) funds expended by competitors or non-purchasing customers,[26] or (3) "monies for health insurance plan members required to pay increased health insurance premiums...." (R. 654, PageID# 15755). The court also does not construe the complaint as seeking to recover these costs. Plaintiffs' complaint seeks thirteen categories of damages, which can be summarized **[*110]** into three general categories—(1) public expenditures made in direct response to opioid use and trafficking; (2) reduced tax revenue resulting from that abuse, misuse, and addiction; and (3) losses caused by diminished property values—none of these damages are recoverable by those individuals who became addicted to opioids, as personal injuries. (R. 514 at ¶¶902, 934). These individuals cannot recover from Defendants the public expenditures of Plaintiffs, they cannot claim lost county or municipal tax revenue, and they cannot claim the diminished values of Plaintiffs' property, or the reduced tax income to Plaintiffs. By way of example, if Plaintiffs seek to recover the costs associated with providing police, firefighters or other emergency personnel with Naloxone to block a potentially fatal overdose (*Id.* at ¶902), this cost cannot be claimed by any other entity except Plaintiffs.[27]

Therefore, the second *Holmes* factor also weighs in favor of a finding that proximate cause has been sufficiently pled.

iii. Other Injured Parties Vindicating the Law

The third and final *Holmes* factor is an inquiry into whether more directly injured victims can bring suit. Plaintiffs argue that if their suit **[*111]** is barred "few, if any, victims of the RICO conspiracy will be able to 'vindicate the law as private attorneys general.'" (R. 654, PageID# 15754) (*quoting Holmes, 503 U.S. at 269-270*). Of course, it is too early to determine whether any laws have been violated. Nevertheless, taking the allegations as true, the court agrees with Plaintiffs that no other category of potential plaintiff groups, aside from states and their political subdivisions, can be counted on to vindicate the law in the same manner.[28]

The court again finds *In re Neurontin* instructive. Although the plaintiff therein was an insurer and not a government entity, the court noted that there was no risk of duplicative recovery because "[n]either the individual physicians, nor the [Drug Information Service] members, nor the [Pharmacy and Therapeutics] Committee members—the parties to whom [defendant] directly made its misrepresentations—ever paid anything toward a Neurontin prescription, so there is no risk of multiple recoveries due to a suit by another of those actors." *712 F.3d at 37*. Defendants have not shown that another party would be able to recover for the specific damages Plaintiffs sustained from Defendants' alleged enterprise. The third factor also favors **[*112]** a finding that proximate cause has been sufficiently pled.

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[26] It is not entirely clear whether Plaintiffs are merely differentiating case law with this statement or disclaiming any interest in monies spent by private providers of emergency services. In any event, it does not meaningfully impact the court's conclusion.

[27] If discovery were to reveal that Plaintiffs routinely assessed these costs to the individuals who required them and/or to their insurers, and that Plaintiffs actually recovered such costs, Defendants would in no way be precluded from arguing that no damages were incurred.

[28] Defendants have stridently asserted that civil RICO damages are unavailable for personal injuries. (R. 491-1, PageID# 7478-7479; R. 499-1, PageID# 7665). In such case, patients, who were inappropriately prescribed opioids and suffered physical or mental injuries as a result, would be precluded from bringing a RICO claim to recover for their personal injuries.

Based on the application of the *Holmes* factors, the court concludes that the connection between Plaintiffs' injuries and the Defendants' alleged scheme—to vastly increase opioid sales by changing physician prescribing practices through fraud coupled with increasing the supply of opioids by failing to report suspicious orders—"is not so indirect, unforeseeable, or illogical that the defendants must prevail as a matter of law." *Wallace, 714 F.3d at 422*.

3. Existence of an Enterprise

"The [RICO] statute does not specifically define the outer boundaries of the 'enterprise' concept but states that the term 'includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.'" *Boyle, 556 U.S. at 944* (citing *§ 1961(4)*). The *Boyle* court recognized that the definition of enterprises was "obviously broad" and ensure[d] that the definition has a wide reach. *Id.* Some structure, however informal, was found to be necessary, because: "it is apparent that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, **[*113]** and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.*

> [A]n association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence.

Id. at 944, 948 (footnotes omitted).

Defendants contend that Plaintiffs have not alleged any facts that could establish the three requisite structural features. (R. 499-1, PageID# 7673-7674, 7685-7686; R. 491-1, PageID# 7490). Specifically, they argue that Plaintiffs have failed to allege that "each defendant had **[*114]** 'some part in directing the enterprise's affairs.'" *Id.* (*quoting* *United States v. Fowler, 535 F.3d 408, 419 (6th Cir. 2008)* (*citing* *Reves v. Ernst & Young, 507 U.S. 170, 179, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993))*. Defendants also assert that the complaint fails to allege a "common purpose," and merely alleges profit-seeking activity by competitors. The court disagrees. First, pursuit of profit is not the exclusive province of legitimate commercial endeavors. Second, Plaintiffs clearly allege a vast scheme that had a fundamental overarching purpose—to materially expand prescription opioid use by altering the medical community's prescribing practices of opioids through repeated fraudulent statements and misrepresentations. The Defendants allegedly used front groups and KOLs, as well as their own sales representatives, to spread their false and misleading message. If such a conspiracy is established by the facts, a profit motive would not negate a common purpose. While Defendants would characterize the allegations as alleging merely "a pattern of crimes" "independently and without coordination," (R. 499-1, PageID# 7673), it is alleged that front groups, such as APF, AAPM, and APA, were funded and directed by multiple Defendants to spread their false message under the guise of a neutral third party. (R. 514 at ¶¶357-428). **[*115]**

On the supply side, the Distributors attempt to portray the allegations as establishing no more than "routine business relationships" or "membership in trade organizations." (R. 491-1, PageID# 7491). Defendants' contentions turn a blind eye to allegations that allege much more. It is alleged the PCF and the HDA created a private network where representatives of the Manufacturers and Distributors could form relationships and create alliances and hold strategic business discussions between high-level executives. (R. 514 at ¶¶534-553). Plaintiffs further allege that the Manufacturers and Distributors were "not two separate groups operating in isolation or two groups forced to work together in a closed system," but rather they "operated together as a united entity, working together on multiple fronts, to engage in the unlawful sale of prescription opioids." *Id.* at ¶¶543-546. Though Defendants may have competed over the ever-mushrooming opioid market, that does not shield them from allegations of racketeering activity in furtherance of a scheme to grow that market.

Defendants assert that their mere participation in trade associations is insufficient to form an enterprise. (R. 744, PageID# **[*116]** 17655; R. 746, PageID# 17711). "In *Boyle*, the [Supreme] Court upheld an instruction that allowed a jury to find an association-in-fact enterprise 'form[ed] solely for the purpose of carrying out a pattern of racketeering acts' and instructed that '[c]ommon sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.'" *Ouwinga v. Benistar 419 Plan Servs., Inc., 694 F.3d 783, 794 (6th Cir. 2012)* (*citing* *Boyle, 556 U.S. at 942*). "[A] pattern of racketeering activity may be sufficient in a particular case to permit a jury to infer the existence of an association-in-fact [enterprise]." *Id. at 951*. It is alleged, for example, that the Manufacturers and Distributors used the HDA to jointly increase production quotas, to stymie efforts that would prevent the diversion of opioids, and to coordinate their refusal to report suspicious orders, including those made by direct competitors. (R. 514 at ¶¶545-552). Defendants do not meaningfully explain how these relationships are insufficient as a matter of law. (R. 746).

An inability to describe the exact inner workings of these associations, without the benefit of discovery, is not dispositive at this stage. At the same time, the allegations in the complaint **[*117]** are significantly more detailed than a mere assertion that because the Defendants were members of a trade association that they must have been part of an illicit enterprise. Again, discovery may yield no fruit in this regard, but Plaintiffs should have an opportunity to prove the substance of their allegations.

Finally, Plaintiffs have alleged longevity sufficient to pursue the enterprise's purpose—the 1990s to the present. (R. 514 at ¶¶829, 834).

4. Racketeering Activity

The Defendants argue that Plaintiffs fail to plead any actionable "racketeering activity." (R. 491-1, PageID# 7486-7490; R. 499-1, PageID# 7674-7678, 7686). "RICO takes aim at 'racketeering activity,' which it defines as any act 'chargeable' under several generically described state criminal laws, any act 'indictable' under numerous specific federal criminal provisions, including mail and wire fraud ...." *Sedima, 473 U.S. at 481*. Plaintiffs allege Defendants engaged in mail and wire fraud under *18 U.S.C. §§ 1341* and *1343*. (R. 514 at ¶¶888-890, 911-916).

a. Marketing Enterprise Claim

"When pleading predicate acts of mail or wire fraud, in order to satisfy the heightened pleading requirements of *Rule 9(b)*, a plaintiff must '(1) specify the statements that the plaintiff contends **[*118]** were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *Heinrich v. Waiting Angels Adoption Servs., Inc., 668 F.3d 393, 404 (6th Cir. 2012)* (*citing* *Frank v. Dana Corp., 547 F.3d 564, 570 (6th Cir. 2008))*. Nevertheless, a RICO plaintiff is *not* required to plead or prove first-party reliance on an allegedly false statement. *See* *Bridge, 553 U.S. at 648*. In addition, "courts have relaxed *Rule 9(b)*'s heightened pleading requirements in cases involving complex fraudulent schemes or those occurring over a lengthy period of time and involving thousands of billing documents." *In re U.S. Foodservice Inc. Pricing Litig., 2009 U.S .Dist. LEXIS 117403, 2009 WL 5064468, at *18 (D. Conn. Dec. 15, 2009)* ("dates, times and places need not be pleaded with absolute precision, so long as the allegations sufficiently put the defendant on notice as to the circumstances of the charged misrepresentations.") (citations omitted); *In re Sumitomo Copper Litig., 995 F. Supp. 451, 456 (S.D.N.Y. 1998)* ("In complex civil RICO actions involving multiple defendants, therefore, *Rule 9(b)* does not require that the temporal or geographic particulars of each mailing or wire transmission made in furtherance of the fraudulent scheme be stated with particularity.").

The Manufacturers assert that the marketing enterprise and supply chain enterprise RICO claims are based entirely on allegations that they fraudulently marketed opioids, but the complaint fails to plead "any such fraudulent marketing **[*119]** anywhere in Summit County as to any Manufacturer Defendant with the particularity required by *Rule 9(b)*." (R. 499-1, PageID# 7678, 7688). They further aver that the so-called "nine categories of misrepresentations" alleged in the complaint do not satisfy the particularity requirements of *Rule 9(b)*. *Id.* at

PageID# 7679. They further contend that Plaintiffs impermissibly rely on the statements of third-parties. *Id.* at PageID# 7681. Plaintiffs point to *Williams v. Duke Energy Intern., Inc.*, wherein the Sixth Circuit Court of Appeals stated:

> [T]his court has held that "[i]t is a principle of basic fairness that a plaintiff should have an opportunity to flesh out her claim through evidence unturned in discovery. *Rule 9(b)* does not require omniscience; rather the Rule requires that the circumstances of the fraud be pled with enough specificity to put defendants on notice as to the nature of the claim." *Michaels Bldg. Co. v. Ameritrust Co., N.A., 848 F.2d 674, 680 (6th Cir. 1988)*. "Especially in a case in which there has been no discovery, courts have been reluctant to dismiss the action where the facts underlying the claims are within the defendant's control." *Id.*

681 F.3d 788, 803 (6th Cir. 2012). A recent decision from this district supports that notion and cautions that "*Rule 9*'s pleading requirement of particularity must be read **[*120]** in harmony with *Rule 8*'s 'policy of simplicity in pleading[.]' [and] ... courts should not be 'too exacting' or 'demand clairvoyance from pleaders' in determining whether the requirements of *Rule 9(b)* have been met." *Ford v. Pa. Higher Educ. Assist. Agency, 2018 U.S. Dist. LEXIS 44549, 2018 WL 1377858 at *4 (N.D. Ohio Mar. 19, 2018)* (Lioi, J.) (citations omitted); *see also* *In re Sumitomo Copper Litig., 995 F. Supp. at 456* ("In cases in which the plaintiff claims that the mails or wires were simply used in furtherance of a master plan to defraud, the communications need not have contained false or misleading information themselves [and] a detailed description of the underlying scheme and the connection therewith of the mail and/or wire communications, is sufficient to satisfy *Rule 9(b)*.") (*citing* *Schmuck v. U.S., 489 U.S. 705, 715, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989)*).

Plaintiffs have sufficiently alleged that the Manufacturers engaged in an "Opioid Marketing Enterprise." At a minimum, they have sufficiently alleged that mail and wire communications were a "step in the plot" of the overarching fraudulent scheme.[29] It is alleged that the "[t]he pattern of racketeering activity used by the RICO Marketing Defendants ... likely involved thousands of separate instances of the use of the U.S. Mail or interstate wire facilities in furtherance of the unlawful Opioid Marketing Enterprise, including essentially uniform misrepresentations, concealments **[*121]** and material omissions regarding the beneficial uses and non-addictive qualities for the long-term treatment of chronic, non-acute and non-cancer pain...." (R. 514 at ¶¶839, 840-848). As set forth in the summary above, the complaint details nine categories of specific misrepresentations. It further sets out how the so-called misrepresentations were disseminated, including through speakers' programs, front groups, KOLs, and directly through sales representatives.

Whether these so-called misrepresentations were indeed false or misleading is an issue of fact. Defendants' motion to dismiss demands an untenable level of specificity above and beyond the pleading rules. Plaintiffs cannot be expected to plead the minutiae of their **[*122]** case without the benefit of discovery.[30] Further, the court finds compelling the reasoning of a decision from the Southern District of New York:

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[29] In *Schmuck, 489 U.S. at 710-711*, the Supreme Court explained that:

> The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be "incident to an essential part of the scheme," or "a step in [the] plot."

(internal citations and footnotes omitted).

[30] Defendants repeated statement that Plaintiffs have failed to identify even one Summit County prescriber who relied on the misrepresentations is a red herring. Plaintiffs allege that interviews with Summit County doctors have confirmed that Defendants' sales representatives "carried the deceptive messages to local prescribers." (R. 514 at ¶675). Defendants will have ample opportunity to ascertain the identity of these doctors in discovery. The allegation that Ohio is one of the hardest hit states by the opioid epidemic, with 39.5 million opioid doses dispensed in Summit County in 2012 alone for a county-wide population of 540,000, coupled with the allegation that it leads the nation in overdose deaths per capita, when accepted as true, renders hollow any notion that the Defendants' more than a decade long nationwide push to expand prescription opioid use failed to permeate Summit County. *Id.* at ¶¶689, 714-719.

> [I]t is difficult to see any useful purpose in requiring that a RICO complaint specifically allege each mailing in furtherance of a complex commercial scheme, at least where, as here, the complaint alleges that numerous mailings of particular kinds were made in furtherance of the scheme. Once the plaintiff alleges with particularity the circumstances constituting the fraudulent scheme, neither the reputational interests nor the notice function served by *Rule 9(b)* would be advanced in any material way by insisting that a complaint contain a list of letters or telephone calls.

Spira v. Nick, 876 F. Supp. 553, 559 (S.D.N.Y. 1995) (footnotes omitted). Taking into consideration the clandestine nature of the alleged conspiracy to swell the market for opioids by undermining the medical community's apprehension towards prescribing them, it is unsurprising that Plaintiffs cannot connect each dot in the conspiracy without the benefit of discovery, as the evidence necessary to prove their allegations, if it exists, undoubtedly lies primarily in the hands of Defendants. Given the detailed allegations of the complaint, **[*123]** it cannot reasonably be deemed a fishing expedition.

Finally, the Manufacturers' assertion that Plaintiffs are relying on statements made by third parties fails to read the complaint as a whole. (R. 499-1, PageID# 7681-7682). Plaintiffs have alleged that the Manufacturers spent millions of dollars on both advertising as well as direct contact with physicians through sales representatives, through which they spread their alleged misrepresentations concerning the safety and efficacy of opioids; that the Manufacturers created the body of literature to support false assertions; and that so-called third parties were merely front groups or KOLs sponsored and controlled directly by the Manufacturers. (R. 514 at ¶¶442-445, 448-455). Although the veracity of these allegations may be in dispute, they cannot be challenged in a 12(b)(6) motion.

b. Supply Chain Enterprise

i. Mail and Wire Fraud

The Distributors also assert that Plaintiffs have failed to allege with sufficient particularity any predicate acts of mail or wire fraud under RICO. (R. 491-1, PageID# 7486-7487). Without repeating the requirements of mail or wire fraud pleading set forth above, the complaint itself appears to concede that **[*124]** a high level of specificity is lacking, but asserts that "[m]any of the precise dates of the fraudulent uses of the U.S. mail and interstate wire facilities have been deliberately hidden by Defendants and cannot be alleged without access to Defendants' books and records. However, Plaintiffs have described the types of, and in some instances, occasions on which the predicate acts of mail and/or wire fraud occurred." (R. 514 at ¶871). The complaint does broadly aver that the Distributors used the mail and/or the wires to ship the opioids themselves, to seek higher production/procurement quotas, to submit reports to the DEA that contained material omissions and/or misrepresentations, to transmit documents that facilitated the transport of the opioids, to process rebates and chargebacks, to make payments to trade organizations such as the HDA—all while being aware that many of the orders were suspicious, exceeded any reasonable amount for legitimate purposes, and subject to diversion. *Id.* at ¶¶855-877.

Furthermore, all three of the moving Distributors are alleged to have paid millions of dollars in civil penalties and/or settlement agreements with the United States and/or the state of West **[*125]** Virginia involving similar allegations that they failed to report suspicious orders of controlled substances: in 2016 AmerisourceBergen Drug Corporation settled a lawsuit with West Virginia for $16 million (R. 514 at ¶585); in 2016 Cardinal Health, Inc. agreed to pay $44 million to the United States and $20 million to West Virginia (*Id.* at ¶¶584-585); and, in 2017 McKesson Corporation agreed to pay $150 million to the United States. (*Id.* at ¶¶581-582). While the court does not construe any of these allegations as admissions by the Distributors, these facts do bolster the plausibility of Plaintiffs' allegations.

Finally, as stated above, the specific evidence of a conspiracy, if indeed one existed, would lie in the hands of Defendants.

ii. Felonious Manufacture, Importation, Receiving, Concealment, Buying, Selling, or Otherwise Dealing in a Controlled Substance as a Predicate Act

The Defendants also challenge the alleged supply chain enterprise, asserting that Plaintiffs have failed to allege a predicate act under RICO. (R. 491-1, PageID# 7486, 7488-7489; R. 499-1, PageID# 7686-7687). "*Section 1961(1)* [of the RICO Act] contains an exhaustive list of acts of 'racketeering,' commonly referred to as 'predicate **[*126]** acts.'" *Beck v. Prupis, 529 U.S. 494, 497, 120 S. Ct. 1608, 146 L. Ed. 2d 561 at n. 2 (2000)*. Under RICO, "racketeering activity" includes "the *felonious* manufacture, importation, receiving, *concealment*, buying, *selling*, or *otherwise dealing* in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under *any law* of the United States." *18 U.S.C. § 1961(1)(D)* (emphasis added). The Manufacturers concede that "certain conduct involving the manufacture and distribution of controlled substances may constitute a predicate act if it is 'punishable by imprisonment for more than one year.'" (R. 499-1, PageID# 7686). They maintain, however, that the alleged "failure to monitor and report suspicious orders amounts to (at most) a violation of *21 U.S.C. § 842(a)(5)*" and is not punishable by more than a year. (R. 499-1, PageID# 7687). Defendants fail to cite any authority that limits Plaintiffs' allegations to *§ 842*, a position not compelled by the plain language of the code.[31] (R. 746, PageID# 17717).

Plaintiffs counter that Defendants' failure to report suspicious orders instead violates *§ 843*, which makes it unlawful to "knowingly or intentionally ... furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other **[*127]** document required to be made, kept, or filed under this subchapter or subchapter II..." (R. 654, PageID# 15770, *citing 21 U.S.C. § 843(a)(4)(A)*). Such a violation is punishable by up to four years imprisonment. *21 U.S.C. § 843(d)(1)*. Despite the admission in their motion to dismiss that the felonious dealing in a controlled substance constitutes a predicate act, Defendants assert that a violation of *§ 843(a)(4)(A)* would not qualify as a predicate act because it is not specifically enumerated in *§ 1961(1)(D)*.[32] (R. 491-1, PageID# 7488; R. 499-1, PageID# 7694-7695). Without relying on any binding case law to support their argument, Distributors assert that "[v]iolations of *Section 843(a)(4)* do not fall within that language [of *18 U.S.C. § 1961(1)(D)*]" because providing false information or making material omissions does not constitute "buying, selling, or otherwise dealing" in controlled substances. (R. 491-1, PageID# 7488). First, the court is skeptical whether providing false information, as alleged, does not constitute "concealment" or "otherwise dealing in a controlled substance" as Distributors suggest. Second, the court takes note that in making the above assertion, the Distributors completely cut out the provision of *§ 1961(1)(D)* that expressly references "concealment" of a controlled substance and **[*128]** furnishing false information as alleged may constitute concealment. Thus, the plain language of *§ 1961(1)(D)* does not appear to preclude the use of a violation of *§ 843(a)(4)(A)* as a predicate

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[31] *§ 842* applies to persons who "refuse or negligently fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under this subchapter or subchapter II...." The complaint alleges intentional conduct that goes well beyond negligence—that Defendants knew about suspicious orders from their own sales representatives and the exacting data they kept but concealed them. (R. 514 at ¶¶554-593).

[32] The Distributors cite one non-binding decision in their argument: *In re Epogen & Aranesp Off-Label Mktg. & Sales Practices Litig., 590 F. Supp. 2d 1282, 1290 (C.D. Cal. 2008)*. (R. 491-1, PageID# 7488-7489). That case, however, is inapposite and contains no discussion at all as to whether a violation of *§ 843(a)(4)(A)* may serve as a predicate act under the language of *§ 1961(1)(D)*. Further, the plaintiff therein alleged RICO liability solely on the basis of off-label marketing relying exclusively on mail and wire fraud as racketeering activities. *In re Epogen, 590 F. Supp. 2d at 1287* ("Plaintiffs allege that Defendants' unlawful promotion of EPO for unsafe, off-label uses constituted a pattern of racketeering activity, including mail and wire fraud."). The district court did hold that "[a]llowing Plaintiffs to proceed on a theory that Defendants violated RICO by engaging in off-label promotion, without specific allegations that Defendants made false or misleading statements, would, in effect, permit Plaintiffs to use RICO as a vehicle to enforce the FDCA and the regulations promulgated thereunder." *Id. at 1289-1290*. Plaintiffs correctly note that "the *In re Epogen* plaintiff did not assert felony predicate acts, claims under the CSA, or the existence of a felony violation of the FDCA." (R. 654, PageID# 15774). Defendants' attempt to portray *In re Epogen* as holding that a felony violation of either the FDCA or the CSA can never serve as a RICO predicate act under *§ 1961(1)(D)* is far too broad and distorts the limited scope of the decision.

act. The argument that *§ 843* is not expressly enumerated as a predicate act by *§ 1961(1)(D)* is untenable, as *§ 1961(1)(D)* does not identify any single, specific section of the United States Code that would constitute a predicate act under the subsection. If Defendants' construction were adopted, the entirety of *§ 1961(1)(D)* would be rendered a nullity.

While Defendants maintain their alleged conduct is more akin to a violation of *§ 842*, the question of whether *§ 842*, *§ 843*, or neither was violated is ultimately an issue of fact that cannot be resolved on a motion to dismiss. Plaintiffs' argument—that the Manufacturers and Distributors, by allegedly suppressing or refusing to identify and report suspicious orders effectively engaged in activity tantamount to "concealment" or "otherwise dealing in controlled substances"—is construed as true at this pleading stage. Thus, Plaintiffs have sufficiently pled a predicate act pursuant to *section 1961(1)(D)* with respect to their supply side RICO theory.

Alternatively, the Manufacturers argue that they "have no duty to monitor, prevent, **[*129]** or report the downstream diversion of prescription opioids at the pharmacy or physician level, where diversion occurs." (R. 499-1, PageID#7687). They maintain that under the "plain text" of *21 C.F.R. § 1301.74(b)*, their duty extends only to monitoring and reporting suspicious orders placed with them *by their direct customers* (*i.e.*, pharmaceutical distributors). *Id.* Plaintiffs counter that such an argument reads words into the text of the CSA and its regulations that do not exist. (R. 654, PageID# 15770). *21 C.F.R. § 1301.74(b)* states:

> The registrant shall design and operate a system to disclose to the registrant suspicious orders of controlled substances. The registrant shall inform the Field Division Office of the Administration in his area of suspicious orders when discovered by the registrant. Suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency.

The plain text of the regulation is not so limiting, and does not state that a registrant's obligation to report suspicious orders applies only to orders from its direct customers. Rather, the plain text requires the registrant to report suspicious orders whenever one is "discovered by the registrant." **[*130]** [33] Further, Defendants cite no case law interpreting the provisions of *§ 1301.74(b)* so narrowly. Plaintiffs also fail to cite any authority interpreting the regulation, save for a DEA enforcement action against Mallinckrodt and Mallinckrodt's ensuing admission that "[a]s a registrant under the CSA, [it] had a responsibility to maintain effective controls against diversion, including a requirement that it review and monitor these sales and report suspicious orders to DEA." (R. 654, PageID# 15770, *citing* R. 514 at ¶520). Nonetheless, the onus is on Defendants as the moving party to demonstrate that Plaintiffs fail to state a claim.

For the forgoing reasons, it is recommended that the court deny the motions to dismiss Counts One and Two.

B. Preemption

The Manufacturers argue that all state law claims are preempted, as they conflict with the FDA's decisions regarding approval and labeling of medications. (R. 499-1, PageID# 7689-93).

1. Claims Involving Marketing of Opioids

The Manufacturers portray the complaint as alleging that they falsely represented opioids as safe and effective for the long-term treatment of chronic non-cancer pain. (R. 499-1, PageID# 76989-7690). They argue the FDA has approved this **[*131]** use, which demonstrates that it found "substantial evidence that the drug will have the effect it purports or is represented to have" and that the opioids in question are safe and effective for treating chronic pain. *Id. citing* *21 U.S.C. § 355(d)*. They cite cases holding that state law claims are preempted where a claim would

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[33] Undoubtedly, a registrant manufacturer would have the most precise information about orders from its direct customers. However, the complaint alleges that the Manufacturers, in concert with the Distributors, collected vast amounts of data that, at least plausibly, led to Defendants' discovery of suspicious orders by parties other than their direct customers.

require a drug manufacturer to make statements about safety or efficacy that differ from what the FDA required. *Id.* (*citing* Rheinfrank v. Abbott Labs., Inc., 680 Fed. App'x 369, 386 (6th Cir. 2017); In re Celexa & Lexapro Mktg. & Sales Practices Litig., 779 F.3d 34, 42-43 (1st Cir. 2015); Utts v. Bristol-Meyers Squibb Co., 251 F. Supp. 3d 644, 663-73 (S.D.N.Y. 2017)).

Conversely, Plaintiffs dispute that their claims are based on allegations that Defendants falsely claimed their medications were "safe and effective for the long-term treatment of chronic non-cancer pain." (R. 654, PageID# 15826). Rather, they insist their allegations revolve around Defendants' "false and misleading promotion of these drugs." *Id.* They argue that there is no preemptive conflict between their state law claims and federal law, because the latter did not require the Manufacturers to misleadingly promote their products. (R. 654, PageID# 15826). Plaintiffs assert that they do not seek to stop the Manufacturers from selling opioids, but only to stop their deceptive marketing. *Id.* Plaintiffs cite cases in support of the proposition that, "because **[*132]** drug manufacturers are under no federal obligation to promote their products, courts have consistently refused to find preemption of fraud-based marketing claims involving FDAapproved drugs even where the manufacturer would be precluded from altering its label (as in the case of generic drugs for which the manufacturer is required to maintain a label identical to the branded equivalent.)" *Id.*, PageID# 15827 (*citing* Arters v. Sandoz Inc., 921 F. Supp. 2d 813, 819-20 (S.D. Ohio 2013) (state law fraud claims based on defendants' allegedly fraudulent or unreasonably dangerous promotion of generic drug were not preempted); Priest v. Sandoz, Inc., 2016 U.S. Dist. LEXIS 186635, 2016 WL 11162903, at *7 (W.D. Tex. Dec. 29, 2016), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 73278 , 2016 WL 8896188 (W.D. Tex. Jan. 31, 2017) (obligation to refrain from falsely promoting drugs does not make it impossible to comply with federal law regarding labelling); Beavers-Gabriel v. Medtronic, Inc., 2015 U.S. Dist. LEXIS 2522, 2015 WL 143944, at *6 (D. Haw. Jan. 9, 2015) (no impossibility preemption for fraud claims); Elmore v. Gorsky, 2012 U.S. Dist. LEXIS 177793, 2012 WL 6569760, at *3 (S.D. Tex. Dec. 17, 2012)).

The cases upon which Defendants rely are all distinguishable. *Rheinfrank* is inapposite because it was argued the defendant should have added a warning label the FDA had twice refused. 680 Fed. App'x at 384-388. In *In re Celexa*, it was argued that the FDA should not have approved Lexapro, and that defendant should have shared negative efficacy information with the FDA. 779 F.3d at 36-43. Because the FDA had reviewed this information and approved the drug, the state law **[*133]** claim was in conflict with federal law. *Id.* In *Utts*, the plaintiffs' fraud-based claims were preempted, because they alleged a fraud upon the FDA. 251 F. Supp. 3d at 679-680 (*citing* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 350, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001) (holding that state law fraud on the FDA claims conflict with federal law and are impliedly preempted)). Herein, the state law claims are not premised upon inappropriate labeling or a fraud upon the FDA, but rather fraudulent marketing in the promotion and sale of their opioids.[34]

At this current stage of the proceedings, Defendants have not met their burden to show that Plaintiffs' claims are preempted.

2. Claims Involving Off-Label Uses

The Manufacturers also argue that claims related to the inappropriate promotion of opioids for off-label uses are preempted. (R. 499-1, PageID# 7689-7691). Preemption is required, they assert, because the FDA is invested with exclusive authority and a variety of enforcement options to address off-label promotion. *Id.* Moreover, the FDCA does not create a private right of action to enforce its provisions. Perdue v. Wyeth Pharms., Inc., 209 F.Supp.3d 847, 851-52 (E.D.N.C. 2016); *see also* McDaniel v. Upsher-Smith Pharms., Inc., 229 F.Supp.3d 707, 713 (W.D. Tenn. 2017).

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[34] The Manufacturers' reply characterizes Plaintiffs' brief as conceding that various claims are preempted. (R. 746, PageID# 17706-17707). The court does not construe Plaintiffs' brief as abandoning or conceding any of their state law claims as preempted. But after discovery, the Plaintiffs may narrow their claims and Defendants may renew their arguments upon a full record.

Plaintiffs assert they are not suing to enforce FDCA off-label use rules, but rather contend that Defendants misrepresented the risks associated with off-label opioid use. (R. 514, PageID# 6818-6869, **[*134]** ¶¶177-349). They argue that state law claims may proceed on such grounds even where the alleged wrongful conduct might also violate the FDCA. (R. 654, PageID# 15829-15830). Moreover, Plaintiffs assert that state law claims founded on violations of federal law duties are precluded only to the extent that they "exist solely by virtue of" the federal law in question and do not "rely on traditional state tort law." *Buckman, 531 U.S. at 352-353*. They rely upon cases in which state law claims proceeded on such grounds even where the alleged wrongful conduct might also have violated the FDCA. *Id.*; *see also* *Loreto v. Procter & Gamble Co., 515 Fed. App'x 576, 580 (6th Cir. 2013)*; *Desiano v. Warner-Lambert & Co., 467 F.3d 85 (2d Cir. 2006)*, *aff'd sub nom.* *Warner-Lambert Co., LLC v. Kent, 552 U.S. 440, 128 S. Ct. 1168, 170 L. Ed. 2d 51 (2008)*; *Arters, 921 F. Supp. 2d at 819-20*.

The Sixth Circuit, in *Loreto*, indicated that "plaintiffs may not bring a state-law claim against a defendant when the state-law claim is in substance (even if not in form) a claim for violating the FDCA." *515 Fed. App'x 576 at 579*. The *Loreto* court explained its method for distinguishing between state law claims that seek to enforce the FDCA and those that actually arise under state law; only the former are preempted. *Id.* The *Loreto* court noted,

> [T]he conduct on which the claim is premised must be the type of conduct that would traditionally give rise to liability under state law—and that would give rise to liability **[*135]** under state law even if the FDCA had never been enacted. If the defendant's conduct is not of this type, then the plaintiff is effectively suing for a violation of the FDCA (no matter how the plaintiff labels the claim), and the plaintiff's claim is thus impliedly preempted under *Buckman*.

Id. The *Loreto* court found no preemption of a claim that a manufacturer's marketing materials misrepresented the health benefits of vitamin C in its over-the-counter cold remedy, ruling that the claim relied "solely on traditional state tort law predating the FDCA," even though the conduct also violated the FDCA. *Id. at 580*. In *Arters*, it was alleged that the defendants had promoted Amiodarone as a routine treatment, rather than as a drug of last resort. *921 F. Supp. 2d at 819-820*. The court held that claims arising from off-label promotion did not seek to enforce the FDCA, because plaintiff did not allege that defendants violated their duty on the ground that the promotion was off-label, but rather because it was fraudulent. *Id.*

Here, Plaintiffs do not seek to enforce the provisions of the FDCA, instead they allege that Defendants fraudulently and misleadingly promoted their opioids. These allegations are of the type that would traditionally **[*136]** be brought as state law claims and, therefore, are not preempted.

3. Obstacle Preemption

The Manufacturers next argue that Plaintiffs' diversion monitoring theory "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" under the FDCA. (R. 499-1, PageID# 7691, *citing* *Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000))*. They frame the allegations as an assertion that the Manufacturers "had a duty not to sell their prescription opioids due to concerns with opioid diversion," and a prayer for damages and an injunction against any further violations. *Id.* at PageID# 7693. Defendants contend that "allowing these claims to proceed would undermine the FDA's decision to make (and keep) [the Manufacturers'] prescription opioids available to the public" and are thus preempted. *Id.* (internal quotation marks omitted).

The complaint cannot be reasonably construed as alleging that Defendants should have stopped selling opioids altogether, but rather alleges that they failed in their duty to prevent or actively concealed opioid diversion and misuse. Plaintiffs contend that their allegations focus on Defendants' "duty to use due care in selling their dangerous products and that they are liable for failing **[*137]** to use such care." (R. 654, PageID# 15832). Plaintiffs further argue that their diversion and monitoring claims are consistent with federal standards of care applicable to the sale of opioids, and thus create no obstacle to the implementation of the FDCA. *Id.*, PageID# 15830-15832.

Federal law preempts state law under the doctrine of obstacle preemption when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby, 530 U.S. at 372-373*. State tort actions related to the sale and marketing of pharmaceuticals raise the specter of obstacle preemption. In *Wyeth v. Levine*, the Supreme Court considered obstacle preemption in the context of a state tort claim alleging that the manufacturer of Phenergan had failed to provide adequate warnings about the risks of injecting the drug. *555 U.S. 555, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)*. The Supreme Court rejected Wyeth's obstacle preemption argument, noting that with limited resources to monitor the 11,000 drugs on the market, the FDA appears to view state tort law as a "complementary" form of drug regulation indicating:

> If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at **[*138]** some point during the FDCA's 70-year history. But despite its 1976 enactment of an express preemption provision for medical devices ... Congress has not enacted such a provision for prescription drugs. See *Riegel v. Medtronic, Inc., 552 U.S., at 327 (2008)* ("Congress could have applied the pre-emption clause to the entire FDCA. It did not do so, but instead wrote a pre-emption clause that applies only to medical devices.") Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness. As Justice O'Connor explained in her opinion for a unanimous Court: "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166-167, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989)* (internal quotation marks omitted).

Wyeth, 555 U.S. at 574-575 (internal footnotes omitted).

The Manufacturers assert that one of Congress' core objectives in enacting the FDCA was to "ensure that any product regulated by the FDA is safe and effective for its intended use." **[*139]** *FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000)*. They state that courts have consistently "held that this regulatory scheme preempts any state law claim seeking to prohibit drug manufacturers from selling their FDA-approved products as permitted by FDA." *See, e.g. Zogenix, Inc. v. Patrick, 2014 U.S. Dist. LEXIS 51840, 2014 WL 1454696, at *1-2 (D. Mass. Apr. 15, 2014)*; *Gross v. Pfizer, Inc., 825 F. Supp. 2d 654, 659 (D. Md. 2011)* (requiring a drug manufacturer "to stop production of a drug" "would directly conflict with" FDA's "sole authority ... to determine whether a drug may be marked."), *aff'd sub nom. Drager v. PLIVA USA, Inc., 741 F.3d 470 (4th Cir. 2014)*. Both *Zogenix* and *Gross* are distinguishable because they, respectively, involved an attempt to enforce a state regulatory ban on the sale of certain drugs and a challenge to the adequacy of label warnings approved by the FDA. By contrast, Plaintiffs here seek to enforce an alleged state law duty to, for example, monitor the sale of drugs with due care—a claim that is not inconsistent with the purposes of the FDCA, and thus not preempted.

C. Statute of Limitations

Noting that the complaint is based on facts dating back to the 1990s, the Manufacturers assert that applying the most generous of the applicable statute of limitations—the 5-year period for an OCPA claim—would bar claims relying on conduct predating early 2013. (R. 499-1, PageID# 7708-7709). Plaintiffs counter that dismissal based **[*140]** on affirmative defenses at the pleading stage is inappropriate where issues of fact concerning tolling exceptions exist.

Resolving a motion to dismiss based on statute-of-limitations grounds is appropriate when the undisputed facts "conclusively establish" the defense as a matter of law. *Estate of Barney v. PNC Bank, 714 F.3d 920, 926 (6th Cir. 2013)*; *Cataldo v. U.S. Steel Corp., 676 F.3d 542, 547 (6th Cir. 2012)*, *cert. denied, 568 U.S. 1157, 133 S. Ct. 1239, 185 L. Ed. 2d 177 (2013)*. But where there are disputed factual questions, for example "relating to the accrual date, ... claims that the defendant fraudulently concealed facts thereby preventing the plaintiff from learning of its injury, ... and complex issues about whether information in the plaintiff's possession sufficed to alert it of the claim[,]" then a statute of limitations defense is more appropriately addressed in the context of a summary judgment motion or at trial. *Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp., 839 F.3d 458, 464 (6th Cir. 2016)*; *Lutz v. Chesapeake Appalachia, LLC, 717 F.3d 459, 473-476 (6th Cir. 2013)* (reversing and remanding to the district court to resolve issue of fraudulent concealment). Moreover, parties "are entitled to have their cause tried on the merits if they can prove that the doctrine of fraudulent concealment should be applied to their case." *Jones v. TransOhio Sav. Ass'n, 747 F.2d 1037, 1043 (6th Cir. 1984)* ("We are unprepared to hold, prior to any discovery on the issue, that Appellants can prove no set of facts consistent with these allegations sufficient to toll the statute **[*141]** of limitations.").

The complaint alleges that the fraudulent concealment and continuing violation doctrines extend the applicable limitations periods, because "Defendants were deliberate in taking steps to conceal their conspiratorial behavior and active role in the deceptive marketing and the oversupply of opioids through overprescribing and suspicious sales, all of which fueled the opioid epidemic." (R. 514 at ¶¶770, 767-777). The complaint also alleges that Defendants, including the Manufacturers, purposefully concealed their unlawful conduct while assuring the government and the public that they were complying with applicable laws and cooperating with law enforcement to curb the opioid crisis, thereby, it is alleged, depriving Plaintiffs of any actual or implied notice of potential claims. (R. 514, ¶¶768-777). It further contends that Defendants' wrongful conduct has not ceased, continues to cause Plaintiffs' injuries, that the opioid epidemic continues to spread, and that the resulting claimed injuries are ongoing. *Id.* at ¶¶715, 718, 724, 727, 729, 744, 767-768, 780, 818, 827. These allegations are sufficient to raise a plausible inference that the applicable limitation periods **[*142]** are subject to tolling.

D. Counts Three and Four: Ohio RICO Statute Claims

In Counts Three and Four, Plaintiffs allege a violation of Ohio's Corrupt Practices Act (OCPA), *O.R.C. § 2923.31 et seq.* against the Marketing Defendants and Supply-Chain Defendants respectively. (R. 514, ¶¶939-973). OCPA, sometimes referred to as the "Ohio RICO" statute, is "patterned after" the federal RICO statute.[35] Consequently, Ohio courts look to federal case law applying RICO to determine how to apply OCPA. *O'Rourke, 640 N.E.2d at 240*; *Durrani, 2014 U.S. Dist. LEXIS 32693, 2014 WL 996471, at *8*.

Defendants assert that Plaintiffs' OCPA claims must be dismissed for the same reasons as the federal RICO claims. (R. 491-1, PageID# 7489-7490; R. 499-1, PageID# 7693-7694). Because the court finds Plaintiffs have sufficiently pleaded the former, the court rejects Defendants' argument. Defendants, however, raise an additional argument: to establish a "pattern" of racketeering activity under the OCPA, a plaintiff must allege "at least one incident other than a violation of" federal mail, wire, or security fraud statutes. *O.R.C. § 2923.34(A)*. Plaintiffs do not challenge the existence of such a requirement, but assert they also pleaded "telecommunications fraud," and "felony dealing in controlled substances pursuant to *RICO section 1961(1)(D)*." (R. **[*143]** 654, PageID# 15778). Plaintiffs have alleged a felony violation of the CSA, specifically *§ 843(a)(4)(A)* ("to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this subchapter or subchapter II..."). *Id.* Defendants contention—that a violation of *§ 843* does not constitute a predicate act—was addressed and rejected above. Thus, Defendants' motion to dismiss the OCPA claims should be denied.

E. Ohio Product Liability Act and Abrogation

The Distributors, joined by the Pharmacies and Manufacturers, argue that Plaintiffs' common law negligence and public nuisance claims, as well as Plaintiffs' statutory public nuisance claim, should be dismissed because they are abrogated by the Ohio Product Liability Act (OPLA), *O.R.C. §§ 2307.71 through 2307.80*. (R. 491-1, PageID# 7492-

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[35] *See, e.g.*, *Aaron v. Durrani, 2014 U.S. Dist. LEXIS 32693, 2014 WL 996471, at *8 (S.D. Ohio Mar. 13, 2014)* (*citing* *U.S. Demolition & Contracting v. O'Rourke, 94 Ohio App. 3d 75, 640 N.E.2d 235, 240 (Ohio Ct. App. 1994))*.

7496, 7502-7505; R. 497-1, PageID# 7599; R. 499-1, PageID# 7695). OPLA, by its terms, abrogates a significant swath of common law tort litigation. O.R.C. § 2307.71(B) expressly states that "Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability claims or causes of action." Pursuant to the statute, a product liability claim is defined as follows: **[*144]**

> "Product liability claim" means a claim or cause of action that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:
>
> (a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;
>
> (b) Any warning or instruction, or lack of warning or instruction, associated with that product;
>
> (c) Any failure of that product to conform to any relevant representation or warranty.
>
> "Product liability claim" also includes any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public.

O.R.C. § 2307.71(A)(13).[36] Thus, there are essentially two types of product liability claims that fall under OPLA's abrogation provisions: (1) product-related causes of action seeking compensatory damages for physical injury or for physical **[*145]** property damage (other than the product in question); and (2) public nuisance-type actions alleging unreasonable interference with a right common to the general public.[37]

1. Abrogation of Negligence Claim

The Distributors argue that Plaintiffs' common law negligence claim is, "at its core, a product liability claim—precisely the kind of claim abrogated by the OPLA." (R. 491-1, PageID# 7504, *citing* Volovetz v. Tremco Barrier Sols., Inc., 2016- Ohio 7707, 74 N.E.3d 743, 753 (Ohio. Ct. App. 2016) (stating courts look to "[t]he essential nature of the substantive allegations of the plaintiff's claim, not the artificial label attached to the claim")). Plaintiffs argue that their negligence claim is not abrogated because they do not seek compensation for physical injuries caused by Defendants' products, but rather "to recover for economic harms inflicted on their communities by Defendants' conduct in marketing and distributing their products." (R. 654, PageID# 15799). Plaintiffs' negligence action does not implicate a Type 2 product liability claims, as it does not allege an unreasonable interference with a right common to the general public. It does, however, potentially implicate a Type 1 product liability claim, as Plaintiffs do not challenge that their action involves the "design, formulation, **[*146]** production, construction, creation, assembly, rebuilding, testing, or marketing of that product." O.R.C. § 2307.71(A)(13)(a). Nevertheless, Plaintiffs assert that OPLA divides compensatory damages into two distinct categories: "harm" and "economic loss." (R. 654, PageID# 15798). They maintain that only claims for "harm" constitute "product liability claims" under OPLA, whereas, "claims solely for 'economic loss' are expressly exempted from the statute and remain available at common law." *Id.* The complaint alleges Defendants breached their duties resulting in "economic damages including, but not limited to, significant expenses for police, emergency, health, prosecution, corrections, rehabilitation, and other services," as well as "non-physical property damage, and damage to its proprietary interests."[38] (R. 514 at ¶¶1062-1063). Thus, the dispositive issue is whether Plaintiffs' negligence action seeks to recover damages for a loss defined as "harm" by OPLA.

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[36] The last paragraph emphasizing the inclusion of public nuisance claims was added by amendment and went into effect on August 1, 2007. State ex rel. Ohio Gen. Assembly v. Brunner, 115 Ohio St. 3d 103, 2007- Ohio 4460, 873 N.E.2d 1232, 1235 (Ohio, 2007).

[37] For the sake of brevity, these will be referred to as "Type 1" and "Type 2" product liability claims respectively.

[38] Though Plaintiffs allege an unreasonable interference with a right common to the general public with their common law public nuisance claim, pleading in the alternative is permissible.

The statute also clarifies that injuries defined as "harm" do not constitute "economic loss" under OPLA, *O.R.C. § 2307.71(A)(2)*. OPLA defines "economic loss" as "direct, incidental, or consequential pecuniary loss, including, but not limited to, damage to the product in question, **[*147]** and nonphysical damage to property other than that product." *Id.* Damages that fall into this category are excluded from the definition of "harm." *O.R.C. § 2307.71(A)(7)*. Type 1 product liability claims encompass claims for compensatory damages for death, physical injury to person, emotional distress, or physical damage to property other than the product in question—the same categories of injuries defined as "harm" by *O.R.C. § 2307.71(A)(7)*.

These distinctions are crucial with respect to Type 1 actions, as another section of OPLA states that: "Any recovery of compensatory damages for economic loss based on a claim that is asserted in a civil action, *other than a product liability claim*, is not subject to *sections 2307.71 to 2307.79* of the Revised Code, but may occur under the common law of this state or other applicable sections of the Revised Code." *O.R.C. § 2307.72(C)* (emphasis added). Because civil actions that implicate Type 1 product liability only fall within OPLA's ambit if they allege harm, a claim for solely economic loss by its very definition excludes harm and is not abrogated. This natural reading of the statutory language was confirmed by an Ohio Supreme Court decision, which predated the 2007 amendment:

> [*O.R.C. §] 2307.72* makes it clear that although a cause of action may concern **[*148]** a product, it is *not a product liability claim* within the purview of Ohio's product liability statutes *unless it alleges damages other than economic ones*, and that a failure to allege other than economic damages does not destroy the claim, but rather removes it from the purview of those statutes.

LaPuma v. Collinwood Concrete, 75 Ohio St. 3d 64, 1996 Ohio 305, 661 N.E.2d 714, 716 (Ohio 1996) (emphasis added); *Volovetz, 74 N.E.3d at 752* (acknowledging *LaPuma*'s holding in a footnote, but finding that plaintiff's negligence claim was barred because it sought recovery for compensatory damages stemming from physical damage to property).

Because Plaintiffs' negligence claim seeks only damages for non-physical property damage and expenses related to governmental expenditures, it is not abrogated by OPLA to the extent it seeks recovery solely for economic loss and not for harm.[39]

2. Abrogation of Public Nuisance Claims

Plaintiffs' Fifth ("Statutory Public Nuisance") and Sixth ("Common Law Absolute Public Nuisance") Claims for Relief allege that Defendants created and maintained a public nuisance in the marketing and distribution of prescription opioids. (R. 514 at ¶¶974-1038). Defendants assert that Plaintiffs' public nuisance claims are abrogated by OPLA and can only be brought as product liability claims under **[*149]** OPLA, if at all.[40] (R. 491-1, PageID# 7492-7496). OPLA was amended in 2007 to expressly include in the definition of a "product liability claim" "any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public." *O.R.C. § 2307.71(A)(13)*.

a. Application to Statutory Public Nuisance Claim

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[39] Defendants argue that framing Plaintiffs' injury as economic loss elevates form over substance, and that the personal injury to the users of opioids is the gravamen of the claim. (R. 744, PageID# 17663-17664). The court cannot find, without the benefit of any factual discovery, that *all* of Plaintiffs' claimed injuries stem from death, physical injuries, or physical damage to property.

[40] "Claims that are authorized by the Ohio Products Liability Act should be pled with reference to the applicable provision of the Act." *Greenway v. Kimberly-Clark Corp., 2016 U.S. Dist. LEXIS 82446, 2016 WL 3460229, at *2 (N.D. Ohio June 24, 2016)* (citations omitted).

Defendants contend that the reference to "*any* public nuisance claim" abrogates both common law *and* statutory public nuisance claims (R. 744, PageID# 17658-17659), while Plaintiffs contend that statutory public nuisances are not abrogated because the phrase "at common law" in the statute modifies both "public nuisance claim" and "cause of action." (R. 654, PageID# 15729). Under Ohio law, "[t]o determine the intent of the legislature," a court must "first look to the plain language of the statute," and if it is "plain and unambiguous," the statute should be applied as written. *State v. Gordon, 153 Ohio St. 3d 601, 2018-Ohio-1975, 109 N.E.3d 1201, 2018 WL 2356650, at *2 (Ohio May 23, 2018)* (citations omitted). The court finds the phrase "any public nuisance claim or cause of action at common law" to be ambiguous. Accordingly, the court looks **[*150]** to the legislative history, which notes:

> SECTION 3. The General Assembly declares its intent that the amendments made by this act to *sections 2307.71* and *2307.73* of the Revised Code are not intended to be substantive but are intended to clarify the General Assembly's original intent in enacting the Ohio Product Liability Act, *sections 2307.71 to 2307.80* of the Revised Code, as initially expressed in Section 3 of Am. Sub. S.B. 80 of the 125th General Assembly, to abrogate all common law product liability causes of action *including common law public nuisance causes of action, regardless of how the claim is described, styled, captioned, characterized, or designated*, including claims against a manufacturer or supplier for a public nuisance allegedly caused by a manufacturer's or supplier's product.

2006 Ohio Laws File 198 (Am. Sub. S.B. 117) (emphasis added).

Given that the legislature explained it intended to abrogate "*common law* public nuisance causes of action," the court agrees with Plaintiffs' statutory construction. Therefore, Plaintiffs' *statutory* public nuisance claim in Count Five is not abrogated by OPLA.

b. Application to Common Law Absolute Public Nuisance Claim

Despite asserting that the 2007 amendment to OPLA intended to abrogate common law public **[*151]** nuisance actions, Plaintiffs aver that their self-styled "common law absolute public nuisance claim" is not abrogated by OPLA because their claim is an "equitable nuisance" claim. (R. 654, PageID# 15729). Plaintiffs rely on an observation from the Ohio Supreme Court in *State ex rel. Miller v. Anthony* that an abatement action was "not a common law action, but a summary proceeding more in the nature of a suit in equity." *72 Ohio St. 3d 132, 1995- Ohio 39, 647 N.E.2d 1368, 1371 (Ohio 1995)* (*quoting* *Cameron v. United States, 148 U.S. 301, 304, 13 S. Ct. 595, 37 L. Ed. 459 (1893))*. The court does not construe the *dicta* from this decision as an affirmative finding that an absolute public nuisance claim is not a common law cause of action within the meaning of OPLA.[41] Moreover, "the distinction between legal and equitable claims [has been] abolished." *Hodges v. Ettinger, 127 Ohio St. 460, 189 N.E. 113, 115, 39 Ohio L. Rep. 653 (Ohio 1934)*. Finally, numerous courts, including a recent decision of the Sixth Circuit Court of Appeals, have recognized that an absolute public nuisance claim in Ohio is a common law action.

> Under Ohio law, *a common law public nuisance* is "an unreasonable interference with a right common to the general public." Examples of such rights, from Ohio and elsewhere, include: a right of public passage (e.g., obstruction of highways); a right to use public space (e.g., pollution of fisheries); a right to navigable **[*152]** waterways (e.g., obstruction of public streams); a right to public health (e.g., exposure to diseased animals); a right to public safety (e.g., negligent marketing/sale of dangerous weapons); a right to public morality (e.g., houses of ill-repute); a right to public peace (e.g., excessive noise); and a right to public comfort (e.g., excessive odors or fumes).

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[41] Notably, *State ex rel. Miller* did not involve an absolute public nuisance action, but instead considered whether a nuisance abatement action brought pursuant to statute—*O.R.C. § 3719.10*—required a jury trial under Ohio's constitution. The court concluded that a jury trial was not required because "the nuisance abatement provisions of R.C. Chapter 3767 are equitable in nature and not created by common law." *647 N.E.2d at 1371*. Thus, it appears the court was focused on the equitable nature of the abatement remedy. Furthermore, by Plaintiffs' logic, the statutory-based nuisance action in *State ex rel. Miller* would not be considered a statutory nuisance claim simply because the court characterized the remedy as equitable in nature. The court declines to elevate form over substance.

> *Ohio law recognizes two types of public nuisances: qualified and absolute*. A qualified public nuisance mirrors a negligence tort.... An absolute public nuisance, sometimes called nuisance per se, comes in two forms, one requiring more evidence of intent (akin to an intentional tort), the other requiring less (akin to a strict liability tort). The action thus requires either the "intentional" creation of a public nuisance or "an abnormally dangerous condition that cannot be maintained without injury to property, no matter what care is taken."

City of Cincinnati v. Deutsche Bank Nat'l Trust Co., 863 F.3d 474, 477 (6th Cir. 2017) (emphasis added); *see also Cleveland v. JP Morgan Chase Bank, N.A., 2013-Ohio-1035, 2013 WL 1183332, at *3 (Ohio Ct. App Mar. 21, 2013)* (describing a public nuisance claim as a common law tort action used to vindicate interference with a general public right); *Brown v. Scioto Cty. Bd. of Commrs., 87 Ohio App. 3d 704, 622 N.E.2d 1153, 1158 (Ohio Ct. App. 1993)* (describing the common law elements of a public nuisance claim and recognizing that, in addition, there are also statutorily defined public **[*153]** nuisances).

Plaintiffs concede that a public nuisance claim, which they label as an "equitable" action, requires an unreasonable interference with a right common to the general public. (R. 654, PageID# 15719). The Sixth Circuit ascribed the same elements to common law public nuisance claims under Ohio law. *Deutsche Bank Nat'l Trust Co., 863 F.3d at 477*. These are identical causes of action that are not derived from statute. Under Plaintiffs' reasoning, common law public nuisance claims essentially do not exist in Ohio, because public nuisance claims are properly designated as suits arising in equity. Such a conclusion is untenable, as it would render the Ohio Legislature's 2007 amendment a nullity.[42] Furthermore, Plaintiffs' argument is contrary to the only Ohio decision that appears to have squarely addressed the operation of the 2007 amendment. *See City of Toledo v. Sherwin-Williams Co., 2007 Ohio Misc. LEXIS 5632, 2007 WL 4965044 (Ohio C.P. December 12, 2007)* (finding that plaintiff's public nuisance claim was "expressly subsumed by the OPLA"). Thus, the court finds that Plaintiffs' absolute public nuisance claim constitutes a common law public nuisance claim and, therefore, falls within the purview of OPLA.

However, Plaintiffs raise an additional argument as to why their absolute public nuisance claim **[*154]** should not be construed as abrogated by OPLA—that the 2007 amendment that added the Type 2 product liability claims definition should be read as covering only those public nuisance actions that seek compensatory damages defined as harm elsewhere in the statute. (R. 654, PageID# 15730). This argument is similar to Plaintiffs' argument above with respect to OPLA's inapplicability to their negligence claim. Plaintiffs' argument here is contrary to the plain language of the statute. *O.R.C. § 2307.71*, as amended, abrogated Type 2 claims—public nuisance claims alleging that "the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product *unreasonably interferes with a right common to the general public*." (emphasis added). Notably absent from the Type 2 product liability definition is the language contained in Type 1 claims that apply only to actions seeking compensatory damages for "death, physical injury to person, emotional distress, or physical damage to property other than the product in question" (*i.e.* "harm"). *O.R.C. § 2307.71(A)(13)*. Thus, the distinction between harm and economic loss is conspicuously absent in the Type 2 definition of product liability claims.[43] Therefore, **[*155]** the issue of whether Plaintiffs' damages under its public nuisance theory are properly categorized as economic loss is immaterial.

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[42] In other words, Plaintiffs contend that non-statutory public nuisance actions in Ohio are equitable actions not common-law actions, and the 2007 amendment applies only to common law public nuisance actions. Such a result would completely frustrate the Ohio Legislature's clear intent to abrogate common-law public nuisance actions, as the amendment would have no applicability.

[43] The argument that the harm requirements of Type 1 claims should be bootstrapped to Type 2 claims is not well taken. As noted above, the court should apply the plain language of the statute where it is unambiguous. Although this court above found that the statute was ambiguous with respect to the question of whether the term "common law" modified both the phrase "any public nuisance claim" and "cause of action," the decision not to include the preexisting language from the Type 1 definition into the Type 2 definition speaks volumes. Had the legislature intended such limiting language in the application of OPLA as it relates to public nuisance claims, it could easily have repeated the language contained in the Type 1 definition. It opted not to do so. It is also telling that the Type 2 definition was not made a subsection of the Type 1 definition, revealing a clear intent to create an alternative or additional definition of a "product liability claim."

Consequently, O.R.C. § 2307.72(C), which states that "[a]ny recovery of compensatory damages for economic loss based on a claim that is asserted in a civil action, *other than a product liability claim*, is not subject to [OPLA]...." is also inapplicable. The Ohio Supreme Court's holding in *LaPuma* interpreted OPLA as it existed in 1996; it did not create a judicial rule exempting product liability claims if they asserted only economic loss. 661 N.E.2d at 716. Before the 2007 amendment, only the Type 1 definition of product liability claims existed, and the definition expressly excluded claims for economic loss rather than harm. This distinction was not maintained with respect to the Type 2 definition. Therefore, Plaintiffs' argument—that its absolute public nuisance claim is not abrogated because it seeks to recover only economic loss—does not exempt its common law public nuisance claim from OPLA. It is recommended that Count Six be dismissed.

F. Count Five: Statutory Public Nuisance

Count Five alleges a statutory public nuisance against all Defendants. (R. 514, PageID# 11208). It seeks "abatement, **[*156]** recovery of abatement costs, injunctive relief, and to prevent injury and annoyance from any nuisance," as well as "all other legal and equitable relief as allowed by law." *Id.* at ¶¶995-996.

The Pharmacies and Distributors assert that, among the Plaintiffs, only the Summit County Prosecutor may maintain a statutory public nuisance action brought pursuant to O.R.C. §4729.35. (R. 491-1, PageID# 7501; 497-1, PageID# 7608-7609; R. 742, PageID# 17613-17615). In addition, the Distributors and Manufacturers assert that Plaintiffs' remedies for a statutory public nuisance are limited to an injunction. (R. 491-1, PageID# 7501-7502; R. 499-1, PageID# 7700, n. 39). This latter argument does not provide a basis for dismissal. While the category of damages recoverable may be a legal issue proper for the court's consideration, Defendants have not identified any authority supporting their proposed statutory construction. *Id.*

1. Ohio Rules of Statutory Interpretation and Applicable Laws

First, under the express rules of Ohio statutory construction, a court should construe various statutes in harmony unless their provisions are irreconcilably in conflict:

> If a general provision conflicts with a special or local provision, **[*157]** they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

O.R.C. §1.51; *see also* United Tel. Co. v. Limbach, 71 Ohio St. 3d 369, 1994- Ohio 209, 643 N.E.2d 1129, 1131 (Ohio 1994) ("All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously. ... [and] in the interpretation of related and co-existing statutes must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict.") (citations omitted).

The following Ohio statutes address the issue of public nuisance and are relevant to the court's discussion. First, Chapter 3767 of the Ohio Revised Code addresses nuisances generally, and gives several definitions of a nuisance, including the following: "That which is defined and declared by statutes to be a nuisance." O.R.C. § 3767.01(C)(1). A separate chapter of the Ohio Revised Code, dealing with occupations and professions, identifies one such public nuisance:

> The violation by a pharmacist or other person of any laws of Ohio or of the United States of America or of any rule of the board of pharmacy **[*158]** controlling the distribution of a drug of abuse as defined in section 3719.011[44] of the Revised Code or the commission of any act set forth in division (A) of section 4729.16 of the Revised Code, is hereby declared to be inimical, harmful, and adverse to the public welfare of the citizens of

[44] O.R.C. §§ 3719.01(R) & 3719.011 define opiate as "a drug of abuse."

> Ohio and to constitute a public nuisance. The attorney general, the prosecuting attorney of any county in which the offense was committed or in which the person committing the offense resides, or the state board of pharmacy may maintain an action in the name of the state to enjoin such person from engaging in such violation. Any action under this section shall be brought in the common pleas court of the county where the offense occurred or the county where the alleged offender resides.

O.R.C. §4729.35. Returning to the general chapter on nuisances, *O.R.C. § 3767.03* states that: "[w]henever a nuisance exists," an authorized party[45] "may bring an action in equity in the name of the state ... to abate the nuisance and to perpetually enjoin the person maintaining the nuisance from further maintaining it."

2. Available Remedies

Defendants assert that any violation of *O.R.C. § 4729.35* limits Plaintiffs' recovery to injunctive relief and that abatement costs are unrecoverable. (R. 491-1, **[*159]** PageID# 7501-7502; R. 499-1, PageID# 7700). However, Defendants' argument—that *O.R.C. § 4729.35*'s provision that an authorized individual "may maintain an action in the name of the state to enjoin" a public nuisance is tantamount to a limitation on the remedies available—is an untenable interpretation of the plain text of the statute. Nothing in this statute can reasonably be construed as addressing or expressly limiting the categories of relief available for the nuisance. Rather, it identifies and defines a public nuisance, identifies who may bring the action to enjoin a nuisance, and finally where the claim should be brought. Further, Defendants' interpretation of the remedies available for a violation of *O.R.C. § 4729.35* is not supported by any authority cited in their briefs.

Finally, Defendants' interpretation of *O.R.C. § 4729.35* contravenes Ohio's laws on statutory construction, as stated above, that require a court to construe statutes so as to give effect to both the special and general provisions, and to construe all provisions of the Revised Code bearing upon the same subject as being in harmony. Defendants' construction does the opposite—it manufactures a conflict where none exists on the face of the statute. Because *O.R.C. § 4729.35* **[*160]** is silent as to what remedies are available and the more general statute explains that an action seeking to abate a nuisance is equitable in nature, the court declines to recommend limiting the recovery or remedies available for a violation of *O.R.C. § 4729.35* from what is typically recoverable in public nuisance actions.

3. City of Akron's Authority to Bring Public Nuisance Suit

Turning to the argument that the City of Akron is barred from bringing a nuisance claim, Defendants assert that *O.R.C. § 4729.35* limits the authority for bringing an action to enjoin a violation of Ohio or federal drug laws to the state attorney general, the county prosecutor of the county in which the offense occurred, and the state board of pharmacy. Plaintiffs' contention that the City of Akron may, nevertheless, maintain a nuisance action for an ostensible violation of federal or Ohio drug laws based on other more generalized nuisance statutes flies in the face of the another portion of the Revised Code that they specifically rely upon—*O.R.C. §1.47* ("In enacting a statute, it is presumed that: (B) The entire statute is intended to be effective").[46] Plaintiffs' position—that municipalities could

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[45] *O.R.C. § 3767.03* includes a significantly broader list of authorized parties who may maintain a public nuisance action than *O.R.C. § 4729.35*, as it includes the attorney general, the village solicitor, the city or township law director, the county prosecutor, or any person who is a citizen of the county in which the nuisance exists so long as the action is brought in the name of the state. The ramifications of this discrepancy is addressed below.

[46] Plaintiffs also rely on *O.R.C. § 715.44*, which states as follows:

A municipal corporation may:

> (A) Abate any nuisance and prosecute in any court of competent jurisdiction, any person who creates, continues, contributes to, or suffers such nuisance to exist;

maintain a statutory public nuisance action for violation **[*161]** of a state or federal drug law—would eviscerate the express statutory provision limiting who can bring suit. Plaintiffs' reliance on *State ex rel. DeWine v. Fred's Party Center, Inc., 2014- Ohio 2358, 13 N.E.3d 699 (Ohio Ct. App. 2014)* is misplaced. (R. 654, PageID# 15726). Therein, not only was the suit brought by the Ohio Attorney General, but the court's passing reference to *O.R.C. § 4729.35* in a footnote neither states nor implies that any party, other than the attorney general, the county prosecutor, or the board of pharmacy is vested with authority to bring an action under that statute. *Id.* at n. 1. Although *O.R.C. § 4729.35* is not the exclusive avenue for a municipal plaintiff to bring a public nuisance claim, the City of Akron cannot claim that the very nuisance it seeks to abate is the one caused by a violation of Ohio or federal drug laws, as set forth in *O.R.C. § 4729.35*, but then attempt to circumvent the limitations on who may bring such a suit as set forth in the same statute simply by claiming to rely on a different portion of the Revised Code. In the complaint, Plaintiffs, including the City of Akron, clearly identify the public nuisance they seek to enjoin as violations of Ohio or federal drug laws (or the rules of the board of pharmacy). (R. 514, PageID# 7068, ¶¶979, 983-984, 986, 988). As such, the City of Akron **[*162]** lacks standing to pursue a statutory public nuisance claim based on violations of Ohio or federal drug laws, or the rules of the board of pharmacy.

4. Sufficiency of the Factual Allegations

The Manufacturers argue that Plaintiffs' statutory nuisance claim should be dismissed for failure to allege facts demonstrating a statutory violation. *See* *Brown, 622 N.E.2d at 1158* (explaining that Ohio statutes and regulations that define certain conduct as being a public nuisance "amount to a legislative declaration that the proscribed conduct is an unreasonable interference with a public right"); *O.R.C. § 3767.01(C)(1)* (defining "nuisance" as "that which is defined and declared by statutes to be a nuisance"). The Manufacturers' statement that they "have complied with all relevant federal and state controlled substances requirements" (R. 499-1, PageID# 7702) is merely an assertion of fact that is disputed by Plaintiffs and does not support dismissal at this stage. They also contend that the alleged violations of Ohio law apply **[*163]** only to distributors and not to pharmaceutical manufacturers. (R. 499-1, PageID# 7700-7701; R. 746, PageID# 17724-17725). Plaintiffs state that certain other laws and rules governing the distribution of controlled substances do apply to the Manufacturers' alleged conduct, including those requiring them to maintain diversion controls and to create a system to disclose suspicious orders, report such orders, and adhere to sales quotas set by the DEA. (R. 654, PageID# 15726-15728, *citing* R. 514 at ¶¶504, 507, 510, 863, 915, 961). The complaint alleges that all Defendants have aided and abetted the violation of federal and state laws controlling the distribution of a drug of abuse as defined in *O.R.C. § 3719.011*.[47] (R. 514 at ¶¶981-986).

The complaint also alleges violations of *O.R.C. § 2925.02(A)(1)* and *(3)*, which prohibit the administering, inducing, or causing another to use a controlled substance "[b]y force, threat, or deception" (*§ 2925.02(A)(1)*), as well as the administering, inducing, or causing another to use such a substance "by any means," with the additional requirement that the actions "cause serious harm" or "cause the other person to become drug dependent" (*§ 2925.02(A)(3)*). (R. 514 at ¶¶986-987). The Manufacturers argue that to the extent these **[*164]** violations are asserted in an attempt by Plaintiffs to hold them liable for failing to stop the sale of prescription opioids that have been approved by the FDA and are regulated by the DEA, any such claim is preempted. (R. 499-1, PageID# 7701-7702). But nowhere in the complaint is it alleged that the Manufacturers should be prevented from operating their business in a lawful manner; rather, Plaintiffs seek to abate the alleged public nuisance.

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(C) Prevent injury and annoyance from any nuisance;

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[47] The Manufacturers also assert that Plaintiffs' Opposition cites to statutory violations not specifically pled, but the complaint identifies specific statutes as bases for alleged liability and also states that the claimed violations include, but are not limited to, conduct proscribed by Ohio and federal law. (R. 514 at ¶984).

Like the Manufacturers, the Pharmacies assert that the complaint fails to allege specific details of nuisance-creating conduct on their part affecting Summit County or even the State of Ohio and that the complaint contains "no more than conclusory factual allegations ..." (R. 497-1, PageID# 7609-7610). They concede, however, that Plaintiffs have alleged several violations of Ohio and federal law, but protest that the allegations are not sufficiently specific with respect to recordkeeping defaults and contend the allegations that they failed to maintain effective controls against diversion or failed to disclose suspicious orders are implausible. *Id.* Indeed, the complaint contains allegations that the Pharmacies engaged in misconduct and violated **[*165]** federal and state laws, and references numerous fines and settlements involving the Pharmacies. (R. 514, ¶¶ 504, 612-659, 684-686). Furthermore, where the facts at issue may be in the control of others, dismissal prior to discovery is not appropriate. *Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp., 830 F.3d 376, 383 (6th Cir. 2016)* (explaining that the pleading standards only require enough facts to demonstrate a reasonable expectation that discovery will reveal evidence to support the allegations).

5. Safe Harbor

"Ohio courts have long imposed the following concrete limitation on public nuisance claims: What the law sanctions cannot be held to be a public nuisance." *City of Cleveland v. Ameriquest, 621 F. Supp.2d 513, 526 (N.D. Ohio 2009)*, *aff'd*, *615 F.3d 496 (6th Cir. 2010)* (citations omitted). The Manufacturers claim that they are shielded from nuisance liability by virtue *O.R.C. § 2925.02(B)*, which provides a "safe harbor" for persons whose conduct is in accordance with Ohio controlled substance regulations. (R. 499-1, PageID# 7001-7002). They assert that they "have complied with all relevant federal and state controlled substances requirements." *Id.*

But as *Ameriquest* makes clear, safe harbor immunity from nuisance liability is available only to those who perform in accordance with their applicable regulatory obligations. *621 F. Supp. 2d at 528* ("Under a long line of decisions, a showing that the challenged **[*166]** conduct is subject to regulation and was performed in conformance therewith insulates such conduct from suit as a public nuisance"). The complaint alleges that all Defendants failed to do so. (R. 514 at ¶¶981-988). It also alleges misconduct unrelated to Defendants' respective regulated activities, for example, as to the Manufacturers, an extensive deceptive marketing scheme that intended to change the perception of opioids and boost sales by misleading doctors and the public about the risks of long-term opioid use. (R. 514 at ¶¶174-179, 989).

While regulatory oversight is a factor to be considered when determining the sufficiency of a public nuisance claim, "extensive regulation does not automatically bar a public nuisance claim." *City of Cleveland v. JP Morgan Chase Bank, N.A., 2013-Ohio-1035, 2013 WL 1183332, *6 (Ohio Ct. App. March 21, 2013)*; *Cincinnati v. Beretta, 768 N.E.2d at 1143*. The *Beretta* court rejected defendants' assertion that they were engaged in "legislatively authorized conduct," and were not subject to liability. *768 N.E.2d at 1143*. The court concluded that "even though there exists a comprehensive regulatory scheme involving the manufacturing, sales, and distribution of firearms, ... the law does not regulate the distribution practices alleged in the complaint," *i.e.*, practices that "fostered the criminal misuse of firearms [and] helped **[*167]** sustain the illegal firearms market in Cincinnati ...." *Id. at 1140*. Contrary to Manufacturers' contention that the complaint is defective because it fails to plead "any facts to show that any Manufacturer Defendant somehow deceived a particular resident in Summit County into using opioids, much less into becoming opioid dependent," that level of specificity is not required prior to discovery. (R. 499-1, PageID# 7702).

Accordingly, it is recommended that Defendants' motions to dismiss be partially granted to the extent they seek to bar the City of Akron from maintaining a statutory public nuisance action based on either: (1) a violation of an Ohio or federal drug law; or (2) any rule of the board of pharmacy controlling the distribution of a drug of abuse. It is otherwise recommended that Defendants' motions to dismiss count five, or to limit Plaintiffs' statutory remedies, be denied.[48]

G. Count Seven: Negligence

The complaint alleges a negligence claim against all Defendants. (R. 514, PageID# 11220). A negligence claim must allege (1) a duty owed by the defendant to the plaintiff to conform to a certain standard of conduct, (2) that the defendant breached that duty, and (3) that the breach **[*168]** of the duty proximately caused the plaintiff's injury. *Cromer v. Children's Hosp. Med. Ctr. of Akron, 142 Ohio St. 3d 257, 2015- Ohio 229, 29 N.E.3d 921, 928-929 (Ohio 2015)*. Defendants challenge the sufficiency of the complaint with respect to the first and third elements. (R. 491-1, PageID# 7505-7513, 7515-7519; R. 497-1, PageID# 7599-7608; R. 499-1, PageID# 7702-7703).

1. Duty of Care

"The existence of a duty is a question of law for a court to determine." *Mussivand v. David, 45 Ohio St. 3d 314, 544 N.E.2d 265, 270 (Ohio 1989)* ("There is no formula for ascertaining whether a duty exists. Duty...is the court's expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.") (citations and quotations omitted). "The Ohio Supreme Court has explained that '[t]he existence of a duty depends on the foreseeability of the injury.'" *Jaycox v. Setty Family Veterans Residential Care Home, 97 Fed. Appx. 640, 2004 WL 1171348, *3 (6th Cir. May 24, 2004)* (quoting *Menifee v. Ohio Welding Products, Inc., 15 Ohio St. 3d 75, 15 Ohio B. 179, 472 N.E.2d 707, 710 (Ohio 1984))*. Moreover,

> The concept of foreseeability is an important part of all negligence claims, because "[t]he existence of a duty depends on the foreseeability of the injury." *Menifee at 77, 472 N.E.2d 707*. As a society, we expect people to exercise reasonable precautions against the risks that a reasonably prudent person would anticipate. *Commerce & Industry Ins. Co. v. Toledo, 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989)*. Conversely, we do not expect people to guard against risks that the reasonable person would not foresee. *Menifee at 77, 472 N.E.2d 707*; Keeton, Dobbs, Keeton & Owen, Prosser and Keeton **[*169]** on the Law of Torts, Section 43, 280 (5th Ed.1984). The foreseeability of the risk of harm is not affected by the magnitude, severity, or exact probability of a particular harm, but instead by the question of whether some risk of harm would be foreseeable to the reasonably prudent person. *See* *Gedeon v. E. Ohio Gas Co., 128 Ohio St. 335, 339, 190 N.E. 924, 40 Ohio L. Rep. 649 (1934)*. Accordingly, the existence and scope of a person's legal duty is determined by the reasonably foreseeable, general risk of harm that is involved.

Cromer, 29 N.E.3d at 928-29 ("The existence of an actor's duty to another person usually arises from the foreseeability of injury to someone in that other person's 'general situation.'") (*quoting* *Gedeon, 190 N.E. at 926*). The "foreseeability of harm usually depends on the defendant's knowledge." *Menifee, 472 N.E.2d at 710*. But in order to owe a duty of care, it is not necessary that the defendant foresee the injury in the precise form in which it occurred. *Bohme, Inc. v. Sprint Int'l Comm. Corp., 115 Ohio App. 3d 723, 686 N.E.2d 300, 303 (Ohio Ct. App. 1996)*; *Pavlides v. Niles Gun Show, Inc., 93 Ohio App. 3d 46, 637 N.E.2d 404 (Ohio Ct. App. 1994)* (holding that an actor cannot necessarily avoid the imposition of a legal duty merely because he did not foresee the exact consequences of his actions).

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[48] Although the Distributors broadly argued that both Plaintiffs' negligence and nuisance claims should be dismissed based on the economic loss doctrine, they made no attempt to distinguish between common law public nuisance claims and statutory public nuisance claims. (R. 491-1, PageID# 7513-7514; R. 744, PageID# 17672-17673). "The doctrine bars tort plaintiffs from recovering purely economic loss that 'do not arise from tangible physical injury' to persons or property.'" *Deutsche Bank, 863 F.3d at 477* (*quoting* *Queen City Terminals v. Gen. Am. Trans., 73 Ohio St. 3d 609, 1995- Ohio 285, 653 N.E.2d 661, 667 (Ohio 1995))*. The movant has presented the court with no compelling reason to apply such a tort doctrine to a statutory claim, especially where it does not appear that Plaintiffs seeks any relief beyond that which is permitted by statute.

In *Cincinnati v. Beretta*, the Ohio Supreme Court addressed the question of whether gun manufacturers owed a duty of care to a local government concerning harms caused by negligent manufacturing, marketing and distributing of firearms. **[*170]** *Beretta* involved allegations that the defendants failed to exercise sufficient control over the distribution of their guns, thereby creating an illegal secondary market in the weapons. The *Beretta* court concluded that the harms that resulted from selling these weapons were foreseeable—that Cincinnati was a foreseeable plaintiff. *768 N.E.2d at 1144*. Plaintiffs argue that the harm caused by the marketing and distribution of opioids are similarly foreseeable.

Plaintiffs assert that Defendants have a common law duty "to not expose Plaintiffs to an unreasonable risk of harm[;] ... a legal duty to exercise reasonable and ordinary care and skill in accordance with applicable standards of conduct in manufacturing, advertising, marketing, selling and/or distributing opioids." (R. 514 at ¶¶1040-1041). Defendants deny that they owed any common law duty to Plaintiffs. (R. 499-1, PageID# 7702-7703; R. 491-1, PageID# 7511-7512; R. 497-1, PageID# 7599-7601; R. 744, PageID# 17666-17667). Defendants claim that the common law does not recognize the duty of care that Plaintiffs assert; that Plaintiffs are actually alleging a statutory duty of care under the CSA which creates duties owed only to the DEA and the Ohio Board **[*171]** of Pharmacy, and which provides for no private right of action; that Plaintiffs are attempting to use negligence *per se* to plead around the absence of a private right of action; that there is no duty to prevent a third person from causing harm; and that the learned intermediary doctrine forecloses any duty running from Defendants to Plaintiffs. Moreover, Distributors deny any foreseeable harm caused by their actions and characterize themselves as mere "middlemen" who "do not write prescriptions or determine whether opioid medications are appropriate for patients" or "meet directly with patients and furnish them with opioids" as pharmacists do. (R. 491-1, PageID# 7511). The Pharmacies assert that Ohio imposes no common law duty "to exercise due care in the distribution of opioids, and specifically to detect, identify, or report suspicious orders." (R. 497-1, PageID# 7599).

Plaintiffs, for their part, do not argue that there is a private right of action under these statutes, but rather argue that the complaint's references to statutes merely identified a statutory standard of care that they contend could serve as a basis to support their theories of a common law duty and breach. (R. 654, **[*172]** PageID# 15787). Here, Plaintiffs base their duty and breach arguments on Defendants' own conduct—failing to report suspicious orders or otherwise act to prevent diversion—which caused their harm. (R. 514 at ¶¶546, 568-569, 607-659, 989, 1046-1071). Plaintiffs' Opposition references allegations in their complaint to argue that Defendants sold opioids "without regard to the likelihood that the opioids would be placed in the hands of criminals, addicts, juveniles, and others not permitted to use or possess prescription opioids" (*id.* at ¶1050); that the Marketing Defendants disseminated deceptive marketing about the safety and addictiveness of opioids through front groups and KOLs (*id.* at ¶¶350-428); that Marketing Defendants funded CMEs to encourage doctors to increase their prescriptions of opioids (*id.* at ¶¶429-442); that Defendants marketed, distributed and sold opioids "in a way that created and fostered an illegal, secondary prescription opioids market that resulted in a foreseeable and unreasonable risk of harm to Plaintiffs" (*id.* at ¶1049); that Manufacturers knew of doctors who were writing large quantities of opioids "[b]ut ... were singularly focused on maintaining, capturing, **[*173]** or increasing their sales" (*id.* at ¶574); that the Pharmacies knew of oversupply of prescription opioids (*id.* at ¶607); that Marketing and Supply Chain Defendants were aware of suspicious orders from their facilities (*id.* at ¶¶763, 589); that Marketing Defendants provided incentives to sales representatives and ignored red flags of diversion during regular visits to pharmacies and doctors (*id.* at ¶¶516, 568-569); and their sales representatives frequently promoted opioids in Summit County (*id.* at ¶673).

Plaintiffs argue that these allegations are sufficient to establish that their resulting harm (*i.e.* dramatically increased expenditures on public health and safety) was the foreseeable and likely result of Defendants' actions. (R. 654, PageID# 15783-15784). Taking Plaintiffs' allegations as true, Plaintiffs have stated a plausible claim that it was reasonably foreseeable that they would be forced to bear the public costs of increased harm from the over-prescription and oversupply of opioids in their communities if Defendants failed to implement and/or follow adequate controls in their marketing, sales, distribution, and dispensing of opioids.

Defendants argue, however, that Ohio law imposes **[*174]** no duty "to prevent a third person from causing harm to another absent a special relation between the parties." (R. 499-1, PageID# 7687; R. 497-1, PageID# 7600; R. 491-1, PageID# 7512). Defendants argue that Plaintiffs have not alleged any special relationship that would give rise to such a duty. *Id.* The defendants in *Cincinnati v. Beretta* raised a similar argument against municipal expenditures following the actions of firearm manufacturers. *768 N.E.2d at 1144-46*. Therein, the city alleged that defendants marketed and distributed their firearms in such a way as to "ensure the widespread accessibility of the firearms to prohibited users" thereby fostering criminal misuse and an illegal aftermarket. *Id. at 1140*. The Ohio Supreme Court determined that the "special relationship rule [was] not determinative" because plaintiffs were not alleging a duty to control third persons. Instead, the court maintained that "the issue is whether appellees are themselves negligent by manufacturing, marketing, and distributing firearms in a way that creates an illegal firearms market that results in a foreseeable injury." *Id.* In this case, Plaintiffs' do not assert a duty to prevent the actions of third persons, but rather a duty owed **[*175]** by Defendants to Plaintiffs to use reasonable care in, for example, marketing, monitoring, reporting, and selling their opioids. The wrongful conduct alleged is that of Defendants, and not of third persons.

The Pharmacies contend that they do not owe a duty as a result of the learned intermediary doctrine. The learned intermediary doctrine is not applicable as explained *supra* in the RICO analysis. Distributors also argue that any duty they may owe to "report suspicious order is a duty that was created by statute, and the duty runs to the DEA and the Ohio Board of Pharmacy, not the County." This duty, they argue, is "unknown at common law." They maintain that when Plaintiffs assert a common law duty of care, they are actually seeking to enforce the CSA and Ohio's pharmacy regulations for controlled substances. (R. 491-1, PageID# 7505-7511; R. 497-1, PageID# 7602-05). Because the court finds that Plaintiffs have plausibly pleaded facts sufficient to establish that Defendants owed them a common law duty, the court does not reach this argument based upon the limited record before it.[49]

2. Proximate Cause

Plaintiffs must allege facts that, if proven, plausibly establish a causal link between **[*176]** Defendants' actions and Plaintiffs harm that is not too remote. The Ohio Supreme Court and the Sixth Circuit have employed the proximate cause test devised by the U.S. Supreme Court in *Holmes* in negligence cases like this one. *503 U.S. at 268-70*; *see also Cincinnati v. Beretta, 768 N.E.2d at 1147-49*; *Ameriquest, 615 F.3d at 504*.

Plaintiffs argue that Defendants' alleged negligent sales practices, including failing to comply with obligations to monitor and report suspicious orders, halt suspicious orders, and implement effective diversion controls have led directly to the creation of a population of addicted patients and nourished the illegal secondary market, both of which lie at the root of the opioid crisis, resulting in complex and costly consequences to Plaintiffs' provision of public health, social, and criminal justice services. (R. 514 at ¶¶1040-1060).

Defendants insist that Plaintiffs' alleged injuries are far too remote and indirect to establish proximate cause. (R. 491-1, PageID# 7515-7518; R. 497-1, PageID# 7605-7608).[50] They argue that there are numerous intervening causes which break the causal link between their own actions and Plaintiffs' harms. These include the actions of prescribing doctors, criminals in the secondary market, and addicted users, among others. **[*177]** *Id.* Defendants also argue that Plaintiffs' harms were not proximately caused by Defendants actions, because those harms are derivative of harms sustained by third parties. Defendants urge the court to reach the same result on causation as the one reached by courts in the recent mortgage finance cases. *See JP Morgan Chase Bank, 2013-Ohio-1035, 2013 WL 1183332, at *6; Ameriquest, 621 F. Supp. 2d at 536*.

The Ohio Supreme Court has explained that in order to establish proximate causation, "there must be some direct relation between the injury asserted and the injurious conduct alleged." *Cincinnati v. Beretta, 768 N.E.2d at 1148*. The Ohio Supreme Court in *Beretta* adopted *Holmes*' analysis for remoteness and proximate cause, concluding that

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[49] Nor is it necessary to address Defendants' arguments with regard to negligence *per se*, as those arguments presuppose Plaintiffs' failure to plead a common law duty.

[50] While asserting that Plaintiffs' negligence claim should be dismissed, the Manufacturers do not meaningfully develop any new argument and adopt earlier arguments. (R. 499-1, PageID# 7702). For the reasons stated elsewhere in this report and recommendation, such reiterated arguments, including the assertion that proximate cause is lacking, fail.

the complaint had set forth facts sufficient to establish proximate cause. As to the first factor, the court reasoned that concerns with the difficulty of proof were minimal, in part, because "the complaint...alleged that as a direct result of misconduct ...[the city] has suffered 'actual injury and damages including but not limited to, significant expenses for police, health, prosecution, emergency, corrections and other services.'" *Id. at 1148*. The second factor did not pose a problem because there was "little risk of double recovery, since [the city] is seeking recovery for injuries to itself **[*178]** only." *Id.* Finally, invoking the deterrence principle embedded in the third *Holmes* factor, the court stated that "[a]lthough appellant is indirectly attempting to protect its citizens from the alleged misconduct by the gun manufacturers and trade associations, appellant is seeking recovery for its own harm. Under these circumstances, the general interest will be best served by having this plaintiff bring this lawsuit." *Id.* The court reversed the appellate court ruling that the city's claims were "too remote for recovery." *Id.*

Although the facts of this case differ in some respects from *Beretta*, its analysis of remoteness under *Holmes* is persuasive. Furthermore, the court has conducted a proximate cause analysis regarding the *Holmes* factors in section III-A-2-b above that need not be repeated here.[51]

Noting that Plaintiffs plead criminal acts, Defendants assert that their position is analogous to sellers who supply to independent retailers from whom drugs are obtained for diversion. *See, e.g., Ashley Cty. v. Pfizer, Inc., 552 F.3d 659, 663 and n.5 (8th Cir. 2009)* (applying Arkansas law to find that intervening acts by retailers and methamphetamine cooks to whom they sold pseudoephedrine were independent causes relieving distributors of liability based **[*179]** on the legal sale of products later used for illicit purpose); *City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 424 (3d Cir. 2002)* (affirming dismissal of public nuisance claim against gun distributors because of the many "links that separate a manufacturer's sale of a gun to a licensee and the gun's arrival in the illegal market through a distribution scheme that is not only lawful, but also is prescribed by statute with respect to the manufacturers' conduct"). The Distributors also argue that Plaintiffs plausibly allege that only Manufacturers could have foreseen that intervening criminal or intentional acts would occur and, therefore, do not establish that the alleged harm was foreseeable to Distributors. (R. 744, PageID# 17672, *citing Feichtner v. Ohio Dep't of Trans., 114 Ohio App. 3d 346, 683 N.E.2d 112, 119-20 (Ohio Ct. App. 1995)* (recognizing that there is no common law duty to anticipate or foresee criminal activity); *Volter v. C. Schmidt Co., 74 Ohio App. 3d 36, 598 N.E.2d 35, 39 (Ohio Ct. App. 1991)* ("Where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct, the intentional act is considered a superseding cause because such acts are typically not foreseeable.")).

Not only does the complaint allege that the opioid addiction epidemic and its attendant injury to government entities were foreseeable to all Defendants, it also alleges that even after Defendants **[*180]** were aware of the opiate addiction crisis they continued distributing commonly abused and diverted drugs in quantities and with frequency that they knew or should have known could not be justified by legitimate medical need and they manipulated quotas to evade reporting duties and maintain that inflated level of sale.[52] (R. 514 at ¶¶18, 518, 550, 557, 565, 579, 496, 606-08, 763, 929, 1012, 1019-1020). The Distributors' argument is also refuted by allegations that they conspired with the Manufacturers in a concerted scheme to expand the opioid market, to ensure that distribution quotas remained artificially high and that suspicious orders were not reported. (R. 514 at ¶¶760-766). In addition, Defendants' arguments concerning third-party intervening acts and alleged superseding events raise significant factual issues not suitable for resolution on a motion to dismiss.

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[51] Although the Pharmacies were not subject to the RICO claims addressed above, the differences between the allegations against them and the remaining Defendants do not compel a different result when addressing the issue of proximate cause. The Pharmacies are alleged to have "failed to report suspicious orders, prevent diversion, or otherwise control the supply of opioids [flowing] into communities across America," (R. 514 at ¶¶579, 607-626), and have been the subject of fines by the DEA for failing to do so. (*Id.* at ¶¶627-659). Moreover, the Pharmacies, the ultimate dispenser of opioids, are arguably a step closer to the injured parties than the other Defendants.

[52] As the cited paragraphs illustrate, the Pharmacies' argument to the contrary is misplaced. (R. 742, PageID# 17611). The complaint does claim the Distributors could have foreseen, and were aware of, unnecessary prescriptions and the operation of pill mills, but nevertheless supplied them.

3. Economic Loss Rule

The Defendants argue that the economic loss doctrine requires dismissal of Plaintiffs' negligence claim. (R. 491-1, PageID# 7513-7514; R. 497-1, PageID# 7601-7602.).[53] They assert that the doctrine prohibits a negligence claim unless the plaintiff incurred a physical injury to person or property. *Id.*; *see* ***[*181]*** *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc., 106 Ohio St. 3d 412, 2005- Ohio 5409, 835 N.E.2d 701, 704 (Ohio 2005)*; *Floor Craft Floor Covering, Inc. v. Parma Cmty. Gen. Hosp. Ass'n, 54 Ohio St. 3d 1, 560 N.E.2d 206, 208 (Ohio 1990)*; *see also Deutsche Bank Nat'l Tr. Co., 863 F.3d at 477* (noting, "The premise of the economic loss rule is that tort law does not impose an independent duty to avoid consequential economic damages."); *Pavlovich v. Nat'l City Bank, 435 F.3d 560, 569 (6th Cir. 2006)*. Defendants also rely upon, *Queen City Terminals, Inc. v. Gen. Am. Transp.*, in which the Ohio Supreme Court held that "in order to recover indirect economic damages in a negligence action, the plaintiff must prove that the indirect economic damages arose from tangible physical injury to persons or from tangible property damage. Indirect economic damages that do not arise from tangible physical injury to persons or from tangible property may only be recovered in contract." *73 Ohio St. 3d 609, 1995- Ohio 285, 653 N.E.2d 661, 667 (Ohio 1995)*; *see also Ashtabula River Corp. Grp. II v. Contrail, Inc., 549 F.Supp.2d 981, 987 (N.D. Ohio 2008)* (R. 744, PageID# 17675).

Plaintiffs argue that the doctrine primarily applies to bar recovery in cases between parties in a contractual relationship. *See Corporex, 835 N.E.2d at 701*; *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co., 42 Ohio St. 3d 40, 537 N.E.2d 624 (Ohio 1989)*; *Digiknow, Inc. v. PKXL Cards, Inc., 2011-Ohio-3592, 2011 WL 2899600, at *1 (Ohio Ct. App. July 21, 2011)*. Plaintiffs argue that the doctrine does not apply to their negligence claim because it is not based on the negligent performance of contractual duties. (R. 654, PageID# 15795-15797).

The Ohio Supreme Court in *Corporex* explained that the rule "stems from the recognition of a balance between tort law, designed to redress losses suffered by a breach of duty imposed by law to protect societal **[*182]** interests, and contract law, which holds that parties to a commercial transaction should remain free to govern their own affairs." *835 N.E.2d at 704* ("Tort law is not designed to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement."). In other words, the economic loss rule recognizes that the risk of consequential economic loss is something that the parties can allocate by agreement when they enter into a contract. This allocation of risk is not possible where, as here, the harm alleged is caused by involuntary interactions between a tortfeasor and a plaintiff. Thus, courts have noted that in cases involving only economic loss, the rule "will bar the tort claim if the duty arose only by contract." *Campbell v. Krupp, 195 Ohio App. 3d 573, 2011-Ohio 2694, 961 N.E.2d 205, 211 (Ohio Ct. App. 2011)*. By contrast, "the economic loss rule does not apply—and the plaintiff who suffered only economic damages can proceed in tort—if the defendant breached a duty that did not arise solely from a contract." *Id.*; *see also Corporex, 835 N.E.2d. at 705* ("When a duty in tort exists, a party may recover in tort. When a duty is premised entirely upon the terms of a contract, a party may recover based upon breach of contract."); *Ineos USA LLC v. Furmanite Am., Inc., 2014-Ohio-4996, 2014 WL 5803042, at *6 (Ohio Ct. App. Nov. 10, 2014)* ("[W]here a tort claim alleges that a duty was breached independent **[*183]** of the contract, the economic loss rule does not apply.").

As discussed elsewhere in this opinion, Plaintiffs have pleaded facts which, if proven, plausibly establish the existence of a common law tort duty. Moreover, it would be premature on this limited record to apply the economic-loss rule as Defendants have characterized Plaintiffs' economic damages as purely derivative of personal injuries, which if ultimately successful at summary judgment or before the trier-of-fact, could foreclose this argument. In addition, Plaintiffs have facially pled damages to their proprietary interests. (R. 514 at ¶1063). As such, Defendants have not shown that Plaintiffs' negligence claim runs afoul of the economic loss rule.

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[53] Manufacturers make only cursory reference to the economic loss doctrine as a reason to dismiss Plaintiffs' negligence claim. (R. 499-1, PageID# 7702). They simply cite to *Corporex* in a bullet point, and then refer to a single paragraph of argument in their public nuisance section. Also, the Pharmacies adopt Distributors' arguments. (R. 742, PageID# 17613).

H. Count Eight: Fraud

In Count Eight, Plaintiffs assert a common law fraud claim against the Marketing Defendants. (R. 514, PageID# 11227). To state a cognizable cause of action for fraud under Ohio law, a complaint must plead the following elements:

> (a) a representation or, where there is a duty to disclose, omission of a fact; (b) which is material to the transaction at hand; (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether **[*184]** it is true or false that knowledge may be inferred; (d) with the intent of misleading another into relying upon it; (e) justifiable reliance upon the representation or concealment; and (f) a resulting injury proximately caused by the reliance.

Lucarell v. Nationwide Mutual Ins. Co., 152 Ohio St. 3d 453, 2018- Ohio 15, 97 N.E.3d 458, 472 (Ohio 2018) (citations omitted).

The briefs focus on the element of justifiable reliance. Generally, whether a plaintiff justifiably relied on an allegedly fraudulent misrepresentation or omission is a question of fact and not appropriate for determination on a motion to dismiss. *See, e.g., Jewell Coke Co., L.P. v. ArcelorMittal USA, Inc., 756 F. Supp. 2d 858, 867 (N.D. Ohio 2010)*. The Manufacturers assert that because the claim is based on alleged misrepresentations made to third parties, it fails to plead the essential element of justifiable reliance (R. 499-1, PageID# 7703). Specifically, they contend that the misrepresentations and omissions alleged by Plaintiffs were made to induce reliance by third-party payors (R. 514 at ¶1074), or directed at state and federal regulators (*id.* at ¶856), and with intent that others rely on their omissions. *Id.* at ¶1075. As such, they contend first-party reliance is lacking.

Plaintiffs respond that the complaint avers justifiable reliance and alleges that "Plaintiffs ... did in fact rightfully, reasonably, **[*185]** and justifiably rely on Marketing Defendants' representations and/or concealments both directly and indirectly ..." (R. 514 at ¶1081) and "proceeded under the misapprehension that the opioid crisis was simply a result of conduct by persons other than Defendants [and] [a]s a consequence, these Defendants prevented Plaintiffs from a more timely and effective response to the opioid crisis" (*id.* at ¶1082). (R. 654, PageID# 15801). In addition, they argue that Ohio recognizes a theory of recovery based on false statements made to third parties that are known or intended to deceive the pleader, *i.e.*,

> that where a party makes false representations to another with the intent or knowledge that they be exhibited or repeated to a third party for the purpose of deceiving him or her, the third party can maintain an action in tort against the party making the false statements for the damages resulting from the fraud.

50 Ohio Jur. 3d, Fraud and Deceit § 79 (2018). "The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker **[*186]** intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved." Restatement of the Law (Torts) *§ 533* (2018). Plaintiffs also cite to authority from the Sixth Circuit and this court recognizing that a *prima facie* common fraud claim is stated based on that theory. *See Nernberg v. Pearce, 35 F.3d 247, 250-51 (6th Cir. 1994)* (stating that "[i]t is generally accepted that a plaintiff is not required to prove direct reliance on a fraudulent misrepresentation to state a claim for fraud."); *accord Lewis v. Horace Mann Ins. Co., 410 F. Supp. 2d 640, 664 (N.D. Ohio 2005)* (denying summary judgment and reasoning that reliance may be satisfied where a fraudulent statement or omission becomes known to a complainant who acts upon it, even if indirectly communicated by others) (also citing Oh. Jur.3d. Ed., Fraud & Deceit § 89, and *Lin v. Gatehouse Constr. Co., 84 Ohio App. 3d 96, 616 N.E.2d 519, 524 (Ohio 1992))*.[54]

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[54] The cases that defendants cite, as plaintiffs note, are distinguishable because there was a lack of evidence supporting reliance. *See Lucarell, 97 N.E.3d at 473-474* (finding that plaintiff "failed to prove that any fraudulent representation had been made to her" where fraud claim was based on misrepresentation made by defendant to lender to induce lender to approve plaintiff's business loan); *Mike McGarry & Sons, Inc. v. Constr. Res. One, LLC, 2018-Ohio-528, ¶ 78-79 (Ohio Ct. App. Feb. 9,*

The Manufacturers are correct in stating that the complaint alleges that they intentionally made misrepresentations and omissions to the medical community, patients, and government regulators with the intent of inducing reliance. (R. 499-1, PageID# 7703-7704). Their contention that this claim fails by not alleging any first-party reliance, however, is not well-taken, **[*187]** as noted above. In addition, Plaintiffs also aver that the Manufacturers knowingly set out to convince physicians, patients and the public at large that false propositions regarding the safety and efficacy of opioids were true (R. 514, *e.g.*, ¶¶177-178, 1076-1078); issued press releases falsely minimizing the risks of addiction and abuse potential of the drugs (*id. e.g.*, ¶¶190, 340-341); and in public outreach and pronouncements, falsely portrayed their compliance with regulatory obligations, cooperation with law enforcement, and commitment to preventing diversion (*id. e.g.*, ¶¶595-98, 601-606). The complaint further alleges:

> Defendants also concealed from Plaintiffs the existence of Plaintiffs' claims by hiding their lack of cooperation with law enforcement and affirmatively seeking to convince the public that their legal duties to report suspicious sales had been satisfied through public assurances that they were working to curb the opioid epidemic. They publicly portrayed themselves as committed to working diligently with law enforcement and others to prevent diversion of these dangerous drugs and curb the opioid epidemic, and they made broad promises to change their ways insisting **[*188]** they were good corporate citizens. These repeated misrepresentations misled regulators, prescribers and the public, including Plaintiffs, and deprived Plaintiffs of actual or implied knowledge of facts sufficient to put Plaintiffs on notice of potential claims.

Id. at ¶772. These allegations support a reasonable inference that these Defendants intended to induce Plaintiffs to rely on their false assurances and omissions in order to deter potential liability for injuries such as those alleged in the complaint. Based on the foregoing, a genuine dispute of fact exists as to whether Plaintiffs' justifiably relied on alleged fraudulent statements and omissions, and it is not appropriately decided on a motion to dismiss.

I. Count Nine: Injury Through Criminal Acts

In Count Nine, Plaintiffs seek relief against all Defendants for injury through criminal acts pursuant to *O.R.C. § 2307.60(A)(1)*, which states:

> Anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law, may recover the costs of maintaining the civil action and attorney's fees if authorized by any provision of the Rules of Civil Procedure or another section of the Revised **[*189]** Code or under the common law of this state, and may recover punitive or exemplary damages if authorized by *section 2315.21* or another section of the Revised Code.

O.R.C. § 2307.60(A)(1).[55] Defendants argue that the vast majority of courts have held that "a conviction for the alleged predicate criminal act" is required before a cause of action accrues. (R. 499-1, PageID# 7704; R. 497-1, PageID# 7614).[56] Defendants maintain that Plaintiffs have failed to allege the requisite criminal conviction against any of them and, therefore, their claims must be dismissed. *Id.* Conversely, Plaintiffs contend that the cases upon which Defendants rely are irreconcilable with a 2016 decision from the Supreme Court of Ohio—*Jacobson v. Kaforey, 149 Ohio St. 3d 398, 2016- Ohio 8434, 75 N.E.3d 203 (Ohio 2016)*. (R. 654, PageID# 15802-15805). Therein, the Ohio Supreme Court held that:

2018) (reversing denial of summary judgment, reasoning that fraud claim could not be maintained where party presented no evidence that it took action in reliance on the allegedly false statement).

[55] Defendants acknowledge the lone exception is inapplicable. (R. 499-1, PageID# 7704).

[56] *Citing Jane v. Patterson, 2017 U.S. Dist. LEXIS 55952, 2017 WL 1345242, at *4 (N.D. Ohio Apr. 12, 2017)*; *A.A. v. Otsego Local Sch. Bd. of Educ., 2016 U.S. Dist. LEXIS 176621, 2016 WL 7387261, at *9 (N.D. Ohio Dec. 21, 2016)*; *Ortiz v. Kazimer, 2015 U.S. Dist. LEXIS 38496, 2015 WL 1400539, at *12 (N.D. Ohio Mar. 26, 2015)*, *aff'd*, *811 F.3d 848 (6th Cir. 2016)*; *Tri-State Comp. Exch., Inc. v. Burt, 2003-Ohio-3197, 2003 WL 21414688, at *6 (Ohio Ct. App. June 20, 2003)*.

> R.C. 2307.60(A)(1), by its plain and unambiguous terms, creates a statutory cause of action for damages resulting from any criminal act. The wording chosen by the Ohio General Assembly is explicit: any person "injured * * * by a criminal act has * * * a civil action" unless a civil action "is specifically excepted by law." (Emphasis added.) R.C. 2307.60(A)(1).

Jacobson, 75 N.E.3d at 206 (emphasis in original). A few weeks before *Jacobson*, a decision from this district found that "Ohio Rev. Code § 2307.60(A)(1) clearly authorizes a civil action **[*190]** for damages for anyone injured by a criminal act, regardless of whether any person has pleaded guilty to or been convicted of a criminal offense." *Chem. Bank v. Kausmeyer, 2016 U.S. Dist. LEXIS 170659, 2016 WL 7178662, at *7 (N.D. Ohio Dec. 9, 2016)* (Pearson, J.) (*citing* *Cuyahoga Hts. Local School Dist. v. Palazzo, 2016 Ohio-5137, 69 N.E.3d 162, 2016 WL 4037309 (Ohio Ct. App. July 28, 2016))*. In addition, a recent decision from this district observed that O.R.C. § 2307.60 authorizes a civil action for damages caused by criminal acts, noting:

> Interestingly, in 2007, the Ohio General Assembly amended ORC § 2307.60 to create a *presumption of civil liability* when the defendant had been convicted of a criminal violation. Am. Sub. S.B. 117. Had the General Assembly wanted to make a criminal conviction a condition precedent to establishing an ORC § 2307.60 claim, they presumably could have done so. However, the creation of this presumption does not conclusively establish that a conviction is not required for civil liability.
>
> Accordingly, the Court will deny the motion to dismiss at this time. Defendants may renew their challenge in the form of a motion for summary judgment after discovery and further research.

*Buddenberg v. Weisdack, 2018 U.S. Dist. LEXIS 108333, 2018 WL 3159052, at *5-6 (N.D. Ohio June 28, 2018)* (Polster, J.) (emphasis in original).

Given that Defendants, as the moving party, bear the burden of demonstrating that Plaintiffs fail to state a claim, dismissal cannot be recommend at this time, especially given the not unreasonable **[*191]** inference from the Ohio Supreme Court's *Jacobson* decision that a conviction may not be a necessary prerequisite.

The Pharmacies also assert that Plaintiffs have not alleged any "injur[y]" to their "person or property" pursuant to O.R.C. § 2307.60(A)(1). (R. 497-1, PageID# 7615). They allege O.R.C. § 2307.60(A)(1) does not provide for recovery for purely economic loss, but cite no authority in support of this proposition, and the statute itself does not contain such an express limitation. *Id.* The only case cited by the Pharmacies is inapposite. *See* Pavlovich, 435 F.3d at 569 ("Under Ohio law, "[t]he economic-loss rule generally prevents recovery *in tort* of damages for purely economic loss.") (emphasis added). The *Pavlovich* decision contains no discussion concerning a statutory action brought under O.R.C. § 2307.60(A)(1), and Defendants cite no other authority suggesting claims arising under that section should be construed identically to tort claims.

Finally, the Pharmacies argue that they are "specifically excepted by law" from liability under § 2307.60, by virtue of O.R.C. §§ 2925.02(B), 2925.03(B). (R. 497-1, PageID# 7615). Defendants fail to meaningfully develop this argument. The complaint alleges that Defendants are not in compliance with multiple provisions of the Revised Code rendering any exceptions unavailable. **[*192]** (R. 514 at ¶¶1095-1097). The Pharmacies protest that "such unsupported and generic legal conclusions should be disregarded." (R. 497-1, PageID# 7615). This statement cannot be credited, as Plaintiffs' assertions or conclusions, as Defendants phrase it, cannot be construed in a vacuum ignoring the other voluminous allegations in the complaint that support the conclusion. To the extent Defendants merely reiterate the safe harbor argument addressed above, it fails for the same reasons.

J. Count Ten: Unjust Enrichment

In Count Ten, Plaintiffs assert an unjust enrichment claim against all Defendants. (R. 514, PageID# 11235). The following elements comprise a valid unjust enrichment cause of action: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *Hambleton v. R.G. Barry Corp., 12 Ohio St. 3d*

179, 12 Ohio B. 246, 465 N.E.2d 1298 (Ohio 1984) (internal quotations omitted). Plaintiffs allege that they conferred a benefit upon Defendants "by paying for Defendants' externalities: the cost of the harms caused by Defendants' improper distribution practices," and that retention of that benefit would be unjust. (R. **[*193]** 514 at ¶¶1114-1115; 1108-1121).

The Defendants assert that Plaintiffs do not properly allege that they conferred a benefit upon them. (R. 491-1, PageID# 7519-7522; R.497-1, PageID# 7612; R. 499-1, PageID# 7705-7706). The Distributors argue that under Ohio law, "[i]t is not enough that a plaintiff suffers a loss and defendant receives a benefit; rather, 'a plaintiff must establish that a benefit has been conferred upon that defendant *by that particular plaintiff*.'" (R. 491-1, PageID# 7520-21) (quoting Ohio Edison Co. v. Direct Energy Bus., LLC, 2017 U.S. Dist. LEXIS 117025, 2017 WL 3174347, at *3 (N.D. Ohio July 26, 2017) (emphasis in original); Bihn v. Fifth Third Mortg. Co., 980 F. Supp. 2d 892, 904 (S.D. Ohio 2013)). Moreover, the Distributors construe Johnson v. Microsoft Corp., 106 Ohio St. 3d 278, 2005- Ohio 4985, 834 N.E.2d 791, 799 (Ohio 2005) and its progeny to announce a "rule of law" holding that unjust enrichment claims may only be sustained if they arise from an economic transaction between the parties.[57] (R. 491-1, PageID# 7520-21; R. 744, PageID# 17675-17676).

Plaintiffs assert *Ohio Edison* is distinguishable, arguing that this case does not raise the same concerns—namely, an inability to allocate benefits and losses where multiple actors bought and sold from each other in a complicated market. They also argue that *Johnson* "is even farther afield" because its concern was that indirect purchasers would invoke unjust enrichment to accomplish an end-run around antitrust **[*194]** laws limiting recovery to direct purchasers. According to Plaintiffs, the reasoning does not mandate the same privity in this case. (R. 654, PageID# 15808). In the present action, Plaintiffs' theory of recovery is not based on a financial transaction, therefore the claim is not barred by *Johnson's* limiting indirect purchasers from maintaining unjust enrichment claims against parties other than those with whom they dealt with directly. Johnson, 834 N.E.2d at 799.

Further, the Pharmacies argue that the alleged expenditures did not save them any expense or loss, but rather the money benefited Plaintiffs' residents by increasing healthcare services and addiction treatment for opioid users. City & Cty. of San Francisco v. Philip Morris, Inc. 957 F. Supp. 1130 (N.D. Cal 1997) (finding that the City could not recover the costs of providing medical care to indigent smokers where there was no allegation that defendant tobacco company had a duty to cover those costs and plaintiff did not show that defendant was enriched); Ashley Cty., Ark. v. Pfizer, Inc., 552 F.3d 659, 666 (8th Cir. 2009) (explaining that Arkansas law only implies a contract to pay for services when they were rendered in expectation of payment from a defendant, and finding that plaintiff had no expectation that the defendant drug manufacturer would pay for municipal services provided in dealing with **[*195]** the methamphetamine crisis). (R. 497-1, PageID# 7612; R. 742, PageID# 17617).

Plaintiffs assert that "[u]njust enrichment arises not only where an expenditure by one party adds to the property of another but also where the expenditure saves the other from expense or loss." (R. 654, PageID # 15806-15807, *quoting* White v. Smith & Wesson, 97 F. Supp. 2d 816, 829 (N.D. Ohio 2000) (Nugent, J.)). Therein, the court found that a municipal plaintiff adequately plead an unjust enrichment claim where it was alleged that plaintiff "conferred a benefit upon Defendants, *i.e.*, that the City paid for what may be called the Defendants' externalities—the costs of the harm caused by Defendants' [conduct].").[58] *Id.* Courts applying *White's* analysis have arrived at the same result. *See, e.g.,* City of Los Angeles v. Wells Fargo & Co., 22 F. Supp. 3d 1047, 1061 (C.D. Cal. 2014) (citing *White* and finding a sufficient restitution theory where plaintiff alleged the benefits conferred were "externalities—the costs of harm caused by Defendants' discriminatory lending that the City has had to shoulder"); City of Los Angeles v. Bank of Am. Corp., 2014 U.S. Dist. LEXIS 85957, 2014 WL 2770083, at *12-13 (C.D. Cal. June 12, 2014) (finding a valid claim for unjust enrichment where plaintiff alleged that the defendants' predatory lending resulted in their

[57] The Manufacturers raise this same argument, citing Randleman v. Fid. Nat'l Title Ins. Co., 465 F. Supp. 2d 812, 824 (N.D. Ohio 2006) in support. (R. 499-1, PageID# 7706).

[58] Because the Plaintiffs theory of recovery is not based on an economic transaction, the Distributors assertion that *White* was "effectively overruled" by *Johnson* does not follow. (R. 744, PageID# 17676).

enrichment at plaintiffs' expense, which paid for defendants' "externalities, or costs of harm caused by its mortgage lending discrimination"); **[*196]** *City of Boston, 12 Mass. L. Rep. 225, 2000 WL 1473568, at *18* (finding plaintiffs stated a claim for unjust enrichment by alleging that they "conferred a benefit upon Defendants by paying for the costs of the harm caused by Defendants' conduct ("externalities")").[59]

Distributors also argue that the complaint fails to plead that they had "knowledge" of the claimed benefit allegedly bestowed upon them, maintaining that alleging that "Defendants were aware of these obvious benefits ...." (R. 514, ¶1115) is too vague and conclusory to state the element. (R. 491-1, PageID# 7521). An identical allegation has been recognized by this court as adequately supporting the unjust enrichment element of knowledge at the pleading stage. *White, 97 F. Supp. 2d at 829*. Distributors further argue that no injustice occurred because Plaintiffs are responsible for the alleged social service expenditures, but cite no authority for that proposition. (R. 491-1, PageID# 7522). Conversely, the *White* decision rejected a similar argument noting that "Defendants fail to cite a single case from Ohio that even comes close to advocating [the] view" that a municipality should be prohibited from recovering "for all governmental functions, such as police, medical, fire and emergency services, **[*197]** and other related expenditures, because these are the kinds of traditional services and functions that a municipality is expected to provide and which are most efficiently and fairly spread among the public." *97 F. Supp. 2d at 821-822* (internal quotations omitted). Here, the complaint pleads that the costs Plaintiffs assumed "are not part of the normal and expected costs of a local government's existence," and that "Defendants' alleged wrongful acts are neither discrete nor of the sort a local government can reasonably expect." (R. 514, ¶¶1118-1119).

Finally, the Defendants contend the claim should be dismissed, arguing they are derivative of Plaintiffs' other claims, and would permit "'an end run around policies' barring a plaintiffs' other failed claims." (R. 491-1, PageID# 7519-7520, *citing* *Johnson, 834 N.E.2d at 799*; R. 499-1, PageID# 7705). While that proposition is correct, the propriety of any application to this case would be determined at a later stage of these proceedings. In addition, multiple causes of action based on the same conduct may be asserted alternatively. *PCA Minerals, LLC v. Merit Energy Co., LLC, 725 F. App'x 342, 349 (6th Cir. 2018)* ("nothing prohibits a plaintiff from pleading multiple claims when there are...multiple theories...that are legally viable and consistent with the facts; where **[*198]** a plaintiff has a contract claim, tort claim, and a claim for statutory violation, all may be pled"); *Hutchings v. Nationstar Mortg. LLC, 2013 U.S. Dist. LEXIS 149027, 2013 WL 5670939 (N.D. Ohio Oct. 16, 2013)* ("[A] plaintiff is not precluded from arguing or pursuing multiple theories in the alternative throughout the course of the litigation."); *Auto Chem Labs., Inc. v. Turtle Wax, Inc., 2008 U.S. Dist. LEXIS 83158, 2008 WL 4372697, at *15 (S.D. Ohio Sept. 23, 2008)* ("[A] party may plead alternative causes of action for the same matter, but may only prevail under one or the other.").

Based on the alleged facts in this case, Plaintiffs state a facially plausible unjust enrichment claim on the theory that they conferred a benefit upon all Defendants by alleging that they paid for the cost of harm caused by the defendant's conduct, *i.e.*, the defendant's externalities. *See, e.g., City of Everett v. Purdue Pharma L.P., 2017 U.S. Dist. LEXIS 156653, 2017 WL 4236062, *9 (W.D. Wash. Sept. 25, 2017)* (finding that plaintiffs' unjust enrichment claim based on their payment of the "so called externalities" of a defendant's conduct was not facially implausible). Accordingly, it is recommended that the court deny the motions to dismiss Count Ten of the complaint.

K. Count Eleven: Civil Conspiracy

Count Eleven of the complaint alleges a civil conspiracy claim against all Defendants. (R. 514, PageID# 11237). "An underlying unlawful act is required before a civil conspiracy claim can succeed." *Williams v. Aetna Fin. Co., 83 Ohio St. 3d 464, 1998- Ohio 294, 700 N.E.2d 859, 868 (Ohio 1998)*. "Conspiracy in and of itself does not

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[59] Plaintiffs also note that potential recovery under unjust enrichment and restitution theories are recognized where third parties have assumed costs of pollution remediation necessitated by defendant activities. *See, e.g., Little Hocking Water Ass'n, Inc. v. E.I. du Pont Nemours & Co., 91 F. Supp. 3d 940, 985-986 (S.D. Ohio 2015)* (observing that unjust enrichment may serve as an alternative theory of recovery where actual damages are too difficult to determine, but it would be unjust to allow the defendant to benefit from the savings it enjoyed without payment to the plaintiff) (citing cases). (R. 654, PageID # 15807-08).

normally **[*199]** establish a basis for recovery in a civil action in Ohio; rather, there must be an actionable wrong committed as a result of the conspiracy." *Glassner v. R.J. Reynolds Tobacco Co., 223 F.3d 343, 354 (6th Cir. 2000)* (*quoting* *NPF IV, Inc., v. Transitional Health Servs., 922 F. Supp. 77, 83 (S.D. Ohio 1996))*; *Hale v. Enerco Grp., Inc., 2011 U.S. Dist. LEXIS 781, 2011 WL 49545, at *5 (N.D. Ohio Jan. 5, 2011)* (reciting the elements of a cognizable conspiracy claim as "(1) a malicious combination; (2) two or more persons; (3) injury to person or property; and (4) existence of an unlawful act independent from the actual conspiracy") (citation and internal quotation marks omitted).

1. Unlawful Acts

Defendants argue that the cause of action should be dismissed "for failure to allege any actionable underlying tort" or an "underlying unlawful act." (R. 491-1, PageID# 7524; R. 497-1, PageID# 7613; R. 499-1, PageID# 7706-7708). With respect to the Manufacturers, as addressed above, Plaintiffs have sufficiently pled a claim for fraud—an intentional tort. In *Williams*, the Ohio Supreme Court found that the evidence supported a finding of a civil conspiracy where the defendants committed a fraud upon the plaintiff. *700 N.E.2d at 869*. With respect to the other Defendants, Plaintiffs also note that under Ohio law, "the unlawful acts of any one member of the conspiracy will satisfy the underlying unlawful act requirement". (R. 654, PageID# 15814, *quoting* *Hale, 2011 U.S. Dist. LEXIS 781, 2011 WL 49545, at *5* (citations and **[*200]** internal quotation marks omitted); *Williams, 83 Ohio St. 3d 464, 1998-Ohio 294, 700 N.E.2d 859, 868* ("[i]n a conspiracy, the acts of co-conspirators are attributable to each other.")). They contend that the complaint, moreover, alleges facts demonstrating that *each* Defendant engaged in unlawful acts supporting the causes of action therein. With the exception of the negligence claim, each of Plaintiffs' claims is based on alleged wrongful acts pursued "purposely, without a reasonable or lawful excuse" and therefore may serve to fulfill the underlying unlawful act element. *See* *Williams, 700 N.E.2d at 868*. Thus, the statutory public nuisance, Ohio RICO, and injury through criminal acts claims would also suffice.

2. Conspiratorial Agreement

Likewise, the Defendants' arguments that a conspiratorial agreement or malicious combination has not been alleged is not well taken. (R. 491-1, PageID# 7522-7524; R. 497-1, PageID# 7613-7614; 499-1, Page ID#7707). Pleading the existence of a malicious conspiracy requires "only a common understanding or design, even if tacit, to commit an unlawful act." *Gosden v. Louis, 116 Ohio App. 3d 195, 687 N.E.2d 481, 496-98 (Ohio Ct. App. 1996)*. "All that must be shown is that ... the alleged coconspirator shared in the general conspiratorial objective ...." *Aetna Cas. & Sur. Co. v. Leahey Const. Co., Inc., 219 F.3d 519, 538 (6th Cir. 2000)* (citation and internal quotation marks omitted). Direct evidence of an express **[*201]** agreement to undertake unlawful activity is rare and not required; a party may rely on circumstantial evidence to prove the claim. *Weberg v. Franks, 229 F.3d 514, 528 (6th Cir. 2000)*. The complaint alleges,

> Defendants conduct in furtherance of the conspiracy described herein was not mere parallel conduct because each Defendant acted directly against their commercial interests in not reporting the unlawful distribution practices of their competitors to the authorities, which they had a legal duty to do. Each Defendant acted against their commercial interests in this regard due to an actual or tacit agreement between the Defendants that they would not report each other to the authorities so they could all continue engaging in their unlawful conduct.

(R. 514 at ¶1130, *see also* ¶¶552-553, 764-766). Plaintiffs note that conduct against economic self-interest is recognized as a "plus factor" that may support the plausibility of alleged conspiratorial behavior. (R. 654, PageID# 15812, citing *In re Polyurethane Foam Antitrust Litig., 152 F. Supp. 3d 968, 989 (N.D. Ohio 2015))*. Furthermore, the complaint alleges that Defendants worked together to manipulate quotas (R. 514 at *e.g.* ¶¶526-528, 548, 550), and that their failure to comply with diversion prevention obligations (*id., e.g.,* ¶¶551-553, 565-566, 611-619) were mutually **[*202]** beneficial to all Defendants in the scheme to expand the opioid market (*id., e.g.* ¶¶760-766). The court has also discussed above the many allegations that the three sets of Defendants acted in concert and need not repeat those discussions here. Although Defendants fault Plaintiffs for not pleading with pinpoint accuracy, it is alleged that Defendants' activities were clandestine and hidden from the public. Prior to discovery, such precision cannot reasonably be expected, and Defendants' position goes well beyond the *Twombly* and *Iqbal* pleading requirements. Defendant's motion to dismiss Count Eleven should, therefore, be denied.

L. Statewide Concern Doctrine

The Manufacturers and Distributors argue that Plaintiffs' claims should be dismissed under the "statewide concern" doctrine, which "is a fundamental principle of Ohio law that... a municipality may not, in the regulation of local matters, infringe on matters of statewide concern." *Reading v. Pub. Util. Comm., 846 N.E.2d 840, 845-46 (Ohio 2016)* (quoting *State ex rel. Evans v. Moore, 69 Ohio St. 2d 88, 431 N.E.2d 311 (Ohio 1982)* (prevailing-wage law superseded local wage regulation)); *see also* *State ex rel. Villari v. Bedford Hts., 11 Ohio St. 3d 222, 11 Ohio B. 537, 465 N.E.2d 64 (Ohio 1984)* (calculation of employee benefits), *overruled on other grounds,* *State ex rel. Adkins v. Sobb, 26 Ohio St. 3d 46, 26 Ohio B. 39, 496 N.E.2d 994 (Ohio 1986)* (vacation-leave credits); *Cleveland Elec. Illum. Co. v. Painesville, 15 Ohio St. 2d 125, 239 N.E.2d 75 (Ohio 1968)* (transmission of electricity through high-voltage lines); *State ex rel. McElroy v. Akron, 173 Ohio St. 189, 181 N.E.2d 26 (Ohio 1962)* (licensing of watercraft). **[*203]** Defendants cite Ohio Supreme Court cases recognizing the general doctrine, but have not cited any Ohio authority holding that the doctrine applies to preclude *lawsuits* brought to vindicate rights under federal or state law. For instance, in *JP Morgan*, an Ohio appellate court refrained from making any ruling on that ground, offering only *dicta* to suggest that litigation might, under certain circumstances, constitute regulation. *2013-Ohio-1035, 2013 WL 1183332, at *6* ("The existence of regulation should not, itself, preclude [a nuisance] cause of action. This will often require more evidentiary development than available when ruling on a motion to dismiss.")

Plaintiffs argue that Ohio's Home Rule Amendment allows a sphere of joint authority where local regulation of police powers can co-exist with state regulation in general matters so long as the local regulation does not conflict with state law. *Ohio Const. Art. XVIII, § 3*; *American Financial Service Ass'n v. Cleveland, 112 Ohio St. 3d 170, 2006-Ohio 6043, 858 N.E.2d 776, 784 (Ohio 2005)*. Plaintiffs assert that they possess police powers, including the power to "adopt and enforce local health and safety measures" in order to "protect the public health, safety, or morals, or the general welfare of the public." *See* *Marich v. Bob Bennett Constr. Co., 116 Ohio St. 3d 553, 2008- Ohio 92, 880 N.E.2d 906, 911 (Ohio 2008)*. Therefore, Plaintiffs argue that this litigation presents no conflict with state law.

The Ohio Supreme Court has explained **[*204]** that even where the doctrine applies, it does not trump the state constitutional authority of municipalities to enact legislation pursuant to the Home Rule Amendment, provided that the local legislation is not in conflict with general laws. *American Financial Services*, on which Defendants rely, explains that "the Ohio Constitution's home-rule provision protects municipalities' authority to govern themselves, and it provides municipalities some authority to control local health and safety matters when the exercise of that authority does not conflict with general laws." *858 N.E.2d at 784*. To determine whether an ordinance is in 'conflict' with general laws, "the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Id.* The only such conflicts Defendants mention are with the Ohio Attorney General's lawsuit over the opioid crisis and Distributors' unexplained citation to *O.R.C. §4729.01*. (R. 499-1, PageID# 7662; R. 491-1, PageID# 7515). Defendants argue that if both of these suits proceed, they would impermissibly split the claims at issue and "risk inconsistent rulings and duplicative recoveries...." (R. 499-1, PageID# 7662). Defendants, however, have identified no Ohio Supreme **[*205]** Court authority holding that, in such context, the statewide concern doctrine bars locally-originated municipal or county lawsuits seeking to remedy alleged injuries within their borders. Dismissal, therefore, is unwarranted.

M. Article III Standing

The Pharmacies move to dismiss to the complaint on the ground that Plaintiffs lack standing under Article III of the U.S. Constitution. (R. 497-1, PageID# 7595-7598). Article III standing requires: (1) an "injury in fact" (2) that is "fairly traceable to the challenged actions of the defendant, and not the result of the independent action of some third party not before the court" and (3) that is "likely to be redressed by the requested relief." *Bank of Am. Corp. v. City* of Miami, 137 S. Ct. 1296, 1302, 197 L. Ed. 2d 678 (2017); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The Pharmacies assert that Plaintiffs have not suffered an "injury in fact" but only a "generalized grievance" and that Plaintiffs' injury is not "fairly traceable" to the Pharmacies' conduct. (R. 497-1, PageID# 7596-7597). They do not contest the third element.

1. Injury in Fact

For purposes of Article III standing, an injury cannot be based on a "generalized grievance" that "no more directly and tangibly" affects the plaintiff "than it does the public at large." *Lujan, 504 U.S. 555 at 574-575, 112 S. Ct. 2130, 119 L. Ed. 2d 351*. Cases assessing "generalized grievances" typically involve citizens **[*206]** challenging the propriety of governmental action. *Id. at 573, 576*. The cases the *Lujan* court used to illustrate what is meant by "generalized grievance" involved taxpayer lawsuits—not suits brought by governmental entities. *See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)* (no standing where taxpayer sued Department of Health, Education and Welfare for allegedly discounted conveyance of government property to a Christian college); *U.S. v. Richardson, 418 U.S. 166, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974)* (holding taxpayers' challenge to the government's failure to disclose CIA expenditures was a "generalized grievance"). *Lujan* itself involved a suit by an environmental advocacy organization challenging a rule promulgated by the Secretary of the Interior, ruling that plaintiffs had alleged an injury to the species in question, but not to themselves. *504 U.S. 555 at 577-578, 112 S. Ct. 2130, 119 L. Ed. 2d 351*.

The Defendants rely on *Richardson and Coyne v. American Tobacco Co., 183 F.3d 488 (6th Cir. 1999)* to support their conclusion that Plaintiffs allege only a generalized grievance. (R. 497-1, PageID# 7596). In *Coyne*, two Ohio local officials sued tobacco companies as private citizens—not in their representative capacities—alleging that the tobacco companies had caused the State of Ohio to expend public funds on health care costs caused by tobacco-related illnesses. *Id. at 491*. The Sixth Circuit held that these **[*207]** plaintiffs had asserted harms that affected the State as a whole and thus had only asserted a generalized grievance. The Pharmacies argue that Plaintiffs' alleged harms are like those in *Coyne*.

The court is not persuaded that Plaintiffs have alleged only a "generalized grievance." The plaintiffs in *Coyne, Lujan, Richardson*, and *Valley Forge Christian College* lacked standing because, as taxpayers, their harms were no different from those of all taxpayers. This is not the case here. Plaintiffs' allegations of extraordinary increases in public expenditures on hospitals, law enforcement, emergency and first responders, treatment of infants born with opioids-related medical conditions, and the criminal justice system constitute injury in fact. (R. 514 at ¶948).

2. Fairly Traceable

The Sixth Circuit has recently addressed the "fairly traceable" prong of the Article III standing test, explaining that it is a lower standard than proximate cause. *Parsons v. U.S. Dep't of Justice, 801 F.3d 701 (6th Cir. 2015)*. The *Parsons* court noted that "even an attenuated line of causation to the eventual injury" would suffice. *Id. at 713*; *United States v. Students Challenging Regulatory Agency Procs. (SCRAP), 412 U.S. 669, 688, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973)*. The court explained that causation in this context "means more than speculative, but less than but-for." *Parsons, 801 F.3d at 714*. In short, so long as the causal **[*208]** link is more than merely speculative, a plaintiff's injuries will be deemed fairly traceable to the actions of the defendant.

The Pharmacies argue that any link between Plaintiffs' alleged harm and their own alleged failure to monitor and report suspicious orders is wholly speculative and does not meet even the relaxed standard of causation associated with the "fairly traceable" requirement for Article III standing. Plaintiffs have alleged that all Defendants, including the Pharmacies, failed to monitor, report, and prevent the diversion of prescription opioids and that this failure has caused Plaintiffs to incur extraordinary municipal costs. (R. 514 at ¶¶555-556, 579-606, 607-659, 934). The court finds these allegations are sufficient. Because Plaintiffs have plausibly pleaded an injury in fact that is fairly traceable to the actions of Defendants, the claim that Plaintiffs lack Article III standing to bring this action should be denied.

IV. Conclusion

After fully considering the second amended complaint and the memoranda in support and against dismissal, it is recommended that the Manufacturers', Distributors' and Pharmacies' separate Motions to Dismiss (R. 491, R. 497, R. 499) be **[*209]** GRANTED in part and DENIED in part. Specifically, it is recommended that the motions be GRANTED with respect to the common law absolute public nuisance claim contained in Count Six, and GRANTED with respect to the City of Akron's statutory public nuisance claim in Count Five to the extent it is based on violations of Ohio or federal drug laws, or the rules of the board of pharmacy. In all other respects, it is recommended that the motions be DENIED.

/s/ *David A. Ruiz*

David A. Ruiz

United States Magistrate Judge

Date: October 5, 2018

LexisNexis

Steves & Sons, Inc. v. Jeld-Wen, Inc.

United States District Court for the Eastern District of Virginia, Richmond Division

October 5, 2018, Decided; October 5, 2018, Filed

Civil Action No. 3:16cv545

Reporter

345 F. Supp. 3d 614 *; 2018 U.S. Dist. LEXIS 173704 **; 2018-2 Trade Cas. (CCH) P80,553; 2018 WL 4855459

STEVES AND SONS, INC., Plaintiff, v. JELD-WEN, INC., Defendants.

Prior History: Steves & Sons, Inc. v. Jeld-Wen, Inc., 252 F. Supp. 3d 537, 2017 U.S. Dist. LEXIS 75308 (E.D. Va., May 17, 2017)

Core Terms

doorskin, divestiture, plant, merger, customers, antitrust, manufacturers, door, divested, suppliers, prices, entity, hardship, remedies, laches, Acquisition, damages, costs, lessened, effects, parties, restore, cases, new owner, buyer, injunctive relief, termination, long-term, public interest, courts

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Judges: Robert E. Payne, Senior United States District Judge.

Opinion by: Robert E. Payne

Opinion

[*624] PUBLIC VERSION

MEMORANDUM OPINION

This matter is before the Court on PLAINTIFF STEVES AND SONS, INC.'S MOTION FOR EQUITABLE RELIEF (ECF No. 1191), which the parties addressed through briefs before and after the evidentiary hearing on equitable remedies ("the Remedies Hearing"). For the reasons set forth below, PLAINTIFF STEVES AND SONS, INC.'S MOTION FOR EQUITABLE RELIEF (ECF No. 1191) will be granted in part and denied in part.

GENERAL BACKGROUND

On June 29, 2016, Steves and Sons, Inc. ("Steves") filed this action against JELD-WEN, Inc. ("JELD-WEN") by filing a COMPLAINT FOR INJUNCTIVE AND DELCARATORY RELIEF, DAMAGES AND SPECIFIC PERFORMANCE (ECF No. 1). The Complaint contained six counts, including COUNT ONE which alleged a violation of *Section 7 of the Clayton Act*, § *15 U.S.C. § 18*, and sought damages **[**7]** under *Section 4 of the Clayton Act*, and injunctive relief under *Section 16 of the Clayton Act*, all by virtue by an allegedly illegal merger that occurred in 2012 but that subsequently substantially lessened competition in the so-called molded interior doorskin market. COUNT TWO alleged various breaches of contract. Steves voluntarily dismissed COUNT THREE (Breach of Warranty), COUNT FIVE (Specific Performance), and COUNT SIX (Trespass to Chatels). In COUNT FOUR, Steves sought declaratory relief and that claim remains for decision by the Court.

COUNTS ONE and TWO were tried to a jury and the jury returned a verdict in favor of Steves on both the antitrust claim and the breach of contract claims. Steves' claim for equitable relief is based on the jury's finding of liability on the antitrust violations in COUNT ONE and arises by virtue of *Section 16 of the Clayton Act*.

By agreement of the parties, the record in the antitrust and breach of contract trial is part of the record upon which the decision respecting Steves' motion for equitable remedies will be decided. In addition, the Court conducted a three day evidentiary hearing during which the parties presented additional evidence on the issues of equitable relief. **[**8]**

Equitable relief under *Section 16 of the Clayton Act* must be tethered to the alleged violation of *Section 7 of the Clayton Act* found by the jury. It is therefore appropriate briefly to summarize the evidence upon which the jury found that JELD-WEN had violated *Section 7 of the Clayton Act*.

The product at issue in this litigation is called an interior molded doorskin. It is created by pouring a moist, softened fibrous material (treated with resin and wax) into a mold and then subjecting it to heat and pressure. The doorskin is a component part of an interior molded door which is made with a four-sided wooden frame and certain filling material to which the molded doorskin is glued. The doorskin provides the decorative covering for the front and the back of the door. The end product resembles a solid wood door but is much lighter and can be made and shipped at a considerably lower cost than a solid wooden door.

Steves and JELD-WEN both sell interior molded doors. JELD-WEN also makes **[*625]** doorskins, some of which it uses to make its own doors, and some of which it sells to independent door manufacturers (the "Independents") of which Steves is one. Steves has never made its own doorskins and has to purchase doorskins from **[**9]** doorskins manufacturers.

From 2001 to 2012, there were three manufacturers from which the Independents, including Steves, could purchase doorskins: Masonite Corporation, JELD-WEN, and Craftmaster International ("CMI"). All three were vertically integrated manufacturers of doorskins and interior molded doors. In 2011, Steves was negotiating for possible long-term supply contracts with all three manufacturers. In May 2012, JELD-WEN and Steves entered into a long-term supply agreement (the "Supply Agreement") that was to last for seven years and that contained an evergreen provision by which the contract was automatically renewed annually if notice of termination was not given in accord with the provisions of the Supply Agreement. In June 2012, JELD-WEN announced that it intended to acquire CMI and the acquisition was completed in October 2012.

The jury found that, as a consequence of the merger and JELD-WEN's conduct in 2014 and thereafter, competition was substantially lessened in the doorskin market and that, as a result, Steves sustained injuries of the type that the antitrust laws were designed to prevent. Thereupon, the jury awarded Steves $58,632,454.00 in antitrust damages which, **[**10]** when trebled as required by statute, amounts to antitrust damages in the amount of $175,897,362.00. The jury also found that JELD-WEN had breached Sections 1, 6, and 8 of the Long Term Supply agreement and awarded damages in the amount of $12,151,873.00 on account of those breaches. That award will be reduced by $2,188,271.00 because the Court granted JELD-WEN, INC'S MOTION FOR JUDGMENT AS A MATTER OF LAW AGAINST STEVES & SONS, INC. (ECF No. 1773).

As a primary equitable remedy, Steves asks the Court to order JELD-WEN to divest Towanda (formerly part of CMI) to restore competition in the doorskin market. Steves also asks the Court to impose certain so-called "behavioral" or "conduct" remedies, including restrictions and obligations on JELD-WEN, to the end that the divested entity will be able to successfully operate as a stand-alone independent business or to be successfully combined with the assets of the acquiring party so as to become an effective competitor. To those ends, Steves contends that the equitable remedy of divestiture must be accompanied by the following conduct remedies:

> (1) transfer of all tangible assets and likes necessary to develop, manufacture, and sell doorskins at Towanda; **[**11]**
> (2) a transfer of licensing of all intangible assets used in the development, manufacturing, and sale of molded doorskins at the Towanda facility to include:
> - Transfers or licenses to the purchasing entity of patents used to make doorskins, schematics or designs used to manufacture doorksins, customer lists, vendor lists, and know-how in trade secrets to operate the facility
>
> (3) an Order assuring that the acquiring entity can retain the services of the employees currently operating the Towanda facility;
> (4) an Order prohibiting JELD-WEN from hiring their employees for at least two-year transitional period;
>
> **[*626]** (5) a provision requiring the divested entity to offer an eight-year long-term supply agreement to Steves at reasonable prices and terms (based on the LTSA);
> (6) a provision allowing independent door manufacturers like Lynden, Haley, and Excel to terminate their supply agreements with JELD-WEN without penalty; and
> (7) a provision allowing JELD-WEN to be allowed to buy doorskins from the divested entity for a period of two years, the so-called transition period.

At the trial on the merits, Steves proved, by a preponderance of the evidence that, before JELD-WEN acquired CMI in 2012, there **[**12]** was a competitive doorskin market with three vertically integrated suppliers. Indeed, the evidence showed, and the Court finds, that the competition among those three suppliers was vigorous and quite effective. The merger reduced the number of suppliers to two. Steves also proved that the merger substantially lessened competition in the doorskin market. The issue now to be decided is how competition can be restored, and whether divestiture of Towanda (without or along with the requested conduct remedies) is the correct, and, as Steves urges, indeed the only way to do that.

I. FINDINGS OF FACT

In making the decision about equitable relief, it is necessary to respect and apply the jury's findings which are binding factual findings and then for the Court to make factual findings based on the trial record and the record at the Remedies Hearing.

A. Jury Findings

The jury found that "JELD-WEN's acquisition of CMI violated *Section 7 of the Clayton Act*." (ECF No. 1022, ¶ 1). The jury also found that "JELD-WEN's violation of the *Clayton Act* caused an injury to Steves that was of the type that the antitrust laws were intended to prevent." (ECF No. 1022, ¶ 2). As to antitrust damages, the jury found:

> 3. (a) **[**13]** As to COUNT ONE, we, the jury, find by a preponderance of the evidence, that the plaintiff is entitled to damages for antitrust injuries ***already sustained*** as a result of the following conduct (if none, write "0"):
>
> (1) JELD-WEN's overcharging Steves for doorskins (other than Madison or Monroe)
> $8,630,567
> (2) JELD-WEN's overcharging Steves for Madison and Monroe doorskins
> $1,303,035
> (3) JELD-WEN's shipping defective doorskins to Steves and failing to reimburse Steves for those doorskins
> $441,458
> (4) JELD-WEN's refusing to reimburse Steves for the cost of doors that incorporated defective doorskins
> $1,776,813
>
> (b) As to COUNT ONE, we, the jury, find by a preponderance of the evidence, that the plaintiff is entitled to damages in the amount of $46,480,581 for ***future lost profits***. If none, write "0."

Those findings are binding on the Court.

B. Factual Findings by the Court

The Court finds the following facts that pertain to the issues of equitable remedies as the parties have emphasized them in the briefing. Additional fact findings are set out along with topics to which they **[*627]** relate in the Conclusions of Law. All findings of fact are proved by a preponderance of the evidence.

1. Interior Molded Doorskin [14] Market in 2001**

As explained above, Steves and JELD-WEN were in 2012, and are now, participants in the interior molded doorskin market in the United States. Steves is an independent door manufacturer that has never produced its own doorskins. As a result, it must purchase doorskins from doorskin manufacturers. JELD-WEN, however, is a vertically integrated door manufacturer, meaning that it both produces doorskins and uses them internally to manufacture and sell finished doors.

Before 2001, JELD-WEN and Masonite were the only doorskin manufacturers in the United States. In the 1970s, Masonite had built a manufacturing facility in Towanda, Pennsylvania ("Towanda"), the facility that is at the center of Steves' request for equitable relief.

In 2000, Masonite was owned by a parent company, International Paper Company. Masonite primarily sold doorskins made at Towanda to Premdor, Inc., but it also sold to eleven other independent door manufacturers. Towanda, as a part of Masonite, did not have "standalone administrative departments" with research and development, accounting, or sales and marketing capabilities; those services were instead provided from separate locations by either Masonite **[**15]** or International Paper.

In 2000, Premdor agreed to buy all of Masonite, including Towanda, from International Paper. However, after Premdor's competitors expressed concerns to the Department of Justice ("DOJ") about the effect of the acquisition on the supply of doorskins, International Paper and Premdor reached a settlement with the DOJ. Pursuant to that settlement agreement, Towanda would be divested and set up as a separate entity to be known as Craftmaster International, Inc. ("CMI").

CMI was to serve as a doorskin supplier to Masonite and JELD-WEN and other customers among the Independents. CMI was then incorporated on September 1, 2001, after Premdor's purchase closed. In March 2002, following an auction sale, CMI was purchased by its new owners, who also owned two of the Independents, Haley and Woodgrain.

When CMI was incorporated, International Paper and Masonite also entered into certain agreements with CMI to enable it to function as an independent entity. First, International Paper and Masonite would provide administrative and technical support services to CMI until it could set up its own services—a process that eventually took longer than a year. Second, CMI and Masonite **[**16]** would be given three years to manufacture the dies needed to produce certain types of doorskins, so that both entities could offer the same complement of doorskins to their customers. Even though Towanda and Masonite's doorskin manufacturing plant in Laurel, Mississippi ("Laurel") were "very similar," certain products were made only at Towanda, and some were made only at Laurel. Similarly, CMI would sell doorskins to Masonite, and vice versa under set terms for three years to help assure that CMI would prosper going forwards. Finally, CMI received a royalty-free license to use such of Masonite's intellectual property as was necessary to manufacture doorskins at Towanda.

2. CMI's Performance as Independent Doorskin Supplier Before the Merger: 2002-2012

According to Bob Merrill ("Merrill"), the former CEO of CMI, and a current JELD-WEN executive, CMI did not become a **[*628]** "completely standalone entity" until a little more than two and a half years after it was divested from Masonite. CMI's initial financial performance was strong because it could control costs and reduce overhead through the separation agreements, and the housing bubble increased demand for new homes and for doors, and in turn, **[**17]** component supplies like doorskins. For instance, in 2006—a year after the peak of the housing bubble—CMI's net sales were [ ], and its profitability was [ ], calculated as earnings before interest, taxes, depreciation, and allocations ("EBITDA").[1] The Independents, including Steves, also benefitted from increased competition between CMI, Masonite, and JELD-WEN, each of which tried to create and sell new styles of doorskins as part of their efforts to win customers.

CMI also used Towanda to manufacture two so-called "trim board" products, MiraTEC and Extira. Masonite had started the MiraTEC business in 1998, but it had yielded only about [ ] in revenue (and negative EBITDA) by the time Towanda was divested in 2001. However, CMI viewed both MiraTEC and Extira as undeveloped products that held considerable promise and "worked to grow [them] aggressively." As a result, those products' financial performance "grew rapidly," and they were responsible for over [ ] in revenue and more than [ ] of EBITDA at CMI's peak in 2006. Moreover, they were important contributors to CMI's overall business after the housing bubble burst; indeed, Merrill testified that they were "the only thing that really **[**18]** kept [CMI] afloat."

Like Masonite, CMI initially sold doorskins to eleven Independents in the United States and Canada. But beginning in 2003, CMI's customer base contracted significantly because eight of those eleven customers were acquired by companies to which CMI did not sell doorskins. In addition, CMI had only one long-term doorskin supply agreement, which ended when that customer was acquired by Masonite. This customer consolidation significantly reduced the volume of doorskins that CMI could sell. Consequently, the company took a cue from JELD-WEN and Masonite and "forward integrat[ed]" from 2005 to 2010, buying two door manufacturers and building two door manufacturing plants to allow the company to more efficiently use the doorskin volume produced by Towanda—that is, by selling doorskins internally as well as externally. By 2011, CMI's internal doorskin sales constituted nearly 40% of its total doorskin sales.

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[1] EBITDA is a "surrogate . . . for cash flow" that investors use as an approximate measure of an entity's profitability.

There is a dispute respecting the performance of Towanda's doorskin business from 2009 to 2014. Steves relies on PTX 341 and PTX 342 to show that, looking only at the doorskin business, Towanda posted positive EBITDA annually from 2009 through 2013 and that there was **[**19]** positive, albeit not sizeable, EBITDA projected for 2014. And, that is what those documents show.

The record is not entirely clear as to the provenance of PTX 341 and 342, but the record does prove that JELD-WEN prepared these figures based both on historical CMI records (for 2009 through 2012) that were acquired in the merger and on JELD-WEN's own records thereafter. And, JELD-WEN used these documents to make business and strategy decisions. Thus, even though their provenance is not entirely clear, the record shows that they are reliable and probative of the state of **[*629]** the doorskin business at Towanda for the period involved.

JELD-WEN takes the view that the profitability of Towanda in 2011 and 2012 should be determined by CMI's audited financial statements, DTX 191, and by the information that JELD-WEN gave to the DOJ in August 2012, DTX 60. And, JELD-WEN says that the most important evidence on that point came from the testimony of Bob Merrill at the Remedies Hearing where Merrill testified that the figures in PTX 341 and 342 were not consistent with documents that he had seen.

The Court does not credit DTX 191 or DTX 60 on the issue of the profitability of the doorskin business at Towanda **[**20]** because those documents reflect information about CMI as a whole, not just Towanda's doorskin business. And, CMI had other businesses such as the door business and the trim business (MiraTEC and Extira) and locations other than Towanda.

Nor can the Court credit Merrill's testimony. If, as he said was the case, Merrill had documentary evidence to refute the proofs that appeared in PTX 341 and 342, those refuting documents would have, indeed should have, been produced. They were not. As a result, Merrill's testimony on the profitability of the doorskin business at Towanda for the time period involved is rejected as not reliable.

The evidence on this issue is probative in the remedial phase of these proceedings because, to find that divestiture is an appropriate remedy, the Court must be satisfied that a divested Towanda can operate competitively and profitably in the doorskin market. And, the fact that Towanda did that in the past, even in the face of adverse market conditions, is evidence that supports a finding that a divested Towanda could do so now.

In any event, it is not disputed that CMI, as an entity, was in difficult financial straits in 2011 and 2012 before the merger. CMI certainly **[**21]** was not profitable then, even with a slightly positive EDITDA from the doorskin business and a positive contribution from the Miratec and Exitera lines.

Indeed, by 2011, CMI's owners had been forced to invest their own funds into CMI to support its cash flow. Thus, after exploring several options, they decided to sell the company by putting it up for auction. As part of that process, they engaged an investment firm that worked with CMI's management to prepare offering documents, send out teaser memos to prospective buyers, and solicit bids from interested entities. One such entity was Steves, which, in October 2011, offered to invest [ ] in CMI in exchange for a minority ownership stake in the company. See DX-462 at 6. CMI's owners rejected the offer, and Steves did not pursue that possibility any further. CMI then identified what management considered to be the "serious prospective buyers" (either four or five) that had submitted purchase bids, and selected JELD-WEN and Masonite as the finalists. JELD-WEN was ultimately chosen as the buyer because of concerns about Masonite's intentions for CMI's door manufacturing plants.

In sum, CMI's doorskin business was quite profitable, and CMI **[**22]** was a competitive factor in the doorskin market from the time of its creation until the housing crisis. Even during the housing crisis, the doorskin component of CMI's business (i.e., Towanda) fared adequately (with slightly positive EBITDA). But, by 2011, it was necessary to put the entirety of CMI up for sale. And, even under those conditions, there were several serious buyers.

[*630] 3. JELD-WEN's Acquisition of CMI and Execution of the Supply Agreement with Steves

JELD-WEN was interested in acquiring CMI for three main reasons: (1) the availability of doorskins of a certain height that were made at Towanda; (2) the lower costs and higher efficiency of Towanda; and (3) the possibility of manufacturing MiraTEC and Extira (so-called "trim" products) at Towanda in addition to doorskins. JELD-WEN wanted to maintain CMI's doorskin volume, so it entered into long-term supply agreements with three of CMI's existing customers: Haley, Woodgrain, and Lynden Door ("Lynden"). The first two contracts were agreed to as part of JELD-WEN's acquisition of CMI ("the CMI Acquisition") because Haley and Woodgrain were also owned by CMI's owners. See PTX-115 ¶ 1.

In 2011, JELD-WEN and Steves were parties to a **[**23]** long-term doorskin supply agreement that they had executed in 2003. But, in 2011, JELD-WEN terminated that agreement. Later in 2011, Steves initiated discussions with JELD-WEN about another long-term supply agreement. And, as part of its plan to secure merger approval, JELD-WEN entered into the current Supply Agreement.

Thus, it was that, on May 1, 2012, Steves and JELD-WEN entered into the Supply Agreement, pursuant to which Steves would purchase doorskins from JELD-WEN on defined terms. Stipulation of Undisputed Facts (ECF No. 1003-1) ("Stip.") ¶ 10; see also Supply Agreement (PTX-149) at 1. Those terms applied to "the full range of JELD-WEN molded doorskin products." Supply Agreement § 1. The Supply Agreement would be in effect through December 31, 2019, but would automatically renew for a successive seven-year term unless either party terminated the contract. Id. § 2. Steves could terminate the Supply Agreement for any reason upon two-year written notice to JELD-WEN, and JELD-WEN could likewise terminate it without cause upon seven-year written notice to Steves. Id. § 3(a)(2)(b).

The doorskin prices that JELD-WEN could charge Steves varied according to a contractually defined formula based on JELD-WEN's **[**24]** key input costs. The Supply Agreement, in fact, obligated JELD-WEN to give Steves annual notice of the prices and input costs for the coming year by November 30, and JELD-WEN could not impose any price increases if it failed to do so. Id. § 6(c). Although Steves had to purchase at least 80% of its interior molded doorskin requirements from JELD-WEN, Steves could purchase any quantity of doorskins from another supplier that offered a price at least 3% lower than JELD-WEN's purchase price, after JELD-WEN had the chance to match that lower price. Id. § 4. Beyond those pricing provisions, the contract required JELD-WEN to provide Steves with doorskin products of satisfactory quality. If any doorskins were defective, JELD-WEN would have to reimburse Steves for the cost of those doorskins, but only after JELD-WEN's inspection and verification of the defect. Id. § 8. Reimbursements for any other costs beyond the price of the doorskins were to be negotiated on a case-by-case basis, Supply Agreement § 8, such that they were never mandatory.

Finally, any disputes under the Supply Agreement were to be resolved under a rather protracted alternative dispute resolution process. Only when that process was exhausted **[**25]** could a party begin litigation. That process would begin with an internal conference between the parties' senior executives. If they could not reach a resolution within thirty days of the dispute being submitted, the parties would have to proceed to mediation. A lawsuit could then be filed only where mediation had failed to **[*631]** yield a solution to the parties' disagreement. Id. § 10.

On July 18, 2012, soon after executing the Supply Agreement, JELD-WEN publicly announced the CMI Acquisition, Stip. ¶ 9, the completion of which was contingent on regulatory approval by government agencies, see PTX-115 ¶ 5; DX-50 § 6.1. Early in 2012, JELD-WEN and CMI had decided to preemptively request approval of the transaction from the DOJ because executives from both companies had been involved in Premdor's acquisition of Masonite, and were therefore aware of the problems that DOJ review could pose. The record is clear that JELD-WEN decided to approach the DOJ only after it had entered into long-term supply contracts with the Independents, knowing that this oft-used tactic would assuage the concerns of the DOJ and the Independents about anticompetitive effects of the proposed merger.

After JELD-WEN approached the **[**26]** DOJ, the agency's Antitrust Division notified JELD-WEN that it had opened a preliminary investigation into the proposed CMI Acquisition. Representatives of CMI and JELD-WEN—Merrill and James Morrison ("Morrison"), respectively—then gave presentations to the DOJ about the Acquisition. See DX-60; DX-54. That presentation emphasized that JELD-WEN had entered into long-term supply contracts with the Independents. Thereafter, the DOJ also contacted Steves, which told the DOJ that it did not oppose the merger because it believed that the Supply Agreement would prevent JELD-WEN from taking any anticompetitive actions. The Antitrust Division subsequently closed its investigation on September 28, 2012, see DX-48, and the Acquisition was completed on October 24, 2012. Stip. ¶ 8. The final purchase price paid by JELD-WEN was [ ].

4. JELD-WEN's Integration of CMI's Operations

Following the merger, JELD-WEN made some general administrative changes. For instance, it closed CMI's head office in Chicago and two of CMI's four door manufacturing plants, and transitioned CMI's human resources, payroll, insurance, safety, environmental, and health and benefits functions into JELD-WEN's organizational structure. **[**27]** DX-933 at 2. Although JELD-WEN and CMI accounting managers were supposed to develop an integration plan, see DX-933 at 2, the accounting systems for Towanda and for JELD-WEN's "legacy plants" (the doorskin plants that it originally owned and developed) remain separate, with Towanda using different accounting software. Similarly, the consolidation of JELD-WEN's and CMI's operations has apparently not affected certain interactions with customers, at least from Steves' perspective. Steves still orders and pays for doorskins from Towanda in the same way it did before the CMI Acquisition; the same is true for Steves' orders of, and payments for, doorskins from JELD-WEN's legacy plants.

At the time of the merger, JELD-WEN operated a doorskin plant in Marion, North Carolina ("Marion" or "the Marion plant"). However, Marion's design prevented it from meeting environmental regulations, and bringing the plant up to standard was projected to be costly and time-consuming. In addition, Marion was both inefficient and unprofitable, with old equipment in poor condition. On the record as a whole, the Court finds that the Marion plant was closed because of the projected cost to bring it into compliance **[**28]** with environmental regulations, and the projected cost to improve its old and ill-maintained operational equipment, not because of the acquisition of CMI.

[*632] Nevertheless, the acquisition of CMI allowed JELD-WEN to move Marion's doorskin production to Towanda. Moving Marion's doorskin production to Towanda—a very efficient and less cost-intensive plant—would therefore enable JELD-WEN to save around [ ] in manufacturing costs, and would eliminate [ ] in fixed costs associated with maintaining Marion as an operational plant. JELD-WEN mothballed Marion in June or July 2013.

In 2011, JELD-WEN had determined that its Dubuque plant was "[i]mpaired," PTX-668 at JW-CIV-00369666, which is analogous to a decision to close the plant. Because Dubuque was situated in an urban environment that was not conducive to doorskin manufacturing, it was JELD-WEN's second-most expensive fiber facility. The location of the Dubuque plant restricted JELD-WEN's ability to perform necessary environmental control tasks. DX-935 at 2. Dubuque would have been closed in 2011, but closure in 2011 was not practical because of startup problems and doorskin quality issues that were occurring at JELD-WEN's newly-opened plant **[**29]** in Dodson, Louisiana ("Dodson"). PTX-668. Once JELD-WEN acquired CMI, it closed the Dubuque plant because the capacities of Dodson and Towanda together rendered Dubuque's doorskin production unnecessary to overcome the problems at the Dodson plant. See DX-935 at 2, 5. JELD-WEN sold Dubuque in or around August 2016. Morrison, who recommended that Dubuque be closed and sold, testified that he would not have made that recommendation if the CMI acquisition had not occurred or if there was a reasonable chance that JELD-WEN would have to divest Towanda. For reasons set forth later, the Court declines to credit Morrison's testimony, finding him to be an untruthful witness. But, apart from that, the record shows that JELD-WEN had determined to close Dubuque before the merger.

JELD-WEN also made certain process changes at the Towanda facility after the CMI Acquisition. It spent around [ ] to install its own manufacturing processes at Towanda by the end of 2013. Among other changes, JELD-WEN: switched the primer used to JELD-WEN primer instead of more expensive third-party primer; reduced the amount of petroleum wax and resin used to make doorskins; enabled Towanda to make lower density doorskins **[**30]** and thereby save on specific component costs; improved the humidization process; and reduced the thickness of doorskins. DX-933 at 3. The changes made by JELD-WEN to the manufacturing process also have resulted in annual savings on doorskin manufacturing costs. The record is that the [ ] expense yielded annual savings of approximately [ ]. See DX-190 at 2. On this record as a whole, the Court finds that, because all of these processes were useful, and used, in other facilities, they would have been implemented in any event and are not attributable to the merger.

After the merger and over time, JELD-WEN made capital improvements to Towanda in order to improve the state of the facility and to decrease the doorskin defect rate. These investments included: (1) adding new doorskin dies, coating equipment, refiners, steam injection valves, a coating manufacturing plant to produce primer at Towanda, and a hydraulic commander to enhance doorskin fiber quality; DX-909 at 13; (2) replacing a line stacker that suffered from quality issues, the sprinkler system, malfunctioning mat separation conveyors, a fiber bin with water infiltration problems, and pressure pumps; DX-909 at 13-14; (3) repairing **[**31]** roofs to prevent water infiltration; DX-909 at 13; and (4) upgrading the doorskin coating process and boiler operating system. DX-909 at 14; DX-917.

[*633] These steps cost JELD-WEN around [ ] in 2015 and [ ] in 2016. DX-909 at 13-14. All told, JELD-WEN estimates that it spent approximately [ ] in capital improvements from July 2014 to July 2017). The investments have generated benefits for JELD-WEN. Many of the improvements noted above were deemed "high return on investment projects," meaning that their projected annual savings were only slightly less than their initial costs. DX-909 at 13-14. And, the record shows that the total returns from those projects to date exceed their total expense.

Through Morrison, JELD-WEN offered evidence that it would not have pursued them if there was a possibility that the CMI Acquisition would not be consummated or that divestiture would be required. As explained, the Court simply does not find Morrison to be a credible witness.

However, it is, of course, self-evident that JELD-WEN would not have made changes to Towanda if the CMI acquisition had not been consumated, because JELD-WEN simply could not have done that. So that aspect of Morrison's testimony is **[**32]** disingenuous. And, the record is that JELD-WEN has known of the risk of divestiture since mid-2015 and still has made many changes to, and investment in, Towanda. So the record disproves that aspect of Morrison's testimony.

JELD-WEN also asserts that, because it acquired CMI, it was able to modify the doorskin designs ("SKUs") manufactured at each of its doorskin plants. After acquiring Towanda, JELD-WEN had four operational plants, but each one does not produce all the different SKUs offered to customers—both because of increased demand for certain SKUs in different parts of the United States, and because of some plants' inability to make certain SKUs given their actual production capacity (which accounts for the die changes necessary to produce a specific quantity of doorskins in a given amount of time).[2] Instead, in 2013, the company began using a statistical tool called a mix model to examine, every quarter, which particular SKUs should be produced at specific doorskin plants—in other words, how the total "mix" of SKUs should be allocated so that each plant's capacity is utilized most efficiently. The mix model accounts for a number of variables, including the overall sales of specific **[**33]** SKUs externally, to independent door manufacturers, and internally, to JELD-WEN's door manufacturing plants; the current and required location of different doorskin dies; and a freight analysis, which measures the freight costs associated with shipping doorskins from the four plants to the buyers' locations.

The record shows that JELD-WEN would have developed the mix model whether or not it had acquired CMI. However, the record shows that having product from Towanda to use in the mix model provides some unquantified measure of savings to both JELD-WEN's internal customers and its external customers. That is because the model helps to balance doorskin production across four plants in different regions of the United States, thereby reducing transit times and freight costs. If one plant, such as Towanda, is closed or divested, then JELD-WEN's internal and JELD-WEN's freight-paying customers that received doorskins from that plant might pay higher freight costs because the doorskins would need to be shipped from another plant, from **[*634]** potentially much farther away.[3]

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[2] A die is a tool used to create a specific doorskin design. Because a plant cannot run all its dies simultaneously, the dies in service are rotated as needed to meet JELD-WEN's doorskin design needs. However, die changes increase downtime, reducing production efficiency and, in turn, production capacity.

[3] JELD-WEN decides which plants will supply particular doorskins to customers. Accordingly, even if Steves orders doorskins from Towanda, JELD-WEN may supply those doorskins from Dodson or one of its West Virginia plants. Because the mix model

Similarly, a customer who received its doorskins primarily from Towanda would not be able to receive every SKU from other plants **[**34]** without substantial changes to JELD-WEN's mix allocation. JELD-WEN says that would cause production inefficiencies and reduced capacity that would inflate JELD-WEN's doorskin prices. All of these apprehended consequences of divestiture were posited in general terms, but JELD-WEN offered no quantification of the apprehended cost increase.

The mix model also led to related changes in JELD-WEN's operations, such as a doorskin consolidation process that eliminated trade matches and redundant SKUs between JELD-WEN and CMI. That process cost around [ ] and took a year to complete. DX-917. This modification affected SKU availability at both Towanda and JELD-WEN's legacy plants. However, much like JELD-WEN's manufacturing process changes and capital improvements at Towanda, that project "paid for itself" within a relatively short period after it was finished. And, the record is that the mix model would still be used and useful in the event of divestiture. It would just operate differently.

Finally, JELD-WEN improved the MiraTEC and Extira business, which is independent of JELD-WEN's doorskin manufacturing business at Towanda. According to Merrill, JELD-WEN is the only company that currently **[**35]** makes both trim and doorskin products.

JELD-WEN has devoted significant resources to growing the MiraTEC and Extira business, which was responsible for around [ ] of Towanda's [ ] EBITDA in 2017. Moreover, exterior trim and panel products like MiraTEC and Extira are "key anchor products" that have allowed JELD-WEN to pursue expansion into the general building products industry, which involves other exterior components that JELD-WEN does not yet make, like siding and fencing. Based on this planned development, JELD-WEN's current CFO, L. Brooks Mallard ("Mallard"), has projected 2018 revenues and EBITDA for JELD-WEN of [ ] and [ ], respectively. See Apr. 12 Remedies Tr. at 710:19-711:21; DX-928 at 2-4.

Nothing in the record suggests that, in the event of divestiture, MiraTEC and Extira products made by an entity other than JELD-WEN could not be sold to JELD-WEN's existing customers for those products. But, if that is the case, the new owner of Towanda, not JELD-WEN, would be receiving the net revenues and the EBITDA generated by those sales.

5. Post-Merger Interactions Between Steves and JELD-WEN

Pursuant to the Supply Agreement, JELD-WEN supplied doorskins to Steves in 2012 and 2013. It **[**36]** is helpful to understand certain provisions of the Supply Agreement that were central to the antitrust violations found by the jury and that are important to the conduct of the parties.

Section 6a of the Supply Agreement sets forth the Initial Price of the doorskins to be supplied to Steves by reference to Schedule 1. Section 6b of the Supply Agreement provides that the "Initial Price shall remain in effect for the duration of this Agreement unless a price increase or **[*635]** decrease takes place in accordance with the terms hereof." Compl. Ex. A. Section 6c sets out the adjustment mechanism for the price increases or decreases that are referred to in Section 6b.[4] Section 6c provides that price adjustments are to be made with references to what are called "key input costs" for Raw Material (wood; resin, wax, oil, and sealer; paint; and packaging) and for Energy (electric power prices, natural gas prices, boiler fuel. (Compl. Ex. A, § 6(c), Sch, 2.)

The record shows that, after the merger, JELD-WEN's key input costs declined every year. Steves' damages expert, Avram Tucker ("Tucker"), testified that, based on his assessment and calculations, JELD-WEN had not disclosed to Steves the full extent of the cost decreases.

"balance[s] the mix across the group," the plant identified by the customer might not make the requested SKU, or might not have sufficient volume for supply from that location to be most efficient for all customers.

[4] By making the damage award in paragraph 3(a)(1) of the Verdict Form, the jury had to conclude, based on the evidence, that Section 6c operated to measure both price increases and price decreases. That is proved by the testimony of the negotiators and the evidence about how the parties administered the contract.

And, notwithstanding these declining **[**37]** costs, JELD-WEN, in 2013, 2014 and 2015, increased the prices that it charged Steves to purchase doorskins under the Supply Agreement.[5] Tucker determined that JELD-WEN had overcharged Steves a cumulative amount of 7.87% in the years following the CMI Acquisition. Steves' antitrust expert, Carl Shapiro ("Shapiro"), testified that other JELD-WEN customers without a supply agreement, such as Excel, Unidoor, and ABS, experienced even greater price increases. Documentary evidence from JELD-WEN's files confirms that testimony. In addition, JELD-WEN charged Steves markedly higher prices for the Madison and Monroe styles of doorskins because JELD-WEN took the view that they were outside the scope of the Supply Agreement, a view that the jury rejected.

As Shapiro explained, JELD-WEN's pricing decisions were a consequence of JELD-WEN's enhanced market power after the CMI Acquisition. Following the merger, JELD-WEN and Masonite were the only two doorskin suppliers in the United States. Steves believed, as found above, that the Supply Agreement would protect it from any anticompetitive activity. Then, in July 2014, Orsino's replacement as JELD-WEN's CEO, Kirk Hachigian ("Hachigian"), sent Steves **[**38]** a presentation made by Masonite on a publically available telephone call for its investors in which Masonite's CEO made clear that Masonite would not sell doorskins to companies that competed with it in the North American door market, as Steves did. Shortly thereafter, in September 2014, Hachigian sent Steves a notice of termination of the Supply Agreement, effective September 10, 2021.[6] That letter followed Steves' rejection of Hachigian's demand to add to the normal doorskin prices permitted under Section 6b of the Supply Agreement a so-called "capital charge," which (according **[*636]** to Hachigian) was to help offset the cost of making capital improvements to JELD-WEN's facilities that made the doorskins sold to Steves. Nothing in the contractual pricing provisions of the Supply Agreement allowed a capital charge.[7] Although these events made Steves concerned about its ability to obtain an adequate doorskin supply, Steves did not terminate the Supply Agreement (as it could have done) to seek a supply elsewhere because Steves believed that there was no viable supply alternative.

In 2014, Steves also experienced a change in the way that JELD-WEN dealt with doorskin defects under the Supply Agreement. Before **[**39]** late 2014, the procedure followed between Steves and JELD-WEN was as follows:

> If Steves discovers defects in JELD-WEN's doorskins after receiving them, it completes and submits a vendor debit memo ("VDM") to JELD-WEN to initiate the reimbursement process. From 2010 to 2011, JELD-WEN responded promptly after receiving VDMs, sometimes inspecting the defective doorskin at Steves' plant and sometimes extending Steves a credit based on a picture of the defect.

In mid-2014, JELD-WEN changed its approach and significantly limited reimbursements for those defects.

Likewise, in 2014-15, JELD-WEN changed the way that it compensated for defective doorskins that had been incorporated in the finished doors that Steves sold to its customers, for which Steves could negotiate for reimbursement under the Supply Agreement. Beginning in 2012, if a Steves' customer rejected a door as defective because of a defective doorskin, Steves would give its customer credits for the purchase price of the doors (assuming that Steves agreed with the defect assessments). Steves would then seek reimbursement from JELD-WEN for the full cost of the doors which had defective doorskin (i.e., the sale price that Steves refunded **[**40]** to the customers) and JELD-WEN would typically pay that entire amount. In those situations, Steves would submit a VDM for the defective door to JELD-WEN, just as it did with the defective doorskins.

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[5] JELD-WEN did not communicate with Steves about key input costs or price changes in 2016 or 2017, so the doorskin prices imposed in 2015 remained the same for those years.

[6] Hachigian subsequently sent Steves a letter, in March 2015, stating that JELD-WEN reserved the right to assert that the Supply Agreement terminated on December 31, 2019 (at the end of its normal seven-year term) instead of in September 2021. PTX-521. JELD-WEN (through Hachigian) abandoned that position at trial. However, proposed acceleration of the termination date is further evidence that JELD-WEN was emboldened by the knowledge that, in 2014, the substantial lessening of competition caused by the merger allowed JELD-WEN to pressure Steves to accept JELD-WEN's new pricing demands.

[7] The record shows that JELD-WEN extracted new contracts from other independent manufacturers requiring them to pay the capital charge. That was the result of lessened competition. It was either pay or face termination and the loss of doorskin supply.

However, the record shows that JELD-WEN adopted a policy in late 2014 or early 2015, to reimburse Steves only for the defective doorskins, rather than for the full cost of the doors. In explanation, JELD-WEN told Steves that "[t]here was a specific change in their [door reimbursement] policy," which applied whether the doors with defective doorskins were sold to customers or remained in Steves' manufacturing plant. This shift followed what Fancher characterized as a "general direction" from JELD-WEN's management to "tighten" its door reimbursement process.

At trial, JELD-WEN took the view that, although it was never contractually required to reimburse Steves for the cost of the doors, JELD-WEN did so as a matter of customer relations. However, it is clear that, because of the substantially lessened competition caused by the merger, JELD-WEN no longer felt that it was competitively necessary to extend this benefit to Steves in 2015 and thereafter.

The record establishes that JELD-WEN will continue **[**41]** to engage in this same sort of conduct respecting pricing and contract administration in the future. That is because, as Shapiro testified, the entry of another doorskin supplier besides JELD-WEN **[*637]** and Masonite into the U.S. market is unlikely. In addition, JELD-WEN is still charging Steves inflated prices for doorskins under the Supply Agreement, including Madison and Monroe doorskins. Likewise, JELD-WEN continues to disregard the price adjustment provisions of § 6c. Moreover, JELD-WEN has tried unilaterally to add labor costs as a key input cost under Schedule 2 and has refused to supply the backup information for the key input costs. The jury found that Steves sustained damages because JELD-WEN had violated Section 6c and other pricing provisions of the contract, including those for the pricing of Madison and Monroe doorskins. And, the jury rightly found that those damages were the consequence of the antitrust violation, i.e., the substantial lessening of competition caused by the merger.

6. Steves' Efforts to Obtain Alternative Doorskin Supply and the Consequences of Not Doing So

After receiving the original and the accelerated notices of termination from JELD-WEN, Steves, with knowledge that a **[**42]** reliable supply of doorskins was essential to its survival, began to explore ways to obtain doorskins without relying on JELD-WEN. Of course, between now and September 2021, Steves can purchase as many doorskins as it needs from JELD-WEN under the Supply Agreement. However, the record proves that JELD-WEN cannot be relied upon to supply Steves with doorskins after that point. Indeed, JELD-WEN has expressed the view that it might be necessary to "kill off" a few of the Independents. That, for Steves, is the predictable result of terminating the Supply Agreement.

Faced with loss of doorskin supply from JELD-WEN, Steves tried to arrange a supply contract with Masonite, even after Masonite's July 2014 announcement that it would no longer sell doorskins to independent door manufacturers such as Steves. Masonite's CEO, Fred Lynch, told Steves that Masonite will not enter into any long-term supply agreement with Steves. Lynch did advise that Masonite remains generally willing to sell doorskins to Steves on a spot sale basis, depending on availability and without a supply agreement. Nonetheless, the prices that Masonite has offered Steves are around 37% higher than the prices it pays under **[**43]** the Supply Agreement.

Unable to secure a reliable, competitively priced source of supply from either domestic supplier, Steves approached foreign doorskin suppliers like Teverpan, Kastamonu, and Yildiz to explore alternate sources of supply. And, those discussions continue today. But, the record shows that Steves could fill only a small part of its doorskin requirements from foreign supply sources. And, the record shows that foreign suppliers can supply only a limited number of the doorskin designs and sizes that Steves uses to manufacture its doors. Further, Steves has experienced serious quality deficiencies with doorskin samples that it has received from foreign suppliers.[8]

Finally, Steves has investigated the possibility of building its own doorskin manufacturing plant ("the MDS Project") so as to have a reliable source of supply after the Supply Agreement ends in September 2021. To that end, Steves hired former JELD-WEN employee John Pierce ("Pierce") in March 2015 to, among other **[*638]** things, provide

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[8] In opposing divestiture, JELD-WEN has asserted that it too has experienced quality problems with the products made by these foreign manufacturers. Indeed, JELD-WEN argues that product from foreign suppliers cannot help fill the short-fall in supply that would ensue a divestiture of Towanda.

information that Steves could use in furtherance of its MDS Project. Then, in July 2015, Steves engaged another former JELD-WEN employee, John Ambruz ("Ambruz"), for the primary purpose **[**44]** of completing a study about the feasibility of Steves building a doorskin manufacturing plant ("the Feasibility Study"). On March 30, 2016, Ambruz emailed Sam and Edward Steves the completed Feasibility Study, which discussed the challenges associated with building a doorskin manufacturing plant—particularly the cost, time, and need for a manufacturing partner.

In early 2017, Steves reached an interim conclusion that it could not feasibly build its own doorskin plant. The record establishes that Steves has made no concrete progress toward building a doorskin manufacturing plant. However, Ambruz and Gregory Wysock—a former Masonite employee hired to work on the MDS Project in July 2016—are still employed by Steves. Moreover, Steves has not completely abandoned its plans to build a plant. Thus, Steves continues to look for a manufacturing partner that could help construct a plant, and it was in contact with several potential partners before trial. However, Steves has had no further communication with those entities since before the trial began. Considered as a whole, the record establishes conclusively that Steves cannot fulfill its doorskin requirements from foreign manufacturers or **[**45]** by building its own doorskin plant.

If Steves cannot repair its relationship with JELD-WEN (which, on this record, will not happen) or acquire doorskins another way (which, as of now, is not possible), it will go out of business after the Supply Agreement expires in 2021. Steves' success rises and falls with its door manufacturing business; in 2017 alone, its interior molded doors sales constituted around 70% of its total revenue. And Steves cannot make those doors without interior molded doorskins. Consequently, if Steves cannot obtain a reliable doorskin supply, its business will soon fail.

That event would affect the 1,100 employees that currently work for Steves, and the members of the Steves family, which has run the company since it was founded in 1866. Steves' principal officers, Edward and Sam Steves, are the fifth generation of the Steves family to manage Steves. Moreover, Sam Steves' son and Edward Steves' daughter are current employees of Steves, and Sam Steves hopes to "pass[] on the reins" to them in the future. Maintaining Steves as a family business is an important goal of the entire Steves family.

7. The Discussions Between JELD-WEN and Steves; The Initiation of Alternative [**46] Dispute Resolution Process; The Filing of This Action: 2012-2016

JELD-WEN has presented the affirmative defense of laches, a topic that is separately considered in Section II.C, infra. The record contains considerable evidence about what Steves knew when, and what Steves did (in addition to attempting to secure an alternative source of supply as outlined in Section I.B.6). Additional facts on those topics are set out below as well as in Section II.C below that addressed the laches defense.

Steves began noticing doorskin quality issues after the merger as soon as November 2012. However, at that time, it did not view those defects as a result of the merger. It is difficult to pinpoint the exact period when Steves connected the dots between the CMI Acquisition and the decrease **[*639]** in doorskin quality.[9] Similarly, Steves had concerns about JELD-WEN's doorskin prices when it received the first notification required by the Supply Agreement in late 2012, and had discussions with Orsino about accurate pricing throughout 2013. However, that initial disagreement concerned whether JELD-WEN's reduction of doorskin thickness should be reflected in doorskin pricing under the Supply Agreement, and it was **[**47]** not thought by Steves to be related to the CMI Acquisition. In fact, the problems with the key input costs provision that underlie Steves' pricing claims in this litigation did not arise until after Hachigian replaced Orsino as JELD-WEN's CEO in early 2014.

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[9] Edward Steves stated during his deposition that he realized in early 2013 that the CMI Acquisition had caused the "degradation" of doorskin quality. Apr. 12 Remedies Tr. at 637:19-638:8. However, he later testified that he did not view the quality issues as related to the Acquisition. Id. at 685:6-17. Having heard the testimony and reviewed the deposition, the Court concludes that Edward Steves was speaking temporally, not causally.

The record shows that, as of August 2014, Sam and Edward Steves exchanged email messages that used the term "antitrust." For example, on August 12, 2014, Sam Steves e-mailed Edward Steves to ask whether Steves was "finished with exploring anti trust issues if J[ELD-WEN] terms [terminated] the supply agreement." DX-291. Then, on August 26, Sam Steves made reference to Steves'"claim on the overcharge" when considering how to respond to a Hachigian e-mail that discussed, in part, doorskin pricing under the Supply Agreement. Sam Steves noted that "the antitrust" was "perhaps the most important" issue at that point. DX-466.

Although the emails were offered in evidence, their meaning and context was not developed at trial. As explained more fully in Section II.C below, even though Steves was aware of potential antitrust ramifications of JELD-WEN's pricing pressure, changes in the treatment of defects, and arbitrary treatment respecting **[**48]** the key input costs, Steves reasonably focused its attention on finding alternative sources of doorskin supply in an effort to survive JELD-WEN's conduct, rather than place its hope for survival on pursuing a first of its kind antitrust action.[10] Many of those efforts took place in the fall of 2014 and early 2015. In addition, Steves, quite reasonably, continued to meet with JELD-WEN in an effort to find some reasonable commercial solution. Indeed, JELD-WEN, largely through Hachigian, repeatedly told Steves that JELD-WEN wanted some commercial solution. Faced, as it was with losing the supply of a key component of its most important product, Steves was reasonable in continuing to try to work on a commercial solution with JELD-WEN.

In early 2015, it became obvious that negotiations with JELD-WEN would not work. Therefore, Steves formally initiated dispute resolution procedures under the Supply Agreement in March 11, 2015. See DX-243 at 1; see also PTX-149 § 10(a)-(b). The formal invocation of Section 10 did not, however, provide JELD-WEN with notice of Steves' possible antitrust claim. However, the dispute process was addressed to contractual matters that lay at the heart of Steves' antitrust concerns so resolution **[**49]** of those issues in the contractually required dispute process likely would **[*640]** mean that Steves would have no antitrust injury.

Steves asked JELD-WEN to meet for the initial dispute resolution conference called for by the Supply Agreement on March 23, DX-243 at 2, but JELD-WEN deferred the internal conferences required by Section 10 until May 2015. Although the focus of those conferences was JELD-WEN's compliance with the key input costs and doorskin quality provisions of the Supply Agreement, Steves' attorney, Marvin Pipkin, also raised Steves' antitrust concerns at the second conference, and Bruce Taten responded on JELD-WEN's behalf. But, the record does not disclose the substance of the discussion about those antitrust concerns. After those conferences failed to yield a resolution to either the contract or antitrust issues, Steves requested, in July 2015, mediation, as is specified to be the next step under the Supply Agreement, see PTX-574 at 1. That occurred on September 4, 2015.

The mediation was also unsuccessful. At the end of it, Steves presented JELD-WEN with a draft complaint that raised both the contract and antitrust issues. The parties then chose to enter into a standstill agreement, **[**50]** which provided that Steves would not sue JELD-WEN on the date of the agreement, and that JELD-WEN would give Steves two days' notice before suing Steves, effective for thirty days. See PTX-591. The standstill agreement recited the mutual desire of Steves and JELD-WEN to continue efforts to work out a solution to their disputes, which then included both the contractual issues and the antitrust ramifications of JELD-WEN's conduct. Subsequently, Steves and JELD-WEN entered into standstill agreements with similar provisions on September 29, 2015; October 13, 2015; January 7, 2016; and April 25, 2016. See PTX-593; PTX-606; PTX-641; PTX-682. Sam Steves acknowledged that these agreements permitted Steves to file suit on any date other than the dates of the agreements themselves, but he said that Steves did not do so because it believed that the parties could resolve their dispute without litigation, as expressed in the standstill agreements. As it was involved in this back-and-forth process with JELD-WEN, Steves, in December 2015, asked the DOJ to examine JELD-WEN's potentially anticompetitive conduct. Steves gave a presentation to the DOJ later that month, and then produced documents to **[**51]** the DOJ in January 2016, in response to a civil investigative demand. On April 7, 2016, JELD-WEN also made a presentation to the DOJ. See DX-45. On May 18, 2016, the DOJ closed its investigation without taking any

[10] As the parties so often observe, no previous case brought by a private party seeking divestiture under the Clayton Act had gone to verdict at the time so Steves had no precedents to inform whether to pursue such a course or, if pursued, what the likelihood of success might be.

action. See DX-182. Steves then asked JELD-WEN to execute another standstill agreement, and when JELD-WEN refused, Steves filed this action on June 29, 2016.

8. Current Status and Standalone Viability of Towanda

Whether divestiture is a viable remedy in this case depends, in part, on whether, if divested, Towanda would be able to operate as an effective competitor in the doorskin market and thereby restore the competition that the merger substantially lessened. The parties have quite different views on the subject.

Towanda occupies 19 of the 275 total acres of land on which the property sits. The plant consists of several different areas: the main plant, which contains the main production lines; the smaller "die form" plant, where Masonite originally manufactured doorskins and which still houses a production line today; the wood yard, which receives doorskin inputs like logs or chips; and the water treatment plant, which removes chemicals from water used in the manufacturing **[**52]** process before that water is redistributed to the environment **[*641]** through the nearby spray fields. All these areas existed when JELD-WEN acquired Towanda, and JELD-WEN purchased the entire property. Towanda's operations require more than 400 total employees, and around 300 in the main plant alone.

Towanda has a design capacity of [ ] doorskins per year. That figure reflects Towanda's maximum production capacity based on its design, which accounts for the number of openings in a press, the number of dies that can be produced within that opening, the number of times the press can go up and down in a specific period of time, and some scheduled maintenance downtime.

However, design capacity is not the same as actual production capacity. The latter is more realistic for production calculations because it also incorporates the downtime that is required to change dies in the press so that different styles (SKUs) can be manufactured. A die change requires waiting for the press to cool down, replacing the die (using a crane), and then reheating the press.

Towanda's two doorskin manufacturing lines are Line 1 (in the main plant) and Dieform (in the die form plant). Line 1 is a high-volume/low-mix press, **[**53]** meaning that it produces a large quantity of a lower variety of SKUs. It currently produces only 6'8" doorskins-the most common size for residential con-struction—and can only produce between 50-60 different SKUs at one time. Line 1 is intended to be the "main production line" at Towanda. Thus, Line 1 has fewer die changes and far less downtime.

Dieform, in contrast, is a high-mix/low-volume press, sacrificing doorskin quantity for SKU variety. It uses smaller dies that can be changed without causing as much downtime as die changes for Line 1. Consequently, Dieform can produce over 250 different SKUs, and it accommodates all of JELD-WEN's 7' and 8' doorskins, as well as its smaller orders for more niche doorskin designs. That line's production capacity is therefore lower.

Even with Line 1 and Dieform being designed to maximize efficiency, some unaccounted-for downtime is still needed to produce the many SKUs sold. This downtime reduces Towanda's current actual production capacity to [ ] doorskins per year. In 2017, and for reasons not explained in the record, Towanda's actual production was [ ] doorskins. Towanda's current doorskin business is strong, generating EBITDA of [ ] in 2017. **[**54]**

These earnings are attributable to several factors. First, doorskin volume has increased because the housing market is performing well. There is evidence that the number of domestic "housing starts"—new homes for which construction is started—was approximately [ ] in 2001, and around [ ] in 2017. Thus, the current demand for doorskins is roughly similar to the demand in the early 2000s, when CMI achieved positive EBITDA (albeit not as high as 2006, when the number of housing starts was approximately [ ]). The market has also improved considerably since 2011, as reflected in the significantly higher volume of doorskins sold to JELD-WEN's external customers in 2016 ([ ]) compared to 2011 ([ ]). Towanda's volume is also used to supply JELD-WEN's door manufacturing plants, which in 2017 purchased about [ ] of Towanda's [ ] doorskins.

Second, the increased demand has helped spread out Towanda's high fixed costs, reducing Towanda's cost per doorskin in 2017 to approximately [ ]. This expense is even lower than the [ ] that each doorskin cost CMI at its peak in 2006 (and substantially lower than the [ ] per-doorskin cost at CMI's nadir in 2011). That **[*642]** reduction is, in part, attributable to JELD-WEN's **[**55]** changes to Towanda, which have lowered both variable and fixed production costs.

Third, doorskin prices have rebounded since 2011, so that JELD-WEN can now charge an average of [ ] per doorskin—only slightly lower than the peak average price of [ ] in 2006.

Finally, JELD-WEN's mix model allows it to allocate SKU demand across its four doorskin plants, increasing Towanda's production efficiency and helping it operate at the level needed to achieve a profit. As Towanda's design capacity is [ ] doorskins, Towanda therefore must sell around [ ] doorskins each year at prices ranging from [ ] doorskin to be profitable. Given the current state of the market, Towanda's actual capacity of [ ] doorskins in 2017 easily surpassed that threshold.[11]

The record proves, without dispute, that today Towanda is a profitable competitor in the doorskin market. And, the Court so finds. Also, the record shows, also beyond dispute, that Towanda was profitable from the formation of CMI in 2001 until the down turn in the housing market in 2006 and it was a competitor in the supply of doorskins to independent door manufacturers then as well. And, the Court so finds.

JELD-WEN argues that, if divested from JELD-WEN, **[**56]** Towanda cannot operate profitably or be a competitor in the doorskin industry. In support of that view, JELD-WEN makes several arguments.

First, JELD-WEN argues that divesting Towanda in its current state would be more complex than the successful divestiture from Masonite in 2001. That earlier process benefited from the relatively amicable relationship between Masonite and SMI and the existence of fewer doorskin designs. Towanda and Masonite's Laurel plant were also similar and the designs offered by each were "exact trade matches," so the companies simply needed time to duplicate dies at each plant. Here, however, says JELD-WEN, CMI and JELD-WEN had "completely different designs" when they merged, and that distinction has largely persisted. That, however, is really just an argument that JELD-WEN would need at least two years to replicate Towanda's design offerings at its legacy plants. And, thus, it relates not to Towanda's future as a competitive entity, but to JELD-WEN's.

Second, JELD-WEN says that Towanda's fixed costs would increase because it would have to set up its own departments to provide administrative and technology services. Those expenses are currently absorbed by JELD-WEN **[**57]** and thus not factored into Towanda's per-doorskin costs. That may well be true, but it hardly shows that a divested Towanda would not be profitable or competitive.

Third, says JELD-WEN, Towanda cannot adequately utilize its capacity without benefitting from JELD-WEN's other doorskin plants or internal door customers. It is true that JELD-WEN uses a good deal of Towanda's output. But, it is virtually **[*643]** certain that Steves alone would purchase [ ] doorskins from a divested Towanda. And, JELD-WEN would buy some of its requirements from the new owner of Towanda (at least [ ] doorskins) at least for two years while it seeks other sources of supply. And, JELD-WEN might well choose to continue buying from Towanda thereafter if, as JELD-WEN has argued, it will not likely make up any shortfall by buying from foreign suppliers or building another plant. Further, the Independents reasonably can be considered as other potential customers of a new owner of Towanda, especially considering (1) the higher prices recently extracted by JELD-WEN in requiring those companies to renegotiate their contracts and (2) the higher prices sought by Masonite. Combined, (all three)

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[11] Towanda's overall profitability is aided by its MiraTEC and Extira production. Towanda is the only facility in the world that makes those products. They are produced on Line 2, a sealed press that sits across from Line 1. However, the manufacturing process for doorskins and MiraTEC and Extira is intertwined in many respects, so those products share many of the same manufacturing facilities in the main plant. As a result, Line 2 and the production equipment needed for MiraTEC and Extira cannot be removed as part of divestiture, because doing so would make doorskin production impossible. Any acquisition of Towanda's doorskin business, then, must include the acquisition of its MiraTEC and Extira business.

the sales would exceed the 17-18 **[**58]** million needed for profitable operation.[12] Thus, the record establishes that a divested Towanda likely would be able to sell at least as much doorskin product as it did in 2017.

Of course, the owner of a divested Towanda would find it necessary to supply a more diverse range of SKUs than CMI supplied in 2005 or 2006 because fewer SKUs existed at that time. Fancher opined that Towanda could not, as a standalone entity, supply all the SKUs needed to meet its external customers' needs—both because "the design mix that would run through [Towanda] couldn't support it," and because Towanda and JELD-WEN's legacy plants both make designs that the other does not.

However, the record contains no particularized evidence from JELD-WEN about which specific SKUs purchased by JELD-WEN's external customers would be implicated by divestiture, or about the effect on Towanda's production capacity and profitability of devoting its resources to meeting the SKU needs of its customers. The consequence of that evidentiary void is that no specific finding can be made.

Nonetheless, the record does permit the general conclusion that divestiture would restrict to some extent Towanda's ability to meet the needs of **[**59]** JELD-WEN's Independent customers because the die changes required to produce the requisite SKU variety would lead to increased downtime and reduced production capacity. This reduced capacity could also result in higher costs for Towanda, which could reduce profitability. There is no evidence that permits the Court to find whether those costs would increase or by how much.

From this record, the Court finds that a divested Towanda would be required to adjust product mix in a not insignificant way, but that the facility is capable of being operated to produce a mix of products that will allow Towanda to be profitable and competitive even if it must make substantial adjustments to do so.

Finally, JELD-WEN argues that it is not possible to conclude that a divested Towanda would be competitive because the existence of a potential buyer who could profitably sell doorskins from Towanda is unknown at this time. It is correct that the record does not identify entities, other than Steves, that are currently interested in buying Towanda and are capable of **[*644]** operating the plant within the scope of their corporate structure or separately.

Steves is the only entity that has expressed interest in acquiring **[**60]** Towanda. However, Steves' executives admittedly lack knowledge about operating a doorskin plant. Of course, in the event of divestiture, Towanda's management and line employees would be retained, or at least given the opportunity to remain. That would be so for a new owner because the retention of its operating personnel would afford the greatest likelihood for success in restoring competition that was substantially lessened by the merger. And, that approach succeeded when CMI was created and divested in 2002 and when CMI was acquired by JELD-WEN in 2012. The record discloses no reason why that approach would not be successful again.

It is not surprising that, at this juncture in the case, potential buyers have not emerged. This is, after all, the first privately brought action under *Section 16 of the Clayton Act* to have gone to verdict and, in which, a private party has sought divestiture. And, as the Supreme Court of the United States explained in *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*, there are not likely to be firm expressions of interest until after the issue of whether divestiture is an appropriate remedy is settled on appeal and the landscape is clear. But, the record shows that Towanda was a profitable operation before the **[**61]** housing crisis and is once again and that its doorskin business produced small, but positive, EBITDA even during the housing crisis. And, even when CMI was up for sale in 2011, at a time when it was not profitable, there were several interested buyers. On this record, the Court concludes that buyers for this profitable operation can be expected to emerge again when the legal battles are ended.

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[12] The record shows that, in the event of divestiture, JELD-WEN would continue to buy from Towanda at least until it could build a new plant which would take several years or until JELD-WEN could find a reliable source of foreign supply (which, like Steves, JELD-WEN has not deemed to be a viable solution). JELD-WEN's counsel have argued that JELD-WEN would not buy from divested Towanda. Because JELD-WEN's witnesses said otherwise and counsel's argument makes no sense if JELD-WEN is to meet its needs, the argument is rejected.

9. Impact of Divestiture on JELD-WEN and Other Entities

Divestiture has been on the table in this action since it was filed in June 2016. Nonetheless, the record is that JELD-WEN has not examined how it would operate in the event that JELD-WEN is ordered to divest Towanda. Nor has JELD-WEN developed a plan for that eventuality. Thus, there is no well thought-out or documented support for how JELD-WEN would be affected by divestiture.

Of course, the absence of such a plan does not foreclose testimony from JELD-WEN's officers and employees giving their opinions about how divestiture might affect JELD-WEN''s overall operations in a general way and how a divestiture might affect JELD-WEN's customers. And that is how JELD-WEN has chosen to present evidence on those topics: by offering opinions of its **[**62]** executives. Those opinions may properly be considered even though they come from witnesses who admittedly have not studied the subject and who are biased to present the worst case scenario.

The lack of concrete analysis and the inherent bias make the opinions of JELD-WEN employees about future events (such as the restructuring of JELD-WEN's company-wide manufacturing operations, potential layoffs, and ripple effects on customers) quite speculative and rather unreliable. Nevertheless, it is possible to conclude that, if Towanda's capacity is removed from JELD-WEN's orbit, JELD-WEN will encounter, in the short run, difficulty manufacturing in its other facilities the number of doorskins that it needs to supply its own needs for making JELD-WEN doors and the needs of its independent doorskin customers.

It is helpful to review JELD-WEN's most recent production figures as a benchmark. In 2017, JELD-WEN, company-wide, **[*645]** including Towanda, made approximately [ ] doorskins, consuming 30 million internally and selling [ ] to the Independents who are its customers, with [ ] of those going to Steves. If, after divestiture, Steves secured its requirements ([ ] doorskins) from the new owner of Towanda, **[**63]** JELD-WEN would need to produce [ ] doorskins to meet its needs and those of its external customers.

The record is not precise on the point, but it appears that divestiture would result in a short-fall of approximately [ ] doorskins in JELD-WEN's internal and external needs (excluding Steves). However, that does not take into account that any divestiture order necessarily would make provision for JELD-WEN to purchase its short-fall from the new owner of Towanda for at least two years. That would be important to JELD-WEN, to its customers, and to the new owner of Towanda.

JELD-WEN also offered evidence that the "full production based on [m]ix" figures in [the record at PTX-1045] do not accurately reflect the effect of losing Towanda on JELD-WEN's doorskin capacity and production volume. That is because divestiture would make it necessary for JELD-WEN to redistribute to its legacy plants the SKUs that are currently manufactured at Towanda in order to provide the quantity and variety of doorskins that its customers desire. This change would cause two problems according to JELD-WEN. First, if those plants tried to accommodate those SKUs, their actual capacity would suffer, to some undefined **[**64]** extent, because the additional die changes needed would increase downtime, thereby reducing efficiency and lowering volume. Second, economics aside, producing the necessary quantity of the Towanda SKUs at the other plants is not possible without using the dies that are used at Towanda to produce those SKUs or making new dies of the same kind. Thus, those dies would have to be made for the legacy plants to use and that would require time.

The record does not show how much time or how much money that would require because JELD-WEN has not put "pen to paper" on that topic or any other relating to how to operate in the event of divestiture. That void notwithstanding, JELD-WEN has shown that divestiture would likely cause operational dislocations that would affect, to an undefined extent, its requirements for doorskins in the number of SKUs in its current line. However, because JELD-WEN has not analyzed how it would reallocate Towanda's SKUs, the degree of the resulting total capacity decrease at its legacy plants, like the degree of impact, is unclear.

It does appear from the record that it would be difficult to replace Towanda's production immediately. JELD-WEN's doorskin plant in Latvia **[**65]** currently has some excess capacity. However, that "excess" does not account for the reality that Latvia has never achieved close to its design capacity of [ ] doorskins per year. Furthermore, the Latvia plant is tailored to the European doorskin market and only produces a few doorskin designs that are usable in the U.S. market. Producing some of Towanda's SKUs in Latvia would also require the use of different dies than those used now in Latvia, and Latvia is currently running close to its total capacity, so that its production process could not be altered without consequences. The record does not show what those consequences are or what their economic impact would be.

Notwithstanding those difficulties, JELD-WEN's contingency business plans outlining options in the event that a natural disaster shuttered one or more of its plants shows that JELD-WEN considers that its Latvian plant, or other domestic plants (including a restarted Marion plant), **[*646]** could be used to augment doorskin supplies until the shuttered plant was back on line. Thus, contrary to JELD-WEN's urgings, it is not possible to conclude that divesting Towanda would leave JELD-WEN without options, even in the short term. JELD-WEN's **[**66]** own business records show otherwise.

The record also leads to the conclusion that obtaining doorskins from alternate suppliers or building a replacement plant is not any more promising for JELD-WEN than it is for Steves. Because of the merger, the only other domestic supplier of doorskins is Masonite, purchase from which is conceptually possible but not considered viable by JELD-WEN. And, given Masonite's position on sales to the Independents, JELD-WEN is likely correct. JELD-WEN conceptually could also purchase doorskins from foreign suppliers, such as Teverpan. But JELD-WEN, like Steves, has concerns about the quality of doorskins made by foreign suppliers, and those suppliers offer fewer SKUs than Towanda. Considering the record as a whole, the Court concludes that foreign suppliers cannot meet a significant part of JELD-WEN's requirements any more than they can meet a significant part of Steves' requirements.

Finally, the record is clear JELD-WEN could build its own doorskin manufacturing plant to replace Towanda's production. And, JELD-WEN is equipped to do that because it has extensive experience building such plants. However, that option would require considerable time and resources. **[**67]** The record shows that JELD-WEN would need at least two to two and a half years, more likely longer, to complete the project. The cost to JELD-WEN has been estimated to be between [ ] to set up a facility with production lines similar to Towanda's. That is a very wide range and thus is quite imprecise.

In sum, the Court finds that divestiture of Towanda would have significant, but not well-documented, consequences for JELD-WEN. However, nothing in the record permits the Court to conclude that divestiture would create the "disaster" that JELD-WEN's counsel urge the Court to find.

The record shows that limitations on JELD-WEN's total production capacity could have several collateral consequences. For instance, JELD-WEN has long-term doorskin supply agreements with several door customers. One of those contracts, with a U.K.-based company called Howdens, provides for certain penalties if JELD-WEN cannot meet Howden's supply needs, with the precise consequences dependent on the size and frequency of the failure. See DX-943 §§ 3.3, 5.13. However, JELD-WEN's obligations with respect to those penalties are subject to a force majeure clause,[13] see id. § 22, which might apply to capacity reductions because of **[**68]** a divestiture order. See id. § 1.1, at 7. Although Howdens is a foreign customer that is supplied primarily by JELD-WEN U.K. and JELD-WEN Europe, see DX-943 § 3.3, JELD-WEN's contracts with domestic customers like The Home Depot and Lowe's contain similar provisions.

In addition, JELD-WEN argues that both its internal and external customers would have to deal with higher doorskin prices and a less streamlined purchasing process. Reduced doorskin capacity, says JELD-WEN, would force JELD-WEN to raise its prices where permitted. Whether that would, or could, be done with a competitive **[*647]** Towanda as a supplier was not addressed by JELD-WEN's witness.

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[13] JELD-WEN's assertion to the contrary is mistaken. See Def. FOF ¶ 190. The contract states that the force majeure provision applies "[w]ithout prejudice to clauses 5.10 to 5.16"—that is, including the cited penalty provision for delivery failures. DX-943 § 22; see also id. § 5.13.

Furthermore, if JELD-WEN's legacy plants cannot produce all of Towanda's SKUs, customers who previously received doorskins made only at Towanda would need to purchase from both Towanda and JELD-WEN (or another supplier). And, JELD-WEN projects that losing its external volume altogether would cause it to lose almost [ ] of revenue and [ ] in EBITDA. Finally, says JELD-WEN, its internal customers—its own door plants—would lose earnings without Towanda because they would lack the doorskins needed to make the current volume of doors. That loss **[**69]** is projected to be roughly [ ] decrease in JELD-WEN's EBITDA.

The Court is concerned that the foregoing figures were belatedly cobbled together for the Remedies Hearing and were not produced during discovery so that they could be tested. And, although the Court rejected Steves' motion to exclude this evidence from consideration in the remedies phase of the case, it is not the sort of evidence in which the Court can place much confidence. That said, the record shows that divestiture, if ordered, would result in some not insignificant collateral consequences.

Finally, says JELD-WEN, Towanda's purchase price in a divestiture auction sale would likely not capture Towanda's full value to JELD-WEN. JELD-WEN offered the opinion of its CFO that Towanda's current enterprise value[14] is approximately nine times its EBITDA. By applying that multiplier to Towanda's 2017 EBITDA of [ ], JELD-WEN contends that the plant's enterprise value is around [ ]. That number, says JELD-WEN, is the minimum a purchaser would have to pay JELD-WEN in recognition of Towanda's worth. According to JELD-WEN, a divestiture sale is unlikely to yield this price.

Whether that multiplier (and hence the asserted enterprise value) **[**70]** is appropriate here is not a matter that has been supported by economic evidence. It is, at best, an unresearched, undocumented ball park figure. Nonetheless, as Shapiro testified, a forced sale always contains some "presumed detriments" for the seller. Id. at 808:16-21. There is nothing in the record to suggest otherwise here. However, it is both premature and improvident to conclude that a post-appeals bidding process would not yield a fair price for Towanda as it exists today. That assessment cannot, and should not, be made until there are bids made after the appellate process is ended and future buyers have a clear picture that they will not be engaged in a futile activity. But, the record is sufficient to find that Towanda, including its doorskin business, as well as the MiraTEC and Extira businesses, have value which potential buyers will recognize when it is clear whether divestiture is an appropriate legal remedy.

The jury findings and the foregoing factual findings made by the Court provide the framework for the legal analysis of Steves' request for equitable remedies. The legal analysis reflects additional factual findings that are most appropriately made in context of the **[**71]** specific legal issues to which those additional findings relate.

II. LEGAL ANALYSIS AND CONCLUSIONS

The most significant form of requested relief is divestiture. It will be assessed first. Then, the opinion will consider the so-called "conduct" remedies sought by Steves.

[*648] A. Steves' Request for Divestiture

1. Legal Standard

Section 16 of the Clayton Act allows private parties to obtain injunctive relief "against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*. This injunctive relief may include an order requiring the acquiring company to divest the assets of the acquired firm. *California v. Am. Stores, 495 U.S. 271, 295, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)*.

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[14] Enterprise value assesses how the stock market values an entity, taking into account the entity's market capitalization and its net debt.

Given the lack of authority from private suits based on Section 7 of the Clayton Act that have reached the divestiture issue, the decisional law respecting the standard for injunctive relief must come mostly from decisions in cases brought by the Government under Section 15. That provision allows the Government to institute proceedings "to prevent and restrain violations of [the Clayon] Act." 15 U.S.C. § 25. Notwith-standing the semantic difference between Sections 15 and 16, those provisions offer largely the same (and possibly identical) remedies. See Am. Stores, 495 U.S. at 281-82.

Whoever brings suit, the Government or private party, "[t]he relief in an antitrust case must be 'effective **[**72]** to redress the violations' and 'to restore competition.'" Ford Motor Co. v. United States, 405 U.S. 562, 573, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972) (quoting United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 326, 81 S. Ct. 1243, 6 L. Ed. 2d 318 (1961)); see also United States v. U.S. Gypsum Co., 340 U.S. 76, 88, 71 S. Ct. 160, 95 L. Ed. 89, 1951 Dec. Comm'r Pat. 580 (1950) (an antitrust remedy must, "so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance"). "Mergers come in a wide variety of shapes and sizes," so the remedy awarded should be "carefully tailored to the competitive harm" in the case. U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies § I(A) (2011) ("Merger Remedies Guide"). District courts are thus "clothed with large discretion to fit the decree to the special needs of the individual case." Ford, 405 U.S. at 573 (internal quotations omitted); see also Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 131, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969) ("Section 16 should be construed and applied . . . with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329-330, 64 S. Ct. 587, 88 L. Ed. 754 (1944))).

The "most drastic, but most effective, of antitrust remedies" is divestiture. E.I. du Pont, 366 U.S. at 326, but complete divestiture is "the remedy best suited to redress the ills of a competitive merger." Am. Stores, 495 U.S. at 285; see also Ford, 405 U.S. at 573. For this reason, the DOJ seeks divestiture in "the vast majority **[**73]** of cases" like this one. Merger Remedies Guide § I(B)(1). Moreover, "[t]he relief which can be afforded [under Section 15] . . . is not limited to the restoration of the status quo ante" in the pre-acquisition market. Ford, 405 U.S. at 573 n.8; cf. U.S. Gypsum, 340 U.S. at 89 (equitable remedy for Sherman Act violation can affect "[legal] practices connected with acts actually found to be illegal," so that defendants are "denied future benefits from their forbidden conduct"). Consequently, divestiture may extend to assets that were unrelated to the antitrust violation if the divested entity would need those assets to become competitive, or if the integration of legally-and illegally-acquired assets makes their **[*649]** separation impossible. See Utah Pub. Serv. Comm'n v. El Paso Nat. Gas Co., 395 U.S. 464, 469, 89 S. Ct. 1860, 23 L. Ed. 2d 474 (1969) (approving equal division between defendant and divested entity of gas reserves developed post-merger); Polypore Int'l, Inc. v. FTC, 686 F.3d 1208, 1218-19 (11th Cir. 2012) (affirming FTC's inclusion of a foreign plant in divestiture order because it "needed to be divested to restore the competition eliminated by the acquisition and provide the acquirer with the ability to compete"); see also Malcolm R. Pfunder et al., Compliance with Divestiture Orders under Section 7 of the Clayton Act: An Analysis of the Relief Obtained, 17 **Antitrust Bull**. 19, 56-67 (1972) (detailing approaches to identifying divestiture assets).

Structural remedies like divestiture also can be coupled **[**74]** with—or replaced entirely by—conduct remedies that can "preserve a merger's . . . efficiencies" and limit anticompetitive conduct at the same time. Merger Remedies Guide § II. "Conduct relief can be a particularly effective option when a structural remedy would eliminate the merger's potential efficiencies, but, absent a remedy, the merger would harm competition." Id.; see also In re Evanston Nw. Healthcare Corp., 144 F.T.C. 1, 520 (2007). However, "conduct remedies risk excessive government entanglement in the market," Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 793 (9th Cir. 2015), so they should be "tailored as precisely as possible to the competitive harms associated with the merger." Merger Remedies Guide § II n.12. This approach is consistent with the general need for courts considering divestiture to avoid "impos[ing] sanctions . . . which ultimately create economic havoc" in industries in which courts are not "well-versed." 5 Earl W. Kintner et al., Federal ***Antitrust Law*** § 40.9 (2017).

At the same time, courts have observed that divestiture is an "'extreme remedy.'" Taleff v. Sw. Airlines Co., 828 F. Supp. 2d 1118, 1122 (N.D. Cal. 2011), aff'd, 554 F. App'x 598 (9th Cir. 2014) (quoting Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 322 (3d Cir. 2007)). It also has some drawbacks. One antitrust treatise highlights three particular problems:By and large, spinoffs of established businesses or subsidiaries are far more successful than the creation of new ones. Second, the **[**75]** merging firms have every incentive to make the divestiture work poorly, particularly if it calls for the creation of a competitive firm. Third, buyers who are not competitors or are not established in the business may start out at a very considerable disadvantage, which sometimes later proves fatal.9G Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 990c2 (4th ed. 2016) (footnotes omitted); see also 5 Kintner et al., supra, § 40.12 (listing "potential hazards of divestiture").

Divestiture also operates somewhat differently in private suits. The Supreme Court has explicitly noted that a district court's ability to order divestiture does not "mean that such power should be exercised in every situation in which the Government would be entitled to such relief under *[Section] 15*." *Am. Stores, 495 U.S. at 295*. Also, *Section 16* requires a plaintiff to establish standing to seek injunctive relief, and a defendant can rely on equitable defenses and other equitable considerations to avoid divestiture. *Id. at 295-96*. And, in government actions, "the proof of the violation of law may itself establish sufficient public injury to warrant relief." *Id. at 295*. Thus, it is no surprise that, in cases brought by the government, **[*650]** Courts have viewed divestiture as "simple, relatively easy to administer, **[**76]** and sure," *E.I. du Pont, 366 U.S. at 331*, because hardships do not need to be balanced nor the public interest assessed in the same way as in *Section 16* cases. See *Ford, 405 U.S. at 575* ("'[O]nce the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.'" (quoting *E.I. du Pont, 366 U.S. at 334*)); *El Paso Nat. Gas, 395 U.S. at 472* ("[T]he pinch on private interests is not relevant to fashioning an antitrust decree, as the public interest is our sole concern."); *E.I. du Pont, 366 U.S. at 326* ("[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests."). These differences do not make those precedents inapposite, but they do caution that, in a private action, divestiture is not as easy a remedy as it is in a government action.

It is also true that scholars have expressed doubt about the wisdom of divestiture under *Section 16*. Indeed, according to one treatise, "private divestiture is to be avoided when other injunctive relief is effective" because "courts are in agreement that divestiture should be applied in a relatively limited number of private suits due to the wide-ranging repercussions of such action, and the possible adverse effect on interests **[**77]** of those who are not parties to the antitrust violation." 5 Kintner et al., supra, § 40.32 (citing, inter alia, *Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120, 127 (N.D. Cal. 1970)* ("[D]ivestiture would appear to be appropriate only in a limited number of cases where no other form of preventative relief would suffice . . . ."); *Schrader v. Nat'l Screen Serv. Corp., 1955 Trade Cas. ¶ 68,217, at 71,009 (E.D. Pa. 1955)* ("[C]onsiderations of policy are against decreeing divestiture or the complete destruction of a nationwide business at the suit of an individual in a private action under the antitrust laws . . . .")); cf. *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 883 F. Supp. 1247, 1264 (W.D. Wis. 1995)*, aff'd in part, rev'd in part on other grounds, *65 F.3d 1406 (7th Cir. 1995)* ("It is questionable whether divestiture of a long completed transaction is an appropriate remedy in a private action under the Sherman Act."). Similarly, Areeda and Hovenkamp take the view that "the Government's recommendation of divestiture deserves far more weight than a similar request from other litigants." 3D Areeda & Hovenkamp, supra, ¶ 326b. Because divestiture can have "far-reaching effects on persons who are not parties to the litigation" and "can affect the viability of otherwise profitable companies, the status of preexisting contracts, and the fortunes of rivals," they recommend taking "great care" before ordering divestiture in private actions. Id.

American Stores, to some extent, has changed the Clayton Act landscape **[**78]** because most of the foregoing cases were decided and since the foregoing views were expressed by commentators. Nonetheless, the concerns expressed in the pre-American Store cases and comments teach that courts must rely on the facts of each case to decide whether divestiture is an appropriate remedy and that courts should resort to it in limited circumstances.

That said, it is still true that divestiture should be ordered when it is the most effective way of restoring the substantially lessened competition brought about by the merger at issue and where its collateral consequences can be mitigated. And, the appropriate remedy should be selected upon "determining (a) what competitive **[*651]** harm the violation has caused or likely will cause and (b) how the proposed relief will remedy that particular competitive harm." Merger Remedies Guide § I(A). Moreover, that remedy should be "calculated to minimize adverse economic effects upon the industry, the public, and the stockholders affected by the unlawful merger. . . . [C]aution, progressive enforcement, and remedy formulation on a case-by-case basis are essential ingredients to effectively combat the effects of an antitrust violation, and to minimize **[**79]** the risk of economic dislocation." 5 Kintner et al., supra, § 40.9 (footnote omitted).

These general considerations should be kept in mind when assessing whether to award divestiture or alternate injunctive relief. However, the parties agree that "well-established principles of equity" establish the framework governing requests for injunctive relief, including divestiture, under the Clayton Act. *eBay Inc v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)*; see also *Am. Stores, 495 U.S. at 285* (*Section 16* permits divestiture only "when appropriate in light of equitable principles"). Under that approach,

> a plaintiff . . . must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay, *547 U.S. at 391* (emphasis added).[15] Even where those factors are met, district courts still retain "equitable discretion" to grant or deny permanent injunctive relief. Id.

2. *Section 16* Standing

Before considering the eBay factors, the Court must assess whether **[**80]** Steves has standing to seek divestiture. "[I]n order to seek injunctive relief under *[Section] 16*, a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. In other words, Steves must be able to demonstrate "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio, 395 U.S. at 130*.

Steves contends that the likely loss of its business when the Supply Agreement expires in September 2021 gives it standing here. This "threatened loss" is linked to an antitrust injury that has already occurred: JELD-WEN's termination of the Supply Agreement in September 2014, which was enabled by its increased market power after the CMI Acquisition. See Summary Judgment Op. at 30-31. JELD-WEN disagrees that Steves will go out of business when the **[*652]** Supply Agreement ends. See Def. Post-Remedies Equitable Br. (ECF No. 1652) (Under Seal) at 25-27 (discussing issue in context of irreparable harm). If JELD-WEN is correct, then Steves would need to identify other threatened antitrust loss or damage to support its request for divestiture.

If **[**81]** JELD-WEN is asserting that Steves lacks standing because it will not go out of business in September 2021, that argument is unpersuasive. Steves' *Section 7* claim sought both legal and equitable relief, and the *Seventh Amendment* entitled Steves to a jury trial on "all issues common to both claims." *Davis v. Ampthill Rayon Workers, Inc., 446 F. Supp. 681, 683 (E.D. Va. 1978)*, aff'd, *594 F.2d 856 (4th Cir. 1979)* (citing *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959))*. "[A] jury verdict in such mixed law-equity cases is binding on the court as to all matters in law and as to all matters in equity where the facts found are common to the law and equity issues." Id. (citing *Dairy Queen v. Wood, 369 U.S. 469, 479, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962))*; see also *Bresler v. Wilmington Tr. Co., No. CIV. PJM 09-2957, 2015 U.S. Dist. LEXIS 36625, 2015 WL 1402377, at *22 (D. Md. Mar. 25, 2015)*, amended in part, *2015 U.S. Dist. LEXIS 91389, 2015 WL 4385994 (D. Md. July 10, 2015)* ("'[W]here claims at law and in equity are joined and the legal claims are tried separately by a jury, the jury's verdict operates as a finding of fact binding on the trial court in its determination of the equitable

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[15] Although eBay applied that test to the Patent Act, the Supreme Court's concluding statement that such discretion also extends to "other cases governed by such standards" makes clear that the test applies in other cases arising under federal statutes. *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 894 F. Supp. 2d 691, 697 (E.D. Va. 2012)* (citing *eBay, 547 U.S. at 394*).

claims.'" (quoting Dybczak v. Tuskegee Inst., 737 F.2d 1524, 1526-27 (11th Cir. 1984))); Int'l Wood Processors v. Power Dry, Inc., 593 F. Supp. 710, 737 (D.S.C. 1984), aff'd, 792 F.2d 416 (4th Cir. 1986) ("The court is . . . bound by the jury verdict on its subsequent ruling on the equitable claims under the doctrine of collateral estoppel.").

Here, the Court instructed the jury that Steves' request for future lost profits was based on the claim that Steves "was harmed because, as a result of JELD-WEN's alleged antitrust violation, Steves will be unable to maintain a viable interior molded door manufacturing business when **[**82]** the contract between Steves and JELD-WEN terminates on September 10, 2021, and will therefore be unable to exist as a company." The Court further instructed the jury that it "must consider any factors that could affect the future success of Steves' business and any other factors affecting Steves' future performance." Jury Instructions (ECF No. 1025), Instruction No. 35. After receiving these instructions, the jury awarded Steves damages for future lost profits. Verdict Form ¶ 3(b). Any factual determinations that were necessary to award these damages are binding on the Court.

To show that Steves will not go out of business, JELD-WEN relies on evidence suggesting that it might continue to sell doorskins to Steves after the Supply Agreement expires; that, without JELD-WEN, Steves can satisfy its doorskin needs through domestic or foreign suppliers like Masonite, Kastamonu, or Teverpan; and that Steves could build its own doorskin manufacturing plant to replace the lost volume from JELD-WEN. But JELD-WEN presented virtually the same evidence to the jury at trial. The jury could not have awarded future lost profits without considering and rejecting that evidence, which is essential to an **[**83]** issue the jury was required to consider—"the future success of Steves' business and any other factors affecting Steves' future performance." Instead, the jury must have decided that Steves will go out of business because Steves cannot find any viable alternative means of doorskin supply. Furthermore, nothing from the Remedies Hearing or the trade secrets trial renders this jury's conclusions **[*653]** improper or unreliable.[16] Consequently, JELD-WEN's position about the likelihood of Steves going out of business is foreclosed by the verdict.

Moreover, given the factual overlay between the legal and equitable relief, the Court finds, by a preponderance of the evidence, that it is not likely that JELD-WEN will continue to supply Steves with doorskins after the Supply Agreement terminates. Indeed, part of JELD-WEN's pricing plan was to kill off some of the independent door makers that were its doorskin customers. And, the Court finds that JELD-WEN's conduct toward Steves (demanding price increases two years after the Supply Agreement was executed even though costs had decreased, engaging in evasive, sharp, and deceptive conduct over the calculation of input costs under Section 6 of the Supply Agreement, **[**84]** and in its general bullying conduct toward Steves) shows that JELD-WEN regarded Steves, a significant player in the interior door market, to be an independent to be killed off.

Further, the Court, as finder of the fact in the remedies phase of the case, finds that Steves has proved that, absent equitable relief, it will be forced out of business when the Supply Agreement terminates in 2021 (See Section II.A.3.(a), infra). And, as found above, JELD-WEN is still engaging in the conduct that led the jury to conclude that the merger had substantially lessened competition and that had caused Steves antitrust injury.

In sum, for the foregoing reasons, Steves has standing to seek injunctive relief under Section 16 that would remedy the threatened loss, and damage presented by the merger.

3. Equitable Factors Analysis

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[16] The parties dispute whether the Court may rely on the record in the trade secrets trial to help resolve the divestiture issue. See Aug. 2 Tr. (ECF No. 1751) at 90:15-91:20, 203:18-206:10. Assuming, without deciding, that the Court can, that record does not establish that Steves can prevent going out of business by building a doorskin plant by September 2021. At best, the evidence at the trade secrets trial indicates that Steves has preliminarily concluded that building a doorskin plant is not feasible, but is continuing to investigate the possibility of doing so. That is no different than what the evidence at the antitrust trial showed. See Def. FOF ¶¶ 265-78.

(a) Irreparable Injury & Absence of Adequate Remedy at Law

To obtain equitable relief in the form of an injunction here, and an order mandating divestiture and conduct remedies, Steves must prove that, absent such relief, it will suffer irreparable injury. Generally, "'[i]rreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate.'" *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc., 193 F. Supp. 3d 556, 574 (E.D. Va. 2016)* (quoting *Multi—Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551 (4th Cir. 1994))*. Whether **[**85]** a plaintiff has an adequate remedy at law "inevitably overlaps" with whether it has suffered irreparable harm. *MercExchange L.L.C. v. eBay, Inc., 500 F. Supp. 2d 556, 582 (E.D. Va. 2007)*.

Most courts to have confronted the question have found that the permanent loss of a business constitutes irreparable injury. See, e.g., *Warren v. City of Athens, 411 F.3d 697, 711 (6th Cir. 2005)* ("financial ruin" that would happen without injunction is irreparable injury); *Am. Passage Media Corp. v. Cass Commc'ns, Inc., 750 F.2d 1470, 1474 (9th Cir. 1985)* ("The threat of being driven out of business is sufficient to establish irreparable harm."). This is particularly true where a company has operated **[*654]** as a family business for a substantial period of time. Judge Friendly recognized long ago that "the right to continue a business in which [a father] had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms" because "the [family] want[s] to sell automobiles, not to live on the income from a damages award." *Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970)*. This "seminal decision" has been cited often, including by the Fourth Circuit. *Auto. Elec. Serv. Corp. v. Ass'n of Auto. Aftermarket Distribs., 747 F. Supp. 1483, 1514 (E.D.N.Y. 1990)* ("This is not a case of mere lost profits, but rather the basic existence of a seventy year old business may be threatened."); see also *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 38 (2d Cir. 1995)* (threat to "the very viability of the plaintiff's business" is irreparable injury); *Wells Am. Corp. v. Ziff-Davis Pub. Co., 900 F.2d 258, 1990 U.S. App. LEXIS 4004, 1990 WL 33532, at *2 (4th Cir. 1990)* ("harm to plaintiffs' **[**86]** [sic] goodwill, its business reputation, business opportunities, or its continued existence" may be irreparable); *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N.Y., 749 F.2d 124, 125-26 (2d Cir. 1984)* ("The loss of [plaintiff]'s distributorship, an ongoing business representing many years of effort and the livelihood of its husband and wife owners, constitutes irreparable harm."); *Fed. Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495, 500 (4th Cir. 1981)* (plaintiff showed irreparable harm where it "s[ought] to preserve its existence and its business").

There is no reason for the Court to deviate from that majority approach here. The termination of a plaintiff's business might not constitute irreparable harm if the entity has only been in business for a "short period of time," *DFW Metro Line Servs. v. Sw. Bell Tel. Co., 901 F.2d 1267, 1269 (5th Cir. 1990)* (per curiam); see also *HCI Techs., Inc. v. Avaya, Inc., 446 F. Supp. 2d 518, 521 (E.D. Va. 2006)* (citing DFW Metro in dicta), or if that injury could be fully remedied by money damages, see *Hardin v. Houston Chronicle Pub. Co., 426 F. Supp. 1114, 1117-18 (S.D. Tex. 1977)*, aff'd, *572 F.2d 1106 (5th Cir. 1978)*; *Lamarca v. Miami Herald Publ'g Co., 395 F. Supp. 324, 328 (S.D. Fla. 1975)*, aff'd, *524 F.2d 1230 (5th Cir. 1975)*. But, Steves has been in business for more than 150 years, making the 1.5-year existence of the plaintiff in DFW Metro seem fleeting in comparison. *901 F.2d at 1269 n.7*. In addition, as in several of the cases described above, there is independent value to continuing Steves as a family operation: Edward and Sam Steves described at the Remedies Hearing their family's deep connection with Steves' business, in which their children have begun to continue **[**87]** and, neither *Hardin* or *Lamarca* involved the facts that Steves has proved in this case.

JELD-WEN tries to distinguish Semmes Motors and subsequent cases in three ways. First, it argues that Steves' business is not at risk because it has several viable doorskin supply alternatives when the Supply Agreement terminates. This line of reasoning has been addressed in connection with Steves' *Section 16* standing. See supra Section I.A.2. In sum, the Court finds, as did the jury, that, after 2021, purchases from JELD-WEN, Masonite, or foreign suppliers do not provide viable alternative supplies of doorskins in the quantity and quality required by Steves. Indeed, it is disingenuous of JELD-WEN to suggest that Steves can turn to foreign suppliers when JELD-

WEN itself will not do so. Further, as set out in Section II.B.6 above, the Court finds that building a doorskin plant of its own is **[*655]** not a viable alternative way to supply Steves' doorskin needs after 2021.[17]

Second, JELD-WEN argues that Steves' claimed injury is merely harm to members of the Steves family, which does not justify permanent injunctive relief for Steves. But the only two cases that JELD-WEN cites **[**88]** in support, *Moody v. Michigan Gaming Control Board, No. 12-CV-13593, 2013 U.S. Dist. LEXIS 54490, 2013 WL 1664380 (E.D. Mich. Apr. 17, 2013)* and *Law v. National Collegiate Athletic Association, No. 94-2053-KHV, 1996 U.S. Dist. LEXIS 3478, 1996 WL 104328 (D. Kan. Jan. 5, 1996)*, are distinguishable. In Moody, the only harm underlying the plaintiff's emergency preliminary injunction motion was his nephew's and son's inability to obtain their harness racing training licenses—an injury not suffered by the plaintiff, whose occupational license had been suspended. *2013 U.S. Dist. LEXIS 54490, 2013 WL 1664380, at *1-2*. Similarly, in Law, the plaintiff coaches sought a classwide injunction under the Clayton Act to prevent the NCAA from enforcing a restricted earnings rule against any coach. However, each named plaintiff had to demonstrate a threat of antitrust injury because the class had not been certified, and just two were employed under the rule in question. As a result, those two coaches could seek injunctive relief only for themselves, not for the whole class. See *Law, 1996 U.S. Dist. LEXIS 3478, 1996 WL 104328, at *3-4*.

Steves, on the other hand, is not seeking divestiture to remedy some harm suffered by individuals in the Steves family rather than Steves itself. Instead, Steves' irreparable injury is the loss of its business. That the business also has a family character is relevant to the irreparable injury analysis. See *Semmes Motors, 429 F.2d at 1205*; *Auto. Elec. Serv., 747 F. Supp. at 1514*. Moody and Law might be applicable if Steves had only identified **[**89]** as an irreparable injury the effect of the loss of Steves' business on, for instance, Edward and Sam Steves, but Steves has not made that claim here. Accordingly, the references to the Steves family in Steves' papers do not lessen the irreparable nature of the company's antitrust injury.

Finally, JELD-WEN insists that Semmes Motors and its progeny, most of which deal with preliminary injunctions, are meaningless where, as here, a plaintiff has obtained future lost profits damages. To obtain equitable relief, a plaintiff must show that its harm cannot be compensated by money damages. *Dairy Queen, 369 U.S. at 478*; *Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp., 17 F.3d 691, 694 (4th Cir. 1994)*. Tucker, however, told the jury that his lost profits calculation was a "reasonable," "conservative," and non-speculative estimate of Steves' future harm. As Tucker proposed, **[*656]** the jury awarded damages of $46,480,581 in loss profits. Trebling that part of the award under the Clayton Act yields total future lost profit damages of around $139 million. See *15 U.S.C. § 15(a)*.[18] In JELD-WEN's view, Steves'"strategic decision to calculate its future harm in money damages" at trial precludes it from now claiming that those damages are inadequate. Def. Post-Remedies Equitable Br. at 24.

A plaintiff's presentation of a future damages **[**90]** number may influence the irreparable injury and legal remedy inadequacy analysis. In *SAS Institute, Inc. v. World Programming Ltd., 874 F.3d 370 (4th Cir. 2017)*, the plaintiff sought and received damages for lost profits, almost half of which was based on expected future losses. The court

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[17] JELD-WEN's claim that Steves should be held accountable here for delaying its efforts to build a doorskin plant is unpersuasive, especially where that factor did not affect the jury's future lost profits award. Intentionally engaging in conduct that contributes to an irreparable injury may undermine a plaintiff's irreparable harm showing. See *Cone v. Randolph Cty. Schs. Bd. of Educ., No. 1:06CV00579, 2006 U.S. Dist. LEXIS 76684, 2006 WL 3000445, at *5, *7 (M.D.N.C. Oct. 20, 2006)* (child's loss of educational services was not irreparable injury, in part because it was caused by parents' intentional obstruction of school placement plan). However, the minimal, and unpersuasive, evidence cited by JELD-WEN does not establish that Steves ceased efforts to build a doorskin plant in order to improve its position in this litigation. Moreover, the record shows that Steves would not have made any notable progress towards building a plant had it devoted its full attention during these proceedings to finding a manufacturing partner. Steves' irreparable injury thus cannot be traced back to its decision to stop negotiations with manufacturing partners. In any event, the record shows that Steves simply cannot afford to build its own doorskin plant so JELD-WEN's position is academic at best.

[18] There were other antitrust damages that also were trebled. Those that survived judgment as a matter of law also will be trebled.

rejected the plaintiff's request for permanent injunctive relief because it found that the "fact that [the plaintiff] already asked for and received these future damages undermines its claim of irreparable injury moving forward." *Id. at 386*. Likewise, in International Wood Processors, the court determined that the plaintiff had an adequate remedy at law because it "requested and received prospective damages" at trial, and under its own damages theory, could "suffer no further future harm" after receiving future lost profits damages. *593 F. Supp. at 737*. And, in Taleff, the court denied plaintiff's request for a post-merger divestiture order under *Section 16* because the only alleged harm was "expressed in terms of monetary damages." *828 F. Supp. 2d at 1123*. Thus, the plaintiff had not shown that legal remedies would be inadequate.

Nonetheless, a plaintiff is not prohibited from seeking alternate injunctive relief merely because it tries to quantify its future harm in front of the jury. The purpose of the Remedies Hearing was, in part, **[**91]** to allow Steves to present further evidence about the inadequacy of its future lost profits award. See Order (ECF No. 1127) at 2.[19] Steves then put on compelling evidence of the incalculable value of its business, which the Court (like the jury) finds would not survive without injunctive relief restoring competition. None of the cases cited by JELD-WEN involved this same sort of loss. See *SAS Inst., 874 F.3d at 386* ("[Plaintiff]'s claims of difficult-to-calculate damages in the form of lost business relationships, market share, and goodwill were largely unsupported by evidence."); *Taleff, 828 F. Supp. 2d at 1123 n.7* (plaintiff alleged harm in terms of higher ticket prices and less cost-effective service); *Int'l Wood Processors, 593 F. Supp. at 737* (plaintiff would "suffer no further future harm" after receiving future lost profits). And, Steves has consistently asserted that JELD-WEN's *Section 7* violation threatens the very existence of its business, so its current position **[*657]** cannot be characterized as some sort of opportunistic about-face. Consequently, Steves' representations to the jury do not prevent it from arguing here that future lost profits damages are inadequate.

The Court finds that, with an adequate supply of doorskins, Steves **[**92]** would, as it has for 150 years, continue in business and prosper. There is nothing in the record to suggest otherwise. The lost profits award would not provide a supply of doorskins. Rather, the Steves shareholders would, like the Semmes family, just live off of the damages award, a choice which, as explained in Semmes, it does not have to make. Were it otherwise, well-heeled companies, like JELD-WEN, would never have to face the undoing of an illegal merger but, instead, could simply pay the damages and finance their way out of the violation of the Clayton Act, leaving in place a merger that has been proved to have substantially lessened competition.

For these reasons, JELD-WEN's arguments fall short, and Steves has shown that the likely, if not certain, loss of its business is an irreparable injury that cannot be adequately remedied by the future lost profits damages it has been awarded.[20]

(b) Balance of Hardships

Under the third eBay factor, "courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)* (quoting *Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987))*. Before undertaking that assessment, the Court must address Steves' assertion

[19] JELD-WEN continues to assert that Steves' quantification of damages must have been an election of legal over equitable remedies. But this wrongly assumes that Steves was required to make an election at some point before now. "Generally, a party is not required to elect between inconsistent remedies or rights or theories of recovery during the trial or at the pleading stage or prior to the jury's verdict; election is generally made after the verdict is entered prior to the entry of judgment." 28A C.J.S. Election of Remedies § 6 (2018). In any event, "a decision as to the time of election rests within the sound discretion of the trial court." Id.; see also *Rahemtulla v. Hassam, No. CIV.A.3:05-0198, 2008 U.S. Dist. LEXIS 42902, 2008 WL 2247195, at *1 (M.D. Pa. May 30, 2008)* (collecting cases). Further, the cases present the so-called "election of remedies" issue as a question of how to preclude double recovery and how to proceed with entry of judgment where the principles of Brown Shoe Co. operate as they do under the facts of this case.

[20] Steves has agreed that it is not entitled to both remedies.

that **[**93]** the hardships claimed by JELD-WEN should be disregarded because the jury has already found that JELD-WEN violated the Clayton Act. See Pl. Post-Remedies Equitable Br. (ECF No. 1606) (Under Seal) at 20 (divestiture is appropriate even if it entails "harsh consequences" for JELD-WEN). That argument necessarily affects the weight given to JELD-WEN's harms.

Steves cites three cases in support of its position, including E.I. du Pont and El Paso Natural Gas. See *El Paso Nat. Gas, 395 U.S. at 472* ("[T]he pinch on private interests is not relevant to fashioning an antitrust decree, as the public interest is our sole concern."); *E.I. du Pont, 366 U.S. at 326* ("[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests."). But Steves' reliance on those cases is misplaced. As noted above, in those cases, the Supreme Court was discussing divestiture in the context of Government actions, which, unlike *Section 16* suits, do not implicate private hardships. The third case cited similarly involves an FTC enforcement action and, more importantly, relies on E.I. du Pont. See *FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1033, 383 U.S. App. D.C. 341 (D.C. Cir. 2008)* ("Even remedies which 'entail harsh consequences' would be appropriate to ameliorate the harm to competition from **[**94]** an antitrust violation." (quoting *E.I. du Pont, 366 U.S. at 327*)). Notwithstanding what Steves believes about the perfect applicability of Government cases in the *Section 16* setting, the differences between Government and private cases limit the relevance of the Government case principles on the balance of hardship factor because, in Government cases, there is no balance of hardships. See *Am. Stores, 495 U.S. at 295-96*; supra Section II.A.1.

[*658] Moreover, assigning less, or no, weight to JELD-WEN's hardships would contradict Supreme Court and Fourth Circuit precedent. Steves' argument essentially reduces a court's role to rubber-stamping divestiture based on a jury verdict finding a *Section 7* violation. The Supreme Court, however, "has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed," instead requiring the hardships to be balanced in every case. eBay, *547 U.S. at 392-93*. The Fourth Circuit found it "impossible to square this directive with the idea that hardship to the losing party should simply be ignored," "even in cases involving clear wrongdoing." *SAS Inst., 874 F.3d at 388*. This statement echoes its earlier determination that courts may not "conclude that any harm **[**95]** that would be suffered by a defendant was self-inflicted and thus entitled to lesser weight in the balancing-of-the-harms portion of the preliminary injunction calculus." *Scotts Co. v. United Indus. Corp., 315 F.3d 264, 285 (4th Cir. 2002)*. Thus, the Court must consider JELD-WEN's hardships in assessing the balance of hardships.[21]

Turning then to the balancing of hardships, the Court finds that Steves will suffer irreparable injury without permanent injunctive relief. If the Court does not order an equitable remedy to restore competition, Steves will likely lose its entire business when the Supply Agreement expires. This effect looms large in the balance of hardships. See *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 58 (2d Cir. 1979)* (balance would have been "amply passed" if plaintiff had "shown a significant possibility that it would be driven out of business" by defendant's anticompetitive actions); *Auto. Elec. Serv., 747 F. Supp. at 1514* (highlighting "ruinous financial hardship" that would result if no equitable relief imposed); cf. *SAS Inst., 874 F.3d at 387-88* (noting that permanent injunction "would likely be ruinous" for defendant (internal quotation marks omitted)). Furthermore, as Steves argues, the relative impact of all the hardships cited by JELD-WEN would be less severe on JELD-WEN than the hardship that will befall Steves. JELD-WEN **[**96]** is a much larger business than Steves, and it is a very diversified company. And, as Steves argues, the record shows that the impact of divestiture on JELD-WEN would not be as a serious a hardship on JELD-WEN as would the loss of doorskin supply. Nevertheless, it is necessary to assess the hardship that likely will befall JELD-WEN in the event of divestiture. Of course, it is JELD-WEN's burden to prove the hardships that it will face.

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[21] That is not to say that all harms that JELD-WEN might allege are cognizable here. For example, loss of profits obtained through anticompetitive conduct is not a valid hardship because it is a product of doing what the antitrust laws require—that is, competing with other firms. See *New York v. Actavis, PLC, No. 14 CIV. 7473, 2014 U.S. Dist. LEXIS 172918, 2014 WL 7015198, at *45 (S.D.N.Y. Dec. 11, 2014)*, aff'd sub nom. *New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015)*; see also *Cadence Design Sys., Inc. v. Avant! Corp., 125 F.3d 824, 830 (9th Cir. 1997)*. Yet JELD-WEN does not rely much on any such harm, and the instances where it does will be appropriately disregarded without affecting the hardship balancing.

JELD-WEN's chief witness on this topic was its CFO, Brooks Mallard, who testified to numerous speculative consequences of divestiture which the Court will not consider because of their speculative nature. Nonetheless, other witnesses have testified, at least generally, about the hardship that divestiture would visit upon **[*659]** JELD-WEN. Chief among those are the costs associated with separating Towanda as an independent entity. JELD-WEN and CMI integrated numerous functions when they merged in 2012, and it takes time and resources to "unscramble all those eggs" now. Suppl. Interrogatory Responses at 4. Courts have found that the "obvious hardship" of splitting up entities that have "combined . . . assets and operations" after a merger weighs heavily in the equitable **[**97]** analysis. *Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1235-36 (8th Cir. 2010)*; see also *Taleff, 828 F. Supp. 2d at 1123* & n.8. That hardship is real, but it can be reduced by divestiture conditions that, for instance, allow current Towanda employees to remain at the plant and require the new owner and JELD-WEN to work together to effectuate an orderly transition of administrative support services. But JELD-WEN would still need to spend money to effect that transition, and there is no obvious way to eliminate that expense. And, of course, "[a] long time has elapsed between the closing of the merger and the conclusion of the litigation," and that presents "greater risks of unforeseen costs and failure." In re Evanston Nw. Healthcare, 144 F.T.C. at 521. The record does not permit quantification of those costs, but they are present in some measure, and must be considered in the balance of hardships.

As discussed in Section I.A.9, divestiture would also affect JELD-WEN's ability to meet its customers' doorskin demands. As explained previously, the mix model allocates SKU production across all four of JELD-WEN's plants, and Towanda's Dieform line permits the manufacture of many SKUs that JELD-WEN's legacy plants do not currently produce. Even if Steves shifts its entire doorskin volume to the divested Towanda entity (thereby freeing **[**98]** capacity in JELD-WEN's plants that supply much of Steves requirements), JELD-WEN would still need to satisfy its other customers' demands for different doorskin varieties. JELD-WEN says that it could not fully accomplish this goal by simply increasing the number of SKUs produced by its legacy plants because those plants are already running close to full production capacity. But, there is present some unquantified additional capacity. Also, JELD-WEN says that attempting to produce more SKUs would add downtime because of die changes, thereby decreasing total production capacity.

The extent of this capacity decrease is not shown by the record because JELD-WEN has not studied how it would reallocate SKUs among its legacy plants if Towanda was divested, and thus the extent of the decrease must be considered as speculative and unproven. However, the Court can still consider that there will be some shortfall and that can be considered as a hardship. See *SAS Inst., 874 F.3d at 387-88* (examining hardships in general manner); *Ginsburg, 623 F.3d at 1235-36* (same).

JELD-WEN's alternatives for obtaining doorskins present their own hardships. JELD-WEN's Latvia facility only produces a few doorskin designs that are usable in the U.S. doorskin market. Other **[**99]** foreign suppliers do not offer as many SKUs as Towanda and, as Steves knows from experience, the quality is not consistent. But, JELD-WEN's "disaster plan" includes supply from Latvia and foreign suppliers as short-term options. However, based on the record, the Court cannot conclude that all SKUs lost to JELD-WEN by virtue of the divestiture of Towanda could be replaced by Latvia and foreign suppliers. In contrast, also as considered on JELD-WEN's disaster plan, restarting operation of the Marion plant would go much further in remedying JELD-WEN's doorskin deficit. Marion has a low-volume/high-mix line that could serve a similar function to Towanda's Dieform **[*660]** line, even if the total production capacity is lower. It is estimated that to restart the Marion plant would cost [ ] because of the need to replace old equipment and comply with environmental relations. And it would take about two years to activate Marion.[22]

Of course, Steves' current divestiture proposal would prevent JELD-WEN from incurring any immediate deficit in doorskin supply. That proposal includes a condition by which JELD-WEN can purchase from the divested entity, for a period of two years, enough doorskins "to ensure **[**100]** that JELD-WEN will be able to fulfill orders of its door and doorskin customers" that exist at the time any divestiture order is entered, as long as those doorskins "cannot reasonably be manufactured as one of its remaining doorskin manufacturing facilities." Proposed Divestiture Order

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[22] The record teaches that building a new doorskin plant is not realistic in the short run, even with JELD-WEN's experience.

§ VI(J). This provision would, in theory, permit JELD-WEN to meet its customers' doorskin needs through Towanda while setting up another long-term solution during that proposed two-year transition period. That approach would ameliorate the doorskins shortfall hardship identified by JELD-WEN and could even eliminate it, particularly if some of JELD-WEN's other independent customers choose to exit their contracts and buy from the new owner of Towanda. Of course, in that event, JELD-WEN would lose the profits from those sales.

The new owner of a divested Towanda might choose to supply JELD-WEN for longer than the two-year period proposed by Steves. Based on JELD-WEN's claim of hardship, that would seem to be an attractive proposition to JELD-WEN. And, a new owner likely would prefer the stability that would ensure a longer term supply contract with JELD-WEN. Thus, there are ameliorating measures for an even **[**101]** longer term hardship (beyond the first two years after divestiture).

The collateral effects of any sustained drop in doorskin volume are hard to predict on this record. JELD-WEN emphasizes the penalties that might be imposed under certain long-term supply agreements if those customers' needs cannot be met, but the language of the force majeure clauses in those contracts suggests that supply failures because of a divestiture order would not give rise to any fines. At the same time, JELD-WEN says that its door manufacturing plants would produce fewer doors based on the doorskins available, thereby reducing the company's EBITDA.

It is also reasonably inferable that JELD-WEN would lose some external customers, both because of the limited doorskin quantities and if JELD-WEN increases prices to cope with lower production capacity. Counting this loss as a hardship is questionable because, in most cases, it would be impossible to tell whether customers left because of the fallout from JELD-WEN's doorskin deficit or because of increased competition, which is an appropriate result of injunctive relief. See *Actavis, 2014 U.S. Dist. LEXIS 172918, 2014 WL 7015198, at *45*. That issue aside, loss of any customers would lower JELD-WEN's total revenue and EBITDA **[**102]** to some extent. But, if customers shift because of increased competition, that is a hardship that is expected to accompany divestiture and it does not weigh heavy in the balance of hardships.

JELD-WEN also claims hardship because the reallocation of production could cause loss of employment in its legacy **[*661]** plants. That assertion is pure speculation. And, it is contrary to the assertion made by JELD-WEN that, after divestiture, its legacy plants would be operating at near capacity.

JELD-WEN also contends that divestiture would cause loss of employment at Towanda. That contention is illogical because a new owner would need the experience offered by Towanda's current management and employees. And, the contention is at odds with history because when JELD-WEN bought CMI, the Towanda management and employees came along with the facility. And, in any event, that apprehended harm will be lessened, or eliminated, by requiring the acquiring entity to allow Towanda's management and employees to remain. And, it is logical that those people would benefit from such a requirement.

Finally, JELD-WEN would lose the value of the improvements it has made at Towanda, as well as the MiraTEC and Extira business **[**103]** that it has developed there. JELD-WEN made total investments of around [ ] in manufacturing installations and capital improvements at the plant between 2014 and 2017, which it expected would pay dividends in the form of company-wide savings well into the future. Even if the loss of those investments can be discounted somewhat because they would not have been possible without the anticompetitive merger, they may still be considered as a hardship. See *Smith & Nephew, 955 F. Supp. 2d at 79*; *W. Watersheds Project v. Salazar, No. CV 11-00492, 2011 U.S. Dist. LEXIS 151556, 2011 WL 13124018, at *20 (C.D. Cal. Aug. 10, 2011)*. But, the record also shows that JELD-WEN has recouped (and then some) its investments in Towanda so they will not be lost.

JELD-WEN's acquisition of CMI's MiraTEC and Extira business, on the other hand, has never posed any antitrust concerns, so the loss of that business weighs more heavily in the hardship analysis. As detailed above, JELD-WEN has structured its business so that MiraTEC and Extira are important parts of its future trajectory, and divestiture would force the company to change course. The record establishes that the manufacturing of these lines could not be removed from Towanda.

Whether the new owner would be willing to pay an appropriate value for the MiraTEC and Extira **[**104]** lines is unknown. And, any sale of those lines would involve licensing of intellectual property necessary to make those products. But, here too, the existing management and employees know how to operate the lines and make the product, and there is no reason on the record to believe that the end products would not be bought by those who are buying them now. Certainly, JELD-WEN offered no evidence to that effect. And, if, as JELD-WEN says, the lines are good products, then a buyer of Towanda could be expected to place value on them.

As the foregoing discussion reflects, the consequences of divestiture on JELD-WEN cannot be discerned with certainty in large measure because JELD-WEN has chosen not to internally assess those effects, except in broad and somewhat speculative terms. Nonetheless, from the showing that JELD-WEN has made, the record proves that all of its claimed hardships can be ameliorated by allowing time for an orderly divestiture, by imposing terms to assure JELD-WEN a reliable source of doorskin supply to satisfy its external and internal requirements for at least two years, by assuring that divestiture occurs in an environment and under circumstances that will produce **[**105]** a reasonable purchase price. Steves, on the other hand, has presented forceful evidence to show a more certain and far more serious harm: permanently going out of business. Therefore, **[*662]** even though the scales are not so one-sided as Steves contends, the balance of hardships tips decidedly in Steves' favor.

(c) Public Interest

(1) Legal Standard

The final eBay factor requires the Court to find "that the public interest would not be disserved by a permanent injunction." eBay, *547 U.S. at 391*. "'The public interest inquiry primarily addresses impact on non-parties rather than parties.'" *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc., 725 F.3d 940, 946 (9th Cir. 2013)* (quoting *Bernhardt v. L.A. Cnty., 339 F.3d 920, 931 (9th Cir. 2003))*. Courts are reluctant to cause any "concrete harms to innocent third parties." If those potential effects exist, the public interest asserted must rely on more than "broad, abstract rule of law concerns." *SAS Inst., 874 F.3d at 388*.

That is not an issue here because the public interest in this case has been firmly established by Congress which is responsible not only for passing laws, but also "establish[ing] their relative priority for the Nation," priorities which courts must respect. *Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978)*. Accordingly, "[w]here a valid law speaks to the proper level of deference to a particular public interest, it controls." *Inst. of Cetacean Research, 725 F.3d at 946*; see also 11A Charles Alan Wright **[**106]** & Arthur R. Miller, Federal Practice and Procedure § 2948.4 (3d ed. 1998) ("The public interest . . . may be declared in the form of a statute."). Here, by enacting *Section 7 of the Clayton Act*, Congress has explicitly indicated that preserving competition is in the public interest. *United States v. Ivaco, Inc., 704 F. Supp. 1409, 1430 (W.D. Mich. 1989)*. Consequently, divestiture would serve the public interest here, assuming that such relief would "'restore competition'"—the central aim of any injunctive relief under the Clayton Act. *Ford, 405 U.S. at 573* (quoting *E.I. du Pont, 366 U.S. at 326*).

Nonetheless, divestiture is not always the ideal equitable relief for the public interest. In some cases, the divested entity might not actually restore competition, depending on the circumstances in which the entity would operate. In others, divestiture might restore competition, but other injunctive relief might also do so with fewer impacts on the public interest. Before ordering divestiture, then, the Court must consider two questions: (1) whether Towanda would be "a willing, independent competitor capable of effective production" in the doorskin market, *White Consol. Indus., Inc. v. Whirlpool Corp., 781 F.2d 1224, 1228 (6th Cir. 1986)*; and (2) even if Towanda would be a viable entity, whether less intrusive injunctive relief can restore competition just as well as divestiture, see *E.I. du Pont, 366 U.S. at 327-28* (equitable relief should **[**107]** cause "as little injury as possible to the interest of the general public" (internal quotations omitted)). Courts have not clearly addressed these issues before ordering divestiture. However,

> [t]here is . . . no doubt that the antitrust court may and should assess the propriety of equitable relief in each particular case . . . and that the judge may decline to restructure a firm where there are serious doubts as to feasibility or a likelihood that other remedies are likely to be sufficient to restore effective competition.

3A Areeda & Hovenkamp, supra, ¶ 303e3 (emphasis added). See also Pfunder et al., supra, at 54 ("In order to achieve the goal of restoring or restructuring competition, a **[*663]** careful economic analysis must be undertaken of the particular assets or entity to be divested. In order for divestiture to achieve procompetitive structural relief, the assets to be divested must comprise an economically viable going concern—that is, the entity must have the economic capability of surviving and competing effectively in the market." (emphasis added)). The parties vigorously dispute what showing Steves must make to enable the Court to answer these questions. JELD-WEN says that before deciding Steves' request for divestiture, Steves must **[**108]** prevail on five factors:

> (1) whether the divestiture assets are sufficient to create a business that will replace lost competition;
> (2) whether the divestiture buyer has the incentive to compete in the relevant market;
> (3) whether the divestiture buyer has the business acumen, experience, and financial ability to compete in the relevant market in the future;
> (4) whether the divestiture itself is likely to cause competitive harm; and
> (5) whether the asset sale is structured to enable the buyer to emerge as a viable competitor.

These factors are used by the DOJ in assessing the remedy of divestiture. Gov't Equitable Relief Statement (ECF No. 1640) at 1-2, 7; see also 5 Kintner et al., supra, § 40.12 (identifying similar "crucial factors considered when framing divestiture order or decree"). This approach, says JELD-WEN, is necessary because it is the approach that the DOJ takes before ordering divestiture. Treating this analysis as a threshold requirement would be dispositive. Although the first and fourth DOJ factors are included in the public interest framework set out above, and will be addressed here, Steves has provided practically no information that would inform the other three factors.

Steves, on the other hand, **[**109]** argues that Towanda's viability as a successful competitor be assessed quite differently. This type of assessment, Steves says, would be more in line with the public interest because the results of the analysis urged by JELD-WEN could be made worthless by changed market conditions and the outcome of future appeals. Moreover, as Steves asserts, the Supreme Court has approved of the method that it urges in *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*, another *Section 7* case. There, the Supreme Court found that the trial court's divestiture order was sufficiently final to enable appellate review even though the order only commanded divestiture without specifying the details of the divestiture sale or separation process, which would be the subject of a proposed divestiture plan to be filed by the defendant. See *id. at 304, 308-10*. According to Steves, the Court can conclude now that divestiture is appropriate, and then work out the particulars by appointing a special master to supervise divestiture after JELD-WEN appeals the order and if the remedy of divestiture is affirmed. The Fourth Circuit (and perhaps the Supreme Court) would then be able to affirm the liability and remedy decisions before the divestiture process moves to fruition. Only then, says Steves, **[**110]** would capable and serious buyers be willing to offer realistic prices for Towanda.

Steves is correct on this point. Neither JELD-WEN nor the DOJ cites any cases in which courts declined to order divestiture because the party seeking divestiture failed to provide the details that the DOJ uses in making its decisions. In fact, the general resources that address the issue teach that divestiture specifics are typically **[*664]** worked out in the compliance process by the court, the parties, or some other monitor. One treatise explains:

> Divestiture decrees rarely contain provisions specifying the details of satisfactory compliance with the order to divest; however, usually courts include continuing supervision provisions to ensure that the acquiring company divests itself of the offending assets and that they are divested in such a manner as to assure restoration of the competitive balance. Tribunals also retain jurisdiction to approve or reject the method of compliance, and to modify its decree or order if the prescribed remedy proves incapable of being carried out according to its terms. . . .
>
> Once the order to divest is entered, the defendant is required to propose within a specified time a plan **[**111]** of compliance indicating the method by which it proposes to locate a purchaser acceptable to the court. These plans are subject to the government's approval, and in instances where disagreements cannot be resolved at this late stage, the government must challenge the plan before the court. Some orders leave the defendant

> considerable discretion to choose the assets to be divested. Even broader is the defendant's discretion to negotiate with parties interested in purchasing the assets to be divested, and to accept the most lucrative offer that will not be attended by anticompetitive consequences.

5 Kintner et al., supra, § 40.12 (footnotes omitted); see also Pfunder et al., supra, at 95-111. The administrative law judge in one recent FTC case cited by JELD-WEN took this exact approach. See In re Evanston Nw. Healthcare, 144 F.T.C. at 335-45, 356-73. Although the FTC reversed that initial decision on substantive grounds, nothing in its opinion suggests that the ALJ's procedural methods were improper. See id. at 519-23.

Brown Shoe does not make it a hard and fast rule that courts must approach divestiture in this way. That case addressed the finality of a particular divestiture order under the Expediting Act, which would not provide the basis for any appeal here. See *Brown Shoe, 370 U.S. at 306-08*. Nonetheless, the Supreme Court's guidance **[**112]** about the substance of general divestiture orders is both helpful and persuasive. In Brown Shoe, the district court's divestiture order only required the defendant to "divest itself completely of all stock, share capital, assets or other interests it held in [the divested entity], so that the "remaining task for the District Court [after appeal] w[ould] be its acceptance of a plan for full divestiture, and the supervision of the plan so accepted." *Id. at 304, 308*. The Supreme Court found the broader divestiture order ripe for review because it had "consistently reviewed antitrust decrees contemplating either future divestiture or other comparable remedial action prior to the formulation and entry of the precise details of the relief ordered." *Id. at 309-10*. The Supreme Court also instructed that policy interests supported that approach:

> [A full divestiture] order requires careful, and often extended, negotiation and formulation. This process does not take place in a vacuum, but, rather, in a changing market place, in which buyers and bankers must be found to accomplish the order of forced sale. The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling divestiture **[**113]** would only make still more difficult the task of assuring expeditious enforcement of the antitrust laws. The delay in withholding review of any of the issues in the case until the details of a divestiture had **[*665]** been approved by the District Court and reviewed here could well mean a change in market conditions sufficiently pronounced to render impractical or otherwise unenforceable the very plan of asset disposition for which the litigation was held. The public interest, as well as that of the parties, would lose by such procedure.

Id. at 309 (emphasis added).

JELD-WEN's sole response to the compelling logic set out by the Supreme Court is to argue that Brown Shoe is inapposite because it was a Government case, and the Government was presumed to be acting in the public interest. Following that logic, there was no need for that district court to have considered the identity and intention of the buyer of the divested assets. There are undoubtedly distinctions between Government actions and private suits for injunctive relief under the Clayton Act. However, those differences do not compel the Court to decide the propriety of divestiture in a manner that is directly contrary to the forceful logic of **[**114]** the Supreme Court.

JELD-WEN's "fear of piecemeal appeals" may be real, *id. at 310*, but that alone cannot dictate a result that Brown Shoe observed makes no sense. Those practical concerns apply equally here. Moreover, the Court can decide whether divestiture is in the public interest without knowing the identity of the buyer. And, if divestiture is ordered and affirmed, and no buyer expresses interest in Towanda, then divestiture will simply not occur. If it turns out that the divestiture process yields a buyer that lacks the incentive or the means to operate Towanda competitively, the Court can decline to divest the plant to that buyer. Finally, if the Court orders a divestiture plan that directs the sale of Towanda to an unsatisfactory buyer, JELD-WEN could presumably appeal that order. That last issue remains unresolved. See id. ("No instance has been found in which the Court has reviewed a case following a divestiture decree such as the one we are asked to consider here, in which the party subject to that decree has later brought the case back to this Court with claims of error in the details of the divestiture finally approved."). But, as this case has repeatedly shown, there is a first **[**115]** time for everything.

(2) The DOJ's Statement of Interest

Pursuant to *28 U.S.C. § 517*, the DOJ submitted a Statement of Interest (ECF No. 1640) after the jury returned its verdict that the merger had substantially lessened competition and that Steves had sustained antitrust injury as a consequence. To begin, the DOJ expressed, in general, a strong preference for the structural relief of divestiture to restore competition. The DOJ then suggested that the Court should use the same analytical framework that the DOJ employs. That framework will be quite useful later.

The DOJ also expressed reservation about ordering divestiture, noting that a potential buyer (other than Steves) had not been identified. And, as to Steves, the DOJ expressed concern that,if Steves were to acquire Towanda, there would be three vertically integrated doorskin suppliers whereas before the JELD-WEN/CMI merger there had been two vertically integrated suppliers and one (CMI) that was not. On that point, the DOJ was in error because CMI was vertically integrated well before the merger.

The DOJ's other concern-the absence of an identified buyer at this state-is, as explained earlier, premature for the reasons set out by the Supreme Court **[**116]** in *Brown Shoe*. Moreover, it is unrealistic to think that the divestiture process in a private party case could proceed in the same way as the Government would proceed until the validity of the divestiture remedy has been **[*666]** affirmed on appeal. Certainly that is so here because appeal has been promised, and it is unrealistic to expect that potential buyers will come forth and be vetted while an appeal looms. However, once the legal battles have ended, the Court fully expects that the Special Master will be able to proceed within much the same framework as used by the DOJ.

(3) Standalone Viability of Towanda

The record here shows that a divested Towanda would provide significant competition in the doorskin market and restore competition that the merger lessened. The analysis begins with the undisputed evidence that, from its formation in 2002 until the housing crisis started in 2007, CMI, including Towanda's doorskins, was profitable. In this case, both parties agree that EBITDA is an appropriate measure of profitability. And the Court finds from PTX 341 and PTX 342 that, looking only at Towanda's doorskin business, the EBITDA was positive in every year from 2009 to 2013 and that it was projected **[**117]** to be profitable on that basis in 2014. That is to say, in the doorskin aspect of its business, Towanda's EBITDA in 2009, 2010, 2011 and 2012 was positive even though overall finances for that same period showed a loss.[23]

It is also clear from the record that CMI was losing money in 2011 and that made it necessary for the owners of the company to put it on the market. But, the record also shows that the situation has changed. In particular, the record establishes that:

- since the merger in 2012, demand for doorskins has increased substantially so that Towanda's most recent annual output was [ ] doorskins;
- from the time it was created CMI (through Towanda) was an important supplier of doorskins to all the Independents. Towanda is a low cost plant;
- Towanda has been significantly improved;
- the new owner could expect Steves to order [ ] doorskins per year under a long term supply contract.

Likewise the new owner would be able to count on contracts to supply JELD-WEN with [ ] doorskins per year. Given the high prices that JELD-WEN charges the other independent doormakers, it is likely that a new competitor would be able to attract business from JELD-WEN's Independent doormaker manufacturer **[**118]** customers other than Steves. And, the new owner of Towanda would have every incentive to try to attract business from the

[23] The record is not entirely clear why that is so but it appears to be that the losses largely occurred in the door manufacturing businesses of CMI at the time because the EBITDA for the doorskin business was positive and, according to JELD-WEN and the record, the MiraTec and Extira business was also profitable during that period of time.

Independents, who are now customers of JELD-WEN's by offering lower prices than the high prices they are now paying to JELD-WEN.[24]

The events of 2011 and 2012 also provide some evidence probative of whether Towanda could be a viable competitor in the doorskin market after divestiture. In particular, when the company was last on the market in 2011, there were approximately five serious buyers for the company. It is fundamentally correct that companies are not prepared to invest in other companies unless they believe they can make a profit **[*667]** in so doing. And, the new buyer will be bidding on a far more successful entity than were the five serious buyers in 2011.

Further, the record shows that the margins at Towanda, which is a way of measuring profitability, were strong. The margin is the difference between the cost of manufacturing the doorskin against the selling price of the doorskin. Professor Shapiro testified that, as far back as 2012, the margin for doorskins made at Towanda was approximately 35%. Since then, JELD-WEN's costs have gone down because improvements have **[**119]** been made at Towanda, thereby lowering the cost of manufacturing the doorskins. Further, the evidence establishes that the key input costs at Towanda have declined. The ultimate conclusion from this information is that the margin has gone up.

Accordingly, there are three substantial reasons for concluding that a divestiture of Towanda is likely to be competitive and profitable. First, there is the fact that Towanda was profitable before the significant housing downturn and that it has returned significantly to profitability. Second, the EBITDA numbers show that, even during the rough periods during the housing crisis, Towanda's EBITDA for doorskins was positive, albeit not large. Third, the margin figures indicate that a substantial profit can be made.

(4) Divestiture Will Remedy the Lessened Competition Found by the Jury

Here, as the jury found, and the record shows, the merger substantially reduced competition in the doorskin industry. Less than two years after the merger reduced the number of suppliers from three to two, one of those suppliers essentially withdrew from the market, thereby depriving the Independents of that key component of a reliable supply source. Masonite made that **[**120]** decision known to its investors and to JELD-WEN in a public telephone conference. Not long thereafter, the other supplier, JELD-WEN, embarked upon a plan to raise doorskin prices, and, in so doing, emphasized that it was then the only game in town. At the same time, JELD-WEN felt free to disregard existing contract obligations respecting pricing and to engage in bullying tactics to get increased prices even if that would kill off some of the Independents who were its customers.

Also, the quality of JELD-WEN's doorskins declined as the lessened competition took hold. And, by the beginning of 2015, the manner in which JELD-WEN dealt with defective products changed because competition had lessened.

None of that was possible when, in 2011 and 2012, CMI had been a competitor. Divestiture will once again restore three competitors who make and sell doorskins. The record does not show whether Masonite can be expected to increase its participation in selling to the Independents. But, it does permit the finding that JELD-WEN and divested Towanda can be expected to compete in selling doorskins.

Divestiture is stiff medicine. Therefore, it is important to assess whether an alternative equitable remedy, **[**121]** or a combination thereof, can effectively restore the competition that was substantially lessened by the merger. This assessment starts by remembering that, in the spring of 2012, there were three vertically integrated doorskin suppliers: Masonite; JELD-WEN; and CMI. The record shows that these three companies competed vigorously in selling doorskins to Steves and the other independent (non-integrated) door manufacturers. That is pointedly illustrated by the fact that, in 2011 and 2012, Steves was in negotiations for a new long-term supply contract, and there was significant price competition for Steves' business. **[*668]** The favorable terms were reflected in the Supply Agreement that JELD-WEN and Steves executed in May 2012, a few months before the merger closed.

[24] Further, as did JELD-WEN in 2012 when it acquired CMI, the new owner will also have the MiraTec and Extira lines and will make those products available to the customers who now buy them from JELD-WEN.

Divestiture would once again place three domestic doorskin suppliers in the doorskin market. Nothing in the record points to how that could be accomplished short of divestiture. Neither party has posited an alternative.

Although the Court could solve Steves' supply problem by ordering JELD-WEN to supply Steves' requirements for a long term, that alternate remedy would not restore competition in the industry as a whole. And, the record **[**122]** proves that the lessened competition has adversely affected the Independents other than Steves. So simply securing a long-term supply for Steves would not aid those manufacturers.

Even if the Court could order JELD-WEN to sell, for a period of time, to Steves and the other Independents at the prices that prevailed before JELD-WEN secured new prices in 2014 and 2015, there still would be only one domestic supplier willing to sell to the Independents other than on a spot basis. And, there would be no structure in place to foster competition after the Court-ordered prices expired.

Based on this record, the Court can discern no alternative to divestiture that would restore competition that the merger substantially lessened.

(5) Use of Special Master

JELD-WEN also contests the potential appointment of a special master to assist with divestiture. JELD-WEN claims that using a special master exceeds the boundary defined in La Buy v. Howes Leather Co. See *352 U.S. 249, 256, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957)* ("The use of masters is to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause, and not to displace the court." (internal citation and quotation marks omitted)).

JELD-WEN is mistaken. *Fed. R. Civ. P. 53* governs **[**123]** when a special master may be appointed. The cases cited by JELD-WEN discussed a version of *Rule 53* that required an "exceptional condition" to justify special master referrals. See *id. at 250, 256*; *Beazer E., Inc. v. Mead Corp., 412 F.3d 429, 440 (3d Cir. 2005)*; *United States v. Microsoft Corp., 147 F.3d 935, 954, 331 U.S. App. D.C. 121 (D.C. Cir. 1998)*; *Burlington N. R. Co. v. Dep't of Revenue of State of Wash., 934 F.2d 1064, 1071 (9th Cir. 1991)*. The current *Rule 53* is very different, allowing special masters to, as relevant here, "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." *Fed. R. Civ. P. 53(a)(1)(C)*. This provision accounts for courts' increased reliance on masters "to assist in framing and enforcing complex decrees." In particular, it permits appointment of a special master "when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent . . . . The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system." *Fed. R. Civ. P. 53(a)(1)* advisory committee's note to 2003 amendment.

Courts have frequently used *Rule 53(a)(1)(C)* to appoint special masters to oversee compliance with complex injunctive relief and make appropriate recommendations to those courts, see, e.g., *RLI Ins. Co. v. Nexus Servs., Inc., No. 5:18-CV-00066, 2018 U.S. Dist. LEXIS 110609, 2018 WL 3244413, at *13-14 (W.D. Va. July 2, 2018)*; *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC, No. CV 2:13-16044, 2016 U.S. Dist. LEXIS 73904, 2016 WL 3190255, at *14 (S.D.W. Va. June 7, 2016)* **[**124]** , or to conduct sales of disputed assets in foreclosure cases. See, e.g., *Stearns Bank Nat'l Ass'n v. Come* ***[*669]*** *Again, Inc., No. 8:15-CV-322-T-30JSS, 2016 U.S. Dist. LEXIS 21139, 2016 WL 695990, at *2 (M.D. Fla. Feb. 22, 2016)*. Here, divestiture compliance involves extraordinarily complex issues that, given the state of the Court's docket and its limited knowledge about asset sales in the building products industry, "cannot be effectively and timely addressed by" the Court or any judge in this district. *Fed. R. Civ. P. 53(a)(1)(C)*. And, even if *Rule 53(a)(1)(C)* did not confer appointment authority here, the Fourth Circuit has approved of special master appointments "based on [a court's] inherent authority to fashion appropriate post-verdict relief." *Trull v. Dayco Prods., LLC, 178 F. App'x 247, 251 (4th Cir. 2006)*. As a result, the Court has ample grounds for appointing a special master if it determines that divestiture is appropriate.

Finally, the parties will be afforded an opportunity to comment on and object to the order appointing the Special Master because the Court does not contemplate adopting the order proposed by Steves, and the Special Master would not be allowed to take significant action without the approval of the Court.

B. The Requested Ancillary Conduct Remedies

To assure that the requested divestiture is effective in restoring competition, Steves proposes several forms of so-called "conduct remedies." Some are appropriate. Others are not.

First, Steves says that JELD-WEN should divest to a new owner not only the Towanda facility, but also the equipment used to develop, manufacture, and sell doorskins there. That is a rather obvious requirement. Section II.A.1, supra.

Second, Steves would require transfer or licensing of all intangible assets used in the development, manufacturing, and sale of doorskins at Towanda (to include patents, schematics, designs, customer lists, vendor lists, trade secrets, and the **[**125]** know-how necessary to operate the facility).[25] A requirement of that sort is also permissible and appropriate. Section II.A.1, supra.

Third, Steves asks for an order affording the new owner a reasonable opportunity to retain the services of current Towanda employees. That too is permissible and appropriate so as to afford the divested entity an opportunity to succeed. Section II.A.1, supra.

Fourth, Steves asks that JELD-WEN be prohibited from rehiring those employees for two years. That is permissible and appropriate to afford the divested entity an opportunity to succeed. Section II.A.1, supra.

Fifth, to help assure the divested firm's success, Steves seeks an order requiring the divested entity to offer Steves an eight-year doorskin supply contract at prices based on the current Supply Agreement. Certainly, a provision requiring the new owner to agree to supply Steves beyond 2021 is a permissible, and necessary, step to remedy the irreparable remedy proved by Steves. And, the divested entity would benefit from a long-term supply agreement with Steves. However, fixing the duration of that agreement and specifying the prices to be based on the current supply agreement would be too great **[**126]** a restriction on the new owner which must be allowed to negotiate its own contract terms if it is to succeed. Section II.A.1, supra.

[*670] Sixth, Steves seeks a provision that would allow JELD-WEN's independent customers-such as Lynden, Haley, and Excel-to terminate, without penalty, their supply agreement with JELD-WEN to help alleviate the effect of the lessened competition on them (the high prices recently extracted by JELD-WEN). Considering that the lessened competition from the merger allowed JELD-WEN to extract high prices from its independent customers, a provision of this sort would help restore competition. Section II.A.1, supra

Lastly, Steves asks that the Court limit JELD-WEN's ability to buy doorskins from the new owner of Towanda to a period of two years. A provision of that sort would not help the new owner to succeed. And, JELD-WEN, like Steves, would be a natural customer for the new owner because JELD-WEN already uses some of Towanda's output. On the other hand, JELD-WEN cannot be allowed to limit the quantity of doorskins that are available to the Independents by buying up all of the output of Towanda. Therefore, it would be appropriate to allow JELD-WEN to buy from the new **[**127]** owner of Towanda, but to require that, after the first two years following divestiture, the new owner satisfy the requirements of the Independents before supplying more than [ ] doorskins to JELD-WEN. Section II.A.1, supra.

For the foregoing reasons, and to the extent recited above, the ancillary provisions and conduct relief will be granted and denied.

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[25] If the buyer should be Steves, it will be necessary to make provisions that secure to JELD-WEN the benefits of the jury verdict and any relief granted in the trade secrets trial.

C. JELD-WEN's Equitable Defenses

As noted in a separate opinion, unclean hands is not a valid defense to a *Section 16* request for injunctive relief on the facts of this case. See Divestiture Evidentiary Issues Op. (ECF No. 1759) at 14. Accordingly, laches is the only pleaded equitable defense remaining to JELD-WEN here. Laches is an available equitable defense to divestiture. See *Am. Stores, 495 U.S. at 296*. The defense also can bar the proposed ancillary remedies.

Laches "operates throughout the entire remedial portion of equity jurisprudence." 2 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 418, at 169 (5th ed. 1941). According to the eminent English chancellor, Lord Camden:

> A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced **[**128]** for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence.

Id. § 419, at 171 (emphasis added) (internal quotation marks omitted). Laches is thus defined as "such neglect or omission to assert a right as, taken in conjunction with lapse of time, more or less great, and other circumstances caus[es] prejudice to an adverse party." *Id. at 171-72* (internal quotation marks omitted). Each case turns on its own facts because, as explained by the Supreme Court,

> what might be inexcusable delay in one case would not be inconsistent with diligence in another, and unless the nonaction of the complainant operated to damage the defendant, or to induce it to change its position, there is no necessary estoppel arising from the mere lapse of time.

N. Pac. R. Co. v. Boyd, 228 U.S. 482, 509, 33 S. Ct. 554, 57 L. Ed. 931 (1913) (citing *Townsend v. Vanderwerker, 160 U.S. 171, 186, 16 S. Ct. 258, 40 L. Ed. 383 (1895))*. In Townsend, the Supreme Court considered the assertion of laches where the defendant's dead and intestate relative **[*671]** ("Marvin") had agreed to convey to the plaintiff a one-half interest in a house on a lot owned by Marvin in exchange for the plaintiff contributing funds to build the house and supervising the construction. The plaintiff superintended the job from 1879 to 1880, and made the required **[**129]** payments from 1879 to 1884. But, he did not file a bill in equity until 1889, after Marvin had died. See *Townsend, 160 U.S. at 172-73*. The Supreme Court held that, this delay notwithstanding, the defense of laches was not available, and thus that plaintiff could treat the property as subject to a lien in his favor and could have it sold to satisfy his claim for half of its original value. *Id. at 182-83*. In making its decision, the Supreme Court examined the circumstances of the house payments and the relationship between Marvin and the plaintiff. As the Supreme Court explained, those individuals had lived together in the house after it was built. Moreover, Marvin regarded the plaintiff as a foster child, and had stated that she would include him in her will and intended the house to be his when she was done with it. Mindful of these circumstances, the Supreme Court held that laches did not preclude the equitable relief sought because,

> [d]ealing with the person who stood in this relationship with him and whom he had always been upon friendly, and even intimate, terms, the same diligence could not be expected of [the plaintiff] as would have been if he had been treating with a stranger.

Id. at 185-86. In other words, what constitutes reasonable **[**130]** diligence depends upon the particular facts of the case, including the relationship between the parties.

The Supreme Court was confronted with another ten-year delay in Northern Pacific Railway Company. In that case, a railroad reorganization pursuant to bankruptcy proceedings had been completed in 1896, and the plaintiff attacked that reorganization by filing a bill in equity in 1906. Noting that background, the Supreme Court held that:

> [t]he fact that improvements are put upon the property—that the stocks and bonds of the new company almost immediately became the subject of transactions with third persons-calls for the special application of the rule of diligence. But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitation. For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and unless the nonaction of the complainant operated to damage the

> defendant, or to induce it to change its position, there is no necessary estoppel of laches arising from the mere lapse of time.

N. Pac. R., 228 U.S. at 508-09 (emphasis added). The Court went on to assess the plaintiff's diligence and concluded that **[**131]** he had made reasonable, albeit time-consuming, efforts to put himself in the position of a judgment creditor of the railroad so that he could proceed in equity to collect his debt. See *id. at 509*. As does Townsend, this decision teaches that the determination of laches must be made in perspective of the facts of each case respecting the circumstances of the delay and the effects thereof.

The Fourth Circuit's approach to the doctrine of laches is consistent with that foundation. "Laches imposes on the defendant the ultimate burden of proving '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990)* (quoting *Costello v. United States, **[*672]** 365 U.S. 265, 282, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961))*. The defense "applies to preclude relief for a plaintiff who has unreasonably 'slept' on his rights," barring "claims where a defendant is prejudiced by a plaintiff's unreasonable delay in bringing suit after the plaintiff knew of the defendant's violation." *PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 121 (4th Cir. 2011)*; see also *Kloth v. Microsoft Corp., 444 F.3d 312, 325 (4th Cir. 2006)* (laches involves an "equitable balancing of a plaintiff's delay with prejudice to a defendant" (internal quotation marks omitted)). The laches analysis is highly fact-dependent. See *White, 909 F.2d at 102*.

Before addressing the elements of the laches framework, it is necessary **[**132]** to address Steves' contention that JELD-WEN must overcome the "strong presumption" that laches does not apply because Steves initiated this litigation within the Clayton Act's statute of limitations for damages claims. *Synergistic Int'l, L.L.C. v. Korman, No. CIV. 2:05CV49, 2007 U.S. Dist. LEXIS 9752, 2007 WL 517677, at *8 (E.D. Va. Feb. 8, 2007)*. Both cases that Steves cites as establishing this "presumption" are trademark infringement suits, so their principles do not necessarily control in an antitrust case. See *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc., 936 F.2d 889, 894 (6th Cir. 1991)* (citing *Tandy Corp. v. Malone & Hyde, Inc., 769 F.2d 362, 365 (6th Cir. 1985))*; *Synergistic Int'l, 2007 U.S. Dist. LEXIS 9752, 2007 WL 51767, at *8* (citing *Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1138-38 (9th Cir. 2006))*.

Section 4B of the Clayton Act imposes a four-year statute of limitations for damages claims by any private plaintiff or by a government entity. See *15 U.S.C. § 15b*. *Section 16*, on the other hand, contains no statute of limitations. See id. *§ 26*; *New York ex rel. Spitzer v. Saint Francis Hosp., 94 F. Supp. 2d 399, 421-22 (S.D.N.Y. 2000)*. Nonetheless, because *Section 4* and *Section 16* provide different remedies for the same antitrust violations, *Cargill, 479 U.S. at 113*, several courts have used *Section 4B*'s limitations period as a guideline for analyzing laches defenses to *Section 16* claims. See *Oliver v. SD-3C LLC, 751 F.3d 1081, 1086 (9th Cir. 2014)*; *Midwestern Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265, 277 (8th Cir. 2004)*; *Duty Free Ams., Inc. v. Estee Lauder Cos., Inc., No. 12-60741-CIV, 2014 U.S. Dist. LEXIS 43673, 2014 WL 1329359, at *14 (S.D. Fla. Mar. 31, 2014)*, aff'd, *797 F.3d 1248 (11th Cir. 2015)*; *KFC Corp. v. Marion-Kay Co., 620 F. Supp. 1160, 1168 (S.D. Ind. 1985)*; *Argus Inc. v. Eastman Kodak Co., 552 F. Supp. 589, 600 (S.D.N.Y. 1982)*; *Farbenfabriken Bayer, A. G. v. Sterling Drug, Inc., 197 F. Supp. 627, 629 (D.N.J. 1961)*, aff'd, *307 F.2d 210 (3d Cir. 1962)*.[26] Moreover, one of the first cases to adopt that approach was *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., 518 F.2d 913 (9th Cir. 1976)*. IT&T's conclusion was supported in part by the existence of what the court referred to as a "double standard" for calculating the laches period:

> If relief **[**133]** is sought, not on the theory that past or present actions or behavior constitute actual violations of the substantive ***antitrust law***, but because the plaintiff is threatened with an impending violation, then laches should normally run from the time when the plaintiff was first confronted with an enjoinable threat and thus could have obtained injunctive relief. If the threat later matures into an actual violation and the plaintiff sues to

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[26] Although the Fourth Circuit implicitly approved of that approach, it has not directly addressed the question. See *Weinberger v. Retail Credit Co., 498 F.2d 552, 556 (4th Cir. 1974)*.

> prevent recurrence or **[*673]** continuation of the violation, then laches should be recomputed from the time of the subsequent actual violation.
>
> This 'double standard' for laches reflects the fact that there are two basic theories of relief for actions under *[Section] 16*. Injunctions may be obtained against (1) impending violations of the substantive law, and (2) past or present violations likely to continue or recur.

Id. at 928-29 (emphasis added) (citing *Zenith Radio, 395 U.S. at 130*). In IT&T, the plaintiff sought to restrain certain actual violations of the Sherman and Clayton Acts, and the court held that "the proper starting point for computation of the laches period is the time when the alleged violations occurred." *Id. at 929* (emphasis added). In doing so, it noted that "[t]he four-year limitation of . . . *Section 4B* for **[**134]** private antitrust actions for damages is long enough to enable potential plaintiffs to observe the actual effects and the possible antitrust violation and to calculate its potential defects." Id. That approach comports with the common sense understanding that the actual competitive effects of a merger may be delayed as they were in this case.

Examining the laches period in this flexible manner is consistent with how laches operates in copyright infringement suits. See *Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 134 S. Ct. 1962, 1977-78, 188 L. Ed. 2d 979 (2014)*. More importantly, it comports with longstanding Fourth Circuit law:

> In the application of the doctrine of laches, the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches, before, and will be stayed after the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer . . . period than that fixed by the statute, the [court] will not be bound by the statute, **[**135]** but will determine the extraordinary case in accordance with the equities which condition it.

King v. Richardson, 136 F.2d 849, 862 (4th Cir. 1943) (emphasis added) (internal quotation marks omitted). Using *Section 4B*'s limitations period as a guideline (as posited by ITT) and not a firm rule better serves the purposes of the Fourth Circuit's settled laches approach because it accounts for the alternate ways in which the laches period may start running under *Section 16*.

As a result, although Steves' initiating this action within *Section 4B*'s limitations period does not necessarily lead to a strong presumption against laches (as it would in trademark infringement suits), it is appropriate to rely on that four-year period as a guideline to determine whether Steves unreasonably delayed here.

1. Reasonableness of Steves' Delay

"An inexcusable or unreasonable delay may occur only after the plaintiff discovers or with reasonable diligence could have discovered the facts giving rise to his cause of action." *White, 909 F.2d at 102*. This factor thus requires the Court to decide when Steves knew or should have known that it was facing "threatened loss or damage" from a *Section 7* violation, as needed to establish *Section 16* standing. *15 U.S.C. § 26*. The laches period would have started running only at that time. See *Ray Communs., Inc. v. Clear Channel Communs., Inc., 673 F.3d 294, 301 (4th Cir. 2012)* ("Logic dictates **[**136]** that 'unreasonable delay' does not include any period of time before the [plaintiff] is able to pursue a claim . . . ." (internal quotation marks **[*674]** omitted)). And, of course, Steves could not have been aware of any *Section 7* violation until it was reasonably knowable that "the effect of [the CMI] [A]cquisition may be substantially to lessen competition." *15 U.S.C. § 18*.

JELD-WEN argues that Steves should have known of a threatened *Section 7* violation as early as April 2012, when Steves became aware of the planned CMI Acquisition, and at the latest on October 24, 2012, when the merger was consummated. But accrual principles for *Section 4* damages claims help show why that is not correct. *Section 4B*'s limitations period "starts to run at 'the point the act first causes injury.'"[27] *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1051 (8th Cir. 2000)* (quoting *Klehr v. A.O. Smith Corp., 521 U.S. 179, 190-91, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997))*. Because *Section 7* makes the acquisition itself illegal, and the antitrust harm from the acquisition is usually known when the merger is consummated, *Section 4* claims often begin accruing on that date. See *id. at 1050*. But a *Section 7* violation "may occur 'at or any time after the acquisition, depending upon the circumstances of the particular case.'" *Midwestern Mach., Inc. v. Nw. Airlines, Inc., 167 F.3d 439, 443 (8th Cir. 1999)* (quoting *United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957))*; see also *United States v. ITT Cont'l Baking Co., 420 U.S. 223, 242, 95 S. Ct. 926, 43 L. Ed. 2d 148 (1975)* (violation may occur post-consummation if there was "no realistic threat of restraint of commerce or creation of a monopoly" **[**137]** when acquisition completed).

Areeda and Hovenkamp's example of this sort of situation is particularly apt here:

> One might imagine a merger that occurred in 1980 but with no immediate price increase, perhaps because the firm at that point lacked the power. But suppose the firm thereafter augmented its power and finally exacted a monopoly price increase in 1990 . . . and the plaintiff brings its action in 1993. In such a case the statute of limitation would not begin to run until the post-merger price increase occurred.

12 Areeda & Hovenkamp, supra, ¶ 1205b.

With these principles in mind, the first task is to ascertain the period of delay that is involved here. This action was filed on June 29, 2016, slightly more than four years after JELD-WEN announced that it was going to acquire CMI and a few months before the fourth anniversary of the consummation of the merger. Therefore, at its maximum reach, the period of delay was equivalent to the four-year statute of limitations set by *Section 4B* for damages claims. Thus, the filing of the antitrust action was within the guideline period as outlined in *ITT* and *King v. Richardson*. That does not, however, resolve the reasonable delay analysis.

To begin, as explained below, the period **[**138]** from April 2012 to August 2014 cannot be included in the period of delay in the laches calculus. Thus, it is necessary to remember that JELD-WEN was aware at the time of the merger that the antitrust issues associated with the CMI Acquisition were significant. PTX-90. Indeed, having calculated market concentration as a consequence of the forthcoming acquisition and the Herfindahl-Hirschman indices for markets impacted by the merger, JELD-WEN retained highly-qualified antitrust counsel from one of the nation's largest **[*675]** law firms, O'Melveny & Myers. In sum, and as the record shows, JELD-WEN knew full well of the merger's antitrust implications.

Mindful of those implications, JELD-WEN pursued an established merger strategy to assuage any possible concerns from the DOJ, from CMI's customers, and from JELD-WEN's own customers (including Steves). Specifically, JELD-WEN developed a plan to enter into long-term supply agreements with independent door manufacturers in the United States (notably Steves, Lynden, and Haley), see PTX-93; PTX-139. As part of its strategy, JELD-WEN deliberately decided not to approach the DOJ about the proposed CMI Acquisition until those long-term agreements had been **[**139]** entered. In fact, JELD-WEN's internal documents show that the company considered it a "tactical error to even call [the DOJ]" before entering into those supply agreements, and that JELD-WEN was fully aware that having those contracts in place would "be very positive for us [at the DOJ] if we ever go." PTX-160. As Shapiro explained at trial, acquiring firms often enter into long-term contracts with customers in order to prevent a challenge to the merger. That tactic limits the DOJ's ability to secure evidence necessary to block a merger because customers with supply agreements are less willing to oppose a merger proposed by their supplier and because customers do not have reason to be threatened.

And, when JELD-WEN did approach the DOJ about the CMI Acquisition, it emphasized its long-term supply agreements with Steves, Lynden, and others. And Morrison, who led the company's presentation to the DOJ, admitted that the purpose of entering into such contracts was "to alleviate" customer concerns about not having a

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[27] Steves did not need to suffer actual antitrust injury to bring a *Section 16* claim, which requires only "threatened" injury. However, based on the facts in the record, it is not clear that this distinction is relevant to the outcome here.

supply and "to assure the customers of CMI, who might eventually become customers of JELD-WEN, that JELD-WEN was committed to their continued supply." See PTX-139.

Based on these **[**140]** facts, the Court finds that before, and at the time of, the merger in 2012, Steves had no reason to believe that there would be anticompetitive effects from the merger because JELD-WEN designed its pre-merger strategy to create that state of mind. To the contrary, Steves had a positive relationship with JELD-WEN through its CEO, Phillip Orsino, and had a recently signed long-term contract with JELD-WEN which Orsino described as a lifetime arrangement. And, although Steves did not take that assurance literally, under all the known circumstances, it was reasonable for Steves to believe that the merger would not produce a substantial lessening of the competition that had produced the favorable terms in the Supply Agreement.

The record here establishes, and the Court finds, that Steves did not know, and could not reasonably have known, that JELD-WEN's conduct violated *Section 7* until August 2014 at the earliest. JELD-WEN is right that Steves learned of the CMI Acquisition in April 2012, and it knew that the merger would reduce the number of doorskin suppliers from three to two. But that did not mean much to Steves because it reasonably believed that the prices that JELD-WEN could charge were constrained **[**141]** by the Supply Agreement. Applying *Section 4* accrual rules here, any claim would have been dead in the water in April or October 2012 because there was no existing or threatened antitrust injury, and antitrust damages would have required speculation about JELD-WEN's future acts.

Although, in November 2012, Steves subsequently noticed some decline in doorskin quality, it did not associate those problems with the CMI Acquisition then. **[*676]** The same is true of the doorskin pricing issues arising in late 2012 through 2013, which Steves perceived as a purely contractual issue that could be, and eventually was, worked out through communications with Orsino. There was no reason for Steves to believe that these issues were anticompetitive effects from the merger; both sides treated Steves' concerns as essentially contract disputes. In any event, Steves could have tried to shift its doorskin purchases to Masonite if it was dissatisfied with JELD-WEN. In other words, even though JELD-WEN had acquired excess market power through the CMI Acquisition, it did not use that power before 2014.

However, the record establishes that, in May 2014, Hachigian, who had taken over from Orsino as JELD-WEN's new CEO, informed **[**142]** Steves that it would be necessary to renegotiate the Supply Agreement to secure higher prices, including a so-called "capital charge" (to help defray JELD-WEN's cost of capital invested in the business) because Hachigian thought that the Supply Agreement was mispriced and unfair to JELD-WEN. At that time, Hachigian also told Steves that he intended to invoke the termination provisions of the Supply Agreement to bring the parties to the bargaining table.

In retrospect, that conduct represented the first of a series of events wherein JELD-WEN exercised the market power brought about by the substantial lessening of competition effected by the merger (as found by the jury). However, Steves was reasonable in believing that the purpose of the threatened termination was, as Hachigian had represented, to bring the parties to the negotiating table to try to get a more favorable agreement for JELD-WEN. Then, in July 2014, Hachigian sent Sam Steves a Masonite presentation stating that Masonite would not sell doorskins to competing door manufacturers like Steves. Hachigian sent that presentation to Steves, not for mere informational purposes, but as a message from JELD-WEN that Steves had to deal **[**143]** with JELD-WEN because the only other supplier (Masonite) was not to be a future source of supply. That conduct, combined with the termination notice and Hachigian's actions in May 2014, portended that the JELD-WEN might now be using the increased market power that it had gained as a result of the merger.

Sam and Edward Steves appear to have recognized that possibility in mid-August 2014. Thus, on August 12, 2014, Sam Steves e-mailed Edward Steves to express his concerns about Masonite's statements that it and JELD-WEN were the only vertically integrated doorskin manufacturers and that the barrier to entry in the doorskin market was "prohibitive." Sam Steves then asked whether Steves was "finished with exploring anti trust issues if J[ELD-WEN] term[inate]s the [S]upply [A]greement." DX-291. Then, on August 26, Sam Steves sent Edward Steves another e-mail that proposed a response to an e-mail from Hachigian about various issues under the Supply Agreement, including the proposed capital charge. In that e-mail to his brother, Sam Steves suggested that Steves send a "VERY strong response" and "tee up [its] claim on the overcharge." His proposed response also included this suggested language: **[**144]** "We remain troubled that you continue to threaten termination of the agreement if we don't consent to . . . a price increase! Finally, and perhaps most important—the antitrust." DX-466.

Neither Sam nor Edward Steves were called upon to explain the comments made in those emails. So, it is difficult to discern their meaning. Nonetheless, those e-mails show that Steves should have been alerted to the possibility that the threatened price **[*677]** increases and the contract termination were effects of the merger. That possibility would have become more concrete when Hachigian sent the Supply Agreement termination letter on September 10, 2014. Accordingly, the record permits the conclusion that Steves should have known that it faced threatened or actual antitrust injury by August 12, 2014,[28] and that Steves did know by September 10, 2014.

Therefore, the question becomes whether JELD-WEN has proven that the time between August 12, 2014 and June 29, 2016 (when this action was filed) constitutes unreasonable delay for purposes of laches. As previously explained, that is a case-specific inquiry that depends on the particular facts at hand. In this case, the inquiry begins with the understanding that **[**145]** Steves needs a reliable supply of doorskins to survive, a fact known by both Steves and JELD-WEN. The inquiry also must take into account that, in August 2014, there were only two domestic doorskin manufacturers, and that one, Masonite, recently had announced that it would not sell doorskins to independent door manufacturers like Steves. The reasonableness assessment must also consider that the other supplier, JELD-WEN, had just given notice to Steves that the Supply Agreement would end in 2021 unless Steves agreed to JELD-WEN's demands for a substantial price increase. Also, in August 2014, there was virtually no decisional law around which to measure the viability of a private party antitrust lawsuit, much less one in which the substantial lessening of competition had been brought about under the circumstances presented by this record. Finally, the assessment must keep in mind that JELD-WEN was a far bigger and far better-heeled company than Steves. The question then becomes whether it was reasonable for Steves, confronted with these realities in August 2014, to have instituted a costly, protracted, and novel antitrust litigation to attempt to solve a supply dilemma that was then **[**146]** seven years in the future. The record teaches that such a course was not reasonable.

Instead, as the record here shows, when confronted with contract termination, Steves reasonably elected to try to find another reliable source of supply. To that end, in October 2014, the Steves Brothers met with Masonite's CEO, Fred Lynch who informed them that Masonite would not sell doorskins to Steves except on a spot basis, and at prices that were so high that Steves could not make a profit. Faced with that position by Masonite, it became both necessary and reasonable for Steves to treat further with JELD-WEN. So, in January 2015, Sam and Edward Steves met with Hachigian, Merrill, and other JELD-WEN representatives in an effort to resolve the differences between the two companies, and thereby to secure the reliable source of supply on which Steves' survival depended.

However, in that meeting, Hachigian threatened that JELD-WEN would be "total pricks" over the remaining term of the Supply Agreement if Steves did not agree to renegotiate the contract to pay higher **[*678]** doorskin prices. See PTX-514. And, from January 2015 to the middle of that year, JELD-WEN informed Steves about a series of greater price **[**147]** increases, which JELD-WEN conceded at trial were actually prohibited by the Supply Agreement. During that same period, JELD-WEN refused to provide Steves with the contractually required information that would allow Steves to determine whether the proposed price increases were legitimate under the controlling provisions of the Supply Agreement.

With those developments, Steves again approached Masonite, the only other domestic supplier, about a supply of doorskins. It was reasonable to make the last ditch effort with Masonite. Lynch again informed Edward Steves that Masonite would not supply Steves with doorskins on a long-term basis, offering to sell Steves' doorskins only on a spot basis at prices that would be unprofitable for Steves.

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[28] At least one case has suggested that the continuing violations doctrine might apply to extend the laches period each time a new anticompetitive act occurs. See *IT&T, 518 F.2d at 929*. However, the Court already noted that this doctrine usually does not apply in Clayton Act cases, and held that the anticompetitive effects here were "unabated inertial consequences" of the CMI Acquisition, not independent *Section 7* violations. See Summary Judgment Op. at 30-31 (internal quotations omitted). Therefore, any doorskin price increases or quality reductions after August 2014 did not change the beginning date of the laches period.

Therefore, at about the same time, Steves found it necessary to explore the possibility of buying doorskins from foreign manufacturers or building its own doorskin plant. Steves ultimately determined that neither option was likely to provide an adequate source of supply by the time that the Supply Agreement would expire. Nonetheless, it was reasonable for a small company like Steves to explore securing a doorskin supply by purchasing from foreign suppliers **[**148]** or building its own plant rather than instituting a novel antitrust lawsuit against its much larger and more powerful supplier. The record shows that the process of assessing the viability of foreign manufacturers as a source of supply, like the process of evaluating whether it was possible or sensible to build a plant as the source of supply was complicated and time-consuming. Here, the record shows that, once Steves had determined that it could rely on neither of the two domestic doorskin suppliers (Masonite or JELD-WEN), it timely and diligently pursued the only other conceivable alternatives to filing an antitrust suit. Accordingly, the record here shows, and the Court finds, that Steves proceeded with reasonable diligence to consider the viability of these alternate sources of supply rather than starting a lengthy, costly,and novel antitrust lawsuit against its vastly better-financed supplier.

By early 2015, Steves had concluded that its future was at serious risk because the Supply Agreement with JELD-WEN would expire in 2021, and neither Masonite nor foreign suppliers offered a reasonable alternative mean of supply. Moreover, it was entirely uncertain whether Steves could afford **[**149]** to build a doorskin plant, either on its own or with a partner.

However, there was available to Steves another means to try to resolve the problems that both threatened Steves' existence and that, if not solved, would present antitrust injury: the alternative dispute resolution provision ("ADR") in the Supply Agreement. That process required Steves and JELD-WEN, as a first step, to hold an internal conference among senior executives. PTX-149 § 10(a). If that step was unsuccessful, the contract the required the parties to engage in mediation as a second step. Id. § 10(b).

On March 11, 2015, Steves invoked the ADR provisions of the Supply Agreement, and it requested an internal conference among senior executives to occur on March 23. DX-243 at 2. However, the two internal conferences did not take place until May 2015. At one of those meetings, Steves' attorney, Marvin Pipkin, expressed Steves' concern about antitrust issues arising out of JELD-WEN's conduct. The record does not reflect the exact details of Pipkin's statements or JELD-WEN's response. But it is clear that, by May 2015, JELD-WEN **[*679]** was aware of the risk of an antitrust claim if it persisted to exploit, in its dealings with Steves, the substantially **[**150]** lessened competition that the merger had produced. Of course, Steves too was aware of that potential antitrust claim.

After the internal conferences were unsuccessful, on July 2, 2015, Steves requested the mediation required by the Supply Agreement. That mediation took place in September 2015. The parties' disputes were not resolved then, but Steves presented JELD-WEN with a draft Complaint that raised both contract and antitrust claims.

Thereafter, on September 4, 2015, the parties entered into the first of several standstill agreements, which were extended on September 29, 2015; October 13, 2015; January 27, 2016; and April 25, 2016. Those agreements contained provisions reciting the parties'"desire to continue to discuss their differences in an effort to resolve these differences without litigation." See PTX-591; PTX-593; PTX-606; PTX-641; PTX-682.

While the standstill agreements were in effect, Steves, in December 2015, gave a presentation to the DOJ complaining of antitrust violations, after which the DOJ initiated a civil investigative demand. JELD-WEN subsequently gave a presentation to the DOJ on April 7, 2016. The investigation was closed by the DOJ on May 18, 2016. In June 2016, **[**151]** Steves requested JELD-WEN to agree to another extension of the standstill agreements, which JELD-WEN rejected. Immediately thereafter, on June 29, 2016, Steves filed this action.

On this record, the Court holds that JELD-WEN has not met its burden to prove that the delay between September 10, 2014 and June 29, 2016 was unreasonable. To the contrary, the record shows that, during that period, Steves took every reasonable step to try to secure a reliable supply of doorskins that was essential for its survival. It was reasonable for a small purchaser, like Steves, to try all reasonable measures to avoid litigation with the supplier of an ingredient essential to its core product line. That is especially so where, as here, the supplier is a vastly larger company that can afford costly litigation and where, as here, that supplier indicates a continued desire to attempt to work things out short of litigation. Public policy supports efforts by parties to work out difficult issues respecting their business relationships without resorting to litigation. See *Essilor Int'l v. Nidek Co., 217 F.3d 857*, [published in full-text format at *1999 U.S. App. LEXIS 28426*] 1999 WL 989071, at *5; (Fed. Cir. 1999); *NAACP v. NAACP Legal Def. & Educ. Fund, Inc., 753 F.2d 131, 137, 243 U.S. App. D.C. 313 (D.C. Cir. 1985)*; *Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 932 (7th Cir. 1984)*; cf. *Petrella, 134 S. Ct. at 1976*. Furthermore, common sense teaches that antitrust litigation would be lengthy and exceedingly expensive. And, in this case, the **[**152]** kind of antitrust case that Steves would have to bring would be the first of its kind. So there was no reliable way to predict what such litigation might cost or whether it would even be concluded before Steves would lose its source of supply in 2021.

Nor was it unreasonable for Steves to use the contractually-required ADR process to try to work out a business compromise to the contract-related problems that actually produced its antitrust injury, instead of immediately commencing antitrust litigation. Even after those procedures failed, the parties, both mindful of the potential for antitrust litigation, agreed to standstill agreements with a view to solving their differences. Considering the representations in those agreements that both parties wanted to resolve their differences without litigation, Steves reasonably avoided **[*680]** filing an antitrust suit until JELD-WEN refused to continue the process.

Considering the record as a whole, JELD-WEN has not proven that the delay from August 2014 to June 2016 was unreasonable. That, of course, defeats JELD-WEN's laches defense, because it has failed to prove the first element of that defense. Thus, the inquiry respecting the application of laches **[**153]** to the equitable remedies is at an end.

2. Prejudice to JELD-WEN

Ordinarily, it is preferable to articulate a single basis for decision, and thereby refrain from making alternative holdings. See *Karsten v. Kaiser Found. Health Plan of Mid-Atl. States, Inc., 36 F.3d 8, 11 (4th Cir. 1994)*. However, this case presents an exception to that rule, given that it presents issues of first impression on which appeal is virtually certain, and considering the nature of the relief sought. Therefore, in the interest of judicial economy, it is appropriate to consider the prejudice element of JELD-WEN's laches defense so that the entire picture will be available for consideration in the likely event of appeal.

Even unreasonable delay does not animate the bar of laches if that delay does not cause harm to the defendant. *Ray Commc'ns, 673 F.3d at 305*. Prejudice is shown by "a disadvantage on the part of the defendant in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff's conduct," *White, 909 F.2d at 102*, including economic prejudice. *Ray Commc'ns, 673 F.3d at 305*. In addition, a defendant is always "'aided by the inference of prejudice warranted by the plaintiff's delay.' . . . [T]he greater the delay, the less the prejudice required to show laches, and vice versa." *White, 909 F.2d at 102* (quoting *Giddens v. Isbrandtsen Co., 355 F.2d 125, 128 (4th Cir. 1966)*. But, in every case, "the defendant **[**154]** is ultimately required to prove prejudice (given the defendant's burden to plead and prove laches under *Fed. R. Civ. P. 8(c)*)." Id.

Here, there is no contention that JELD-WEN suffered any disadvantage in asserting or establishing a claimed right. Instead, JELD-WEN relies on the presence of "some other harm caused by detrimental reliance on [Steves'] conduct." In particular, JELD-WEN asserts various economic disadvantages that it says constitute prejudice.

JELD-WEN contends that, beginning immediately after the merger and continuing through 2016, it took numerous steps to integrate Towanda into its overall manufacturing operation. It claims that it closed CMI's Chicago headquarters, consolidated administrative functions, mothballed the Marion plant in 2013, sold Dubuque in 2016, and otherwise integrated Towanda into its general manufacturing plans but for Steves' delay in initiating suit. Those positions are based almost exclusively on the testimony of Morrison, and the Court declines to accept his testimony.

Morrison, who also served as JELD-WEN's trade secrets expert in the liability phase of the trade secrets case, was shown at the trade secrets trial to be a witness who could not be believed. He lied **[**155]** on his resume, which was offered into evidence, stating that he had graduated from Louisiana State University when in fact he had attended but one semester. He lied again, at his deposition and trial, when asked about his resume and his education, and he allowed JELD-WEN to publicly tout him as a graduate of Louisiana State University for years. A person who will lie about something of that nature is not to be believed. Moreover, having observed Morrison's conduct when testifying in the Remedies Hearing, the Court notes that he was **[*681]** more advocate than witness, and regrettably concludes that he would say anything to support JELD-WEN's cause whether it was supported by facts or not.

Accordingly, the Court does not believe his testimony that, in reliance on the absence of an antitrust suit, JELD-WEN would not have mothballed the Marion plant, closed the Dubuque plant, made the modifications in its system, and effectuated the integration of the Towanda plant into JELD-WEN's operations. Wholly apart from Morrison's lack of credibility, the record shows that the Marion plant was mothballed because of the expense of meeting environmental regulations and updating antiquated equipment. And, the **[**156]** record also shows that the decision to close the Dubuque plant was made in 2011, before the merger. Thus, the record also shows that Morrison's testimony is not credible.

Putting aside Morrison's testimony, the evidence is generally undisputed that JELD-WEN expended significant funds installing capital improvements and manufacturing processes in Towanda and integrating Towanda into its operation. But, the preponderance of the evidence does not establish that JELD-WEN relied on the absence of an asserted antitrust claim by Steves, in taking those steps. To the contrary, JELD-WEN made substantial investment in Towanda even after it was told by Pipkin in May 2015 that Steves had antitrust concerns and after Steves presented a copy of an anti complaint in September 2015. That JELD-WEN continued to invest in Towanda with that knowledge materially undercuts JELD-WEN's contention that it would not have made investments in Towanda had it been aware of a possible antitrust claim.

Further, the Court finds that JELD-WEN was fully aware that an antitrust action could be filed at any time within four years after the merger and, in any event, it is charged with that knowledge. And, mindful of that **[**157]** possibility, JELD-WEN made its investments in Towanda, integrated Towanda into its operational system, and took all the actions it now uses to prove the prejudice component of its laches defense.

The record shows that JELD-WEN relied not on Steves' inaction but on having successfully lulled Steves and the DOJ into action by entering into long-term contracts with the independent doorskin customers, including Steves. JELD-WEN thus relied on that tactic to insulate it going forward after the merger, not on Steves' inaction. Accordingly, JELD-WEN has not met its burden of proof on the component of detrimental reliance.

But, even if JELD-WEN can be said to have made the requisite showing of detrimental reliance, it has nonetheless failed to show prejudice that would suffice to establish laches. For example, the record is clear that JELD-WEN has more than recovered the capital investments (plant modifications and new equipment) that it made in Towanda after the merger, the making of which JELD-WEN asserts as prejudice. And, its operation of Towanda has yielded considerable profit. JELD-WEN, of course, will not have to disgorge that profit.

As discussed fully in Section II.A.3.(b) (Balance of **[**158]** Hardships), the operational changes that, of necessity, will be made in the event of divestiture will no doubt be troublesome to achieve, will entail significant expense, and will have some detrimental collateral consequences. However, the making of the changes necessary to restore competition is not such prejudice as will call into operation the equitable defense of laches into play.

JELD-WEN's position on laches is founded principally on the decisions in **[*682]** *Garabet v. Autonomous Techs. Corp., 116 F. Supp. 2d 1159 (C.D. Ca. 2000)* and *Taleff v. Southwest Airlines Co., 828 F. Supp. 2d 1118 (N.D. Ca. 2011)*. In both cases, the plaintiffs sued under *Section 7* of the Clayton Act, alleging that the merger itself would substantially lessen competition. In both cases, the plaintiffs were aware of the proposed merger and the threat to competition for several months before the merger. In Gabaret, the plaintiffs filed suit after the merger (one day in Taleff, the same day in Garabet). In Garabeet, the court held that the plaintiffs lacked anitrust standing for each antitrust injury and the court sustained a defense of laches. *Garabet, 116 F. Supp.2d at 1165-71*. In *Taleff*, the court did not actually decide the applicability of laches, but it held that the delay in filing suit until after the merger tipped the balance of hardship against the plaintiffs. *828 F. Supp. 2d at 1123-24*.

Neither *Gabaret* nor *Taleff* **[**159]** apply here because the facts of this case are different. Here, unlike *Garabet* and *Taleff*, there was no reason for the plaintiff to apprehend a lessening of competition before or at the time of the merger. To the contrary, JELD-WEN's strategy was intended to give Steves comfort. And, as explained above, the conduct causing antitrust injury occurred well after the merger.

Accepting JELD-WEN's theory would mean that where, as here, the lessening of competition occurs after the merger, a party thereby injured simply could never seek equitable redress to restore competition. For the reasons previously explained, the rules of antitrust injury and antitrust standing as well as the fundamental principles of equity foreclose such a result.

CONCLUSION

For the reasons, and to the extent, set forth above, PLAINTIFF STEVES AND SONS, INC.'S MOTION FOR EQUITABLE RELIEF (ECF No. 1191) will be granted in part and denied in part. The motion will be granted to require that JELD-WEN divest itself of the Towanda facility and, to the extent set out in Section II.B, to grant the conduct remedies necessary to the success of the divested entity as a manufacturer of interior molded doorskins. The motion will be **[**160]** denied as to the requested conduct remedies not necessary to that purpose.

To assure, to the extent reasonably possible, that JELD-WEN receives a fair price for Towanda, and to assure that divestiture produces a competitive entity that is likely to restore competition, the process specified by the Supreme Court in Brown Shoe, will be followed so as to assure that the divestiture is conducted in a realistic setting that is conducive to attracting qualified buyers who will pay a fair price for Towanda. To assure the success of that process, a Special Master will be appointed.

It is so ORDERED.

/s/ Robert E. Payne

Robert E. Payne

Senior United States District Judge

Richmond, Virginia

Date: October 5, 2018

Hoglund v. Charter Communs., Inc.

United States District Court for the Northern District of Alabama, Southern Division

October 9, 2018, Decided; October 9, 2018, Filed

2:18-cv-00968-LSC

Reporter

2018 U.S. Dist. LEXIS 173210 *; 2018 WL 4896352

CLARENCE ROBERT HOGLUND, JR., Plaintiff, v. CHARTER COMMUNICATIONS, INC., et al., Defendants.

Core Terms

satellite, geographic, television, disability, cause of action, condominium complex, internet service, allegations, disconnect

Counsel: **[*1]** Clarence Robert Hoglund, Jr, Plaintiff, Pro se, Pinson, AL.

For Charter Communications Inc, Thomas M Rutledge, Chairman, CEO Charter, Employees of the Gardendale Alabama office of Charter Communications Inc, Defendants: Barry W Hair, Bradley J Smith, CLARK HAIR & SMITH PC, Birmingham, AL.

Judges: L. Scott Coogler, United States District Judge.

Opinion by: L. Scott Coogler

Opinion

Memorandum of Opinion

Plaintiff Clarence Robert Hoglund, Jr. ("Hoglund") filed this action against Charter Communications, Inc. ("Charter"), Thomas M. Rutledge, and Employees of the Gardendale Alabama Office of Charter Communications (collectively "Defendants"), alleging violations of the *Sherman Antitrust Act*, the *Robison-Patman Act*, *Americans with Disabilities Act*, *Hobbs Act*, *Fourteenth Amendment of the United States Constitution*, and *Ala. Code § 13A-6-193*. Before this Court is Defendants' motion to dismiss. (Doc. 8.) The motion has been fully briefed and is now ripe for review. For the reasons stated below, Defendants' motion to dismiss (doc. 8) is due to be granted.

I. BACKGROUND[1]

Hoglund is a seventy-six-year-old disabled veteran. In January 2014, Hoglund moved to a condominium complex in Trussville, Alabama. He specifically chose this complex because he would be able to install a Dish satellite to watch

[1] In evaluating a motion to dismiss, this Court "accept[s] the allegations in the complaint as true and construe[s] the facts in the light most favorable to the plaintiff." *Johnson v. Midland Funding, LLC, 823 F.3d 1334, 1337 (11th Cir. 2016)*. The following facts, are therefore, taken from the allegations contained in Hoglund's Complaint, and the Court makes no ruling on their veracity.

television. **[*2]** Hoglund's landlord allowed him to install the satellite, and between January 2014 and June 2016, Dish provided Hoglund with uninterrupted television service.

In June 2016, Hoglund requested Charter internet service. When a Charter technician came to Hoglund's condominium, he disabled the Dish satellite. The technician told Hoglund that he had been instructed to disconnect any cable connection not provided by Charter. After calling Charter and receiving an apology, Hoglund apparently had the satellite repaired. According to Hoglund, this scene repeated itself multiple times until he moved in April 2017. Every few weeks, Charter would come and disconnect the Dish satellite and Hoglund would then have the satellite repaired. This resulted in Hoglund losing television service for days at a time.

When Hoglund contacted Charter's Gardendale, Alabama office, he was told that Charter owned all of the cable lines in his condominium complex so that only Charter could provide television service to its residents. Following Hoglund's conversation with Charter's Gardendale office, he made numerous customer service complaints and wrote to Charter CEO Thomas Rutledge about the satellite disconnection, **[*3]** but according to Hoglund, those complaints were falsely categorized as complaints about Charter's internet service. Hoglund also filed a complaint with the Federal Communications Commission, which he alleges Charter responded to by stating that all of Hoglund's prior complaints related to internet service problems and not his Dish satellite. Hoglund claims that his issues with Charter forced him to move out of his condominium and into a single-family residence. He contends that this move has caused him serious financial, emotional, and physical harm because he now lives farther from friends, medical facilities, and shopping areas and has had to hire someone to help maintain his house.

II. Standard of Review

The Federal Rules of Civil Procedure require that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. To meet this standard, the complaint must state enough facts to raise the right to relief "above a speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Pleadings based upon "labels and conclusions" or "naked assertion[s]" without supporting factual allegations will not suffice. *Id. at 555, 557*. A party need not specifically plead each element in his or her cause of **[*4]** action, but the pleading must contain "enough information regarding the material elements of a cause of action to support recovery under some viable legal theory." *Am. Fed'n of Labor & Cong. Of Indus. Orgs. v. City of Miami, Fla., 637 F.3d 1178, 1186 (11th Cir. 2011)*. Ultimately, the Court must be able to draw a reasonable inference from the facts that the other party is liable. *Reese v. Ellis, Painter, Ratterree & Adams, LLP, 678 F.3d 1211, 1215 (11th Cir. 2012)*. The Court must construe pleadings broadly and resolve inferences in the nonmoving party's favor. *Levine v. World Fin. Network Nat'l Bank, 437 F.3d 1118, 1120 (11th Cir. 2006)*.

Moreover, the Court must liberally construe Hoglund's complaint because he submitted his complaint *pro se. See* *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*. However, while a *pro se* plaintiff will be given greater leniency, "[t]his leniency . . . does not require or allow courts to rewrite an otherwise deficient pleading in order to sustain an action." *Thomas v. Pentagon Fed. Credit Union, 393 Fed. Appx. 635, 637 (11th Cir. 2010)*.

To survive a motion to dismiss, the plaintiff's complaint must "state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*. To be plausible, the claim for relief must contain "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" to support the claim. *Id. at 556*. If this Court decides that the facts pleaded by plaintiff do not state a plausible claim, the complaint is due to be dismissed. *Id. at 570*. To have facial plausibility, the plaintiff's complaint must plead "factual content that allows the **[*5]** court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

III. Discussion

Hoglund first brings claims against Charter under *Sections One* and *Two of the Sherman Antitrust Act*. To bring a claim under *Section One, 15 U.S.C. § 1*, a plaintiff must allege (1) an agreement between two or more persons or business entities, (2) designed to achieve an unlawful objective, (3) that actually restrains trade. *See Aquatherm Indus., Inc. v. Fla. Power & Light Co., 145 F.3d 1258, 1262 (11th Cir. 1998)*. Moreover, the plaintiff must define both the relevant product and geographic markets. *See Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1336 (11th Cir. 2010)*. *Section Two of the Sherman Antitrust Act, 15 U.S.C. § 2*, prohibits (1) monopolization; (2) attempted monopolization; and (3) conspiracies to monopolize. *See 15 U.S.C. § 2*. Like claims brought under Section One, the failure to define either the product or geographic boundaries of a relevant market is fatal to a monopolization claim. *See Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns. Inc., 376 F.3d 1065, 1074 (11th Cir. 2004)*.

For antitrust purposes, the geographic market "is the area in which the product or its reasonably interchangeable substitutes are traded." *T. Harris Young & Assoc., Inc. v. Marquette Elecs., Inc., 931 F.2d 816, 823 (11th Cir. 1991)*. In other words, "[t]he relevant market is the 'area of effective competition' in which competitors generally are willing to compete for consumer potential . . . ." *Am. Key Corp. v. Cole Nat. Corp., 762 F.2d 1569, 1581 (11th Cir. 1985)*.

Here, Hoglund does not specifically define the relevant product **[*6]** or geographic markets. Construing Hoglund's complaint liberally, the Court finds that the relevant product market at issue is television and internet services. The closest Hoglund comes to defining the relevant geographic market is describing Charter's control over the cable lines in his condominium complex located at 811 Penny Lane, Trussville, Alabama. Common sense dictates that the relevant geographic market cannot be this narrow. Charter, Dish, and other television providers compete with each other to service consumers throughout the United States and not just the occupants of Hoglund's condominium complex. Moreover, when the condominium residents signed their leases they had the ability to, as Hoglund did, inquire into the cable and internet services that would be available to them. If they wished for a provider other than Charter, they could have chosen to live somewhere else. Thus, at some point, Charter competed for the residents' business, and the condominium complex is not so isolated from the rest of the economy as to plausibly form a distinct geographic market. *See Wampler v. Sw. Bell Tel. Co., 597 F.3d 741, 746 (5th Cir. 2010)* (finding that one multiple dwelling unit did not constitute a plausible geographic market because AT&T had **[*7]** to initially compete with other internet service providers to contract with the unit and those dissatisfied with AT&T's services could choose to live somewhere else). Accordingly, Hoglund's Sherman Act claims fail as a matter of law.

Additionally, Hoglund alleges that Charter violated *Section 3 of the Robison-Patman Act, 15 U.S.C. § 13a*, stating that Charter's actions denied him the benefits of competition. The Supreme Court has held that private causes of action may not be brought under this criminal statute. *See Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 381, 78 S. Ct. 352, 2 L. Ed. 2d 340 (1958)*. Thus, Hoglund may not bring a claim under *15 U.S.C. § 13a*. Even assuming Hoglund meant to bring this claim under *Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a)*, his claim fails as a matter of law. To show a violation of this provision, a plaintiff must allege: "(1) That the defendant is engaged in commerce; (2) that, in the course of such commerce, the defendant has discriminated in price between different purchasers of commodities of like grade and quality; (3) that either or any of the purchases involved in such discrimination are in commerce; and (4) that there is likely to be a severe, adverse effect on competition." *Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1143-44 (5th Cir. 1973)*.[2] Hoglund's complaint is bereft of facts or allegations that Charter ever engaged in price discrimination. **[*8]** Therefore, regardless of whether Hoglund is alleging a violation of *Section 2(a)* or *Section 3 of the Robinson-Patman Act*, this claim is due to be dismissed.[3]

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[2] In *Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)* (en banc), the Eleventh Circuit adopted as binding precedent all decisions by the former Fifth Circuit prior to October 1, 1981.

[3] To the extent that Hoglund seeks damages under *Section Four of the Clayton Act*, he is not entitled to them because he has not sufficiently alleged violations of any underlying ***antitrust law***. *See 15 U.S.C. 15(a)*.

Hoglund also asserts a claim under Title III of the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12181, et seq.*[4] A claim under Title III of the ADA must allege (1) that the plaintiff is an individual with a disability; (2) that the defendant is a place of public accommodation; and (3) that the defendant denied the plaintiff full and equal enjoyment of the goods, services, facilities or privileges offered by defendant (4) on the basis of his disability. *See Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289, 1299 (11th Cir. 2005)*. The ADA's definition of "public accommodation" does not include a business that provides services to private residences. *See 42 U.S.C. § 12181(7)*. Also, Hoglund's complaint does not allege that Charter interrupted his Dish satellite service because of his disability. Thus, Hoglund fails to state a claim under Title III of the ADA.

Hoglund next attempts to bring a claim under the Hobbs Act, *18 U.S.C. § 1951*, alleging that the disruption of his access to Dish's television services constituted robbery and that Charter's implied threat to continue disconnecting his Dish satellite amounted to extortion. The Hobbs Act is a criminal statute that prohibits **[*9]** robbery or extortion within the context of interstate commerce. *See 18 U.S.C. § 1951(a)*. An implied private right of action under a federal statute may only be found when there is "clear evidence of Congress's intent to create a cause of action."*McDonald v. State Farm Bureau Life Ins. Co., 291 F.3d 718, 723 (11th Cir. 2002)* (quoting *Baggett v. First Nat'l Bank of Gainesville, 117 F.3d 1342, 1345 (11th Cir. 1997))*. There is no evidence that Congress intended to create a private cause of action under the Hobbs Act. *See Wisdom v. First Midwest Bank, of Popular Bluff, 167 F.3d 402, 409 (8th Cir. 1999)* (holding that "neither the statutory language of *18 U.S.C. § 1951* nor its legislative history reflect an intent by Congress to create a private right of action"); *see also Brookhart v. Rohr, 385 Fed. Appx. 67, 70 (3d Cir. 2010)* ("The Hobbs Act provides only for criminal sanctions and not civil relief."). Therefore, Hoglund's claim under the Hobbs Act is due to be dismissed.

Next, Hoglund asserts a claim under the *Fourteenth Amendment to the United States Constitution*, alleging Charter's refusal to allow him to choose the television provider of his choice violated his civil rights. The *Fourteenth Amendment* "can be violated only by conduct that may be fairly characterized as 'state action.'" *Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 924, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)*. It does not apply to the conduct of private parties unless those parties are acting on behalf of the state. *See Nat'l Broadcasting Co., Inc. v. Commc'ns Workers of Am., 860 F.2d 1022, 1024-25 (11th Cir. 1988)*. Charter is a private company. Hoglund's complaint contains no facts or allegations that Charter disconnected his Dish satellite at the request of the state. Thus, the complaint fails to **[*10]** state a claim under the *Fourteenth Amendment*.

Finally, Hoglund brings a claim under *Ala. Code § 13A-6-193*, alleging that Charter's employees abused him by disrupting his access to the Dish satellite. *Section 13A-6-193* is an Alabama criminal statute that prohibits elder abuse and neglect. *See Ala. Code § 13A-6-193*. Under Alabama law, "[o]ne claiming a private right of action within a statutory scheme must show clear evidence of a legislative intent to impose civil liability for a violation of the statute." *Century Tel of Ala. v. Dothan/Houston Cty. Commc'ns Dist., 197 So. 3d 456, 463 (Ala. 2015)* (quoting *Am. Auto. Ins. Co. v. McDonald, 812 So. 2d 309, 311 (Ala. 2001))*. There is no evidence that this elder abuse statute was intended to create a private cause of action. Thus, Hoglund has not sufficiently stated a claim under the Alabama elder abuse statute.

In sum, Hoglund's complaint fails to state a claim under the Sherman Antitrust Act, Robinson-Patman Act, Americans with Disabilities Act, Hobbs Act, *Fourteenth Amendment*, or *Ala. Code § 13A-6-193*. To the extent that Hoglund would be able to assert any claim against Charter, it would be an Alabama state law claim for tortious interference with property rights. This Court doubts that it would have subject matter jurisdiction over such a claim. Because Hoglund's complaint fails to state a claim upon which relief can be granted, it is due to be dismissed.

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[4] The ADA has three sections. *Title I* regulates discrimination in the workplace. *Title II* prohibits discrimination by public entities. Title III prohibits discrimination by private entities in places of public accommodation. Although Hoglund does not specify which section of the ADA he claims Charter violated, Charter is neither a public entity nor Hoglund's workplace. Therefore, the Court will construe Hoglund's complaint as bringing a claim under Title III.

IV. Conclusion

For the reasons stated above, Defendants' **[*11]** motion to dismiss (doc. 8) is due to be GRANTED and this case DISMISSED WITH PREJUDICE. A separate order consistent with this opinion will be entered contemporaneously herewith.

DONE and **ORDERED** on October 9, 2018.

/s/ L. Scott Coogler

L. Scott Coogler

United States District Judge

Ashton Woods Holdings LLC v. USG Corp. (In re Domestic Drywall Antitrust Litig.)

United States District Court for the Eastern District of Pennsylvania

October 11, 2018, Decided; October 11, 2018, Filed

CIVIL ACTION MDL No. 13-2437; 15-cv-1712

Reporter

2018 U.S. Dist. LEXIS 174981 *; 2018-2 Trade Cas. (CCH) P80,556; 2018 WL 4932709

IN RE: DOMESTIC DRYWALL ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: Ashton Woods Holdings LLC, et al., Plaintiffs, v. USG Corp., et al., Defendants.

Prior History: *In re Domestic Drywall Antitrust Litig., 939 F. Supp. 2d 1371, 2013 U.S. Dist. LEXIS 52566 (J.P.M.L., Apr. 8, 2013)*

Core Terms

summary judgment, Homebuilder, summary judgment motion, settlement, Purchaser, motion to strike, prior motion, conspiracy, cases, antitrust, discovery, prices

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Judges: MICHAEL M. BAYLSON, United States District Judge.

Opinion by: MICHAEL M. BAYLSON

Opinion

MEMORANDUM RE: DEFENDANT PABCO'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION TO STRIKE

Baylson, J.

This action was brought by twelve large homebuilders ("Homebuilder Plaintiffs") **[*3]** in the United States seeking damages for *Sherman Act* violations by seven (7) separate defendants. This case was consolidated by the Judicial Panel on Multidistrict Litigation with other similar cases already pending in this Court for pretrial litigation purposes only. After several years of litigation, the two classes of drywall purchasers, both Direct and Indirect Purchasers, have reached settlements. The Court has already approved the Direct Purchaser settlement and a request for approval of the Indirect Purchaser settlement is pending.

Although several Defendants have settled with the Homebuilder Plaintiffs, PABCO has not. This Court denied PABCO's prior motion for summary judgment as reported at *163 F. Supp. 3d 175 (Feb. 18, 2016)*. (Mot., ECF 309).

Following the class certification settlements in this case, Defendant PABCO has again moved for summary judgment on "liability issues" heavily relying on a recent Third Circuit case, *Valspar Corporation v. DuPont, 873 F.3d 185 (Sept. 14, 2017)*, which was handed down after

PABCO asserts that the Valspar Third Circuit decision requires this Court to reconsider and change its holding denying summary judgment. Plaintiff Homebuilders have answered this Motion for Summary Judgment with a Motion to Strike. (ECF 310).[1]

Having carefully **[*4]** reviewed the Valspar decision and this Court's earlier decision, the Court will deny the PABCO's Motion and grant the Plaintiffs' Motion to Strike.

Valspar is, of course, a binding precedent and this Court recognizes it is an important decision in a sequence of precedential antitrust decisions by the Third Circuit on summary judgment motions. Nonetheless, this Court believes that its own analysis of PABCO's prior Motions for Summary Judgment in the class actions, and denying them at least as to PABCO, was well grounded in existing Third Circuit law, and Valspar does not require or not allow for reconsideration or reversal.

The *Valspar* decision carefully continued the Third Circuit's analysis of facts presented of record, taken in the light most favorable to the non-moving party in the context of ***antitrust law***. As is customary, the Third Circuit not only applied traditional summary judgment standards, but also the unique standards that it has consistently held are

[1] Plaintiffs Motion to Strike addresses the summary judgment motions by Defendant PABCO, New NGC, Inc. ("National"), and USG Corporation, United States Gypsum Company, and L&W Supple Corporation (collectively "USG Defendants"). In this memorandum we address only PABCO's motion, as National has since settled with Plaintiffs, rendering its motion moot. (See ECF 331.) USG Defendants' motion is addressed separately in an Order filed this date.

applicable in antitrust cases charging a price fixing conspiracy, particularly in the context of an oligopoly and facts about pricing, which have been historically referred to as "conscious parallelism."

In Judge Hardiman's decision, **[*5]** the Circuit Court recognized that conscious parallelism, standing alone, does not prove any conspiracy to fix prices, but that a court must apply so-called "plus factors" and then determine, from the evidence considered as a whole, whether it was more likely or not that the defendants had agreed upon prices.

Judge Hardiman's careful analysis of the facts in Vaspar is similar to this Court's analysis of the facts, in denying PABCO's prior motion for summary judgment in the class cases. See *163 F. Supp. 3d at 251-259*. Consistent with Judge Hardiman's emphasis on the third plus factor, traditional conspiracy evidence, this Court noted a number of communications between PABCO and other drywall manufacturers that would allow a jury to find an agreement on prices. *Id. at 255-257*.

Judge Hardiman's opinion in Valspar relies heavily on three recent Third Circuit cases, *In re Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999)*, *In Re Flat Glass Antitrust Litig., 385 F.3d 350 (3d Cir. 2004)*, and In *Re Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir. 2015)*, which are three of the precedents that this Court also relied upon. See, e.g., *163 F. Supp. 3d at 192-94*.

Contrary to PABCO's arguments, this Court did not ignore or violate the standards set forth in Valspar, nor did it ignore or violate the standards set forth in any of the three cases cited above.

What distinguishes this case from *Vaspar* is that in considering the plus factors **[*6]** in this case, there was evidence of "traditional" conspiratorial evidence, specifically as to PABCO. See *163 F. Supp. 3d at 255-57* (discussing emails from PABCO's Director of Sales and VP of Sales and Marketing related to the decision to eliminate job quotes and coordinated behavior among manufacturers).

The Valspar decision clearly holds that there was no such evidence as to DuPont and this absence of evidence was the major factor in affirming the grant of summary judgment in favor of DuPont by the district court. *Valspar, 873 F.3d at 202* ("Valspar did not offer any single **FORM (check)** of evidence that would have gotten it close to showing that a conspiracy is more likely than not.")

We also note that following this Court's decision denying summary judgment to all defendants which had moved for summary judgment (but one), this Court granted non-settling defendants' motion for certification under *28 U.S.C. § 1292(b)*, for interlocutory appeal. (See 13-2437, ECF 391). We determined that the statutory prerequisites for interlocutory appeal were satisfied, and cited the district court's decision in Valspar, with a note that "if the Third Circuit affirms Valspar in a precedential opinion, this Court may reconsider its summary judgment decision." (13-cv-2437, **[*7]** ECF 384). However, the Third Circuit rejected the defendants' request for certification in this case.

Vaspar continued the well-settled Third Circuit standards for adjudicating summary judgment motions in antitrust cases charging price agreements in violation of the Sherman Act. Because of the absence of any "plus factors" as to DuPont, the Third Circuit affirmed the grant of summary judgment by the district court. To the contrary, in view of the evidence of plus factors applicable to PABCO, as set forth in detail in this Court's prior opinion denying summary judgment, PABCO does not have any right to a second "bite at the summary judgment apple" — but it retains its defenses for trial, as this Court has only upheld the sufficiency of the Plaintiffs' evidence to allow a jury to find that there was an agreement. This Court's prior denial of PABCO's summary judgment motion in no way relieves Homebuilder Plaintiffs of proving to the satisfaction of a jury that PABCO was in fact a member of a conspiracy to fix prices of drywall.

In sum, as explained in our extensive February 18, 2016 decision, Defendant PABCO has not demonstrated that there is no genuine issue of material fact as to the **[*8]** alleged conspiracy, and has not shown that Valspar changes Third Circuit law or requires this Court to conclude that its prior decision as to PABCO was erroneous. We will therefore grant the Homebuilder Plaintiffs' motion to strike as to PABCO only.

An appropriate order follows.

ORDER RE: PENDING MOTIONS FOR SUMMARY JUDGMENT AND SCHEDULING

In this last remaining case in this multi-district litigation, twelve large homebuilder plaintiffs (hereinafter "Homebuilder Plaintiffs") have claimed damages for antitrust violations. Only three defendants remain in this case, PABCO, and United States Gypsum Company ("USG") and its wholly-owned subsidiary, L&W Supply Corporation. ("L&W").

PABCO, whose prior motion for summary judgment (MDL Dkt., ECF 205) was denied, asserts that a recent Third Circuit case *Valspar Corporation v. DuPont, 873 F.3d 185 (Sept. 14, 2017)* requires reconsideration and granting summary judgment in its favor against the Homebuilder Plaintiffs. (ECF 745.)

As discussed in the foregoing memorandum, the Court has concluded that the Third Circuit's decision in Valspar does not change Third Circuit law and does not require this Court to reexamine its prior holding denying summary judgment as to PABCO and the other defendants who had moved for **[*9]** summary judgment.

Defendants USG/L&W are in a different situation than PABCO. USG/L&W settled the claims of the Direct and Indirect Purchaser classes as of February 12 and 13, 2015 (ECF 180 & 181), when the class Plaintiffs filed Motions for Preliminary Approval. This was prior to the transfer of the Homebuilders' Complaint, which had been filed in the United States District Court for the Northern District of California as of March 17, 2015, and was transferred to this Court by the Judicial Panel on Multidistrict Litigation, as a "tag along" case. The first docket entry of the Homebuilder Plaintiffs in this Court is April 2, 2015, which is after the USG/L&W settlement became public knowledge by the filing of the motion for preliminary approval.

On May 31, 2018, in this case, USG/L&W filed a motion for summary judgment (ECF 740) asserting that Homebuilder Plaintiffs do not have sufficient evidence to allow a jury to find that USG/L&W had entered into any agreement with a competitor to fix the price of the drywall. Thus, USG/L&W now moves for summary judgment against the Homebuilder Plaintiffs, as the other Defendants had moved for summary judgment against the class Plaintiffs.[1]

USG/L&W **[*10]** assert that their motion for summary judgment is timely because they had settled the class claims (Direct Purchasers and Indirect Purchasers) against them, prior to the close of discovery and prior to all other non-settling defendants having filed motions for summary judgment on May 12, 2015 (ECF 204-208). USG/L&W have not previously presented to this Court their independent grounds for summary judgment.

The Homebuilder Plaintiffs have moved to strike the USG/L&W Motion and assert that USG/L&W's motion comes much too late and cannot succeed since the evidence introduced by Plaintiffs in opposing the prior motions for summary judgment clearly applies to USG and L&W.

In their Motion to Strike, the USG/L&W Motion for Summary Judgment, Homebuilder Plaintiffs accurately point out that in prior memoranda and orders, after the Homebuilder Plaintiffs case became part of this multidistrict litigation, this Court often referred to "defendants," including by definition USG/L&W, when, in fact, USG/L&W were no longer part of the continuing litigation of the class actions because they had settled those actions only, but not this case.

Notwithstanding this arguably overly broad use of the term "defendants," **[*11]** Homebuilder Plaintiffs surely knew USG/L&W were not included in the Court's broad references to Defendants merely because they had already settled with both proposed classes, but had not settled with the Homebuilder Plaintiffs.

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[1] Other motions for summary judgment are also pending and fully briefed, but are not affected by this Order. See Defendants' Motion for Partial Summary Judgment on Umbrella Damages (ECF 724), Defendants' Motion for Summary Judgment on Choice of Law (ECF 754), Defendants' Motion for Partial Summary Judgment concerning Certainteed, Continental, Georgia-Pacific, Lafarge, Panel Rey, and Tin (ECF 756), and Defendants' Motion for Partial Summary Judgment on Unassigned Claims (ECF 755).

When Homebuilder Plaintiffs entered this MDL after USG/L&W reached a settlement with the class Plaintiffs, Homebuilder Plaintiffs were fully involved in the MDL. The USG/L&W settlements were finally approved on August 20, 2015 (ECF 276 & 278). Homebuilder Plaintiffs thus knew that USG/L&W were no longer in the class action, and also, had not yet filed a motion for summary judgment in this case. In addition, this Court's lengthy opinion dated February 18, 2016, granting summary judgment to Certainteed, but denying it to all other moving defendants (not including USG/L&W)[2] quite obviously put Homebuilder Plaintiffs on notice that USG/L&W had not moved for summary judgment because of the prior settlement with both classes.

The Court notes the joint stipulation setting a schedule for dispositive motions in this case (ECF 735), filed May 21, 2018, set a deadline for any dispositive motions for July 2, 2018. Thus, the USG/L&W motion for summary judgment is timely.

Therefore, **[*12]** the Court finds, without deciding the merits of the USG/L&W motion for summary judgment at this time, that the Homebuilder Plaintiffs, whose counsel have consistently had impressive mastery of the underlying facts in this case, and the procedural history, are not prejudiced by being required to respond to the USG/L&W motion for summary judgment at this time. Denying USG/L&W's right to file such a motion, as *Rule 56* allows in every case, would be unfair.

For the reasons stated above and in the foregoing Memorandum, this Court concludes and ORDERS:

1. Homebuilder Plaintiffs' Motion to Strike (15-cv-1712, ECF 310) will be GRANTED as to PABCO but will be DENIED as to USG and L&W.

2. Although the Court does not see any need for any further discovery, if Homebuilder Plaintiffs and/or USG/L&W assert discovery is necessary, they should promptly confer with each other, and may conduct agreed upon discovery. In the absence of agreement, either party should file a motion to compel, within 21 days, without legal memorandum, following which the Court will have a recorded telephone conference. If discovery is to take place, the following schedule will be changed.

3. Homebuilder Plaintiffs shall respond to **[*13]** the USG/L&W Motion for Summary Judgment within thirty (30) days, and shall incorporate by reference, without repetition or new submission of previously submitted exhibits, the arguments and evidence presented by the class plaintiffs in opposing the prior motions for summary judgment.

4. Moving defendants, USG/L&W, shall file a reply brief within 21 days.

5. The Court will have oral argument on the USG/L&W Motion at a date to be set after briefs have been filed. Because counsel for these clients are out of town, the Court will approve, if mutually agreed, "live streaming" of the argument rather than requiring counsel to appear in Philadelphia.

BY THE COURT:

Dated: 10/11/18

/s/ Michael M. Baylson

MICHAEL M. BAYLSON

United States District Court Judge

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[2] Homebuilder Plaintiffs' brief, pp. 9-12, details numerous facts, cited in this Court's opinion, concerning USG/L&W communications with other defendants. USG/L&W's reply brief shall respond as to these facts of record.

[Dealer Mgmt. Sys. Antitrust Litig. v. CDK Global]

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

October 22, 2018, Decided; October 22, 2018, Filed

Case No. 18-cv-864

Reporter

2018 U.S. Dist. LEXIS 214398 *; 2018-2 Trade Cas. (CCH) P80,571

IN RE DEALER MANAGEMENT SYSTEMS ANTITRUST LITIGATION, MDL 2817. This document relates to: Motor Vehicle Software Corporation v. CDK Global, Inc. et al. Case No. 18-cv-865

Subsequent History: Motion granted by, in part, Motion denied by, in part, Dismissed without prejudice by, in part *In re Dealer Mgmt. Sys. Antitrust Litig., 2019 U.S. Dist. LEXIS 149288, 2019 WL 4166864 (N.D. Ill., Sept. 3, 2019)*

Prior History: *Authenticom, Inc. v. CDK Global, LLC (In re Dealer Mgmt. Sys. Antitrust Litig.), 313 F. Supp. 3d 931, 2018 U.S. Dist. LEXIS 80937, 2018 WL 2193236 (N.D. Ill., May 14, 2018)*

Core Terms

allegations, antitrust, dealer, monopolization, subsidiary, joint venture, entity, motion to dismiss, competitors, anticompetitive conduct, parent company, conspiracy, cases, conspiring, Software, programs, compete, substantial control, dealerships, employees, controls, violates, argues, antitrust claim, registration, decisions, involvement, block, second amended complaint, supplemental brief

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For Kenny Thomas Enterprises, Inc, also known as, Olathe Toyota, Plaintiff: Amy Marie Zeman, LEAD ATTORNEY, PRO HAC VICE, Gibbs Law Group LLP, Oakland, CA; Collin R. White, LEAD ATTORNEY, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Michael Lawrence Schrag, LEAD ATTORNEY, PRO HAC VICE, Gibbs Law Group LLP, Oakland, CA; Bloomfield Joshua, Gibbs Law Group LLP, Oakland, CA; Eric H. Gibbs, Gibbs Law Group LLP, Oakland, CA; Justin Nicholas Boley, Wexler Wallace Llp, Chicago, IL; Kenneth A. Wexler, Wexler Wallace LLP, Chicago, IL; Mark H Troutman, Isaac Wiles Burkholder & Teetor LLC, Columbus, OH.

For Cox Automotive, Inc., Plaintiff: Collin R. White, LEAD ATTORNEY, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Derek Tam Ho, LEAD ATTORNEY, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Aaron Martin Panner, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Benjamin Louis Rudofsky, PRO HAC VICE, Kellogg, **[*5]** Hansen, Todd, Figel, & Frederick P.L.L.C., Washington, DC; Christine Ann Bonomo, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C, Washington, DC; Daniel V. Dorris, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Daniel Guarnera, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; David L. Schwarz, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Jennifer L. Gregor, Godfrey & Kahn SC, Madison, WI; Joshua Hafenbrack, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Kendall W Harrison, Godfrey & Kahn, S.c., Madison, WI; Kevin J. Miller, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Michael N. Nemelka, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Samuel Issacharoff, New York, NY.

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For Dealertrack, Inc., Plaintiff: Derek Tam Ho, LEAD ATTORNEY, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Aaron Martin Panner, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, **[*7]** P.L.L.C., Washington, DC; Benjamin Louis Rudofsky, PRO HAC VICE, Kellogg, Hansen, Todd, Figel, & Frederick P.L.L.C., Washington, DC; Christine Ann Bonomo, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C, Washington, DC; Daniel V. Dorris, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Daniel Guarnera, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; David L. Schwarz, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Jennifer L. Gregor, Godfrey & Kahn SC, Madison, WI; Joshua Hafenbrack, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Kendall W Harrison, Godfrey & Kahn, S.c., Madison, WI; Kevin J. Miller, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Michael N. Nemelka, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC.

For Hoover Automotive, LLC, individually and on behalf of all others similarly situated, doing business as Hoover Dodge Chrysler Jeep of Summerville, Plaintiff: Collin R. White, LEAD ATTORNEY, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Karen Halbert, LEAD ATTORNEY, Roberts **[*8]** Law Firm, P.A., Little Rock, AR; Mike L. Roberts, LEAD ATTORNEY, Roberts Law Firm, P.A., Little Rock, AR; Philip N Elbert, LEAD ATTORNEY, PRO HAC VICE, Neal & Harwell, PLC, Nashville, TN; Charles F. Barrett, Neal & Harwell, PLC, Nashville, TN; Shawn M Raiter, Larson & King, LLP, St. Paul, MN; Peggy J Wedgworth, Milberg LLP, New York, NY.

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For 440 Jericho Turnpike Sales LLC, on Behalf of Themselves, and on Behalf of All Others Similarly Situated, Patchogue 112 Motors LLC, on Behalf of Themselves, and on Behalf of All Others Similarly Situated, Plaintiffs: Collin R. White, LEAD ATTORNEY, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Peggy J Wedgworth, LEAD ATTORNEY, Milberg LLP, New York, NY; James E. Cecchi, Carella Byrne Cecchi **[*9]** Olstein Brody & Agnesso, P.C., Roseland, NJ; Justin Nicholas Boley, Wexler Wallace Llp, Chicago, IL; Kenneth A. Wexler, Wexler Wallace LLP, Chicago, IL; Leonard A Bellavia, PRO HAC VICE, Bellavia Blatt & Crossett, Pc, Mineola, NY.

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For Computerized Vehicle Registration, Inc., also known as, CDK Vehicle Registration, Inc., Defendant: Britt Marie Miller, Mayer Brown LLP, Chicago, IL; John Nadolenco, **[*17]** Mayer, Brown & Platt, Los Angeles, CA; Mark W. Ryan, Mayer Brown, Washington, DC.

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For Dominion Enterprises, Inc., Respondent: Deepti Bansal, PRO HAC VICE, Cooley LLP, Washington, DC; Jeffrey Thomas Norberg, Neal & McDevitt, Northfield, IL; Marc G Schildkraut, PRO HAC VICE, Cooley LLP, Washington, DC.

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For CDK Global, LLC, Counter Claimant: Britt Marie Miller, Mayer Brown LLP, Chicago, IL; Jeffrey Allan Simmons, Foley & Lardner LLP, Madison, WI; John Nadolenco, Mayer, Brown & Platt, Los Angeles, CA; Joseph S Harper, Foley & Lardner, Madison, WI; MICHAEL MARTINEZ, MAYER BROWN LLP, NEW YORK, NY; Mark W. Ryan, Mayer Brown, Washington, DC; Matthew David Provance, Mayer Brown LLP, Chicago, IL; Michelle M. Umberger, Perkins Coie LLP, Madison, WI; William N. Reed, BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC - Jackson, Jackson, MS.

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Judges: Robert M. Dow, Jr., United States District Judge. **[*20]**

Opinion by: Robert M. Dow, Jr.

Opinion

MEMORANDUM OPINION AND ORDER

Before the Court are the motions to dismiss Plaintiff Motor Vehicle Software Corporation's second amended complaint filed by Defendants Reynolds and Reynolds Co. [44], CDK Global, Inc. [45], and Computerized Vehicle Registration, Inc. [46]. Also before the Court is the motion to strike Motor Vehicle Software Corp.'s supplemental brief in opposition to Defendants' motions to dismiss [144]. For the reasons set forth below, the Court denies the motion to strike [144] and the motions to dismiss [44; 45; 46].

I. Background[1]

Plaintiff Motor Vehicle Software Corporation ("MVSC" or "Plaintiff") brings this action to remedy and put a stop to alleged ongoing federal and state antitrust violations being committed by Defendants CDK Global, Inc. ("CDK") and The Reynolds and Reynolds Company ("Reynolds"), and their joint venture Computerized Vehicle Registration, Inc. a/k/a CDK Vehicle Registration, Inc. ("CVR"). [*Motor Vehicle Software Corporation v. CDK Global, Inc., et al.*, Case No. 18-cv-865, Dkt. 76, at ¶ 1.] MVSC is a provider of electronic vehicle registration and titling services ("EVR"). [*Id.* at ¶ 2.] As an EVR provider, MVSC partners with state **[*21]** governments to issue the physical registration, license plates, and titles for vehicles sold at car dealerships. [*Id.*] Electronic registration and titling has made the process far more convenient and efficient for dealerships and consumers. [*Id.*]

Defendant CVR is a wholly-owned joint venture of CDK and Reynolds that (like MVSC) provides EVR services. [*Id.*] In order to process the registration and title with a state, EVR providers require basic information about the car sale—namely, vehicle, buyer, and financing details. [*Id.* at ¶ 3.] That data is stored on a dealership's Dealer Management System software, otherwise referred to as a dealership's "DMS." [*Id.*] Because the data is not stored anywhere else, it is impossible to provide EVR services without access to this data. [*Id.*] In addition to storing a

[1] For purposes of the motions to dismiss, the Court accepts as true all of Plaintiff's well-pleaded factual allegations and draws all reasonable inferences in Plaintiff's favor. *Killingsworth v. HSBC Bank Nev., N.A., 507 F.3d 614, 618 (7th Cir. 2007)*.

dealer's data, the DMS manages every function of a dealer's business from sales and inventory to service and parts. [*Id.* at ¶ 4.] A car dealership cannot operate without the DMS software. [*Id.*]

Defendants CDK and Reynolds control close to 80 percent of the United States market by number of dealers and approximately 90 of the United States market by vehicles sold. [*Id.*] It is deeply disruptive **[*22]** and expensive for a dealer to switch DMS providers, as switching takes up to a year of preparation and training. [*Id.*] MVSC alleges that CDK and Reynolds use their market power to compel dealers to submit to long-term contracts of five to seven years in length. [*Id.*] While dealers own the data on their DMS, CDK and Reynolds also have seized control over who is allowed to access the data. [*Id.* at ¶ 5.] Many third-party vendors require access to dealer data in order to perform essential tasks—such as EVR services—for the dealer. [*Id.*] CDK and Reynolds provide vendors access (for a fee) to the data on a dealer's DMS pursuant to formal third-party access programs. [*Id.*] CDK's arrangement is called the Third Party Access ("3PA") program, and Reynolds's arrangement is called the Reynolds Certified Interface ("RCI") program. [*Id.*] These programs allow third-party vendors to access in real time necessary data from a dealer's DMS in order to provide services for the dealership. [*Id.*]

In this case, Plaintiff challenges an alleged horizontal agreement between CDK and Reynolds to exclude MVSC from their third-party programs in order to prevent MVSC from obtaining the data it needs to provide EVR **[*23]** services. [*Id.* at ¶ 6.] According to MVSC, the purpose of the agreement is to block MVSC's access to the data on which its services depend, thereby eliminating a formidable competitor to CVR. [*Id.*] MVSC competes with CVR in two state EVR markets—Illinois and California. [*Id.* at ¶ 8.] In the Illinois EVR market, CVR maintains a market share of approximately 95 percent. [*Id.*] Real-time access to dealer data is a prerequisite to competing in Illinois because the state requires that a dealership provide the registration and license plates to the car buyer at the time of sale. [*Id.*] Participation in the 3PA and RCI programs is the only means for an EVR provider to obtain this real time access to dealer data. [*Id.*]

Unlike Illinois, California does not require that a car buyer receive the registration and license plates at the time of the sale. [*Id.* at ¶ 9.] Real-time access to dealer data (and participation in the 3PA and RCI programs) therefore has not been necessary in California. [*Id.*] Instead, MVSC was able to obtain the required dealer data by other means, either through companies that provided intermediary access to a dealer's DMS or through a manual workaround whereby dealers ran a **[*24]** daily report with the necessary data and then transmitted the information to MVSC. [*Id.*]

MVSC alleges that because it was able to compete in the California EVR market based on the quality of its products and services, CDK and Reynolds engaged in a campaign to completely block MVSC's access to dealer data in California. [*Id.* at ¶ 10.] In addition to blocking MVSC from participating in their 3PA and RCI programs, CDK and Reynolds have cut off MVSC's access through intermediaries. [*Id.*] Furthermore, according to MVSC, CDK and Reynolds are intimidating dealers with near constant threats that if dealers continue to provide MVSC with their data, then the dealers will be in breach of their DMS contract. [*Id.*]

As of January 2014 (and possibly earlier), CDK and Reynolds had entered into an agreement in which both DMS providers agreed to block MVSC from participating in their third-party access programs. [*Id.* at ¶ 100.] Thus, CDK and Reynolds (competitors in the DMS market) coordinated their actions and agreed that they both would reject MVSC from their third-party programs. [*Id.* at ¶ 101.] The agreement continues to this day. [*Id.* at ¶ 100.]

According to MVSC, CDK and Reynolds entered into the **[*25]** agreement with CVR's encouragement. [*Id.* at ¶ 101.] MVSC alleges that CVR was not a bystander to the CDK and Reynolds agreement to block MVSC from their respective 3PA and RCI programs. [*Id.* at ¶ 109.] Rather, CVR executives actively participated in conspiratorial conversations with CDK and Reynolds, specifically discussing the need to block MVSC from accessing dealer data (whether through the 3PA and RCI data integration programs or otherwise) so that MVSC could not compete effectively. [*Id.*] A long-time member of CVR's Board of Directors—which is comprised of representatives from CDK, Reynolds, and CVR—admitted to MVSC that the board specifically discussed keeping MVSC at a disadvantage with respect to data access. [*Id.* at ¶ 110.] Board members recognized that MVSC "outcompeted CVR" with respect to "technology and improved services," and so board members agreed that CVR needed a competitive advantage as compared to its competitors regarding access to dealer data. [*Id.*] The CVR executives who are alleged to have had these conspiratorial conversations with CDK and Reynolds at board meetings and elsewhere include, but are not limited to, Scott Herbers (former CVR General Manager), Jim **[*26]** Quinlan (current CVR General Manager), and John Roeder (CVR Senior Executive of Sales and Operations). [*Id.* at ¶ 111.]

MCSC further claims that, outside of board meetings, CVR executives worked with CDK to keep its integration program "closed" to MVSC. [*Id.* at ¶ 112.] In an internal CDK presentation regarding its 3PA program, there is a section entitled "Category Restrictions in Place," with a subsection dedicated to "CVR Competitors." [*Id.*] It reads: "Not allowed to sign, even with extract, only unless in a territory not of value to CVR." [*Id.*] These rules as described in the internal CDK presentation were implemented and are enforced with the express participation, input, and approval from CVR executives. [*Id.*]

CDK and Reynolds together own CVR, owning 80 percent of the company and 20 percent of the company, respectively. [*Id.* at ¶ 22.] Although MVSC alleges that CDK and Reynolds both control the management and decision making of CVR, Plaintiff alleges that it is CDK that exercises substantial control over the decision-making and operations of CVR, directing its day-to-day operations such as its marketing, dealer on-site visits, hiring and firing of employees, budgets, investments **[*27]** in technology and services, and other functions normally handled internally by a corporate entity. [*Id.* at ¶¶ 7, 152.] CDK controls the CVR board of directors (and CDK executives occupy most seats). [*Id.* at ¶ 56.] CVR's general manager reports directly to a CDK Vice President. [*Id.*] CVR executives are concurrently CDK executives (with CVR's longtime general manager also serving as a top executive at CDK). [*Id.*] In public filings, CDK informs investors that it holds a "controlling" financial and management interest in CVR. [*Id.*] CDK rolls up CVR's financial results into CDK's consolidated financial statements and controls CVR's budget and capital investments. [*Id.* at ¶ 57.] CVR employees have CDK email addresses and job descriptions. [*Id.*] CDK makes hiring and firing decisions for CVR and posts new job listings for CVR on the CDK website. [*Id.*] CDK houses CVR's offices within CDK's California headquarters on the same floor as CDK employees. [*Id.*] CDK dictates where CVR should focus its sales efforts and CDK executives accompany CVR sales representatives on trips to dealerships. [*Id.*] CDK also refers to CVR as "our" EVR service. [*Id.* at ¶ 58.] Still, Reynolds retains seats on CVR's board **[*28]** [*id.* at ¶ 110], and reaps profits from its interest in CVR. [*Id.* at ¶ 55.]

II. Legal Standard

To survive a *Federal Rule of Civil Procedure ("Rule") 12(b)(6)* motion to dismiss for failure to state a claim upon which relief can be granted, the complaint first must comply with *Rule 8(a)* by providing "a short and plain statement of the claim showing that the pleader is entitled to relief," *Fed. R. Civ. P. 8(a)(2)*, such that the defendant is given "fair notice of what the * * * claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))* (alteration in original). Second, the factual allegations in the complaint must be sufficient to raise the possibility of relief above the "speculative level." *E.E.O.C. v. Concentra Health Servs., Inc., 496 F.3d 773, 776 (7th Cir. 2007)* (quoting *Twombly, 550 U.S. at 555*). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 555*). Dismissal for failure to state a claim under *Rule 12(b)(6)* is proper "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Twombly, 550 U.S. at 558*. In reviewing a motion to dismiss pursuant to *Rule 12(b)(6)*, the Court accepts as true all of Plaintiff's well-pleaded factual allegations and draws all reasonable inferences in Plaintiff's favor. *Killingsworth v. HSBC Bank Nev., N.A., 507 F.3d 614, 618 (7th Cir. 2007)*.

III. Analysis

A. Motion to Strike

When this case was pending in the United States District **[*29]** Court for the Central District of California, Judge Fischer granted Defendants' motions to dismiss MVSC's *Section 2* claims and various state-law claims. [*Motor Vehicle Software Corp. v. CDK Global, Inc., et al.*, Case No. 17-896, Dkt. 73, at 10-12.] Judge Fischer concluded, however, that Plaintiff sufficiently alleged a *Section 1* claim against Defendants CDK and Reynolds based on their alleged horizontal conspiracy. [*Id.* at 6-8.] MVSC filed a second amended complaint, which Defendants again moved to dismiss. After the case was transferred to the Northern District of Illinois as part of this MDL, Judge St. Eve requested that the parties file supplemental briefs addressing their respective arguments under Seventh Circuit case law.[2] [Document 144-1 in Case No. 18-cv-864, at 42:12-43:25.] After Defendants filed their supplemental briefs [118; 120; 121], MVSC filed a supplemental brief addressing Seventh Circuit case law and citing to discovery material it contends elaborates on and further supports the allegations in its second amended complaint [138].

Defendants CDK and CVR filed a motion to strike MVSC's supplemental brief because (1) it goes beyond the scope of the request for supplemental briefing on Seventh Circuit **[*30]** case law, (2) the Court should not consider discovery materials supporting an opposition to the motions to dismiss because Defendants have not had an opportunity to respond, and (3) MVSC's use of the discovery materials was improper. Although Judge St. Eve agreed that the parties should limit their supplemental briefs to the law and not to re-argue the factual points already set out in the initial briefing on Defendants' motions to dismiss [144-1, at 43:14-25], MVSC's supplement does not reargue factual points already in their opposition brief. Rather, MVSC identifies discovery material purportedly supporting the allegations in its second amended complaint. Defendants argue that such supplementation is not permitted under the plain language of *Rule 12*, but the Seventh Circuit has indicated that a party opposing (or appealing) a *Rule 12(b)(6)* dismissal "may elaborate on [its] factual allegations so long as the new elaborations are consistent with the pleadings." *Geinosky v. City of Chicago, 675 F.3d 743, 745 n.1 (7th Cir. 2012)* (collecting cases). Furthermore, although Defendants did not seek leave to file a sur-reply, they did take the opportunity to respond to the documents submitted by MVSC in their motion to strike. [144, at 4.] To the extent that Defendants contend **[*31]** that MVSC's use of the discovery material violates "the spirit, if not the letter, of a confidentiality order[,]" a position the Court takes no position on at this time, the Court is not persuaded that refusing to consider the documents is the appropriate remedy. Accordingly, Defendants' motion to strike [144] is denied. In any event, consideration of the documents MVSC attached to and referenced in its supplemental brief does not change the outcome of the Court's ruling on the arguments raised by Defendants in support of dismissal, to which the Court now turns.

B. Market Participant Requirement

Defendant CDK argues that Plaintiff's *Section 2* claims against it fail because CDK is not a participant in the relevant EVR markets (or any EVR market for that matter). In order to state a claim against CDK for monopolization or attempted monopolization, Plaintiff must allege facts sufficient to establish that CDK competes in the relevant market.[3] *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 457, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 854 (7th Cir. 2011)*. With respect to Count II, the relevant market is the Illinois EVR market. With respect to Count III, the relevant market is the California EVR market. MVSC argues that CDK is a participant in the relevant EVR markets by way of its relationship to its majority-owned **[*32]** subsidiary CVR.

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[2] "[I]n federal question cases consolidated under *§ 1407*, the law of the transferor court warrants 'close consideration' but does not bind the transferee court." *In re Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d 827, 853 (N.D. Ill. 2010)* (citations omitted).

[3] CDK moves to dismiss all of MVSC's *Section 2* claims for failure to establish that it is participant in the EVR market. [45 (CDK Br.), at 4.] Although market power in the relevant market is an element of monopolization and attempted monopolization claims under *Section 2*, it is not an element of a conspiracy to monopolize claim. *Wagner v. Magellan Health Servs., Inc., 121 F. Supp. 2d 673, 680 (N.D. Ill. 2000)* ("[M]arket power is not an element of a conspiracy to monopolize claim under *Section 2*." (citing *United States v. National City Lines, 186 F.2d 562 (7th Cir. 1951)*). The Court therefore focuses on MVSC's monopolization and attempted monopolization arguments.

Both CDK and MVSC discuss the substantial control test set forth by United States Court of Appeals for the District of Columbia Circuit in *Caribbean Broad. System, Ltd. v. Cable & Wireless P.L.C., 148 F.3d 1080, 331 U.S. App. D.C. 226 (D.C. Cir. 1998)*.[4] In that case, the court held that an "ownership interest in another company is not sufficient by itself to make the owner a competitor, for purposes of the antitrust laws, of the subsidiary's rivals. To be a competitor at the level of the subsidiary, the parent must have substantial control over the affairs and policies of the subsidiary." *Id. at 1088* (collecting cases).[5] CDK argues that the requisite "substantial control" effectively equates to "the showing required to establish that a parent company is liable for a subsidiary's act under an agency theory." [45 (CDK Br.), at 6.] Thus, in support of its substantial control argument, CDK cites to numerous cases addressing agency and veil piercing standards under various laws. While these cases may shed some light on how to analyze an investor's control in a company, the ultimate standard is whether the investor has "substantial control over the affairs and policies of the subsidiary"—meaning that the investor exercises "the type of day-to-day control" over "the company in which it invested as to make it a **[*33]** competitor of that company's rivals." *Caribbean Broad. Sys., Ltd., 148 F.3d at 1089*.[6]

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[4] CDK asserts that the Seventh Circuit has long followed the substantial control standard, citing *National Lead Co. v. FTC, 227 F.2d 825 (7th Cir. 1955)*, rev'd on other grounds, *352 U.S. 419, 77 S. Ct. 502, 1 L. Ed. 2d 438 (1957)*. [120 (CDK Supp. Br.), at 2.] However, in *National Lead*, the Court did not apply the substantial control standard. In that case, the Seventh Circuit held that a parent company should have been dismissed from an FTC action for purported violations of the Federal Trade Commission Act and the Clayton Act by the parent company's subsidiary. *227 F.2d at 829*. In concluding that the parent company never "engaged in the [relevant] industry as a producer, distributor or otherwise," the court applied a "substantial identity" rule, which required "evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction." *Id. at 828-29*. But no court has ever cited *National Lead* in support of a "substantial control" analysis. Nor would it make sense to do so. When *National Lead* was decided, the Supreme Court still applied the "now-defunct doctrine known as the 'intraenterprise conspiracy doctrine,'" under which the Supreme Court "treated cooperation between legally separate entities as necessarily covered by *§ 1*[.]" *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 192, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (discussing the history of the "'intraenterprise conspiracy doctrine"). It therefore would make sense to require "evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction" before blurring the legal lines between a parent company and its subsidiary. Given that the Supreme Court has abandoned the intraenterprise conspiracy doctrine in favor of a more functional approach, it would be inappropriate to equate the strict "substantial identity" standard applied in *National Lead* with the "substantial control" standard advanced by the parties in this case.

[5] Because all parties have relied on the substantial control standard, the Court assumes without deciding that the substantial control standard applies. In discussing whether Defendants are a unified entity incapable of conspiring under federal antitrust laws pursuant to *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*—, an issue addressed in more detail below—MVSC argues that Reynolds is judicially estopped from arguing that it is incapable of conspiring with CVR because Reynolds argued in prior motions to dismiss that it was not a participant in the EVR market. In other words, because Reynolds previously took the position that it is not a competitor in the EVR market, MVSC argues that it cannot claim to be a unified entity with CVR, its partially-owned subsidiary that competes in the EVR market. This position has some support. See, *e.g., Copperweld Corp., 467 U.S. at 777* ("Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control will always be subject to scrutiny under *§ 1* of the Sherman Act and *§ 7* of the Clayton Act. Thereafter, the enterprise is fully subject to *§ 2* of the Sherman Act and *§ 5* of the Federal Trade Commission Act." (internal citations omitted)); *In re: Zinc Antitrust Litig., 2016 U.S. Dist. LEXIS 73192, 2016 WL 3167192, at *21 (S.D.N.Y. June 6, 2016)* ("[D]efendants cannot have it both ways. Glencore Ltd. and Pacorini may not * * * argue that they are incapable of conspiring with each other for purposes of forming an anticompetitive agreement in violation of *Section 1* of the Sherman Act, but also argue, on the other hand, that Pacorini may not be individually liable for playing a direct and key role in Glencore Ltd.'s ability to control prices in a market in which it competes." (internal citation omitted)). If that is MVSC's position, however, it is unclear why MVSC would rely on the substantial control standard, which might allow a parent company to avoid *Section 2* scrutiny in its subsidiary's market even if the parent and subsidiary were a unified entity under *Copperweld*.

[6] Although the court in *Caribbean Broadcasting System* cited cases applying agency standards, the court did not actually engage in an agency analysis. The "substantial control" test used by the court in *Caribbean Broadcasting System* has been adopting by other courts and the test appears capable of being applied without resort to agency, veil piercing, and/or alter ego standards,

Plaintiff makes such allegations here. Plaintiff's second amended complaint alleges that CDK owns 80 percent of CVR. [*Motor Vehicle Software Corporation v. CDK Global, Inc., et al.*, Case No. 18-cv-865, Dkt. 76, at ¶ 56.] CDK controls CVR's board of directors and CDK executives occupy most of its seats. [*Id.*] CVR's general manager reports directly to a CDK Vice President. [*Id.*] CVR executives are concurrently CDK executives, with CVR's longtime general manager also serving as a top executive at CDK. [*Id.*] In public filings, CDK informs investors that it holds a "controlling" financial and management interest in CVR. [*Id.*] CDK treats CVR as a division rather than a separate subsidiary—for example, by rolling up CVR's financial results into CDK's consolidated financial statements. [*Id.* at ¶ 57.] CDK controls CVR's budget and capital investments. [*Id.*] CVR employees have CDK email addresses and job descriptions. [*Id.*] CDK makes hiring and firing decisions of CVR employees. [*Id.*] CDK posts new job listings for CVR on the **[*34]** CDK website. [*Id.*] CDK houses CVR's offices within CDK's California headquarters—on the same floor as CDK employees. [*Id.*] CVR is a marketing conduit for CDK, as CDK dictates where CVR should focus its sales efforts and CDK executives accompany CVR sales representatives on trips to dealerships. [*Id.*] Finally, CDK touts CVR as "our" EVR service. [*Id.* at ¶ 58.] These allegations are sufficient to establish at the motion to dismiss stage that CDK substantially controls CVR. *Cf.* *In re Packaged Seafood Prods. Antitrust Litig., 242 F. Supp. 3d 1033, 1064 (S.D. Cal. 2017)* (merely alleging "domination or control" over "production, pricing, hiring, budgeting, capitalization, and/or marketing of canned tuna" not sufficient to establish agency).

CDK cites cases indicating that some of these allegations standing alone would be insufficient to establish that an investor company controls the day-to-day operations of its subsidiary. See, *e.g.,* *Caribbean Broad. Sys., Ltd., 148 F.3d at 1089* (allegations that company with minority ownership interest had one representative on subsidiary's board of directors and "engaged in discussions and negotiations" regarding the relationship between the parent and its subsidiary was not sufficient to establish substantial control). But many of the cases cited by CDK stand for the proposition that **[*35]** mere oversight and/or high-level involvement by a parent corporation (which likely exists to some extent in any parent/subsidiary relationship) is not enough to establish substantial control. See, *e.g.,* *Phoenix Canada Oil Co. v. Texaco, Inc., 658 F. Supp. 1061, 1084 (D. Del. 1987)*, aff'd, *842 F.2d 1466 (3d Cir. 1988)* (shared officers and directors and involvement in substantial financial decisions not enough to establish an agency relationship); *United States v. Bestfoods, 524 U.S. 51, 72, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)* (noting that "supervision of the subsidiary's finance and capital budget decisions" is "consistent with the parent's investor status") (internal quotation marks omitted); *whiteCryption Corp. v. Arxan Techs., Inc., 2016 U.S. Dist. LEXIS 78106, 2016 WL 3275944, at *11 (N.D. Cal. June 15, 2016)* (holding that parent company's involvement in "higher level policy and strategy decisions" was not sufficient to establish agency liability).

Here, MVSC alleges that CDK is involved in more than oversight and high-level policy and strategy decisions. To begin, MVSC alleges facts indicating that CDK employees work closely with CVR employees in the day-to-day operations of CVR. MVSC alleges that at least one CVR executive reports directly to a CDK Vice President, and CVR executives serve concurrently as CDK executives. CDK executives also accompany CVR sales representatives on trips to dealerships. CDK even makes hiring and firing decisions for CVR employees and posts **[*36]** new job listings for CVR on the CDK website. CDK does not explain how these allegations are consistent with the typical, high-level involvement of any parent corporation. Furthermore, MVSC alleges facts indicating the operations of CVR and CDK are intertwined. CVR employees have CDK email addresses and job descriptions.[7] And CDK houses CVR's offices within CDK's California headquarters—on the same floor as CDK employees.

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see, *e.g.,* *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065 (11th Cir. 2004)*, which are applied differently under various state and federal laws. Although there may be reason to adopt such standards as part of the "substantial control" analysis, the parties have not explained why any such standards are appropriate and/or necessary here.

[7] One of the cases relied extensively upon by CDK recognizes that the use of a parent company's email addresses supports a finding of substantial control, even though it is not sufficient by itself. *whiteCryption Corp. v. Arxan Techs., Inc., 2016 U.S. Dist. LEXIS 78106, 2016 WL 3275944, at *11 (N.D. Cal. June 15, 2016)* ("[B]eyond the use of [ ] associated email addresses, the acts appear to be more consistent with higher level policy and strategy decisions.").

CDK criticizes MVSC's response by noting that "MVSC does not defend the adequacy of *any* of its specific allegations" but instead simply compiles its allegations to argue that they "overall" are comparable to the kinds of allegations that have been found sufficient in other cases. [49 (CDK Reply), at 2.] But the Court does not need to look at MVSC's allegations in isolation. Taking MVSC's allegations together, it is unclear to the Court what additional allegations could be necessary to establish at the pleading stage that CDK substantially controls MVSC. CDK appears to argue that MVSC must allege comingling of funds and a lack of corporate formalities to establish substantial control. [49 (CDK Reply), at 5 (distinguishing *Stewart v. Screen Gems-EMI Music, Inc., 81 F. Supp. 3d 938 (N.D. Cal. 2015)*; *Barba v. Seung Heun Lee, 2009 U.S. Dist. LEXIS 132415, 2009 WL 8747368, at *5 (D. Ariz. Nov. 4, 2009)*; *Sawyer v. Bill Me Later, Inc., 2010 U.S. Dist. LEXIS 138098, 2010 WL 11492736, at *14 (C.D. Cal. Dec. 14, 2010))*.] Although such allegations certainly would support a finding **[*37]** of substantial control, CDK does not cite any case indicating that such allegations are necessary.

Furthermore, where a plaintiff alleges—as MVSC does here—that a parent company has directed its subsidiary to engage in anticompetitive conduct and itself engages in anticompetitive conduct, such allegations are sufficient to establish market participation by the parent company. See, e.g., *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1070 (D. Colo. 2004)* ("[A] parent can be considered a competitor in a market where its subsidiary is a participant if, and only if, the parent sufficiently controls, dictates, or encourages the policies of the subsidiary. When the parent controls, directs, or encourages the subsidiary's anticompetitive conduct, the parent engages in sufficient independent conduct to be held directly liable as a single enterprise with the subsidiary under the Sherman Act." (citations omitted)); *Intellectual Ventures I LLC v. Cap. One Fin. Corp., 2016 U.S. Dist. LEXIS 4581, 2016 WL 160263, at *5 (D. Md. Jan. 14, 2016)* (plaintiff adequately alleged market participation of defendant where the defendant "is a parent company, controlling or directing the anticompetitive conduct" of its affiliates);[8] see also *In re Packaged Seafood Prods. Antitrust Litig., 242 F. Supp. 3d 1033, 1059 (S.D. Cal. 2017)* (allegations that parent companies "directly conspired with their respective subsidiaries" sufficient to establish market participation). Because MVSC alleges **[*38]** facts sufficient to establish that CDK controlled the day-to-day operations of CVR and directly participated in the alleged anticompetitive conduct, MVSC states a plausible claim that CDK was a participant in the relevant EVR markets.[9]

C. Monopoly versus Oligopoly

CDK argues that Plaintiff's monopolization and attempted monopolization claims fail because they are premised on concerted action, not just the action of a single firm. In support of this argument, CDK relies on cases recognizing that "monopolization and attempted monopolization are single-firm violations." *United Food & Commercial Workers Local 1776 & Participating Emp'ls Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F. Supp. 3d 1052, 1076 (N.D. Cal. 2014)* (citations omitted); see also *Standfacts Credit Servs., Inc. v. Experian Info. Sols., Inc., 405 F. Supp. 2d 1141, 1152 (C.D. Cal. 2005)* ("*section 2* prohibits only monopolization by a single entity, as opposed to shared monopolization"), aff'd in part *294 F. App'x 271 (9th Cir. 2008)*.

While this case was pending before the Central District of California, the court accepted that argument with respect to the monopolization and attempted monopolization claims in MVSC's first amended complaint, noting that they were "based on concerted conduct rather than on the conduct of a single **[*39]** entity." [*Motor Vehicle Software Corp. v. CDK Global, Inc., et al., Case No. 17-cv-896, Dkt. 73, at 8, 2017 U.S. Dist. LEXIS 218016 (N.D. Cal. Oct. 2, 2017)*.] In reaching that conclusion, the court cited *Rebel Oil Co. v. Atlantic Richfield Co.*, which held that "[t]o

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[8] CDK argues that *Intellectual Ventures* and *Nobody in Particular* can be dismissed as wrongly decided because they did not reference the "day-to-day" analysis discussed in *Caribbean Broadcasting System*. [49 (CDK Reply), at 3.] However, both cases still analyzed whether and to what extent the parent companies exercised substantial control over their respective subsidiaries.

[9] MVSC also has submitted documents elaborating (albeit to a very limited extent) on its factual allegations relating to CDK's substantial control over CVR. For example, Bob Karp (CDK's North America President) was involved in discussions regarding at least one CVR executive's bonus grid and was praised for his "deep level of engagement in CVR." [*Motor Vehicle Software Corporation v. CDK Global, Inc. et al.*, Case No. 18-cv-865, Dkt. 118, at 7-9.]

pose a threat of monopolization, one firm *alone* must have the power to control market output and exclude competition." 51 F.3d 1421, 1443 (9th Cir. 1995) (citation omitted). In *Rebel Oil*, the court noted that an oligopolist lacks such unitary power. Since MVSC had not established that Defendants were a unitary entity, the court dismissed MVSC's monopolization and attempted monopolization claims. [Motor Vehicle Software Corp. v. CDK Global, Inc., et al., Case No. 17-cv-896, Dkt. 73, at 8, 2017 U.S. Dist. LEXIS 218016 (N.D. Cal. Oct. 2, 2017).] Here, however, Plaintiff is not challenging an alleged oligopoly. Rather, Plaintiff is challenging the anticompetitive conduct of the unitary CDK/CVR entity.[10] Because MVSC's monopolization and attempted monopolization claims do not challenge an oligopoly, the Court will not dismiss MVSC's monopolization and attempted monopolization claims on that basis.

D. Anticompetitive Conduct

Defendant CDK also argues that MVSC's Section 2 claims also fail because MVSC has not alleged that CDK engaged in **[*40]** any anticompetitive conduct. To state a claim for monopolization or attempted monopolization under Section 2, a plaintiff must allege that the defendant engaged in predatory or anticompetitive conduct. Spectrum Sports, Inc., 506 U.S. at 456 (recognizing "predatory or anticompetitive conduct" as an element of an attempted monopolization claim); Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 854 (7th Cir. 2011) (holding that a claim for monopolization under Section 2 requires that the defendant "willfully acquired or maintained that power by means other than the quality of its product, its business acumen, or historical accident"). "Anti-competitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008)*. To state a claim for conspiracy to monopolize under Section 2, a plaintiff must allege "the existence of a combination or conspiracy[.]" Goodloe v. Nat'l Wholesale Co., 2004 U.S. Dist. LEXIS 13630, 2004 WL 1631728, at *6 (N.D. Ill. July 19, 2004) (citing The Great Escape, Inc. v. Union City Body Co., Inc., 791 F.2d 532, 541-42 (7th Cir. 1986)). Plaintiff contends that CDK has engaged in anticompetitive conduct by (1) conspiring to deny Plaintiff access to dealer data, and (2) refusing to sell Plaintiff a service sold to non-competitors. [47 (MVSC Opp.), at 10.]

To the extent that MVSC seeks to bring Section 2 claims based on the alleged conspiracy to deny MVSC access to dealer data, MVSC sufficient has alleged the requisite **[*41]** anticompetitive conduct. CDK argues that because Plaintiffs' Section 2 claims are based on an alleged "group boycott" of Plaintiff, Plaintiff essentially is challenging concerted action. However, the CDK/CVR entity cannot use the allegedly anticompetitive agreement between CDK and Reynolds in the DMS market to maintain or obtain monopoly power in the EVR market. As MVSC notes, "[h]orizontal collusion is anti-competitive conduct that supports liability under Section 2." [47 (MVSC Opp.), at 9.] A defendant violates "Section 2 of the Sherman Act * * * [if it] 'has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under [Section] 1.'" Fin. & Sec. Prods. Ass'n v. Diebold, Inc., 2005 U.S. Dist. LEXIS 45409, 2005 WL 1629813, at *4 (N.D. Cal. July 8, 2005) (quoting United States v. Griffith, 334 U.S. 100, 106, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)); see also Gumwood HP Shopping Partners, L.P. v. Simon Prop. Grp., Inc., 2013 U.S. Dist. LEXIS 92133, 2013 WL 3214983, at *7 (N.D. Ind. Mar. 13, 2013) ("Where defendant has engaged in unlawful restraint of trade that would independently violate Section 1 of the Sherman Antitrust Act, it is well established that it also violates Section 2 if it acquires or maintains a monopoly by means of that restraint of trade." (citing Griffith, 334 U.S. at 106). Because Plaintiff has alleged that the CDK/CVR entity is attempting to maintain and/or acquire monopoly power in the Illinois and California EVR markets by way of conduct that violates Section 1 (*i.e.* CDK's alleged horizontal agreement with **[*42]** Reynolds), Plaintiff has alleged sufficient anticompetitive conduct to state a claim against the CDK/CVR entity under Section 2.

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[10] For the reasons discussed below, CDK and CVR can be treated as a single entity under *Copperweld* for the purposes of examining MVSC's antitrust claims.

To the extent that Plaintiff seeks to establish an antitrust violation based on the CDK/CVR entity's alleged unilateral refusal to deal, however, Plaintiff's *Section 2* claims fail. Plaintiff argues that the fact that the CDK refuses to allow Plaintiff to purchase its services at the rates generally available to others shows that CDK's refusal to deal with Plaintiff is motivated by anticompetitive conduct and therefore is improper. However, as Judge St. Eve noted, there is "no antitrust duty to deal * * * in selling services to [ ] competitors in the retail market." *In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d 931, 955 (N.D. Ill. 2018)* (citing *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 450, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009))*; see also *Schor v. Abbott Labs., 457 F.3d 608, 610 (7th Cir. 2006)* ("[A]ntitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals to compete. Cooperation is a problem in antitrust, not one of its obligations." (internal citation omitted)); *Authenticom, Inc. v. CDK Global, LLC, 874 F.3d 1019, 1025 (7th Cir. 2017)* ("Even monopolists are almost never required to assist their competitors[.]" (citation omitted).

The Supreme Court has recognized an exceedingly narrow exception to this principle in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*, in which the Supreme Court held that a plaintiff could bring a refusal-to-deal **[*43]** claim under *Section 2* where the "unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (summarizing *Aspen Skiing*). The Supreme Court has recognized, however, that *Aspen Skiing* "is at or near the outer boundary of *§ 2* liability." *Id.* The Supreme Court therefore has rejected refusal-to-deal claims unless they fall within the "limited exception recognized by *Aspen Skiing*." *Id.* For example, in *Trinko*, the Supreme Court rejected a refusal-to-deal claim because the complaint did not allege that the defendant "engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion." *Id.* Because MVSC has not made such allegations here, MVSC has not sufficiently alleged its refusal-to-deal claim. *Viamedia, Inc. v. Comcast Corp., 2017 U.S. Dist. LEXIS 24213, 2017 WL 698681, at *4 (N.D. Ill. Feb. 22, 2017)* (plaintiff bringing a unilateral refusal-to-deal claim must show "a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival" (citing *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013))*.

Indeed, in *Authenticom, Inc. v. CDK Glob.*, the Seventh Circuit concluded that CDK's decision to prevent unauthorized access to its DMS is "a far cry from *Aspen Skiing*" and it is clear **[*44]** that a refusal-to-deal theory "cannot support relief" based on that purported refusal to deal. *874 F.3d at 1026* ("And as we have noted, even if it did, this case is a far cry from *Aspen Skiing*, which represented the high-water mark in *section 2* cases for a duty-to-deal theory. *Trinko* and *Linkline* leave no doubt that such a theory cannot support relief."). The Court sees no reason to depart from that reasoning here.[11] Still, because CDK's agreement with Reynolds supports MVSC's *Section 2* claims, MVSC sufficiently has alleged that CDK engaged in anticompetitive conduct supporting its *Section 2* claims against CDK.

E. Antitrust Injury

Defendant Reynolds argues that Plaintiff "cannot establish any viable antitrust injury where the allegedly restrained trade is illegal." [44 (Reynolds Mem.), at 9-16.] To succeed on an antitrust claim, Plaintiff must establish actual or threatened "'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent.'" *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. Federal courts therefore have held that a plaintiff cannot establish an antitrust injury where the business alleged to have been restrained itself was unlawful. See, *e.g., Modesto Irrigation Dist. v. Pac. Gas & Elec. Co., 309 F. Supp. 2d*

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[11] In *Authenticom*, the Seventh Circuit was addressing a refusal-to-deal claim under *Section 1*. Although the court distinguished *Aspen Skiing*, which was a *Section 2* claim, on that ground, that distinction was not the only basis for the court's decision. The court also focused on the fact that the history between the parties did not fit within the narrow exception established by *Aspen Skiing*, which also is true with respect to MVSC's *Section 2* claims.

1156, 1169-70 (N.D. Cal. 2004), aff'd, *158 Fed. Appx. 807 (9th Cir. 2005)* (plaintiff lacked antitrust injury because its conduct **[*45]** was "unlawful by its own terms"); *Maltz v. Sax, 134 F.2d 2, 4 (7th Cir. 1943)* (company "engaged in the business of making and selling gambling devices" could not establish an antitrust injury). Still, "[c]ourts have generally held that a plaintiff's wrongdoing is not a defense to an antitrust suit." *In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 946*. "Proof of the plaintiff's unrelated unlawful conduct is not a valid *in pari delicto* defense to an antitrust charge." *Pinto Trucking Serv., Inc. v. Motor Dispatch, Inc., 649 F.2d 530, 534 (7th Cir. 1981)*.

Here, Reynolds frames MVSC's antitrust injury as the denial of access to Reynolds's DMS without authorization through Authenticom. Because—according to Reynolds—it is a violation of the Computer Fraud and Abuse Act ("CFAA") and the California Computer Crime Law ("CCCL") for Plaintiff to access Reynolds's DMS without authorization through Authenticom, Reynolds contends that Plaintiff cannot establish an antitrust injury. To the extent Reynolds seeks to raise an *in pari delicto* defense based on Plaintiff's purported violations of the CFAA and related state-law claims, the court recently rejected such an argument in ruling on the motions to dismiss in *Authenticom, Inc. v. CDK Global, LLC* (Case No. 18-cv-868). That Reynolds may have claims against Plaintiff under the CFAA and related state laws does not foreclose Plaintiff's **[*46]** antitrust claims. *In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 947* ("Both things can be true: Defendants may be able to state valid cyber-security claims against Authenticom *and* Authenticom may be able to state valid antitrust claims against Defendants.").

To the extent that Reynolds argues that Plaintiff cannot establish an antitrust injury because Plaintiff's conduct purportedly violates the CFAA and/or the CCCL, Reynolds argument also fails. Even assuming Plaintiff's conduct violates the CFAA or the CCCL,[12] it would only be because Reynolds denied it access to its DMS pursuant to the alleged conspiracy. Unlike the cases cited by Reynolds, Plaintiff's "as-alleged practices are not illegal independent of Defendants' challenged conduct." *In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 947*; *cf. In re Canadian Import Antitrust Litig., 470 F.3d 785, 791 (8th Cir. 2006)* (finding no antitrust injury where alleged injury (not being able to import less expensive drugs distributed by Canadian pharmacies) was caused by "federal statutory and regulatory scheme adopted by the United States government * * *, not by the conduct of the defendants"); *Pearl Music Co. v. Recording Indus. Ass'n of Am., Inc., 460 F. Supp. 1060, 1068 (C.D. Cal. 1978)* (finding lack of standing or capacity to bring antitrust claim where plaintiff's conduct was "totally illegal under the laws of forty-nine states"); *Modesto Irrigation Dist., 309 F. Supp. 2d at 1170* (plaintiff lacked antitrust injury because its conduct was "unlawful by **[*47]** its own terms"); *Snake River Valley Elec. Ass'n v. PacifiCorp, 357 F.3d 1042, 1050 n.8 (9th Cir. 2004)* (noting that there would be no antitrust injury where plaintiff had not obtained required state approval to engage in conduct allegedly restrained); *Maltz v. Sax, 134 F.2d 2, 4 (7th Cir. 1943)* (company "engaged in the business of making and selling [illegal] gambling devices" could not establish an antitrust injury). Even if Reynolds's authorization is necessary for Plaintiff to be able to access its DMS, Reynolds "is not free to withhold such approval pursuant to illegal arrangements." *In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 948* (collecting cases).

Regardless, whether MVSC and/or Authenticom violated the CFAA or the CCCL is a question of fact that cannot be determined based on the pleadings alone. *In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 949* (rejecting similar argument with respect to purported violations of the CFAA and related state laws by Authenticom). Accordingly, Reynolds's motion to dismiss Plaintiff's conspiracy claim based on a failure to allege an antitrust injury is denied.[13]

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[12] The Court takes no position on whether Plaintiff's conduct violates the CFAA and/or the CCCL. As the Court noted in ruling on the motions to dismiss in *Authenticom, Inc. v. CDK Global, LLC* (Case No. 18-cv-868), "'authorization' here is 'a factual matter' and 'not properly before the Court based on the pleadings alone[.]" *In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 949* (quoting *Weingand v. Harland Fin. Sols., Inc., 2012 U.S. Dist. LEXIS 123160, 2012 WL 3763640, at *2 (N.D. Cal. Aug. 29, 2012))*.

[13] Neither CDK nor CVR moved to dismiss MVSC's antitrust claims for failure to allege an antitrust injury. They did, however, adopt Reynolds's argument in their supplemental briefs. [120 (CDK Supp. Br.), at 7; 121 (CVR Supp. Br.), at 7.] Because MVSC

F. Conspiracy to Monopolize Claim

i. Plausibility of Allegations

The court previously dismissed Plaintiff's conspiracy to monopolize claim because Plaintiff failed to plead sufficient facts to find that CVR engaged in conspiratorial conversations with either CDK or Reynolds. [*Motor* ***[*48]*** *Vehicle Software Corp. v. CDK Global, Inc., et al.*, Case No. 17-896, Dkt. 73, at 11.] At most, Plaintiff alleged that CVR had the motive and opportunity to conspire. [*Id.*] Plaintiff's second amended complaint alleges more than the motive and opportunity to conspire. Defendants argue, however, that Plaintiff's additional allegations are lacking sufficient factual details to survive a motion to dismiss.

Defendants cite cases indicating that Plaintiff must allege the who, what, where, and when of its antitrust claims. [See, *e.g.*, 44 (Reynolds Br.), at 5-6.] However, such specific allegations are only necessary to survive a motion to dismiss under *Rule 9(b)*. *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC, 836 F.3d 770, 776 (7th Cir. 2016)*. Plaintiff's antitrust claims are not subject to the heightened pleading standards of *Rule 9(b)*. *In re Plasma-Derivative Protein Therapies Antitrust Litig., 764 F. Supp. 2d 991, 999 (N.D. Ill. 2011)* (citing *Twombly, 550 U.S. at 569 n. 14*). Plaintiff need only allege "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*. Plaintiff has done so here.

In its second amended complaint, Plaintiff alleges that "CVR executives actively participated in conspiratorial conversations with CDK and Reynolds, specifically discussing the need to block MVSC from accessing dealer data (whether through the 3PA and RCI data integration programs or otherwise) so that MVSC could not effectively compete." **[*49]** [*Motor Vehicle Software Corporation v. CDK Global, Inc., et al.*, Case No. 18-cv-865, Dkt. 76, at ¶ 109.] Plaintiff further alleges that "[a] long-time member of CVR's Board of Directors—which is [comprised] of representatives from CDK, Reynolds, and CVR—admitted MVSC that the board specifically discussed keeping MVSC at a disadvantage with respect to data access. Board members recognized that MVSC 'outcompeted CVR' with respect to 'technology and improved services,' and so board members agreed that CVR needed a competitive advantage as compared to its competitors regarding access to dealer data." [*Id.* at ¶ 110.] Plaintiff further alleges which CVR executives participated in the conspiratorial conversations. [*Id.* at ¶ 111.] In conjunction with Plaintiff's allegations regarding an improper agreement between CDK and Reynolds, these allegations are sufficient to state a claim to relief that is plausible on its face.

This case therefore is unlike the cases relied upon by Defendants, in which the plaintiff merely alleged parallel conduct, *Twombly, 550 U.S. at 557*, alleged conduct equally consistent with innocent conduct, *id.*, or offered conclusory assertions without any factual detail. See, *e.g., Oliver v. SD-3C* ***[*50]*** *LLC*, 2016 WL 5950345, at *11 (N.D. Cal. Sept. 30, 2016) (alleging "upon information and belief" that all companies who participated in licenses and who abided by the terms of licenses were co-conspirators). The Court recognizes that MVSC's allegations with respect to Reynolds's involvement in the alleged conspiracy are not robust. Still, MVSC's allegations regarding Reynolds's involvement in discussions regarding the need to block MVSC from accessing dealer data and keeping MVSC at a disadvantage with respect to data access, in conjunction with Reynolds's alleged agreement with CDK, are sufficient to state a plausible claim, and *Rule 8* requires no more. Thus, to the extent that Defendants seek dismissal of MVSC's conspiracy claim based on the plausibility of MVSC's allegations, Defendants motions to dismiss are denied.

ii. Copperweld Doctrine

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adequately has alleged an antitrust injury, the Court need not address whether CDK and CVR properly joined Reynolds's motion.

Defendants argue that Plaintiff's conspiracy-to-monopolize claim fails under *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, which held that legally separate entities—such as a parent company and its wholly owned subsidiary—may constitute a single entity that it is incapable of engaging in concerted action under the Sherman Act.[14] "Although *Copperweld* did not set clear parameters for what constitutes **[*51]** a single economic entity beyond the parent-subsidiary context, it nonetheless encouraged the courts to analyze the substance, not the form, of economic arrangements." *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 834 (3d Cir. 2010)* (citations and quotations omitted). "The relevant inquiry, therefore, is whether there is a contract, combination * * * or conspiracy amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition." *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (internal quotation marks omitted). As the Supreme Court noted in *American Needle*, "it is not determinative that two parties to an alleged [Sherman Act] violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture." *Id. at 196*. If an agreement joins independent centers of decision-making, "the entities are capable of conspiring[.]" *Id.*

Defendants argue that under *Copperweld*, MVSC cannot bring an antitrust conspiracy claim against a joint venture (CVR) and its parent corporations **[*52]** (CDK and Reynolds). Based on CDK's majority ownership interest in CVR and CDK's involvement in the operations of CVR,[15] Plaintiff admits that CDK and CVR are a unified entity for antitrust purposes. MVSC argues, however, that Reynolds still is capable of conspiring with the CDK/CVR entity. Defendants argue that because MVSC alleges that Reynolds and CDK jointly own CVR and that they jointly control the management and decision making of CVR, Reynolds also is incapable of conspiring with the CDK/CVR entity.[16] [See, *e.g, Motor Vehicle Software Corporation v. CDK Global, Inc., et al.*, Case No. 18-cv-865, Dkt. 76, at ¶ 152.] Defendants also note that MVSC alleges that Reynolds retains seats on CVR's board [*id.* at ¶ 110], and reaps profits from its interest in CVR. [*Id.* at ¶ 55.] According to Defendants, this makes Reynolds a participant in the "economically integrated joint venture" incapable of conspiring because of Defendants' unity of interests.

But Defendants here do not have a unity of interests. CDK and Reynolds are competitors. Their status as competitors is not changed by the fact that they entered into a joint **[*53]** venture. To the contrary, as the Supreme Court has noted, "the most significant competitive threats arise when joint venture participants are actual or potential competitors[.]" *Am. Needle, Inc., 560 U.S. at 197* (quoting 7 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 1464c, at 206 (2d ed. 2003)). For example, in *American Needle*, the Supreme Court held that a joint venture created by National Football League to develop, license, and market the intellectual property of member teams involved concerted action subject to antitrust scrutiny. *560 U.S. at 199*. The Supreme Court concluded that even

[14] Although *Copperweld* involved a conspiracy claim under *Section 1*, courts have held that *Copperweld* also applies to *Section 2* claims. See, *e.g., Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1234 (10th Cir. 2017)*; *Fid. Nat'l Title Ins. Co. of New York v. Intercounty Nat'l Title Ins. Co., 161 F. Supp. 2d 876, 883 (N.D. Ill. 2001)*.

[15] In support of its argument that Defendants are incapable of conspiring under the *Copperweld* doctrine, Defendant CVR cites a number of cases applying the *Copperweld* doctrine to partially owned subsidiaries. [46 (CVR Br.), at 3 n.3.] However, almost all of the cases cited involved one majority owner. Given that CDK has a majority interest in CVR and is alleged to be extensively involved in the operations of CVR, these cases support the argument that CDK and CVR may be considered a unified entity pursuant to *Copperweld*. Still, Plaintiff has alleged that CDK, CVR, ***and Reynolds*** conspired with each other. Defendants have only cited to one case— *Stanislaus Food Prod. Co. v. USS-POSCO Indus., 2010 U.S. Dist. LEXIS 92236. 2010 WL 3521979 (E.D. Cal. Sept. 3, 2010)* —in which the alleged misconduct involved a joint venture and its ***two*** parent companies. For the reasons discussed below, that case also is distinguishable.

[16] While this case still was in the Central District of California, Reynolds argued that the allegations in MVSC's first amended complaint regarding Reynolds's extensive control over CVR barred MVSC's *Copperweld* arguments. Because MVSC's first amended complaint was not verified, Reynolds has abandoned this argument because of Seventh Circuit caselaw only holds that an amended complaint cannot contradict an earlier ***verified*** complaint. [118 (Reynolds Supp. Br.), at 7 (citing *Beal v. Beller, 847 F.3d 897, 901 (7th Cir. 2017)*.] Regardless, although MVSC's first amended complaint included more allegations regarding Reynolds's control over CVR, it is not clear to the Court that those allegations directly undermine MVSC's *Copperweld* argument.

when a "group of firms agree to produce a joint product, cooperation amongst those firms" still may be treated as concerted action. *Id.*

Defendants argue that *American Needle* is distinguishable because in that case, the NFL teams competed against each other in the market of their joint venture and captured "individual economic benefits separate and apart from [the joint venture's] profits as a result of the decisions they [made] for [the joint venture]." [50 (CVR Reply), at 3.] Because (according to Defendants) CDK and Reynolds do not compete in the EVR market or capture economic benefits from that market separate and apart from their joint venture's profits, **[*54]** Defendants contend that *American Needle* does not support MVSC's argument. Defendants submit instead that this case is more similar to *Stanislaus Food Prod. Co. v. USS-POSCO Indus., 2010 U.S. Dist. LEXIS 92236, 2010 WL 3521979 (E.D. Cal. Sept. 3, 2010)*, in which the court found that a joint venture was incapable of conspiring with its two parent companies.

However, in *Stanislaus*, the creation of the joint venture eliminated the competition that previously existed between its two parent companies. The Court noted, "[i]f two erstwhile competitors combine to become a single economic entity—by merger or acquisition, for example—the act of combination may violate the antitrust laws, but their subsequent relations are generally immune from *section 1*." *Id.* at 19. Because the parent companies did not have any business enterprise other than their joint venture, the court concluded that Defendants were an economically integrated joint venture incapable of conspiring pursuant to *Copperweld*.

In this case, Plaintiff alleges that Defendants CDK and Reynolds are competitors in the DMS market. Although they both have an ownership interest and involvement in the operations of their joint venture CVR, they have their own respective business enterprises. As the Supreme Court noted in *American Needle*, even when a joint venture "partially **[*55]** [unites] the economic interests of the parent firms," the parent companies "still have distinct, potentially competing interests." *560 U.S. at 198* (internal quotations omitted). Although antitrust concerns might be stronger where—as in *American Needle*—the parent firms competed in the market of their joint venture, that does not mean that two parent companies have completely united economic interests simply because they enter into a joint venture. Although MVSC alleges that Reynolds has an ownership interest in CVR and controls CVR with CDK, these allegations do not change the fact that CDK and Reynolds are separate economic actors pursuing separate economic interests. Their interests may be partially united as a result of their joint venture, but that is not enough to avoid antitrust scrutiny.

Defendants have not identified a single case in which a court has concluded that ***two*** parent companies that compete against each other in one market are incapable of conspiring with their joint venture. Although Defendants cite cases applying *Copperweld's* holding that a parent company is incapable of conspiring with its wholly-owned subsidiary or extending that holding to similar situation in which there was **[*56]** a similar unity of interests, see, *e.g., McCoy v. Iberdrola Renewables, Inc., 760 F.3d 674, 681 (7th Cir. 2014)* (parent company and two wholly-owned subsidiaries not capable of engaging in concerted action); *Vollrath Co. v. Sammi Corp., 9 F.3d 1455, 1463 (9th Cir. 1993)* (parent company, its subsidiary, and its subsidiary's subsidiary not capable of engaging in concerted action), Defendants have not identified such a unity of interests in this case.

Implicitly recognizing that Defendants do not have a complete unity of interests, Defendants argue that "CVR's supposed participation in a conspiracy with Reynolds (and CDK) to restrict MVSC's unauthorized access to the respective DMSs does not deprive the market place of independent centers of decisionmaking, as it pertains to the alleged wrongful conduct." [121 (CVR Supp. Br.), at 3 (quotations and alterations omitted).] However, given that Reynolds and CDK compete in the DMS market—where the horizontal agreement to advance CVR's monopoly power is claimed to have occurred—the alleged misconduct actually does deprive the market of independent decisionmakers. This case is unlike *Texaco Inc. v. Dagher*, cited by Defendants, in which the Court concluded that the purely internal pricing decisions of a joint venture entered into by Texaco Inc. and Shell Oil were not horizontal price-fixing agreements **[*57]** subject to *per se* liability under the Sherman Act.[17] Because Defendants are capable

[17] Defendants rely on *Texaco Inc. v. Dagher, 547 U.S. 1, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* in support of their *Copperweld* argument. However, in *Texaco*, the Supreme Court did not actually address whether the defendants were capable of conspiring

of engaging in concerted conduct, Defendants' motion to dismiss MVSC's conspiracy claim under *Copperweld* is denied.[18]

G. State-Law Claims

Defendants have moved for dismissal of certain state-law claims that—according to Defendants—fail for the same reasons that Plaintiff's federal antitrust claims fail. [See (Reynolds Mem.), at 16-17; (CDK Mem.), at 12; (CVR Mem.), at 6-7.] Although MVSC did not respond to Defendants' arguments for dismissing MVSC's state-law claims, MVSC did respond fully to Defendants' arguments regarding the federal antitrust claims. Because Plaintiff's federal antitrust claims survive, Defendants' motions to dismiss Plaintiff's related **[*58]** state-law claims are denied.

IV. Conclusion

For the reasons set forth below, the Court denies the motion to strike [144] and the motions to dismiss [44; 45; 46].

Date: October 22, 2018

/s/ Robert M. Dow, Jr.

Robert M. Dow, Jr.

United States District Judge

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under *Copperweld*. Because the plaintiff only argued that defendants conduct was a *per se* violation of the Sherman Act, the Court limited its analysis to whether a joint venture's internal price setting was subject to a *per se* or rule of reason analysis.

[18] Given that the Court is denying Defendants' motion to dismiss MVSC's conspiracy claim under *Copperweld*, the Court does not address Plaintiff's alternative argument that Reynolds is judicially estopped from invoking *Copperweld* because Reynolds previously took the position that it was not a competitor in the CVR market. The Court notes, however, that it is not readily apparent that such position is inconsistent with the invocation of *Copperweld*.

Counts v. GM, LLC

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

October 23, 2018, Decided; October 23, 2018, Filed

Case No. 16-cv-12541

Reporter

2018 U.S. Dist. LEXIS 181490 *; 2018 WL 5264194

JASON COUNTS, et al, Plaintiffs, v. GENERAL MOTORS, LLC, ROBERT BOSCH GMBH, and ROBERT BOSCH, LLC, Defendants.

Prior History: *Counts v. GM, LLC, 237 F. Supp. 3d 572, 2017 U.S. Dist. LEXIS 20277, 2017 WL 588457 (E.D. Mich., Feb. 14, 2017)*

Core Terms

Plaintiffs', allegations, fraudulent, enterprise, mail, defeat, emissions, regulators, motion to dismiss, diesel, consumers, deceptive, contends, omission, argues, racketeering activity, discovery, documents, premium, engine, amended complaint, Defendants', speculation, cognizable, defraud, predicate act, participated, overpayment, deceive, district court

LexisNexis® Headnotes

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

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN1[] **Motions to Dismiss, Failure to State Claim**

Under *Fed. R. Civ. P. 12(b)(1)*, a party may assert lack of subject-matter jurisdiction as a defense. A *Fed. R. Civ. P. 12(b)(1)* motion for lack of subject matter jurisdiction can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack). A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegations of the complaint as true for purposes of *Fed. R. Civ. P. 12(b)(1)* analysis. However, a factual attack challenges the factual existence of subject matter jurisdiction. In that case, the district court has broad discretion over what evidence to consider and may look outside the pleadings to determine whether subject-matter jurisdiction exists. Regardless, the plaintiff bears the burden of proving that jurisdiction exists.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] **Motions to Dismiss, Failure to State Claim**

A pleading fails to state a claim under *Fed. R. Civ. P. 12(b)(6)* if it does not contain allegations that support recovery under any recognizable legal theory. In considering a *Fed. R. Civ. P. 12(b)(6)* motion, the Court construes the pleading in the non-movant's favor and accepts the allegations of facts therein as true. The pleader need not provide detailed factual allegations to survive dismissal, but the obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. In essence, the pleading must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face and the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN3[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) provides a heightened pleading standard for claims of fraud. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. Claims of fraud must meet the following requirements: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent. At a minimum, a claimant must allege the time, place and contents of the alleged fraud.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN4[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act establishes bases for both criminal and civil suits. A RICO civil suit may be brought by any person injured in his business or property by reason of a violation of *18 U.S.C.S. § 1962* of this chapter. *18 U.S.C.S. § 1964(c)*. *18 U.S.C.S. § 1962* provides that it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. *18 U.S.C.S. § 1962(c)*. In other words, a party advancing a civil RICO claim must establish their right to sue and then further allege the following elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN5[] **Mail Fraud, Elements**

To state a claim based on mail or wire fraud, the plaintiffs must allege the following three elements: (1) devising or intending to devise a scheme to defraud or to perform specified fraudulent acts; (2) involving a use of the mails; and (3) for the purpose of executing the scheme or attempting to do so. The plaintiffs must allege that defendants possessed the specific intent to deceive or defraud. The scheme to defraud must involve misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. The plaintiffs need not show actual reliance, but the plaintiffs must demonstrate that the misrepresentations or omissions were material. Specific intent to defraud or deceive exists if the defendant by material misrepresentations intends the victim to accept a substantial risk that otherwise would not have been taken.

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN6[] Mail Fraud, Elements

Importantly, a defendant may commit mail fraud even if he personally has not used the mails. A mail fraud conviction requires only a showing that the defendant acted with knowledge that use of the mails would follow in the ordinary course of business, or that a reasonable person would have foreseen use of the mails. In other words, there is no requirement that the defendant have actually intended that the mails or wire be used. And, further, the mailings may be innocent or even legally necessary. The use of the mails need only be closely related to the scheme and reasonably foreseeable as a result of the defendant's actions.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN7[] Heightened Pleading Requirements, Fraud Claims

When pleading predicate acts of mail or wire fraud, in order to satisfy the heightened pleading requirements of *Fed. R. Civ. P. 9(b)*, a plaintiff must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

HN8[] Motions to Dismiss, Failure to State Claim

A court generally cannot look beyond the face of the plaintiff's complaint when adjudicating a motion to dismiss for failure to state a claim unless the court converts the motion into a motion for summary judgment after proper notice is given to the parties. However, a district court can consider such documents without converting the motion into one for summary judgment where two conditions are met: 1) the documents are referred to in the complaint, and 2) are central to the claims contained therein.

Counsel: [*1] For Jason Counts, Donald Klein, Oscar Zamora, Brandon Stone, Jason Silveus, Jason Silveus, Thomas Hayduk, Joshua Hurst, Joshua Rodriguez, Plaintiffs: Scott A. George, Seeger Weiss LLP, Philadelphia, PA; Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Jason J. Thompson, Sommers Schwartz, P.C., Southfield, MI.

For General Motors, LLC, Defendant: April N. Ross, Kathleen T. Sooy, Rebecca Baden Chaney, Corwell & Moring LLP, Washington, DC; Christopher V. Burtley, Dykema Gossett PLLC, Detroit, MI; Michael P. Cooney, Dykema Gossett, Detroit, MI.

Judges: Honorable Thomas L. Ludington, United States District Judge.

Opinion by: Thomas L. Ludington

Opinion

ORDER DENYING ROBERT BOSCH LLC'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT

On June 7, 2016, nine plaintiffs (including first-named Plaintiff Jason Counts) filed a 442-page complaint framing a putative class-action and alleging deceptive advertising, breach of contract, and fraudulent concealment claims under the laws of thirty states against Defendant General Motors ("GM"). ECF No. 1. Fundamentally, Plaintiffs allege that GM installed a "defeat device" in the 2014 Chevrolet Cruze Diesel which results in significantly higher emissions **[*2]** when the vehicle is in use compared to when it is being tested in laboratory conditions.

GM filed a motion to dismiss on October 3, 2016, which contended that Plaintiffs' suit should be dismissed because Plaintiffs lack standing to bring suit, their claims are preempted by the *Clean Air Act*, the primary jurisdiction doctrine mandates deference to an EPA investigation of the claims, and Plaintiffs have failed to state a claim upon which relief can be granted. ECF No. 12. The motion was granted in part and denied in part. ECF No. 21. The Court held that Plaintiffs had standing, that their claims were not preempted by the Clean Air Act (CAA), and that the primary jurisdiction doctrine was inapplicable. The Court also held that Plaintiffs had not stated a claim for fraudulent misrepresentation based on statements GM made in its advertising campaign. However, the Court found that Plaintiffs had stated a claim for fraudulent concealment in that they had sufficiently alleged that GM had actively concealed the existence of the defeat device and had exclusive knowledge of the device. Plaintiffs did not oppose dismissal of their breach of contract claims.

After GM's motion to dismiss was denied **[*3]** in part, Plaintiffs' counsel initiated another lawsuit involving similar allegations but different diesel vehicles and naming GM as a Defendant. *In re Duramax Litigation*, Case No. 17-cv-11661. That complaint also named Bosch, a German company, as a Defendant and alleged that certain electronic devices supplied by Bosch to GM enabled the defeat devices.

A series of discovery motions were addressed in *Counts*, substantial discovery was exchanged, and the scheduling order was modified. On February 20, 2018, GM and Bosch's motions to dismiss were denied in the *Duramax* case. *298 F. Supp. 3d 1037*. The Court concluded that Plaintiffs had plausibly stated a *Racketeer Influenced and Corrupt Organizations Act* (RICO) claim against both GM and Bosch. *Id.*; *18 U.S.C. § 1961 et seq.*

On April 6, 2018, Plaintiffs filed a motion for leave to file an amended complaint. ECF No. 82. In Plaintiffs' proposed first amended complaint, they sought to join Robert Bosch GmbH and Robert Bosch LLC (collectively, "Bosch") as Defendants, add a RICO claim against all three Defendants, and add Bosch as Defendants to Plaintiffs' state law claims. In opposing that motion, GM argued that Plaintiffs had actual or constructive notice **[*4]** of Bosch's involvement with GM's diesel vehicle production since at least the filing of the complaint in the *Duramax* litigation and concluded, apparently, that there was no basis to include Bosch as a Defendant. GM argued that Plaintiffs' true motivation behind amending the complaint was the Court's denial of GM's (and Bosch's) motion to dismiss a similar RICO claim in the *Duramax* litigation. GM argued that this "wait-and-see" approach is disfavored and should not be rewarded. Finally, GM argued that allowing the amendment would prejudice GM by substantially delaying the resolution of the case and dramatically altering the "landscape of the litigation." Def. Resp. Br. at 18, ECF No. 86.

The Court granted the motion to amend and to join Bosch. ECF No. 93. The Court found that the delay in filing the motion was reasonable because Plaintiffs sought to include corroborating information learned during discovery which they believed would strengthen and particularize their allegations against Bosch. Those allegations were predicated on internal and confidential material from GM and Bosch which would not have been available to Plaintiffs prior to discovery. Similarly, the Court found that it **[*5]** was reasonable for Plaintiffs to await the Court's decision in *Duramax* regarding the viability of the RICO claims before seeking leave to amend, because that approach conserved judicial resources rather than wasting them. Finally, the Court found that granting leave to amend would cause no prejudice to Defendants, other than the "prejudice" that is inherent in defending complex commercial litigation. On June 11, 2018, Plaintiffs filed their First Amended Class Action Complaint ("amended complaint"). ECF Nos. 94-95.

Defendant Bosch now moves pursuant to *Federal Rules of Civil Procedure 9(b)*, *12(b)(1)*, and *12(b)(6)* for dismissal of the amended complaint. ECF No. 108. Defendant GM filed a notice of joinder/concurrence in the motion. ECF No. 109. In the motion, Bosch argues that Plaintiffs fail to allege: 1) that their injuries were "by reason of" a RICO violation by Bosch; 2) that they suffered a cognizable RICO injury; 3) that Bosch engaged in a pattern of racketeering activity; 4) that Bosch participated in the conduct of a RICO enterprise; and 5) the existence of a conspiracy to violate RICO. Plaintiffs contend that the Court has already rejected these arguments in *Duramax*. Bosch responds that it does not seek to relitigate the Court's **[*6]** holding in *Duramax*, but rather seeks to "address deficiencies with Plaintiffs' complaint that were either not before the Court when it decided those earlier motions or that were not fully addressed in those proceedings." Mot. at 1, ECF No. 108. Moreover, Bosch argues that the "law of the case" doctrine does not apply because the Court has not yet addressed the viability of Plaintiffs' RICO claims in this case.

I.

A.

HN1[] Under *Rule 12(b)(1)*, a party may assert lack of subject-matter jurisdiction as a defense. "A *Rule 12(b)(1)* motion for lack of subject matter jurisdiction can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack)." *Cartwright v. Garner, 751 F.3d 752, 759 (6th Cir. 2014)* (citing *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir.1994)). "A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegations of the complaint as true for purposes of *Rule 12(b)(1)* analysis." *Id.* However, a "factual attack challenges the factual existence of subject matter jurisdiction." *Id.* In that case, "the district court has broad discretion over what evidence to consider and may look outside the pleadings to determine whether subject-matter jurisdiction exists." *Adkisson v. Jacobs Eng'g Grp., Inc., 790 F.3d 641, 647 (6th Cir. 2015)*. Regardless, "the **[*7]** plaintiff bears the burden of proving that jurisdiction exists." *DLX, Inc. v. Kentucky, 381 F.3d 511, 516 (6th Cir. 2004)*.

B.

HN2[] A pleading fails to state a claim under *Rule 12(b)(6)* if it does not contain allegations that support recovery under any recognizable legal theory. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. In considering a *Rule 12(b)(6)* motion, the Court construes the pleading in the non-movant's favor and accepts the allegations of facts therein as true. *See Lambert, 517 F.3d at 439*. The pleader need not provide "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In essence, the pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal, 556 U.S. at 678-79* (quotations and citation omitted).

C.

HN3[] *Federal Rule of Civil Procedure 9(b)* provides a heightened pleading standard for claims of fraud. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be **[*8]** alleged generally." *Id.* As explained by the Sixth Circuit in *Frank v. Dana Corp. 547 F.3d 564 (6th Cir. 2008)*, claims of fraud must meet the following requirements: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Id. at 569* (citation omitted). At a minimum, a claimant must allege "the time, place and contents" of the alleged fraud. *Id.*

D.

HN4[] The Racketeer Influenced and Corrupt Organizations Act establishes bases for both criminal and civil suits. A RICO civil suit may be brought by "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c). Section 1962 provides that: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Id.* at § 1962(c). In other words, a party advancing a civil RICO claim must establish their right to sue and then further allege the following elements: "'(1) conduct (2) of an enterprise **[*9]** (3) through a pattern (4) of racketeering activity.'" *Heinrich v. Waiting Angels Adoption Servs., Inc., 668 F.3d 393, 404 (6th Cir. 2012)* (quoting *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985))*.

II.

As Bosch correctly underscores, the doctrine of the law of the case does not apply to Plaintiffs' RICO claim because the Court addressed the viability of the RICO claim in *Duramax*, and not in this case. Bosch suggests that this Court's opinion in *Duramax*, much like any other district court precedent, only constitutes persuasive (not controlling) authority. This too is true. As a practical matter, however, this case is a companion case to *Duramax*, and arises out of substantially similar facts. Moreover, the Court's opinion on the viability of a RICO claim in this context has not changed since February of this year when the Court denied GM and Bosch's motion to dismiss the *Duramax* plaintiffs' RICO claim. Thus, absent a change in applicable law, a novel argument, or a meaningful factual distinction between the allegations in *Duramax* and the allegations in the present case, the result will be the same.

A.

Bosch argues that Plaintiffs fail to allege that they suffered a cognizable RICO injury.[1] Plaintiffs may assert a RICO claim only if they can identify an injury to their "business or property by reason of a violation of **[*10]** section 1962." 18 U.S.C. § 1964(c). In so limiting the scope of RICO standing, Congress exhibited an intention to exclude "personal injury—that is, an injury 'to a person, such as a broken bone, a cut, or a bruise' or a 'bodily injury.'" *Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F.3d 556, 564 (6th Cir. 2013)* (quoting Black's Law Dictionary 857 (9th ed. 2009)). Similarly, a RICO injury must be concrete, not intangible or speculative. *See Saro v. Brown, 11 F. App'x 387, 389 (6th Cir. 2001)*; *see also Fleischhauer v. Feltner, 879 F.2d 1290, 1299 (6th Cir. 1989)* (explaining that RICO plaintiffs must identify a "reasonable and principled basis of recovery" which is "not based upon mere speculation and surmise"); *Short v. Janssen Pharm., Inc., No. 1:14-CV-1025, 2015 U.S. Dist. LEXIS 61123, 2015 WL 2201713, at *3 (W.D. Mich. May 11, 2015)* ("Short must, at a minimum, show some direct, pecuniary injury to his own pocket that is unrelated to the claimed personal injury.").

In *Reiter v. Sonotone Corp.*, the Supreme Court interpreted § 4 of the Clayton Act, which authorizes "[a]ny person who shall be injured in his business or property" by reason of an ***antitrust law*** violation to bring suit. *442 U.S. 330, 337, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*. The Supreme Court held that "where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated by reason of respondents' anticompetitive conduct, she has alleged an injury in her 'property' under § 4." *Id. at 342*. That holding did not involve the RICO **[*11]** statute, but the Sixth Circuit has held that "Reiter's common-sense observation about § 4 applies with equal logical force to § 1964(c)." *Jackson, 731 F.3d at 564*.

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[1] The Court will discuss Defendant's arguments in a different order than they were presented. It seems intuitive to first discuss whether Plaintiffs have alleged a cognizable RICO injury, then discuss whether Plaintiffs have alleged a RICO violation (i.e. whether Bosch engaged in a pattern of racketeering activity; whether Bosch participated in the conduct of a RICO enterprise; whether there was a conspiracy to violate RICO). Finally, the Court will discuss whether Plaintiffs have sufficiently alleged a causal connection between the violation and the injury.

Bosch takes issue with the three types of injuries identified by Plaintiffs: 1) "future attempted repairs, future additional costs, decreased performance of the vehicle, and diminished value of the vehicle," 2) harm caused from "unwittingly driv[ing] vehicles that were polluting in volumes and manners a reasonable consumer would not expect," and 3) "[o]verpayment for [Subject] Vehicles" because the "price for the vehicles was artificially inflated" by a "diesel premium of $2,400." Mot. at 19 (citing Compl. ¶¶ 28-37, 219, 284). With respect to future attempted repairs, future costs, and diminished future performance or value, this Court held in *Duramax* that such injuries are too speculative to constitute a cognizable RICO injury. *In re Duramax Diesel Litig., 298 F. Supp. 3d 1037, 1071 (E.D. Mich. 2018)*. With respect to "unwittingly driv[ing]" polluting vehicles, this Court previously held (in *Counts*) in its order granting GM's motion to dismiss in part that such environmental harms are insufficient to support Article III standing under *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351(1992)*. Order at 10, ECF No. 21. This Court did hold in *Duramax*, however, that overpayment for the vehicles **[*12]** constitutes a cognizable RICO injury:

> Plaintiffs' first alleged injury clearly suffices to create RICO standing. Plaintiffs contend that they "paid a premium of nearly $9,000, as GM charged more for its Duramax engine than a comparable gas car." Con. Am. Compl. at 115. Plaintiffs thus identify a specific payment attributable directly to the vehicle component at issue which they opted to purchase on the basis of fraudulent conduct. This is cognizable out-of-pocket injury: "[T]he price of the [Duramax engine-equipped vehicle which Plaintiffs] bought was artificially inflated by reason of [Defendants' fraudulent] conduct." *Reiter, 442 U.S. at 342*. *See also* *Jackson, 731 F.3d at 564*; *Canyon Cty. v. Syngenta Seeds, Inc., 519 F.3d 969, 976 (9th Cir. 2008)*. Accepting Plaintiffs' allegations as true, the fraud (and thus overcharge) occurred at the time the purchase was made. *See* *Bailey, 992 F. Supp. 2d at 579*. Unlike in *Bridgestone* (where only some tires exhibited the defect), the alleged injury occurred every time a Duramax vehicle was purchased. The amount by which Plaintiffs overpaid is not contingent on a future occurrence or on the vagaries of the free market. It occurred and became determinable at the moment the Plaintiffs paid a premium for a vehicle component which did not work as had been represented. Plaintiffs experienced a **[*13]** financial property loss at that moment, which distinguishes the present case from others where the overpayment or diminution in value had not yet occurred. *Compare* *Bridgestone, 155 F. Supp. 2d at 1093 & n.26*; *Gelt, 27 F.3d at 769*, with *Bailey, 992 F. Supp 2d at 580-81*. This is a cognizable RICO injury.

Duramax, 298 F. Supp. 3d at 1071.

Similarly, Plaintiffs in this case allege that they paid a diesel premium of $2,400 because the price of the vehicle was inflated by Defendants' fraudulent conduct (conduct which will be discussed below). Compl. ¶ 284. Bosch nevertheless asks the Court to revisit its holding, citing to the *Ignition Switch* litigation. Mot. at 21 (citing *See* *Ignition Switch, 2016 U.S. Dist. LEXIS 92499, 2016 WL 3920353, at *7, 16)*. As noted in the *Duramax* opinion, the *Ignition Switch* opinion does appear to support a conclusion contrary to the conclusion reached by this Court. This Court nevertheless rejected the *Ignition Switch* litigation, as explained fully in *Duramax. Duramax, 298 F. Supp. 3d at 1072*. That explanation still obtains. Notably, the *Ignition Switch* is an unreported district court opinion from another circuit which relied heavily on the Second Circuit's opinion in *McLaughlin v. American Tobacco Co., 522 F.3d 215 (2d Cir. 2008)*.

Recently, two other district courts have rejected the injury analysis in both *Ignition Switch* and *Mclaughlin* and have held that overpayment due to deceptive conduct may constitute a RICO injury. *See* *In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices & Prods. Liab. Litig., 295 F. Supp. 3d 927, 959 (N.D. Cal. 2018)* (rejecting the defendants' **[*14]** reliance on *Ignition Switch* and *Mclaughlin* and noting that "when a plaintiff alleges that he or she overpaid for a good or service because of anticompetitive or deceptive conduct, the Supreme Court's decision in *Reiter* and the Ninth Circuit's decision in *Canyon County* support that such an injury is one to property not merely expectation interests. Those decisions bind this Court; *McLaughlin* and [*Ignition Switch*] do not.") (internal citations and quotations omitted); *Nemet v. Volkswagen Group of America, Inc., No. 3:17-cv-04372-CRB, Dkt. No. 5374, 349 F. Supp. 3d 881, 2018 U.S. Dist. LEXIS 171598 (N.D. Cal.)* ("Bosch relies on certain out-of-circuit decisions in which courts have held that when consumers do not receive the benefit of their bargain the injury they suffer is one to their expectation interests, not to their business or property as RICO requires . . . As the district court in *Chrysler* recently noted, the Supreme Court's decision in *Reiter* and the Ninth Circuit's decision in *Canyon County* support the opposite: that when a plaintiff alleges that he or she overpaid for a good or service because of anticompetitive or deceptive conduct, . . . such an injury is one to property, not merely expectation interests. The Court therefore **[*15]** does not follow *McLaughlin* and [*Ignition Switch*] here.") (internal citations and quotations omitted).

Finally, Bosch takes issue with the overpayment theory by identifying what they suggest is an internal inconsistency in the *Duramax* opinion:

> This Court in Duramax found that "overpayment" for the "vehicle component at issue" conferred RICO standing. See *298 F. Supp. 3d at 1071-72*. But, in considering a related theory of RICO injury, the Court also noted that the Duramax plaintiffs' "contention that they 'would have paid substantially less' [for their vehicles had they known of the higher emissions] appears to be premised on some approximation of what the new market value for the vehicles would have been" and that "[d]etermining what that decrease in value would have been seems hopelessly speculative." *Id. at 1071* (emphasis added). Plaintiffs' "overpayment" theory requires the same speculation, because it too is nothing more than a claim that Plaintiffs "would have paid substantially less" for the Subject Vehicles under different circumstances. See Compl. ¶ 284 ("Plaintiffs would not have paid a diesel premium of $2,400, if proper disclosures had been made."). Nor is the speculation rendered concrete by attaching the $2,400 **[*16]** number to it, because the $2,400 figure is itself the product of Plaintiffs' speculation. Plaintiffs declare $2,400 to be the price difference between a "diesel Cruze" and a "comparable gas car," Compl. ¶ 217, but they also concede - as they must - that there are many differences between diesel and gas vehicles other than NOx emissions: "diesel engines generally produce greater torque, low-end power, better drivability, and much higher fuel efficiency" than gasoline engines, id. ¶ 4. Plaintiffs thus fail to allege a supposed "diesel premium" attributable to NOx emissions performance, the subject of the claimed fraud.

Mot. at 21-22. Contrary to Bosch's assertion, the allegation that GM charged an artificially inflated premium for the vehicles is distinct from Plaintiffs allegation that they "would have paid substantially less" for the vehicles had they known of the alleged defeat device. The reason the Court found that the former allegation was sufficiently concrete was not because the Plaintiffs attached a specific dollar amount to it ($9,000 in *Duramax*, and $2,400 in this case). Rather, the former allegation is more concrete because it is not premised on Plaintiffs' subjective willingness **[*17]** to pay or on the hypothetical new market value for a "dirty" diesel engine (the product as allegedly delivered) as opposed to a "clean" diesel engine (allegedly a non-existent product). Rather, it is premised on a premium that *GM itself* allegedly charged for a diesel engine knowing that it would not perform as represented. This is a cognizable RICO injury.

B.

Bosch contends that Plaintiffs fail to allege that Bosch engaged in a pattern of racketeering activity. Pursuant to *§ 1961(5)*, a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." Plaintiffs must allege that each Defendant engaged in two predicate acts of racketeering activity. *See Kerrigan v. ViSalus, Inc., 112 F.Supp.3d 580, 605 (E.D. Mich. 2015)*. *See also Crest Const. II, Inc. v. Doe, 660 F.3d 346, 358 (8th Cir. 2011)*; *Guaranteed Rate, Inc. v. Barr, 912 F.Supp.2d 671, 684 (N.D. Ill. 2012)*.

Here, as in *Duramax*, the Plaintiffs alleged predicate acts of mail and wire fraud. As the Court noted in *Duramax*,

> ***HN5***[] To state a claim based on mail or wire fraud, the Plaintiffs must allege the following three elements: "(1) devising or intending to devise a scheme to defraud (or to perform specified fraudulent **[*18]** acts); (2) involving a use of the mails; and (3) for the purpose of executing the scheme or attempting to do so. *United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013)* (quoting *United States v. Frost, 125 F.3d 346, 354 (6th Cir.1997))*. The Plaintiffs must allege that Defendants possessed the "specific intent to deceive or defraud." *Frost, 125 F.3d at 354*. The "scheme to defraud must involve 'misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.'" *Bender v. Southland Corp., 749 F.2d 1205, 1216 (6th Cir. 1984)* (quoting *United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979))*. The

> Plaintiffs need not show "actual reliance," but the Plaintiffs must demonstrate that the misrepresentations or omissions were "material." *United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003)*. Specific intent to defraud or deceive exists if "the defendant by material misrepresentations intends the victim to accept a substantial risk that otherwise would not have been taken." *Id. at 488*.
>
> ***HN6***[] Importantly, "[a] defendant may commit mail fraud even if he personally has not used the mails." *Frost, 125 F.3d at 354* (citing *United States v. Griffith, 17 F.3d 865, 874 (6th Cir.1994))*. "A mail fraud conviction requires only a showing that the defendant acted with knowledge that use of the mails would follow in the ordinary course of business, or that a reasonable person would have foreseen use of the mails." *Id.* In other words, there is no requirement that the defendant have actually intended that the mails (or wire) be used. *Id.* And, further, "'[t]he **[*19]** mailings may be innocent or even legally necessary.'" *Id.*(quoting *United States v. Oldfield, 859 F.2d 392, 400 (6th Cir. 1988))*. The use of the mails "'need only be closely related to the scheme and reasonably foreseeable as a result of the defendant's actions.'" *Id.* (quoting *Oldfield, 859 F.2d at 400*).
>
> ***HN7***[] "When pleading predicate acts of mail or wire fraud, in order to satisfy the heightened pleading requirements of *Rule 9(b)*, a plaintiff must '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *Heinrich, 668 F.3d at 404* (quoting *Frank v. Dana Corp., 547 F.3d 564, 570 (6th Cir. 2008))*.

In re Duramax Diesel Litig., 298 F. Supp. 3d 1037, 1083 (E.D. Mich. 2018).

Bosch argues that Plaintiffs have alleged no facts that allow the Court to infer that Bosch specifically intended to defraud them. Mot. at 23. Rather, Bosch contends that Plaintiffs have offered nothing more than conclusions and unfounded allegations. Mot. at 23-24. To the contrary, Plaintiffs allege that Bosch "actively participated in the development of the defeat device." Am. Compl. ¶ 165, ECF No. 94. Plaintiffs allege that the EDC17 "controls every parameter that is important for effective, low-emission combustion." *Id.* ¶ 167. Plaintiffs further allege that the EDC17 is equipped with a defeat device, that Bosch "exerts near-total **[*20]** control" over the EDC17, and that the EDC17 is designed "to prevent customers, like GM, from making significant changes on their own." Compl. ¶¶ 147, 248.

Bosch contends that its alleged act of supplying the EDC17 for the subject vehicles is insufficient to raise an inference that Bosch had the specific intent to defraud Plaintiffs, because the EDC17 or similar device is present in every modern automobile engine. Mot. at 24-25 (quoting *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig, MDL No. 2672, 2017 U.S. Dist. LEXIS 179652, 2017 WL 4890594, at *2 (N.D. Cal. Oct. 30, 2017)* ("***The EDC17 is not inherently a tool for deceit***; it is widely used by automakers that operate modern diesel engines.") (emphasis in original). Simply put, every modern vehicle may indeed have an EDC17 or a similar system, but not all EDC17's are necessarily designed and equipped with defeat devices, as is alleged here. As this Court noted in *Duramax*, Bosch's specific intent to defraud customers "can be inferred from the nature of the alleged conduct. The way in which EDC17 interacted with the Duramax engine is inherently deceptive. The alleged purpose of the device is to provide the perception of reduced emissions while avoiding the reality of reduced emissions." *Duramax, 298 F. Supp. 3d at 1083*.

Bosch contends that "unlike in *Duramax*, Plaintiffs here **[*21]** allege only scant facts about how the alleged 'defeat device works,' and none that supports the conclusory assertion that Bosch LLC *knew* that the Subject Vehicles contained these unspecified defeat devices." Mot. at 25 (emphasis in original). Bosch underscores paragraphs 126-148 of the *Duramax* complaint, in which the plaintiffs set forth details concerning testing that was performed on the subject vehicles. Bosch contends that no such details are present here. Those allegations were unnecessary to sustain the plaintiffs' RICO claim in *Duramax*, and indeed were entirely absent from the Court's discussion of predicate acts of racketeering activity. Thus, their absence from the current amended complaint is of no significance. The allegations set forth above are sufficient to raise an inference that Bosch knew that the subject vehicles contained the defeat devices. The amended complaint alleges that Bosch designed the EDC17 containing the defeat device and had exclusive control thereof. *See* Am. Compl. ¶¶ 148, 165, 167, 248. As stated in *Duramax*, "Defendants cannot reasonably argue that the deceptive nature of EDC17 was unanticipated or unintended, and even if they do, that argument should **[*22]** be resolved only by a jury. Plaintiffs have plausibly alleged that the purpose of EDC17 was deception, and so Defendants' protestations that it has an innocent and lawful purpose are non-cognizable at the pleading stage." *Duramax, 298 F. Supp. 3d at 1083*.

Bosch also argues that Plaintiffs have failed to allege the predicate acts of mail or wire fraud because Plaintiffs have identified no actionable misrepresentation or omission by Bosch. Bosch argues that, in order to proceed under an omission theory, Plaintiffs must allege the existence of an independent legal duty to disclose information. In *Duramax*, the Court surveyed the applicable authority and found no such requirement. *Id. at 1085*. Although the defendants did identify some non-controlling precedent in support of their position that a fraudulent omission theory requires an independent duty to disclose, the Court concluded that the more recent and better reasoned cases supported the opposite conclusion. *Id.* That conclusion still obtains.

Bosch now cites to *Jamieson*, which Bosch contends conclusively establishes that fraud by omission requires an affirmative duty to disclose information. Mot. at 28 (citing *United States v. Jamieson, 427 F.3d 394, 415 (6th Cir. 2005)* (reviewing conviction for conspiracy to commit mail fraud). Not so. **[*23]** In fact, the Sixth Circuit rejected Jamieson's contention that the trial court should have instructed the jury concerning a "duty to disclose." *United States v. Jamieson, 427 F.3d at 415* ("*Even if* the trial court's refusal to give the 'duty to disclose' instruction was error, the error must be considered harmless.") (emphasis added). Thus, the Sixth Circuit did not affirmatively state that the failure to give the "duty to disclose" instruction was erroneous. In fact, the Sixth Circuit shied away from doing so (perhaps due to the lack of precedent on point, as this Court noted in *Duramax*).

The Sixth Circuit found that the district court's instruction "adequately guards against the jury finding that a simple omission, independent of any other statements encouraging trust and confidence in the defendant, can constitute fraud." *Id.* This dicta suggests that, in the Sixth Circuit's opinion, a "simple omission" on its own cannot constitute fraud. Contrary to Bosch's contention, however, this dicta does not rise to the level of a "holding" that "something more than a 'simple omission' is required before that omission is actionable as mail or wire fraud." Mot. at 28. No such holding is present in *Jamieson*, and even the dicta in *Jamieson* ***[*24]*** is unsupported by any citation to controlling law.

Even if such a holding could be derived from *Jamieson*, it would not warrant a conclusion contrary to the one reached in *Duramax*. The "simple omission" alleged in this case is not "independent of any other statements encouraging trust and confidence in the defendant." *Jamieson, 427 F.3d at 415*. Rather, the factual predicates giving rise to the scheme to defraud include affirmative misrepresentations concerning the operation of the emissions technology, the importance of which was explained in *Duramax*:

> If Plaintiffs were relying on these advertisements as the basis for its claim of fraud, then Defendants' arguments regarding puffery and duty to disclose would become relevant. However, these representations do not constitute the fraudulent scheme; they merely further it. The level of emissions produced by a diesel engine was a material consideration for consumers purchasing a vehicle. GM's extensive advertising which emphasized the low emissions and environmentally-friendly nature of its "clean diesel" engine underscores its understanding of that fact. Thus, regardless of whether these advertisements would be actionable on their own, they were material to the scheme. **[*25]** The advertisements urged consumers to buy Duramax vehicles *because* they were environmentally friendly even though the Defendants had purposefully worked together to obfuscate the true level of emissions. Plaintiffs have specifically identified a number of communications that were "reasonably calculated to deceive persons of ordinary prudence and comprehension." The communications themselves may not have been demonstrably fraudulent, but they were intended to increase the likelihood that consumers would purchase Duramax vehicles because they produced emissions at a low level, when in fact the true level of emissions was much higher. The nondisclosure of the true operation of the Duramax engine was material precisely because GM worked so hard to convince consumers that it was a "clean diesel" engine.

Duramax, 298 F. Supp. 3d at 1084.

Here, Plaintiffs allege that the EDC17 is equipped with a defeat device, that Bosch "exerts near-total control" over the EDC17, and that the EDC17 was designed "to prevent customers, like GM, from making significant changes on their own." Compl. ¶¶ 147, 248. Plaintiffs also allege that Bosch and GM worked together to develop and implement a specific set of software algorithms in the Affected **[*26]** Vehicles to reduce emissions in testing environments but not on the road. *Id.* ¶ 158.Bosch also allegedly engaged in marketing and lobbying efforts in the United States to get regulators to approve "clean diesel." ¶ 42. *Id.* Bosch allegedly took these actions with knowledge of the engine's true operation, and under circumstances where its alleged coconspirator had actively marketed the engine's emissions reduction capability. For the same reasons discussed in *Duramax* and above, these constitute sufficient predicate acts to give rise to RICO liability.

C.

Additionally, Bosch argues that Plaintiffs do not plead a plausible claim that Bosch participated in the conduct of the alleged enterprise by either "making decisions on behalf of the enterprise or by knowingly carrying them out." Mot. at 30-31 (citing *Duramax, 298 F. Supp. 3d at 1086*).

In *Reves v. Ernst & Young*, the Supreme Court addressed the requirement that a RICO defendant "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." *507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993)* (quoting*§ 1962(c)*). The Court explained:

> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of *§ 1962(c)* comes into **[*27]** focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required.
>
> *Id.*
>
> "[L]iability [under *§ 1962(c)*] depends on showing that the defendants conducted or participated in the conduct of the "*enterprise's* affairs," not just their *own* affairs." *Id. at 185, 113 S.Ct. 1163*. "Although *Reves* does not explain what it means to have some part in directing the enterprise's affairs, subsequent decisions from our sister circuits have persuasively explained that it can be accomplished either by making decisions on behalf of the enterprise or by knowingly carrying them out." *United States v. Fowler, 535 F.3d 408, 418 (6th Cir. 2008)*.

In *Duramax*, this Court concluded that the plaintiffs had adequately alleged that Bosch participated in the conduct of a RICO enterprise:

> Plaintiffs' allegations characterize EDC17 as performing an inherently deceptive function. **[*28]** Thus, the operation of EDC17 is the apparent heart of the fraudulent enterprise and, because Bosch bears primary responsibility for programming EDC17, it "knowingly carried...out" core aspects of the alleged enterprise.

Duramax, 298 F. Supp. 3d at 1087. The same allegations are present here concerning Bosch's primary responsibility for programming the EDC17, as detailed above. Accordingly, Plaintiffs' allegations are adequate. Bosch's argument for distinguishing *Duramax* is not persuasive. Bosch argues that:

> Unlike in Duramax, Plaintiffs have incorporated documents into the Complaint that demonstrate there was no fraudulent enterprise between GM and Bosch LLC. See Compl. ¶¶ 149-58. Such documents show nothing more than back-and-forth between manufacturer and supplier during an ongoing development process. See, e.g., Compl. ¶ 156 (citing GMCOUNTS000023551, an email chain in which a GM employee circulated an innocuous meeting agenda among GM and Bosch engineers). And as discussed above, intent cannot be inferred simply by supplying the EDC-17. Supra p. 24-25.

> Many months and tens of thousands of documents into discovery, Plaintiffs cannot cite even one document demonstrating that Bosch LLC knowingly carried out the supposed objectives **[*29]** of the alleged RICO enterprise. Unable to support their weighty allegations, Plaintiffs instead resort to a familiar and defective crutch: "information and belief." See Compl. ¶¶ 156 (referencing an unremarkable document but alleging "[o]n information and belief, discussions at these regular meetings included developing and concealing defeat devices for the [Subject] Vehicles."), 157 (similar, but alleging "[o]n information and belief, AECD disclosures drafted by Bosch GmbH and Bosch LLC were deceptive and false when submitted by GM to regulators.").

Id.

Bosch contends that the documents incorporated by reference in Plaintiffs' complaint "show nothing more than back-and-forth between manufacturer and supplier during an ongoing development process." Therefore, Bosch concludes that the documents "demonstrate that there was no fraudulent enterprise between GM and Bosch LLC." This conclusion does not follow. Failing to affirmatively demonstrate the alleged fraudulent enterprise does not establish the absence of a fraudulent enterprise.

Bosch criticizes Plaintiffs for failing to identify documentary evidence demonstrating Bosch's participation in the RICO enterprise after receiving tens of **[*30]** thousands of documents from Defendants. Bosch overlooks the procedural posture of this case. Plaintiffs are under no obligation at the pleading stage to identify documentary evidence substantiating their claims. The fact that they attempted to do so, successfully or not, is not fatal to their claims, nor does their attempt to do so create an obligation that did not otherwise exist. Bosch contends that "at this stage of the case, Plaintiffs can no longer claim that 'the relevant facts lie exclusively within the knowledge and control of' GM and Bosch LLC." Mot. at 32. The implication is that Plaintiffs should face a higher pleading burden at this stage because they have had the benefit of discovery before filing an amended complaint. Neither *Rule 8(a)* nor *9(b)* makes such a distinction.

Moreover, this documentary evidence is not properly before the Court's consideration on a 12(b)(6) motion.[2] ***HN8***[] A court generally cannot look beyond the face of the Plaintiff's complaint when adjudicating a motion to dismiss for failure to state a claim unless the court converts the motion into a motion for summary judgment after proper notice is given to the parties. However, a district court can consider such documents **[*31]** without converting the motion into one for summary judgment where two conditions are met: 1) the documents are referred to in the complaint, and 2) are central to the claims contained therein. *Gavitt v. Born, 835 F.3d 623, 640 (6th Cir. 2016)*.

Here, the documents are referred to in the complaint. However, Bosch offers no explanation as to how "an email chain in which a GM employee circulated an innocuous meeting agenda among GM and Bosch engineers" is central to Plaintiffs' claim. In fact, Bosch's characterization of the document cuts the opposite way, suggesting that it has no evidentiary value at all. That document, though potentially illustrative of some alleged communication between GM and Bosch, is by no means central to Plaintiffs' claim that Bosch participated in the conduct of a RICO enterprise. Plaintiffs' claim does not rise or fall based on that alleged correspondence. Rather, the salient allegations are those discussed above concerning Bosch's role in programming the EDC17, the device at the heart of the fraudulent enterprise. *See Duramax, 298 F. Supp. 3d at 1087*.[3]

Before addressing the remaining arguments advanced by the motion to dismiss, it is worth emphasizing a point made by Bosch in opposing their joinder and now criticizing Plaintiffs' information **[*32]** and belief pleading. *Rule 8(a)* and, in this circumstance, *rule 9(b)* are not the only rules governing the pleadings. Pursuant to *Federal Rule of Civil Procedure 11(b)*, by presenting a pleading to the Court Plaintiffs are certifying that to the best of their "knowledge, information, and belief, formed *after an inquiry reasonable under the circumstances* . . . the factual

[2] If the current evidentiary record affirmatively disproves the Plaintiffs' claims, as Bosch contends, Bosch presumably would not hesitate to move for summary judgment.

[3] Bosch also argues briefly that Plaintiffs fail to plead the existence of a RICO conspiracy because they fail to plead intent or a substantive RICO violation. Because the Court disagrees with Bosch's conclusions on those two points (as discussed above), the Court also disagrees with Bosch's conclusion as to the RICO conspiracy.

contentions have *evidentiary* support." (emphasis added). Of course, the rule applies with equal force to "the denial of factual contentions." *Fed. R. Civ. P. 11(b)(4)*. Because Plaintiffs have the benefit of substantial discovery that was previously only available to General Motors, their duty of inquiry extends to that discovery. It is reasonable to expect a thorough review of the discovery furnished thus far and that the amended complaint reflects a candid appraisal of the evidentiary basis for the allegations. To the extent Plaintiffs are being cavalier with their "information and belief" pleading solely to survive the 12(b)(6) motion, they risk sanctions. *See* *Fed. R. Civ. P. 11(c)*.

D.

Bosch argues that Plaintiffs fail to allege that their injuries were "by reason of" a RICO violation. Mot. at 10 (quoting 19 U.S.C. 1964(c)). The RICO proximate causation analysis is closely related to (even subsumed in) the statutory standing analysis. **[*33]** The Supreme Court has "held that a plaintiff's right to sue...required a showing that the defendant's violation not only was a 'but for' cause of his injury but, was the proximate cause as well." *Holmes, 503 U.S. at 268, 112 S.Ct. 1311*. The plaintiff must show "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* Importantly, the causation inquiry must focus on the alleged link between the "predicate acts" and the asserted injury. Plaintiffs must show that each defendant's wrongful conduct was a "substantial and foreseeable cause of the injury and the relationship between the wrongful conduct and the injury is logical and not speculative." *In re ClassicStar Mare Lease Litig., 727 F.3d 473, 487 (6th Cir. 2013)* (quotations omitted).

In *Duramax*, this Court held as follows:

> Plaintiffs have plausibly alleged that Bosch's joint activities with GM were a substantial factor contributing to their injury. EDC17 is the means by which Plaintiffs were injured. According to Plaintiffs, Bosch 'exerts near-total control' over the customization of EDC17, eliminating the possibility that GM programmed the functionality which enables use of defeat devices without Bosch's knowledge. *See* Con. Am. Compl. at 94-95. Plaintiffs thus plausibly allege that Bosch developed the vehicle **[*34]** component which has caused Plaintiffs' injury, that Bosch was aware of the deception that component would inevitably contribute to, and that Bosch was aware that consumers would pay a premium for vehicle capabilities that the component would not deliver.

Duramax, 298 F. Supp. 3d at 1076. Similarly, Plaintiffs in this case allege that Bosch "actively participated in the development of the defeat device." Compl. ¶ 165, ECF No. 94. Specifically, Plaintiffs allege that the EDC17 "controls every parameter that is important for effective, low-emission combustion." *Id.* ¶ 167. Plaintiffs further allege that the EDC17 is equipped with a defeat device, that Bosch "exerts near-total control" over the EDC17, and that the EDC17 is designed "to prevent customers, like GM, from making significant changes on their own." Compl. ¶¶ 147, 248. Plaintiffs have sufficiently alleged that Bosch's programming of the EDC17 was a substantial and foreseeable cause of their injury.

Bosch argues as follows in its motion to dismiss:

> This Court in Duramax sustained plaintiffs' RICO claim on the understanding that it was "not primarily premised on proof of violation of EPA regulations" and that "alleg[ations] that the [defendants] intended to deceive **[*35]** regulators" were not essential to the plaintiffs' RICO claim. *See* *298 F. Supp. 3d at 1088*. That premise is not viable here, and for that reason the RICO claims here fail. The Complaint makes clear that the allegations regarding EPA and CARB are central to the claim and that the EPA and CARB are the "direct victims." *See* Compl. ¶¶ 160-61. ("[I]n order ***to obtain the COCs necessary to sell their vehicles, GM*** did not disclose, and ***affirmatively concealed from government regulators***, the presence of the test-detecting and performance-altering software code that it developed with Bosch . . . . ***Because the COCs were fraudulently obtained*** . . . **the [Subject] Vehicles** were never covered by a valid COC, ***and thus were never legal for sale***.") (emphasis added), 163 ("GM hid . . . facts from the EPA, CARB and other state regulators, and consumers, and it continued to sell and lease the [Subject] Vehicles despite their ***illegality*** and with the complicity of Bosch"), 242 (The alleged enterprise's "direct purpose was ***to deceive the regulators*** and the public")

Mot. at 10-11. As Bosch acknowledged, this Court concluded in *Duramax* that the plaintiffs' RICO claim was not premised on proof of violation of EPA regulations. Bosch **[*36]** contends that "this premise is not viable here," however, due to certain allegations in Plaintiffs' complaint that supposedly demonstrate that the EPA and CARB, and not Plaintiffs, were the "direct victims" of any alleged RICO activity. Yet these identical allegations were also present in the complaint at issue in *Duramax*. Compl. ¶¶ 164-165, ECF No. 18 (Case No. 17-cv-11661). For the same reasons identified in *Duramax*, Plaintiffs' RICO claim in this case is not dependent on proof of a violation of EPA regulations.

Bosch's argument here is also somewhat out of place. The argument centers around alleged regulatory violations and their importance to sustaining Plaintiffs' RICO claims. Yet Bosch raises this discussion in section A of its brief, which purports to address causation. It is unclear how the two topics relate. In *Duramax*, the Court determined that the Plaintiffs' RICO claims were not dependent on proof of a regulatory violation. The Court made this determination in response to the defendants' argument that the EPA's extensive regulatory scheme provided the exclusive remedy to redress violations of the CAA, thereby precluding plaintiffs' RICO claim. The Court found that argument **[*37]** to be without merit, and to be largely coterminous with the defendants' argument that plaintiffs' state law claims are preempted by the CAA. The discussion in that opinion had nothing to do with causation.

Bosch now advances the same argument by raising it in the context of the causation requirement. Bosch suggests that Plaintiffs' allegations concerning fraud on the EPA and CARB somehow undermine the causal relationship between the RICO violation and Plaintiffs' injury. According to Bosch, those allegations demonstrate that the EPA and CARB are the "direct victims" of Bosch's conduct. Even if the EPA and CARB are direct victims, the conclusion Bosch reaches does not follow. There is no reason why Bosch's conduct cannot have multiple "direct victims," including EPA, CARB, and the Plaintiffs. Bosch's discussion is non-responsive to the allegations in the Complaint concerning the injuries sustained by Plaintiffs, not the EPA or CARB, and the causal connection between those injuries and the RICO violation.

As explained in *Duramax*,

> Plaintiffs' RICO claim is not primarily premised on proof of violation of EPA regulations and thus is cognizable. The alleged common purpose at the heart of the **[*38]** RICO scheme is the deception of consumers. The alleged injury is overpayment by consumers. The identified predicate acts of mail and wire fraud involve communications to consumers. Admittedly, Plaintiffs also allege that the RICO Defendants intended to deceive regulators and made fraudulent mail and wire communications to regulators. But neither of those allegations are essential to Plaintiffs' RICO claim. Accordingly, they are best construed as collateral matters that are only peripherally related to the regulatory concerns advanced by EPA regulations.

In re Duramax Diesel Litig., 298 F. Supp. 3d 1037, 1088 (E.D. Mich. 2018). In other words, the allegations concerning regulatory violations are collateral allegations which are unnecessary to sustain Plaintiffs' RICO claim. Bosch concludes that this is somehow fatal to Plaintiffs' RICO claim. This conclusion does not follow logically. When faced with a motion to dismiss under *rule 12(b)(6)*, the Court is to consider whether the Plaintiffs have pled *sufficient* facts to sustain their claim, not whether they have pled more facts than necessary.

III.

Accordingly, it is **ORDERED** that the motion to dismiss, ECF No. 108, is **DENIED**.

Dated: October 23, 2018

/s/ Thomas L. Ludington

THOMAS L. LUDINGTON

United States District Judge

In re Lantus Direct Purchaser Antitrust Litig.

United States District Court for the District of Massachusetts

October 24, 2018, Decided; October 24, 2018, Filed

CIVIL ACTION NO. 16-12652-JGD

Reporter

2018 U.S. Dist. LEXIS 216240 *; 2018-2 Trade Cas. (CCH) P80,570

In re LANTUS DIRECT PURCHASER ANTITRUST LITIGATION

Subsequent History: Reversed by, Remanded by *Cesar Castillo, Inc. v. Sanofi-Aventis U.S., LLC (In re Lantus Direct Purchaser Antitrust Litig.), 950 F.3d 1, 2020 U.S. App. LEXIS 4565, 2020 WL 728628 (1st Cir. Mass., Feb. 13, 2020)*

Motion denied by *In re Lantus Direct Purchaser Antitrust Litig., 2020 U.S. Dist. LEXIS 240574 (D. Mass., Dec. 22, 2020)*

Prior History: *In re Lantus Direct Purchaser Antitrust Litig., 284 F. Supp. 3d 91, 2018 U.S. Dist. LEXIS 4503 (D. Mass., Jan. 10, 2018)*

Core Terms

patents, listing, FDA, insulin, infringed, pen, lawsuit, antitrust, baseless, certification, petitioning, glargine, injector, sham, allegations, products, drug product, motion to dismiss, plaintiffs', manufacture, settlement, anticompetitive, monopolization, quotations, serial, delivery system, Sherman Act, competitor, packaging, fail to state a claim

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Judges: Judith Gail Dein, United States Magistrate Judge.

Opinion by: Judith Gail Dein

Opinion

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

DEIN, U.S.M.J.

I. INTRODUCTION

By Memorandum of Decision and Order (Docket No. 40) dated January 10, 2018, this court dismissed the plaintiffs' **[*2]** Amended Complaint without prejudice. Thereafter, plaintiffs were granted leave to and did file a Second Amended Complaint (Docket Nos. 49, 51). Defendant has now moved to dismiss the Second Amended Complaint pursuant to *Fed. R. Civ. P. 12(b)(6)* (Docket No. 54) (the "Motion to Dismiss"). Plaintiffs have opposed the Motion to Dismiss (Docket No. 59) ("Opp.") and defendant has filed a Reply (Docket No. 62). After oral argument on the Motion to Dismiss, the parties submitted supplemental letters to the court (Docket Nos. 71, 72) addressing questions raised at oral argument. The court has carefully considered the parties' submissions and arguments made in open court. For the reasons detailed herein, the Second Amended Complaint fails to state a claim on which relief can be granted. The Motion to Dismiss is therefore ALLOWED and the Second Amended Complaint is dismissed with prejudice.

II. STATEMENT OF FACTS[1]

Since the Second Amended Complaint is premised on and merely expands upon the allegations of the First Amended Complaint, this court will assume the reader's familiarity with its earlier decision and will not repeat the extensive factual history laid out therein. All of those facts remain relevant to the instant **[*3]** analysis. What follows is a brief overview of the facts and regulatory context for this Motion.

The defendant, Sanofi-Aventis US LLC ("Sanofi"), is a life sciences company that sells, among other medicines, Lantus — an insulin glargine solution used for management of diabetes. See SAC ¶ 3. Lantus is sold in vial form or, as particularly relevant here, in an injector pen known as Lantus SoloSTAR. Id. Plaintiffs, FWK Holdings, LLC and Cesar Castillo, Inc., are purchasers of Lantus and allege that Sanofi unlawfully extended its period of market exclusivity over insulin glargine products and charged supra-competitive prices for Lantus after February 2015. Id. ¶¶ 14, 15, 196, 197. On behalf of themselves and a purported class of similar purchasers, the plaintiffs seek damages for having had to pay those supra-competitive prices. The plaintiffs define the class as anyone who "purchased Lantus (in cartridges or SoloSTAR) directly from Sanofi at any time between February 13, 2015 and December 31, 2016 or until the anticompetitive effects of Sanofi's conduct cease[.]" Id. ¶ 486.

The plaintiffs assert two counts in their Complaint, monopolization and attempted monopolization. Both counts are antitrust **[*4]** claims arising under *§ 2* of the Sherman Act (*15 U.S.C. § 2*). Both counts are premised on the plaintiffs' arguments that Sanofi engaged in an exclusionary conduct scheme consisting of improperly listing patents in the U.S. Food & Drug Administration's ("FDA") *Approved Drug Products with Therapeutic Equivalence Evaluations* ("Orange Book"), commencing and maintaining a sham litigation lawsuit against Eli Lilly & Company ("Lilly"), and engaging in a pattern of anticompetitive serial petitioning. Id. ¶¶ 496-514.

As relevant for this opinion, Sanofi is the holder of "formulation" patents covering preparations of insulin, and "pen" patents covering injector pens or components thereof. Id. ¶¶ 216-217, 249-254, 354, 390-402. As with Sanofi's previous motion to dismiss (Docket No. 21), the instant Motion focuses largely on Sanofi's conduct related to U.S Patent No. 8,556,864 ("the '864 Patent"), titled "Drive Mechanisms Suitable for Use in Drug Delivery Devices." SAC Ex. I. This patent covers a part used in Sanofi's insulin injector pen, the Lantus SoloSTAR. The plaintiffs allege that Sanofi improperly listed the '864 Patent in the Orange Book and commenced sham litigation against Lilly asserting infringement of that patent. Sanofi denies that its conduct related **[*5]** to the '864 Patent was anticompetitive, and argues that because the '864 Patent stood as a lawful bar to competition, the plaintiffs' other allegations fail due to issues of causation.

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[1] Unless otherwise noted, the facts are derived from the Second Amended Complaint (Docket No. 51) ("SAC").

The Orange Book is intended to put other drug manufacturers on notice of relevant patents. Companies seeking FDA approval of a new drug submit a new drug application ("NDA") pursuant to the Federal Food, Drug, and Cosmetic Act, *21 U.S.C. § 301 et seq.* ("FDCA"). Those companies must list any patents in the Orange Book "which claim[] the drug for which the applicant submitted the application or which claim[] a method of using such drug and with respect to which a claim of patent infringement could reasonably be asserted." *21 U.S.C. § 355(b)(1)*. Sanofi submitted an NDA for Lantus and a Supplemental NDA for Lantus SoloSTAR, and has listed patents for each. See SAC ¶¶ 182, 203, 280, 282. The plaintiffs claim that Sanofi improperly listed certain patents, including the '864 Patent, in the Orange Book, thereby illegally gaining the ability to commence litigation against competitors and extend its period of exclusivity, as explained below.

Under the Drug Price Competition and Patent Term Restoration Act, *Pub. L. No. 98-417, 98 Stat. 1585 (1984)*, known as the Hatch-Waxman Amendments, drug manufacturers seeking approval to sell products similar to already **[*6]** approved brand drugs can file an application for approval which relies on a brand manufacturer's NDA. Id. ¶¶ 35, 37, 71. This makes it easier for follow-on or generic manufacturers to gain FDA approval. In doing so, the new manufacturer must certify as to how their product impacts the patents that the brand drug manufacturer listed for its original NDA.

As relevant here, Lilly submitted an application for its insulin glargine product Basaglar, relying on Sanofi's NDA submissions for its Lantus products. Basaglar, like the Lantus SoloSTAR, provides insulin glargine in an injector pen. See id. ¶¶ 300-02. Lilly planned on using its own pen for the product, the KwikPen, which Lilly had previously been using for other products. Id. Because Lilly relied on Sanofi's submissions, it had to file certifications related to Sanofi's patents for Lantus and Lantus SoloSTAR. With the exception of one patent, Lilly certified that Sanofi's listed patents "were invalid, unenforceable, and/or would not be infringed by the commercial manufacture, use, or sale of [Basaglar]." Id. ¶ 306. This type of certification is known as a "paragraph IV certification." Filing a paragraph IV certification "may provoke **[*7]** litigation. The patent statute treats such filing as an act of technical infringement and provides the brand company an opportunity to sue." Id. ¶ 79; *35 U.S.C. § 271(e)(2)(A)*. Thus, if Sanofi had reason to believe that Lilly's product infringed any of its listed patents when Lilly filed its paragraph IV certification, it had the opportunity to sue Lilly prior to the FDA approving Lilly's product. "If the branded drug manufacturer initiates a patent infringement action against its would-be competitor within forty-five days of receiving notification of the paragraph IV certification, the FDA will not grant final approval to the [new drug application] until the earlier of (a) the passage of 30 months, or (b) the issuance of a decision by a court that the patent is invalid or not infringed by the [new] product." Id. ¶ 80; *21 U.S.C. § 355(c)(3)(C)*.

After receiving Lilly's paragraph IV certifications, Sanofi sued Lilly for patent infringement on two of the formulation patents and two of the pen patents, including the '864 patent. SAC ¶ 325. The plaintiffs claim that this litigation was a sham because it was based on improper Orange Book listings and because Sanofi had no reasonable basis for thinking that its patents were infringed. As is provided **[*8]** for by *21 U.S.C. § 355(c)(3)(C)*, the lawsuit against Lilly triggered an automatic stay of FDA approval for Basaglar. Id. ¶ 326. On September 28, 2015, the morning of trial, Lilly and Sanofi settled the litigation. Id. ¶ 375. As part of the settlement, Sanofi granted Lilly a royalty-bearing license so that Lilly could manufacture and sell Basaglar, and Lilly agreed to delay its launch of Basaglar until December 15, 2016. Id. ¶¶ 375-77.

In addition to the conduct related to Lilly, the plaintiffs include in their Second Amended Complaint additional facts that they claim add to Sanofi's overall anticompetitive scheme. First, the plaintiffs allege that "[e]ven after Sanofi's litigation with Lilly, [Sanofi] expected other companies would soon seek to create affordable follow-on insulin glargine products. To further frustrate those efforts, Sanofi obtained and then listed in the Orange Book an additional thirteen patents over its SoloSTAR injector pen." Id. ¶ 389 (emphasis omitted). The plaintiffs allege that "[n]one of the new patents claim insulin or insulin glargine. Each claims one or more aspects of the SoloSTAR packaging. All are improperly listed in the Orange Book and serve to frustrate competition." Id. **[*9]** ¶ 403. Second, the plaintiffs allege that Sanofi commenced lawsuits against would-be competitors Merck and Mylan, exhibiting a "pattern of anticompetitive petitioning for which [Sanofi] is independently liable under federal ***antitrust law***, even if each act of petitioning is not independently objectively baseless." Id. ¶ 500.

This court granted Sanofi's first motion to dismiss on January 10, 2018 (Docket No. 40). Therein, this court held that the plaintiffs failed to state a claim related to antitrust liability stemming from improper Orange Book listings because the alleged facts did not show that it was unreasonable to list the '864 Patent. This court also dismissed the plaintiffs' sham litigation claim, ruling that the plaintiffs failed to plead facts which showed that Sanofi's litigation against Lilly involving the '864 Patent was objectively baseless. As the '864 Patent stood as a legal barrier to Basaglar's market entry prior to December 15, 2016, this court dismissed the plaintiffs' remaining allegations for lack of causation. The court's dismissal was without prejudice. The plaintiffs have now submitted a Second Amended Complaint and Sanofi has again moved for this court to dismiss both counts.

Additional facts **[*10]** are included herein as necessary.

III. LEGAL STANDARD

A. Motion to Dismiss for Failure to State a Claim

While Sanofi has moved to dismiss the Second Amended Complaint for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, it argues further that this court should decline to reconsider its earlier rulings, and, instead, invoke the "law of the case" doctrine. See Mem. in Supp. of Motion to Dismiss (Docket No. 55) at 13-14. The law of the case doctrine holds that "unless corrected by an appellate tribunal, a legal decision made at one stage of a civil or criminal case constitutes the law of the case throughout the pendency of the litigation." *Ellis v. United States, 313 F.3d 636, 646 (1st Cir. 2002)* (internal citation and quotation omitted). In light of the substantial new allegations of the Second Amended Complaint, however, as well as the extensive arguments presented by the parties, this court has considered the sufficiency of the Second Amended Complaint anew, and applied the *12(b)(6)* standard of review. Nevertheless, as detailed below, this court has not altered its decision and incorporates herein the analysis included in its decision of January 10, 2018 (Docket No. 40) (hereinafter, "Order").

Standard of Review

Motions to dismiss under *Rule 12(b)(6)* test the sufficiency **[*11]** of the pleadings. When confronted with such a motion, the court accepts as true all well-pleaded facts and draws all reasonable inferences in favor of the plaintiff. See *Cooperman v. Individual Inc., 171 F.3d 43, 46 (1st Cir. 1999)*. The court may also consider "implications from documents attached to or fairly incorporated into the complaint . . . facts susceptible to judicial notice . . . [and] concessions in plaintiff's response to the motion to dismiss." *Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55-56 (1st Cir. 2012)* (internal quotations and citations omitted).

As the First Circuit has explained, in considering the merits of a motion to dismiss, the court proceeds in two steps. First, we "isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements." *Id. at 55*. Second, we "take the complaint's well-pled (*i.e.*, non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief." Id. Dismissal is only appropriate if the complaint, so viewed, fails to allege "a plausible entitlement to relief." *Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 95 (1st Cir. 2007)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559, 127 S. Ct. 1955, 1967, 167 L. Ed. 2d 929 (2007))*. "Plausible . . . means something more than merely possible[.]" *Schatz, 669 F.3d at 55*. "The bottom line is that the combined allegations, taken as true, must state a plausible, **[*12]** not merely conceivable, case for relief." *Carrero-Ojeda v. Autoridad De Energía Eléctrica, 755 F.3d 711, 718 (1st Cir. 2014)* (internal citations and quotations omitted). "Engaging in this plausibility inquiry is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Germanowski v. Harris, 854 F.3d 68, 72 (1st Cir. 2017)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009))*.

B. Monopolization and Attempted Monopolization Under the Sherman Act

Plaintiffs bring two counts under the Sherman Act, *15 U.S.C. § 2*, one for monopolization and the other for attempted monopolization. SAC ¶¶ 496-514. In order to be successful on a claim under *§ 2* of the Sherman Act, a plaintiff must "demonstrate (1) that the defendant possesses monopoly power in the relevant market, and (2) that the defendant has acquired or maintained that power by improper means." *Town of Concord v. Boston Edison Co., 915 F.2d 17, 21 (1st Cir. 1990)* (internal quotations and citations omitted). "[A] practice, a method, a means, is 'improper' if it is 'exclusionary.' To decide whether [a company's] conduct was exclusionary, we should ask whether its dealings with [a competitor] went beyond the needs of ordinary business dealings, beyond the ambit of ordinary business skill, and 'unnecessarily excluded competition' from the [] market." *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983)* (internal citations omitted). Thus, successful claims of monopolization must establish "that the **[*13]** defendant 'has engaged in impermissible 'exclusionary' practices with the design or effect of protecting or enhancing its monopoly position.'" *Boston Sci. Corp. v. Schneider (Europe) AG, 983 F. Supp. 245, 268 (D. Mass. 1997)* (quoting *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 195-96 (1st Cir. 1996))*. "In other words, the acquisition and maintenance of the power must be willful, rather than a result of legitimate means such as patents, superior products, business acumen, or historic accident." Id. Finally, "[a]ttempted monopolization under *§ 2* of the Sherman Act requires proof of (1) anti-competitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a dangerous probability that the attempt will succeed." *Id.*, and cases cited.

Applying these principles compels the conclusion that Sanofi's Motion to Dismiss must be allowed.

IV. ANALYSIS

A. Orange Book Listing

The plaintiffs ask this court to reconsider its prior holding that the Complaint fails to state a claim that Sanofi had unreasonably listed the '864 Patent in the Orange Book. In particular, the plaintiffs continue to assert that the '864 Patent is just for packaging, and that it was improper to list it in the Orange Book since the Patent does not claim the approved drug product. See, e.g., Opp. at 19-24. Sanofi, on the other hand, continues to argue that the '864 Patent was appropriately listed as a "drug delivery **[*14]** system[ ] used and approved in combination with a drug." Reply at 4. This court previously held that "while it may be debatable whether the Lantus SoloSTAR fits neatly into the category of patents that must be disclosed, it does not fit into the category of patents that must not be disclosed." Order at 21. The allegations in the Second Amended Complaint do not warrant a different conclusion. The court once again concludes that the facts in the Second Amended Complaint are insufficient to show that Sanofi unreasonably or improperly listed the '864 Patent in the Orange Book.

Appropriate Standard of Review

As addressed in this court's prior Order, "Orange Book listing is a statutory obligation and enforcement is a statutory right." *In re Lipitor Antitrust Litig., No. 12-2389, 2013 U.S. Dist. LEXIS 126468, 2013 WL 4780496, at *21 (D.N.J. Sept. 5, 2013)*; see also *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-02503, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at *12 (D. Mass. Aug. 16, 2015)*. Applicants are "required by law" to identify "any patent that 'claims the drug for which the applicant submitted the application or which claims a method of using such drug and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug.'" *In re Buspirone Patent Litig., 185 F. Supp. 2d 363, 371 (S.D.N.Y. 2002)* (quoting *21 U.S.C. § 355(b)(1)*).

While companies must list certain patents in the Orange Book, improperly listing a patent may subject **[*15]** the patent holder to antitrust liability. See *id. at 373* (conduct in providing information for listing in Orange Book is "not immune from liability under the Sherman Act."). Importantly, however, an improper listing does not give automatic rise to antitrust liability. This court established in its prior Order, and reaffirms here, that in order to establish a claim under the Sherman Act for Orange Book listing, a party must show that the defendant's decision to list a patent was unreasonable. See Order at 19.

The plaintiffs contend that this court was incorrect in using such a reasonableness standard. They argue that the court improperly focused on whether Sanofi reasonably (or unreasonably) believed that the '864 Patent fit within the criteria for patents to be listed in the Orange Book. See Opp. at 24-26. This misconstrues this court's ruling. Sanofi's subjective belief as to the propriety of its interpretation of the listing requirements is not at issue. Rather, as this court previously ruled, and confirms herein, it is objectively reasonable to interpret the Listing Provisions in *21 C.F.R. § 314.53* and the associated FDA Response as allowing the '864 Patent to be listed in the Orange Book as a component of a drug delivery system. Therefore, **[*16]** in listing the '864 Patent, Sanofi did not engage in improper conduct. See *Organon Inc. v. Mylan Pharms., Inc., 293 F. Supp. 2d 453, 460 (D.N.J. 2003)* ("given the statutory and regulatory language at the time it submitted the '099 Patent for listing in the Orange Book, Organon had a reasonable basis for the submission, and therefore, Organon's listing was not improper."). While the plaintiffs attempt to distinguish Organon on the grounds that the regulatory language at issue in that case was ambiguous and the Orange Book listing requirements here are not, that attempt must fail. As detailed in this court's prior Order and herein, the listing requirements and associated guidance are subject to differing interpretations. Where there is more than one reasonable interpretation of the listing requirements, and a party follows one of those interpretations, the conduct is not improper.

The '864 Patent is Not Just for Packaging

The plaintiffs argue that the '864 Patent is for packaging and is precluded from being listed in the Orange Book. This court found that argument unpersuasive in its earlier decision. See Order at 20. While the plaintiffs have expanded on their legal arguments in their Second Amended Complaint, they have not added any substantive facts which compel this court to reach a different result. **[*17]**

As an initial matter, the plaintiffs contend that the Lantus SoloSTAR was approved only as packaging. This contention is belied by the record. Rather, the SoloSTAR was approved as a drug product.

It is undisputed that Lantus SoloSTAR is sold as an injector pen filled with insulin glargine. See SAC ¶ 209. Lantus SoloSTAR was approved as a "disposable insulin injection device." SAC Ex. D. The 2003 Comments and Response from the FDA, discussed in detail in this court's prior Order, indicate that "pre-filled drug delivery systems" are drug products for Orange Book listing purposes. See Order at 7-9 (discussing *68 Fed. Reg. 36676-01, 2003 WL 21391636, at 36,680 (June 18, 2003)* ("FDA Response")). As evidenced by the FDA website, of which this court takes judicial notice, insulin injector pens are considered "pre-filled drug delivery systems." FDA, https://www.fda.gov/CombinationProducts/AboutCombinationProducts/ucm101496.htm#examples (last visited Oct. 22, 2018) (listing as examples of combination products "[p]refilled drug delivery systems (syringes, insulin injector pen, metered dose inhaler)"); see *Kader v. Sarepta Therapeutics, Inc., No. 14-14318, 2016 U.S. Dist. LEXIS 46025, 2016 WL 1337256, at *11 (D. Mass. Apr. 5, 2016)* (holding that official statements of the FDA made on a government website constitute public records of which the court can take judicial notice). The **[*18]** FDA's SoloSTAR approval letter refers to the Lantus SoloSTAR as a "drug product." SAC Ex. D. ("If you issue a letter communicating important information about this drug product . . . we request that . . . .").

In an effort to avoid this conclusion, the plaintiffs excerpt various phrases from communications between the FDA and Sanofi relating to the proposed labelling for the SoloSTAR in which "the FDA repeatedly referred to the [SoloSTAR] pen as a container" or "packaging." SAC ¶¶ 203-10. The plaintiffs rely on these select comments in concluding that "it was unreasonable for Sanofi to believe that its [supplemental new drug application] approval was for anything other than a package change." Id. ¶ 211. However, these select references must be placed in context. As Sanofi accurately asserts, "[t]hose references concerned where to put the drug label in order to minimize the risk of medication errors and how to protect the insulin cartridge integrated into the device." Reply at 4-5 (citing SAC Ex. N at 68-78, 98-101). A fair reading of the referenced communications shows that the FDA approved SoloSTAR as a "disposable insulin injection device." SAC Ex. D; Cf. SAC ¶ 204. It is consistently **[*19]** referred to by the FDA as a "device." See SAC Ex. N at 68, 71, 74, 76. The record compels the conclusion, as detailed in this court's earlier Order, that the SoloSTAR was not just packaging but was approved as a drug delivery system. Order at 20-21.

Need to Claim the Drug Product

As before, the plaintiffs next allege that Sanofi was unreasonable in listing the '864 Patent because it does not claim the relevant drug or drug product. They assert that it was improper to list the '864 Patent, which claims only components of an injector pen but does not mention Lantus SoloSTAR, or insulin glargine, because the Regulations provide that "[f]or patents that claim a drug product, the applicant must submit information only on those **patents that claim the drug product**, as defined in *§ 314.3*, that is described in the pending or approved NDA." *21 C.F.R. § 314.53(b)(1)* (emphasis added). The plaintiffs argue that since the '864 Patent does not expressly mention Lantus, Lantus SoloSTAR, or insulin glargine, it is improper to list it in the Orange Book as claiming Lantus SoloSTAR. This court does not agree.

As detailed in this court's earlier Order, the FDA's guidance regarding what a patent must expressly claim is ambiguous and is reasonably read to allow for the **[*20]** listing of the '864 Patent. The FDA has expressly interpreted "drug products", for which patents must be listed in the Orange Book, to include "pre-filled drug delivery systems." See FDA Response. Similarly, as detailed above, the FDA has recognized that insulin injector pens constitute "pre-filled drug delivery systems" and it approved SoloSTAR as a "disposable insulin injection device." Hence, it is reasonable to interpret the FDA Regulations as requiring the listing of patents for devices such as SoloSTAR regardless of whether the patent itself expressly references insulin glargine, or insulin glargine in conjunction with the pen-type injector. See SAC ¶ 272.

This court previously held on this point that "even assuming such a 'claim' must be made in the patent, it is not clear whether or not the 'claims' of the '864 patent, which are for a drug delivery device which includes a dose dial sleeve and a dose limiting mechanism, among other things, are sufficient to satisfy any such requirement." Order at 21. The court hereby affirms its prior ruling. The '864 Patent indisputably claims components of the Lantus SoloSTAR, which, as addressed *supra*, Sanofi correctly had reason to believe met the definition of "drug product" **[*21]** under the ambiguous FDA guidance. The plaintiffs have not alleged facts which show that it was unreasonable for Sanofi to list patents claiming components of that drug product.

The plaintiffs rely on *Pfizer, Inc. v. FDA, 753 F. Supp. 171 (D. Md. 1990)*, to argue that patents for components of a drug product should not be listed. Opp. at 17-18. The court in Pfizer, however, did not hold that component parts of drugs cannot be listed — rather, the court ruled that listed components must be part of the specific drug "for which the applicant submitted the application." *753 F. Supp. at 176-77*.

The listed drug at issue in Pfizer was a "nifedipine solution in a soft gelatin capsule, which Pfizer markets in the United States under the trade name Procardia." *Id. at 173*. The FDA in that case refused to list Pfizer's '986 patent, "which claimed a tablet formulation of nifedipine[,]" in the Orange Book for Procardia. *Id. at 174*. The FDA had two principal issues with listing the '986 patent. First, the FDA needed proof that the composition underlying the tablet formulation in the '986 patent was approved. Id. Second, the FDA relied on its own interpretation of the term "drug" to conclude that patents need only be filed when they claim the listed drug or drug product for which the NDA was submitted. *Id. at 174-75*. While both Procardia, a soft gelatin **[*22]** capsule, and Pfizer's tablet formulation include nifedipine, they were two distinct products. See *id. at 176*. The court in Pfizer held that a listed patent must claim the approved drug product for which the NDA was submitted — in that case Procardia. Id. Pfizer could not submit a patent for a different product just because it shared an active ingredient with Procardia. Pfizer was not submitting components of Procardia itself, but a patent for a different product which shared a component with Procardia.[2] In the instant case, by comparison, Sanofi's patent listed a component of Lantus SoloSTAR, the relevant approved drug product. Including the '864 Patent in the Orange Book is entirely consistent with Pfizer.

Finally, the plaintiffs disagree with this court's interpretation of correspondence between companies and the FDA, which evidence confusion in the industry over the very question presented by this litigation. See, e.g., Letter from GSK to FDA, Docket No. FDA-2005-A-0476 (Feb. 11, 2009), available at https://www.regulations.gov/document?D=FDA-2005-A-0476-0004 ("in the absence of further guidance from the FDA, [GSK] has modified its Orange Book listing practice to list those patents . . . **[*23]** that claim all or a portion of integrated drug-device products, regardless of whether the approved drug substance is specifically mentioned in the claims of such patents."). This court also took judicial notice of responses from the FDA, including a 2011 response to an inquiry from Forest Laboratories, Inc., in which the FDA wrote that "due to the need to address other Agency priorities," it "has been unable to reach a decision" on "whether a patent that claims a drug delivery device whose use is integral to the administration of the active ingredient and the approval of the NDA, but that does not claim the active ingredient of the approved drug product, should be submitted for listing in [the Orange Book]." Interim Response to Forest Laboratories, Inc., Docket No. FDA-2011-A-0363 (Nov. 7, 2011), available at https://www.regulations.gov/document?D=FDA-2011-A-0363-0008.

The plaintiffs claim that the letters show, not confusion, but rather an admission by industry members that the current framework does not allow for the listing of patents unless that patent explicitly claims the active drug substance. The court takes judicial notice of the letters themselves, and is not bound to accept **[*24]** the interpretation of their content provided by either party. See *OrbusNeich Med. Co. v. Boston Sci. Corp., 694 F. Supp. 2d 106, 111 (D. Mass. 2010)* ("The public filing of [a] document with a regulatory agency [] makes it a proper subject of judicial notice, at least with regard to the fact that it contains certain information, though not as to the truth of its contents."). The letters, posing the question of whether component patents must be listed, further show what this court has held — that the ambiguous listing requirements in this area allow for Sanofi's interpretation permitting the listing of the '864 Patent.

For the foregoing reasons, the plaintiffs again fail to state a claim for Sherman Act violations based on the Orange Book listing of the '864 Patent.

B. Litigation Against Lilly

The plaintiffs also ask this court to reconsider its prior order dismissing their sham litigation claim. They contend that Sanofi engaged in exclusionary conduct through "[c]ommencing and maintaining a sham litigation against Lilly to delay introduction of competing insulin glargine products into the U.S. market." SAC ¶ 498. The plaintiffs further claim that "Sanofi's suit against Lilly was objectively baseless and motivated by a subjective desire to delay competition in the insulin glargine market." **[*25]** Id. ¶ 499. This court previously dismissed the plaintiffs' sham litigation claim regarding the Lilly lawsuit. The allegations in the Second Amended Complaint do not compel a different result.

Once Lilly filed its paragraph IV certification, Sanofi had the statutory right to sue under *35 U.S.C. § 271(e)(2)(A)*. A paragraph IV certification is deemed to be "a defined act of infringement sufficient to create case or controversy jurisdiction to enable a court to promptly resolve any dispute concerning infringement and validity." *Glaxo, Inc. v. Novopharm, Ltd., 110 F.3d 1562, 1569 (Fed. Cir. 1997)*. Importantly, while a patent holder has the right to sue upon receipt of a paragraph IV certification, it is not obligated to do so.

[2] The Pfizer court's discussion of the definition of "drug" recognized that it includes component parts of the final drug. ***Id. at 176*** (citing *21 U.S.C. § 321(g)(1)*); see also *United States v. Generix Drug Corp., 460 U.S. 453, 459, 103 S. Ct. 1298, 1301-02, 75 L. Ed. 2d 198 (1983)* ("The term 'drug' is plainly intended throughout the Act to include entire drug products, complete with active and inactive ingredients."). Recognizing component parts of a drug product is entirely consistent.

The filing of a lawsuit is generally protected activity under the First Amendment, as recognized by the Noerr-Pennington doctrine. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); and United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965). However, this immunity is lost if the lawsuit is a "sham." See In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-02503, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at *11 ("Under the Noerr-Pennington doctrine, filing a lawsuit is protected under the First Amendment unless the lawsuit is a 'sham.'" (citing Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 1928, 123 L. Ed. 2d 611 (1993))).

The Supreme Court has identified a two-part definition for sham litigation.

> First, the lawsuit must be objectively baseless in the sense that no reason-able litigant could realistically expect success on the merits. If an objective litigant could conclude **[*26]** that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor ....

Prof'l Real Estate Investors, Inc., 508 U.S. at 60-61, 113 S. Ct. at 1928 (internal quotations, citations, and emphasis omitted). To prevail, "a plaintiff must allege that both prongs of the test are met." United Food & Commer. Workers Unions & Employers Midwest Health Benefits Fund v. Novartis Pharms. Corp., 902 F.3d 1, 13 (1st Cir. 2018). In the instant case, Sanofi contends that the plaintiffs have failed to allege that its litigation to enforce the '864 Patent was "objectively baseless." See, e.g., id.; see also 800 Adept, Inc. v. Murex Sec., Ltd., 539 F.3d 1354, 1370 (Fed. Cir. 2008) (to prove objectively baseless prong, the plaintiff had to prove the defendant "had no reasonable basis to believe that its patent claims were valid or that they were infringed[.]"). This court agrees, and concludes that the plaintiffs have not alleged sufficient facts to make the necessary showing.

Plaintiffs argue that they have cured deficiencies from their previous complaint related to the Lilly sham litigation **[*27]** claim. Opp. at 28-31. The court disagrees. This court found the following in its prior Order:

> According to the Amended Complaint, prior to bringing suit Sanofi had the pages of Lilly's § 505(b)(2) application that (1) showed the list of ingredients of Lilly's NDA product, and (2) identified the type of injector pen by which the Lilly NDA product would be administered. Other than repeatedly stating that the documents showed that Lilly's products would not infringe any of the claims in the two injector pen patents (the '864 and '044 patents) or any claims in the two vial formulation patents (the '652 and '930 patents), the plaintiffs have offered no facts in support of these conclusions. Since this court must disregard conclusory allegations of fact and law, the allegations of the Amended Complaint are insufficient to show that the underlying lawsuit lacked any reasonable merit.

Order at 27 (internal citations and quotations omitted). This court also found that other factors supported the conclusion that the underlying lawsuit was not objectively baseless, including the fact that Sanofi was enforcing valid patents in the face of a paragraph IV certification, that the litigation was hard fought on issues related to the '864 Patent, and that the settlement **[*28]** included favorable terms to Sanofi.

The plaintiffs have amended their Complaint to include facts they believe are sufficient to show that Sanofi's lawsuit against Lilly lacked any reasonable merit. First, the plaintiffs allege in detail the differences between the two pens. SAC ¶¶ 333-343. They assert that, based on those differences, "[n]o reasonable pharmaceutical company in Sanofi's position would realistically expect to succeed in proving infringement." Id. ¶ 332. Next, the plaintiffs assert that if there was a valid basis for infringement, Sanofi would have sued Lilly earlier, when Lilly used its KwikPen in connection with another insulin product Humalog. Id. ¶¶ 289-298. The plaintiffs contend that since "Sanofi never took the position that Lilly's KwikPen infringed Sanofi's initial injector pen patents, let alone sue Lilly for infringement[,]" Sanofi had no reasonable basis to claim that the KwikPen infringed Sanofi's patents in connection with Lantus or Lantus SoloSTAR. Id. ¶ 298. Finally, the plaintiffs allege that when Sanofi launched a follow-on version of Lilly's Humalog product using its SoloSTAR pen, Sanofi filed a paragraph IV certification alleging that

"Lilly's '132 patent was **[*29]** 'invalid, unenforceable, or will not be infringed' by Sanofi's Admelog SoloSTAR product." Id. ¶ 438. The plaintiffs allege that Sanofi's paragraph IV certification in that instance contradicts its position in the Lilly litigation that Basaglar infringed the '864 Patent. See id.

Even considering these new allegations, however, the plaintiffs have failed to allege sufficient facts to establish that Sanofi's suit against Lilly ("Sanofi I") was objectively baseless. "A firm that has received a patent from the patent office (and not by fraud . . .), and thus enjoys the presumption of validity that attaches to an issued patent . . . is entitled to defend the patent's validity in court, to sue alleged infringers, and to settle with them, whatever its private doubts, unless a neutral observer would reasonably think either that the patent was almost certain to be declared invalid, or the defendants were almost certain to be found not to have infringed it, if the suit went to judgment." *United Food & Commercial Workers Unions v. Novartis Pharm. Corp., No. 15-12732, 2017 U.S. Dist. LEXIS 102389, 2017 WL 2837002, at *11 (D. Mass. June 30, 2017)* (internal quotation and citation omitted), aff'd, *902 F.3d 1 (1st Cir. 2018)*. It does not matter whether Sanofi would have prevailed at trial. If Sanofi had even a colorable claim of infringement, it is afforded Noerr-Pennington immunity. Id.; see **[*30]** also *Asahi Glass Co. v. Pentech Pharm., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)* ("to avoid turning every patent case into an antitrust case, some threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase . . . the determination of whether such a suit is a sham depends not on what the patentee believes but on the nature of and the underlying merits of the patentee's case." (internal citations and quotations omitted)). Thus, even if the plaintiffs are right that Lilly would have ultimately prevailed at trial, that is not the question before the court. The sham litigation exception to the Noerr-Pennington doctrine was not intended to provide all third parties with an opportunity to re-litigate cases. The doctrine was reserved for those cases in which the record shows that the suit was objectively baseless.

None of the plaintiffs' new allegations show that Sanofi's suit was objectively baseless. While the plaintiffs now provide the court with ample allegations showing the differences between the injector pens, these differences do not objectively show that Lilly's product did not infringe Sanofi's '864 Patent. Despite the alleged differences between the pens, **[*31]** the underlying litigation docket shows a hard fought case in which non-infringement was anything but clear.[3] See *AstraZeneca AB v. Mylan Labs., Inc., Nos. 00-6749, 03-6057, 2010 U.S. Dist. LEXIS 50049, 2010 WL 2079722, at *4 (S.D.N.Y. May 19, 2010)* (finding that the underlying lawsuit was "hard-fought and close" and that such an "outcome hardly bespeaks baseless litigation."). For example, the record in Sanofi I is clear that Sanofi was asserting that Lilly's pen violated the claims in the '864 Patent. See Sanofi I Joint Claim Construction Brief (Docket No. 149) at 1. Sanofi's contention that the '864 Patent had been infringed formed the basis of many of Sanofi's discovery requests. See, e.g., Sanofi I Docket No. 224 at 1 ("Lilly's accused product includes a pen containing various components that, when assembled, combine to form a closing mechanism. Sanofi's asserted device patents include claims to injection devices having particular components, and Sanofi must therefore be able to analyze the structure of the internal components of Lilly's accused device."); see also Docket Nos. 215, 227 (discovery letters).

The court in Sanofi I conducted an extensive claims construction process in which the court accepted some of each party's constructions of the '864 Patent. Sanofi I Docket No. 192. The extent of the litigation negates the plaintiffs' assertion **[*32]** that no reasonable pharmaceutical company would expect to succeed on infringement claims. The fact that the pens had many differences does not show otherwise.

The plaintiffs' allegations regarding Sanofi's conduct related to another insulin product Humalog are also unsuccessful in showing that the underlying suit was baseless. Sanofi's decision not to sue Lilly previously, and decision to file a paragraph IV certification with regard to another drug product, do not show that Sanofi's belief in

[3] The court takes judicial notice of the underlying litigation. *Maher v. Hyde, 272 F.3d 83, 86 n.3 (1st Cir. 2001)* (holding that a court may take judicial notice of the docket of any court case).

this particular instance was base-less. Those allegations, even if true, do not show that Sanofi had no reasonable expectation of winning its suit against Lilly concerning this product, Basaglar.[4]

Finally, the settlement between Sanofi and Lilly in the underlying lawsuit provides further support for the conclusion that the lawsuit was not baseless. See *Toyo Tire & Rubber Co., Ltd. v. Atturo Tire Corp., No. 14-0206, 2017 U.S. Dist. LEXIS 48672, 2017 WL 1178224, at *4 (N.D. Ill. Mar. 30, 2017)* ("courts have invariably held that lawsuits terminating in favorable settlement are also objecttively reasonable and are not shams"). Under the terms of the settlement, Lilly was granted a royalty-bearing license such that Lilly could manufacture and sell Basaglar in the KwikPen device globally. SAC ¶ 375. Sanofi, for **[*33]** its part, gained royalties and a delay in Lilly coming to market. Lilly gained the ability to come to market before the expiration of the patents at issue, including the '864 Patent. See id. The court is certainly aware that "[p]arties may settle a litigation for a variety of reasons independent of the merits of the claims." *Morton Grove Pharm. Inc. v. Par Pharm. Co., No. 04-7007, 2006 U.S. Dist. LEXIS 13779, 2006 WL 850873, at *11 (N.D. Ill. Mar. 28, 2006)* (internal citations omitted). This court acknowledges both parties' arguments related to the import of the settlement, and simply notes that the existence of such a settlement supports the conclusion that Sanofi's underlying infringement claim was at least colorable. For the foregoing reasons, the plaintiffs have failed to state a claim for antitrust violations related to sham litigation.

C. Serial Petitioning

The court must next address the plaintiffs' added allegations related to serial petitioning. The plaintiffs argue that Sanofi has filed two additional lawsuits against Merck and Mylan, which, when assessed in connection with the Lilly lawsuit, constitute a "pattern of anticompetitive petitioning for which [Sanofi] is independently liable under federal ***antitrust law***, even if each act of petitioning is not independently objectively baseless."[5] SAC ¶ 500. The plaintiffs **[*34]** allege that "[s]imply by filing those suits (which were just as meritless as Sanofi's suit against Lilly), Sanofi triggered regulatory stays that [are] delaying full competition in the Lantus and insulin glargine market lasting at least into 2020." Id. ¶ 11. The plaintiffs claim this is particularly harmful to purchasers because, even though Lilly's product is now on the market, "the largest drop in product price occurs when the number of follow-on products in the market goes from one to two[.]" Id. ¶ 424.

As relevant to the Merck lawsuit, Merck submitted an application for its version of insulin glargine on May 31, 2016. Id. ¶ 405. Merck "included a paragraph IV certification to the laundry list of patents then listed in the Orange Book as covering Lantus and Lantus SoloSTAR, on August 4, 2016." Id. ¶ 407. The plaintiffs allege that Sanofi "refused to accept or review portions of Merck's NDA to determine if it had a viable, non-frivolous claim of patent infringement." Id. ¶ 410. "Instead, on September 16, 2016, Sanofi sued Merck on [] ten patents in the United States District Court for the District **[*35]** of Delaware." Id. ¶ 411.

The second lawsuit the plaintiffs rely on is against Mylan. The plaintiffs allege that "rather than wait for Sanofi to sue Mylan and block competition, Mylan brought the fight to Sanofi[.]" Id. ¶ 426. "On June 5, 2017, Mylan filed with the Patent Trials and Appeals Board ("PTAB") petitions for inter partes review [ ] of Sanofi's vial formulation patents — the '652 patent and the '930 patent." Id. ¶ 427. The plaintiffs assert that "Sanofi opposed the petitions, but on December 13, 2017, the PTAB granted Mylan's petitions — meaning Mylan had demonstrated a 'reasonable likelihood of success' in showing at least one claim of each patent would be found invalid — and instituted an inter partes review of the vial formulation patents." Id. ¶ 428 (internal punctuation omitted). Mylan separately filed an application "seeking permission to manufacture, market, and sell a follow-on version of Lantus SoloSTAR.

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[4] This conclusion is supported by the fact that these facts were all known at the time of Sanofi I and Lilly raised some of the same arguments yet nevertheless proceeded towards trial and eventual settlement in Sanofi I. See Sanofi I Docket No. 149 at 3 ("the injector pen part patents were never asserted against Lilly's marketed KwikPen product.").

[5] The lawsuit with Merck is Sanofi-Aventis U.S. LLC v. Merck Sharp & Dohme Corp., No. 16-00812 (D. Del. filed Sept. 16, 2016). The parties completed a five day bench trial on June 4, 2018 and have submitted post trial briefing. The lawsuit with Mylan is Sanofi-Aventis U.S. LLC v. Mylan N.V., No. 17-09105 (D.N.J. filed Oct. 24, 2017). The litigation is ongoing.

Contained within its application was a paragraph IV certification that the plethora of vial formulation patents and injector pen patents listed under Lantus in the Orange Book were invalid, unenforceable, or would not be infringed by Mylan's proposed follow-on insulin glargine product." **[*36]** Id. ¶ 430. As with Merck, the plaintiffs claim that Sanofi "refused to accept or review portions of Mylan's NDA to determine whether it had any viable, non-frivolous claim of infringement against Mylan." Id. ¶ 433. "Sanofi sued Mylan on October 24, 2017, alleging that Mylan infringed every one of Sanofi's eighteen injector pen patents and vial formulation patents." Id. ¶ 434. As a result of the lawsuit, "the FDA was automatically prohibited from approving Mylan's product for 30 months, or until March 18, 2020." Id. ¶ 435.

The plaintiffs allege that these two lawsuits, which were filed in response to paragraph IV certifications, subject Sanofi to antitrust liability regardless of their merit. The court does not agree. In its recent decision affirming summary judgment for a competitor in the face of allegations of serial petitioning, the First Circuit noted that although not every suit need be baseless in order for a serial petitioning claim to survive, "the task here is to identify sham litigation, not probable winners. And while we can see the logic inherent in reasoning that a nonfrivolous suit might be viewed differently when flown in a flock of frivolous suits, we see little logic **[*37]** in concluding that an exercise of the right to file an objectively reasonable petition loses its protection merely because it is accompanied by other exercises of that right." *P.R. Tel. Co. v. San Juan Cable LLC, 874 F.3d 767, 772 (1st Cir. 2017)*. In concurring, Judge Barron, joined by Judge Torruella, explained that in evaluating serial petitioning cases, the court relies "on a more record-based, case-specific line of reasoning that . . . leaves open the possibility that . . . a monopolist might be liable under the antitrust laws for engaging in a pattern of petitioning, even though no single filing in that pattern is objectively baseless." *Id. at 773*. Judge Barron explained further that "[t]he antitrust violation — if it exists — in a pattern case of that kind inheres in the monopolist's use of the petitioning process to make the costs of the rival's petitioning activity so high that the rival cannot secure the legal relief that would enable it actually to become a competitor." *Id. at 776*. Judge Barron noted that "no circuit has actually permitted a suit to go forward in which the underlying petitions were not baseless and there was no clear and convincing evidence that an alleged monopolist sought to use the govern-mental process [] as an anticompetitive weapon." *Id. at 777* (citations, **[*38]** quotations, and emphasis omitted). The court does not find, in the allegations of the Second Amended Complaint, facts related to these three lawsuits to meet the high bar necessary for the plaintiffs to make a plausible serial petitioning claim. Each suit followed a paragraph IV certification, an act of infringement that permits a company to sue on a colorable claim. Sanofi contends that it did not fully review the records before engaging in litigation in part because Merck and Mylan demanded burdensome confidentiality agreements. Reply at 14. Even if Sanofi did not fully review Merck and Mylan's applications, and even if the PTAB made a preliminary ruling in Mylan's favor, Sanofi has a protective right to sue and defend colorable claims related to its listed patents. The plaintiffs have neither pleaded a plausible case that these suits were individually baseless, nor have they pleaded a plausible case that Sanofi, through filing these lawsuits, used the governmental process as an anticompetitive weapon. The plaintiffs' antitrust claims, as premised on serial petitioning allegations, fail to state a claim.

D. Causation

The court is cognizant of the fact that the '864 Patent is not the only Orange **[*39]** Book listing and litigated patent the plaintiffs complain of. In fact, the Second Amended Complaint adds even more Orange Book listing claims, asserting that "[e]ven after Sanofi's litigation with Lilly, it expected other companies would soon seek to create affordable follow-on insulin glargine products. To further frustrate those efforts, Sanofi obtained and then listed in the Orange Book an additional *thirteen* patents over its SoloSTAR injector pen." SAC ¶ 389 (emphasis in original). These Sherman Act claims, as based on these other patents, fail for lack of causation.

"An antitrust plaintiff must prove a causal connection between the antitrust violation and actual damages suffered." *In re Wellbutrin XL Antitrust Litig., Nos. 08-2431, 08-2433, 2012 U.S. Dist. LEXIS 66312, 2012 WL 1657734, at *33 (E.D.P.A. May 11, 2012)*. In an antitrust class action, "individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008)*. The plaintiffs have alleged harm from Sanofi's practices "between February 13, 2015 and December 31, 2016 or until the anticompetitive effects of Sanofi's conduct cease[.]" SAC ¶ 486. As addressed above, the plaintiffs have failed to state a plausible claim **[*40]** for relief based on the listing of the '864 Patent or the litigation enforcing that patent against Lilly, which ended in a settlement agreement that delayed Lilly's market entry until December 2016.

The plaintiffs argue that even if Sanofi's conduct related to the '864 Patent were valid, the thirty-month stay provided for by statute expired on June 20, 2016, six months prior to Lilly's product coming to market. Opp. at 34-35. The plaintiffs seem to be arguing that there were damages during that additional period for which the '864 Patent was not an independent bar. That delay, however, was the product of a settlement agreement entered into between the parties in Sanofi I on September 28, 2015, well before the expiration of the stay. SAC ¶ 375. As explained above, when a party sues on a paragraph IV certification, as Sanofi did here, "the FDA will not grant final approval to the [new drug application] until the earlier of (a) the passage of 30 months, or (b) the issuance of a decision by a court that the patent is invalid or not infringed by the [new] product." *21 U.S.C. § 355(c)(3)(C)*. Where, as here, the court endorsed a settlement prior to the expiration of 30 months, Sanofi is entitled to any additional delay embodied in that settlement.

Thus, the '864 Patent **[*41]** , and the settlement based thereon, stood as a lawful bar to Lilly's market entry, and the plaintiffs cannot show that Sanofi's conduct related to any other patent caused harm from Lilly's delay during that time period. Additionally, in light of this court's dismissal of the plaintiffs' serial petitioning claim alleging harm from the Merck and Mylan suits, the plaintiffs have failed to show that Sanofi can be held liable for actions causing market delay after December 31, 2016.

E. Claim of Overall Scheme

Finally, the court addresses the fact that the plaintiffs have not simply alleged that the Orange Book listings and the litigations against Lilly, Merck, and Mylan violated the antitrust laws, but that these actions collectively create an "illegal scheme to prevent, delay, and/or minimize the success of the introduction into the United States marketplace of any competing versions of [] insulin glargine products[.]" SAC ¶ 502. A court "can consider the individual aspects of [a scheme] claim so long as it keeps the larger scope of the scheme in context." *In re Asacol Antitrust Litig., 233 F. Supp. 3d 247, 261 (D. Mass. 2017)*. "In antitrust cases in which a scheme is alleged, 'plaintiffs should be given the full benefit of their proof without tightly compartmentalizing **[*42]** the various factual components and wiping the slate clean after scrutiny of each.'" Id. (quoting *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698-99, 82 S. Ct. 1404, 1410, 8 L. Ed. 2d 777 (1962))*. However, "if all we are shown is a number of perfectly legal acts, it becomes much more difficult to find overall wrongdoing. Similarly, a finding of some slight wrongdoing in certain areas need not by itself add up to a violation. We are not dealing with a mathematical equation. We are dealing with what has been called the 'synergistic effect' of the mixture of the elements." *City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1376 (9th Cir. 1992)* (quoting *City of Groton v. Conn. Light & Power Co., 662 F.2d 921, 929 (2d Cir. 1981)*.

A consideration of the overall mixture of alleged conduct in this case does not warrant a different conclusion than does the evaluation of each element. As shown above, the plaintiffs have not plausibly shown that Sanofi engaged in the improper practice of Orange Book listing and suing competitors to cause anticompetitive injury. The plaintiffs' antitrust claims, as premised on an overall scheme of improper listings and improper litigations, are dismissed.

F. Market Power

As the court concludes that the Second Amended Complaint fails to adequately plead an improper means of acquiring monopoly power, this court need not address the parties' arguments over whether the plaintiffs have adequately pled that **[*43]** Sanofi possessed monopoly power in the relevant market.

V. CONCLUSION

For the reasons herein, the plaintiffs have failed to state a claim on which relief can be granted for monopolization or attempted monopolization. The Motion to Dismiss (Docket No. 54) is hereby ALLOWED and the Second Amended Complaint is dismissed with prejudice.

/s/ Judith Gail Dein

Judith Gail Dein

United States Magistrate Judge

Contant v. Bank of Am. Corp.

United States District Court for the Southern District of New York

October 25, 2018, Decided; October 25, 2018, Filed

17 Civ. 3139 (LGS)

Reporter

2018 U.S. Dist. LEXIS 183586 *; 2018-2 Trade Cas. (CCH) P80,573; 2018 WL 5292126

JAMES CONTANT, et al., Plaintiffs, -against- BANK OF AMERICA CORPORATION, et al., Defendants.

Prior History: Contant v. Bank of Am. Corp., 2018 U.S. Dist. LEXIS 42870 (S.D.N.Y., Mar. 15, 2018)

Core Terms

Retail, Dealer, banks, instruments, consumers, antitrust, prices, Plaintiffs', alleges, class action, exemption, purchaser, Defendants', rates, benchmark, regulated, courts, pleads, federal court, liquidity, commerce, currency, indirect, trading, bid, leave to amend, national bank, spot market, misconduct, providers

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For Martin-Han Tran, on behalf of themselves and all others similarly situated, Carlos Gonzalez, on behalf of themselves and all others similarly situated, Ugnius Matkus, on behalf of themselves and all others similarly situated, Jerry Jacobson, on behalf of themselves and all others similarly situated, Paul Vermillion, on behalf of themselves and all others similarly situated, Plaintiffs: Michael C. Dell'Angelo, Joshua Ripley, Berger & Montague, P.C., Philadelphia, PA; R. Bryant McCulley, McCulley McCluer PLLC, Sullivans Island, SC; Stuart Halkett McCluer, McCulley Mccluer PLLC, Oxford, MS.

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Judges: LORNA G. SCHOFIELD, UNITED STATES DISTRICT JUDGE.

Opinion by: LORNA G. SCHOFIELD

Opinion

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

Plaintiffs,[1] a group of individuals and businesses that purchased foreign exchange ("FX") instruments from retail foreign exchange dealers ("Retail Dealers"), filed this putative class action against 18 banks and their affiliates[2] seeking injunctive relief under the Sherman Antitrust Act, *15 U.S.C. § 1, et seq.*, and damages under certain state antitrust and consumer protection laws. Plaintiffs allege that they paid inflated prices for various financial instruments because of Defendants' alleged conspiracy to fix prices in the FX spot market. Plaintiffs' Consolidated Class Action Complaint ("CCAC") was dismissed because it failed to plead facts **[*6]** sufficient to establish antitrust standing as to Plaintiffs' claims under the Sherman Act and the state antitrust laws of California, Illinois and New York. *Contant v. Bank of Am. Corp., No. 17 Civ. 3139, 2018 U.S. Dist. LEXIS 42870, 2018 WL 1353290, at *5 (S.D.N.Y. Mar. 15, 2018)* ("*Contant I*"). The CCAC also failed to plead sufficient facts to establish proximate cause, which is required for each of Plaintiffs' claims, and failed to meet due process requirements for bringing state law claims, except those under New York law. *2018 U.S. Dist. LEXIS 42870, [WL] at *8*. Finally, the CCAC failed to establish the availability of injunctive relief for Plaintiffs' Sherman Act claim. *2018 U.S. Dist. LEXIS 42870, [WL] at *9*. Plaintiffs move for leave to file their Proposed Second Consolidated Class Action Complaint (the "Proposed Complaint") pursuant to *Federal Rule of Civil Procedure 15(a)(2)*. For the following reasons, Plaintiffs' motion is granted in substantial part.

BACKGROUND

Familiarity with the procedural history and the allegations contained in the CCAC is assumed. *See* *Contant I, 2018 U.S. Dist. LEXIS 42870, 2018 WL 1353290, at *1-2*. The following alleged facts are taken from the Proposed Complaint and documents integral to the complaint, and are assumed to be true only for the purposes of this motion. *Cohen v. Rosicki, Rosicki & Assocs., P.C., 897 F.3d 75, 80 (2d Cir. 2018)*.

On May 20, 2015, the United States Department of Justice announced that Defendants Citigroup, JPMorgan Chase, Barclays, RBS and UBS were pleading guilty to conspiring to manipulate FX **[*7]** benchmark rates. Those benchmark rates are derived at the same time daily from bids and offers in the FX spot market during short windows of time called "fix periods." The two principal benchmark rates that Defendants manipulated are the European Central Bank rate and the World Markets/Reuters rate. These are the two most widely referenced FX benchmark rates and are used to set FX exchange rates globally. In 2013, Defendants collectively controlled 90.92% of the global FX spot trading market, and 98% of all FX spot trading volume in the United States. Defendants conspired in electronic chatrooms to fix prices, conform FX trade quotes and coordinate the timing and volume of trades, thereby artificially inflating the prices paid by non-Defendant FX purchasers.

Defendants' price fixing scheme operated to Plaintiffs' detriment by causing them to pay more for the FX instruments[3] that they purchased from Retail Dealers than they otherwise would have paid. The Retail Dealers

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[1] The named plaintiffs are James Contant, Sandra Lavender, Victor Hernandez, Martin-Han Tran, FX Primus Ltd., Carlos Gonzalez, Ugnius Matkus, Charles G. Hitchcock III, Jerry Jacobson, Tina Porter and Paul Vermillion.

[2] Defendants are Bank of America Corporation, Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated, The Bank of Tokyo-Mitsubishi UFJ, Ltd., Barclays Bank PLC, Barclays Capital Inc., BNP Paribas, BNP Paribas North America, Inc., BNP Paribas Securities Corp., BNP Paribas Prime Brokerage, Inc., Credit Suisse Group AG, Credit Suisse AG, Credit Suisse Securities (USA) LLC, Deutsche Bank AG, Deutsche Bank Securities Inc., The Goldman Sachs Group, Inc., Goldman, Sachs & Co., HSBC Bank plc, HSBC North America Holdings, Inc., HSBC Bank USA, N.A., HSBC Securities (USA) Inc., JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., Morgan Stanley, Morgan Stanley & Co., LLC, Morgan Stanley & Co. International PLC, RBC Capital Markets, LLC, The Royal Bank of Scotland plc, RBS Securities Inc., Société Générale S.A., Standard Chartered Bank, UBS AG, UBS Group AG and UBS Securities, LLC. The Citigroup Defendants have settled.

[3] "FX Instrument" is defined in the Proposed Complaint and in the *FOREX* settlements as any FX spot transaction, forward, swap, future, option or any other FX transaction or instrument the trading or settlement value of which is related in any way to FX rates.

quoted Plaintiffs prices based on the rates in the price-fixed spot market, thereby passing on to Plaintiffs the costs of Defendants' anticompetitive practices. When a Plaintiff placed an order for an FX instrument with **[*8]** a Retail Dealer, the Retail Dealer would then execute a covering trade, purchasing the FX Instrument from a Defendant liquidity provider and reselling it to the Plaintiff for that purchase price plus a retail markup. Depending on the Retail Dealer, the amount of the markup could be fixed based on the currency pair, or it could be calculated as a multiple of the best bid-ask spread quotes that the Retail Dealer receives from liquidity providers.

The Proposed Complaint bases these allegations primarily on analyses conducted by Plaintiffs expert, Dr. Carol L. Osler. According to Dr. Osler, "Each [Retail Dealer] maintains a proprietary algorithm for generating bid and ask quotes that are based on a data feed from the interbank market. Therefore, clients' trading costs are in proportion to the size of the trade and depend on the bid-ask spreads charged to the [Retail Dealers]." Most algorithms set the bid and ask prices for a retail FX instrument via a three step process -- "Step 1: Take in prices from one or more dealer banks as sources of liquidity; Step 2: Identify the highest bid and lowest ask prices among those liquidity-provider prices; Step 3: Set the retail ask price by adding **[*9]** a markup to the wholesale ask[] and set the retail bid price by subtracting a markup from the wholesale bid." In the alternative, some Retail Dealers calculate retail prices by "first identifying the wholesale mid-quote and adding (for the ask) or subtracting (for the bid) an appropriate markup." Because of Defendants' dominant market share in the wholesale FX Market, "the Step-1 market prices will almost certainly include streaming quotes from one or more Defendant liquidity providers . . . ."

Dr. Osler's statistical models confirm that the spot FX prices charged by Defendants to Retail Dealers are nearly perfectly correlated with the prices at which Plaintiffs purchased the instruments from the Retail Dealers. "Because the distorted bid and ask quotes from the liquidity providers are incorporated into the [Retail Dealer] bid and ask quotes, any price distortions at the liquidity provider level are passed down to the retail customer at the [Retail Dealer] level," and are "fully incorporated into [Retail Dealer] pricing."

STANDARD

"Leave to amend should be 'freely give[n] . . . when justice so requires,' *Fed. R. Civ. P. 15(a)(2)*, but should generally be denied in instances of futility [or] undue delay . . . **[*10]** ." *United States ex rel. Ladas v. Exelis, Inc., 824 F.3d 16, 28 (2d Cir. 2016)* (some internal quotation marks omitted). "A proposed amendment to a complaint is futile when it could not withstand a motion to dismiss." *F5 Capital v. Pappas, 856 F.3d 61, 89 (2d Cir. 2017)*. To withstand dismissal, a pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*; *accord Myun-Uk Choi v. Tower Research Capital LLC, 890 F.3d 60, 65 (2d Cir. 2018)*.

In reviewing a motion for leave to amend, a court accepts as true all factual allegations and draws all reasonable inferences in the plaintiff's favor. *See Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt., 843 F.3d 561, 566 (2d Cir. 2016)*. In adjudicating a motion for leave to amend, "A complaint is also deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are integral to the complaint." *Cohen, 897 F.3d at 80*.

DISCUSSION

The Proposed Complaint claims that Defendants' price-fixing agreements violated *§ 1* of the Sherman Antitrust Act; the state antitrust statutes of Arizona, California, Illinois, Minnesota, New York and North Carolina and the consumer protection statutes of California, Florida and Massachusetts. For the reasons below, Plaintiffs' motion for leave to file the Proposed Complaint is granted in substantial part. The Proposed Complaint adequately **[*11]** pleads (at least as to some Defendants) all of Plaintiffs' claims, except for the Sherman Act claim, which still fails for lack of Article III standing.

A. Contradictions between the CCAC and Proposed Complaint

Defendants argue that it is inappropriate even to assess the sufficiency of the facts pleaded in the Proposed Complaint, because "Plaintiffs may not delete previously pleaded factual allegations and replace them with contradictory allegations." This argument fails, because Plaintiffs inserted the challenged amendments and corrections to their pleading with the help of an expert to address the CCAC's deficiencies identified in *Contant I*.

Pursuant to *Rule 15(a)*, "The court should freely give leave when justice so requires." *Fed. R. Civ. P. 15*. "Leave to amend, though liberally granted, may properly be denied for: undue delay, bad faith or dilatory motive on the part of the movant . . . ." *Ruotolo v. City of New York, 514 F.3d 184, 191 (2d Cir. 2008)* (citations omitted); *accord* *Melendez v. POP Displays USA, No. 18 Civ. 2323, 2018 U.S. Dist. LEXIS 126159, 2018 WL 3611934, at *3 (S.D.N.Y. July 27, 2018)*. It is "well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect." *Int'l Controls Corp. v. Vesco, 556 F.2d 665, 668 (2d Cir. 1977)*; *accord* Elliott v. City of Hartford, 649 F. App'x 31, 32 (2d Cir. 2016) (summary order).

This is not a case where Plaintiffs have blatantly changed their version of facts known personally to them, suggesting bad faith. Here, the Proposed **[*12]** Complaint corrects and clarifies a description of a complex business transaction outside the ken of Plaintiffs and their lawyers. *See, e.g.,* *Bernadotte v. New York Hosp. Med. Ctr. of Queens, No. 13 Civ. 965, 2014 U.S. Dist. LEXIS 26115, 2014 WL 808013, at *6 (E.D.N.Y. Feb. 28, 2014)* ("Taken as a whole, while not congruous, Plaintiff's allegations are not in such direct contradiction that the Court is moved to abandon the usual deference afforded to an Amended Complaint."); *Streit v. Bushnell, 424 F. Supp. 2d 633, 640 (S.D.N.Y. 2006)* ("It would be a harsh rule of law indeed if a litigant were to change a statement in an amended pleading to repair a weakness cited by an adversary or by the Court, only to have the case dismissed because the conforming change in some way may conflict with an allegation in the earlier pleadings"). Assessing the Proposed Complaint's sufficiency is appropriate.

B. Sherman Act Claim

The Proposed Complaint's Sherman Act claim once again fails for lack of Article III standing. "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)* (citation omitted).

Plaintiffs seek only injunctive relief with respect to their Sherman Act Claim, presumably **[*13]** because they may not seek damages as indirect purchasers. *See* *Illinois Brick Co. v. Illinois, 431 U.S. 720, 735, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* (holding the treble damage actions under *§ 4* of the Clayton Act are limited to "direct purchaser[s]"); *see also* *Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 413 n.7 (2d Cir. 2014)* ("The indirect purchaser doctrine . . . does not apply to claims for equitable relief."). However, injunctive relief is not available because Plaintiffs fail to allege any ongoing misconduct. *See* *15 U.S.C. § 26*. Past injuries "do not confer standing . . . unless the plaintiff can demonstrate that she is likely to be harmed again in the future in a similar way." *Nicosia v. Amazon.com, Inc., 834 F.3d 220, 239 (2d Cir. 2016)* (affirming dismissal of injunctive claim).

Like the CCAC, the Proposed Complaint pleads no plausible threat of ongoing or recurring violations. The Proposed Complaint asserts a Class Period ending on December 31, 2013, suggesting the alleged violations ended in 2013. The Proposed Complaint alleges that, following investigations, guilty pleas and fines, "Defendants terminated and suspended traders, forced traders to resign and implemented internal safeguards. . . ." -- suggesting that Defendants have reformed their FX operations.

Plaintiffs assert three arguments why the Proposed Complaint pleads a sufficient threat of future harm; none are persuasive. First, Plaintiffs **[*14]** point to "recent developments in government investigations" into the price fixing conspiracy. This argument fails, because the Government's uncovering of further details with respect to Defendants' past misconduct does not imply that the misconduct is continuing or likely to recur. Second, Plaintiffs argue that allegations "that the same market conditions that facilitated the Conspiracy continue today" are sufficient, because "[i]f Defendants continue to be able to manipulate FX prices, those Plaintiffs will continue to be harmed." This argument assumes without reason that, despite being caught and punished for manipulating the market, Defendants will continue to manipulate the market simply because they allegedly still can. *See, e.g., Shain v. Ellison, 356 F.3d 211, 216 (2d Cir. 2004)* (denying injunctive relief where an "accumulation of inferences is simply too speculative and conjectural to supply a predicate for prospective injunctive relief"); *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 296 F. Supp. 3d 614, 625 (S.D.N.Y. 2017)* (denying an injunction where the "alleged harm [was] far too speculative to justify injunctive relief").

Third, as evidence of an ongoing threat, Plaintiffs point to a paragraph in the Proposed Complaint that alleges ongoing regulatory violations "that included failing to segregate client **[*15]** funds, failing to report FX transactions, failure to report Credit Suisse's short positions, selling risky investment products to clients, and the charging of incorrect rates and commissions to FX clients." But this allegation does not describe an ongoing threat from the *same* FX-related misconduct that catalyzed the present lawsuit -- i.e., collusion amongst Defendants to rig FX benchmarks. Because Plaintiffs cannot obtain damages or injunctive relief under the Sherman Act, their alleged injury is not "likely to be redressed by a favorable judicial decision," *Spokeo, 136 S.Ct. at 1547*, and leave to amend is denied.

C. State Law Claims -- Proximate Cause

As discussed in detail in *Contant I*, proximate cause is required for all of the Plaintiffs' state law claims, which are unchanged in the Proposed Complaint. *2018 U.S. Dist. LEXIS 42870, 2018 WL 1353290, at *7*. Proximate cause -- under the rubric of "directness" -- is also in effect a requirement for antitrust standing for at least the California, Illinois and New York antitrust claims. *See Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 135, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)* (noting that "directness" is in essence a proximate cause requirement); *see also Harry v. Total Gas & Power N. Am., Inc., 889 F.3d 104, 116 (2d Cir. 2018)* ("The overall [antitrust standing] inquiry is akin to proximate cause in tort law . . . ."); *see generally Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 540-45, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("*AGC*") (discussing the "efficient enforcer" doctrine **[*16]** and the four factors used to measure the link between a defendant's conduct and the plaintiff's injury in an antitrust action); *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 778 (2d Cir. 2016)* ("the 'directness or indirectness of the asserted injury' [] requires evaluation of the 'chain of causation' linking appellants' asserted injury and the Banks' alleged price-fixing").

"A proximate cause determination does not require a jury to identify the liable party as the sole cause of harm; it only asks that the identified cause be a substantial factor in bringing about the injury." *Hydro Inv'rs, Inc. v. Trafalgar Power Inc., 227 F.3d 8, 15 (2d Cir. 2000)*; *accord ScentSational Techs., LLC v. Pepsico, Inc., No. 13 Civ. 8645, 2018 U.S. Dist. LEXIS 91180, 2018 WL 2465370, at *7 (S.D.N.Y. May 23, 2018)*. The harm alleged need have only "a sufficiently close connection to the conduct the statute prohibits," *Lexmark, 572 U.S. at 133* -- proximate causation does not demand total causation.

Accepting the Proposed Complaint's allegation that retail FX prices "move in nearperfect correlation" with FX benchmarks, because FX benchmarks constitute the predominant component of FX retail prices, a direct link connects the alleged anticompetitive conduct and Plaintiffs' injury; any engineered increase in FX benchmark rates galvanized an equivalent increase in the price paid by retail consumers. *See In re Foreign Exch. Benchmark Rates Antitrust Litig., No. 13 Civ. 7789, 2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at *9 (S.D.N.Y. Sept. 20, 2016)* ("*FOREX*") (directness factor satisfied where rates in the market in which plaintiffs participated allegedly **[*17]** "track" and "move in virtual lockstep" with rates in the manipulated market).

Defendants argue that the Proposed Complaint does not sufficiently plead proximate cause or "directness" because Plaintiffs' purchases cannot be traced to Defendants: "Plaintiffs here allege that they purchased currency from an unidentified [Retail Dealer] that dealt with a defendant, but they cannot plausibly allege a direct and proximate connection between their completely fungible currency transactions in the retail foreign currency market and any antecedent transaction between their [Retail Dealer] and one of the defendants." This argument fails for two reasons. First, the Proposed Complaint alleges that Defendants manipulated the FX benchmark rates, which underlie the pricing of all FX Instruments, including those sold by nonconspirators. *See* *Gelboim, 823 F.3d at 779* (stating that, where defendants allegedly manipulated the LIBOR benchmark, "there appears to be no difference in the injury alleged by those who dealt in LIBOR-denominated instruments, whether their transactions were conducted directly or indirectly with the Banks").

Second, this argument mischaracterizes the Proposed Complaint, which limits the putative class to **[*18]** those who purchased indirectly from a Defendant through a Retail Dealer:

> All persons and entities who . . . indirectly purchased an FX Instrument *from a Defendant or co-conspirator* in the United States and/or while domiciled in the United States, by entering into an FX Instrument with a member of the Direct Settlement Class [i.e., the Retail Dealers who were plaintiffs and class members in *FOREX*], where the Direct Settlement Class member entered into the FX Instrument *directly with a Defendant or coconspirator* [emphasis added].

The "Direct Settlement Class" in *FOREX* is defined to include participants in the FX spot market, who traded "FX Instruments" and "FX Exchange-Traded Instruments" with Defendants, but does not include consumers "who purchased supracompetitive foreign currency exchange rates from Defendants and their co-conspirators *for their own end use* . . . ." *Nypl v. JP Morgan Chase & Co., No. 15 Civ. 9300, 2016 U.S. Dist. LEXIS 75155, 2016 WL 3211440, at *2 (S.D.N.Y. June 8, 2016)*.

Contrary to Defendants' argument, these transactions are not impossible to identify because of the fungible nature of currency. By mirroring the "Direct Settlement Class" in *FOREX*, the putative class in this case does not include Plaintiffs who purchased fungible currency notes from a Retail Dealer to use in buying goods **[*19]** and services. It includes only Plaintiffs who purchased a traceable FX instrument from a Retail Dealer. The Proposed Complaint alleges that every FX instrument Plaintiffs purchased from a Retail Dealer is traceable back to a Defendant liquidity provider, which is plausible given the recordkeeping requirements imposed on Retail Dealers by the Commodity Futures Trading Commission. *See* *17 C.F.R. § 5.14* ("No person shall be registered as a retail foreign exchange dealer under the Act unless . . . he prepares and keeps current ledgers or other similar records which show or summarize, with appropriate references to supporting documents, *each transaction* affecting his asset, liability, income, expense and capital accounts . . . .") (emphasis added). Accordingly, the Proposed Complaint alleges that Plaintiffs' losses were proximately caused by, and flowed directly from, Defendants' misconduct.[4]

Defendants argue that "because the bid and ask quotes of defendants and other nondefendant liquidity providers are comingled in the [Retail Dealers'] algorithms, plaintiffs cannot rely on those algorithms -- and their purported self-imposed absence of pricing discretion -- to show that defendants' alleged conduct **[*20]** directly or proximately caused plaintiffs' claimed injury." This argument is inapposite.

First, Plaintiffs are not required to provide expert analysis at the pleading stage, much less rebut anticipated counterarguments. *See* *Elkind v. Revlon Consumer Prods. Corp., No. 14 Civ. 2484, 2015 U.S. Dist. LEXIS 63464, 2015 WL 2344134, at *11 n.7 (E.D.N.Y. May 14, 2015)* (stating that plaintiffs are generally not required to provide expert analysis at the pleading stage).

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[4] Defendants argue in a summary fashion that Plaintiffs' inability to trace the foreign currency they purchased in the retail market to defendants' conduct undermines Plaintiff's ability to meet the other *AGC* antitrust standing requirements, as it does the "directness" requirement. *See* *AGC, 459 U.S. at 540-45*; *Gelboim, 823 F.3d at 778*. This argument fails for the same reasons as explained in the text; the Proposed Complaint plausibly alleges Plaintiffs' ability to trace the transactions at issue to the Defendants' wrongful conduct.

Second, the Proposed Complaint alleges that the conspiring Defendant liquidity providers controlled 90% of trading in the global FX spot market and 98% of trading in the United States FX spot market. Given this market share and the likelihood that streaming quotes would include those from Defendants, the Proposed Complaint plausibly alleges that Defendants' misconduct was the "substantial factor in bringing about the injury." *Hydro Inv'rs, 227 F.3d at 15*.

D. State Law Claims -- Due Process Requirements

The Proposed Complaint also pleads facts sufficient to satisfy due process. The Proposed Complaint pleads consumer and antitrust claims under the law of 8 different states (New York, Arizona, California, Florida, Illinois, Massachusetts, Minnesota, North Carolina), in each case on behalf of one or more named Plaintiffs who both reside in that state and purchased FX instruments in that state, and **[*21]** on behalf of a putative class of those who "purchased an FX Instrument from a Defendant or co-conspirator in [that state] and/or while domiciled in [that state] . . . ."

Under the *Fourteenth Amendment Due Process Clause*, a state law may not be applied unless that state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* (citing *Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981))*. Application of a state's law is invalid where the state has "no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." *Allstate, 449 U.S. at 308*. This places "modest restrictions on the application of forum law." *Shutts, 472 U.S. at 818*.

Courts treat antitrust claims as torts for purposes of due process analyses. *See In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 208 (2d Cir. 2003)* (stating that the "effects" test, which is used to analyze whether the exercise of specific personal jurisdiction comports with due process in the tort context, applies to antitrust claims).[5] For tort claims, the factors relevant to determining a state's interest are: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation **[*22]** and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." *Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 142 (2d Cir. 2015)* (citing *Restatement (Second) of Conflict of Laws § 145(2)* (1971)).

The Proposed Complaint satisfies these due process requirements by alleging facts relevant to the first three factors. Factor (d) is inapplicable because, as alleged, Plaintiffs did not transact with Defendants and had no relationship with them. The Proposed Complaint alleges that at least one Plaintiff lives in each of the states in question, and that Plaintiff purchased an FX instrument while physically located in their respective states of residence. Plaintiffs were therefore injured in their home states. *See In re TFT-LCD (Flat Panel) Antitrust Litig., No. 09 Civ. 4997, 2012 U.S. Dist. LEXIS 121756, 2012 WL 3727221, at *3 (N.D. Cal. Aug. 27, 2012)* ("for purposes of state law indirect purchaser claims, plaintiffs are deemed to be injured in the states where they agreed to pay inflated prices for products."). The Proposed Complaint alleges that the Defendants each maintain a significant corporate presence in each of the states. Accordingly, application of the laws of each Plaintiff's home state to that Plaintiff's claims comports with due process. *See, e.g., Falise v. Am. Tobacco Co., 94 F. Supp. 2d 316, 354 (E.D.N.Y. 2000)* (holding that application of New York law satisfied due process where plaintiffs suffered injury in New York). **[*23]**

Defendants argue that the Proposed Complaint does not satisfy the requirements of due process because Plaintiffs must plead facts to show that title passed in their home states. Defendants cite no authority for the proposition that,

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[5] *See also Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836, 841 (E.D.N.Y. 1971)* ("[A]n action alleging violations of the antitrust laws is a claim for injuries sustained, and therefore in the nature of a tort."); *accord* ***Daniel v. Am. Bd. of Emergency Med., 988 F. Supp. 127, 231-32 (W.D.N.Y. 1997)*** (analyzing antitrust actions for purposes of the New York long-arm statute); *Saratoga Harness Racing Inc. v. Veneglia, 897 F. Supp. 38, 44 n.8 (N.D.N.Y. 1995)* (same).

for the *Nextel* state interest analysis, the place of injury is where title passes. The two securities cases upon which Defendants rely have nothing to do with application of state law under the *Due Process Clause* and are inapposite.

E. State-Specific Arguments

Defendants raise arguments specific to the antitrust laws of six of the states. For the reasons below, leave to replead the Florida and Illinois claims is denied with respect to Bank of America, N.A., HSBC Bank USA, N.A. and JPMorgan Chase Bank, N.A. Leave to amend is otherwise granted.

1. Arizona

The Proposed Complaint asserts a claim under Arizona's Uniform State Antitrust Act (the "AUSAA"), *Ariz. Rev. Stat. Ann. § 44-1401, et seq.*, on behalf of an Arizona resident and an Arizona putative class. Defendants argue that the Proposed Complaint fails to state a claim under the AUSAA, because Plaintiffs did not serve Arizona's Attorney General with a copy of the CCAC contemporaneously with its filing, as required by the statute. *See Ariz. Rev. Stat. Ann. § 44-1415* ("A person filing a complaint, **[*24]** counterclaim or answer for any violation of the provisions of this article shall simultaneously with the filing of the pleading . . . in the federal court, serve a copy of the complaint, counterclaim or answer on the attorney general."). Plaintiffs argue that because the provision is procedural, not substantive, under *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)*, it is inapplicable in federal proceedings.

Deciding the *Shady Grove* issue, on which various district courts have split, is unnecessary. *Compare In re Asacol Antitrust Litig., No. 15 Civ. 12730, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at *15 (D. Mass. July 20, 2016)* (dismissing without prejudice claims under Arizona ***antitrust law*** for a failure to serve the Arizona Attorney General), *with In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 254 (D. Conn. 2015)* (declining to dismiss for failure to serve the state attorney general under an analogous Hawaii statute). Even those courts that have held that service requirements are substantive, and hence enforceable in federal court, have dismissed without prejudice to renewal after proper service. *See, e.g., Asacol, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333*; *In re Chocolate Confectionary Antitrust Litig., 749 F. Supp. 2d 224, 232 (M.D. Pa. 2010)*, *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1158 (N.D. Cal. 2009)* (same). Plaintiffs have already served the Arizona Attorney General the CCAC, which in any event was dismissed, and presumably they will timely serve the new complaint filed pursuant to this Opinion. No reason exists to deny leave to file an amended complaint that includes the AUSAA claim.

2. California

The **[*25]** Proposed Complaint asserts two claims for violation of the Cartwright Act and California's Unfair Competition Law (the "UCL"), respectively, on behalf of the California Plaintiffs and a California putative class. *California Business and Professions Code § 16720, et seq.*; *1720, et seq.* Defendants argue that the Proposed Complaint is deficient as to these claims because it "pleads no specific intrastate conduct within California."

This argument fails because it misstates the law. To state a valid Cartwright Act or UCL claim, a plaintiff must allege either (1) that the antitrust misconduct occurred within California *or* (2) that the plaintiff suffered antitrust injury in California. *See RLH Indus., Inc. v. SBC Communications, Inc., 133 Cal. App. 4th 1277, 1281-82, 35 Cal. Rptr. 3d 469 (2005)* (recognizing that the Cartwright Act is meant to protect against "anticompetitive conduct that causes injury in California"); *Norwest Mortg., Inc. v. Superior Court, 72 Cal. App. 4th 214, 226, 85 Cal. Rptr. 2d 18 (1st Div. 1999)* (holding that the UCL applies where anticompetitive conduct occurred in California or when the plaintiff was injured there); *see also McKinnon v. Dollar Thrifty Auto. Grp., Inc., No. 12 Civ. 4457, 2013 U.S. Dist. LEXIS 29095, 2013 WL 791457, at *4 (N.D. Cal. Mar. 4, 2013)* (stating that UCL claims are inadequate "where none of the alleged misconduct or injuries occurred in California"). Even the case cited by Defendants illustrates the point; *Meridian Project Sys. v. Hardin Constr. Co., 404 F. Supp. 2d 1214, 1225 (E.D. Cal. 2005)*, states, "California's UCL does not support claims by non-California residents where none of the alleged misconduct *or injuries* occurred **[*26]** in California." *404 F. Supp. 2d at 1225* (emphasis added).

Here, the Proposed Complaint alleges that the California Plaintiffs were injured in California when they purchased overpriced FX instruments while in California. Accordingly, the Proposed Complaint's California claims are adequately pleaded.[6]

3. Florida

The Proposed Complaint pleads a cause of action under the Florida Deceptive and Unfair Trade Practices Act (the "FDUTPA"), *Fl. Stat. § 501.201, et seq.*, on behalf of the Florida residents in the purported class. Defendants argue that the Proposed Complaint fails to state a claim under the FDUTPA because (1) Plaintiffs are not "consumers" within the meaning of the statute and (2) the FDUTPA does not apply to federally regulated banks. Neither argument merits denial of leave to amend.

a. "Consumers"

Defendants argue that, for purposes of FDUTPA, "[c]onsumers are those who purchased goods and services for personal, family or household use . . . ." This argument misstates the law. In 2003, the FDUTPA was amended to apply to a broader category than just consumers. *See* *Fla. Stat. Ann. § 501.202* ("The provisions of this part shall be construed liberally . . . . To protect the consuming public *and legitimate enterprises* from those who engage in unfair methods **[*27]** of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." (emphasis added)). Furthermore, the FDUTPA defines the terms "consumer" and "trade or commerce" as:

> "Consumer" means an individual; child, by and through its parent or legal guardian; business; firm; association; joint venture; partnership; estate; trust; business trust; syndicate; fiduciary; corporation; any commercial entity, however denominated; or any other group or combination.
> "Trade or commerce" means the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. "Trade or commerce" shall include the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity.

Fla. Stat. Ann. § 501.203(7-8). Given these broad definitions, Florida courts have clarified that the FDUTPA "is not limited to contracts for 'personal, family or household purposes' as defined in the Uniform Commercial Code." *State v. Commerce Commercial Leasing, LLC, 946 So. 2d 1253, 1258 (Fla. Dist. Ct. App. 2007)*. Plaintiffs' purchase of FX instruments falls within these definitions because **[*28]** Plaintiffs are individuals, businesses or associations; and Plaintiffs purchased FX instruments, which are, at minimum, a "thing of value." *Fla. Stat. Ann. § 501.203(8)*.

In arguing to the contrary, Defendants cite two types of cases, neither of which is persuasive. First, Defendants cite cases involving claims brought by sellers -- rather than the buyers -- of goods and services, who do not qualify as "consumers" because they have not purchased anything. *See* *Burger King Corp. v. Ashland Equities, Inc., 161 F.Supp.2d 1331, 1338 (S.D. Fla. 2001)* (holding that plaintiffs, who owned Burger King franchises and claimed that Burger King interfered with their attempt to sell those franchises, were not "consumers" under FDUTPA); *N.G.L. Travel Assocs. v. Celebrity Cruises Inc., 764 So. 2d 672, 674 (Fla. 3d DCA 2000)* (holding that travel agencies that sold services to cruise lines, rather than purchasing services from them, were not "consumers" entitled to protection

[6] In this regard, Plaintiffs should limit the definition of the California Class to those who purchased an FX Instrument in California, and not include those who were merely domiciled there. *See* *In re TFT-LCD, 2012 U.S. Dist. LEXIS 121756, 2012 WL 3727221, at *3* ("for purposes of state law indirect purchaser claims, plaintiffs are deemed to be injured in the states where they agreed to pay inflated prices for products.").

under FDUTPA). These cases are inapplicable because Plaintiffs are the buyers, rather than the sellers, of FX instruments.[7]

Second, Defendants cite cases that have defined the term "unfair trade practices" and held that "deceptive conduct" relating to securities is not covered by the FDUTPA, because (1) federal securities "laws provide plaintiffs with an appropriate civil remedy" and (2) the FDUTPA is modeled after the **[*29]** Federal Trade Commission Act, which does not apply to securities transactions. *Rogers v. Cisco Sys., Inc., 268 F. Supp. 2d 1305, 1315-16 (N.D. Fla. 2003)*; *see also* *Minshall v. TD Evergreen, No. 05 Civ. 1232, 2005 U.S. Dist. LEXIS 50237, 2005 WL 8145046, at *1 (M.D. Fla. Aug. 4, 2005)*. These cases are inapplicable, first, because they do not shed light on the definition of "consumer." Also, although FX instruments are analogous to securities in some respects, Plaintiffs do not have recourse under federal securities or antitrust laws. Defendants cite nothing to suggest that the Florida legislature meant to exempt the conduct in question from FDUTPA.

b. Banking Exception

Leave to amend is denied with respect to three of the Defendants. The FDUTPA explicitly "does not apply to . . . . Banks, credit unions, and savings and loan associations regulated by federal agencies." *Fla. Stat. Ann. § 501.212(4)(c)*; *see also* *Bankers Tr. Co. v. Basciano, 960 So. 2d 773, 778 (Fla. 5th DCA 2007)* ("FDUTPA does not apply to banks and savings and loan associations regulated by the state or the federal government."). Plaintiffs argue that this statutory exception to FDUTPA "only applies where the specific activities at issue were subject to federal banking laws." "A review of the governing case law reveals some ambiguity as to whether being regulated by a federal agency is sufficient in and of itself to exempt an entity under *Fla. Stat. § 501.212(4)(c)* or if, in addition to being federally regulated, the activity at issue **[*30]** must be subject to the federal regulatory authority." *Regions Bank v. Legal Outsource PA, No. 214 Civ. 476, 2015 U.S. Dist. LEXIS 162248, 2015 WL 7777516, at *5 (M.D. Fla. Dec. 3, 2015)* (collecting cases that reached conflicting conclusions regarding whether the FDUTPA can ever apply to banks).

"The majority of Florida courts" have held that a federally regulated bank cannot be held liable under the FDUTPA, regardless of whether the anticompetitive activity at issue is itself federally regulated. *Id. See, e.g.,* *Bankers Tr., 960 So. 2d at 779* ("the statute unambiguously excludes banks."); *see also* *Wing Kei Ho v. Bank of Am., N.A., No. 16 Civ. 80538, 2016 U.S. Dist. LEXIS 195248, 2016 WL 8679174, at *4 (S.D. Fla. Sept. 19, 2016)*; *Wilson v. EverBank, N.A., 77 F. Supp. 3d 1202, 1221 (S.D. Fla. 2015)*; *Sovereign Bonds Exch. LLC v. Fed. Republic of Germany, 899 F. Supp. 2d 1304, 1315 (S.D. Fla. 2010)*.

This majority position is most likely to be found correct if considered by the Supreme Court of Florida. "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Bank of New York Mellon v. Glenville, __ So.3d __, 2018 Fla. LEXIS 1580, 2018 WL 4327881, at *5 (Fla. Sept. 6, 2018)*. Here, the FDUTPA exception is explicit; the FDUTPA cannot be applied to a "bank" "regulated by federal agencies" -- regardless of what activities are regulated. *Fla. Stat. Ann. § 501.212(4)(c)*. Plaintiffs' additional argument that Defendant's FX activities are not "federally regulated" is unpersuasive in light of the Proposed Complaint's protracted discussion of the various federal entities that levied civil and criminal **[*31]** penalties against Defendants for the precise FX benchmark rigging at issue here, including, for example, the Commodity Futures Trading Commission and Federal Reserve.

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[7] Defendants cite other cases in which the plaintiff also had not purchased anything, but that are less applicable to the facts at hand. *See, e.g.,* *Kertesz v. Net Transactions, Ltd., 635 F. Supp. 2d 1339, 1350 (S.D. Fla. 2009)* (holding that a college student, whose photograph appeared in advertising on a pornographic website, was not a "consumer" who can sue under FDUTPA); *Cannova v. Breckenridge Pharm., Inc., No. 08 Civ. 81145, 2009 U.S. Dist. LEXIS 1168, 2009 WL 64337, at *3 (S.D. Fla. Jan. 9, 2009)* (dismissing an FDUTPA claim premised on wrongful termination of employment).

The Parties dispute which Defendants are "banks" within the meaning of the exemption. Defendants fall into three categories: (1) three Defendants are federally chartered national associations (the "NAs"); (2) twenty-four Defendants are bank holding companies (the "BHCs") or their subsidiaries and (3) twenty-four Defendants are foreign banks, foreign banking organizations or subsidiaries thereof (the "Foreign Defendants").

All of the NAs are "banks" within the meaning of the FDUTPA, and Plaintiffs concede as much.[8] *See George v. Wells Fargo Bank, N.A., No. 13 Civ. 80776, 2014 U.S. Dist. LEXIS 2000, 2014 WL 61487, at *5 (S.D. Fla. Jan. 8, 2014)* ("There can be no dispute that 'N.A.' stands for 'National Bank.' As a National Bank, Defendant is exempt from FDUTPA."). But ambiguity exists with respect to what non-NA entities constitute "banks" for the purposes of the FDUTPA exemption. *See Brown v. Capital One Bank (USA), N.A., No. 15 Civ. 60590, 2015 U.S. Dist. LEXIS 193887, 2015 WL 12712062, at *2 (S.D. Fla. June 19, 2015)* (stating that "there is no express definition of 'bank' or 'federal agency' within the meaning of [FDUTPA]").[9]

In the absence of guidance from the Florida courts, *see Casey v. Merck & Co., 653 F.3d 95, 100 (2d Cir. 2011)* ("To determine questions of state law, we look principally to the opinions of **[*32]** that state's courts."), this Opinion refers to the definition of "bank" from the "Taxation and Finance" portion of the Florida Annotated Statutes:

> The term "bank" means a bank holding company registered under the Bank Holding Company Act of 1956 of the United States, 12 U.S.C. ss. 1841-1849, as amended, or a bank or trust company incorporated and doing business under the laws of the United States (including laws relating to the District of Columbia), of any state, or of any territory, a substantial part of the business of which consists of receiving deposits and making loans and discounts or of exercising fiduciary powers similar to those permitted to national banks under authority of the Comptroller of the Currency and which is subject by law to supervision and examination by state, territorial, or federal authority having supervision over banking institutions. The term "bank" also includes any banking association, corporation, or other similar organization organized and operated under the laws of any foreign country, which banking association, corporation, or other organization is also operating in this state pursuant to chapter 663.

Fla. Stat. Ann. § 220.62.

In light of this definition, and lacking any other, **[*33]** leave to amend is granted with respect to both the BHCs and the Foreign Defendants. Accepting the facts pleaded in the Proposed Complaint, and drawing all inferences in Plaintiffs' favor, it is plausible that the BHCs do not qualify as banks under this definition because a "a substantial part of the[ir] business" does not consist of "receiving deposits and making loans and discounts or of exercising fiduciary powers similar to those permitted to national banks." *Id.* Likewise, it is plausible to infer that some of the Foreign Defendants will not qualify as banks because they do not operate in Florida "pursuant to chapter 663." *Id.* Determining which, if any, of the BHCs and Foreign Defendants qualify as banks will require discovery and need to be resolved at a later stage. *See Christie v. Bank of Am., N.A., No. 13 Civ. 1371, 2014 U.S. Dist. LEXIS 147022, 2014 WL 5285987, at *4 (M.D. Fla. Oct. 15, 2014)* (denying a motion to dismiss a FDUTPA claim because the issue of whether the defendant qualified as a "bank" was "better addressed on a more fully developed record"); *Renfrow v. First Mortg. Am., Inc., No. 08 Civ. 80233, 2011 U.S. Dist. LEXIS 63392, 2011 WL 2416247, at *3 (S.D. Fla. June*

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8 Only three NAs are left from the original four because Citibank, N.A., is no longer a party to the action.

9 The BHCs and Foreign Defendants are not necessarily "banks." *See Bankers Tr. Co. v. Basciano, 960 So. 2d 773, 779 (Fla. Dist. Ct. App. 2007)* ("Nothing in FDUTPA suggests that bank subsidiaries, affiliates or agents are necessarily exempt from FDUTPA."); *see also State v. Commerce Commercial Leasing, LLC, 946 So. 2d 1253, 1258 (Fla. Dist. Ct. App. 2007)* ("It is quite a leap, however, to suggest that, just because an entity is a subsidiary of a bank, it is necessarily exempt from the Act."); *but see Sovereign Bonds Exch. LLC v. Fed. Republic of Germany, 899 F. Supp. 2d 1304, 1316 (S.D. Fla. 2010)* (holding that German Banks cannot be sued under the FDUTPA because they "are subject to federal regulation under the International Banking Act of 1978, the Foreign Bank Supervision Enhancement Act of 1991, and the Gramm-Leach-Bliley Act of 1999 . . . ."); *Caban v. J.P. Morgan Chase & Co., 606 F. Supp. 2d 1361, 1371 (S.D. Fla. 2009)* (dismissing FDUTPA claims against J.P. Morgan Chase & Co., a BHC "because the statute does not apply to federally regulated banks such as Chase.").

13, 2011) (same). Leave to amend is therefore granted in substantial part with respect to the FDUTPA claim, except that the Proposed Complaint shall not include the NAs as defendants in the Florida cause of action.

4. Illinois

The Proposed Complaint asserts **[*34]** violations of the Illinois Antitrust Act ("IAA"), *740 Ill. Comp. Stat. 10/1, et seq.*, on behalf of the Illinois Plaintiff and an Illinois putative class. Defendants argue that the Proposed Complaint fails to state a claim under the IAA because (1) the IAA does not allow for class actions and (2) the IAA does not apply to banks. Neither argument merits denial of leave to amend.

a. Class Actions

The IAA states, "no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General, who may maintain an action parens patriae as provided in this subsection." *740 Ill. Comp. Stat. Ann. 10/7(2)*. If, as Defendants argue, this provision is "substantive" under the doctrine of *Shady Grove, 559 U.S. at 397-406*, then it must be applied in federal court. But if, as Plaintiffs argue, the provision is "procedural" under the doctrine of *Shady Grove, 559 U.S. at 397-406*, then only the dictates of *Rule 23* would apply. District courts have reached conflicting conclusions about whether indirect purchasers' class action claims raised under the IAA in federal court can proceed. *Compare In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712, 728 (S.D.N.Y. 2017)* (holding that the IAA provision is a "state procedural rule [that] does not control in federal court, where *Rule 23* sets the only relevant **[*35]** requirements to file a class action."), *with In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 416 (S.D.N.Y. 2011)* (concluding, by following the analysis outlined in Justice Stevens's *Shady Grove* concurrence, that "[b]ecause the indirect purchaser restrictions of the IAA are 'intertwined' with the underlying substantive right, application of *Rule 23* would 'abridge, enlarge or modify' Illinois' substantive rights, and therefore Illinois' restrictions on indirect purchaser actions must be applied in federal court.").

For two reasons, the IAA allows for class actions in federal court. First, it is unnecessary to reach the *Shady Grove* question, because the statute, by its terms, does not apply in federal court; the statute states, "no person shall be authorized to maintain a class action *in any court of this State* for indirect purchasers asserting claims under this Act." *740 Ill. Comp. Stat. Ann. 10/7(2)*. The proscription has no effect on indirect purchaser class claims brought outside of Illinois courts. *Id.; see also In re Aggrenox Antitrust Litig., No. 14 Md. 2516, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at *5 (D. Conn. Aug. 9, 2016)* (holding that an IAA class action could proceed in federal court).

Second, even if it is necessary to reach the *Shady Grove* analysis, the statute is procedural, not substantive, and does not apply in federal court. In *Shady Grove*, the New York statute, which the Supreme Court held **[*36]** to be procedural, stated that "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." *N.Y. C.P.L.R. 901; see Shady Grove, 559 U.S. at 397*. If that New York statute, which foreclosed a wide range of potential class actions, did not "abridge, enlarge or modify any substantive right," then the IAA, which applies exclusively to antitrust class actions, must also be procedural. In short, although some courts have reached a conflicting conclusion by following the reasoning of one justice's concurrence, the holding of *Shady Grove*, which was approved by five justices, is controlling.

b. Banking Exemption

Defendants next argue that they are exempt under the IAA's banking exemption, which states, "No provisions of this Act shall be construed to make illegal . . . . the activities of any state or national bank to the extent that such activities are regulated or supervised by officers of the state or federal government under the banking laws of this

State or the United States." *740 Ill. Comp. Stat. Ann. 10/5(11)*. It appears that no court has ever applied the IAA banking exemption as the parties have not cited any case, nor has the Court found one.

For purposes of interpreting the IAA's banking exemption, **[*37]** this Opinion uses the definition of "national bank" from the Illinois Banking Act ("IBA"), *205 Ill. Comp. Stat. Ann. 5/2*, which is specifically referenced in the IAA exemption -- i.e., "the banking laws of this State." *740 Ill. Comp. Stat. Ann. 10/5(11)*. Under the IBA, "'National bank' means . . . a national banking association without regard to its location." *205 Ill. Comp. Stat. Ann. 5/2*. "'State bank' means any banking corporation that has a banking charter issued by the [Banking] Commissioner [of Illinois] under this Act." *205 Ill. Comp. Stat. Ann. 5/2*.

This reading of the IAA comports with the Illinois Bar Committee's 1967 comments to the IAA exemptions, which state, "It is assumed that all of the provisions of *Section 5* will be strictly construed and narrowly applied." *740 Ill. Comp. Stat. Ann. 10/5*. Furthermore, unlike the FDUTPA, which exempts "banks," the IAA exempts "any state or national bank." The modifiers "state or national" are presumed to carry significance and limit the definition of "bank." *See, e.g., Maimonides Med. Ctr. v. United States, 809 F.3d 85, 89 (2d Cir. 2015)* ("we must give effect to every word of a statute wherever possible.") (quotation marks omitted). Leave to amend is denied with respect to the NAs, which clearly are within the definition of "national bank," but granted with respect to the BHCs and the Foreign Defendants.

5. Massachusetts

Plaintiffs assert a claim under Chapter **[*38]** 9 of the Massachusetts Consumer Protection Act (the "MCPA"), *Mass. Gen. Laws ch. 93A, §1 et seq.*, on behalf of the Massachusetts Plaintiff and a putative Massachusetts class. Defendants argue that Plaintiffs are not "consumers" entitled to bring a claim under Chapter 9 of the MCPA, because "trading in foreign currency instruments is not a consumer-oriented activity." In support of this argument, Defendants rely principally on *Axiom Inv. Advisors, LLC by & through Gildor Mgmt., LLC v. Deutsche Bank AG, 234 F. Supp. 3d 526, 537 (S.D.N.Y. 2017)*, which held that trading on the FX spot market between Deutsche Bank and a large hedge fund was not "consumer oriented" for purposes of the New York's Consumer Protection Act, *N.Y. Gen. Bus. Law §§ 349*, *350*. This argument fails for two reasons.

First, *Axiom*'s analysis under New York law does not shed light on the MCPA, which expressly contemplates that the purchase of investment instruments can be a consumer activity. In 1988, the Massachusetts legislature passed "An Act Providing Increased Protection for Consumers in Securities and Commodities Transactions," which amended the definition of "trade" and "commerce" in the MCPA to include the term "any security." *See Barron v. Fid. Magellan Fund, 57 Mass. App. Ct. 507, 513, 784 N.E.2d 634 (2003)* (describing the evolution of consumer securities actions under the MCPA). As a result of that amendment, the "definitions" **[*39]** chapter of MCPA states in broad terms:

> "Trade" and "commerce" shall include the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and *any property*, tangible or *intangible*, real, personal or mixed, *any security* . . . and any contract of sale of a *commodity for future delivery*, and any other article, commodity, *or thing of value wherever situate*, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

Mass. Gen. Laws Ann. ch. 93A, § 1(b) (emphasis added). Beyond merely incorporating the MCPA's general definitions of "trade" and "commerce," *Section 9* expressly contemplates that individual consumers can bring claims for anticompetitive conduct that negatively affects their investments. *See Mass. Gen. Laws Ann. ch. 93A, § 9(3)* ("if the court finds any method, act or practice unlawful with regard to any security or any contract of sale of a commodity for future delivery as defined in section two, and if the court finds for the petitioner, recovery shall be in the amount of actual damages.").

Accordingly, the purchase of FX instruments is not automatically outside of Chapter 9 of the MCPA simply because it is an investment. *See Barron v. Fid. Magellan Fund, 57 Mass. App. Ct. 507, 784 N.E.2d 634 (2003)* (holding that anticompetitive conduct affecting **[*40]** plaintiff's shares in a mutual fund fell within Chapter 9); *Bergeron v. Ridgewood Sec. Corp., 610 F. Supp. 2d 113, 147 (D. Mass. 2009)* ("It is beyond question that chapter 93A applies to the sale of securities."). If Plaintiffs purchased investment instruments for their personal portfolios, then FX instruments are, at minimum, "a thing of value" within the ambit of Chapter 9.

Second, Defendants' reliance on *Axiom, 234 F. Supp. 3d at 537*, is misplaced, because the factual circumstances of that case are distinguishable from this case. *Axiom* held that FX trading in the spot market between Deutsche Bank and Axiom, a large hedge fund, was not "consumer oriented" within the meaning of New York's Consumer Protection Act, *N.Y. Gen. Bus. Law §§ 349*, *350*, because it did not have "a broader impact on consumers at large." *Id.* (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 647 N.E.2d 741, 623 N.Y.S.2d 529, (1995))*. *Axiom* noted that "[t]ransactions between businesses or sophisticated parties that do not affect average consumers do not constitute consumer-oriented conduct." *Id.* (citations omitted). In contrast to *Axiom*, Plaintiffs here are not billion dollar hedge funds that trade directly with liquidity providers on the FX spot market. They are individuals who purchased FX instruments from a Retail Dealer. Plaintiffs use FX instruments "for a variety of purposes, including long and short-term investing, **[*41]** portfolio diversification, and to hedge their foreign investments against risks of foreign currency fluctuations." This small-scale purchasing of FX instruments in the retail market qualifies as a consumer activity.[10]

6. North Carolina

The Proposed Complaint asserts a claim under the North Carolina Unfair Trade Practice Act (the "NCUTPA"), *N.C. Gen. Stat. § 75-1, et seq.*, on behalf of the North Carolina Plaintiff and a putative North Carolina Class. Defendants seek dismissal of the NCUTPA claim on the grounds that (1) application of the NCUTPA is precluded by the statute's regulatory scheme exception and (2) the Proposed Complaint does not plead a sufficient effect on North Carolina in state business. Both arguments fail.

a. Regulatory Scheme Exception

Defendants invoke the NCUTPA's regulatory scheme exception, which they assert "bars such claims when application of the statute would create unnecessary and overlapping supervision, enforcement, and liability in the face of existing state or federal laws and regulatory schemes. A concurrent state regulatory scheme is not required, an overlapping federal scheme is sufficient . . . ." This argument mischaracterizes the law.

An overlapping state or federal regulatory **[*42]** regime is not alone sufficient to preclude application of the NCUTPA. *See* *Walker v. Fleetwood Homes of N. Carolina, Inc., 362 N.C. 63, 70, 653 S.E.2d 393 (2007)* ("[A] violation of a regulatory statute which governs business activities 'may also be a violation of *N.C. Gen. Stat. § 75-1.1*.'"). Absent a showing that the overlapping regulatory regime provides plaintiffs an adequate remedy, courts have held NCUTPA to apply. *See* *Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 182, 268 S.E.2d 271 (1980)* (holding that NCUTPA provides a cause of action to plaintiff suing an insurance company where state statutes regulating insurance companies did not provide for civil damage actions); *see also* *Ray v. United Family Life Ins. Co., 430 F. Supp. 1353, 1356 (W.D.N.C. 1977)* (same). The cases cited by Defendants are distinguishable because, in each of them, the plaintiff could bring a cause of action and seek relief under a different statute. *See, e.g.,* *Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162, 167 (4th Cir. 1985)* (holding that NCUTPA did not apply

[10] Because the Proposed Complaint asserts a consumer claim under Chapter 9 of the MCPA, it is unnecessary to address whether the alleged misconduct occurred "primarily and substantially" in Massachusetts, as that test applies only to business claims under Chapter 11 of the MCPA. *See* *Mass. Gen. Laws Ann. ch. 93A, § 11* ("No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth."); *see also* *Pare v. Northborough Capital Partners, LLC, 89 F. Supp. 3d 192, 193 (D. Mass. 2015)* ("Unlike actions under *§ 9*, an action brought under *§ 11* must allege unfair practices that occur primarily and substantially within the Commonwealth.").

where the plaintiff could recover under North Carolina Securities Act, as well as the Securities Act of 1933 and the Securities Exchange Act of 1934); *Hagy v. Advance Auto Parts, Inc., No. 15 Civ. 509, 2016 U.S. Dist. LEXIS 133499, 2016 WL 5661530, at *2 (W.D.N.C. Sept. 28, 2016)* (holding that NCUTPA did not apply where there was a private cause of action available under the Medicare Secondary Payer Act, *42 U.S.C.A. § 1395y(b)*); *Skinner v. E.F. Hutton & Co., 314 N.C. 267, 275, 333 S.E.2d 236 (1985)* (confirming *Linder*'s holding that the NCUTPA does not apply to securities claims).[11]

b. In State Effects

Defendants also argue that the proposed NCUTPA claim does not plead an adequate effect **[*43]** on in state business. This argument fails because the Proposed Complaint alleges that the Plaintiffs, who are North Carolina residents, were injured in North Carolina when they purchased FX instruments at inflated prices while located in North Carolina.[12] This in state injury is sufficient to state a claim under the NCUTPA. *Compare* *In re Lidoderm Antitrust Litig., 103 F. Supp. 3d 1155, 1174 n. 16 (N.D. Cal. 2015)* ("Here, GEHA has alleged in-state injury and that defendants' products were being sold in North Carolina. That is sufficient at this juncture to state a claim under the NCUDTPA.") (internal citations omitted), *with* *Duke Energy Int'l, L.L.C. v. Napoli, 748 F.Supp.2d 656, 677 (S.D. Tex. 2010)* (dismissing NCUTPA where plaintiff failed to explain how it "experienced harm in North Carolina as a the result of the alleged wrongful conduct"); *In re Parmalat, 383 F. Supp. 2d 587, 603 (S.D.N.Y.2005)* (dismissing NCUTPA claim where plaintiff failed to allege any in state injury).

Both of the cases cited by Defendants illustrate that an injury that occurs in North Carolina is sufficient to sustain a NCUTPA claim. *See* *Dixie Yarns, Inc. v. Plantation Knits, Inc., No. 93 Civ. 301, 1994 U.S. Dist. LEXIS 21725, 1994 WL 910955, at *2 (W.D.N.C. July 12, 1994)* (dismissing an NCUTPA claim where "[i]t is not at all clear that Defendants injury occurred when it received the goods free on board in North Carolina."); *The 'In' Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 501 (M.D.N.C. 1987)* (holding that NCUTPA claims are not available "to a foreign plaintiff suing a resident defendant over alleged foreign injuries **[*44]** having a negligible effect, if any, on North Carolina trade or commerce."). Leave to amend the NCUTPA claim is granted.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to amend is DENIED with respect to the Sherman Act claim. Plaintiffs' motion for leave to amend is GRANTED with respect to all state law claims, except to the extent that the Proposed Complaint raises claims against the NAs under Florida and Illinois law.

The Clerk of Court is respectfully directed to close the motion at Docket Nos. 103, 105 and 120.

Dated: October 25, 2018

New York, New York

/s/ Lorna G. Schofield

LORNA G. SCHOFIELD

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[11] Defendants also cite *Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 420, 248 S.E.2d 567 (1978)*, which held that the NCUTPA could not be applied to claims for misconduct relating to futures contracts because any state regulation of commodities brokers was pre-empted by the Commodity Futures Trading Act. That case is inapplicable here, because the Sherman Act does not preempt NCUTPA. *See* *California v. ARC Am. Corp., 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86(1989)* ("the Court of Appeals erred in holding that the state indirect purchaser statutes are pre-empted").

[12] Plaintiffs should consider whether the definition of the North Carolina putative class should be revised.

UNITED STATES DISTRICT JUDGE

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Ellison v. Am. Bd. of Orthopaedic Surgery, Inc.

United States District Court for the District of New Jersey

October 29, 2018, Decided; October 30, 2018, Filed

Civ. No. 16-8441 (KM) (JBC)

Reporter
2018 U.S. Dist. LEXIS 186459 *; 2018-2 Trade Cas. (CCH) P80,569

BRUCE E. ELLISON, M.D., Plaintiff, v. AMERICAN BOARD OF ORTHOPAEDIC SURGERY, INC., Defendant.

Prior History: *Ellison v. Am. Bd. of Orthopaedic Surgery, Inc., 2017 U.S. Dist. LEXIS 113463 (D.N.J., July 10, 2017)*

Core Terms

amended complaint, privileges, board certification, medical staff, allegations, conspiracy, exam, antitrust, concerted, northern, Surgery, orthopedic surgeon, motion to dismiss, take part, certification, conspired, grounds, reside

Counsel: **[*1]** For BRUCE E ELLISON, Plaintiff: ANDREW LAYTON SCHLAFLY, LEAD ATTORNEY, FAR HILLS, NJ.

For AMERICAN BOARD OF ORTHOPAEDIC SURGERY, INC., Defendant: DANIEL C. GREEN, VEDDER PRICE, P.C., NEW YORK, NY.

Judges: HON. KEVIN MCNULTY, United States District Judge.

Opinion by: KEVIN MCNULTY

Opinion

MEMORANDUM OPINION

KEVIN MCNULTY, U.S.D.J.:

Plaintiff Bruce E. Ellison, M.D., ("Dr. Ellison") brought this action against Defendant American Board of Orthopaedic Surgery, Inc., ("ABOS") based on alleged violations of federal ***antitrust law*** in relation to the certifications ABOS provides to certain qualifying physicians ("Board Certification"). Dr. Ellison asserts that ABOS improperly restrains trade by colluding with hospitals in requiring orthopedic surgeons to obtain Board Certification as a condition of practicing at those hospitals. According to the Amended Complaint,[1] ABOS prevents Dr. Ellison from obtaining

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[1] For ease of reference, certain items from the record will be abbreviated as follows:

"DE __" = Docket Entry in this case

"AC" = Amended Complaint (DE 28)

"Def. Mot." = Defendant's Memo of Law in Support of its Motion to Dismiss the Amended Complaint (DE 29-1)

Board Certification unless he first has hospital medical staff privileges, thereby reducing competition at hospitals by excluding surgeons who, like Dr. Ellison, practice exclusively at ambulatory surgery centers or other places that do not offer those medical staff privileges. (AC ¶ 3) Dr. Ellison seeks declaratory and injunctive **[*2]** relief, as well as damages. ABOS has moved to dismiss the Amended Complaint on a variety of grounds. For the reasons explained in this opinion, I will dismiss the Amended Complaint pursuant to *Rule 12(b)(6)* for failure to meet the minimal pleading standards of *Rule 8*.

I. Summary

a. Factual background

Dr. Ellison holds a medical license in California, where he currently treats patients as an orthopedic surgeon. (AC ¶¶ 6, 22) For "personal and professional reasons, Dr. Ellison would like to obtain medical staff privileges" at a hospital in northern New Jersey. (*Id.* ¶ 40) The hospitals in which he seeks to apply require that he have Board Certification provided by ABOS. (*Id.* ¶ 41)

ABOS is a nonprofit organization incorporated in Delaware that conducts Board Certification programs for orthopedic surgeons. (*Id.* ¶ 7) It **[*3]** has twelve active directors and officers who reside in nine different states, none of which are located in New Jersey. (*Id.* ¶ 8; DE 29-2 ¶ 4) It also has two "Directors-Elect" who reside in Tennessee and Pennsylvania, as well as one public member who resides in Iowa. (AC ¶ 8) ABOS arranges for the administration of the written portion of its Board Certification exam through a third-party subcontractor at testing locations throughout the United States, including in New Jersey, collects "up to a million dollars or more annually" from physicians located in New Jersey, and communicates with hospitals and patients in New Jersey about which physicians hold Board Certifications. (*Id.* ¶¶ 27-29; DE 29-2 ¶ 5) ABOS does not maintain any offices, records, property, or staff in New Jersey. (DE 29-2 ¶ 4)

According to the Amended Complaint, the largest hospital system in New Jersey, RWJBarnabas Health, requires the hospitals under its purview to provide medical staff privileges only to doctors who have obtained Board Certification. (*Id.* ¶¶ 11-12) St. Peter's University Hospital, located in New Brunswick, New Jersey, also requires Board Certification as a condition of obtaining medical staff privileges. **[*4]** (*Id.* ¶ 15) Similarly, Rutgers University Hospital requires Board Certification in order to obtain medical staff privileges and will not process the applications for employment of prospective doctors unless the applicant has acquired Board Certification within seven years of completing residency training. (*Id.* ¶¶ 13-14)

Dr. Ellison alleges that the requirement for Board Certification precludes him from obtaining medical staff privileges "at the major hospitals in the regions of northern New Jersey." (*Id.* ¶ 16) Dr. Ellison successfully passed the written portion of ABOS's exam ("Part I") in Chicago, Illinois. (AC ¶¶ 42-44; DE 29-2 ¶ 6) This qualified him to take the oral portion of the exam ("Part II"), which is only administered in Chicago. (AC ¶¶ 42-44; DE 29-2 ¶ 7) However, ABOS subsequently refused to allow him to take Part II of the exam because he did not have medical staff privileges, a newly imposed prerequisite. (*Id.* ¶¶ 3, 30, 45)

This, says Dr. Ellison, confronted him with the proverbial catch-22: without medical staff privileges he cannot take Part II of the certification exam, but without certification he cannot acquire medical staff privileges. This practice, Dr. Ellison alleges, **[*5]** reduces competition to hospitals by shutting out surgeons, like himself, who practice exclusively at ambulatory surgery centers (which do not provide medical staff privileges), thereby preventing the attainment of Board Certification and reducing the supply of orthopedic surgeons available to patients. (*Id.* ¶¶ 3, 30, 33, 45) There is an exception to the staff-privileges prerequisite for physicians who have recently completed their residency, but that exception is unavailable to Dr. Ellison at this stage in his career. (*Id.* ¶ 5)

"Pl. Opp." = Plaintiff's Memo in Opposition to Defendant's Motion to Dismiss the Amended Complaint (DE 32)

"Def. Reply" = Defendant's Reply Memo of Law in Further Support of its Motion to Dismiss the Amended Complaint (DE 33)

Dr. Ellison has not applied for medical staff privileges at these New Jersey hospitals because, without board certification, rejection is likely, and a rejection of an application for medical staff privileges allegedly "results in an automatic adverse entry in the National Practitioner Data Bank, which severely damages the reputation of a physician." (*Id.* ¶ 19)

Dr. Ellison asserts that ABOS has acted in concert with hospitals to require Board Certification as a precondition for employment, thus interfering with the market of orthopedic surgery services provided at hospitals in northern New Jersey. (*Id.* ¶¶ 35, 37) He claims that this is an anticompetitive tying **[*6]** arrangement between ABOS and hospitals in violation of *Section 1 of the Sherman Act*. (*Id.* ¶ 49). In this respect, ABOS and the hospitals are allegedly acting in concert for ABOS's pecuniary benefit. (*Id.* ¶¶ 46-50) This, Dr. Ellison asserts, reduces "the availability of physicians in the relevant market, which reduces patient choice and increases health care costs." (*Id.*) He seeks damages, a declaratory judgment that ABOS has violated the *Sherman Act*, injunctive relief allowing Dr. Ellison to take Part II of the exam, an order requiring ABOS to cease requiring surgical privileges as a precondition for taking Part II of the exam, attorneys fees, and costs. (*Id.* ¶¶ 56-61)

b. Procedural history

Dr. Ellison first brought suit against ABOS in the United States District Court for the Northern District of Illinois in December 2015 (the "Illinois Complaint") seeking the same relief he seeks in the present suit. *See Ellison v. American Board of Orthopaedic Surgery, Inc.*, No. 15-cv-11848, Docket Entry 1, Illinois Complaint ¶¶ 3, 28-32. However, Dr. Ellison voluntarily dismissed the Illinois Complaint in April 2016. *Id.*

That same month Dr. Ellison filed a factually similar complaint in the Superior Court **[*7]** of New Jersey, Law Division, Union County, alleging that ABOS violated the *New Jersey Consumer Fraud Act ("NJCFA"), N.J. Stat. Ann. § 56:8-1, et seq.*, and the *New Jersey Antitrust Act, N.J. Stat. Ann. § 56:9-1, et seq.* (*See* DE 1) Dr. Ellison sought treble damages, attorneys' fees, and declaratory and injunctive relief requiring ABOS to allow him to take the Part II exam.

In November 2016, ABOS removed the case to federal court ("Removed Complaint") on the basis of diversity of citizenship. *See 28 U.S.C. § 1332(a)*. The notice of removal states that Dr. Ellison is domiciled in California, and that ABOS is a Delaware corporation with its principal place of business in North Carolina. (DE 1 ¶¶ 11-15)[2]

In February 2017, ABOS moved to dismiss the Removed Complaint on a variety of grounds. (DE 4) I granted that motion and dismissed the Removed Complaint pursuant to *Rule 12(b)(6)* for failure to meet the minimal pleading standards of *Rule 8*. (DE 17) In that opinion I noted that "[t]he vagueness of the Complaint makes it difficult to discern what, if anything, connects Dr. Ellison, ABOS, and any wrongful acts to the State of New Jersey." (*Id.* at p. 5.) Additionally, without alleging a concrete injury in fact, I could not "accept that Dr. Ellison possesse[d] a cause of action in any jurisdiction where he theoretically **[*8]** could have sought, and been refused, admitting privileges." (*Id.*) Finding that Dr. Ellison had failed to state a claim, I did "not reach, or prejudge" the issues related to personal jurisdiction, venue, or standing raised by ABOS and entered the dismissal of the Removed Complaint without prejudice to the filing of a motion to amend. (*Id.*)

Dr. Ellison subsequently moved for leave to amend the complaint, which was granted, and filed an Amended Complaint. (DE nos. 21, 27, 28) *See Ellison v. Am. Bd. of Orthopaedic Surgery, Inc., No. 16-8441, 2018 U.S. Dist. LEXIS 68549, 2018 WL 1919953, at *1 (D.N.J. Apr. 24, 2018)*. The Amended Complaint drops the counts alleging violations of New Jersey state law and instead alleges a single count of restraint of trade in violation of *Section 1 of the Sherman Act, 15 U.S.C. § 1*. (*See* AC)

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[2] The Removed Complaint alleges, less specifically, that Dr. Ellison is located in California and that ABOS is headquartered in North Carolina. (DE no 1-1 ¶¶ 2, 3; DE 1-3, Civil Cover Sheet)

Now before the Court is ABOS's motion to dismiss the Amended Complaint for lack of personal jurisdiction, improper venue, lack of standing, and failure to state a claim, pursuant to *Fed. R. Civ. P. 12(b)(2)*, *(3)*, and *(6)*. (DE 29) For the reasons stated below, I will dismiss the Amended Complaint pursuant to *Rule 12(b)(6)* for failure to meet the minimal pleading standards of *Rule 8*.

II. ANALYSIS

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if it fails to state a claim upon which relief can be granted. The defendant, as the moving party, bears the burden of **[*9]** showing that no claim has been stated. *Animal Science Products, Inc. v. China Minmetals Corp., 654 F.3d 462, 469 n. 9 (3d Cir. 2011)*. For the purposes of a motion to dismiss, the facts alleged in the complaint are accepted as true and all reasonable inferences are drawn in favor of the plaintiff. *New Jersey Carpenters & the Trustees Thereof v. Tishman Const. Corp. of New Jersey, 760 F.3d 297, 302 (3d Cir. 2014)*.

Federal Rule of Civil Procedure 8(a) does not require that a complaint contain detailed factual allegations. Nevertheless, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Thus, the complaint's factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, so that a claim is "plausible on its face." *Id. at 570*; *see also* *West Run Student Housing Assocs., LLC v. Huntington Nat. Bank, 712 F.3d 165, 169 (3d Cir. 2013)*. That facial-plausibility standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). While "[t]he plausibility standard is not akin to a 'probability requirement' . . . it asks for more than a sheer possibility." *Iqbal, 556 U.S. at 678*.

A. Sherman Act claim

The *Sherman Anti-Trust Act* declares "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several **[*10]** States ... to be illegal." *15 U.S.C. § 1*. "Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition." *Animal Sci. Prod., Inc., 34 F. Supp. 3d at 480* (quoting *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4-5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*.

"In order to sustain a cause of action under *§ 1 of the Sherman Act*, the plaintiff must prove: (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy." *Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81-82 (3d Cir.1977)*. *Accord* *Howard Hess Dental Laboratories Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 253 (3d Cir.2010)* ("A plaintiff asserting a *Section 1* claim ... must allege four elements: '(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action.'") (citing *Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir.2005))*; *cf.* *Franco v. Connecticut Gen. Life Ins. Co., 818 F.Supp.2d 792, 829 (D.N.J.2011)* ("Pleading a colorable *Sherman Act section 1* claim requires a plaintiff to allege (1) an agreement (2) imposing an unreasonable restraint of trade within a relevant **[*11]** product market and (3) resulting in antitrust injury, that is 'injury of the type the antitrust laws were intended to prevent and ... that flows from that which make defendants' acts unlawful.'").

The essence of a *Section 1* claim is the existence of an unlawful agreement. *See* *Gordon, 423 F.3d at 207* ("Unilateral action simply does not support liability; there must be a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement.") (internal citations omitted). "Concerted action is established where two or more distinct entities have agreed to take action against the plaintiff.... Accordingly, it requires proof of a causal relationship between pressure from one conspirator and an anticompetitive decision of another conspirator." *Id.* (internal citations omitted).

"To allege such an agreement between two or more persons or entities, a plaintiff must allege facts plausibly suggesting 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *Howard Hess Dental Labs. Inc., 602 F.3d at 254* (quoting *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 755, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. With respect to the alleged conspiracy between ABOS and northern New Jersey hospitals, Dr. Ellison has failed to allege an agreement that plausibly suggests such an unlawful **[*12]** arrangement.

The Amended Complaint states only in a conclusory manner that northern New Jersey hospitals conspired and knew about the alleged plan to bolster ABOS's market position. The Amended Complaint alleges, for instance, that "Defendant ABOS has undertaken its actions with a common design and understanding with hospitals to exclude some competent orthopedic surgeons from the relevant market, including Dr. Ellison." (AC ¶ 51) This type of conclusory allegation is found throughout the Amended Complaint. (*E.g.*, AC ¶¶ 2, 10, 31, 34, 46, 47, 49, 52-54). "But to survive dismissal it does not suffice to simply say that the defendants had knowledge; there must be factual allegations to plausibly suggest as much." *Howard Hess Dental Labs. Inc., 602 F.3d at 255 (3d Cir. 2010)* (citing *Twombly, 550 U.S. at 564*).

There are no such allegations here. Without more, the mere fact that certain hospitals require Board Certification for admitting privileges combined with a bare assertion that hospitals conspired with ABOS is not a sufficient recitation of facts to allege an unlawful agreement. *See* *Twombly, 550 U.S. at 556-57* ("[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement **[*13]** at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a [*Sherman Act] § 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.").

ABOS points out that the hospitals' conduct in requiring Board Certification could very well be based on its own independent action: "hospitals may look to certification as a quality standard in granting privileges wholly apart from any ABOS purported influence." (Def. Mot. at 26) This explanation may indeed be a reasonable basis for the hospitals' independent action. More significantly, the Amended Complaint does not assert *any* plausible basis for a conspiracy between ABOS and the vast network of New Jersey hospitals, nor does the Amended Complaint include any plausible allegations that place the hospitals' conduct in a context that raises a suggestion of a preceding agreement. Dr. Ellison has not pled "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly, 550 U.S. at 556*.

Consequently, Dr. Ellison fails to sufficiently **[*14]** state a claim for an improper agreement under *Section 1 of the Sherman Act*. The Court need not opine on whether the other elements of a *Section 1 Sherman Act* violation are sufficiently pled because the failure to allege an unlawful agreement alone warrants dismissal for failure to state a claim. *See* *Howard Hess Dental Labs. Inc., 602 F.3d at 254* ("*Section 1* claims are limited to combinations, contracts, and conspiracies, and thus always require the existence of an agreement.").

The Court need not reach the other grounds for dismissal and dismisses the Amended Complaint solely on the basis that Dr. Ellison has not sufficiently alleged an unlawful agreement under *Section 1 of the Sherman Act*, without prejudging those other grounds.

B. Prejudice/Other Grounds

This opinion rests on the facial insufficiency of the claim and does not begin to reach such grounds for dismissal as, e.g., antitrust standing. Antitrust causes of action, however, are notoriously complex, and antitrust pleading notoriously difficult. Given, as I say, the difficulty of pleading such a claim, I will enter this dismissal without prejudice to the submission, within 30 days, of a second amended complaint that remedies the defects of the amended complaint.[3]

III. CONCLUSION

ABOS's motion to dismiss **[*15]** the Amended Complaint is granted on *Rule 12(b)(6)* grounds. This dismissal is without prejudice to the filing of a second amended complaint within 30 days.

An appropriate Order follows.

Dated: October 29, 2018

/s/ Kevin Mcnulty

HON. KEVIN MCNULTY, U.S.D.J.

ORDER

THIS MATTER having come before the Court on the motion of defendant American Board of Orthopaedic Surgery, Inc. ("ABOS"), to dismiss the Amended Complaint (DE 29); and the plaintiff, Bruce E. Ellison, M.D., having opposed the motion (DE 32); and the defendant ABOS having filed a reply (DE 33); and the Court having considered the papers before it without oral argument pursuant to *Fed. R. Civ. P. 78(b)*; for the reasons stated in the Opinion filed on this date, and for good cause shown:

IT IS this 29th day of October, 2018,

ORDERED that the motion (DE 29) of defendant ABOS to dismiss the Amended Complaint for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*, is **GRANTED** without prejudice to the filing of a properly supported motion to amend, pursuant to *Fed. R. Civ. P. 15*, attaching a proposed amended complaint, within 30 days.

/s/ Kevin Mcnulty

HON. KEVIN MCNULTY, U.S.D.J.

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[3] I note that the Amended Complaint adds an allegation of a New Jersey connection—*i.e.*, that Dr. Ellison, a California practitioner, seeks to apply for privileges at New Jersey hospitals for reasons of professional growth. (AC ¶ 17) He alleges that three major hospital systems in New Jersey require board certification, so that *if* he applied for admitting privileges, he would anticipate rejection, which would be a blot on his record. I do not now rule on whether mat bare statement of intent, with no corroborating facts, suffices to establish the necessary connection to New Jersey. I iterate ray earlier admonition, however, that if such an allegation clears the hurdle of a motion to dismiss but is not supported by any objective evidence, it may make sense to consider now whether "to file this lawsuit in a district where the defendant is incorporated and has its principal place of business, or in the alternative in a district where the acts complained of actually took place." (DE 17 at p.5) Such a course might avoid miring the lawsuit in non-merits discovery and litigation pertaining to jurisdiction, venue, and the like.

LegalForce RAPC Worldwide, P.C. v. Trademark Engine LLC

United States District Court for the Northern District of California

October 31, 2018, Decided; October 31, 2018, Filed

Case No. 17-cv-07303-MMC

Reporter

2018 U.S. Dist. LEXIS 186769 *; 2018 WL 5734621

LEGALFORCE RAPC WORLDWIDE P.C., Plaintiff, v. TRADEMARK ENGINE LLC, et al., Defendants.

Prior History: LegalForce RAPC Worldwide, P.C. v. Trademark Engine, LLC, 2018 U.S. Dist. LEXIS 100240 (N.D. Cal., June 14, 2018)

Core Terms

alleges, advertising, trademark, unauthorized practice of law, subject to dismissal, customers, unfair, leave to amend, practice of law, right to privacy, regulations, fraudulent, misleading, practitioner, specimens, privacy, website, phone number, privacy-related, non-lawyer, email, fails, Lanham Act, practices, quotation, pleaded, motion to dismiss, participated, competitor, injunction

Counsel: **[*1]** For LegalForce RAPC Worldwide P.C., LegalForce, Inc., Plaintiffs: Raj Vasant Abhyanker, LEAD ATTORNEY, Raj Abhyanker, PC, Mountain View, CA; Wensheng Ma, LegalForce RAPC Worldwide, P.C., Mountain View, CA.

For Trademark Engine LLC, Defendant: Daniel Patrick Kappes, Holland Knight LLP, San Francisco, CA; Dayna E Underhill, PRO HAC VICE, Holland and Knight LLP, Portland, OR; Jessica Marie Brown, Holland and Knight, Anchorage, AK; Nicholas Brian Melzer, Holland & Knight LLP, Los Angeles, CA.

For Travis Crabtree, Defendant: Allison D. Martin Rhodes, LEAD ATTORNEY, Holland & Knight LLP, Portland, OR; Daniel Patrick Kappes, Holland Knight LLP, San Francisco, CA; Dayna E Underhill, PRO HAC VICE, Holland and Knight LLP, Portland, OR; Jessica Marie Brown, Holland and Knight, Anchorage, AK; Nicholas Brian Melzer, Holland & Knight LLP, Los Angeles, CA.

Judges: MAXINE M. CHESNEY, United States District Judge.

Opinion by: MAXINE M. CHESNEY

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT; AFFORDING PLAINTIFF LIMITED LEAVE TO AMEND

Re: Dkt. No. 108

Before the Court is defendants Trademark Engine, LLC ("TME") and Travis Crabtree's ("Crabtree") Motion, filed August 24, 2018, "to **[*2]** Dismiss Plaintiffs' Second Amended Complaint." Plaintiff LegalForce RAPC Worldwide, P.C. ("RAPC") has filed opposition, to which defendants have replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.[1]

BACKGROUND

In the operative complaint, the Second Amended Complaint ("SAC"), RAPC, a law firm, alleges it "practices patent and trademark law before the USPTO [United States Patent and Trademark Office]." (See SAC ¶ 5). RAPC alleges that TME, one of RAPC's competitors, "operates website TrademarkEngine.com to advertise, promote and provide trademark related services" (see SAC ¶¶ 3, 6), and that Crabtree, "a licensed Texas attorney," is "a managing member" of TME (see SAC ¶ 7).

According to RAPC, TME has made "false and/or misleading statements" in "Google" advertisements and on its "website" (see SAC ¶¶ 13-15), has deprived its customers of "privacy" (see SAC ¶ 48), has submitted "fraudulent specimens" to the USPTO (see SAC ¶ 52),[2] and has engaged in the "unauthorized practice of law" (see SAC ¶ 39). Further, according to RAPC, Crabtree "authorized, directed or participated in" the making of TME's alleged false statements **[*3]** (see SAC ¶ 36), "directed[,] submitted or aided and abetted [TME] to submit fake and fraudulent specimens to the USPTO (see SAC ¶ 55), "aid[ed] and abett[ed] [TME] to practice law" (see SAC ¶ 53), and "violated" USPTO "regulations" (see SAC ¶ 56).

Based on the above allegations, RAPC asserts in the SAC three Claims for Relief: (1) "Declaratory Judgment"; (2) "False or Misleading Advertising [under] the *Lanham Act*, *15 U.S.C. § 1125(a)*"; and (3) "California Unfair Competition [under] *Cal. Bus. & Prof. Code § 17200 et seq.*"

LEGAL STANDARD

Dismissal under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." See *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. *Rule 8(a)(2)*, however, "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" See *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Fed. R. Civ. P. 8(a)(2)*). Consequently, "a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." See id. (internal quotation, citation, and alteration omitted).

In analyzing a motion to dismiss, a district **[*4]** court must accept as true all material allegations in the complaint, and construe them in the light most favorable to the nonmoving party. See *NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)*. "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly, 550 U.S. at 555*. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." See *Iqbal, 556 U.S. at 678* (internal quotation and citation omitted).

DISCUSSION

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[1] By order filed October 22, 2018, the Court took the matter under submission.

[2] The Court understands the word "specimen" to refer to the "mark as used on or in connection with the goods or services" that is submitted for registration to the USPTO. See *37 C.F.R. § 2.56(a)*.

Defendants argue that each of RAPC's claims is subject to dismissal.

A. Federal Claim

The Lanham Act prohibits any "false or misleading description of fact, or false or misleading representation of fact, which . . . [,] in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another's goods, services, or commercial activities." See *15 U.S.C. § 1125(a)(1)*.

In the Second Claim for Relief, asserted against both TME and Crabtree, RAPC alleges that TME, in violation of the Lanham Act, has made false and misleading statements" in "Google advertisements" (see SAC ¶ 16) and on its **[*5]** website (see SAC ¶¶ 17, 26-27), and that Crabtree "authorized, directed or otherwise participated in the design and advertising of the [challenged] statements" (see SAC ¶ 38).

1. Liability of Crabtree

Defendants contend the SAC includes insufficient facts to support a finding that Crabtree can be held liable for the conduct on which the Lanham Act claim is based.

By order filed July 19, 2018 ("July 19 order"), the Court dismissed RAPC's Lanham Act claim against Crabtree, as alleged in the First Amended Complaint ("FAC"), for the reason that RAPC failed to allege sufficient facts to support the theory of liability on which it relied, specifically, that Crabtree was the alter ego of TME. In the SAC, RAPC no longer proceeds against Crabtree on an alter ego theory, but, rather, on the theory that Crabtree "authorized, directed or participated" in TME's advertisements. (See SAC ¶ 38.)

A "corporate officer or director" can be held liable for a Lanham Act violation committed by the corporate entity where the officer or director "authorize[d] or direct[ed]" the violation, or otherwise "participate[d]" therein. See *Coastal Abstract Service, Inc. v. First American Title Ins. Co., 173 F.3d 725, 734 (9th Cir. 1999)*. As set forth in the Court's July 19 order, however, RAPC's Lanham Act claim is **[*6]** subject to *Rule 9(b) of the Federal Rules of Civil Procedure*, and, consequently, RAPC must allege with "specificity" the "misconduct" it attributes to Crabtree. See *Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007)* (holding *Rule 9(b)* requires a plaintiff to "inform each defendant separately of the allegations surrounding his alleged participation in the fraud") (internal quotation and citation omitted). Further, as the allegations against Crabtree are made upon "information and belief" (see SAC ¶ 38), the allegations must be "accompanied by a statement of the facts upon which the belief is founded." See *Wool v. Tandem Computers Inc., 818 F.2d 1433, 1439 (9th Cir. 1987)*.

Here, RAPC alleges that "[b]ecause advertising and promotion [are] key to a company's operation, upon information and belief, Crabtree authorized, directed, or otherwise participated in the design and advertising of the [challenged] statements." (See SAC ¶ 38.) As set forth in the SAC, RAPC's belief is founded on information it obtained during a job interview with an individual who previously had worked for TME. (See SAC ¶ 37; see also id. Ex. F (transcript of interview).) Nothing was said by such applicant, however, that pertains to TME's advertising or otherwise addresses the identity of the person or persons who, on behalf of TME, authorized, directed or participated in TME's advertising **[*7]** decisions. (See SAC Ex F.) Further, although it may be "reasonable to presume" that some types of statements, by their very nature, would be made or approved by corporate officers, see *Wool, 818 F.2d at 1440* (holding district court could, at pleading stage, "presume" corporate officers who had "direct involvement . . . in [corporation's] financial statements" were responsible for misleading information contained in corporation's prospectus), RAPC fails to allege sufficient facts to support a finding that such presumption is applicable here. (See SAC ¶ 7) (describing Crabtree generally as "a co-founder, minority member and a managing member").

Accordingly, to the extent the Lanham Act claim is alleged against Crabtree, it is subject to dismissal.

2. Liability of TME

The Court next considers whether RAPC sufficiently alleges its Lanham Act claim against TME.

a. Use of "Professional"

RAPC alleges that two of TME's advertisements contain the word "professional," which word, according to RAPC, consumers would understand as a representation that TME's services are "lawful" (see SAC ¶ 14), which, according to RAPC, is false and misleading because TME, in providing its services, engages in a number of assertedly unlawful **[*8]** acts, specifically, depriving its customers of privacy, submitting fraudulent specimens to the USPTO, and engaging in the unauthorized practice of law. (See SAC ¶¶ 14, 39, 48, 52.)

The first advertisement challenged by RAPC allegedly is displayed in response to a Google user's search for the phrase "trademark filing." (See SAC ¶ 16.) According to RAPC, the advertisement contains (1) a title, such as "$69 Register Trademark Online — File Trademark in 3 Easy Steps" or a similar phrase,[3] (2) the address of TME's website, and (3) two sentences of text, specifically, (a) "Complete in Only 5 Minutes" or "Apply in Only 5 Minutes," and (b) "Let the Professionals File Your Trademark Today!" (See id.) The second challenged advertisement, found on a TME webpage that describes the features of three different "packages" available for sale, contains, as applicable to each such package, the phrase "Professional Preparation of your federal trademark application." (See SAC ¶ 17, Ex. C.)

Defendants argue that the word "professional," as used in the subject advertisements, is non-actionable puffery. "[P]uffery in advertisements" constitutes "either vague or highly subjective" assertions, e.g., an **[*9]** advertisement that "states in general terms that one product is superior." See *Cook, Perkiss & Liehe, Inc. Northern California Collection Service Inc., 911 F.2d 242, 246 (9th Cir. 1990)*.

A number of courts have considered whether "professional" connotes a factual assertion, and have concluded, under the circumstances presented therein, that it does not. See, e.g., *Griggs v. State Farm Lloyds, 181 F.3d 694, 699, 701 (5th Cir. 1999)* (characterizing representation by insurer that it "would provide timely and professional service" as "non-actionable puffery" rather than "representation[ ] of specific material fact"); *McElroy v. Boise Cascade Corp., 632 S.W. 2d 127, 134-135 (Tenn. Ct. App. 1982)* (finding no "actionable misrepresentation" where seller stated its prefabricated homes were "distributed through more than 1,200 independent professional home builders"; holding "use of the word 'professional' is, in and of itself, no guarantee of anything"); *Ludlow v. Lowe's Companies, Inc., 2014 U.S. Dist. LEXIS 200513, 2014 WL 12580233, at *12 (D. Haw. 2014)* (characterizing as "generalized" and "mere puffery" appliance store sign advertising "professional delivery"; noting sign made "no specific representations about capability, experience, or services provided"); *Larobina v. Wells Fargo Bank, N.A., 2012 U.S. Dist. LEXIS 41992, 2012 WL 1032953, at *4 (D. Conn. March 27, 2012)* (finding defendant's description of itself as "a professional and stalwart bank" was non-actionable "statement[ ] of opinion — not fact"); *EarthCam, Inc. v. OxBlue Corp., 2012 U.S. Dist. LEXIS 191822, 2012 WL 12836518, at *6 (N.D. Ga. March 26, 2012)* (finding statement that defendant's camera product "deliver[ed] professional-quality time-lapse construction video" was "nonactionable puffery"; **[*10]** characterizing "professional-quality," absent further elaboration, as "vague" and "not quantifiable"); *In re Marsh & McLennan Companies, Inc. Sec. Litig., 2006 U.S. Dist. LEXIS 70476, 2006 WL 2789860, at *1-2 (September 27, 2006)* (characterizing as "puffery" insurance broker's statement "regarding its 'commitment to client service and professional standards'"); but see *James v. Penguin Group (USA) Inc., 2014 U.S. Dist. LEXIS 50769, 2014 WL 1407697, at *8 (S.D. N.Y. April 11, 2014)* (finding defendant publisher's representation that its "publishing and marketing services for its authors would be provided by professionals" was actionable because statement could be "tested with objective evidence").[4]

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[3] The other titles are "$69 Trademark a Name Online — File Trademark in 3 Easy Steps," "$69 Trademark a Logo Online — File Trademark in 3 Easy Steps," "$69 Trademark Application — File Trademark in 3 Easy Steps," "$69 Register Trademark Online — Fast Affordable Online Process," and "Looking to Get a Trademark? — File Trademark in 3 Easy Steps." (See id.)

[4] As defendants note, the opinion does not identify the nature of the "objective evidence" on which it relied.

Here, as in the great majority of the above-cited cases, the term "professional" is a "general assertion[ ] of superiority" that lacks "the kind of detailed or specific factual assertions that are necessary to state a false advertising cause of action." See *Cook, Perkiss & Liehe, 911 F.2d at 246*.

Accordingly, to the extent RAPC's Lanham Act claim is based on TME's use of the word "professional" in advertisements, the claim is subject to dismissal.

b. "Privacy-Related Statements"[5]

RAPC alleges that TME, on its website, makes false and misleading statements on a page in which it describes its "Identity Protection Program." (See SAC ¶ 27, Ex. E.) Specifically, the webpage states that when a trademark applicant submits an application directly to the USPTO, the applicant's **[*11]** "email and phone number will be available for all to see," including "[s]pammers, solicitors and anyone else," but that, for a monthly fee of $5, TME will provide its email and phone number to the USPTO, so that the "public" will not "see" the applicant's email and phone number. (See id.)

RAPC alleges that the following statements on the above-referenced webpage are false and misleading: (1) the introductory phrase "Protect your Identity — Identity Protection Program"; (2) "With our Trademark Privacy Protection program, the public will see our email and phone number rather than yours," which statement describes the services TME states it will provide for an additional fee; and (3) "Yes, I want to keep my information private ($5/month) Highly Recommended," which is one of the choices TME provides to customers who wish to respond to the webpage's offer. (See id.)

Defendants argue that RAPC has failed to sufficiently allege it has standing to seek relief for the privacy-related statements because, defendants assert, RAPC has failed to allege sufficient facts to support a finding that RAPC has been injured by those statements. "[W]hen [a] plaintiff competes directly with [a] defendant," **[*12]** however, "a misrepresentation will give rise to a presumed commercial injury that is sufficient to establish standing," see *TrafficSchool.com v. Edriver, Inc., 653 F.3d 820, 826-27 (9th Cir. 2011)*, and RAPC alleges it "compete[s]" with TME "to provide individuals and small businesses" with "services that allow them to protect their marks through filings with the [USPTO]" (see SAC ¶ 3).

Defendants also argue that the privacy-related statements are not pleaded in conformity with *Rule 9(b)*'s requirement that "[a]verments of fraud" be "accompanied by 'the who, what, when, where, and how' of the misconduct charged." See *Vess v. Ciba-Geigy Corp., USA, 317 F.3d 1097, 1106 (9th Cir. 2003)*. The Court disagrees. By alleging the statements are made by TME on its website and have appeared thereon "[a]t least since 2017" (see SAC ¶¶ 27-28), RAPC has sufficiently pleaded the "who," the "when," and the "where" required by *Rule 9(b)*. Next, by quoting the challenged statements and attaching to the SAC a copy of the webpage on which the statements are located, RAPC has sufficiently pleaded the "what." (See SAC ¶¶ 26-27, Ex. B.) Further, by alleging that, "regardless of whether a customer purchased the $5/month privacy protection program or not, [TME] always lists each of its customer's contact information, including emails and phone numbers, on [the] USPTO's **[*13]** trademark application forms" (see SAC ¶ 30), and that such customer information is "publically [sic] available on [the] USPTO's website" (see SAC ¶ 32), RAPC has sufficiently pleaded the "how."

Lastly, defendants argue, RAPC has failed to sufficiently allege the privacy-related statements were a proximate cause of RAPC's injuries. A "[p]roximate-cause analysis" considers "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." See *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*. With respect to the Lanham Act, a plaintiff establishes proximate cause where, for example, a competitor makes "false statements about his own goods . . . and thus induc[es] customers to switch." See *id. at 137*; see also *id. at 138* (noting "diversion of sales to a direct

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[5] Both parties collectively refer to the statements discussed in the following section as TME's "privacy-related statements." (See Defs.' Mot. at 12:3; Pl.'s Opp. at 13:30.)

competitor may be the paradigmatic direct injury from false advertising"). Here, RAPC alleges it has "lost customers" to TME (see SAC ¶ 84), which allegation is supported by the further allegation that from 2015 to 2017, the year RAPC filed the instant action, RAPC's "market share" has "decline[d]" from "nearly 2.4%" to "approximately 1.8%," a loss that, according to RAPC, corresponds to "approximately 2670 trademark[ ] filings per year" (see SAC ¶¶ 69). In addition, **[*14]** RAPC alleges, it has had to reduce its prices from "$499 to $199 and sometimes lower to match the unfair competition of [TME]." (See SAC ¶ 70.) Irrespective of any difficulty RAPC may encounter in proving such allegations, see *TrafficSchool.com, 653 F.3d at 831* (affirming district court's denial of request for monetary award based on lost profits, where plaintiff failed to offer "any proof of past injury or causation"), the Court finds them sufficient at the pleading stage.

Accordingly, to the extent RAPC's Lanham Act claim is based on the above-referenced privacy-related statements, the claim is not subject to dismissal.

B. State Law Claims[6]

1. *Section 17200*

In the Third Claim for Relief, RAPC alleges defendants have violated *§ 17200*, which statute prohibits any "unlawful, unfair or fraudulent business act or practice." See *Cal. Bus. & Prof. Code § 17200*. RAPC bases its *§ 17200* claim on allegedly "unlawful" and "unfair" practices.[7]

a. Alleged "Unlawful" Practices

RAPC bases its claim on four types of allegedly unlawful conduct, each of which the Court considers in turn.

1. Violation of California Constitutional Right to Privacy

RAPC alleges that TME has deprived its clients of their "right to privacy" (see SAC ¶ 50), specifically, the right to privacy set forth in the **[*15]** California Constitution. See *Cal. Const. Art. I, § 1* (providing "[a]ll people are by nature free and independent and have inalienable rights," including the right of "privacy"). The claim is based on the allegation that TME engages in the following conduct: "(1) waiving clients' rights to cancel the filing or refund the government fee; (2) waiving clients' rights to privacy by allowing their names, phone numbers, emails and street addresses to be published publicly; and (3) permitting [the] USPTO to make clients' information available for public search on [the] USPTO's online databases and other databases." (See SAC ¶ 48.)

Defendants argue that RAPC lacks standing to assert such claim and that the claim is, in any event, not cognizable. The Court agrees.

To have standing to assert a *§ 17200* claim, the plaintiff must have "lost money or property as a result of the unfair competition." See *Cal. Bus. & Prof. Code § 17204*. Here, as RAPC does not and cannot allege that its constitutional

[6] As the Court has not dismissed the entirety of RAPC's federal claim, the Court finds it appropriate to exercise supplemental jurisdiction over the state law claims. The Court notes, however, that RAPC's alternative allegations in support of diversity jurisdiction (see SAC ¶¶ 5, 7, 10) are insufficient for two reasons: (1) RAPC fails to allege the state in which it is "incorporated," see *28 U.S.C. § 1332(c)(1)*; and (2) RAPC fails to allege Crabtree's "state citizenship," see *Kanter v. Warner-Lambert Co., 265 F.3d 853, 857-58 (9th Cir. 2001)*.

[7] In its opposition, RAPC clarifies that its *§ 17200* claim is not based on any "misrepresentation" (see Pl.'s Opp. at 18:6-16), e.g., any of the claimed misrepresentations upon which RAPC bases its Lanham Act claim. Consequently, the Court does not consider herein defendants' argument that RAPC has failed to allege reliance.

right to privacy has been violated, see *SCC Acquisitions, Inc. v. Superior Court, 243 Cal. App. 4th 741, 755, 196 Cal. Rptr. 3d 533 (2015)* (holding "corporations do not have a right of privacy protected by the California Constitution"), it necessarily must base its claim on the theory that TME's clients, at least those who are not corporations, have been deprived **[*16]** of a constitutionally-protected privacy right. RAPC fails to allege, however, any facts to support a finding that it has lost money or property as a result of any of TME's clients having been deprived of his/her asserted right of privacy.

Additionally, to the extent the claim is based on TME's having allegedly waived its client's "right to cancel the filing or refund the government fee" (see SAC ¶ 48), RAPC fails to allege any facts to support a finding that said conduct by TME implicates "a legally protected privacy interest." See *Folgelstrom v. Lamps Plus, Inc., 195 Cal. App. 4th 986, 990, 125 Cal. Rptr. 3d 260 (2011)* (setting forth elements of claim for invasion of constitutional right to privacy) (internal quotation and citation omitted). Further, assuming TME's clients have a legally protected privacy interest in their respective names, phone number, emails, and street addresses, RAPC fails to allege any facts to support a finding that any disclosure by TME of such information to the USPTO rises to the level of "an egregious breach of social norms." See *id. at 992*; see also *id. at 991* (listing, as examples of egregious breaches, "CHP officers' internet dissemination of photographs of the decapitated corpse of an accident victim," physician's "gratuitous disclosure of a patient's HIV status," **[*17]** and "the improper use of confidential mental health records").

Accordingly, to the extent RAPC's *§ 17200* claim is based on violations of *Article I, § 1 of the California Constitution*, the claim is subject to dismissal.

2. Submission of Fraudulent Specimens to USPTO

RAPC alleges that TME and Crabtree have violated *18 U.S.C. § 1001* by "submitting or aiding and abetting its customers in submitting fraudulent specimens to the USPTO." (See SAC ¶¶ 51-52.)

Section 1001 prohibits "knowingly and willfully" making to the United States "any materially false, fictitious, or fraudulent statement or representation" or "falsify[ing] . . . a material fact." See *18 U.S.C. § 1001*. As defendants correctly point out, however, the SAC includes no facts to support a finding that defendants "knowingly and willfully" submitted, or aided and abetted the submission of, a specimen containing false information. Indeed, although it quotes the statutory requirement that the allegedly false statement must be "knowingly and willfully" made (see SAC ¶ 51), the SAC is devoid of any facts, let alone facts sufficient to support a finding that defendants acted with such intent. See *Iqbal, 556 U.S. at 686-87* (holding that, although "malice, intent, knowledge, and other conditions of a person's mind" need not be pleaded "under an elevated pleading **[*18]** standard," plaintiff must do more than "plead the bare elements of his cause of action [and] affix the label 'general allegation'").

Accordingly, and even assuming RAPC has standing to challenge TME and/or Crabtree's alleged submission of fraudulent specimens to the USPTO,[8] RAPC's *§ 17200* claim, to the extent based on violations of *18 U.S.C. § 1001*, is subject to dismissal.

3. Unauthorized Practice of Law

RAPC alleges that TME and Crabtree have engaged in the unauthorized practice of law, in violation of both California and Texas law. See Cal. Bus. & Prof. *§ 6125* (providing "[n]o person shall practice law in California unless the person is an active member of the State Bar"); *Texas Gov't Code § 81.102(a)* (providing "a person may not practice law in [Texas] unless the person is a member of the state bar"). Specifically, RAPC alleges, non-lawyers employed by TME have engaged in acts that constitute the practice of law. (See SAC ¶¶ 42-46.)

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[8] RAPC does not expressly allege that it lost any money or property as a result of the alleged submission of fraudulent specimens, nor is any such loss evident from the allegations in the SAC.

At the outset, defendants argue that RAPC has not sufficiently pleaded its standing to challenge TME's allegedly unauthorized practice. The Court disagrees. Where a law firm asserts against a non-lawyer competitor a *§ 17200* claim based on the unauthorized practice of law, such plaintiff has standing if it "suffered losses in revenue **[*19]** and asset value and was required to pay increased advertising costs specifically because of the [allegedly unauthorized practice]." See *Law Offices of Mathew Higbee v. Expungement Assistance Services, 214 Cal. App. 4th 544, 564, 153 Cal. Rptr. 3d 865 (2013)*. Here, RAPC has alleged such losses (see SAC ¶¶ 66-70), as well as facts to support a finding that such losses were the result of the conduct RAPC alleges constitutes defendants' unauthorized practice of law (see SAC ¶ 71).

Defendants next contend the facts alleged in the SAC are insufficient to support a finding that TME has engaged in the unauthorized practice of law. The Court again disagrees.

Under California law, the practice of law "includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court." See *Baron v. City of Los Angeles, 2 Cal. 3d 535, 542, 86 Cal. Rptr. 673, 469 P.2d 353 (1970)* (internal alteration omitted). Similarly, under Texas law, the practice of law "embraces, in general, all advice to clients and all action taken for them in matters connected with the law." See *Crain v. Unauthorized Practice of Law Committee, 11 S.W. 3d 328, 333 (Tex. App. 2000)*. Here, RAPC alleges that TME's non-lawyer employees, when "creating and reviewing trademark applications," make "legal determinations about classification" and recommend "changes to classifications and goods and services descriptions" (**[*20]** see SAC ¶ 41; see also SAC ¶¶ 44-45), as well as "perform[ ] pre-filing searches for potential conflicting trademarks and advise[ ] clients of the conflict and possible solutions" (see SAC ¶ 46).

"In close cases, the courts have determined that the resolution of legal questions for another by advice and action is practicing law if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind." *Baron, 2 Cal. 3d at 543* (internal quotation and citation omitted); see also *Crain, 11 S.W. 3d at 333* (holding "preparation and filing of mechanic's liens" constitutes "practice of law"; finding preparer, in so doing, "impliedly advises its clients of their legal rights and entitlement under the law"). In light thereof, the Court declines to find at the pleading stage that the alleged acts by TME's non-lawyer employees do not, as a matter of law, constitute "difficult or doubtful legal issues," see *Baron, 2 Cal. 3d at 543*, particularly given the USPTO's stated position, as set forth on its website, regarding what actions taken in connection with the submission of a trademark application constitute the practice of law.[9]

With respect to Crabtree, however, the Court **[*21]** agrees that RAPC has failed to allege said individual defendant has engaged in the unauthorized practice of law. To the extent the claim is based on a theory that Crabtree, who is a member of the Texas State Bar, is practicing law in California, the claim is subject to dismissal because the SAC includes no facts to support such contention. To the extent the claim is based on a theory that Crabtree has violated California and Texas law by aiding and abetting non-lawyers who are practicing law in those states, or that he otherwise is personally responsible for the acts of those non-lawyers, the SAC likewise fails to include facts in support thereof.

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[9] On a webpage titled "Warning about unauthorized practice of law," the USPTO states that "non-attorneys" cannot perform the following acts: "[c]onsulting with or giving advice to an applicant or registrant in contemplation of filing a trademark application or application-related document" or "[p]reparing or prosecuting an application." (See SAC ¶ 40.a-b (quoting USPTO webpage at https://www.uspto.gov/trademark/trademark-updates-and-announcements/warning-unauthorized-lawpractice).) On a separate webpage in which the USPTO states it "cannot give legal advice," it identifies the following acts, inter alia, that constitute "legal advice": "[c]onducting pre-filing searches for potentially conflicting trademarks," "[a]nalyzing or pre-approving documents before filing," and "[a]dvising applicants on substantive examination issues, such as the acceptability of . . . classification of goods and services." (See SAC ¶ 40.d-f) (quoting USPTO webpage at https://www.uspto.gov/learning-and-resources/support-centers/trademark-assistance-center)); see also *People v. Landlords Professional Services, 215 Cal. App. 3d 1599, 1608, 264 Cal. Rptr. 548 (1989)* (holding non-lawyers' assisting clients in completing legal forms does "not amount to the practice of law as long as the service offered by [the non-lawyer] [is] merely clerical").

Accordingly, to the extent RAPC's *§ 17200* claim is based on the alleged unauthorized practice of law, the claim, as alleged against TME, is not subject to dismissal, and, as alleged against Crabtree, is subject to dismissal.

4. Violations of USPTO Regulations

RAPC alleges that Crabtree has violated five USPTO regulations applicable to "practitioners." (See SAC ¶¶ 56, 88.c.)[10]

First, RAPC alleges, Crabtree has violated a regulation requiring a practitioner to "reasonably consult with the client about the means by which the client's objectives **[*22]** are to be accomplished," see *37 C.F.R. § 11.104(a)*; specifically, according to RAPC, TME's customers' "rights to privacy were waived without their knowledge." (See SAC ¶ 56.a.) Second, RAPC alleges, Crabtree has violated a regulation requiring a practitioner to "deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the practitioner only as fees are earned or expenses incurred," see *37 C.F.R. § 11.115(c)*, because, according to RAPC, he "fail[ed] to deposit legal fees and expenses paid in advance by his customers into a client trust account." (See SAC ¶ 56.d.) Next, RAPC alleges, Crabtree has violated regulations providing that a practitioner shall not, subject to certain exceptions, "represent a client if the representation involves a concurrent conflict of interest," see *37 C.F.R. § 11.107*, and shall not, if he/she "formerly represented a client in a matter," represent "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client," see *37 C.F.R. § 11.109(a)*; in particular, according to RAPC, Crabtree "fail[ed] to check [for a] conflict of interest among his current and former clients prior to retaining new clients **[*23]** for [TME]." (See SAC ¶ 56.c.) Lastly, RAPC alleges, Crabtree has failed to comply with a regulation providing that, with respect to "a non-practitioner assistant employed or retained by or associated with a practitioner," the practitioner "shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the practitioner," see *37 C.F.R. § 11.503(b)*, because, according to RAPC, "non-practitioner assistants at [TME] have engaged in the unauthorized practice of law." (See SAC ¶ 56.c.)

As defendants point out, each of the subject regulations is a rule of professional responsibility applicable to an attorney who represents clients before the USPTO, and the SAC does not include any facts to support a finding that Crabtree has represented TME customers before the USPTO. Moreover, RAPC fails to plead any facts to support a finding that Crabtree waived without consent the privacy rights of any TME customer, that he obtained legal fees or expenses from a TME customer, that he had a conflict of interest with respect to any TME customer he may have represented, or, as noted above, that he can be held personally responsible for any TME non-lawyer employee's alleged **[*24]** unauthorized practice of law.

Accordingly, and even assuming RAPC would have standing to challenge Crabtree's non-compliance with a rule of professional responsibility, RAPC's *§ 17200* claim, to the extent based on Crabtree's alleged non-compliance with the above-referenced USPTO regulations, is subject to dismissal.

b. Alleged "Unfair" Practices

RAPC also bases its *§ 17200* claim on the theory that defendants have engaged in "unfair" business practices. (See SAC ¶ 89.) In particular, such claim is based on defendants' alleged submission of "fraudulent specimens" to the USPTO and their "unauthorized practice of law" (see SAC ¶ 89.a), which acts, if they occurred, are alleged to be "unlawful[ ]" (see SAC ¶ 89.d).

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[10] In "trademark matters," a "practitioner" is "an individual who is an active member in good standing of the bar of the highest court of any State." See *37 C.F.R. § 11.1* (defining "practitioner" and "attorney"); see also *37 C.F.R. §§ 11.14(a)*, *5 U.S.C. § 552(b)*.

Defendants, citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (hereinafter, "Cal-Tech"), argue that RAPC has failed to allege a cognizable "unfair" practice. As set forth in Cal-Tech, "[w]hen a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *§ 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or **[*25]** otherwise significantly threatens or harms competition." See *id. at 187*.

Here, as noted, RAPC bases its "unfair" claims on conduct that, if it occurred, is assertedly "unlawful." The "unlawful" acts, however, are not acts alleged to be in violation of an ***antitrust law***, nor does RAPC contend those acts violate the policy or spirit of any ***antitrust law*** or otherwise significantly harm competition.[11]

Accordingly, to the extent RAPC's *§ 17200* claim is based on the theory that defendants engaged in "unfair" practices, the claim is subject to dismissal.

c. Scope of Relief

As relief for the alleged violations of *§ 17200*, RAPC alleges it is entitled to an injunction and to an award of restitution. (See SAC ¶ 92.) Defendants argue that RAPC has failed to allege any facts to support a finding that it is entitled to restitution.[12]

"[A]n order for restitution is one compelling a *[§ 17200*] defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1149, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)* (internal quotation and citation omitted). Here, RAPC fails to plead any facts to support a finding **[*26]** that TME, by reason of its having allegedly engaged in an unlawful business practice, obtained from RAPC property in which RAPC had an ownership interest. Consequently, RAPC is limited to seeking an injunction. See *ABC Int'l Traders, Inc. v. Matsushita Electric Corp., 14 Cal. 4th 1247, 1268, 61 Cal. Rptr. 2d 112, 931 P.2d 290 (1997)* (holding only remedies available to plaintiff who prevails on *§ 17200* claim are injunctive relief and restitution).

d. Conclusion as to *§ 17200* Claim

To the extent RAPC's *§ 17200* claim seeks an injunction precluding TME from engaging in the unauthorized practice of law, the claim is not subject to dismissal. In all other respects, RAPC's *§ 17200* claim is subject to dismissal.

2. Declaratory Judgment

In its First Claim for Relief, RAPC alleges it is entitled to a declaration "as to whether [TME] has engaged in the unauthorized practice of law." (See SAC ¶ 75.)

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[11] RAPC argues that the Court should not apply the test set forth in Cal-Tech, but, rather, should apply "the *FTC Act section 5* test." (See Pl.'s Opp. at 24:23-24.) As the California Court of Appeal has explained, however, "the *section 5* test" only applies to a *§ 17200* claim when a "consumer" alleges that a practice is "unfair." See *Camacho v. Automobile Club of Southern California, 142 Cal. App. 4th 1394, 1401-1406, 48 Cal. Rptr. 3d 770 (2006)*.

[12] Defendants also argue that, in a *§ 17200* action, the plaintiff is not entitled to seek damages or an award of attorney's fees. Such argument, although a correct statement of the law, see *Cel-Tech, 20 Cal. 4th at 179*, is unavailing, as RAPC does not seek such relief for its *§ 17200* claim, but only for its Lanham Act claim.

Defendants seek dismissal of the claim for the reason that the Court, in its order dismissing the FAC and affording RAPC leave to amend, did not allow RAPC to add any new claims without leave of court, and RAPC did not seek, let alone obtain, leave to add a claim for declaratory judgment.

In its opposition, RAPC states it "agrees to dismissal of declaratory judgment to the extent that it is viewed as a separate claim" (see Pl.'s Opp. at 8:20-21) rather **[*27]** than a "remedy" (see id. at 8:19).

Accordingly, the First Claim for Relief will be dismissed.

D. Leave to Amend

Defendants argue that RAPC should not be afforded further leave to amend.

With respect to the portions of the Second Claim for Relief that will be dismissed, the Court declines to afford RAPC leave to amend with respect to its challenge to the use of "professional," but will afford RAPC leave to amend to allege facts to support a finding that Crabtree can be held personally liable for TME's challenged privacy-related statements. Additionally, the Court will afford RAPC leave to amend to cure the deficiencies identified herein with respect to the Third Claim for Relief.[13]

CONCLUSION

For the reasons stated above, defendants' motion to dismiss is hereby GRANTED in part and DENIED in part, as follows:

1. The First Claim for Relief is hereby DISMISSED without leave to amend;

2. The Second Claim for Relief, to the extent based on TME's use of the word "professional," is hereby DISMISSED without leave to amend, and to the extent alleged against Crabtree based on the privacy-related statements, is hereby DISMISSED with leave to amend; in all other respects, the Second Claim for Relief is not **[*28]** subject to dismissal.

3. The Third Claim for Relief is hereby DISMISSED with leave to amend, with the exception of RAPC's claim for injunctive relief based on the alleged unauthorized practice of law by TME, which claim is not subject to dismissal.

4. RAPC is hereby afforded leave to amend solely to the extent set forth above. Any Third Amended Complaint shall be filed no later than November 16, 2018. If RAPC does not file a Third Amended Complaint by the deadline set herein, the instant action will proceed on the remaining claims in the SAC.

IT IS SO ORDERED.

Dated: October 31, 2018

/s/ Maxine M. Chesney

MAXINE M. CHESNEY

United States District Judge

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[13] The Court's July 19 order did not address any of the deficiencies as to which leave to amend will be afforded.

[U.S. Futures Exch., LLC v. Bd. of Trade]

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

October 31, 2018, Decided; October 31, 2018, Filed

No. 04 C 6756

Reporter

346 F. Supp. 3d 1230 *; 2018 U.S. Dist. LEXIS 186813 **; 2018-2 Trade Cas. (CCH) P80,575; 2018 WL 5717983

U.S. FUTURES EXCHANGE, LLC AND U.S. EXCHANGE HOLDINGS, INC., Plaintiffs, v. BOARD OF TRADE OF THE CITY OF CHICAGO, INC. AND CHICAGO MERCANTILE EXCHANGE, INC., Defendants.

Subsequent History: Affirmed by *U.S. Futures Exch., L.L.C. v. Bd. of Trade, 2020 U.S. App. LEXIS 9031 (7th Cir. Ill., Mar. 23, 2020)*

Prior History: *United States Futures Exch., LLC v. Bd. of Trade of Chi., 2005 U.S. Dist. LEXIS 17779 (N.D. Ill., Aug. 22, 2005)*

Core Terms

CFTC, clearing, defendants', plaintiffs', antitrust, immunity, letters, summary judgment, anti trust law, sham, competitors, contracts, antitrust immunity, regulation, approving, anticompetitive, clearinghouse, baseless, launch, principles, petitioning, expectancy, termination, trading, staff, sham exception, lawsuits, cases, customers, courts

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Judges: Honorable Thomas M. Durkin, United States District Judge.

Opinion by: Thomas M. Durkin

Opinion

[*1236] MEMORANDUM OPINION & ORDER

Plaintiffs U.S. Futures Exchange, LLC ("USFE") and U.S. Exchange Holdings, Inc. ("UEH") bring this antitrust case against defendants Board of Trade of the City of Chicago, Inc. ("CBOT") and Chicago **[*1237]** Mercantile Exchange, Inc. ("CME").[1] Plaintiffs allege that defendants engaged in anticompetitive conduct to block plaintiffs from successfully entering the U.S. Treasury futures and options exchange market. Pending before the Court are: (1) defendants' motion for summary judgment [708]; and (2) **[**3]** plaintiffs' motion for partial summary judgment [712]. For the reasons that follow, the Court grants defendants' motion [708]. The Court denies plaintiffs' motion for partial summary judgment [712] as moot.[2]

Background[3]

A. Factual Chronology

1. CBOT's Launch Of U.S. Treasury Futures And Options Trading

In the 1970s, CBOT created and launched what later became its flagship product: futures contracts on U.S. Treasury notes and bonds. Futures and options contracts can be traded in the United States only on an exchange like CBOT that is approved by the U.S. Commodity Futures Trading Commission ("CFTC") as a designated contract market. R. 742 ¶ 1 (Defendants' Response to Plaintiffs' L.R. 56.1 Statement of Additional Facts).

2. CBOT-Eurex License Agreements

In the 1990s, UEH's parent Eurex Frankfurt AG ("Eurex") developed an all-electronic trading exchange in Europe. *Id.* ¶ 4. CBOT licensed Eurex's electronic trading platform in October 1999, and the parties signed a non-compete

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[1] During the course of this long-pending litigation, CME merged with CBOT. The new, merged entity created in 2007 is named CME Group.

[2] This case was originally set for trial on June 4, 2018. On April 27, 2018, after reviewing the parties' summary judgment motions, the Court vacated the trial date and explained that it would "issue a written opinion on the pending motions for summary judgment." R. 753.

[3] The Court disregards all inappropriate legal arguments in the parties' L.R. 56.1 statements. Plaintiffs' responses to defendants' statements of fact and plaintiffs' statement of additional facts in particular are rife with "legal and factual argument that must be disregarded." *Rao v. Gondi, 2017 U.S. Dist. LEXIS 86152, 2017 WL 2445131, at *2 (N.D. Ill. June 5, 2017)*; *accord* *Ortega v. Chicago Pub. Sch. of the Bd. of Educ. of the City of Chicago, 2015 U.S. Dist. LEXIS 84455, 2015 WL 4036016, at *3 (N.D. Ill. June 30, 2015)* (disregarding "argumentative language as it is improper"). The Court also disregards numerous facts raised by both parties that are not "*material* to the movant's motion." *Wilbern v. Culver Franchising Sys., 2015 U.S. Dist. LEXIS 130888, 2015 WL 5722825, at *17 (N.D. Ill. Sept. 29, 2015)*. And the Court disregards portions of plaintiffs' statement of additional facts that do not contain "specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph." *L.R. 56.1*. Finally, the Court notes that both parties run afoul of the rule that each paragraph of a *L.R. 56.1* statement be "short" and "contain only one or two individual allegations." *Malec v. Sanford, 191 F.R.D. 581, 583 (N.D. Ill. 2000)*. Plaintiffs in particular have violated this rule, including through numerous paragraphs in their statement of additional facts that span a page to page-and-a-half of single spaced text, with large numbers of exhibits cited in each. *See* R. 742.

to prevent Eurex from, among other things, offering U.S. Treasury futures itself. *Id.*; R. 731 ¶ 6 (Plaintiffs' Response to Defendants' *L.R. 56.1* Statement of Facts). The parties entered into a new license agreement in July **[**4]** 2002. R. 731 ¶ 6. That agreement was set to expire on December 31, 2003, and the non-compete was set to expire on January 30, 2004. *Id.* In early January 2003, CBOT notified Eurex that it intended to terminate the license agreement the day it was set to expire (December 31, 2003). R. 742 ¶ 5.

3. Eurex's Plan To Launch USFE As A Competing Exchange

Both CBOT and Eurex made public announcements on January 10, 2003. R. 731 **[*1238]** ¶¶ 6-8. CBOT announced that it had entered into a contract to use a different trading platform after December 31, 2003 when its licensing agreement with Eurex expired. *Id.* ¶ 7. And Eurex announced its intent to launch a U.S. Treasury futures and options exchange, USFE, to compete head-to-head with CBOT. *Id.* ¶¶ 2, 8. The planned launch date for Eurex's competing exchange was February 1, 2004, the earliest date possible under the non-compete agreement. *Id.* ¶¶ 6, 8.

While planning for its U.S. launch, Eurex created a business case defining the two most likely outcomes as: (1) winning the entire futures market by 2007; or (2) failing and quickly exiting from the market. *Id.* ¶ 9. The business case assumed a "binary outcome" was most likely because "the nature of . . . the futures **[**5]** business is that [in] any one product, there is a tendency to concentrate the market or liquidity into one market." *Id.* Eurex cited "the 'network effect' of CBOT's large volume" as a "barrier to entry" into the U.S. Treasury futures market. *Id.* ¶ 10. In a March 17, 2003 presentation, Eurex assessed the probability of USFE's success at "10%, however increasing to 50% if achieving mile-stones." *Id.* ¶ 11. Defendants' executives readily acknowledged the business threat posed by USFE's planned entry into the market, including in light of Eurex's low-cost, all-electronic trading platform (which market participants were familiar with, having used it during the years that CBOT licensed it). R. 742 ¶¶ 6, 8, 16.

4. CBOT And Eurex's Competing Clearing Agreements

All futures contracts and options traded on an exchange must be submitted to a clearinghouse for clearing. *Id.* ¶ 1. A clearinghouse is a financial institution formed to facilitate the exchange of transactions. It stands in between the two firms participating in a trade and guarantees all trades it clears, and its purpose is to reduce the risk of a firm failing to honor its obligations. Eurex and CBOT separately began negotiations with two **[**6]** clearinghouses for their competing exchanges: (1) defendant CME; and (2) the Board of Trade Clearing Corporation ("BOTCC"), which was CBOT's prior clearinghouse. R. 731 ¶¶ 12-13. BOTCC was an independent corporation not owned by CBOT.

During CBOT's negotiations with BOTCC, CBOT requested that BOTCC act as an exclusive clearinghouse for CBOT's key products, including U.S. Treasury futures and options, but BOTCC was resistant. R. 742 ¶ 24. Prior to this, CBOT and BOTCC never had a written agreement, and there was no restriction on BOTCC's ability to provide clearing services for other exchanges. *Id.* CBOT encountered less resistance in its request for exclusivity from CME. *Id.* ¶ 25. In a March 25, 2003 email summarizing the negotiations, CBOT explained: "CME wants flexibility in providing clearing services for other exchanges, however, CBOT would have exclusivity for the core products . . . . Only concern is with respect to anti-trust considerations but CME intent is to grant us exclusivity." R. 733 Ex. 145.

From the time the buyer or seller of a futures contract opens the contract until the counter-party closes it, the contract is considered "open." Contracts that are outstanding at the **[**7]** clearinghouse—*i.e.*, that have not been offset by delivery—are called "open interest." *See* R. 742 ¶ 1. As part of CBOT's negotiations with CME, they debated whether a bulk transfer of open interest from BOTCC to CME would be possible as part of a CBOT-CME agreement. *Id.* ¶ 27. Defendants understood that "interjecting CFTC into the process" by submitting rules for "approval of the CFTC" could reduce risk and "act[ ] as an insulator against liability." *Id.* ¶ 28. **[*1239]** Defendants began discussions about this with the CFTC in April 2003. R. 731 ¶ 18.

On April 16, 2003, CBOT entered into a clearing services agreement ("clearing link") with CME set to begin on January 2, 2004. R. 742 ¶ 25; R. 731 ¶¶ 13-14. Under that agreement, CME could provide clearing services for products competing with CBOT products only after first giving 30 days' notice to CBOT, at which time CBOT had the right to terminate the agreement. R. 731 ¶ 14. Although this provision was not framed in terms of exclusivity, construing emails in the light most favorable to plaintiffs supports an inference that defendants had an internal understanding that CME would grant CBOT exclusivity. R. 742 ¶ 25. CBOT subsequently attempted to acquire **[**8]** BOTCC, but BOTCC refused CBOT's acquisition overture. *Id.* ¶ 26.

On May 20, 2003, USFE and BOTCC signed a letter of intent to enter into a clearing services agreement. R. 731 ¶ 16. The parties dispute the extent to which USFE was already committed to or leaning towards BOTCC at the time defendants announced their clearing link. R. 731 ¶¶ 15-16; R. 742 ¶ 25. USFE and BOTCC's plans raised a concern for defendants that if USFE gained access to BOTCC before open interest was transferred to CME, "CBOT's customers could effectively become Eurex US customers without the need to change any clearing procedures." R. 742 ¶ 27.

5. CBOT And CME's Submission Of Clearing Link And Open Interest Transfer For CFTC Approval

Defendants' clearing link agreement required them to "draft and submit to the CFTC for approval rules that provide for the clearing of CBOT products at the CME clearing house . . . and facilitate the transfer of open interest in CBOT [p]roducts from BOTCC to CME." R. 731 ¶ 17. On June 3, 2003, CME submitted a request for the CFTC to approve proposed rules to implement the clearing link. *Id.* ¶ 19. On June 13, 2003, CBOT submitted a request for the CFTC to approve a proposed rule ("Regulation **[**9]** 701.01") requiring transfer of CBOT members' open interest from BOTCC to CME. *Id.* ¶ 20; R. 742 ¶¶ 28, 32; R. 733 Ex. 162.

Although the CFTC had no obligation to publish these rule submissions or to provide an opportunity for public comment, on July 8, 2003, the CFTC made defendants' proposed rule changes available for comment on the CFTC website by July 14, 2003. R. 731 ¶ 21; R. 742 ¶ 29. This was far shorter than that 45-day review period allowed (but not required) by a commission rule. R. 742 ¶ 29. CBOT had requested quick CFTC approval of the proposed rules in June 2003, citing a provision in the clearing link agreement allowing CME to walk away from the agreement by July 15, 2003. *Id.* However, CME's Board Steering Committee had decided on July 7, 2003 to allow the walkaway provision to lapse. *Id.*

During the review period between July 8 and July 14, 2003, numerous industry participants, including USFE and BOTCC, submitted comment letters. R. 731 ¶ 22. USFE's letter raised antitrust concerns, explaining that "an analysis of the anti-competitive impact of the [open market transfer rule] CB[O]T Regulation 701 under the factors of *section 15(b) of the [Commodity Exchange Act ('CEA')]* precludes the **[**10]** CFTC from approving it." *Id.* ¶ 23. Other market participants likewise raised competition and market-based concerns in their comment letters. R. 742 ¶ 30. USFE and other market participants also requested that the CFTC extend the comment period. *Id.*

The CFTC did not extend the comment period. On July 15, 2003, CFTC staff provided a 17-page memorandum addressing the proposed rules and comment letters. **[*1240]** R. 731 ¶ 24; R. 742 ¶ 32. That memorandum explained that the comment letters had raised the concern that the proposed rules "would violate the obligations of [CBOT] and the Commission in light of the antitrust provisions of the Act," including "*Section 15(b)*." R. 731 ¶ 24. CFTC staff

> acknowledge[d] that these rules relate to important policy and legal issues of market structure and competition that the Commission has been addressing since June, 2002.[4] However, . . . 'despite all the discussion about

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[4] In June 2002, the CFTC issued a report describing concerns among industry participants that "competition at the exchange and clearing organization level . . . had not materialized." *Id.* ¶ 31. The CFTC identified "two particular characteristics of the market structure of the futures industry . . . as possible causes: [1] the lack of fungibility of products across exchanges and [2] the lack of common clearing." *Id.* With respect to fungibility of products across exchanges, the CFTC acknowledged the potential benefits of such an approach, but also noted that "the development of new products can require a significant expenditure of capital" and "[m]andating fungibility could decrease the potential reward and therefore decrease the incentive for innovation." *Id.* ¶ 32. With respect to common clearing, the report mentioned potential benefits, and also noted: "Commentators suggested that common

> alternative clearing models embracing choice in one form or another, to-date no alternatives to the use of a single dedicated clearinghouse exist and none have been proposed in an implementable form.

Id. ¶ 25. CFTC staff recommended approving the rules, including Regulation 701.01, "[i]n order to move forward **[**11]** to implement the Link in an orderly manner, and to enhance legal certainty concerning the procedures to implement the Link." *Id.* CFTC staff subsequently explained:

> The staff recognizes that the Clearing Services Agreement between CBOT and CME could appear to raise antitrust issues. However, the staff believes that any potential antitrust issues are outweighed by the benefits to be gained including potential clearing efficiencies, significant cost savings for members and customers, and systemic risk abatement. . . . On balance, the staff believes that . . . the Commission's approval of the CBOT as DCO would not be inconsistent with the Commission's obligation under *Section 15(b) of the CEA*.

Id. ¶ 29.

On July 15, 2003, the CFTC unanimously approved the clearing link and open interest transfer rules submitted by defendants. *Id.* ¶ 26. The same day, the CFTC issued a press release announcing the approval and stating:

> [T]he policy and legal issues involved have been well known to interested parties since they were initially raised at the CFTC Clearing Roundtable held almost a year ago. CBOT, CME, and the Board of Trade Clearing Corporation have consulted widely with their members **[*1241]** and the Commission **[**12]** about this project and submitted to the Commission an agreed transition schedule on June 13.
> Under the Commodity Exchange Act, the Commission is not obligated to publish rule submissions of self-regulatory organizations. Nevertheless, based upon the many expressions of interest in this matter, the Commission decided to provide a short comment period. . . .
> The rules are necessary for the orderly implementation of the Link and will provide continuity of financial integrity and customer protection in the futures markets. The Commission believes that the Link and these rules further the Commodity Futures Modernization Act's goal of supporting innovation in the futures industry.
>
> The Commission's decision was based upon the information before it, including comment letters from several interested parties. The Commission is aware of public and industry interest in related policy issues regarding market structure and competition, and looks forward to hearing more on these issues. The Commission believes, however, that this broader dialogue should not impede the planning necessary to move forward to implement the Link in an orderly manner. The Commission believes it is of paramount importance **[**13]** to enhance legal certainty concerning the procedures to implement the Link.

Id. ¶ 27.

6. USFE's CFTC Application And Preparation To Enter The Market

Knowing that it needed CFTC approval to become a designated contract market ("DCM") before it could launch, USFE pre-filed its DCM application with the CFTC in July 2003. R. 742 ¶ 15. USFE attended meetings with the CFTC that month to discuss its application. *Id.*[5]

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clearing could work to heighten competition between exchanges and clearing organizations. However, mandating common clearing would have the effect of subjecting clearing organizations to one another's credit risk involuntarily." *Id.* ¶ 33. The report observed that neither the CEA nor CFTC rules require the CFTC to mandate fungibility or common clearing, but the CFTC intended to organize a roundtable with industry participants to discuss these issues. *Id.* ¶ 34. The CFTC held that roundtable and heard testimony from industry representatives on August 1, 2002. *Id.* ¶ 35. They did not change the model. The CFTC and SEC evaluated these issues again and came to the same conclusion in an October 2009 report, explaining that "futures exchanges ordinarily do not treat contracts listed across markets as 'fungible'" because there are "decreased incentives of a futures exchange to innovate product listings and potential exposure of one clearinghouse to the credit risks of another." *Id.* ¶ 38. The 2009 report further explained that "permitting listing of replica contracts on competing exchanges facilitates 'free-riding' on the first exchange's investment and may decrease incentives favoring innovation." *Id.*

On September 3, 2003, USFE, Eurex, and BOTCC officially entered into their clearing services agreement. R. 731 ¶ 39. That agreement prohibited BOTCC from making USFE's contracts "fungible with contracts traded on exchanges other than [USFE] or Eurex" without prior written consent of USFE. *Id.* If the agreement was terminated, USFE could require BOTCC to "facilitate the transfer of open positions and collateral with respect to [USFE] Contracts as to which [BOTCC] maintain[ed] open positions" to another clearing service provider. *Id.* ¶ 40. In other words, the agreement gave USFE the right to transfer open interest in USFE contracts to another clearinghouse upon termination, just as CBOT had arranged to do with CME. In the wake of USFE's clearing services agreement with BOTCC, **[**14]** CBOT proposed crediting the account of any BOTCC member who became a CME-CBOT clearing link member with "the net book value ($16,628 per share) of up to 150 shares of the clearing member's BOTCC stock." R. 742 ¶ 33; R. 733 Ex. 189.

Around the same time, USFE entered into a regulatory services agreement with the National Futures Association ("NFA") for the NFA to perform market and trade practice surveillance for USFE for an initial term of three years. R. 731 ¶ 42. Prior to this agreement, defendants made efforts to hamper an agreement between USFE and the NFA, including by arguing that the NFA should be precluded from providing regulatory oversight services to USFE on numerous grounds that were ultimately rejected by the CFTC. R. 742 ¶ 34.

[*1242] On September 16, 2003, USFE filed its formal DCM application with the CFTC. R. 731 ¶ 44; R. 742 ¶ 16. Shortly after USFE's September 16, 2003 application, defendants pursued separate FOIA requests regarding the application and requested extensions of the CFTC comment period until 45 days after receipt of the requested FOIA documentation. R. 742 ¶ 16.

By regulation, USFE's application was initially eligible for fast-track, sixty-day review. R. 731 ¶ **[**15]** 44; R. 742 ¶ 15.[6] But the CFTC removed USFE's application from fast-track review on October 14, 2003, with the stated intent "to ensure that it ha[d] an adequate opportunity to consider fully the issues presented by [USFE's] application." R. 731 ¶ 44. The same day, the CFTC postponed a hearing on USFE's application originally set for October 16, 2003 before the House Agriculture Subcommittee. R. 742 ¶ 16.

The hearing before the House Agriculture Subcommittee was rescheduled for November 6, 2003. *Id.* ¶ 18. At that hearing, the CFTC Chairman testified that because USFE's application was "large" and "extensive," the CFTC had determined that it would be "very difficult to get to a point where we are comfortable within [the 60 day, fast-track] time frame." R. 731 ¶ 45. But he also testified that the application "include[d] all general information required by our rules to be considered complete." R. 742 ¶ 15.

During the review period, CFTC staff themselves raised numerous issues with USFE, sending over 75 questions (in at least four sets) for USFE to answer regarding its application. R. 731 ¶ 48. The CFTC sent copies of USFE's application to the Federal Reserve and the Department of Treasury **[**16]** on November 3, 2003, and the Treasury and Federal Reserve submitted their comments on December 18 and 19, 2003, respectively. *Id.* ¶ 53.

CFTC also made non-confidential portions of USFE's application publicly available on its website for comment. *Id.* ¶ 49. CBOT and CME separately submitted a series of comment letters raising concerns with USFE's application. R. 742 ¶ 19. Several of defendants' comments focused on discrepancies between USFE's public marketing and what was disclosed in USFE's application. Although the application represented that all USFE-listed contracts would be cleared by BOTCC, USFE was publicly marketing a "global clearing link" that would allow products to be cleared at either BOTCC or Eurex Clearing, the latter of which was not Commission-registered. R. 731 ¶ 50. The application

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[5] A large volume of U.S. Treasury futures were set to expire in late-March 2004. *Id.* ¶ 13. USFE anticipated that in the month of February 2004, some customers would close out these positions on CBOT, reopen them on USFE, and then trade that open interest on USFE. *Id.* This timeline made the date of USFE's launch important. *Id.* ¶ 14.

[6] A year later, in November 2004, the CFTC "eliminate[d] the presumption of automatic fast-track review of applications and replace[d] it with the presumption that all applications [would] be reviewed pursuant to the statutory 180-day timeframe and procedures specified in *Section 6(a)* of the [CEA]" in order "to ensure a comprehensive review of applications and to meet other public policy objectives." R. 731 ¶ 46.

also did not mention a rebate plan that USFE was publicly marketing. *Id.* ¶ 51. Additionally, defendants raised an issue regarding USFE's one-member Board of Directors. *Id.* ¶ 52.

On December 9, 2003, the CFTC announced that it would hold a hearing on USFE's application on December 17, 2003. *Id.* ¶ 54; R. 742 ¶ 20. Later that day, CME and CBOT submitted nearly identical letters to the CFTC stating **[**17]** that they had previously scheduled meetings that conflicted with the December 17 hearing and requesting that that hearing be rescheduled (a) based on the conflict and (b) to address questions raised at the November 6, 2003 House Agriculture Subcommittee hearing. R. 731 ¶ 55; R. 742 ¶ 20.

[*1243] The next day, on December 10, 2003, the CFTC cancelled the December 17, 2003 hearing, citing "scheduling conflicts of some market participants." R. 731 ¶ 56. It also reopened the public comment period through December 19, 2003 to respond to questions raised at the House Agriculture Subcommittee hearing. *Id.* ¶¶ 56-57. *Id.* The CFTC received 27 more comment letters in response. *Id.* ¶ 56.

On December 19, 2003, the CFTC sent a letter to BOTCC, Eurex, and USFE regarding "misleading" statements made in a December 16, 2003 joint press release claiming that USFE would launch on February 1, 2004. *Id.* ¶ 58. The CFTC said that the deadline for action on the application was March 15, 2004, and that the CFTC "cannot and has not committed itself to any earlier date . . ., and certainly cannot and has not committed itself to a favorable decision on the application." *Id.*

By early January 2004, CBOT had transitioned to **[**18]** a new electronic trading platform, and defendants had implemented their clearing link and transfer of open interest, resulting in a $1.4 billion reduction in performance bond requirements for their members and $200 million in reduced security deposits. *Id.* ¶ 72.

On January 23, 2004, USFE submitted to the CFTC revised rules, bylaws, and an LLC agreement relating to its DCM application. *Id.* ¶ 64. USFE submitted a letter to the CFTC on January 26, 2004 committing itself to four "undertakings," including a commitment not to use a non-Commission-registered clearing service like Eurex Clearing without permission (a concern defendants raised in their comments) and a commitment to provide the Commission with one-month notice of "any non-traditional form of incentive program" (another concern defendants raised in their comments). *Id.* ¶ 65.

The CFTC announced on January 27, 2004 that it would hold an open meeting on February 4, 2004 to consider USFE's DCM application. *Id.* ¶ 66. USFE's 30(b)(6) deponent testified that this announcement "was the first time USFE received any indication concerning the timing of the CFTC's decision." *Id.* ¶ 67.

On February 2, 2004, CFTC staff issued a 142-page memorandum **[**19]** recommending approval of USFE's application. *Id.* ¶ 68. Staff observed that with respect to CBOT's concerns about USFE's use of a single-person board, USFE had since amended its bylaws to establish a 12-person board. *Id.*

The next day, on February 3, 2004, CBOT reduced exchange transaction fees for customers trading U.S. Treasury futures. *Id.* ¶ 73; R. 742 ¶ 38. CBOT also negotiated an amendment to its clearing link agreement with CME to lower clearing fees for all financial products for a six-month period. R. 742 ¶ 38.

The CFTC approved USFE as a DCM on February 4, 2004. R. 731 ¶ 69. The CFTC required USFE to comply with its agreed undertakings to use only CFTC-registered clearing organizations (*i.e.*, not Eurex Clearing) and to provide any incentive program to the CFTC for review one month before the proposed effective date. *Id.* The CFTC explained during the approval hearing, "we found nothing in th[e] comments that made us feel [USFE] had not or would not be in compliance with [the criteria for DCM designation] and core principles." R. 742 ¶ 23. The CFTC reviewed each objection raised by defendants and rejected the majority of them as without merit. *Id.*

7. USFE's Launch

USFE launched its **[**20]** exchange on February 8, 2004, with BOTCC providing clearing services and the NFA performing market and trade practice surveillance. R. 731 ¶¶ 43, 74. USFE ultimately "failed to capture **[*1244]** more than a trivial portion of the market." *Id.* ¶ 74.

8. Subsequent Events

In January 2005, CBOT increased average exchange fee rates. R. 742 ¶ 38. In 2007, in the course of evaluating CME's proposed merger with CBOT, the DOJ Antitrust Division conducted an "extensive investigation" of the CBOT-CME clearing link agreement. R. 731 ¶ 36. The DOJ Antitrust Division concluded "that the evidence does not indicate that . . . the clearing agreement is likely to reduce competition substantially" or that the clearing agreement "will foreclose entry by other exchanges." *Id.*

B. Evidence Related To Coordination And Intent

Plaintiffs cite numerous documents and testimony to demonstrate what they characterize as defendants' coordinated "Washington strategy" and intent to stall USFE's launch. Defendants do not meaningfully refute that they engaged in a coordinated effort to try to prevent USFE from taking over the U.S. Treasury futures and options exchange market. Instead, as discussed in more detail below, defendants **[**21]** argue that the actions they took as part of that coordinated effort are lobbying and related efforts immune from antitrust scrutiny.

The principal evidence on which plaintiffs focus includes:

○ On May 23, 2003, CME's Director of Clearing Development sent CME's outside counsel an email titled "?State Ownership of Eurex??," asking whether "there may be some regulatory stumbling blocks that could be thrown up in front of [Eurex]?" in light of the fact that several of Eurex's members are "state-owned and operated banks — subject (I believe) to very close provincial regulation." R. 733 Ex. 70. CME's Director explained that "even small obstacles might be enough to trip them up enough to ensure our success" given USFE's "rather abbreviated window of opportunity to make inroads into U.S. markets," but also noted, "I'm not sure what CME could actually DO in this regard." *Id.*

○ On August 4, 2003, CBOT representatives discussed in an email "the ways in which our product is better," including "(4) we will have the established liquidity and isn't our Washington strategy designed to prolong the Eurex entrance as long as possible." *Id.* Ex. 116.

○ On September 23, 2003, an internal CBOT email described **[**22]** efforts to "throw some big guns around Washington" to "help us at Eurex's expense." *Id.* Ex. 73.

○ On October 22, 2003, CME's Director of Government Relations shared with top CME executives a "CME/CBOT Washington Strategy." *Id.* Ex. 97. This strategy included "Plan A" of meeting "with staff of every member of the House Agriculture committee" to brief them on "five [identified] concerns," with the hope of having "members of the Ag Committee instruct the CFTC not to move forward on the Eurex application until the Committee's policy concerns have been answered," and "[t]o further delay the CFTC process" by considering "asking for a Senate hearing to be scheduled after the first of the year." *Id.* "Plan B" consisted of "secur[ing] statutory amendment in the form of language in the omnibus appropriations bill that would provide that no funding can be used by the CFTC for approval of the Eurex application until a study is conducted on our issues," **[*1245]** which would "need to be carried out in an extremely discrete manner." *Id.* Plan B was intended to serve as a "concrete solution for delaying the process." *Id.*

○ Defendants followed up on their "Washington Strategy" by meeting with Congressional members **[**23]** of the House Agriculture Subcommittee to discuss concerns with USFE's DCM application. R. 742 ¶ 18. Defendants encouraged members of Congress and their staff to raise defendants' concerns with the CFTC. *Id.*

○ At the November 6, 2003 House Agriculture Subcommittee hearing, CME's Chairman explained in his written testimony: "Eurex U.S.'s evident plan was to secure CFTC designation for its empty shell of an exchange and thereafter to 'self-certify' the rules that implement its true business plan in a manner that would escape Commission review and approval . . . . We made a clear case that the fast track process was not appropriate, and the Commission responded accordingly." *Id.* ¶ 17; R. 733 Ex. 68 at 114-15. CBOT's Chairman similarly testified: "I am pleased the CFTC has agreed and decided to disallow fast track treatment of the [USFE] application." R. 742 ¶ 17; R. 733 Ex. 68 at 91-92. CME had provided comments on the draft testimony of government officials and third parties who testified at the November 6, 2003 hearing. R. 742 ¶ 18.

○ In a November 18, 2003 letter drafted by CME outside counsel to the House Committee Chairman, CME's outside counsel noted that the November 6, 2003 hearing **[**24]** "had tremendously positive consequences on the scrutiny that is being afforded to Eurex's U.S. application." R. 733 Ex. 111. He also listed remaining concerns, including that "Eurex U.S. would operate as a branch office of Eurex Frankfurt with all of its critical governance, regulatory, operational and clearing functions outsourced to third parties," some of whom "were beyond the jurisdictional reach of the Commission." *Id.*

○ On December 9, 2003, CME and CBOT submitted nearly identical letters to the CFTC stating that they had previously scheduled meetings and requesting that the CFTC's anticipated December 17, 2003 hearing on USFE's application be rescheduled. R. 731 ¶ 55; R. 742 ¶ 20. Defendants' counsel has conceded that these letters were the product of coordinated efforts. R. 742 ¶ 20.

○ A December 29, 2003 CME powerpoint presentation explained that CBOT set up a "war chest" as part of a "pre-emptive plan to deal with the threat posed by Eurex's entrance to the U.S. market place." R. 733 Ex. 71 at 1, 3. The powerpoint noted that CME's "desired outcome" that Eurex would be "unsuccessful in establishing a viable business model in the U.S. futures space" and therefore unable "to further **[**25]** proceed to compete directly against CME products." *Id.* at 10.

○ CME's Chairman stated in a January 27, 2004 email: "It has come to my attention that the CFTC will hold a public vote on the Eurex application . . . on February 4. . . . I suspect this will come as no surprise that the vote will probably pass. But, I wanted to remind the Board of what I said at the last meeting. Because of our efforts, Eurex will not be able to implement any cross border clearing link without approval and that is not **[*1246]** in this application. . . . It is due to our efforts that we will get exactly what we want and not what Eurex wants, that is, to compete on a level playing field." *Id.* Ex. 133.

○ CBOT's Chairman acknowledged at his deposition that "the longer it takes for the DCM application to be ruled on, whether it's a denial or an approval, that's good for . . . CBOT." *Id.* Ex. 24 at 194:5-10.

C. Evidence Related To Causation

Just before and after USFE's launch, USFE executives observed that CBOT's price cuts stole momentum and eliminated USFE's competitive advantage. R. 731 ¶¶ 73, 75-80; *see, e.g., id.* ¶ 78 (USFE executive on April 24, 2004: "[T]he market got what it wanted: Lower prices and an irreversible trend towards **[**26]** electronic trading. Given all this, no one has an economic reason at the moment to use Eurex — US"); *id.* ¶ 80 (USFE executive in 2006: "[USFE] offered the same products, with much less liquidity, on an inferior platform, with a market model that was no longer unique"). Relying on these observations by USFE executives and defendants' expert testimony, as well as the fact that USFE's launch occurred only seven days after the planned date, defendants attribute USFE's failure to legitimate competition, including CBOT's new, more efficient electronic trading system and CBOT's price cuts that eliminated USFE's competitive advantage.

Plaintiffs, on the other hand, attribute USFE's failure to delay tactics on the part of defendants, which they claim resulted in traders not being technologically ready or able to trade with USFE at its launch. R. 742 ¶¶ 39, 40. Plaintiffs rely on documents indicating that potential customers delayed because of regulatory uncertainty surrounding CFTC approval of USFE's application, as well as testimony from plaintiffs' expert. *Id.*

D. Procedural History

This case was originally filed before Judge Zagel in October 2004. R. 44. On July 2, 2010, Judge Zagel granted **[**27]** defendants' motion for partial summary judgment on plaintiffs' predatory pricing theory (filed while discovery was ongoing). R. 416. Judge Zagel concluded:

> CBOT has put forth uncontested facts to show that its prices for U.S. Treasury derivative exchange services exceeded its average variable cost . . . [and] also its average total cost. Accordingly, I find that Defendants' pricing was above every measure of cost appropriate for a predatory pricing analysis and grant Defendants' motion for summary judgment on the issue of predatory pricing.

Id. at 6.

Two years later, on August 3, 2012, Judge Zagel granted in part and denied in part another motion for partial summary judgment by defendants (again filed while discovery was ongoing). R. 445. In that motion, defendants tested three of plaintiffs' remaining theories of liability. Plaintiffs' first theory was that defendants obstructed the regulatory approval process in order to hamstring USFE's launch. Judge Zagel found this theory foreclosed by the *Noerr-Pennington* doctrine, which "extends absolute immunity under the antitrust laws to businesses and other associations when they join together to petition legislative bodies, administrative agencies, **[**28]** or courts for action that may have anticompetitive effects." *Mercatus Group, LLC v. Lake Forest Hosp., 641 F.3d 834, 841 (7th Cir. 2011)*. Judge Zagel found that "in weighing USFE's DCM application, the CFTC was acting in a legislative capacity," and that defendants' efforts to influence **[*1247]** the CFTC were shielded by *Noerr-Pennington* immunity. R. 445 at 7.

On a motion for reconsideration, Judge Zagel afforded plaintiffs a narrow opportunity to proceed on their regulatory delay theory. He concluded that "it was error not to consider Defendants' [December 9, 2003] letters to the CFTC separately from the other lobbying activity." R. 460 at 1. The Supreme Court in *City of Columbia v. Omni Outdoor Advertising Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*, stated that "[t]he 'sham' exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving the denial of the license but simply in order to impose expense and delay." *Id. at 380*. Judge Zagel found that this example was "very close to what Plaintiffs allege here—that Defendants requested a change in the CFTC hearing date strictly to impose expense and delay"—and allowed plaintiffs' regulatory **[**29]** delay theory to proceed on that basis. R. 460 at 2.

Plaintiffs' second theory addressed in Judge Zagel's August 2012 partial summary judgment order was that defendants prevented USFE from securing competitive clearing services. R. 445 at 9. Judge Zagel explained that "[u]nder Section Two of the Sherman Act, otherwise lawful activity may be rendered unlawful if it is accompanied by a 'specific intent to accomplish the forbidden objective.'" *Id.* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985))*. Judge Zagel held that more discovery was required before intent and causation of injury with respect to this theory could be resolved. *Id.*

Plaintiffs' third theory was that defendants interfered with plaintiffs' customer relationships through a campaign of threats and misinformation. Judge Zagel explained: "Plaintiffs have had considerable difficulty finding traders who will support the[se] claims. . . . However, it is still possible that evidence exists in Defendants' own files." *Id.* at 10. Judge Zagel found that plaintiffs should have "full opportunity to examine appropriate documents in Defendants' possession." *Id.*

In March 2017, this case was reassigned from Judge Zagel to this Court. R. 610. In March 2018, defendants moved for summary judgment **[**30]** as to all of plaintiffs' claims (R. 708), and plaintiffs moved for partial summary judgment on the issues of the relevant market definition and CBOT's monopoly power (R. 712).

Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see also* *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The Court considers the entire evidentiary record and must view all of the evidence and draw all reasonable inferences from that evidence in the light most favorable to the nonmovant. *Horton v. Pobjecky, 883 F.3d 941, 948 (7th Cir. 2018)*. To defeat summary judgment, a nonmovant must produce more than a "mere scintilla of evidence" and come forward with "specific facts showing that there is a genuine issue for trial." *Johnson v. Advocate Health and Hosps. Corp., 892 F.3d 887, 894, 896 (7th Cir. 2018)*. Ultimately, summary judgment is warranted only if a reasonable jury could not return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

[*1248] "In the field of ***antitrust law***, summary judgment serves a vital function—it avoids wasteful trials and prevents lengthy litigation that may have a chilling effect on pro-competitive market forces." *Anderson News, L.L.C. v. Am. Media, Inc., 899 F.3d. 87, 98 (2d Cir. 2018)*; *see also* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. "[T]he very nature of antitrust litigation encourages summary disposition of such cases when permissible." *Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 475 (7th Cir. 1988)*. Although there is not a heightened **[**31]** summary judgment standard in antitrust cases, an antitrust claimant must "present evidence that tends to exclude the possibility that the [defendants'] conduct was as consistent with competition as with illegal conduct" to survive summary judgment. *Mercatus, 641 F.3d at 856*.

Analysis

Plaintiffs assert antitrust claims under *§§ 1* and *2* of the Sherman Act, alleging a conspiracy by defendants in restraint of trade and anticompetitive conduct by CBOT to preserve its monopoly, as well as a claim under Illinois law for tortious interference with prospective economic advantage. *Section 1 of the Sherman Act* "prohibits '[e]very . . . combination . . . or conspiracy . . . in restraint of trade or commerce,' though courts have long restricted its reach to agreements that unreasonably restrain trade." *Omnicare, Inc. v. UnitedHealth Group, Inc., 629 F.3d 697, 705 (7th Cir. 2011)* (quoting *15 U.S.C. § 1*). A *§ 1* claim has three elements: "(1) that defendants had a contract, combination, or conspiracy ('an agreement'); (2) that as a result, trade in the relevant market was unreasonably restrained; and (3) that [the plaintiff was] injured." *Id.* *Section 2* of the Sherman Act proscribes monopolization and attempted monopolization. *15 U.S.C. § 2*. *Section 2* does not make monopolies illegal, but rather forbids the exercise or pursuit of monopoly power through improper **[**32]** means. *Mercatus, 641 F.3d at 854*. To prevail on a *§ 2* claim, a plaintiff must show "(1) that the [defendant] possessed monopoly power in that market; and (2) that the [defendant] willfully acquired or maintained that power by means other than the quality of its product, its business acumen, or historical accident." *Id.*

As a threshold matter, plaintiffs argue that defendants' alleged conspiracy cannot be viewed by looking only at its component parts, and instead must be viewed as a whole. Plaintiffs rely primarily on *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*, which directed against "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each" in judging "the character and effect" of an antitrust conspiracy. *Id. at 699*. Plaintiffs say that conduct immunized by Judge Zagel's prior summary judgment order based on the *Noerr-Pennington* doctrine is therefore properly considered in assessing the overall character and effect of defendants' conduct. And plaintiffs advocate for a wholistic view of the evidence in assessing whether a denial of summary judgment is warranted.

It is true that courts generally view allegations of antitrust conspiracy as a whole to judge the character of the conspiracy and intent. *See id.*; *see also* ***[**33]*** *Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478, 481 (7th Cir. 1980)* (error to isolate aspects of a "multi-faceted conspiracy" and fail to consider allegations concerning "conspiratorial motive and intent" "as parts of the whole conspiracy"). It is also true that conduct immunized from antitrust liability is still admissible to show the purpose and character of non-protected conduct. *See* *MCI Commc'ns* ***[*1249]*** *Corp. v. Am. Tel. & Tel. Co., 462 F. Supp. 1072, 1084 (N.D. Ill. 1978)*; *see also* *In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 789 (7th Cir. 1999)* (district court "erred in treating the [*Noerr-Pennington*] doctrine as a rule of evidence").

But as the Seventh Circuit explained when interpreting *Continental Ore* in *Mercatus*, the principle that a plaintiff "should be given the full benefit of [its] proof" under *Continental Ore* "does not mean . . . that we will aggregate the effects of conduct immunized from antitrust liability with the effects of conduct not so immunized. This approach would nullify the immunity." *Mercatus, 641 F.3d at 839*. "For that reason," a court on summary judgment "must first identify any conduct that is immunized," and after doing so, "consider the evidence of the *remaining* challenged conduct in the aggregate to see if it is sufficient to support antitrust liability." *Id.* (emphasis added).

Additionally, as other courts interpreting *Continental Ore* have made clear, separate theories of antitrust liability **[**34]** still must be assessed individually. *See, e.g., Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1366-67 (Fed. Cir. 1999)* ("*Continental Ore* did not hold . . . that the degrees of support for each legal theory should be added up. Each legal theory must be examined for its sufficiency and applicability, on the entirety of the relevant facts."); *In re Processed Egg Prods. Antitrust Litig., 206 F. Supp. 3d 1033, 1042 (E.D. Pa. 2016)* ("*Continental Ore* focuses on the use of evidence. . . . Subsequent decisions have acknowledged that the holding in *Continental Ore* was not intended to limit a court's individual assessment of the legality of the various components of an alleged conspiracy."). Indeed, plaintiffs themselves treat their theories as individual "claim[s]" and analyze them separately. *See, e.g.*, R. 732 at 10. The Court therefore addresses each of plaintiffs' remaining theories of liability in turn.

Plaintiffs' four remaining theories of antitrust liability under the Sherman Act are: (1) that defendants engaged in sham petitioning to create regulatory delay; (2) that defendants deprived plaintiffs of liquidity through (a) their clearing link and (b) the transfer of open interest from BOTCC to CME; (3) that defendants interfered with plaintiffs' customer relationships through a campaign of threats and public misinformation; and (4) that defendants **[**35]** interfered with plaintiffs' relationships with BOTCC and the NFA. Plaintiffs' Illinois tort claim is based on the same allegations underlying their fourth antitrust liability theory.

I. Regulatory Delay Theory

Plaintiffs' first theory is that defendants engaged in sham petitioning to delay USFE's DCM application, which resulted in lack of market readiness at the time of USFE's launch and ultimately caused USFE to fail. Despite plaintiffs' mischaracterizations of Judge Zagel's reconsideration order (*e.g., id.* at 21-22), Judge Zagel's ruling in fact left only a small window open for plaintiffs to pursue this regulatory delay theory. *See* R. 460. That window is based on defendants' December 9, 2003 letters to the CFTC. *Id.* Defendants now attempt to shut that small window for two independent reasons: (1) defendants argue their scheduling letters are protected petitioning activity under *Noerr-Pennington* and do not qualify under the "sham" exception to that doctrine; and (2) defendants argue plaintiffs cannot show any antitrust injury resulting from the letters.

A. *Noerr-Pennington*

1. Key Principles Of *Noerr-Pennington* Doctrine And Seventh Circuit's *Mercatus* Decision

As explained above, the *Noerr-Pennington* ***[**36]*** doctrine extends absolute antitrust **[*1250]** immunity to "businesses and other associations when they join together to petition legislative bodies, administrative agencies, or courts for action that may have anticompetitive effects." *Mercatus, 641 F.3d at 841*. The immunity is extended "in part because the original purposes of the Sherman Act did not include regulating political activity and in part because it is questionable whether the *First Amendment* allows such regulation." *Premier Elec. Co. v. Nat'l Elec. Contractors Ass'n, Inc., 814 F.2d 358, 371 (7th Cir. 1987)*. As the Seventh Circuit in *Premier Electric* explained, "people are free to try to persuade their representatives that monopoly is preferable." *Id.*

The Seventh Circuit's interpretation of the *Noerr-Pennington* doctrine in *Mercatus* has important implications for this case. *Mercatus* involved a "multipronged campaign" to prevent displacement of a monopoly hospital by a "huge threat" from Mercatus, a competitor. *641 F.3d at 837*. This campaign involved lobbying local board members, "a public relations campaign," making "derogatory statements" about the competitor to healthcare providers, and offering physician practice groups incentives not to move their practices. *Id. at 837-38*. Despite finding some of this conduct "dishonest or distasteful," *id. at 857*, the Seventh Circuit held that the district court **[**37]** had properly granted summary judgment on the plaintiff's antitrust claims based on *Noerr-Pennington* and other grounds.

A key principle emerging from *Mercatus* is that "many kinds of conduct may prevent or discourage a potential competitor from entering a particular market," but "[f]ederal antitrust laws are only implicated when that conduct is predatory or unjustifiable." *641 F.3d at 854*. The *Mercatus* court concluded that the defendant hospital in that case had not used unjustifiable means. "Even if the Hospital had monopoly power in the geographic and product markets Mercatus' economic expert endorsed, the Hospital had no duty to step aside and allow Mercatus to make off with its physicians, patients, and revenue"; "[i]t would be perverse if Mercatus' failure to prevail *in that competition* gave it a grievance cognizable under the Sherman Act." *Id. at 857*.

As the *Mercatus* court explained, "the sham exception" to *Noerr-Pennington* immunity—the exception invoked by plaintiffs in this case—allows the antitrust laws to reach otherwise protected *First Amendment* activity in two narrow contexts: "(1) sham lawsuits; and (2) fraudulent misrepresentations." *Id. at 842*; *see also* *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* ("[t]here may be situations in which a publicity campaign, ostensibly **[**38]** directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified").

The Seventh Circuit in *Mercatus* held that the fraudulent misrepresentation prong of the sham exception "is based on the Supreme Court's desire to protect the integrity of non-political governmental proceedings" and therefore "*does not apply at all outside of adjudicative proceedings*"—in other words, even deliberate lies to legislative bodies are immunized under *Noerr-Pennington*. *641 F.3d at 844* (emphasis added). The *Mercatus* court laid out a multi-factor analysis for determining when a proceeding qualifies as adjudicative or legislative. *Id. at 844-46*. Applying those factors in that case, the *Mercatus* court concluded that "the Village Board acted in a legislative capacity when it declined to approve the proposed Mercatus physician **[*1251]** center." *Id. at 847-49*. The court therefore held that the fraudulent misrepresentation exception invoked by Mercatus could not apply as a matter of law. *Id.* And Mercatus did not allege a sham lawsuit for purposes of the second prong of the exception. The *Mercatus* court **[**39]** therefore found that the district court properly granted summary judgment on the "antitrust claims based on the Hospital's activities during the Village Board proceedings." *Id. at 849*.

2. Application Of *Noerr-Pennington* Here

Plaintiffs do not ask the Court to revisit Judge Zagel's holding that the CFTC proceedings that defendants sought to influence were legislative, not adjudicative. This Court agrees with that holding based on the factors laid out in *Mercatus*. This means that under *Mercatus*, plaintiffs cannot invoke the fraudulent misrepresentation prong of the sham exception to antitrust immunity under *Noerr-Pennington. See* *id. at 844* (the fraudulent misrepresentation prong "does not apply at all outside of adjudicative proceedings").

Defendants argue that the other prong of the exception—described in *Mercatus* as the "sham lawsuits" prong (*id. at 842*)—does not apply in the legislative context either. As defendants point out, the Seventh Circuit in *Mercatus* said "sham lawsuits"—not "sham proceedings." Defendants claim this choice of words means that the "sham" prong, like the fraudulent misrepresentation prong, does not apply at all in the legislative context. As defendants point out, a contrary conclusion "would **[**40]** . . . lead to the anomalous result that *Noerr-Pennington* immunizes deliberate lies to the CFTC and Congress [in legislative proceedings], but leaves unprotected petitioning through the ordinary channels of legislative and regulatory process" as long as they qualify as a baseless "sham." R. 739 at 4. Indeed, prior to *Mercatus*, plaintiffs alleged a fraudulent misrepresentation theory (R. 56 ¶¶ 46-47), but after *Mercatus* and Judge Zagel's rulings that the CFTC proceeding was legislative, plaintiffs now describe defendants petitioning as a "baseless" sham proceeding rather than as "fraudulent misrepresentation." It makes little sense to allow a claim to survive based on a simple change of adjectives like this.

Nevertheless, the Court finds that by using the term "sham lawsuits," the Seventh Circuit in *Mercatus* likely did not mean to entirely foreclose antitrust actions based on pure procedural abuse in the legislative context. Dicta in several Supreme Court cases supports that the sham exception could apply to baseless legislative proceedings. *See* *City of Columbia, 499 U.S. at 380* (sham exception could encompass "the filing of frivolous objections to the license application of a competitor"); *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499-500 n.4, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)* ("in whatever forum, private **[**41]** action that is not genuinely aimed at procuring favorable governmental action is a mere sham that cannot be deemed a valid effort to influence government action").

But there is no question that if the sham exception does apply in the legislative context, it is "extraordinarily narrow." *Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056, 1061 (9th Cir. 1998)*; *see also* *Mercatus, 641 F.3d at 842* (citing *Kottle* approvingly for other propositions); *Comm. to Protect our* *Agric. Water v. Occidental Oil & Gas Corp., 235 F. Supp. 3d 1132, 1155 (E.D. Cal. 2017)* ("The scope of the *Noerr—Pennington* sham exception depends on the branch of government involved. If the relevant petitioning activity involves the legislature, the sham exception is extraordinarily narrow.") (citations omitted); I. Phillip E. Areeda & Herbert Hovenkamp, Fundamentals **[*1252]** of ***Antitrust Law*** § 203 (4th ed. 2019) (noting that, in the context of legislative petitioning, "it is virtually impossible to identify the sham"). Although a number of courts have mentioned the possibility of a legislative sham, plaintiffs cite no court of appeals case actually applying that exception to find legislative petitioning to be a sham. *See* R. 732 at 18-19.

To fit within the extraordinarily narrow confines of a legislative sham exception, plaintiffs first must pass a significant threshold: showing that defendants' conduct was objectively **[**42]** baseless. Addressing the sham standard in the (not so narrow) context of meritless lawsuits, the Supreme Court in *Prof'l Real Estate Inv'rs v. Columbia Pictures Indus., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*, "reject[ed] a purely subjective definition of 'sham'" that would "undermine, if not vitiate, *Noerr."* *Id. at 60*. The *PRE* Court held that courts must first determine whether activity is "objectively baseless in the sense that no reasonable [party] could realistically expect success on the merits." *Id*. Only where the challenged activity is "objectively meritless may a court examine . . . subjective motivation." *Id.*

Objective baselessness is routinely decided as a matter of law on motions to dismiss and summary judgment. R. 710 at 12 n.9 (collecting cases); *see, e.g.,* *Associated Bodywork & Massage Professionals v. Am. Massage Therapy Ass'n, 897 F. Supp. 1116, 1120 (N.D. Ill. 1995)* (granting motion to dismiss where plaintiff failed to allege plausibly that defendant "had no reasonable expectation of obtaining the favorable legislation").

Plaintiffs argue that the *PRE* standard does not apply here, and that a more flexible test set forth in *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*, applies because defendants engaged in a pattern of petitioning. Plaintiffs therefore claim that objective baselessness is not a threshold requirement. But *PRE* clarified *California Motor* and the boundaries of "the sham exception," stressing that the assessment **[**43]** of "sham petitioning must be resolved according to objective criteria." *508 U.S. at 59-60*. Post-*PRE*, the Seventh Circuit has not recognized a different standard for "pattern[s]," *see* *Mercatus, 641 F.3d at 842 n.3*, and other courts of appeals have done so only in the adjudicatory context, including where a defendant has brought multiple lawsuits. *See, e.g.,* *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL-CIO, 31 F.3d 800, 810-11 (9th Cir. 1994)* ("twenty-nine lawsuits" not a sham where fifteen of them proved successful; reconciling *California Motor* and *PRE* as dealing with "different situations"—*California Motor* with "the filing of a whole series of lawsuits" and *PRE* with the filing of "a single" lawsuit); *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 180-81 (3d Cir. 2015)* (four frivolous lawsuits); *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27, 728 F.3d 354, 364 (4th Cir. 2013)* ("series of legal proceedings"); *Primetime 24 Joint Venture v. NBC, 219 F.3d 92, 101 (2d Cir. 2000)* ("voluminous" prelitigation challenges).

This case does not involve the filing of numerous lawsuits—it involves a single legislative proceeding (*i.e.*, the CFTC proceeding seeking approval of USFE's DCM application). Therefore, the Court finds that *PRE's* objective baselessness standard applies.

a. Objective Baselessness

Again, "in the legislative context," the sham exception to *Noerr-Pennington* immunity is "extraordinarily narrow," "virtually impossible," and requires a showing **[*1253]** of "no expectation of obtaining legitimate government action." *E.g., Occidental, 235 F. Supp. 3d at 1155*; *see also* ***[**44]*** *PRE, 508 U.S. at 60-61* (in context of lawsuits, defining objective baselessness to mean that "no reasonable litigant could realistically expect success on the merits"). That is not what the evidence shows here.

Defendants correctly argue as a threshold matter that the December 9, 2003 scheduling letters cannot be considered objectively baseless because they succeeded in obtaining legitimate government action. The letters asked the CFTC to: (1) reschedule the December 17 public hearing on USFE's application so defendants' principals could participate (citing previously scheduled board meetings on December 16, "follow-up special strategy meetings" for CBOT on December 17 and 18, and "meetings with CME clearing firms and other CME customers in New York" for CME on December 17 and 18); and (2) respond to questions raised by House Agriculture Subcommittee members on November 6, 2003. R. 731 ¶ 55; R. 733 Exs. 120-121. The CFTC responded favorably to both requests. The CFTC explained that it was cancelling the December 17 hearing based on "scheduling conflicts of some market participants," and it replaced the public hearing with a new comment period to respond to questions raised at the House hearing. R. 731 ¶¶ **[**45]** 56-57.

Defendants further argue that the letters were not objectively baseless because they reflected a true scheduling conflict that prevented defendants from attending the hearing, which they had a clear interest in attending. Plaintiffs dispute whether there is evidence of an actual scheduling conflict, saying there is no evidence the conflicts described in the letters actually happened. To begin, however, even if statements in the letters were false, false representations are fully insulated in the legislative context under *Mercatus*.

Moreover, plaintiffs misrepresent the facts. In support of their claim of a genuine scheduling conflict (R. 731 ¶ 55), defendants cite: (1) an internal CME email on October 22, 2003 to numerous CME executives titled "December 16, 2003 Board Meeting" that describes event details (R. 718 Ex. 69); (2) a November 19, 2003 internal CBOT email explaining "The December 2003 Board of Directors meeting will be held on Tuesday, December 16, 2003" (*id.* Ex. 70); (3) December 16, 2003 CME board meeting minutes (*id.* Ex. 71); (4) December 16, 2003 CBOT board meeting minutes (*id.* Ex. 72); (5) an itinerary for a CBOT executive's speaking event in New York from December **[**46]** 15-17 (*id.* Ex. 73); and (6) deposition testimony from a CME employee describing the long-scheduled December 16 CME board meeting in New York, followed by client visits and receptions involving "[a]lmost the entire board" on December 17 and 18 (*id.* Ex. 74 at 264:18-266:16).

Clearly, the board meetings were long scheduled and took place on the December 16 date listed in defendants' letters. And there is unrefuted evidence that follow up CME meetings took place on December 17 and 18. The exhibits do not appear to corroborate the "follow-up special strategy meetings" on December 17 and 18 mentioned by CBOT in its letter, but it is clear that at least one CBOT executive was tied up in meetings in New York during those days.

Plaintiffs emphasize that defendants' letters are nearly identical, and that defendants' counsel has conceded the letters were the product of coordinated efforts. But that does not make them an objectively baseless abuse of process. They were not.

Plaintiffs also focus on the larger set of defendants' petitioning, claiming that the CFTC disagreed with all of it, and **[*1254]** it was a baseless sham. *First*, however, all of this petitioning aside from the letters already has been immunized. **[**47]** As the Seventh Circuit instructed in *Mercatus*, the court extracts "any conduct that is immunized" under *Noerr-Pennington* from its assessment of "the evidence of the remaining challenged conduct in the aggregate to see if it is sufficient to support antitrust liability." *641 F.3d at 839*. Plaintiffs' attempt to shoehorn into their regulatory delay claim ample evidence that Judge Zagel already excluded as immunized runs afoul of this instruction in *Mercatus*. *Second*, even if it had not already been immunized, defendants' other legislative petitioning does not meet the very high bar for objective baselessness in the legislative context. The CFTC agreed with or held

USFE to its proposed "undertakings" to address a number of defendants' comments and concerns, including defendants' objections to USFE's one-member board, USFE's proposed global or cross-border clearing link, and USFE's proposed incentive programs. R. 731 ¶¶ 48, 50-52, 62, 68-69. CME's Chairman noted that defendants' efforts succeeded because USFE "will not be able to implement any cross border clearing link without approval," meaning that competition would occur "on a level playing field." R. 733 Ex. 133.

Moreover, defendants are correct that **[**48]** the fact that the CFTC staff addressed all of the issues raised by defendants speaks to their substantiality. The CFTC did not even address many of the other comments filed. *See* R. 718 Ex. 67. The Court therefore concludes as a matter of law that defendants' conduct did not rise to the level of objective baselessness, a standard that is "virtually impossible" to meet in the legislative context. *See* Areeda & Hovenkamp, *supra*, § 203.

b. Subjective Evidence

In discussing their regulatory delay theory, plaintiffs focus heavily on evidence of defendants' subjective intent without grounding that discussion in the governing legal standards. Plaintiffs try to put the December 9 letters in the context of "a larger course of conduct designed to delay USFE's entry," relying on the coordination and intent-related evidence summarized above. *See* R. 732 at 28-29. But because the Court concludes that defendants' challenged activity was not objectively baseless, it does not reach the issue of defendants' subjective motivation under *PRE. See* *508 U.S. at 60*. Indeed, the Supreme Court in *Noerr* found political activity immunized despite the fact that petitioners' "sole purpose . . . was to destroy [their rivals] as competitors," and their efforts **[**49]** were conducted unethically. *365 U.S. at 138-41*. And the Supreme Court in *PRE* expressly "dispelled the notion that an antitrust plaintiff could prove a sham merely by showing that its competitor's purposes were to delay [the plaintiff's] entry into the market." *508 U.S. at 59-60*. Evidence of defendants' subjective intent is therefore irrelevant.

2. Antitrust Injury

Defendants maintain that there is an independent basis for granting summary judgment on plaintiffs' regulatory delay theory based on the scheduling letters: lack of antitrust injury. Defendants argue that there is an "insurmountable gap in Plaintiffs' causation theory" linking defendants' letters—which the CFTC acted upon favorably—to any delay in the CFTC's approval of USFE's application. R. 710 at 14. Defendants point to: (1) USFE's 30(b)(6) deponent's testimony that the January 27, 2004 announcement of a public hearing "was the first time USFE received any indication concerning the timing of the CFTC's decision" (R. 731 ¶ 67); (2) the letter the CFTC wrote to USFE on December 19, 2003 stressing that "the **[*1255]** CFTC cannot and has not committed itself to any earlier date [than March 15, 2004] by which a decision or designation approval will be made, and certainly **[**50]** cannot and has not committed itself to a favorable decision on the application" (*id.* ¶ 58); and (3) the CFTC's conversations with USFE in January 2004 about "draft undertakings" that could "move" the CFTC "away from the position that the USFE application is materially incomplete and therefore ineligible for designation (as a result of the proposed [global] clearing link)" (*id.* ¶ 62).

The Court finds this causation argument to be simply another facet of defendants' *Noerr-Pennington* argument. The cases on which defendants rely recited the relevant causation-related principles as an extra justification for *Noerr-Pennington* immunity in cases where legislative persuasion is successful. *See* *Toyo Tire & Rubber Co. v. Atturo Tire Corp., 2017 U.S. Dist. LEXIS 48672, 2017 WL 1178224, at *3 (N.D. Ill. Mar. 30, 2017)* (the *Noerr-Pennington* "principle follows in part from basic notions of causation: namely, when the government acts based on petitioning, any purportedly unlawful result is most proximately caused by government action, not by the private petitioning"); *Associated Bodywork, 897 F. Supp. at 1120* (explaining that under *Noerr-Pennington* principles, "where . . . the alleged injury stems from a competitor's success in influencing legislation," the legislatures' actions, while "encouraged" by defendant, "compris[ed] a supervening 'cause,'" breaking **[**51]** the causal "link"). The fact that the CFTC acted on defendants' scheduling letters and subsequently indicated that it had never committed itself to a date earlier than March 15, 2004 for approving USFE's DCM application breaks the causal chain and provides further support for finding those letters immunized under *Noerr - Pennington*.

* * *

In the wake of Judge Zagel's predatory pricing holding, plaintiffs made the regulatory delay theory their cornerstone. The Court agrees with defendants that in doing so, plaintiffs focus on legislative petitioning with Congress and the CFTC that lies at the heart of *Noerr-Pennington*. There would be a significant chilling effect if market participants had to fear treble damages if a regulator disagreed about their comments about competitors. *See, e.g., Noerr, 365 U.S. at 139* (holding businesses liable for urging government action to achieve competitive advantage would deprive the government of "a valuable source of information" and "deprive the people of their right to petition in the very instances in which that right may be of the most importance to them"); *Mercatus, 641 F.3d at 846* ("*Noerr-Pennington* was crafted to protect the freedom to petition guaranteed under the *First Amendment* . . . . [Improper] application **[**52]** of the sham exception might inadvertently stifle the legitimate exercise of this core right."). Without the regulatory delay theory or any evidence of predatory pricing, the legs are cut out from under plaintiffs' case.

II. Clearing Link And Open Interest Transfer Theory

Plaintiffs' second theory is that defendants conspired to deprive plaintiffs of liquidity through their clearing link and the transfer of CBOT's open interest from BOTCC to CME. Defendants argue that: (1) this theory is foreclosed by implied antitrust immunity because the CFTC formally approved the clearing link and open interest transfer; and (2) this theory is not actionable under the antitrust laws.

A. Implied Antitrust Immunity

1. Key Principles Of Implied Immunity Doctrine And Seventh Circuit's *American Agriculture* Decision

The implied antitrust immunity doctrine originated in the SEC context. The Supreme **[*1256]** Court has found implied antitrust immunity where the SEC effectively authorized the conduct in question, *Gordon v. N.Y. Stock Exchange, 422 U.S. 659, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975)*, where the SEC chose not to issue prohibitions or restrictions despite having authority to do so, *United States v. Nat'l Assoc. of Sec. Dealers, Inc., 422 U.S. 694, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975)*, and where the SEC disapproved the challenged practices, but it was possible that lines drawn by antitrust courts **[**53]** could lead to future conflicts with SEC determinations, *Credit Suisse Sec. v. Billing, 551 U.S. 264, 127 S. Ct. 2383, 168 L. Ed. 2d 145 (2007)*.

In its most recent articulation of the doctrine in *Credit Suisse*, the Supreme Court explained that conduct is implicitly immune from antitrust liability where finding liability would create a risk of "clear repugnancy" or "clear incompati[bility]" between a specialized regulatory scheme and the antitrust laws. *551 U.S. at 275*. Building on principles in *Gordon* and *NASD*, the *Credit Suisse* Court identified a four-part test for implied antitrust immunity:

> (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entit[y] exercise[s] that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct . . . [and (4) whether] the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.

Id. at 275-76.

Just as the Seventh Circuit's decision in *Mercatus* had important implications for plaintiffs' regulatory delay theory, the Seventh Circuit's decision in *American Agriculture Movement, Inc. v. Board of Trade of City of Chicago, 977*

F.2d 1147 (7th Cir. 1992), has important **[**54]** implications for plaintiffs' clearing link and open interest transfer theory. In *American Agriculture*, the Seventh Circuit reversed a summary judgment decision by the district court applying implied antitrust immunity to bar an antitrust claim based on an emergency resolution adopted by CBOT. Id. at 1150- 51. In that case, "[a]fter receiving notice of the CBOT's adoption of the [emergency resolution], the [CFTC] took no formal action; it neither overturned nor approved the Resolution." Id. at 1151. Applying cases from the SEC context, the *American Agriculture* court delineated the circumstances in which it would be appropriate to find that "the CEA"—*i.e.*, the law that "governs the trading of commodity futures contracts, and grants to the [CFTC] the authority, in large measure, to implement the regulatory regime established therein"—"has impliedly repealed the antitrust laws." Id. at 1150, 1158. It explained that there are "two variants of implied repealer": (1) "pervasive repealer," where agency initiative controls every aspect of defendant's behavior; and (2) repealer "immuniz[ing] from antitrust attack activities that were ([a]) required by law or the relevant agency, or ([b]) scrutinized and approved by the agency." Id. at 1158.

The **[**55]** Seventh Circuit found no pervasive repealer in the CEA context, citing the "legislative history" of the CEA that "demonstrates that Congress intended to leave federal courts with at least some authority over exchange practices." Id. at 1160-61. The Seventh Circuit also found that the CFTC had not ordered CBOT to take action so as to satisfy the "required by law or the relevant agency" prong. Id. at 1158-61. Next, the *American Agriculture* court analyzed whether the "scrutiny and approval" prong of implied repealer was satisfied. Id. at 1162-67. After distilling key **[*1257]** principles from the Supreme Court's SEC cases, the *American Agriculture* court found the issue of applying antitrust immunity principles in that case to be "admittedly a close one," but "conclude[d] that the regulatory supervision in th[at] case was not sufficient to cloak the [emergency] Resolution with . . . immunity." Id. at 1163. In support, the court emphasized that the CFTC "never formally voted on or approved" the resolution, meaning that its "approval . . . was not the product of any affirmative action, but rather of acquiescence, or the failure to take affirmative action." *Id.*

Although the Supreme Court's decision in *Gordon* applying antitrust immunity had likewise involved **[**56]** acquiescence on the part of the regulatory body (the SEC), the *American Agriculture* court distinguished *Gordon* on several bases. "[T]he most significant distinction" between that case and *Gordon* "concern[ed] the availability of judicial review," which *Gordon* "emphasized . . . was an important— and perhaps essential—ingredient to any claim of implied antitrust immunity." Id. at 1164. The *American Agriculture* court explicitly contrasted the CFTC's formal "approval or disapproval" of "nonemergency exchange rules," which is "presumably subject to judicial review," with the emergency resolution in that case that was not. Id. at 1164-65.

Another basis on which the *American Agriculture* court distinguished *Gordon* was the SEC's "deep and serious study" of the issue in *Gordon* and "Congress' 'continued approval' of the SEC's regulatory track record." *Id.* The *American Agriculture* court explained that "[t]he fact that an agency let stand a practice voluntarily initiated by a regulatory entity—even when it had the power to review, modify and overturn that practice—is not sufficient, in and of itself to confer antitrust immunity. Also pertinent is the *nature* and *degree* of the agency supervision at issue." Id. at 1163.

Near the end of **[**57]** its opinion, the *American Agriculture* court gave the following summary statement:

> [I]mmunity is proper when the relevant agency's scrutiny and approval of the challenged practice is active, intrusive and appropriately deliberative. Put another way, an antitrust court, before relinquishing jurisdiction over allegedly anticompetitive activities, must be convinced that the agency has exercised its independent judgment in reflecting upon and approving the activity at issue. Moreover, the availability of judicial review, even if not the *sine qua non* of immunity, is extremely important. We do not deny that the CEA and its enabling regulations lay in place a regulatory framework under which the [CFTC] can exercise the requisite degree of supervision. Here, however, the [CFTC] did not utilize that framework.

Id. at 1167. Therefore, the Court held, implied antitrust immunity did not apply.

2. Applicability Of Implied Immunity In CEA Context

Plaintiffs take issue as a threshold matter with the application of SEC implied immunity cases in the CEA context. Plaintiffs point to the legislative history of the CEA considering and rejecting blanket antitrust exemption. *See, e.g., Strobl v. New York Mercantile Exch., 768 F.2d 22, 29 (2d Cir. 1985)* (summarizing legislative history). **[**58]** They point to the general CEA savings clause explaining that nothing in the CEA "shall supersede or limit the jurisdiction conferred on courts of the United States or any State." *7 U.S.C. § 2(a)(1)(A)*. And they point to the CFTC's acknowledgement when addressing potential "Fair Competition Issues" raised by CBOT with respect to USFE's DCM application "that **[*1258]** [USFE] will be subject to *the federal antitrust laws* as well as Commission oversight . . ." R. 733 Ex. 110 at 126-28 (emphasis added). As plaintiffs acknowledge, however, all this means is that the CEA "forecloses wholesale antitrust immunity." R. 732 at 33. It does not mean that a *Credit Suisse* implied immunity analysis does not apply.

Plaintiffs also say that securities and commodity futures industries are regulated differently. A 2009 Treasury Department White Paper noted that the CFTC "employs a 'principles-based approach' to regulation of exchanges, clearing organizations, and intermediaries; while pursuant to the securities laws, the SEC employs a 'rules-based approach.'" R. 733 Ex. 183. It is true that after the Commodities Futures Modernization Act of 2000, the CFTC no longer has to "approve most contract market rules." R. 733 Ex. 184. As defendants **[**59]** point out, however, the Commodity Futures Modernization Act expressly preserved the option for registered entities to invoke a prior approval process asking the CFTC to formally determine whether a submitted rule is consistent with the CEA. *See 7 U.S.C. § 7a-2(c) (2000)*. In doing so, the CFTC must take into account the "public interest to be protected by antitrust laws" and "endeavor to take the least anticompetitive means of achieving the objectives of" the CEA. *7 U.S.C. § 19(b) (2000)*.

The implied immunity doctrine rests on the finding of a "plain repugnancy between the antitrust and regulatory provisions," focusing on "the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws." *Credit Suisse, 551 U.S. at 271-72*. In other words, the application of implied repealer principles is context and fact specific. It does not apply wholesale in particular regulatory areas and not in others. Furthermore, the Seventh Circuit has already applied implied antitrust immunity principles from the SEC context in the CEA context in *American Agriculture*. Nowhere does *American Agriculture* indicate that inherent differences between the securities and **[**60]** commodities contexts means that the same antitrust immunity principles do not apply. *See also In re Western States Wholesale Natural Gas Antitrust Litig., 661 F. Supp. 2d 1172, 1178-81 (D. Nev. 2009)* (case cited by plaintiffs acknowledging that the CEA can implicitly preclude the antitrust laws' application, but finding no implied immunity because that case involved conduct explicitly "prohibited by the CEA.").

3. Appropriateness Of Deciding Implied Immunity As A Matter Of Law

Plaintiffs also argue as a threshold matter that the "implied immunity analysis" is "fact-specific" and should not be decided as a matter of law, citing *Friedman v. Salomon/Smith Barney, 313 F.3d 796, 799 (2d Cir. 2002)*. But the Supreme Court held in *Gordon* that the application of the implied immunity doctrine is a threshold legal question. *See 422 U.S. at 688* (the "factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges" is irrelevant to the "legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme"); *see also id. at 687* (rejecting approach in *Thill Sec. Corp. v. N.Y. Stock Exch., 433 F.2d 264 (7th Cir. 1970)*, of "view[ing] the question of implied repeal as a question of fact"). In *Friedman* itself the issue was decided as a matter of law. *313 F.3d at 797-99*. The issue also was decided as a matter of law in *American Agriculture* and *Credit Suisse*. Implied antitrust immunity **[**61]** **[*1259]** is not an issue for the jury, but a threshold determination for the Court.

4. Application Of Implied Immunity Doctrine Here

Turning to the application of implied immunity principles to the facts here, the Court agrees with defendants that on the spectrum set forth in the SEC cases ranging from mere acquiescence to formal approval of defendants' challenged conduct, this case falls on the latter end. Unlike in American Agriculture, the CFTC formally approved defendants' clearing link and open interest transfer. This clear, affirmative approval goes beyond actions of the SEC in *Credit Suisse, NASD*, and *Gordon* that were found to warrant immunity. Also, unlike in American Agriculture, the CFTC's formal approval was subject to judicial review under the Administrative Procedure Act just like the SEC's actions in *Gordon*—the factor that the Seventh Circuit in *American Agriculture* described as "extremely important." 977 F.2d at 1167. Applying the four-part test from Credit Suisse confirms the appropriateness of finding implied immunity here.

First factor (regulatory authority to supervise activity). The first factor is easily satisfied. The CFTC has had authority to review and approve exchange rules since its **[**62]** creation in 1974 (*see* 7 U.S.C. § 7a-2(c)), and specifically to regulate the clearing of futures transactions (*see* 17 C.F.R. Part 39).

Second factor (evidence that agency exercises regulatory authority). The second factor also is easily met. The CFTC exercised its regulatory authority to approve the very rules with respect to the clearing link and open interest transfer that plaintiffs challenge, and it has routinely approved DCM rules since its creation. *See* CFTC Industry Filings, Rules & Rule Amendments, https://www.cftc.gov/IndustryOversight/IndustryFilings/index.htm.

The CFTC also exercised its regulatory authority in this area when considering market structure and competition issues related to defendants' rules in the year preceding those rules' approval. In its June 2002 report, the CFTC acknowledged the potential benefits of mandated fungibility (essentially, the scenario USFE demands in this case), but warned that it "could decrease the potential reward [for an exchange from developing a new product] and therefore decrease the incentive for innovation," and could "subject[ ] clearing organizations to one other's credit risk involuntarily." R. 731 ¶¶ 32-33. The CFTC made clear when it approved defendants' rules that it had been considering "the policy and legal **[**63]** issues involved" for the past year. *Id.* ¶ 27. The CFTC later concluded when subsequently approving CBOT's DCM application that "any potential antitrust issues are outweighed by the benefits to be gained including potential clearing efficiencies, significant cost savings for members and customers, and systemic risk abatement." *Id.* ¶ 29. The CFTC thus clearly exercised its regulatory authority in the area of defendants' challenged conduct.

Third factor (a resulting risk of conflicting guidance). The Court further finds that plaintiffs' challenge places the CEA and the antitrust laws in an actual irreconcilable conflict because the CFTC expressly approved defendants' rules as consistent with the CEA, notwithstanding possible anticompetitive effects. The CEA assigns to the CFTC the responsibility to "take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of [the CEA]" when approving a contract market rule. 7 U.S.C. § 19(b). And the CFTC **[*1260]** explicitly did so here. The CFTC allowed a comment period during which USFE and others submitted objections to the rules (and particularly Regulation 701.01 regarding **[**64]** the open interest transfer) based on "anti-competitive impact." R. 733 ¶ 23. In approving the rules, the CFTC explained: (1) that the comment letters had raised the concern that the proposed rules "would violate the obligations of [CBOT] and the Commission in light of the antitrust provisions of the Act" (*id.* ¶ 24); (2) that the CFTC had considered these comment letters and had been considering the "market structure and competition" issues involved since June 2002 (*id.* ¶ 25); and (3) that the CFTC ultimately found that "no alternatives to the use of a single dedicated clearinghouse exist" (*id.*) and that defendants' rules "support[ed] innovation in the futures industry" (*id.* ¶ 27). Indeed, the conflict created by recognizing an antitrust claim would be even stronger here than in *Credit Suisse* because it would be an actual conflict with the CFTC's assessment, including its balancing of antitrust risk against other factors, rather than a hypothetical one. *See* 551 U.S. 281-82.

Fourth factor (whether conflict affected practices lying squarely within regulated area). Finally, the Court finds the conflict affects the practices of DCMs and clearing organizations, and those practices lie at the heart of the **[**65]** CFTC's oversight responsibilities, as the many statutory provisions and rules addressing those practices show. *See, e.g.*, 7 U.S.C. § 7(d) (CEA's core principles for DCMs); *id.* § 7a-1(c) (CEA's core principles for clearing organizations); 17 C.F.R. Part 38 (CFTC rules for DCMs); *id.* Part 39 (CFTC rules for clearing organizations).

Plaintiffs acknowledge that the CEA regulates the broad topic of exchange-directed clearing, but they emphasize that the CFTC "had not previously reviewed or ruled on" the "specific forced transfer" of open interest. R. 732 at 44.

The important point, however, is that the CFTC did rule on it here. And it did so as part of its broader consideration of whether to keep a single clearinghouse model or adopt a model with more fungibility and open access clearing. The open interest transfer defendants sought was directly related to the single clearinghouse model. In light of that model, not transferring would mean leaving the open interest at CBOT's previous clearinghouse (BOTCC) that would now become USFE's clearinghouse.

The CFTC evaluated in 2002-2003 and then again in 2009 whether to move to a model more akin to securities markets where contracts are fungible between competing exchanges and open access **[**66]** clearing is mandated, and it declined to change the model. R. 731 ¶¶ 31-35, 38. The Court therefore finds that the conflict between the CFTC's approval of the open interest transfer and recognizing an antitrust claim based on that transfer falls squarely within an area the CEA regulates (clearing organization and DCM practices).

Beyond the *Credit Suisse* analysis, plaintiffs' opposition latches onto the language in *American Agriculture*, that "outside the context of a pervasive regulatory scheme, [implied] immunity is proper when the relevant agency's scrutiny and approval of the challenged practice is active, intrusive and appropriately deliberative." *977 F.2d at 1167* (citing *Gordon, 422 U.S. at 689-91*). Plaintiffs argue that rather than being active and appropriately deliberative, the CFTC's review of defendants' rules, and particularly the open interest transfer rules, was "cursory and haphazard" as a result of defendants' own actions. R. 732 at 37. But a test that takes a deep dive into the factual nuances of the CFTC's review to determine if it was sufficiently deliberative is not the law. **[*1261]** The four-part test in *Credit Suisse* is the law. As defendants emphasize, in the sentences immediately following the sentence on which **[**67]** plaintiffs focus, the *American Agriculture* court added: "Put another way, an antitrust court, before relinquishing jurisdiction over allegedly anticompetitive activities, must be convinced that the agency has exercised its independent judgment in reflecting upon and approving the activity at issue. Moreover, the availability of judicial review, even if not the *sine qua non* of immunity, is extremely important." *977 F.2d at 1167*.

Here, unlike in *American Agriculture*, there is no doubt that the CFTC exercised its independent judgment in reflecting on and approving the activity in question—it expressly approved it. Indeed, the *American Agriculture* court contrasted the mere acquiescence to an emergency rule in that case with "[t]he Commission's [formal] approval or disapproval of [exchange] rules." *Id. at 1164*. And unlike in *American Agriculture*, judicial review was available here.

Read in proper context, the Court believes that the "active, intrusive and appropriately deliberative" inquiry is short-circuited in cases where an agency gives express approval. It was because the CFTC in *American Agriculture* had merely acquiesced to the challenged conduct that the court undertook deeper scrutiny to determine whether the **[**68]** CFTC had in fact "exercised . . . independent judgment." *Id.*

In any event, even if a more detailed assessment of the CFTC's review is appropriate, that does not change the Court's conclusion. Plaintiffs first try to establish that the shortened review period was based on a misrepresentation by CBOT. They cite an email reporting that CBOT's general counsel "noted" to the CFTC in June 2003 "that there was a walkaway provision in the [clearing link agreement] as of mid-July based on obtaining regulatory approval" for "rule changes." R. 733 Ex. 165. Plaintiffs explain that CME's CEO had expressed its intent in a July 7, 2003 board meeting to let the "walk-away option" "lapse." *Id.* Ex. 167 at 4. Notably, however, the CME board meeting summary does not indicate that CBOT or its general counsel was aware of CME's position on the walk-away option. Plaintiffs further say the CFTC relied on CBOT's misrepresentation about the walk-away option to shorten the anticipated 45-day period for public comment to four days. They cite comments from CFTC members complaining about the short timeframe resulting from the mid-July deadline. R. 733 Ex. 166; R. 733 Ex. 173.

Ultimately, however, regardless of the **[**69]** duration of the CFTC's review period or the cause of that duration, plaintiffs ignore the broader backdrop of consideration by the CFTC of competition and antitrust issues imposed by the single clearinghouse model. And they ignore that the CFTC actively solicited comment letters—despite the fact that it was not required to do so—and considered them when approving the rules. CFTC staff acknowledged and weighed the antitrust and competition objections raised and concluded that there were no viable alternatives to the "single dedicated clearinghouse" model. R. 733 ¶¶ 25, 29.

At bottom, this was not a situation like in *American Agriculture* of nonpublic review and no express approval. This was a case of express CFTC approval, after a year's worth of considering related competition issues, all of which was subject to *Administrative Procedure Act* review that plaintiffs did not seek. R. 731 ¶ 28. Thus, the Court agrees with defendants that the CFTC's decision approving the clearing link and open interest transfer are implicitly immune from antitrust scrutiny.

[*1262] B. Actionability Under Antitrust Laws

Defendants have an alternative basis for summary judgment on plaintiffs' liquidity deprivation theory **[**70]** based on the clearing link agreement and open interest transfer: that it is not actionable under the antitrust laws. Defendants note that even now, thirteen years after this theory first appeared in plaintiffs' second amended complaint, plaintiffs have not identified the specific antitrust doctrines on which they rely in support. And that is because, defendants say, this theory contravenes basic antitrust principles.

Because the parties raise different arguments with respect to the open interest transfer and the clearing link components of this theory, the Court considers them separately.

1. Transfer Of Open Interest

Defendants contend that plaintiffs' transfer of open interest theory assumes that CBOT should have left open positions in the CBOT Treasury futures contracts at BOTCC so that USFE could use them to attract liquidity in its new copy-cat futures contracts. The Court agrees with defendants that such an assumption runs headlong into the basic antitrust principle that there is "no duty to aid competitors" in light of the "uncertain virtue of forced sharing." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 410, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*; *see also* *Mercatus, 641 F.3d at 857* ("[e]ven if the Hospital had monopoly power," it had "no duty to step aside and allow Mercatus to make off with **[**71]** its physicians, patients, and revenue"). Defendants had no duty to aid plaintiffs—their competitors hoping to take over the U.S. Treasury futures and options market—by voluntarily leaving open positions at BOTCC.

Plaintiffs argue that defendants misconstrue their theory. They say they are not arguing that defendants had a duty to aid plaintiffs through forced sharing. Instead, plaintiffs argue that CBOT "forcibly transferred" to CME an interest that did not belong to CBOT. R. 732 at 50. Relying on their expert report and internal defendant documents, plaintiffs claim that the open interest "was the product of separate and independent contracts between BOTCC and the traders," such that "CBOT had no right to dictate where those open positions resided." *Id.* (citing R. 742 ¶¶ 1, 27). Defendants dispute these facts. *See* R. 742 ¶¶ 1, 27.

The Court finds this fact dispute regarding ownership of open interests irrelevant for several reasons. For starters, if plaintiffs are correct that separate and independent contracts existed between BOTCC and traders, then any breach of those contracts would result in separate claims between BOTCC and the traders irrelevant to the antitrust claim before this **[**72]** Court. Moreover, the undisputed facts are that the CFTC approved the open interest transfer proposed by CBOT. Plaintiffs offer no legal support for the proposition that CBOT had no right to direct where the open positions in the contracts were cleared. Plaintiffs' position is particularly ironic given that USFE negotiated a term in its agreement with BOTCC to do precisely what CBOT had done in the event of termination: transfer open interest in USFE contracts to another clearinghouse. R. 731 ¶ 40. USFE sought this requirement because "[i]n the case of changing a clearinghouse, it is important for the exchange to have a smooth transition and a functioning market over that change." *Id.* This was (and still is) the prevailing regulatory structure, and USFE negotiated for it in its own clearing services agreement. The Court agrees with defendants that plaintiffs' position on the open interest transfer would require forced sharing, or aiding of CBOT's competitor, by leaving **[*1263]** open interest at BOTCC instead of using regulatory channels to approve a transfer of that open interest to CME.

A narrow exception to the "no duty to aid competitors" rule lies "at or near the outer boundary of [Sherman **[**73]** Act] *§ 2* liability" and applies where a firm unilaterally terminates a longstanding course of dealing with its rival and removes from the market services "marketed or available to the public." Trinko, 540 U.S. at 409-10 (clarifying the Court's earlier decision in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)); *see also* Weber-Stephen Prods. LLC v. Sears Holding Corp., 2014 U.S. Dist. LEXIS 21338, 2014 WL 656753, at *7 (N.D. Ill. Feb. 20, 2014) ("[T]he Seventh Circuit has recognized that *Aspen*-like circumstances are a rare exception."). This is the exception cited by Judge Zagel in his prior summary judgment ruling allowing further discovery on plaintiffs' open interest theory to resolve the issue of defendants' intent. R. 445 at 9. But plaintiffs do not claim that this case involves *Aspen*-like circumstances. And for good reason, since that doctrine does not fit the facts here.

Beyond their emphatic attempts to explain what their open interest claim is *not, i.e.*, a forced sharing claim (*see* R. 732 at 50-51), plaintiffs do not clearly articulate what their claim *is* and how it fits within the antitrust laws. Plaintiffs' theory thus would require this Court to impose a novel exception to the "no duty to aid competitors" rule, which the Court is particularly reluctant to do in light of the complexities of the industry and the close supervision of the CFTC. *See, e.g.,* N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc., 323 F. Supp. 2d 559, 570 (S.D.N.Y. 2004) ("the CFTC is in a **[**74]** better position than a general antitrust court to determine the scope and terms of any forced sharing of settlement prices among the exchanges that it regulates"). The Court agrees with defendants that plaintiffs' theory based on the open interest transfer, if actionable at all, lies on the outer bounds of ***antitrust law***, and is best left to the CFTC to regulate—a conclusion that bolsters this Court's grant of summary judgment on this theory. *See, e.g.,* Trinko, 540 U.S. at 410-16 (affirming dismissal where traditional antitrust principles did not justify new addition to "no duty to aid competitors" rule, including because the challenged conduct was subject to the FCC's regulatory authority and "[a]ntitrust analysis must always be attuned to . . . the significance of regulation" in "the industry").

2. Clearing Link

With respect to the clearing link, plaintiffs' theory is that defendants' exclusive clearing link "had the requisite exclusionary effect to constitute both an act of monopolization and an actionable conspiracy" because it "drained the open interest from BOTCC and locked it up at CME." R. 732 at 47-48. Plaintiffs say this arrangement "impaired USFE's clearing through BOTCC." *Id.* at 47.

Under both §§ 1 and 2 of the Sherman **[**75]** Act, "an exclusive contract is illegal only if it substantially forecloses competition in the relevant market." Methodist Health Servs. Corp. v. OSF Healthcare Sys., 2016 U.S. Dist. LEXIS 136478, 2016 WL 5817176, at *7-8 (C.D. Ill. Sept. 30, 2016), *aff'd*, 859 F.3d 408 (7th Cir. 2017); *accord* Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr., 684 F.2d 1346, 1352 (7th Cir. 1982) ("In the context of exclusive dealing arrangements, . . . the plaintiff can prevail only by showing that the agreement in question results in a substantial foreclosure of competition in an area of effective competition, that is, in a relevant market."). Defendants argue that their clearing agreement did not "substantial[ly] foreclose[ ]" USFE from the clearing **[*1264]** market for the simple reason that USFE obtained clearing services from BOTCC. *See id.; see also* Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1234 (8th Cir. 1987) (plaintiff "produced no evidence suggesting that [defendant's] exclusive dealing provisions generally prevent[ed] competitors from finding effective distributors"). This argument is supported by the DOJ's finding in 2007 (as part of its review of CME's proposed merger with CBOT) after an "extensive investigation" of the clearing link agreement that it was not "likely to reduce competition substantially" or to "foreclose entry by other exchanges." R. 731 ¶ 36.

Plaintiffs respond that they did not need to be foreclosed from the clearing market for their injury to be actionable under the antitrust laws. They **[**76]** cite United States v. Dentsply Int'l Inc., 399 F.3d 181 (3d Cir. 2005), which found that where an exclusive dealing arrangement ensured that sales of a product would be kept "below the critical level necessary for any rival to pose a real threat to Dentsply's market share," the requisite anticompetitive effect could be shown. Id. at 191. *Dentsply* relied on the principle that "[a] set of strategically planned exclusive dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its products or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller firm's growth." *Id.* But plaintiffs do not point to any facts supporting that BOTCC was an inferior or more expensive outlet, or that consumer injury resulted. And as defendants point out, Dentsply is in tension with Seventh Circuit law. *See* Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 394 (7th Cir. 1984) (exclusive deal not anticompetitive despite causing plaintiff to "expand more slowly than it would otherwise have done, and at somewhat higher cost").

As with the open interest component of plaintiffs' second theory, the Court agrees with defendants that an exclusive dealing theory based on the clearing link that did not in fact exclude USFE from **[**77]** the clearing market lies on the outer bounds of ***antitrust law*** if it is actionable at all. *Cf.* Methodist Health Servs. Corp. v. OSF Healthcare Sys., 859 F.3d 408, 410 (7th Cir. 2017) (affirming summary judgment where exclusive dealing arrangement did not prevent plaintiff from having "a shot at . . . outbidding" its rival). This conclusion further supports this Court's grant of summary judgment of plaintiffs' second theory.[7]

III. Customer Threats and Public Misinformation Theory

After plaintiffs had a full opportunity for discovery as to consumer threats, plaintiffs still were unable to find support in the documents or depositions. In support of the consumer threats component of their third theory, plaintiffs now point only to their 2006 interrogatory response for evidence that "[d]efendants also threatened and intimidated traders." R. 731 ¶ 37 & Ex. 211 at 8-9. But this interrogatory response is not admissible evidence, and it **[*1265]** does not contain cites to deposition testimony or other admissible evidence.

Discovery also has not borne out the public misinformation component of plaintiffs' third theory in the way plaintiffs hoped. Plaintiffs claim that CBOT made intentionally false and deceptive public statements to thwart USFE's entry into the market. The speech or **[**78]** statements plaintiffs point to, however, are from internal presentations and memos rather than published articles. R. 742 ¶¶ 35-36.

Moreover, although the record supports that defendants separately hired media consultants who prepared stories as part of defendants' campaign to dissuade regulators from supporting USFE, *id.* ¶ 36, at least the majority of this activity was related to defendants' CFTC lobbying efforts and therefore falling within *Noerr-Pennington* immunity. The *Mercatus* court held that the "public relations campaign" in that case was "sheltered by *Noerr-Pennington*," because "'a publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity.'" 641 F.3d at 849 (quoting Allied Tube, 486 U.S. at 499-500). This is the case even where the campaign "employs unethical and deceptive methods." *Id.* And it is the case even where the campaign persuades people to "refuse or hesitate to do business with the target, causing that target some injury despite the government's refusal to act. Such injuries are inevitable whenever a business attempts to rally the public to encourage government action that will adversely affect one of its competitors." Id. at 850.

The *Mercatus* court further held **[**79]** that even when unrelated to legislative action, derogatory and false comments are "outside the reach of the antitrust laws, however critical they may be of a competitor[ ]," unless they are accompanied by a "coercive enforcement mechanism[ ]." Id. at 851-53. Absent such a mechanism, "even demonstrably false [c]ommercial speech is not actionable under the antitrust laws." Id. at 852. "Examples of coercive mechanisms include the ability to boycott, the ability to enter into agreements not to distribute certain products or an inherent authority that can be used as leverage." Int'l Equip. Trading, Ltd. v. AB SCIEX LLC, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *8 (N.D. Ill. Aug. 29, 2013). The only allegedly coercive mechanism to which plaintiffs point here is CBOT's 99% market share. But *Mercatus* likewise involved an alleged monopolist

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[7] Defendants also say USFE selected BOTCC as its preferred clearing provider before learning of the CBOT-CME clearing link, meaning that plaintiffs did not suffer antitrust injury from not being able to clear through CME. *See* Paddock Publ'ns, Inc. v. Chi. Tribune Co., 103 F.3d 42, 47 (7th Cir. 1996) (affirming dismissal where plaintiff "never tried to make a better offer," explaining that "[plaintiff] should try to outbid [defendants] in the marketplace, rather than to outmaneuver them in court"). The Court does not find it appropriate to grant judgment as a matter of law on this alternative basis. None of the exhibits defendants cite conclusively shows that USFE selected BOTCC as its preferred provider *before* learning of the clearing link. R. 731 ¶¶ 7-8, 12-15.

with market power, and the false statements unrelated to legislative petitioning were not actionable because they "were not backed by any threats designed to coerce acceptance of the [defendant's] views about [plaintiff]." 641 F.3d at 851. Plaintiffs have not cited evidence of threats of coercion to accept defendants' views about plaintiffs here. As such, the Court finds that there is no evidence warranting a trial on this theory.

IV. Interference with Relationships Theory

Plaintiffs' final theory is that **[**80]** (a) CBOT attempted to interfere with USFE's contractual dealings with BOTCC and (b) defendants attempted to interfere with USFE's contractual dealings with the NFA.[8] Defendants say this theory is not viable under the antitrust laws for a **[*1266]** straightforward reason: USFE successfully entered into relationships with BOTCC and the NFA months before USFE launched its exchange. The Court agrees that this evidence forecloses plaintiffs' antitrust theory based on interference with relationships because it shows a lack of anticompetitive effect. *See* Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 400 (7th Cir. 1989) (conduct "is not illegal without anticompetitive effects"). Plaintiffs do not meaningfully argue otherwise.

But the analysis of plaintiffs' Illinois tort claim based on the same evidence is not quite so simple. Under Illinois law, a claim for intentional interference with prospective economic advantage has four elements: "(1) a reasonable expectancy of entering into a valid business relationship, (2) the defendant's knowledge of the expectancy, (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy, and (4) damage to the plaintiff resulting from the defendant's interference." **[**81]** McCoy v. Iberdrola Renewables, Inc., 760 F.3d 674, 685 (7th Cir. 2014).

Defendants argue that plaintiffs' Illinois tort claim fails at the outset because defendants did not cause a termination of the expected business relationship plaintiffs had with BOTCC and the NFA—to the contrary, plaintiffs successfully entered into business relationships with both entities. In support, defendants rely on McCoy v. Gamesa Tech. Corp., 2013 U.S. Dist. LEXIS 82240, 2013 WL 2636365 (N.D. Ill. June 12, 2013), *aff'd on other grounds sub nom.* McCoy, 760 F.3d 674, which stated: "This Court has thoroughly reviewed Illinois law and can discern no instance in which a claim based upon interference with prospective economic advantage has survived where there has been no termination of the economic relations." 2013 U.S. Dist. LEXIS 82240, [WL] at *7. But the Seventh Circuit on appeal in McCoy clarified that while "[i]t is possible that Illinois courts would require a complete termination of the prospective relationship," "most Illinois cases on the subject involve an employee's suit against an employer for a rejection from another job, which is necessarily an all-or-nothing proposition." 760 F.3d at 686. The Seventh Circuit suggested that a plaintiff might be able to state a tort claim under Illinois law where the relationship at issue "was merely impaired but not terminated," if the plaintiff's "expectancy" was diminished. *Id.* Despite the Seventh **[**82]** Circuit's recognition of this possibility, it remains the case that no Illinois court appears to have recognized such a theory.

Even if Illinois courts do not require a complete termination of a business relationship, however, the Court still finds that plaintiffs' theory of tortious interference fails. A long line of Illinois cases makes clear that for purposes of the third element of the tort—*i.e.*, "an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy" (id. at 685)—interfering conduct *directed at the third-party* must cause the diminished expectancy. *See, e.g.,* id. at 686; Galinski v. Kessler, 134 Ill. App. 3d 602, 480 N.E.2d 1176, 1180, 89 Ill. Dec. 433 (Ill. App. Ct. 1985) ("tort of interference with prospective economic advantage requires action by the defendant towards a third party which results in such interference"); F.E.L. Publications v. Catholic Bishop of Chicago, 1989 U.S. Dist. LEXIS 10119, 1989 WL 100006, at *1 (N.D. Ill. Aug. 18 1989), *aff'd sub nom.* Fitzpatrick v. Catholic Bishop of Chicago, 916 F.2d 1254 (7th Cir. 1990) (plaintiff "must demonstrate . . . some action toward a

[8] Plaintiffs also say that defendants "ignored" their theory that defendants interfered with contractual dealings with potential customers in addition to the contractual dealings with BOTCC and the NFA. R. 732 at 53. But plaintiffs do not cite any evidence related to customer contract interference to support that theory. *See id.* Nor, as discussed above, have plaintiffs found any prospective customer to testify about alleged threats.

third party which caused breach or termination of [plaintiff's] . . . expectancy"); *House of Brides, Inc. v. Alfred Angelo, Inc., 2014 U.S. Dist. LEXIS 1850, 2014 WL 64657, at *10 (N.D. Ill. Jan. 8, 2014)* ("It is insufficient for the purpose motivating the conduct to **[*1267]** be to interfere with prospective business relations; the act itself must be directed toward the third party."); *see also* *Schuler v. Abbott Lab., 265 Ill. App. 3d 991, 639 N.E.2d 144, 147-48, 203 Ill. Dec. 105 (Ill. App. Ct. 1993)* (although there is no requirement that an "interfering party must make **[**83]** contact with the third party," "the interfering action [must] be directed in the first instance at the third party"). "Summary judgment is appropriate when the plaintiff fails to present adequate evidence of a causal connection between the defendant's conduct [directed toward the third party] and the third party's action." *F.E.L., 1989 U.S. Dist. LEXIS 10119, 1989 WL 100006, at *1*.

Here, the conduct plaintiffs allege defendants directed at BOTCC and the NFA—the third-parties at issue—is disconnected from the expectancy plaintiffs say was diminished. Taking the facts in the light most favorable to plaintiffs: (1) CBOT attempted to get exclusivity with BOTCC and later to acquire BOTCC to try to shut it down, and (2) defendants misrepresented the NFA's lawful capacity to contract with USFE, including threatening to sue to invalidate the NFA-USFE agreement. R. 742 ¶¶ 24-34, 39-40. But plaintiffs do not explain how these specific (and ultimately unsuccessful) actions caused the diminishment of a reasonable expectancy plaintiffs had for their relationships with BOTCC or the NFA.

Rather, the only specific expectancy plaintiffs cite is that "USFE reasonably expected that the open interest would have remained at BOTCC . . . but for Defendants' anticompetitive **[**84]** conduct." R. 732 at 54. But it was not CBOT's alleged actions directed at BOTCC (or any actions directed at the NFA) that caused this change in plaintiffs' alleged expectancy. It was the open interest transfer rules that defendants proposed and that the CFTC approved. Absent a causal connection between the conduct directed toward a third-party and plaintiffs' alleged diminished expectancy, plaintiffs' tortious interference claim fails under Illinois law. *See, e.g.,* *F.E.L., 1989 U.S. Dist. LEXIS 10119, 1989 WL 100006, at *1*; *F:A J Kikson v. Underwriters Labs., Inc., 492 F.3d 794, 801 (7th Cir. 2007)* (claim failed absent evidence of statements "directed at third-party potential customers" that diminished expectancy).

Nor is it clear for purposes of the first element of the tort how an expectancy that open positions would remain at BOTCC could be "reasonable" in light of the fact that the CFTC approved the open interest transfer. *See* *McCoy, 760 F.3d at 685* (first element is a "reasonable expectancy"). It is plaintiffs' job on summary judgment to clearly articulate their legal theories, *United States v. Rode Corp., 996 F.2d 174, 178 (7th Cir. 1993)*, and to present "specific facts showing that there is a genuine issue for trial" on those theories, *Johnson, 892 F.3d at 896*. *See also* *Allstate Ins. Co. v. St. Anthony's Spine & Joint Inst., P.C., 691 F. Supp. 2d 797, 810 (N.D. Ill. 2010)* ("While we view the facts in the light most favorable to the nonmoving party, there is an affirmative burden of production on the nonmoving party **[**85]** to defeat a proper summary judgment motion."). Plaintiffs have not done so with respect to their Illinois tort claim. The Court therefore grants summary judgment on that claim along with plaintiffs' antitrust claims.

V. Causation

Finally, defendants argue that the lack of evidence that defendants' conduct caused USFE to fail entitles defendants to summary judgment on all of plaintiffs' antitrust theories. The Court need not reach this issue because it has already found that defendants are entitled to summary judgment on each theory.

[*1268] VI. Plaintiffs' Motion For Partial Summary Judgment

Because the Court has found summary judgment appropriate on plaintiffs' antitrust claims, plaintiffs' motion for partial summary judgment on the issues of the relevant market definition and CBOT's monopoly power is moot.

Conclusion

For the foregoing reasons, the Court grants defendants' motion for summary judgment [708] and denies plaintiffs' motion for partial summary judgment [712] as moot.

ENTERED:

/s/ Thomas M. Durkin

Honorable Thomas M. Durkin

United States District Judge

Dated: October 31, 2018
